

TIME OUT: CANADIAN PROFESSIONAL SPORTS TEAM FRANCHISE – IS THE GAME REALLY OVER?

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I. INTRODUCTION

FOR YEARS CANADIAN CITIES have been faced with franchise relocation, a persistent problem that first became evident with the Edmonton Oilers trade of Wayne Gretzky to the Los Angeles Kings due to financial inability to meet the salary expectations of “The Great One.”¹ Over the years, the issue reemerged with the departure of teams from the cities of Winnipeg and Quebec in the NHL, followed by the city of Montreal in the MBA.² Recently owners of the Ottawa Senators, Calgary Flames, and Edmonton Oilers have been faced with the prospect of putting their teams up for sale.³

The origin of these troubled Canadian franchises involves several factors, including city size. Canadian cities are not as large and economically advantaged as American, leading to impoverished ticket sales and decreased revenues from televised games.⁴ Since 1989, hockey has suffered from a 41% decrease in its televised audience. One major factor leading to this decrease is the inability of Canadian teams to maintain a roster filled with big name players. Most of these players flock to the United States⁵ where there are less financial constraints on owners, demands for salary increases are fulfilled, and the burden of

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¹ Gretzky’s salary demands at the time were \$825 000. See R. C. Berry & G. M. Wong, *Law and Business of the Sports Industries*, 1986) at 43 and S. Pearlstein, “Canada Considers Sport-Team Subsidies; Plan Aims to Keep Franchises at Home” *The Washington Post* (9 October 1999) A40.

² Pearlstein, *supra* note 1.

³ G. Gherson, “Manley never had more than tepid support” *The Washington Post* (22 January 2000) A3.

⁴ Pearlstein, *supra* note 1.

⁵ Only 60% of players on Canadian NHL teams are Canadian. “The Maple Leafs are falling” *The Economist* (7 February 1998) 38.

income taxation is alleviated.⁶ Another major factor may be growing spectator disenchantment with the stifling effect of brute physical contact it was once thought fans so loved to watch.⁷

In addition, player's paycheques are expended in American dollars while franchise earnings are reaped in Canadian currency.⁸ Taking into consideration the Canadian-American exchange rate, this discrepancy can cost small cities a fortune in the long run. According to one commentator, "[i]n the space of 5 years, the Jets had watched the NHL's average salary grow from \$300 000 to more than \$1-million and their payroll spiral from \$3-million to \$20-million" as the city grew victim to the expanding industry of the National Hockey League.⁹

Across the border, the United States with its larger city size and more valuable dollar, continues to bask in the defeat of its northern competitors, absorbing the remains of broken Canadian teams.

For the Americans, heavy government subsidization and tax exemption clauses have granted the freedom to spend dollars where it is most valuable – to lure in top name players. In addition, money is spent on demolishing outdated stadiums, ballparks, and arenas; constructing lavish sports complexes with which to attract fans, even as the product on the field lessens in quality; and purchasing and relocating bankrupt leagues.

To demonstrate, consider the generosity of the city of St. Louis, which granted its professional hockey team the following:

- \$62.5 million dollars (American) to build a new sports complex, the Kiel Center, (as provided for by municipal tax-exempt bonds);
- \$34 million in preparation for building this lavish center and to construct an adequately lavish parking facility; and
- rent-free municipal land upon which to build this complex with a 25-year long municipal property tax exemption.

As Rod Bryden of the Ottawa Senators surmised: "[w]e are being killed by two factors. Taxation and private payment for public facilities."¹⁰

To quote authors Joana Cagan and Neil deMause of *Field of Schemes*:

⁶ Damon Stoudamire of the Toronto Raptors is an example of a professional sports star that fled his Canadian team for this reason. See R. E. Beam, S. N. Laiken & D. A. Raoux, "The Taxation of Non-Resident US Athletes Employed By Canadian-Based Professional Sports Teams: Attracting Athletes to Canada" (1999) 47 Cdn. Tax J. 305 at 306.

⁷ *Supra* note 5.

⁸ Pearlstein, *supra* note 1.

⁹ E. Willes, "Our game' is worth the fight" *The National Post* (21 January 2000) B15.

