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A Comparative Analysis of American and Canadian Antitrust and Labor Laws as Applied to Professional Sports League Lockouts and Potential Solutions to Prevent Their Occurrence

Jo-Annie Charbonneau

A COMPARATIVE ANALYSIS OF AMERICAN AND CANADIAN ANTITRUST AND LABOR LAWS AS APPLIED TO PROFESSIONAL SPORTS LEAGUE LOCKOUTS AND POTENTIAL SOLUTIONS TO PREVENT THEIR OCCURRENCE

JO-ANNIE CHARBONNEAU*

I. INTRODUCTION

Over the last five years, three of the four major North American professional sports leagues experienced a lockout; the National Football League (NFL) and the National Basketball Association (NBA) locked out their players in 2011,[1] while the National Hockey League (NHL) imposed a similar treatment in 2012.[2] Lockouts have proven over the years to provide significant leverage to the leagues, the players' employers, during the negotiation process. Currently, all leagues have agreed on a collective bargaining agreement (CBA) with the players associations and are experiencing work peace. However, due to the ongoing growth of the sports industry and the exponential amount of money that these professional sports leagues and clubs generate,[3] there will always be

*Obtained her LL.M. in Sports Law from Marquette University Law School in 2014 and her LL.L. and J.D. from the University of Ottawa (Canada) in 2011 and 2012. She would like to thank Matthew J. Mitten for his time in reviewing this work and for his great advice. She would also like to thank Benoit Girardin, her boss and mentor, for his support. Finally, she would like to sincerely thank her parents, Ginette and Richard, for the unconditional love and support and for allowing her to pursue her dreams. A special thanks to her family and friends who have always been there for her. The Author's native language is French, so European spelling is used for some words throughout the Article.

1. Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights on*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 251, 268 (2012).

2. Christopher Botta, *NHL Lockout: Gary Bettman Is Going Nowhere—No Matter What*, SPORTING NEWS (Oct. 29, 2012), http://www.sportingnews.com/nhl/story/2012-10-29/nhl-lockout-news-2012-gary-bettman-criticism-hockey-strike-david-stern-retire.

3. The revenues for the NFL were evaluated at $9 billion for the year 2013. Monte Burke, *How the National Football League Can Reach $25 Billion in Annual Revenues*, FORBES (Aug. 17, 2013), http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/. The NHL revenues were evaluated at $3.7 billion for the 2013–2014 season. James Mirtle, *Report: NHL Revenues to Hit Record $3.7-Billion*, GLOBE & MAIL (June 9,

tension between players and club owners, as both want to get a bigger part of the revenue. Different reasons motivate them; players seek a bigger percentage of the shared revenue because they are the product of the leagues, and the leagues, as the employers, seek a bigger percentage of the shared revenue because they manage the league. As seen in recent years, lockouts are the most common weapon used by leagues to gain leverage during a CBA negotiation. In North America, the four major professional sports leagues provide the highest level of competition for athletes. The leagues monopolize the market of professional sports; currently there are no other valid options for players to compete professionally. There are other sports leagues in Europe, but they are not as competitive as the leagues in North America. The only league that does not have control of the market is Major League Soccer (MLS) because better options exist for players in Europe, where the highest level of soccer is played. As a result, players and players associations have started bringing actions under both antitrust and labor laws to counterbalance this power. The choice to sue under a particular law is made once players have been locked out and a CBA expires.

Another consideration that players associations and leagues must take into account in the four major North American professional sports leagues is the fact that most leagues have teams in two different countries: Canada and the United States. The NBA and MLB each have one team in the Province of Ontario. The NFL used to have a team that played home games in the Province of Ontario, a scenario that could be reproduced because the NFL is open to playing home games outside of the United States of America.[4] However, the biggest impact of this situation is observed within the NHL. Out of the thirty NHL teams, seven teams are located in five provinces of Canada: Alberta, British Columbia, Manitoba, Ontario, and Québec. The number of Canadian teams could grow in upcoming years as Canadian cities have demonstrated an interest to the NHL to obtain a hockey team during the new appeal-for-interest process for potential expansion. The Canadian teams are important markets for the NHL because they

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2014), http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/report-nhl-revenues-to-hit-record-37-billion/article19080171/. The revenues of the NBA were evaluated at $4.6 billion for the year 2013. Kurt Badenhausen, *As Stern Says Goodbye, Knicks, Lakers Set Records as NBA's Most Valuable Teams*, FORBES (Jan. 22, 2014), http://www.forbes.com/sites/kurtbadenhausen/2014/01/22/as-stern-says-goodbye-knicks-lakers-set-records-as-nbas-most-valuable-teams/. The revenues of Major League Baseball (MLB) were evaluated at $8.5 billion for the year 2013. Maury Brown, *Major League Baseball Sees Record Revenues Exceed $8 Billion for 2013*, FORBES (Dec. 17, 2013), http://www.forbes.com/sites/maurybrown/2013/12/17/major-league-baseball-sees-record-revenues-exceed-8-billion-for-2013/.

4. See Kevin Patra, *Buffalo Bills Terminate Toronto Series*, NFL, (Dec. 3, 2014), http://www.nfl.com/news/story/0ap3000000438147/article/buffalo-bills-terminate-toronto-series.

generate a great portion of the NHL's total revenues.[5] Nevertheless, the presence of these teams in Canada is enough to require club owners and players associations to comply with Canadian laws. During past lockouts, the NHL mostly ignored Canadian laws. A similar situation is unlikely to occur again in upcoming years. As this Article will establish, Canada has concurrent jurisdiction with the United States over professional sports leagues. To demonstrate this concurrent jurisdiction, this Article uses the NHL as a case study.

Part II will first analyze the legal issues that arise under labor laws in the different provinces of Canada and the federal jurisdiction of the United States. In Canada, each province regulates labor relations. The individual provincial labor regulations may create difficulties for trans-provincial companies because each province is independent in how it controls these relations. In the United States, one labor relations law regulates all states. Consequently, labor issues, such as procedures to declare a lockout and the remedies to stop a lockout, are different throughout Canada and the United States. Part II will explain the different laws and the different systems that govern labor laws. Once these laws are defined, an analysis of the concurrent jurisdiction between these two countries will be provided. Over the years, Provincial Canadian jurisprudence has established jurisdiction over labor relations matters that occur in Canadian territory. This issue is central to this Article because contrary to what happened in the previous lockout, the NHL shall comply with Canadian laws as well as American law. Furthermore, Part II will discuss the different claims, arguments, and remedies under the labor laws of both countries and the role of concurrent jurisdiction in these claims. Concurrent jurisdiction provides opportunities for players associations to gain leverage in a work stoppage situation.

Part III of this Article will examine the legal issues that arise under the antitrust laws in Canada and the United States. In Canada and the United States, antitrust is federally regulated. The issues that arise under American antitrust law regard agreements between multiple owners to operate a certain way and to declare a lockout. The central issue in the United States is when antitrust law may be applied because, as long as a league and a players association are in a labor relationship, the non-statutory labor exemption applies and antitrust claims cannot be brought. Once the labor relationship ends, antitrust claims may be a weapon for players to stop a lockout. All of these issues will be addressed in Part III. As for the antitrust issue in Canada, because there is no equivalent to

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5. *See* Mike Ozanian, *The Most Valuable Teams in the NHL*, FORBES (Nov. 25, 2014), http://www.forbes.com/sites/mikeozanian/2014/11/25/the-most-valuable-teams-in-the-nhl/. The revenues generated by the seven Canadian NHL hockey teams were evaluated at $922 million. This means that 24.92% of the NHL's revenue is coming from Canadian teams. This value does not account for broadcasting and sponsorship deals from Canadian corporations.

the non-statutory labor exemption, the main problem is evaluating if a lockout was the result of a conspiracy. If a conspiracy is found, the issue is how Canadian law is applied to stop a lockout. The laws of both countries will be analyzed to set the basis of any possible legal claims. When the principles and different claims have been established, arguments and remedies will be developed. Concurrent jurisdiction will be addressed in Part III; however, unlike labor law, there is no significant difference that will permit a party to gain leverage by bringing a claim in one country instead of the other, even though the vast majority of antitrust claims are usually brought under American law.

The main point of this Article is that in recent years, lockouts have occurred in multiple professional sports leagues. In each lockout, Canadian laws were overlooked because the majority of the professional sports teams are located in the United States. In the 2005 NHL lockout, the NHL never considered Canadian laws. In the 2012 NHL lockout, the NHL only considered Ontario labor relations laws but did not consider the provincial nature of labor relations. By locking out its players in 2005 and 2012, the NHL gained unfair negotiating leverage. The lockout was detrimental to the players because they could not play; thus, the players did not earn a salary. The salary losses forced the players to agree to certain conditions that they might not have agreed to under different circumstances, such as the salary cap and the minimum and maximum salaries. Nevertheless, even though the NHL has unfair negotiating power, a lockout is a legitimate means for the NHL and other leagues to obtain what they want. To counterbalance the unfair negotiation power, this Article will demonstrate that Canadian laws cannot be overlooked and there are more effective means to fight a lockout under Canadian labor laws. Consequently, it is possible for both sides to gain leverage at any point during the negotiation process. In terms of antitrust law, if a decertification is agreed upon, players will have more effective means to fight a lockout in the United States. It is up to the players associations and the players to decide which strategy will be more beneficial to them to obtain as much leverage as possible. However, it is evident that if the laws remain unchanged, the best strategy for players who want to stay unionized will be to fight a lockout under labor laws.

II. LEGALITY OF NHL LOCKOUT UNDER AMERICAN AND CANADIAN LABOR LAWS

A CBA governs the relations between a professional sports league and a players association. As a result, club owners and players are bound by it. Labor laws regulate the collective bargaining process. Canada and the United States have a different set of laws that are not based on the same jurisdiction. However, in both countries, it is the players' decision whether or not to unionize. In the

United States, labor law falls under federal jurisdiction, while in Canada, provinces regulate labor law. Each province has its own set of laws.

A. American Labor Law

Labor relations have been tense in the United States as early as the 1920s during the Industrial Revolution. At the time, employees did not receive any protection for their work. There were no relationships between employees and their employers. Employees became upset because of poor working conditions, which created a lot of violence. To bring peace into labor relations, Congress adopted the Norris-LaGuardia Act in 1932.[6] A few years later, in 1935, President Roosevelt enacted a law to regulate all labor relations in the United States and permit unionization; this law was entitled the National Labor Relations Act (NLRA).[7] The NLRA allows workers to unionize, meaning they can agree that an organization will be designated as their representative for any labor relations dispute with an employer.

It must be mentioned that Congress established two main premises to accompany the NLRA. Congress first said that the government should not interfere when the parties negotiate terms of employment in good faith. [8] When two parties decide to be bound by a CBA and engage in the collective bargaining process, Congress will not get involved. Congress gives full freedom to the parties to negotiate the terms they want to include in a CBA, as long as the CBA respects the process established in the NLRA. Secondly, Congress stated that the bargaining power should be of the same level.[9] Through the NLRA, Congress meant to level the bargaining power between employers and their employees. Even if the bargaining power may never be equal between the two sides, the NLRA offers protection to employees and gives them some rights and benefits they would not otherwise have. Congress has never intervened in any individual labor dispute. Courts have the authority to review labor relations disputes. Courts will leave the parties to negotiate their own CBA. Therefore, the remedies under American labor law are limited to administrative and judicial claims.

The NLRA is central to labor relations; it created the National Labor

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6. Norris-LaGuardia Act, 29 U.S.C. § 101 (2006) (effective Mar. 23, 1932). With this law in place, courts were only able to grant injunctions to end strikes involving violence or fraud. Baumann, *supra* note 1, at 254. As such, the Norris-LaGuardia Act helped bring some peace to the labor industry. *Id*.

7. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

8. Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859, 875 (2012).

9. *Id.*

Relations Board (NLRB).[10] The NLRB's mission is to enforce the NLRA's provisions, which encompass employees' rights and ensure good faith bargaining from both sides, but mostly from the employers. One of the most important powers of the NLRB is to certify unions.[11] Under this power, once a union is certified as the official bargaining representative of employees to negotiate with an employer, no other representative or individual employee may do so. As with any other industry, it must be noted that players decide and voluntarily choose to unionize. Once a majority of players decides to unionize, a labor organization is chosen to represent them. The organization then applies for certification with the NLRB. Once this process is achieved and the NLRB recognizes the union, the certified union is the only unit that can represent the employees to the employer. In professional sports, certification means that leagues can only negotiate with players associations; leagues cannot negotiate with players individually.[12] Once the NLRB certifies a union, the NLRB grants the union the right to act on behalf of the union's members.[13] The union and the employer are mandated to negotiate a CBA. The NLRB, as a federal agency, establishes the mandatory subjects[14] that must be negotiated in a CBA. These mandatory subjects are wages, hours, and conditions of employment. All other legal issues are considered permissive subjects, meaning that an employer and union may or may not choose to negotiate these terms. An example of a permissive subject is the determination of the negotiators. As it can be noted, American labor relations laws are mostly procedural. Consequently, the laws provide both parties latitude in their negotiations, allowing them to reach the best deal possible.

In terms of professional sports leagues, the NLRB established its jurisdiction to oversee league disputes in the 1970s in *American League of Professional Baseball Clubs and Ass'n of National Baseball League Umpires*.[15]

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10. 29 U.S.C. §§ 151–169. *See also* Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 86 TUL. L. REV. 831, 838–89 (2012).

11. MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMI DURU, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 487 (3d ed. 2013).

12. Morio v. N. Am. Soccer League, 501 F. Supp. 633, 639 (S.D.N.Y. 1980). In this case, the North American Soccer League (NASL) tried to avoid bargaining with the players association and negotiated directly with the players. *Id.* at 637. The court enjoined the NASL from doing so. *Id.* at 640. It stated that the league's "duty to bargain with the exclusive representative carries with it the negative duty not to bargain with individual employees." *Id.* at 639 (citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. Acme Air Appliance Co., 117 F.2d 417 (2d Cir. 1941)).

13. MITTEN, DAVIS, SMITH & DURU, *supra* note 11, at 547.

14. There are no equivalent mandatory subjects in the provincial laws in Canada.

15. *See generally* 180 N.L.R.B. 190 (1969). In this case, the American League Umpires sought recognition as a union, but the league already had a system for self-regulation of umpire disputes. *Id.* at 190–91. The NLRB concluded in this case that baseball was a business engaged in interstate

In this case, the MLB umpires sought recognition of their union by the NLRB.[16] The NLRB established that professional sports affect interstate commerce.[17] As a result, professional sports should be subject to the NLRB's jurisdiction.[18] The NLRB exercised its jurisdiction, even though an MLB club was located in Canada.[19] Another element the NLRB considered to assert jurisdiction was the lack of internal regulation of disputes by MLB.[20] The NLRB found that MLB solely designed the system, and the system did not include anything on how to deal with labor disputes.[21] MLB tried to qualify the umpires as supervisors to exempt them from the NLRA.[22] Its argument was unsuccessful.[23] As a result, the NLRB took full jurisdiction over the matter and permitted the umpires to unionize,[24] even though the Major League Baseball Players Association was recognized by MLB.

This decision allowed the players association to be recognized by the NLRB as well as its respective league.[25] Consequently, the NLRB gave the players protection under the NLRA by asserting jurisdiction over labor relations in professional sports. The ruling of the case determined that because MLB held games in more than one state, MLB engaged in interstate commerce.[26] As the NLRB stated, "[F]uture labor disputes . . . will be national in scope, radiating their impact far beyond individual State boundaries."[27] Also, MLB is an industry that relies on interstate travel.[28] The NLRB finally mentioned, "The Employer's final contention, that Board processes are unsuited to regulate effectively baseball's international aspects, clearly lacks merit, as many if not most of the industries subject to the Act have similar international features."[29]

As a result, the NLRB could derive its jurisdictional power based on that particular decision. The NLRB could not avoid deciding a case involving

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commerce, meaning that the business was conducted in more than one state. *Id.* at 192.

16. *Id.* at 190.

17. *Id.*

18. *Id.* at 191.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 192.

23. *Id.* at 193.

24. *Id.*

25. Gregory Boucher, *Baseball, Antitrust and the Rise of the Players' Association*, 2008 DENV. U. SPORTS & ENT. L.J. 121, 129 (2008).

26. *Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 192.

27. *Id.*

28. *Id.*

29. *Id.*

professional sports that have the same characteristics. The four major North American professional sports leagues are governed by the NLRA, which means that the NLRB has jurisdiction to oversee issues deriving from the labor relations between leagues and players associations. Based on American jurisprudence, the NLRB has jurisdiction to intervene on issues that arise both within and outside the United States. To do so, a court must consider the effects of the conduct complained about in the United States. A court must determine if the conduct "negated or substantially qualified the presumption against extraterritoriality under the NLRA."[30] The effect must be considerable.

As demonstrated in *American League of Professional Baseball Clubs*, under labor law, it is important to consider some factors that are specific to professional sports. One element is multi-employer bargaining, which means that a bargaining group is set by a group of employees to represent and bind them with a union. In the NHL, multi-employer bargaining means that all club owners agree to bargain with one group, the National Hockey League Players' Association (NHLPA) that represents the players, and recognize the NHLPA's power to negotiate and conclude agreements for the players. As a result, the NHL clubs bargain as a joint employer. The NHLPA has established that, in professional sports, even though clubs operate independently and look to enhance their own viability and interest, clubs also need each other for the league to function properly and efficiently.[31] Clubs need common rules to operate and also to further the objective of the league to have competitive balance. Competitive balance is an important factor because a league and the teams would not generate as much revenue if competition on the ice is not high-level and not exciting to spectators. As a result, the NLRB concluded that all individual teams constitute a single employer unit in terms of bargaining purposes.[32] In *North American Soccer League*, the NLRB discussed how a joint employer relationship is formed.[33] The criterion is the degree of control one employer has over labor relations rules.[34] The NLRB found that the NASL had enough control over these issues to be recognized as a joint employer.[35] Control

30. WILLIAM B. GOULD IV, RE: COLBY ARMSTRONG ET AL AND THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION VS. CLUB DE HOCKEY CANADIEN INC. AND THE NATIONAL HOCKEY LEAGUE (C.M. NO, CM-2012-4431) par. 19 (2012).

31. *See* Brown v. Pro Football Inc., 518 U.S. 231, 248 (1996).

32. N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1383 (5th Cir. 1980). In this case, the NASL disputed the certification that was granted by the NLRB to the National American Soccer League Players Association to represent all NASL players of clubs located in the United States. *Id.* at 1380–81. The court concluded that "a league-wide [sic] bargaining unit as appropriate is reasonable." *Id.* at 1383.

33. *Id.* at 1382.

34. *Id.*

35. *Id.* at 1383.

is exercised through standard player contracts, the submission of players' contracts to the NASL Commissioner, and the NASL's broad player discipline power.[36] Consequently, if a league has such control, it will be considered a single employer unit.[37]

Another element to consider in professional sports is that a league is unique in nature and, as mentioned previously, needs the interdependence of the teams to conduct an effective business and provide an interesting and relevant product. Generally, if employers group together to form a single bargaining unit, the grouping would constitute an antitrust violation. The main reason why club owners group together is to provide an attractive product to consumers, such as exciting games among the member clubs of a league. Under the NLRA, a CBA that is negotiated by a multi-employer would not bind the parties unless all the parties agreed to it. In the case of the NHL and the NHLPA, the parties voluntarily accepted a CBA in 1967. Because this acceptation has not been contested, it is an admissible fact that both parties agreed to be bound by the CBA. It must be noted that the NHLPA never bargained with an individual club, neither in Canada nor the United States.

The NLRB has the authority to oversee unfair labor practices[38] and to review the scope of bargaining.[39] For example, an unfair labor practice is failing to bargain in good faith by either party during the collective bargaining process. The duty to bargain in good faith does not, however, include the legal duty to submit a reasonable proposal or to agree to any terms. The elements of the duty to negotiate in good faith include meeting with the other party to negotiate and meeting at a reasonable time. The scope of bargaining over mandatory issues includes wages, hours, and terms and conditions of employment. Any party may bring an administrative claim to the NLRB regarding an unfair labor practice and the scope of review. Similar arguments, depending on the facts, will be brought by either party. As American labor law is highly procedural, one party may argue that the other did not follow the proper process during a negotiation. The arguments will be related to bad faith bargaining by one party, i.e., delaying the process, missing a negotiation meeting, or failing to cooperate. Bad faith bargaining is difficult to prove because one fact alone might not be sufficient, but the combination of multiple factors may be enough to establish a claim on the merits. Anyhow, if an administrative claim before the NLRB fails, a party

36. *Id.*

37. *Id.*

38. Taft-Hartley Act, 29 U.S.C. §§ 141–197 (1947). The Taft-Hartley Act gave the NLRB jurisdiction over unions and employers in regards to unfair labor practices. *Id.*

39. MITTEN, DAVIS, SMITH & DURU, *supra* note 11, at 486.

may bring a similar claim in federal court.[40] Either through an administrative claim or a judicial claim, a party is typically seeking an order to stop the behavior of the other party.

In the NHL, players considered unionization beginning in the 1950s.[41] At that time, the players did not have the same working conditions as today. The salaries were not the same, and playing conditions were not as good; hockey was considered a dangerous physical contact sport because in the 1950s, players did not have the same protective equipment as today. Players wanted to obtain more guarantees for their life after they retired from the NHL. In 1957, Doug Harvey and Ted Lindsay, two NHL hockey players, sued the NHL because it refused to give players a pension plan.[42] Their efforts were counterbalanced by the NHL's actions. The NHL forced the players' teams to trade them.[43] The NHL also forced the Detroit Red Wings to disassociate from the players' movement.[44] As a result, the first effort to unionize did not work.

The NHLPA that we know today was formed in 1967.[45] The goal of the NHLPA was to obtain better salaries and guarantee more protection for the players. Bob Pulford, the Executive Director of the NHLPA at the time, ensured that the union would be recognized because he met with the owners and asked them for recognition and guarantees that players would not be penalized for being a union member.[46] The owners agreed. Through union representation, players obtain the rights and benefits that are provided by the NLRA. The NHLPA has the power to collectively bargain an agreement on behalf of the players that will set the different conditions of their employment.[47] The players obtain the right to strike, while the NHL has the right to lockout players.[48]

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40. An unfair labor practice claim is filed with the NLRB. When the NLRB receives a claim, it will investigate the allegations. Once an investigation is completed, the NLRB will determine if it will proceed through consent procedures or formal procedures. In a consent procedure, the parties waive their right to a formal hearing. In a formal procedure, the parties go through a formal hearing. An administrative law judge presides over a hearing. The administrative law judge will either impose a cease and desist order of the unfair labor practice or dismiss the unfair labor practice claim. If either party does not agree or does not comply with the order, a federal court of appeals court may review the NLRB's decision and decide to enforce, set aside, or remand the decision to the NLRB.

41. *Inside NHLPA*, NHLPA, http://www.nhlpa.com/inside-nhlpa (last visited Dec. 14, 2015).

42. Daniel Wyatt, *Ted Lindsay and the First NHL Players' Association*, DANIEL WYATT; HIGH ON HIST. (July 20, 2013), http://danielwyatt.blogspot.com/2013/07/ted-lindsay-and-first-nhl-players.html.

43. *Id.*

44. *Id.*

45. *Inside NHLPA*, *supra* note 41.

46. *NHLPA*, WATERFRONT BIA, http://www.waterfrontbia.com/directory.asp?idn=1467&pg=10 (last visited Dec. 14, 2015).

47. National Labor Relations Act, 29 U.S.C. §§ 151–169 (1947).

48. *Id.*

Furthermore, the NLRA prohibits employers from sanctioning employees who want to unionize;[49] as a result, the actions of the NHL in the 1950s would not be permitted now. A union permits the creation of a strong force against owners or an employer. Multiple employees allow for a stronger voice than one employee negotiating alone.

A players association has a duty to fairly represent any current or prospective players. In the NHL, the NHLPA is the labor organization that represents the players in their collective bargaining negotiations with the NHL. Furthermore, just as the players have the right to choose to unionize, they have the equivalent right to forgo union representation at any given point in time. There are two ways players can dissolve their union, either through a disclaimer of interest or through decertification.[50] This process will be elaborated further in detail in the antitrust section, as it is an important factor to determine when players can bring antitrust claims.

1. Legal Remedies to Prevent or Stop an NHL Lockout

Under American labor law, as mentioned previously, there are only two ways to bring a claim before the NLRB, either through an unfair labor practice or scope of bargaining claim. Both parties, either a league or a players association, may bring a claim before the NLRB. In terms of a lockout, only an unfair labor practice claim would apply. Section 8(d) of the NLRA imposes an obligation on both parties to negotiate in good faith.[51] This remedy would be the best way for a league to force a players association to negotiate. This would not end a lockout, but it would put pressure on a players association and force it to sit at the negotiation table, even though players might still be locked out. It would be a strong tactic for a league to bring an unfair labor practice claim and still lock out the players because the league would gain more bargaining power.

Taking the 2012 NHL lockout for example, the NHL could have argued that the players association was not bargaining in good faith because the players filed multiple labor relations claims in different instances, which could be defined as an uncooperative negotiation practice. The players looked at alternative ways to enjoin the league from locking them out instead of putting all their efforts into the negotiation process. The league could have brought a claim, even though a lockout was already in place. The league would have gained even more bargaining power. This would have been a remedy to counter the efforts of the players association's claims against the league. If the NHL had

49. *Id.*

50. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1256 (2012).

51. 29 U.S.C. § 158(d).

engaged in unfair labor practices, the players association could have also brought a claim under this provision.

Pursuing the same synopsis as mentioned in the previous paragraph, the players association could have argued that the league never bargained in good faith because it was clear the league intended to lock out the players on a particular date. Also, the players association could have argued that the league had a history of locking out its players.[52] Under the same commissioner, the NHL experienced three lockouts. This trend shows that the league used lockouts as a common tactic and not as a pressure measure for a particular situation. The league knew that a lockout would give it bargaining power, and the league decided to lock out the players without negotiating fairly with the NHLPA from the beginning. It would be hard for the NHLPA to establish because lockouts are a pressure tactic permitted under the NLRA.