¹⁰ B. Appleton & M. Neceski "Submission: NAFTA & Sports" (12 May 1998), Online: Appleton & Associates International Lawyers <<http://www.appletonlaw.com/6bsports.htm>> at 2-3.

in an era of increased public and government reluctance to lay out public money for anything ... the eagerness with which cities are offering up hundreds of millions of dollars to build new stadiums is mind-boggling. Welfare as we know it may be dead, but corporate welfare is alive and kicking.¹¹

The idea of corporate welfare stems from Mark Rosentraub's manipulation of the words of Winston Churchill: "[n]ever have so few received so much from so many;"¹² referring of course, to the few upper-class beneficiaries of sports subsidies for whom it is economically feasible to take in a game at an unnecessarily lavish sports facility. According to Rosentraub:

[t]his welfare system exists ... because state and local government leaders, dazzled by promises of economic growth ... mesmerized by visions of enhanced images for their communities, and captivated by a mythology of the importance of professional sports, have failed to do their homework.¹³

And yet, the "shifting sands of stadium tastes"¹⁴ continue to perplex sporting communities as they struggle to remain competitively fashionable in this die-hard world, ever convinced by proponents of sports league expansionism of the need for greed.

Proponents of increased facility spending rely on several proclamations to persuade cities to contribute to their cause. For instance, owners claim new facilities benefit local economies through various means. These benefits include the creation of employment in the construction industry, increased employment opportunities in jobs directly related to maintaining the organization, improved fan and home-viewer attendance, new spending resulting from increased employment, and an increase in tourist attraction revenues.¹⁵ All of which, it is also argued, results in a "multiplier effect" in which increased local income results in increased spending and job creation.¹⁶

¹¹ (Maine: Common Courage Press, 1998) at 29.

¹² M. S. Rosentraub, *Major League Losers: The Real Cost of Sports and Who's Paying For It* (New York: BasicBooks, 1997) at 452.

¹³ Cagan & deMause, *supra* note 11 at 67.

¹⁴ R. G. Noll & A. Zimbalist, *Sports, Jobs & Taxes: The Economic Impact of Sports Teams and Stadiums* (Washington, D.C.: The Brookings Institution, 1997) at 35–39, Online: The Brookings Review

<<http://www.brook.edu/press/review/summer97/noll.htm>>.

¹⁵ *Ibid.*

¹⁶ Cagan & deMause, *supra* note 11 at 35 (as termed by Economist R. Noll).

Furthermore, proponents continue to sway naysayers with persuasive consulting reports. These political documents¹⁷ outline exactly how the multi-million dollar facilities will pay for themselves through increased ticket sales and concession stand revenues, and of course, increased spending.

The bottom line surrounding these assertions lies in the following logic:

a new stadium is needed if the team is to stay in town, and ...
a team in town is needed if the city hopes to make a great urban comeback, or remain a 'major-league city.'¹⁸

The personalization of such arguments ("our town, our team, our pride") serves as an important additive, increasing the city's inability to let go of wandering franchises.

In fact, team owners have in recent years, attempted to increase fan interest through exploiting this sense of community involvement in the community team. As Cagan and deMause note, however, they have done so:

only in the most superficial sense, by making public offerings of millions of shares of stock ... but only as much as 49 percent of the club, leaving the team firmly in private control.¹⁹

Economists Roger Noll and Andrew Zimbalist, in the book *Sports, Jobs & Taxes: The Economic Impact of Sports Teams and Stadiums*, believe such arguments are the result of flawed "economic reasoning." According to the authors, growth of the economy occurs when the productivity of a community's resources is increased. They maintain that increased productivity occurs in one of two ways: "from economically beneficial specialization by the community for the purpose of trading with other regions or from local value added that is higher than other uses of local workers, land, and investments."²⁰ Continuing with their view, stadium construction enhances local economy "only if a stadium is the most productive way to make capital investments and use its workers."²¹ As such, the effect of a new sports facility on local economy has proven to be incremental or negative.²² Noll and Zimbalist acknowledge that where sports are an important industry in export, a substantial increase in economic growth will occur. Yet it is relevant to

¹⁷ *Ibid.* at 33.

¹⁸ *Ibid.* at 191.

¹⁹ Noll & Zimbalist, *supra* note 14.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

note that Oriole Park, “the most successful export facility... where about a third of the crowd at every home game comes from outside the Baltimore area”, had a net annual gain of \$3 million, a poor return on an investment worth \$200 million.²³

Noll and Zimbalist are also cognizant of the existence of natural licensing and broadcasting revenues from sports franchises. But again, they remind proponents of sports subsidies of the massive resources escaping the local economy. The experts argue that the expenditure of income abroad by foreign athletes (athletes who do not live locally), the foreign investing of large, short-term athlete salaries, and the presence of equalization funding in most major franchises²⁴ leads to incredible domestic financial loss. As the authors point out, this “leaves little or no net local export gain to a community.”²⁵

Furthermore, Noll and Zimbalist argue that family night at the stadium is often replacement expenditure for other local entertainment. Such substitute spending results in a concentration of income, as money is transferred from one (or even multiple) source(s) of recreation to another.²⁶

In addition, the experts are apt to point out that the substantial revenue from sports teams is divided up to cover the high salaries of a few athletes, coaches, and executives. At the same time, numerous employees of the team are part-time labourers making little more than minimum wage and a very small percentage of the revenue generated. Once again, combining the effects of such a disproportionate pay scale with expenditure substitution results in reduced employment opportunities and the replacement of full-time with part-time employment at a very low wage.²⁷ All in all, the report card given to professional sports teams from an economic perspective, is everything but impressive.