Because the NLRA specifically permits a lockout, there are not many remedies that players can bring to prevent or stop a lockout under American labor law. As established in *American Ship Building Co*.,[53] a lockout is legal even if it is used to put economic pressure on employees. The Court said that the "use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such."[54] Therefore, because the league made its intention of locking the players out clear, the argument that the league bargained in bad faith may not be a compelling argument to convince the NLRB. It seems like the NLRA, which was enacted to help employees gain leverage in the bargaining process, gives an employer more power and measures to help employees modify their demands. Because a lockout is protected and almost impossible to fight under labor laws, it seems that the main goal of the NLRA is no longer fulfilled. As a result, due to all the elements mentioned previously, it seems that the main goal of the NLRA, to give resources to employees and empower them in their relation with their employer, is not fulfilled to the same

52. *Pro Sports Lockouts and Strikes Fast Facts*, CNN, http://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/ (last updated Jan. 28, 2015). The NHL experienced three lockouts since 1992. The first one was during the 1994–1995 season; this lockout lasted 103 days. *Id.* The second lockout was during the 2004–2005 season. *Id*. This lockout lasted 310 days. *Id.* The third lockout was during the 2012–2013 season. *Id.* During this lockout, 526 regular season games were canceled. *Id.*

53. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312 (1965). In this case, the employer who operated a shipyard company wanted a new agreement with its unions. *Id.* at 302. When the negotiations reached an impasse, the employer closed down one of its yards and laid off some employees for a temporary period. *Id.* at 303–04. The employees argued that the employer did so because it knew that a strike was coming. *Id.* The employer argued that it did so to support its bargaining position and put economic pressure on the employees. *Id.* at 304.

54. *Id.* at 312.

extent as when it was enacted, based on the legality and legitimate means a lockout provides to an employer.

B. Provincial Canadian Labor Law

The main difference between American and Canadian labor laws is jurisdiction. In Canada, the provinces regulate labor law. Each province has its own labor relations code or act. Each code or act must be interpreted according to the legal system it is subject to. Provincial Canadian labor relations laws apply to the players and teams that are located in and provide work services in Canada. Even though the NLRB claimed jurisdiction and recognized the extraterritoriality of the NLRA, the Canadian labor boards' decisions must be taken into account. Seven of the thirty NHL teams are located in Canada; however, all of the Canadian teams generate more revenue than most of the American teams.[55] Canadian teams also have a gigantic fan base. Even when the teams are not playing in Canada, there are huge impacts on revenues, sponsorships, and broadcasts. Therefore, in the NHL, it can be argued that the main effects of a lockout are felt in Canada. In the last NHL lockout, some Canadian enterprises, such as restaurants and souvenir boutiques, surrounding the NHL arenas closed due to the lack of business. These main economic effects cannot be disregarded. Furthermore, Canadian NHL teams have lucrative broadcasting deals. In 2014, the NHL entered into its most lucrative Canadian television broadcasting deal with an agreement with Sportsnet to become the official broadcaster of the NHL for the next twelve years. The deal was evaluated at 5.2 billion dollars.[56] Some broadcast television companies make most of their revenues from televised hockey games. An NHL lockout results in a direct negative impact on television revenues. Based on all of these elements, Canadian laws may not be overlooked, although it seems they have been overlooked in the previous lockouts.

1. Québec Labour Law

The Province of Québec is the only province that has a completely mixed legal system of civil and common law. Common law is mostly used for issues

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55. Paul D. Staudohar, *The Hockey Lockout of 2012–2013*, U.S. BUREAU OF LAB. STAT. (July 2013), http://www.bls.gov/opub/mlr/2013/article/the-hockey-lockout-of-2012.htm. Jeff Klein established that three of the NHL clubs are responsible for the generation of 80% of the NHL revenues. *Id.* Two of those clubs are located in Canada, which are Montreal and Toronto. *Id*. Revenue generation in the NHL is calculated differently than the other sports leagues, as the revenues are mostly derived from attendance and local television agreements, whereas, in other professional sports leagues, revenue generation comes from national television agreements. *Id.*

56. *Deal Gives Rogers Rights to All NHL Games Through 2025–26*, SPORTSNET (Nov. 26, 2013), http://www.sportsnet.ca/hockey/nhl/deal-gives-rogers-rights-to-all-nhl-games-through-2025-26/.

that are federal in nature, such as criminal law. On the other hand, labor law is under the umbrella of the civil legal system. In Québec, any matters that result out of labor law are codified in the Québec Labour Code.[57] Originally, the labor system was developed on two basic premises: minimum working conditions and the autonomy of the parties involved in an employment relationship.[58] The latter premise is still predominant in the law, meaning that the law recognizes the voluntary association of employees, the collective bargaining process, and the pressure tactics that can be used by employees.[59]

To benefit from certain protections of the Québec Labour Code, a union must be certified as the representative of that particular group of employees. The employees must take a vote, and the majority must approve the unit that will represent them. In this case, for the NHLPA to be the official unit, the players would have to vote to elect this organization. Once the vote has passed, an application must be filed to obtain certification to the Québec Labour Relations Board. When a union is certified, employees may benefit from the rights that are provided in the Québec Labour Code. For example, once certified, players would acquire the right to strike, which would give the league the right to lock out the players. Currently, the NHLPA is not a certified union under the Québec Labour Code, which means that the players cannot be locked out and a lockout is illegal.

Another codified provision regards arbitration. The Québec Labour Code provides that its dispute resolution system is the exclusive means to settle grievances resulting from a CBA. The law is clear on this subject: "Any dispute shall be submitted to an arbitrator upon written application to the Minister by the parties."[60] Therefore, if the NHLPA were a recognized union under the Québec Labour Code,[61] the NHL and the NHLPA would have to bring any of their disputes to arbitration, not to court. Once a CBA expires, both parties may agree to submit their disputes to arbitration; however, it is not mandatory.

Another provision that directly applies to professional sports concerns organizations with multiple employers. The Québec Labour Code provides that multi-employer certification is prohibited. This can be an issue in professional sports because a professional sports league is a group of club owners who are the employers. To have an efficient league, club owners must work together. The multi-employer bargaining unit is pivotal to the NHL because the business

57. *See generally* Québec Labour Code, R.S.Q. 2009, c C-27 (Can.).

58. Mathieu Fournier & Dominic Roux, *Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining?*, 20 MARQ. SPORTS L. REV. 147, 149 (2009).

59. *Id.*

60. Québec Labour Code, R.S.Q. 2009, c C-27, art 74 (Can.).

61. *See id.*

of clubs is so intertwined that they need to be governed by the same rules for their best interest. One can argue that it would be more complex to have multiple bargaining units and unions (i.e., thirty in the NHL); therefore, it is impossible to imagine a non-multi-employer bargaining unit. If it were necessary, it would mean that under the Québec Labour Code, it would be impossible for the NHLPA to be recognized as a certified union, unless it created divisions specific for each team.

During the last NHL lockout, the Montreal Canadiens players brought a labor law claim against the Club de Hockey Canadien Inc. and the NHL.[62] The players claimed the lockout was illegal and sought an injunction to suspend the lockout.[63] The main argument raised by the Montreal Canadiens players and the NHLPA was that the lockout was unlawful.[64] Under the Québec Labour Code, the Montreal Canadiens players are considered employees based on their individual employment contracts.[65] The NHLPA is the labor association that represents these players.[66] However, the NHLPA is not a certified union under the Québec Labour Code.[67] Concurrent jurisdiction was established because the Labor Relations Commission ascertained the matter in front of it. The Québec Labour Code applies to employers (i.e., the team) and employees (i.e., the players) who work in Québec.[68] As a result, in Québec, locking out employees is prohibited because they did not acquire the right to strike, as the players association is not a certified union. For this reason, "the players and the NHLPA asked the [Québec Labour Relations] Board to step in."[69] The NHL argued that it was not an employer as defined by the Québec Labour Code.[70] According to the NHL, the only employer that existed, as defined by the Québec Labour Code, was the Montreal Canadiens.[71] The Commission des relations du travail ultimately concluded the Québec Labour Code applies to everyone and, therefore, applied to the current dispute.[72]

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62. Armstrong c. Club de Hockey Canadien Inc., 2012 QCCRT 0445 (Can.). In this case, the players and the NHLPA sought a provisional order to prevent the league from locking the players out. *Id*. The order was not granted at the preliminary hearing. *Id*. A final decision was never issued. *Id*.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Danilo Di Vincenzo & Linda Bernier, *The National Hockey League and the Montreal Canadiens' Hockey Club on the Labour Relations Board's Ice*, CANADIAN BAR ASS'N (Nov. 2012), http://www.cba.org/CBA/sections_labour/newsletters2012/nhl.aspx.

69. *Id.*

70. *Armstrong*, 2012 QCCRT 0445.

71. *Id*.

72. *Id*.

The NHL also argued that the Québec Labour Code did not apply because the NHLPA was not a certified unit in Québec.[73] The NHL then argued that it negotiated a CBA with the NHLPA in 1967, so they had a contractual relationship since then.[74] As a result, one team should not be certified because the NHLPA bargained with the league and not individual clubs for many years.[75] The NHL also stated that because the CBA was expired, the NLRA permitted such a pressing measure to force the NHLPA to negotiate.[76] Finally, the NHL argued that the NHLPA's claims were a demonstration of its bad faith in the negotiation process, as it was using the claim only to pressure the league.[77] The Commission des relations du travail rendered only an interlocutory decision.[78] The parties were convened in that judgment for another ruling on the merits of the case.[79] The merits of the case were never decided, so there is no basic rule to follow in terms of a claim in Québec. Furthermore, the Commission des relations du travail did not grant the injunction sought by the players because the NHL caused no harm.[80]

The Commission des relations du travail's decision was one of the first judgments involving professional athletes that could have opened the door for the Commission des relations du travail to decide its jurisdiction and the involvement of Québec law in professional sports leagues issues. The Commission des relations du travail seemed compelled by the arguments of the players and the NHLPA in regard to legal pluralism.[81] The Commission des relations du travail stated that it has exclusive jurisdiction in labor relations matters that occur in Québec.[82] However, the Commission des relations du travail still needs to decide whether legislation applies in this case. The Québec Labour Relations Board will have to establish how legislation applies to the NHL. Based on the previous NHL lockout, because the NHLPA was not a certified union, it seems that the lockout imposed by the NHL was illegal.

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73. *Id*.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* The Commission des relations du travail dismissed the application of the players of the Club de hockey Canadien Inc. because at the time the application was filed, the criteria to grant an injunction was not met, which includes whether there was a serious question, irreparable harm, and preponderance of inconveniences. *Id*. The main criterion that was not met was irreparable harm, as the players did not lose any salaries or benefits as of September. *Id.* The Commission des relations du travail set a date to reconvene in October. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

The arguments brought by both parties were valid. The players rightfully argued that the Québec Labour Code applies to them because they work in Québec and their employer is located in Québec. However, one issue regarding the application of Québec's legislation might complicate a decision in favor of the players. Based on the facts of the 2012 NHL lockout, the lockout was illegal because the NHLPA is not a certified union, which means that the players are entitled to the same benefits that they would normally have if they were playing. The problem is the legality of the lockout outside Québec. According to the Québec Labour Code, the lockout would be illegal only in the province of Québec. A positive decision from the Commission des relations du travail would give the players bargaining power, even though it could invalidate a league-wide lockout.

2.. Alberta, British Columbia, Ontario, and Manitoba Labor Laws

The four provinces, Alberta, British Columbia, Manitoba, and Ontario, are all governed by the common law legal system, meaning that precedent is an important factor when deciding a particular issue. For example, because some labor comissions and judicial instances already assert jurisdiction over professional sports leagues' labor relations disputes, if a dispute arose in a future lockout, a board would have to recognize its jurisdiction. Each of the four provinces has adopted statutes that regulate labor relations in its territory, and courts in these jurisdictions have more flexibility to adapt the labor relations laws to a specific situation.[83]

a. Alberta

The Alberta Employment Standards Code[84] applies to every employer and employee in Alberta.[85] Therefore, the teams located in Alberta, the Calgary Flames and the Edmonton Oilers, must comply with the Alberta Employment Standards Code. Under the Alberta Employment Standards Code, employers must follow certain administrative steps to impose a lawful lockout on their employees. The Alberta Employment Standards Code provides for mediation.[86]

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83. Common law courts and instances have more flexibility to adapt the laws, statutes, and regulations to the reality because the system allows for the evolution of the law over time. In a civil law system, it is more difficult to make the law evolve, and it often requires modification of the law, which requires a robust process of legislation.

84. *See generally* Province of Alberta Employment Standards Code, R.S.A. 2000, c E-9 (Can.).

85. *Id.* art 2(1) (stating, "This Act applies to all employers and employees, including the Crown in right of Alberta and its employees.").

86. *Id.* art 73(2)(b).