In the past, cities have attempted to curtail spending through referenda, voting whether to continue supporting their break-even teams or to purchase another community's break-even team. But as authors Cagan and deMause have discovered, manipulative words coupled with

²³ *Ibid.*

²⁴ Such equalization funded franchises include dispersing among peer cities ticket revenues from increased fan attendance at newly constructed stadiums. *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

mass-media attention²⁸ have resulted in the susceptibility of cities to fall prey to the subsidy-hungry, placing themselves in a position where they must turn to the law to recover lost finances.²⁹ Indeed, host cities have attempted to force corporate owners to carry out their “end of the bargain” with “clawback legislation” invoking an enforced subsidy repayment scheme when economic promises are not upheld within a period of time.³⁰

Several individuals have also attempted to counteract the various disadvantages (including the massive subsidization of professional sports teams in the United States) that have contributed to the “brawn drain” – albeit unsuccessfully, beginning in 1998 with Toronto legislator Dennis Mills, in a special committee report to the House of Commons. His proposal outlined an “annual government subsidy of \$5 million Canadian dollars ... to each of the country’s nine professional sports franchises.”³¹ In return, Mills envisioned a 150% tax deduction for the generous corporations, tourist attraction, increased employment opportunities, and high income return for the franchise city. In addition, to prevent public disavowal of subsidizing already hundred-thousand dollar player salaries, a system of salary caps and shared revenues between teams large and small would need to be instituted.³²

Mills’ efforts were followed by Industry Minister John Manley’s proposal to create a national sports lottery from which profits would be donated to the NHL. In seeking public approval for this proposal, Manley reasoned that finances from “those who bet on the games” are ethically more suitable in a time where hospital beds are scarce and education cutbacks on the rise, rather than finances from direct government subsidies or property tax benefits. Manley also foresaw provincial governments distributing revenues from provincial sports gaming to subsidize professional sports teams.³³

Yet another failing attempt at providing a revenue source to put an end to franchise relocation involved utilization of federal treasury lottery funding – an annual \$55 million dollar payment. The rationale for such a proposal stems from the finding that “lotteries generate about \$5.6

²⁸ With pre-game and post-game shows, sports television networks, televised league award ceremonies, and whole sections in newspapers devoted to professional sports, media broadcasters “underscore the importance of sports in our lives” and remind us that if our city “does not have a team, it cannot host ‘big games’ and thus is suddenly not a ‘big city.’” Cagan & deMause, *supra* note 11 at 107.

²⁹ Rosentraub, *supra* note 12 at 450.

³⁰ Cagan & deMause, *supra* note 11 at 119.

³¹ Pearlstein, *supra* note 1.

³² *Ibid.*

³³ K. May, “lottery cash stash could save NHL clubs” *The Ottawa Citizen* (19 June 1999) B8.

billion in revenues ... \$344 million comes from sports lotteries.”³⁴ Proponents for this solution also noted that the 1976 Olympics were partially funded by Lotto Canada upon the will of the federal government.³⁵

One final proposal, only to be withdrawn after great public discontent, stemmed once again from Industry Minister Manley, in his efforts to maintain professional sports in Canada. Manley announced in January of 2000 that the federal government would donate the final 25% (totalling approximately \$12 million) towards an agreement between the NHL and six municipal and four provincial governments.³⁶ While franchise owners, coaches, players, businessmen, and fans alike were aware of the need to “prove that helping the struggling teams at this time would serve a ‘public benefit’”³⁷ (in order for any such solution to be successful), the lengthy hospital emergency waiting lines and seemingly exponential increase in taxation prevented the public from supporting an unconvincing expansionist National Hockey League. And so the problem of franchise relocation continues....

II. THE ROLE OF NAFTA

EENTER BARRY APPLETON, International Trade Lawyer, and Marjan Neceski, Economist and International Trade Lawyer. They argue the solution to this industry crisis lies in a multilateral treaty called the North American Free Trade Agreement (NAFTA).³⁸ Appleton and Neceski approached the Sub-Committee on the Study of Professional Sport in Canada on 12 May 1998, with their submission outlining how relevant chapters of this agreement will save remaining NHL franchises and other professional sports teams in Canada without the use of direct government subsidization, municipal tax abatement, or the indirect use of public funds. Relying on the Investment Chapter of the agreement, Appleton and Neceski are confident that financial compensation from a NAFTA dispute settlement process will put an end to the advantage Americans have over the True North. As a result, such compensation would enable players and teams to keep their sticks on the ice in the country where the game of hockey was created.

Appleton and Neceski begin their submission by pointing out that while the federal governments of the three participating countries signed this agreement, “all levels of government in a NAFTA country are bound

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Gherson, *supra* note 3.

³⁷ R. MacGregor, “Canadiens to threaten move south” *The National Post* (26 June 1999) A1.

³⁸ Appleton & Neceski, *supra* note 10.

by the obligations in the agreement.”³⁹ Having established that it is therefore any act by any level of government in either Canada, the United States, or Mexico that may become the focus of an investor-state claim under the NAFTA, Appleton and Neceski then turn to relevant provisions of the agreement as they apply to Canada’s professional sports industry.

The lawyers note that “investment” as provided by the NAFTA agreement “applies to most kinds of business activity owned or controlled by a NAFTA investor, directly or indirectly”⁴⁰ In addition, they propose that paragraphs (e), (g), and (h) of Article 1139 specifically include Canadian professional sports teams competing with their American counterparts across the border. These paragraphs state that an investment includes:

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.⁴¹

Appleton and Neceski then provide three bases to establish that Canadian professional sports teams constitute an investment as they compete against American professional sports teams in the United States. The first basis rests on (internationally) televised sports and profits from “equalization funds” received by Canadian teams in which “all NHL teams share in the pooled television revenue.”⁴² The second and third grounds upon which Appleton and Neceski base their claim that professional sports constitute an investment arise from the inclusion of enterprises as per Article 1139(e), and the ownership by Canadian teams of income-intellectual property rights. In providing such presumptions, Appleton and Neceski are therefore comfortable with their assertion that:

³⁹ *Ibid.* at 6.

⁴⁰ *Ibid.* at 7.

⁴¹ *Ibid.* at 7-8.

⁴² For instance, NHL teams enjoy revenue from televised hockey games in one such equalization fund. *Ibid.*

Canadian professional sports teams operating in the United States are subject to the full protections against unfair government actions contained in the NAFTA Investment Chapter.⁴³

As such, they also argue that Article 1106 prohibits the application of specific conditions on an investment by governments of NAFTA members, including forced use of “local goods or services,” such as requiring a sports team to locate in a particular city. Relying on economists Noll and Zimbalist, Appleton and Neceski note that six American cities have meted out conditioned subsidies to teams in order to prevent franchise relocation.⁴⁴ In addition, three American teams (New Orleans Saints, Minnesota Timberwolves, and the Tennessee Oilers) have been threatened by local governments with damage regimes for relocating before their lease expires – also inconsistent with Article 1106 of the NAFTA.⁴⁵

Appleton and Neceski also note that Article 1102 of NAFTA contains a national treatment provision by which all investors are to be treated equally regardless of any preference for locality. They point out that this provision operates on a “like circumstances” standard, which the lawyers define by stating: “with respect to national treatment for investment, if the two investments engage in similar activities, then they should be in ‘like circumstances.’”⁴⁶ It is then obvious to Appleton and Neceski that “two professional sports teams playing the same sport would be in ‘like circumstances.’”⁴⁷

In addition to Articles 1106 and 1102 (the national treatment provision), Appleton and Neceski highlight the applicability of Article 2103 on taxation to the franchise relocation crisis. While this chapter has attempted to exempt tax from the agreement’s expansive reach – according to the interpretation of the lawyers, it does so with limited success. Appleton and Neceski believe that tax incentives provided by the American government, preventing professional sports teams from relocating “can be the basis of a violation of the national treatment obligations of the NAFTA.”⁴⁸

Appleton and Neceski also counter arguments before the subcommittee raising the NAFTA Canadian cultural exemption clause, which would not prohibit a government from violating NAFTA for the benefit of cultural sport. This clause, however, exempts five cultural industries

⁴³ *Ibid.*

⁴⁴ The six teams include: Orlando Magic, Colorado Rockies, Baltimore Orioles, Baltimore Ravens, Seattle Mariners, and the Minnesota Twins. *Ibid.* at 13.