Furthermore, a lockout is permitted only if certain conditions occur, such as notice of a lockout, a vote on a lockout supervised by the Division of Labor Relations, and the expiration of a CBA.[87] If these conditions are not met, a lockout may be declared illegal.

During the 2012 NHL lockout, players from the Calgary Flames and the Edmonton Oilers filed a claim with the Alberta Labour Relations Board stating that the lockout was illegal in Alberta.[88] The players argued that they were

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> The Registrar may
>
> (a) initiate any system of appeal management in order to expedite the fair resolution of an appeal;
>
> (b) with the agreement of the parties, appoint or facilitate the appointment of an impartial third party mediator, fact-finder or other person to assist the parties in settling their dispute;
>
> (c) design processes to manage appeals that, at the option and with the agreement of the parties, may be used to resolve an appeal.

Id. art 73(2).

87. *See* Province of Alberta Employment Standards Code, R.S.A. 2000, c L-1, art 73 (Can.).

> An employer or employers' organization is entitled to cause a lockout if
>
> (a) no collective agreement is in force, other than as a result of section 130,
>
> (b) a lockout vote was held under this Division
>
> (i) that remains current,
>
> (ii) for which the results have been filed with the Board, and
>
> (iii) that resulted in a majority in favour of a lockout,
>
> (c) lockout notice is given in accordance with this Division,
>
> (d) the lockout commences on the day and at the time and location specified in the lockout notice or, if an amendment to the lockout notice is agreed to and is permitted under this Division, on the day and at the time and location specified in the amended lockout notice, and
>
> (e) in a case where a disputes inquiry board is established before the commencement of the lockout, the time limits referred to in section 105(3) have expired.

Id. art 74.

> (1) A bargaining agent that is a party to a dispute may apply to the Board to supervise a strike vote, and an employer or employers' organization that is a party to a dispute may apply to the Board to supervise a lockout vote.
>
> (2) No strike or lockout vote shall be supervised while a collective agreement is in force unless that agreement is in force pursuant to section 130.
>
> (3) No strike or lockout vote shall be supervised until a mediator has been appointed under section 65 and the cooling-off period referred to in subsection (7) of that section has expired.

Id. art 75.

88. Edmonton Oilers Hockey Corp. and Nat'l Hockey League Players' Ass'n, 2012 CarswellAlta 1678, para. 2 (Can.).

"employees" as defined by the Alberta Employment Standards Code and, as such, their rights should be protected, even though the NHL filed for voluntary recognition.[89] Although the league did file for voluntary recognition, it did not receive an answer to assess the legality of the lockout.[90] The Alberta Labour Relations Board dismissed the claim of the players, stating that because all of the steps were not completed, it would not invalidate the lockout.[91] Furthermore, the Alberta Labour Relations Board did not want to support strategic tactics to prevent negotiation discussion,[92] believing its involvement would be detrimental to the parties' relationship.[93] The Alberta Labour Relations Board stated,

> The result of such an intervention by this Board would be to effectively remove the Calgary Flames and Edmonton Oilers teams and players from the league-wide collective bargaining process that the parties have historically engaged in and has been established and recognized under the *NLRA*. The Calgary Flames and Edmonton Oilers Clubs could not participate in the league-wide lockout in which the rest of the League is engaged as part of the current collective bargaining process. This is, in part, the very reason the British Columbia Labour Relations Board refused to grant certification of the B.C. NHLPA in its application involving the Vancouver Canucks in *Orca Bay*.[94]

As demonstrated, the Alberta Labour Relations Board was reluctant to assert jurisdiction over the NHL lockout. However, the fact that the NHL filed for voluntary recognition of the lockout supported its argument that it had a good faith basis for having the lockout declared legal. The main point to remember is that the Alberta Employment Standards Code provides the Alberta Labour Relations Board with the possibility to decline or assert jurisdiction on matters that happen in its territory.

89. *Id.* at para. 31.
90. *Id.* at para. 28.
91. *Id.* at paras. 39, 41.
92. *Id.* at para. 40.
93. *Id.* at para. 42.
94. *Id.* at para. 42.

b. British Columbia

The British Columbia Labour Relations Code[95] includes similar provisions with regard to mandatory administrative steps that must be fulfilled to have a legal lockout. As in Alberta, all employers must vote prior to a lockout.[96] This

95. British Columbia Labour Relations Code, R.S.B.C. 1996, c 244, art 61 (Can.).

96. *Id.* art 61(1).

> (1) If 2 or more employers are engaged in the same dispute with their employees, a person must not declare or authorize a lockout and an employer must not lock out his or her employees until a vote as to whether to lock out has been taken by all the employers in accordance with the regulations, and a majority of those employers who vote have voted for a lockout.
>
> (2) If on application by a person directly affected by a lockout vote or an impending lockout, or on its own behalf, the board is satisfied that a vote has not been held in accordance with subsection (1) or the regulations, the board may make an order declaring the vote of no force or effect and directing that if another vote is conducted the vote must be taken on the terms the board considers necessary or advisable.
>
> (3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected,
>
> (a) if a vote is taken under subsection (1) and the vote favours a lockout, a person must not declare or authorize a lockout and an employer must not lock out his or her employees except during the 3 months immediately following the date of the vote, and
>
> (b) an employer must not lock out his or her employees unless
>
> (i) the trade union has been served with written notice by the employer that the employer is going to lock out his or her employees,
>
> (ii) written notice has been filed with the board,
>
> (iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was
>
> (A) filed with the board, and
>
> (B) served on the trade union, and
>
> (iv) if a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the employers are informed by the associate chair that the mediation officer has reported to him or her, or from the time required under subparagraph (iii) of this paragraph, whichever is longer.
>
> (4) Despite subsection (3) (b) (iii), the board may direct an employer to give more than 72 hours' notice of a lockout, on application or on its own motion, for the protection of
>
> (a) perishable property, or
>
> (b) other property or persons affected by perishable property.
>
> (5) If the board makes a direction under subsection (4), the board
>
> (a) must specify the length of the written notice required, and
>
> (b) may specify terms it considers necessary or advisable.
>
> (6) If facilities, productions or services have been designated as essential services under Part 6 and a lockout that affects those facilities, productions or services does not occur on the expiry of the 72 hour period referred to in subsection (3) (b) (iii) or the longer period specified under subsection (5), the employer must give to the board and the trade union a new lockout notice of at least 72 hours before commencing a lockout.

vote is subject to the approval of the British Columbia Labour Relations Board because the vote must comply with the British Columbia Labour Relations Code, including giving seventy-two hours' notice to the British Columbia Labour Relations Board and trade union.[97] Furthermore, the majority of employers shall vote in favor of a lockout for it to be legal.[98] If this administrative step is not fulfilled, the lockout is illegal.[99] The British Columbia Labour Code also provides that both parties must negotiate in good faith,[100] a duty that is also provided by the NLRA. The jurisdiction of the British Columbia Labour Relations Board was challenged prior to the 2012 NHL lockout.

In 2007, the Orca Bay Club and the NHL asked the British Columbia Labour Relations Board to take jurisdiction over the issue that "a separate bargaining unit including only the Vancouver Canucks would be an appropriate bargaining unit under the Code."[101] The British Columbia Chapter of the National Hockey League Players' Association (BC-NHLPA) sought recognition as the official union of the Vancouver Canucks players.[102] On the other hand, the NHL and Orca Bay argued that "the Canucks players had voluntarily chosen to be part of a league-wide collective bargaining relationship," and during previous negotiations, the players bargained under the NHLPA umbrella.[103] In the final decision, the British Columbia Labour Relations Board was reluctant to intervene between the two parties due to their history, the nature of the structure of their relationship, and the way their relationship functions.[104] It was established that

> The Board has no jurisdiction to grant an application for certification on any terms other than under the provincial legislation; however, where those terms are met, the employer's preference for another bargaining unit configuration in another jurisdiction cannot stand as a bar to the

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Id. art 61.

[97] *Id.* art 61(3)(b)(iii).

98. *Id.* art 61(1).

99. *See id.*

100. *Id.* art 11.

101. Orca Bay Hockey Ltd. P'ship v. British Columbia Chapter of the Nat'l Hockey League Players' Ass'n, 2007 CarswellBC 3314, para. 1 (Can.). In this case, the British Columbia Chapter of the NHLPA applied for certification to the British Columbia Labour Relations Board. *Id.* at paras. 5–6.

102. *Id.* para. 6.

103. *Id.* para. 9.

104. *Id.* para. 36.

Board exercising its jurisdiction under the Code.[105]

The British Columbia Labour Relations Board established that it has jurisdiction over the employees and employers working in British Columbia.[106] In its decision, the British Columbia Labour Relations Board determined that the NLRB did not have the power to certify a bargaining unit in Canada and it also did have the power to prevent labor organizations from applying for certification.[107] Therefore, even though the NHLPA is not a certified unit in British Columbia, the British Columbia Labour Relations Board can still look at disputes that implicate them.[108]

It is clear that even though the NLRA applies to the relationship between the NHLPA and the NHL, the law of British Columbia still applies and the British Columbia Labour Relations Board may review labor relations disputes in British Columbia. Nevertheless, as it was explained in *Edmonton Oilers Hockey Corp. & National Hockey League Players' Ass'n*, the British Columbia Labour Relations Board did not get involved in the labor disputes to avoid involvement in labor relations that implicated actors other than just the Vancouver Canucks players and the club owner.[109] This is a crucial element of the British Columbia Labour Relations Board's holding because by not intervening, it would have given almost full jurisdiction to its counterpart, the NLRB.

c. Ontario

In the Province of Ontario, the Ontario Labour Relations Act[110] regulates labor relations. The Ontario Labour Relations Act applies to all persons who work in Ontario.[111] Its jurisdiction over professional sports personnel who provide work services in the province has been established in multiple cases; two of these cases are highly important to the subject discussed in this section. In a case involving an MLB team, the Toronto Blue Jays, regarding the use of replacement umpires, the Ontario Labour Relations Board decided that the umpires were working regularly and customarily in Ontario. This meant that the

105. *Id.* para. 35.

106. *See* Orca Bay Hockey Ltd. P'ship & NHLPA, 2005 CarswellBC 4555, para. 29 (Can.).

107. Orca Bay Hockey Ltd. P'ship v. British Columbia Chapter of the Nat'l Hockey League Players' Ass'n, 2007 CarswellBC 3314, para. 35 (Can.).

108. *See id.* para. 29.

109. Edmonton Oilers Hockey Corp. & Nat'l Hockey League Players' Ass'n, 2012 CarswellAlta 1678, para. 42 (Can.).

110. *See generally* Ontario Labour Relations Act, R.S.O. 1995, c. 1 (Can.).

111. *Id.*

Ontario Labour Relations Act applied and the Ontario Labour Relations Board had jurisdiction over the players and the teams working in its territory.[112] In *National Basketball Referees Ass'n v. National Basketball Ass'n*,[113] the Ontario Labour Relations Board upheld an analogous decision.

The Ontario Labour Relations Act provides multiple steps that must be encountered prior to declaring a legal lockout when no CBA is in place.[114] One step is mandatory conciliation. In such a case, the Minister of Labour will appoint a conciliation officer or a mediator.[115] Within fourteen days of this appointment, the conciliator reports to the Minister of Labour regarding the endeavour.[116] The conciliator determines if the parties are reconcilable. If so, the conciliator can allow them to get back into the collective bargaining process. Following the meeting, this person shall produce a report to the Minister of Labour. The report is produced to the Ontario Labour Relations Board, which determines if a conciliation board should be appointed. If it is advisable, meaning that there is a window for the collective bargaining process to continue,

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112. Ass'n of Major League Umpires v. Am. League & Nat'l League of Prof'l Baseball Clubs, 1995 CarswellOnt 1524, para. 13 (Can.). In this case, the Association of Major League Umpires filed an unfair labor practice claim against the American League and National League of Professional Baseball Clubs and the Toronto Blue Jays Baseball Club. *Id.* at para. 1. The Ontario Labour Relations Board found that labor relations are subject to the application of the Ontario Labour Relations Act. *Id.* at para. 13. Furthermore, it stated that an umpire who worked regularly and customarily in Ontario is an employee as defined in the Ontario Labour Relations Act. *Id.* Consequently, "Any lock-out of umpires, at this time, in the Province of Ontario would be unlawful in Ontario because neither the Leagues nor the Umpires' Organization have triggered the compulsory conciliation process which is mandatory in this province before a lawful strike or lock-out can occur." *Id.*

113. 1995 CarswellOnt 1620, para. 21. This case followed the lockout of the NBA's referees by the NBA for the 1995–1996 season. *Id.* at para. 11. The Ontario Labour Relations Board decided that it had jurisdiction over the dispute because a team was located in Ontario, Canada. *Id.* at para. 16. Therefore, the referees worked in Ontario. *Id.*

114. R.S.O. 1995, c. 1, art 79(2).

115. *Id.*

116. *Id.* art 20(1).

> (1) Where a conciliation officer is appointed, he or she shall confer with the parties and endeavour to effect a collective agreement and he or she shall, within 14 days from his or her appointment, report the result of his or her endeavour to the Minister.
>
> Extension of 14-day period
>
> (2) The period mentioned in subsection (1) may be extended by agreement of the parties or by the Minister upon the advice of the conciliation officer that a collective agreement may be made within a reasonable time if the period is extended.
>
> Report of settlement
>
> (3) Where the conciliation officer reports to the Minister that the differences between the parties concerning the terms of a collective agreement have been settled, the Minister shall forthwith by notice in writing inform the parties of the report.

Id. art 20.

a conciliation board will be appointed and a lockout shall not be declared during the process. However, if the report states that it is not advisable to appoint a conciliation board, the Minster of Labour will authorize the lockout. One particularity of this provision is voluntary recognition of the conciliation process. Written consent must be filed with the Ontario Labour Relations Board, which may decide to accept or refuse the consent.

During the 2012 NHL lockout, the Minister of Labour in the Province of Ontario, in his full discretion, gave permission to the Toronto Maple Leafs and the Ottawa Senators to lock out their players.[117] As such, the NHL did not have to go through all the administrative steps to have a legal lockout. If the NHL did not apply for voluntary recognition, the NHL would have needed to fulfill all the administrative steps required by the law.[118]

d. Manitoba

It must be mentioned that a seventh team, the Winnipeg Jets, is located in Winnipeg, Manitoba. Like all of the other Canadian provinces discussed, Manitoba enacted its own labor relations law, the Labour Relations Act.[119] The law applies to NHL players who work in Manitoba because it is where they are employed. During the 2012 NHL lockout, the NHLPA and the players of the Winnipeg Jets did not file a suit to block the lockout; the NHLPA was still exploring options, but it did not follow through.[120] There are some particular provisions in the Manitoba Labour Relations Act that could help the players association. The main provision that could create issues with the NHL is article 87.1.[121] This provision provides that either side may apply, in writing, to the

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117. Sean Rainey, *Is a Possible NHL Lockout Even Legal in Canada?*, DAILY CALLER (Sept. 11, 2012), http://dailycaller.com/2012/09/11/is-a-possible-nhl-lockout-even-legal-in-canada/.

118. *See* R.S.O. 1995, c. 1, art 79(2).

119. Manitoba Labour Relations Act, C.C.S.M. 1988, c. L-10 (Can.).

120. Dave Stubbs *NHLPA Looks to Quebec Labour Law to Halt Lockout*, NAT'L POST (Sept. 10, 2012), http://news.nationalpost.com/sports/nhl/nhlpa-looks-to-quebec-labour-laws-to-halt-lockout.

121. R.S.O. 1995, *supra* note 118, art 87.1.

> Where a collective agreement has expired and a strike or lockout has commenced, the employer or the bargaining agent for a unit may apply in writing to the board to settle the provisions of a collective agreement if
>
> (a) at least 60 days have elapsed since the strike or lockout commenced;
>
> (b) the parties have attempted to conclude a new collective agreement with the assistance of a conciliation officer or mediator for at least 30 days during the period of the strike or lockout; and
>
> (c) the parties have not concluded a new collective agreement.

Id. art 87.1(1).

Manitoba Labour Relations Board to ask them to settle the terms of a CBA.[122] An application may be made once at least sixty days have passed since the beginning of a lockout.[123] This could be an interesting tactic that should be analyzed by the players. The Manitoba Labour Relations Board has sole discretion to accept the application.[124] The Manitoba Labour Relations Board has the power to require the parties to submit to conciliation, if it believes that the parties are negotiating in good faith and could come to an agreement within thirty days.[125] The Manitoba Labour Relations Board will try to leave the collective bargaining process in the hands of the parties.[126] However, if the Manitoba Labour Relations Board decides to accept the application following a request to settle the terms of a CBA, these terms will be binding for one year.[127]

Other issues may arise if the players in Manitoba file such a claim because the Manitoba Labour Relations Board would settle the terms of a CBA. The settled terms would directly impact the other NHL players and teams because the NHLPA and the NHL would have to comply with the terms of the CBA in Manitoba. The critical determination in such a process would be defining the bargaining unit and which players are covered by it. It is unlikely that such an application would be filed, but it could be a measure to gain leverage in a negotiation process.

e. Concurring Jurisdiction of Provincial Canadian Labor Law and American Labor Law

In all of the common law provinces, a claim may be brought to a labour relations board. The NHLPA will try to argue that a lockout is illegal based on the different provincial Canadian labour relations laws. The NHL brought a similar jurisdictional argument, stating that the respective provincial labour relations laws did not apply to the relationship between the NHL and the NHLPA.[128] The NHL's arguments relied almost strictly on previous practices, mentioning that it always did business that way and the provincial Canadian labour relations boards never interfered with the previous negotiations.[129]

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122. *Id.*

123. *Id*. art 87.1(1)(a).

124. *See id*. art 87.1(1).

125. *Id*. art 87.2(1).

126. *Id.*

127. *Id*. art 87.3(5).

128. Grant Goeckner-Zoeller, Note, *Extraterritorial Lockouts in Sports: How the Alberta Labour Board Erred in Declining Jurisdiction over the NHL*, 37 COLUM. J.L. & ARTS 101, 121 (2013).

129. *Id.*

However, many decisions, such as *Ass'n of Major League Umpires* and *Orca Bay Hockey Ltd. Partnership*, support the position that the provincial labor relations laws applied—in addition to the NLRA—even if the boards ultimately decided not to intervene.[130] Challenges have been brought before labor boards in Canada.

Furthermore, the NLRA might be enforced in Canada. To do so, a provincial Canadian board must decline jurisdiction or establish that the NLRB is better suited to deal with a specific issue than the courts or boards in Canada.[131] However, even if the NLRB exercised its jurisdiction in Canada, it cannot override Canadian laws. The NLRB must consider provincial Canadian laws in its decision. Canadian laws must be respected, which means that the NHL should comply with all the administrative procedures to respect the laws previously mentioned. On the other hand, the NHLPA's main argument would be that the NHL did not fulfill all of the administrative steps that were required by the law to declare a legal lockout.[132] During the last NHL lockout, only the prior requirements to declare a lockout were fulfilled in Ontario, and that is only because the law provides voluntary recognition. Otherwise, none of the administrative steps in any of the other provinces were fulfilled, meaning that the 2012 NHL lockout would have been illegal. Due to concurrent jurisdiction, as established by different labour relations boards, a league must respect the laws in place in the Canadian provinces. Over the years, concurrent jurisdiction has been at the center of all disputes. Canadian labour relations boards tend to agree with the players association regarding jurisdiction; however, some provinces, such as Alberta, have been reluctant to enforce their jurisdiction.[133]

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130. Orca Bay Hockey Ltd. P'ship v. British Columbia Chapter of the Nat'l Hockey League Players' Ass'n, 2007 CarswellBC 3314, para. 35 (Can.); Ass'n of Major League Umpires v. Am. League & Nat'l League of Prof'l Baseball Clubs, 1995 CarswellOnt 1524, para. 13 (Can.).

131. Club de Hockey Canadien Inc. Ligue Nationale de Hockey c. Ass'n des Joueurs de la Ligue Nationale de Hockey, 2005 QCCRT 0621 (Can.). During the 2004–2005 lockout, the players filed a claim with the Commission des relations de travail (the Québec Labour Relations Board). *Id.* The claim was denied based on forum non conveniens, stating that the NLRB would be the proper forum to hear labor relations issues between the NHL and the NHLPA. *Id.*

132. *Id.*

133. An application was brought by the NHLPA, Chris Butler, Matt Stajan, Michael Cammalleri, Blake Comeau, Derek Smith, Tim Jackman, Dennis Wideman, Jarome Iginala, Sam Gagner, Nick Schultz, Shawn Horcoff, Ryan Whitney, Eric Belanger, Corey Potter, Mark Giordano, Mikael Backlund, Ryan Smyth, Mikka Kiprusoff, Devan Dubnyk, Ryan Jones, Henrik Karlsson, Cory Sarich, and Alex Tanguay, affecting the Edmonton Oilers Hockey Corp., the Calgary Flames Hockey Club, and the National Hockey League. *See generally* ALTA. LAB. REL. BOARD, AN APPLICATION BROUGHT BY THE NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, (2012), http://oilers.nhl.com/v2/ext/pdf/NHLDecision.pdf.

3. Provincial Labor Law Remedies to Prevent or Stop an NHL Lockout

In terms of remedies under labor laws, due to concurrent jurisdiction, Canadian labor laws offer more ways to end a lockout. In the 2012–2013 season, the NHL lockout was considered legal in Québec, at least according to the Québec Labour Relations Board's interlocutory decision.[134] However, a lockout would be illegal in Québec if the NHLPA was recognized as a certified union under the Québec Labour Code. A lockout would also be illegal in Alberta, British Columbia, and Ontario if the NHL did not fulfill the required administrative steps to declare a legal lockout in these three provinces.

Because Canadian jurisprudence has demonstrated interest in intervening in labor relations between the NHL and the NHLPA, if the NHLPA brings a suit in Canada, its negotiating power will likely increase. This tactic would put pressure on the NHL to negotiate in good faith and find solutions that would accommodate the NHLPA. The burden of a suit in Canada would be more detrimental to the NHL because it is time-consuming and the risk of having the provincial Canadian labour relations boards assert jurisdiction is increasing every year. By pursuing claims under provincial labour relations law, allowing the boards to enjoin the NHLPA's claims, and obtaining injunctions against the NHL, Canadian teams will face even greater monetary losses than their counterparts in the United States.[135] If such a claim is recognized in Canada, the teams would have to pay their players during the regular season. One of the reasons why the injunction was not granted in 2012 in *Armstrong* is that there was no irreparable harm. Because the NHL season starts in October, the players did not experience any loss or damages by not playing. The claim was decided on September 21, 2012. The result of that claim might have been completely different if the claim was decided in November. Therefore, if a lockout were determined to be illegal in Canada, club owners would have to pay their players during the season, even though no revenues are generated. This could influence the negotiation, as not all the teams can afford to pay their players if no revenues are generated. Another consequence, more specifically under Québec law, is that penal provisions could apply. The NHL would have to pay a separate fine. Provincial Canadian labour laws cannot be disregarded. For this reason, the NHLPA may be able to invalidate or suspend a lockout under provincial Canadian labor laws, unless the NHL would fully comply with the requirements of these laws. These claims are ways to pressure the NHL, but nobody can avoid

134. Armstrong c. Club de Hockey Canadien Inc., 2012 QCCRT 0445 (Can.). By dismissing the provisional order and maintaining the interlocutory decision, the Commission des relations du travail kept the status quo on the work conflict, which means that until further decision from the Commission, the lockout was legal at this moment in time.

135. Ozanian, *supra* note 5.

the law.

To resolve conflicts between the different jurisdictions, the NHL would have to ensure that it complies with provincial Canadian labour relations laws. It was demonstrated earlier that Alberta, British Columbia, and Ontario require employers to fulfill administrative steps prior to declaring a lockout. In Ontario, it seems, as the NHL did in a previous lockout, that the league could apply for voluntary recognition and the conciliation process would be aborted; therefore, this step would be recognized and would permit the league to declare a legal lockout. In British Columbia, there is no equivalent to voluntary recognition. To prevent claims being brought before the British Columbia Labour Relations Board, the NHL would have to take a vote to declare a legal lockout. Once the vote is taken, the board could permit a lockout. In Alberta, the same administrative steps must be fulfilled. The only step that would be an issue is mandatory mediation. This criterion is the hardest to fulfill. Usually, demonstrating that both parties reasonably tried to negotiate may fulfill this step; both parties can send their representatives. Normally, after an information session on mediation, the parties can both agree to abort this step. Finally, in Québec, the issue is certification. It might not be possible for the NHLPA to obtain certification. The main problem is establishing who the labor unions should represent by determining the proper bargaining unit and members. Furthermore, it is prohibited in Québec to have multi-employer bargaining. As a result, a lockout would not be legal in Québec. This could create problems because the players who are working regularly in Québec would still be paid.

Consequently, provincial Canadian labour laws offer effective means for players to suspend the lockout and maybe accelerate the negotiation process and gain some leverage in negotiations. Provincial Canadian labour relations boards have jurisdiction to hear disputes that arise in their territories. The remedies provided are, nonetheless, limited. As established in *Edmonton Oilers Hockey Corp.* and *Orca Bay Hockey Ltd. Partnership*, the labour relations boards do not want to intervene in the collective bargaining process because their intervention would be detrimental to the historical relationship between the NHL and the NHLPA. Even though the laws offer effective means to prevent a lockout in Canada, it is unlikely that a judgment in favor of the players in Canada would enjoin a league-wide lockout. However, a judgment in favor of the players in Canada would give leverage to the NHLPA in its negotiations with the NHL.

III. LEGALITY OF NHL LOCKOUT UNDER AMERICAN AND CANADIAN ANTITRUST LAWS

Antitrust laws have become more important in recent years, such as when the NFL players decided to disclaim interest in their union during the 2011 NFL

lockout because they felt it was the only way for them to end the lockout. Disclaiming interest in a union is a process where players vote to renounce representation by their players association. Following this disclaimer, the NFL Players Association (NFLPA) members that were non-unionized players sued the NFL based on antitrust laws. Not long after this suit, different groups of the NBA Players Association (NBAPA) filed antitrust lawsuits in California and Minnesota federal courts. However, the NBAPA's litigation did not go as far as the NFLPA because the NBA players settled before going to court. Nonetheless, arguments were brought under antitrust laws, and these arguments will be explained in this section.

A. American Antitrust Law

The Sherman Act regulates antitrust in the United States.[136] Courts have enforced the Sherman Act over the years, and these courts have developed some exemptions to adapt the Sherman Act to the unique business of sports. Antitrust is described as the illegal restraint of trade that occurs from a contract.[137] Antitrust laws promote procompetitive behaviors and, therefore, prohibit anticompetitive behaviors.[138]

1. The Sherman Act

Section 1 of the Sherman Act "prohibits monopolies and restraint of trade."[139] It specifically states that it is illegal to restrain trade or commerce between states by contract.[140] To establish a violation of section 1, three elements must be established: concerted action, interstate commerce, and unreasonable restraint of trade. A concerted action is found when it is established that an agreement was made among the institutions that are being sued for antitrust violations. In *American Needle, Inc. v. National Football League*, the court stated: "The key is whether the alleged 'contract, combination …, [sic] or conspiracy' is concerted action—that is, whether it joins together separate decision-makers."[141] In terms of professional sports leagues, concerted action is easily demonstrated, as almost all the agreements, rules, and regulations that a league adopts are the result of an agreement between

136. Sherman Act, 15 U.S.C. § 1 et seq. (2006).

137. *Antitrust Labor Law Issues in Sports*, SPORTS L., http://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/ (last visited Dec. 14, 2015).

138. *Id.*

139. *Id.*

140. *Id.*

141. 560 U.S. 183, 195 (2010).

club owners.

Interstate commerce is also an element that is easily established. All professional sports leagues have teams that are located in different states across the country. Each team plays against each other. During their work, players must travel to other states. The main business of a professional sports league has effects in multiple states. Consequently, the interstate commerce element is established.

The third element that must be established by a claimant under section 1 of the Sherman Act is an unreasonable restraint of trade. *American Needle*[142] established that, to demonstrate this element, a rule of reason analysis must be performed. A plaintiff must demonstrate the anticompetitive effects of the rule that the plaintiff is complaining about. This first part requires a plaintiff to show an adverse impact on competition in a relevant market. The application of the relevant market analysis was provided in *Fraser v. Major League Soccer L.L.C.*[143] In *Los Angeles Memorial Coliseum Commission v. National Football League* (*Raiders I*), the plaintiff contested the decision to not allow the relocation of an NFL franchise.[144] The court established that there are two markets that must be analyzed, the product market and the geographic market.[145] The product market is what the employer and the employees are producing.[146] In *Raiders I*, one party argued that the product was NFL football, while the other defined the product as being all entertainment options.[147] The geographic market is the region in which the product is performed.[148] Again, in *Raiders I*,[149] one party defined the market as being the Southern California region, while the other defined the market as the United States.[150] Leagues will always tend to define the market in the broadest way possible because the larger the market,

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142. *Id.* at 186.

143. *See generally* 284 F.3d 47 (1st Cir. 2002). MLS operates the major soccer league in North America. MLS has the power to bargain agreements and operates the league on a daily basis. Its tasks include, not exclusively, recruitment, payment of salaries, negotiation, and signage of agreements with broadcasters. In this case, Fraser, an MLS player, objected to the control of MLS over the players and alleged violations of antitrust laws, such as Sections 1 and 2 of the Sherman Act. *Id.* at 60. The court had to conduct a market analysis to determine if MLS monopolized the industry of soccer. *See generally id.* Fraser failed to demonstrate that MLS controlled the geographic and product market. *Id.* at 55. In this case, the geographic market for elite soccer players was worldwide, not just North America, as argued by the players. *Id.*

144. 726 F.2d 1381, 1385 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

145. *Id.* at 1392.

146. *Id.*

147. *Id.* at 1393.

148. *Id.*

149. *Id.*

150. *Id.*

the harder it is for a court to find that the league has control.

Once the first part of the rule of reason is established, the burden of proof shifts to the defendant who must show a procompetitive justification for the imposition of the contested rule. Courts have accepted several procompetitive justifications. Competitive balance has been a justification that has been highly accepted by courts, as noted in *American Needle*.[151] Another justification that has been accepted is financial stability. In *Sullivan v. NFL,*[152] the court mentioned that if a rule permits the league to function efficiently and prevent detrimental financial effects, it should be recognized as having a procompetitive effect. Financial integrity and competitiveness are important aspects of a league. To generate maximum revenues, club owners must work together for the best interest of a league.

If a defendant is able to prove a procompetitive justification for the challenged rule, the burden of proof shifts again to the plaintiff, who must establish that the restraint is not necessary to achieve the procompetitive justification. In *Sullivan*,[153] the court found that there were other less restrictive means for the NFL to achieve its goal, such as "modifying the NFL's policy to permit a club's sale of minority, nonvoting shares of team stock to the public with limits on the size of an individual's holdings."[154]

Finally, a jury will have to balance the positive and negative effects of a restraint. If the restraint of trade is found to have a net anticompetitive effect, the conduct will be declared illegal.[155] However, if the net effects are found to be procompetitive, the conduct will be found legal,[156] and there will be no antitrust violation.

Professional sports teams have been found to be interdependent of each other. Economically, they cannot function properly if the league has multiple CBAs. Teams need to collaborate to negotiate a CBA that will apply to all of the teams. As a result, because teams have to work together for a league's benefit, teams are engaged in concerted action. Moreover, in professional sports, teams are located in different states, as well as different countries. In *American League of Professional Baseball Clubs*,[157] it was established that

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151. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010).

152. Sullivan II v. Nat'l Football League, 34 F.3d 1091, 1112–13 (1st Cir. 1994). In this case, the challenged NFL policy regarded the prohibition of the sale of an ownership interest through a public stock offering. *Id.* at 1095.

153. *Id.*

154. MITTEN, DAVIS, SMITH & DURU, *supra* note 11, at 429.

155. *Antitrust Labor Law Issues in Sports*, *supra* note 137.

156. *Id.*

157. 180 N.L.R.B. 190, 190 (1969). "Baseball, like the other major professional sports, is now an industry in or affecting interstate commerce . . . ." *Id.*

sports leagues are engaged in interstate commerce.

The NHL, for example, is present in seventeen states in the United States and five provinces in Canada. Therefore, the main analysis to establish an antitrust violation will be based on the arguments brought to fulfill the requirements of the rule of reason test. In contrast with federal labor law, antitrust law permits employees to eliminate competition among the teams by unionizing. As previously established, there are two types of exemptions under antitrust laws: statutory exemptions resulting from the Clayton Act and the Norris-LaGuardia Act, and the non-statutory exemption.

In terms of antitrust, the defenses that are usually raised, and that were used in *Brady*[158] and *Anthony*,[159] are related to the application of the Sherman Act. One of the main defenses under antitrust law is that a league is a single entity incapable of violating the Sherman Act;[160] leagues claim that because sports teams are interdependent, they should receive special treatment in terms of antitrust.[161] Sports are a unique business; teams must agree on common ground rules for a league to function. As a result, it would be inappropriate if antitrust laws applied to the interdependence of teams. Another argument that is intrinsically linked to the first part is, that because of the interdependence of teams, their actions would never pass an antitrust analysis;[162] therefore, a league should be exempt to protect the function of the league. Another argument that has been used by leagues is that the rule of reason analysis places a strict burden on the defendant and it is an unreasonable rule for the professional sports industry.[163] However, this argument has been rejected because the rule of reason can be adapted to specific industries.

To win an antitrust claim, players must argue that allowing a league to lock out players would constitute an irreparable harm,[164] and, therefore, leagues should not be allowed to do so. To establish this point, players must demonstrate that the Sherman Act applies to the professional sports industry. In a broader sense, players must argue that the Sherman Act applies to all agreements among the employers (i.e., the teams) that restrain trade in the labor market.[165] The

158. *See generally* Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011).

159. *See generally* Class Action Complaint & Jury Demand, Anthony v. Nat'l Basketball Ass'n, No. 11-05525 (N.D. Cal. Nov. 15, 2011), https://docs.justia.com/cases/federal/district-courts/california/candce/4:2011cv05525/247629/1.

160. Feldman, *supra* note 50, at 1267.

161. *Id.*

162. *Id.*

163. *Id.* at 1225.

164. STEPHEN F. ROSS, SUMMARY OF LEGAL ISSUES ARISING IN THE CURRENT NFL LABOR DISPUTE 8 (n.d.).

165. *Id.*

Sherman Act was enacted to protect everybody from anticompetitive behaviors. Secondly, players will have to demonstrate that the rule of reason analysis is a straightforward standard that can apply to all industries,[166] including professional sports. This test has been applied over the years and has been flexible enough to apply to all industries. This analysis has already been used in the sports industry, as it was applied in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[167] as well as in *McNeil v. National Football League.*[168] Another argument that has been raised is that the statutory labor exemption does not protect an unreasonable restraint of trade when workers waive their labor rights and do not negotiate a new CBA.[169] In this instance, players will argue that because their CBA expired, antitrust scrutiny applies to prevent anticompetitive behaviors. Also, players are allowed to benefit from antitrust protections because a certified union does not cover them. For all of these reasons, players will argue that the Sherman Act applies and that the leagues' behaviors are an illegal restraint of trade.

2. Statutory Labor Exemption

The Clayton Act[170] provides the statutory labor exemption. The main section that applies to professional sports is section 17.[171] The first section provides that employees can group together and form a union, or in the case of professional sports, a players association. It allows an employer in professional sports to negotiate a CBA that will apply to all employees—all prospective and current players. Once a union is formed and recognized by the NLRB, it becomes protected from antitrust suits. The antitrust immunity applies to a union only in limited cases. The designed labor organization must act in its own interest. It shall not group with another labor organization. If it does, the statutory labor exemption will not apply. The statutory labor exemption supports free collective bargaining and gives the parties the opportunity to bargain for their own CBAs that will regulate their working relationships.

3. Non-Statutory Labor Exemption

The non-statutory labor exemption was created to give full effect to the NLRA. The exemption was developed to allow labor processes to work to the

166. *Id.* at 3.

167. 468 U.S. 85, 107 (1984).

168. *See generally* 790 F. Supp. 871 (D. Minn. 1992).

169. Feldman, *supra* note 50, at 1240.

170. Clayton Act, 15 U.S.C. §§ 12–27 (2006).

171. *Id.*

fullest. Antitrust should not undermine this process. For example, in the NHL, the organization is comprised of member clubs located in different states and provinces. If the members chose to voluntarily group under one umbrella and follow labor relations law, these decisions should be enforced. These groups should not be limited by antitrust in terms of labor relations; this is why the non-statutory labor exemption was developed. Historically, courts developed the non-statutory labor exemption to ensure that labor laws regulate labor relations,[172] as established in *Brown v. Pro Football, Inc.*,[173] where the Court broadly construed the scope of the non-statutory labor exemption. In this case, a group of NFL players filed an antitrust claim against the football club owners.[174] The CBA expired in 1987.[175] In 1989, the parties were still negotiating.[176] The NFL presented a developmental squad plan to the players that would introduce a weekly fixed salary for squad players.[177] The NFLPA disagreed.[178] The negotiation reached the point of impasse.[179] Therefore, in June 1989, the League unilaterally implemented the development squad plan.[180] The main issue in that case was whether the players could bring an antitrust claim.[181] The Court decided that because the matter satisfied the four criteria, the non-statutory labor exemption applied[182]: "Th[e] conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship."[183] *Brown* clearly stated that the non-statutory labor exemption applies so long as there is a collective bargaining relationship. For the non-statutory labor exemption to apply, there must be a sufficient period of time that indicates a clear end point in the relationship.[184] The Court did not set a particular end point or period to define when the exemption applies.[185]

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172. MITTEN, DAVIS, SMITH & DURU, *supra* note 11, at 603.

173. *See generally* 518 U.S. 231 (1996).

174. *Id.* at 235.

175. *Id.* at 234.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 235.

180. *Id.*

181. *See generally* 518 U.S. 231 (1996).

182. *Id.* at 250.

183. *Id.*

184. *Id.*

185. *Id.*

The non-statutory labor exemption no longer applies when a collective bargaining relationship dissolves. At this point, either party can bring an antitrust claim. Prior to this point, the non-statutory labor exemption immunizes the terms of the expired CBA from any antitrust challenge beyond impasse because of the ongoing collective bargaining relationship. Therefore, to bring an antitrust claim, a players association must end the collective bargaining relationship. The most effective way to end a collective bargaining relationship is through decertification, which allows a players association to bring a class action claim under the antitrust laws. The non-statutory labor exemption applies, generally, as long as there is an ongoing collective bargaining relationship[186] and the parties keep their respective status. However, a disclaimer of interest or a decertification on the part of the players and a players association might change the application of this exemption. It appears that a disclaimer of interest might not be enough for the non-statutory labor exemption to apply; however, through decertification, it is definitely possible for the players to bring an antitrust claim.[187]

In *Brady*, the players voted to disclaim interest in their union. This procedure was not strong enough to end the collective bargaining relationship, which is why their request was denied. Statutory exemptions provide immunity for a union's unilateral actions that further players' economic interests. As a result, when players unionize, a league does not have to worry about antitrust claims. However, without a union, any antitrust claim is possible.

4. *Brady v. National Football League*[188]

The Norris-LaGuardia Act was adopted to prevent courts from issuing injunctions to end strikes, except in cases of violence or fraud.[189] The Norris-LaGuardia Act also allows employees to unionize and organize themselves to form a labor organization that will represent the interests of the employees in negotiations with an employer.[190] In *Brady v. National Football League*,[191] the court, pursuant to the Norris-LaGuardia Act, prohibited federal courts from issuing injunctions for lockouts that grew out of labor relations.[192] Furthermore, the court stated that to have a labor dispute, there is no need to

186. *Id.*

187. *See generally* Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011).

188. *Id.*

189. Baumann, *supra* note 1, at 254.

190. Norris La-Guardia Act, 29 U.S.C. § 102 (2006).

191. *Brady*, 644 F.3d at 661.

192. *Id*. at 680–81.

establish the existence of a union (i.e., a players association).[193] The Eighth Circuit concluded that the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.[194] However, an injunction cannot be granted for a lockout as a means to pressure the employees in the negotiation process.[195]

Brady was decided in 2011.[196] The CBA between the NFL and the NFLPA was set to expire on March 11, 2011.[197] The NFL expressed publicly that if an agreement was not reached by the termination date, the NFL would lock out its players.[198] The players, who were aware of the NFL's strategy, disclaimed interest in the NFLPA on the expiration date of the CBA.[199] As previously mentioned, there are two ways to dissolve a union. The first way is through a disclaimer of interest, which is an informal procedure, whereby the players indicate their disinterest in being represented by their union by a majority vote.[200] The second way is by a decertification process, which is a formal procedure through the NLRB.[201] All represented players must vote, under NLRB supervision, to decide whether they want to decertify the union.[202] If the players have a majority, the players will go through the formal process of decertification. Once the union is decertified, no union can represent the players for a period of twelve months.[203]

Following this process in *Brady*, the players filed an antitrust suit, claiming that the NFL engaged in a group boycott and a price-fixing agreement, which was a violation of section 1 of the Sherman Act.[204] The NFL locked out the players on March 12, 2011.[205] As a result, the players asked the district court, through a preliminary injunction, to enjoin the lockout because it would cause

193. *See id*. at 675.
194. *Id*. at 680–81.
195. *Id.*
196. *See generally* 64 F.3d 661.
197. *Id.* at 663.
198. *Id.*
199. *Id.*
200. MITTEN, DAVIS, SMITH & DURU, *supra* note 11, at 619.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Brady*, 644 F.3d at 663.
205. *Id.*

the players irreparable harm.[206] The court granted the players the injunction.[207] Consequently, the NFL appealed to the Eighth Circuit Court of Appeals.[208]

The majority of the Eighth Circuit panel[209] concluded that the injunction did not comply with the Norris-LaGuardia Act.[210] The court went through an analysis of the plain language of the Norris-LaGuardia Act.[211] Section 101 of the Norris-LaGuardia Act states that "[n]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute."[212] The court concluded that, even though the players disclaimed interest in the NFLPA, the disclaimer did not end the labor relationship. As a result, the issue at stake grew out of a labor dispute.[213] The majority also analyzed section 104 of the Norris-LaGuardia Act.[214] The central point of the analysis was the consideration of the employment relationship.[215] Section 101 of the Norris-LaGuardia Act confirmed that an employer and an employee might be in an employment relationship.[216] As a result, the court concluded that section 4(a)[217] prohibits a federal court from issuing an injunction to stop a lockout that is being imposed by an employer.[218]

Further, the court mentioned that an employer lockout is part of the "'interplay of the competing economic forces.'"[219] The NFL's argument was that the disclaimer of interest, on the same day as the expiration of the CBA, was mostly a sham.[220] The court responded to this argument by stating:

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206. Brady v. Nat'l Football League, 779 F. Supp. 2d 992, 998 (D. Minn. 2011). In their submissions for an injunction, the players argued that "[t]hey [we]re [s]uffering, [a]nd [would] [c]ontinue [t]o [s]uffer, [i]rreparable [h]arm" in the form of money damages; the irreparable harm to the players would outweigh the harm to the NFL; "[t]he [p]layers . . . [e]stablished [a] [f]air [c]hance of [s]uccess on [t]he [m]erits;" and "[t]he [p]ublic [i]nterest [did] [n]ot [f]avor [t]he '[l]ockout.'" *Id*. at 1034, 1038–39, 1041. Consequently, the preliminary injunction was granted. *Id.* at 1043.

207. *Id.*

208. *See Brady*, 644 F.3d 661.

209. The three-judge panel majority was comprised of two judges. *See generally* 644 F.3d 661.

210. *Id*. at 661.

211. *Id.* at 679–80.

212. Norris-LaGuardia Act, 29 U.S.C. § 101 (2006).

213. *Brady*, 644 F.3d at 673.

214. *Id.* at 675–76.

215. *Id.* at 676.

216. 29 U.S.C. § 101.

217. 29 U.S.C. § 104.

218. *Brady*, 644 F.3d at 680–81.

219. *Id.* at 678 (quoting Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 40 (1957) (emphasis omitted)).

220. *Id.* at 667.

> Given the close temporal and substantive relationship linking this case with the labor dispute between League and the Players' union, we struggle at this juncture to see why this case is not at least one "growing out of a labor dispute"—even under the district court's view that union involvement is required for a labor dispute. [221]

Therefore, the distinction between a disclaimer of interest and a decertification is crucial to determine when antitrust claims may be brought. With respect to the district court, a clear decision should have been rendered with regard to requirements to stop the non-statutory labor exemption from applying. A disclaimer of interest should not be enough to permit an antitrust law claim. A decertification should be the only mechanism available to the players who file claims under antitrust law. It is the only permanent mechanism that ends the labor relations between players and a players association, and consequently, between a league and players association.

In his dissent, Judge Bye stated that by voting to end the NFLPA's status, the collective bargaining relationship terminated.[222] Because the relationship ended, the players were allowed to bring an antitrust claim.[223] The judge pointed out that the main issue was the endpoint of the relationship, which made a clear demarcation between antitrust and labor law.[224] The disclaimer of interest was sufficient, in his view, to end the collective bargaining relationship, even though with a disclaimer the players may decide to re-unionize at any point in time.[225]

As previously demonstrated, it seems problematic to validate a disclaimer of interest to put an end to the labor relationship between a players association and a league. A disclaimer of interest does not completely end the relationship between the players and a players association. The players may reclaim their interest at any point in time after their original vote. Consequently, it would be unfair for a league to allow the players to benefit from labor law and antitrust law and then benefit again under labor law. As a result, only decertification should be considered the end point of a labor relationship to allow antitrust law to apply.

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221. Brady v. Nat'l Football League, 640 F.3d 785, 791–92 (8th Cir. 2011).

222. *Brady*, 644 F.3d at 687.

223. *Id.*

224. *Id.* at 685.

225. *Id.* at 687.

5. Use of Antitrust Law to Enjoin a Lockout: Unresolved Issues

Antitrust claims, such as the claims made by the NFL and NBA players,[226] are a good way to put pressure on a league. Even though *Brady* established that a lockout could not be enjoined because the players used a disclaimer of interest, a decertification might allow players to obtain an enjoined lockout from a court. The main barrier prohibiting players from obtaining an injunction under the Norris-LaGuardia Act is the demarcation between labor law and antitrust law. Once there is an endpoint in the labor relationship, there is no doubt that an injunction may be obtained. A disclaimer of interest is not sufficient to obtain an injunction, as a disclaimer does not clearly end a relationship because it is always possible for players to re-unionize. Consequently, in a potential future lockout, even if the players disclaim interest in their union, they would probably not gain the leverage they are seeking in a negotiation. The only way to gain leverage would be to decertify their union and then file an antitrust claim. It seems that decertifying a union would be highly efficient for players to gain bargaining power. Moreover, if the players obtain an injunction, it would likely enjoin a lockout and allow them to have access to their training facilities and earn salaries.

In terms of jurisdiction, American law has generally prevailed. Through antitrust law, players seek an injunction from a court that will enjoin a league's imposed lockout because it violates section 1 of the Sherman Act. Through antitrust claims, players could seek to recover damages for their lost revenues. Nevertheless, in *Brady* the main purpose of the antitrust claim was to obtain an injunction to stop the lockout. In *Brady*, the district court decided in favor of the players.[227] The Eighth Circuit vacated this decision because the injunction violated the Norris-LaGuardia Act.[228] The discussion regarding the recovery of damages due to an anticompetitive lockout is still open for discussion. Under the rule of reason analysis, it is possible that in a future claim, players will be able to recover damages.

B. Canadian Competition Law

In Canada, antitrust is a matter of federal jurisdiction. The Competition

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226. *See generally id*.; Class Action Complaint & Jury Demand, *supra* note 159. In these two cases, players from both the NBA and the NFL sued the leagues and sought an injunction to enjoin the lockouts. *Brady*, 644 F.3d at 663; Class Action Complaint & Jury Demand, *supra* note 159, at 24. In the first instance, the NFL received a positive decision from the court. *Brady*, 644 F.3d at 682. However, courts have shown some openness to the arguments of the players. This is one of the reasons why antitrust claims are remedies for players to gain leverage in a lockout.

227. Brady v. Nat'l Football League, 779 F. Supp. 2d 992, 998 (D. Minn. 2011).

228. *Brady*, 644 F.3d at 663 (referencing Norris La-Guardia Act, 29 U.S.C. § 101 et seq. (2006)).

Act[229] encompasses most of the principles that are found in the Sherman Act. The Canadian Competition Act applies to professional sports, as well as to all citizens. The Competition Act is the federal Canadian law that regulates antitrust. It contains both civil and criminal provisions.[230] The Competition Bureau of Canada enforces the Competition Act.[231] The purpose of the Competition Act is to "expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada."[232] The three important sections of the Competition Act are article 48.1 (Conspiracy Relating to Professional Sport)[233] and articles 45 and 90.1 (Agreements or Arrangements that Prevent or Lessen Competition Substantially).[234] Article 48 was integrated into the Competition Act in 1976,

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229. *See generally* Competition Act, R.S.C. 1985, c. C-34 (Can.).

230. *See generally id.*

231. *Our Organisation*, COMPETITION BUREAU (Nov. 11, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html.

232. *Id.* art 1.1; *Our Legislation*, COMPETITION BUREAU, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html (last modified Jan. 11, 2012).

233. R.S.C. 1985, c C-34, art 48.

> (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to 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) to 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
>
> is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.
>
> (2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to
>
> (a) whether the sport in relation to which the contravention 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.
>
> (3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

Id.

234. *Id*. arts 45, 90.1.

and the goal was to permit professional sports leagues to subsist in Canada.[235] Through this exception, the government recognizes the particularities of professional sports leagues.[236] It acknowledges that sports are unique and they often involve an international aspect because all of the major professional sports leagues have teams in two North American countries.[237] The Competition Act also recognizes teams within a league as a single economic unit[238] because teams need to work together for leagues to function properly and preserve competitive balance. Therefore, due to this entwinement between clubs, the rules of competition do not apply as strictly to professional sports leagues.

Moreover, professional sports leagues are usually international in nature. As a result, article 48 of the Competition Act was added to also accommodate foreign jurisdiction to include sports leagues performing in different countries, states, or provinces, including Canada.[239] Courts have used the reasonableness standard to determine if an action violates the Competition Act.[240] There are two components of the standard: "(i) whether the sport is organized on an international basis and, if so, whether any limitations, terms or conditions

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> (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Id. art 45(1).

> (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> (a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or
>
> (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Id. art 90.1(1).

235. J. Kevin Wright & Jonathan Gilhen, *A Note on U.S. Antitrust Law and Professional Sport*: American Needle *and the Implications for Canadian Competition Law*, 23 CANADIAN COMPETITION REC. 66, 71 (2010).

236. *See id.*

237. *Id*. at 72.

238. *Id.*

239. *Id.*

240. *Id.*

alleged should, for that reason, be accepted in Canada, and (ii) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league."[241] The Competition Act gives sports leagues flexibility in the management of sports.[242] As long as the limitations on competition are necessary and reasonable, there will be no violation of antitrust.[243] It appears that "agreements relating to the granting and operation of franchises that have the effect . . . of unreasonably limiting participation in professional sports . . . are likely subject to [article] 48."[244] Scholars have mentioned that as long as the leagues use regulations and agreements that are necessary to the particular function of the league, player and franchise restraints are an acceptable limitation.[245] It is important to mention that article 4 of the Competition Act exempts CBAs from the act.[246] This exemption is similar to the exemption that was developed in *Brown v. Pro Football Inc.*, but the meaning of the Competition Act gives a broader exemption in Canada.[247] Nevertheless, it has usually been interpreted that Article 4 does not apply to article 48; otherwise, article 48 would be irrelevant.[248] However, once a CBA expires, because there is no longer an agreement between an employer and an employee, it seems like article 4 of the Competition Act would apply; therefore, competition claims could be brought.

The general provision of the Competition Act prohibits ancillary restraint of trade; the general provision states that it is "unlawful . . . to agree to fix prices," and "control the supply of a product," among other prohibitions.[249] Under the general regime, there will be a violation only when the persons involved are competitors.[250] Article 90.1 includes agreements between competitors that do not fall into the provision of article 48, such as intellectual property agreements and broadcasting.[251] Even though there is a specific regime to professional sports, it is limited to certain agreements.[252] For all other

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 73.

246. Competition Act, R.S.C. 1985, c C-34, art 4(1)(c) (Can.).

247. Stephen F. Ross, *The Current State of Labour Relations in the National Hockey League*, COMPETITION BUREAU (Oct. 9, 2012), https://pennstatelaw.psu.edu/_file/Ross/Current_State_of_Labour_Relations_in_the_NHL.pdf.

248. *Id.*

249. Wright & Gilhen, *supra* note 235, at 73.

250. *Id.*

251. *Id.*

252. *See id.*

agreements, the general regime shall apply.[253] In terms of lockouts, the section that will be used is article 48, which is the specific section that applies to professional sports situations.[254]

It is important to note that articles 45, 48, and 90.1 cannot "be used to set aside a [CBA]."[255] Article 4 of the Competition Act states:

> [C]ontracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment [are not subject to the Competition Act].[256]

Article 4 is similar to the non-statutory labor exemption that is provided in American antitrust law. However, because the Canadian courts have not had many opportunities to interpret this section, some issues have not been discussed. For example, it is not clear if the section applies to professional sports leagues and CBAs that govern in the United States and Canada. If article 4 were to apply, it would render the application of the other sections under the Competition Act unnecessary. However, one can also argue that once a lockout occurs and no CBA is in place, either party may bring an antitrust claim under articles 45 or 48 of the Competition Act. It does not appear that a claim to establish the validity of a lockout has been brought under the Competition Act involving professional sports. Under the Competition Act, the validity of a lockout would be subject to a softer test than under American law, as it would be subject to the reasonableness analysis. It is unlikely that players would succeed in this avenue, as article 48 of the Competition Act was created to exempt professional sports from the normal principles that apply to other

253. *Id.*

254. *Id.*

255. Yashin v. Nat'l Hockey League, 2000 CarswellOnt 3278, para. 44 (Can.). In this case, the NHLPA initiated a grievance on behalf of Alexei Yashin against the NHL. *Id*. para. 1. The issue at stake was whether Yashin's contract expired on June 30, 2000, which would have allowed him to be a free agent on July 1, 2000. *Id.* para. 33. However, because Yashin decided to sit out during the 1999–2000 season, the team alleged that Yashin owed it a season prior to becoming a free agent. *Id*. para. 22. Jurisdiction and restraint of trade were alleged in this case. *Id*. paras. 27, 43. The court stated that it had "no basis for the proposition that Section 48 of the Competition Act can be used to set aside a collectively bargained agreement." *Id.* para. 44.

256. Competition Act, R.S.C. 1985, c C-34, art 4(1)(c) (Can.).

businesses.

IV. POTENTIAL REMEDIES TO PREVENT FUTURE LOCKOUTS

With the growing business of the sports industry and the fact that it generates more and more revenue each year, it is obvious that other lockouts will occur or be used as a tool to pressure players associations during negotiations. Lockouts are a legitimate, legal tool that may be used by a league, but they should not be unduly used. Therefore, it is important to find solutions to avoid future lockouts. A lockout gives leagues negotiating power. Even with all of the remedies that players may use, they will never possess the same level of power, unless the players strike. Players are the essential product of professional sports leagues. The relationship between a league and the players should be collaborative. One of the main issues that must be addressed in future negotiations is concurrent jurisdiction. The best way to avoid conflict would be for both parties to agree on a jurisdiction and establish that all matters are subject to the NLRA. However, it is not possible to agree to circumscribe other countries' laws through a CBA, so even though this would be an ideal solution, it might not be realistic.

The NHL and the NHLPA should collectively bargain a post-CBA procedure in future negotiations. A post-CBA procedure would not waive the NHL's right to impose a lockout; rather, it would be a process between the expiration of the CBA and a lockout or strike. This procedure would permit an internal mechanism to comply with Canadian laws, while conserving the rights provided in the NLRA. The current NHL CBA[257] does not provide any particular process in regards to what should happen once it expires. Article 7 of the NHL CBA, regarding lockouts, only mentions that a lockout cannot be declared when the current CBA is in effect.[258]

The future CBA should include terms of the current CBA that will remain in effect until a new CBA is negotiated. The provision should include an exception that would permit the CBA to comply with American laws and allow the terms of the CBA to change after impasse. If included, the parties could then include a provision that would submit the CBA to a specific jurisdiction.[259] This solution would be efficient only if both parties agree to it. The provision would

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257. *See generally* COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION (2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf.

258. *Id.* art. 7.1(b) (stating, "Neither the League nor any Club shall engage in a lockout during the term of this Agreement.").

259. The contractual legal implications and obligations have not been analyzed during research for this Article. Extensive research should be done to establish a more detailed procedure and explanation of the legal consequences of such an approach.

be in effect only until a second cycle of collective bargaining.

A solution for the NHL to avoid multiple claims in different jurisdictions, if it still wants to use lockouts as an efficient tool, would be to create a formal procedure that the league is required to follow prior to declaring a lockout. As previously determined, to have a legal lockout in Canada, a league must fulfill administrative requirements. Part of the administrative requirements would be satisfied if a league has an internal procedure, such as the one proposed in this Article. The first step of the proposed procedure would include a mediation or conciliation process. Because the procedure affects both parties, it would have to be collectively bargained for or mutually agreed upon. If the parties reach an impasse during the negotiation, the parties would bring their dispute through the mediation or conciliation process. The process does not force the parties to come to an agreement, but it would require discussions between the parties. Furthermore, having a neutral advisor would provide another perspective. The parties would have to agree on which party would pay for the mediation or conciliation. One proposition would be that the party who declares the work stoppage would pay for a mediator or conciliator's fees.

The mediation or conciliation process would serve as a step in between negotiation and complete rupture of negotiations. A neutral party would determine if there is any way to restart the negotiations. The neutral party should be a sports labor relations expert, whom the parties pick from a list of names. This first step would meet the mandatory mediation requirement under the Alberta Employment Standards Code and show the intention of good faith bargaining as provided in the British Columbia Labour Relations Code. It would also give leverage to a league when it asks the Ontario Minister of Labour to voluntarily recognize a lockout. The second step prior to declaring a lockout would be to provide prior notice, which would satisfy one of the requirements of the Alberta Employment Standards Code. The internal policy would indicate a delay upon which notice must be sent prior to declaring a lockout. The third and final step would be for club owners to vote on whether a league should lock out its players. Even if the vote is not a supervised vote by any of the provincial labour relations boards, a formal vote would support an argument that the club owners put their best efforts into fulfilling all of the administrative steps that the Canadian labour laws require. As a result, a players association would not be able to challenge a lockout as illegal in these Canadian provinces. The league would maintain the leverage it is attempting to obtain through a lockout.

Another avenue that both parties should explore is American or Canadian legislation reform. Both parties should work towards a modification of the Sherman Act, section 26b (Application of antitrust laws to professional major

league baseball).[260] All major professional sports leagues in North America operate the same way as MLB. After including all of the professional sports leagues under section 26b, the leagues should then seek to incorporate a provision that would incorporate a statutory exemption to remedy the issue of the non-statutory exemption. A provision regarding the beginning point of the application of the Sherman Act should be defined. The title of this subsection could be "The Application of this Act," and the section could read,

> Sections 1 and 2 of the Sherman Act shall apply to professional sports leagues after a labor relationship between a players association and a professional sports league terminates. With respect to the labor relationships between players associations and a professional sports league, the relationships will be considered terminated once (1) a collective bargaining agreement expires; and (2) a union representing the players is decertified.

The creation of this section would give a clear advantage to a league when negotiating because it would allow a league to negotiate without the burden of a potential antitrust claim. This section would also give some benefits to players because they would have a specific section that would allow them to obtain an injunction. Once the protection of labor law no longer applies, players could use an injunction as a strategy against a league. However, players would need to decertify their union to begin this process.

Another option for a league is reform of provincial Canadian legislation to include the process of voluntary recognition that exists under the Ontario Labour Relations Code and the Alberta Employment Standards Code. Adding this process under the British Columbia Labour Relations Code would facilitate the process of declaring a lockout. The only concern a league would face is filing for voluntary recognition in due time. In Québec, the issue is not exactly the same. During the lockout in *Armstrong*, the players sought to be recognized as employees and have the NHLPA recognized as a valid union under Québec law. A league cannot force a players association to be a recognized union, and, even if this practice was allowed, it does not mean that it would be accepted by the Commission des relations du travail. As such, a league may seek to add an exemption in the Québec Labour Relations Code for professional sports.

A potential solution to enjoin a lockout that could give leverage to players, if none of the legislative reforms proposed are implemented, is an

260. 15 U.S.C. § 26b (2014).

antitrust claim. As demonstrated previously, if players are not unionized, they may pursue a claim under the Sherman Act, and historically, players have been successful in doing so. The main issue is determining when players can bring such a claim. There is currently a grey area in establishing whether a disclaimer of interest is sufficient to permit an antitrust claim. *Brown* established that decertification of a union permits players to challenge a league for antitrust violations. However, if players decide to proceed through a disclaimer of interest, it might not be enough. The particularity of a disclaimer is that players may decide to unionize and de-unionize whenever they want.

There is no limitation regarding when a labor relationship terminates. As a result, it seems that a disclaimer of interest would be advantageous to a league, while a decertification would be an advantage for players. This process must be done carefully because once players decertify their union, the players cannot be represented by a union for a period of twelve months, which would mean that leagues and clubs could negotiate individually with players. An antitrust claim gives leverage to players because decertification can be costly to a league, which might force a league to settle, and as a result, agree to the demand of the players who now have a negotiating advantage.

There is no perfect solution that would satisfy both parties. However, in the long term, legislative reform is the best possible solution because reform would create specific legislation regarding only professional sports. Professional sports are a unique business that cannot be compared to other industries because the revenues and expenses at stake are not comparable. In the short term, a league should review the provincial Canadian labour laws and lobby to modify them because reducing the avenues for a players association to enjoin a lockout would allow a league to gain leverage in future CBA negotiations.

In the long term, both a league and a players association should lobby to reform American antitrust law. This process should be in conjunction with the other professional sports leagues that would be affected by the reform, including the NBA and the NFL. Reform would be a long and thorough process, but it would be beneficial to both parties and would reduce the use of pressure tactics, such as lockouts, in the collective bargaining relationship.

V. CONCLUSION

After analyzing the different laws from Canada and the United States, it is obvious that there is concurrent jurisdiction in the application of laws to professional sports leagues. Under labor law, Canadian courts and labour relations boards have established jurisdiction over professional athletes and teams located on Canadian territory. In addition to American antitrust law,

Canadian antitrust law applies to professional sports leagues, clubs, and athletes. Furthermore, this application must be enforced when teams in the other country have an important market power within a league. For example, in professional hockey, the seven Canadian hockey clubs have most of the economic power, as they generate a large part of the NHL's revenues. Because concurrent jurisdiction is established, in a future lockout, professional sports leagues will have to be more careful in declaring a work stoppage because they will want to ensure they are complying with Canadian laws.

While players and players associations have multiple remedies to prevent or stop a lockout, the majority of these remedies are ineffective. The remedies available are intended to enjoin a lockout or provide players with tools to gain leverage in negotiating a new CBA. This is an advantage for a players association and players who previously lacked bargaining power in the negotiations. Professional sports leagues should be worried and try to look for remedies to avoid these concurrent jurisdiction issues. It must be noted that labor law claims could be counterbalanced if a league fulfills all of the Canadian administrative requirements prior to declaring a lockout. If the requirements are fulfilled, a league would eliminate the leverage that a players association gains if it is successful in its Canadian labour law claims. With all of the major professional sports leagues looking to expand abroad, these jurisdictional issues will become the center point of negotiation. The leagues will have to keep in mind that, in Europe, as well as in Canada, the system does not give labor exemptions like the American system. Ideally, to prevent potential issues, the four major professional sports leagues should collaborate with the players associations to find ways to prevent potential work stoppage problems. This Article proposes that the best way to avoid work stoppage issues is to negotiate a process that allows negotiations to continue with the help of an independent third party who would reduce the tension between a players association and a league. Tribunals are not the best method to regulate the labor relationship in professional sports. Therefore, it would be beneficial for both players associations and leagues to voluntarily and collaboratively develop a process that will leave labor relations in the players associations and leagues' control, or in the hands of an expert in professional sports.