⁴⁵ *Ibid.* at 10-13.

⁴⁶ *Ibid.* at 15-16.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 18-19.

(printed publications, film and video, music recording, music publishing, and broadcasting). They argue: “[e]ven though professional sports may form an integral part of Canadian culture, it is not covered by the NAFTA’s cultural industries exception.”⁴⁹

Furthermore, Appleton and Neceski would like to rely on NAFTA’s Service Chapter in their submission. However, they acknowledge that because professional sports teams constitute “a service provided by an investment” (in their opinion) this chapter is no longer applicable.⁵⁰

Carrying these lessons in NAFTA over to the Canadian scene, they argue that it is not difficult to reveal American investor violation of the provisions whether it be through direct government subsidization, through the granting of tax-free status, or through public financial assistance to professional sports teams. According to experts Appleton and Neceski, in taking the above into consideration, two remedies are available to alleviate the harm caused to professional sports teams in Canada by their American sporting competitors. Canadian sports franchises could utilize Chapter 20 of NAFTA, with the federal government acting as an intervenor, proving the occurrence of a violation of the NAFTA provisions 1102 and 1106 in an action before a NAFTA panel. The NAFTA panel would then rule on the perceived presence of the violation. In order to be successful, the challenging government must provide evidence of a NAFTA provisional violation. Due to the interpretive nature of Chapter 20 of the agreement, no compensatory award (financial or legislative) or appeal is available to a disconcerted government. The Chapter 20 panel could, however, request that the United States government bring its laws into conformity with the agreement’s provisions.

In the alternative, an investor-state claim could be brought to an international arbitration panel by the teams themselves, with the possibility – if successful in proving a violation of the Investment Chapter provisions, of an award of compensatory damages payable by the signor of the agreement, the American federal government. Such compensation would amount to the dollar value of the inability of Canadian sports teams to receive equal government treatment through government subsidization, tax benefits, or public funding, as compared to their American counterparts. However, Appleton and Neceski caution the sub-committee that neither mechanism will result in the elimination of disadvantages or inconsistencies in the agreement.⁵¹

⁴⁹ *Ibid* at 20-21.

⁵⁰ According to the definitions of cross-border provision of a service and cross-border trade in services, a service provided by a party to an investment (as per Article 1139 Investment – Definitions) in the territory of that party is not included within the Services Chapter (Chapter 1213). *Ibid.* at 17-18.

⁵¹ *Ibid.* at 21-22.

As previously mentioned, while the Chapter 20 panel review process is also available to the professional sports industry, Appleton and Neceski also invoke the presence of the investor-state provisions in the NAFTA. These provisions permit an investor to bring a claim directly to the faulting party member rather than relying on a government which “has other things on its mind” to do so.⁵² Moreover, the experts advise bringing the Chapter 11 time barred dispute settlement process before the Chapter 20 process that is not temporally restricted with the statute of limitations. However, it is possible to pursue both actions simultaneously.⁵³

While the considered proposal by Appleton and Neceski was welcomed by the sub-committee, they were not without their opponents. Enter Mr. John Klassen, Director General, General Trade Policy Bureau, Department of Foreign Affairs and International Trade. It is Klassen’s opinion that no provisions of the NAFTA agreement are applicable to the franchise relocation problem. While he admits that the WTO (NAFTA’s predecessor) has incorporated countervailing duty remedies for the effects of unfair trade practices of government in local industry, such remedies are restricted to trade in goods where goods that are exported injure the import country’s industry. Klassen is apt to point out that sport franchises do not involve such injury as “no physical goods” are exported in the playing out of a three period game on ice.⁵⁴

In addition, the Director General admits that there are remedies within the WTO and in NAFTA for unfair trade practices in services. The WTO, with its “most favoured nation treatment principle,” directs members “to provide services and service providers of other member countries with a treatment no less favourable than it accords to like services and service providers of any other member country.”⁵⁵ However, this provision is not applicable unless the member state expressly provides for it. (This latter provision is known as the “national treatment principle.”) Klassen therefore reasons that it is imperative to determine whether sports franchises are indeed a “service” encumbered by the expansive United States-Canada-Mexico agreement. While NAFTA provides for national treatment, it does so with limited exceptions, as the provision applies only to trade in goods and not trade in services. Without providing any reasons, it is Klassen’s opinion that sports as

⁵² Sub-Committee on the Study of Sport in Canada of the Standing Committee on Canadian Heritage (12 May 1998), Online: Parliamentary Internet <<http://www.parl.gc.ca/InfocomDoc/36/1/SINS/Meetings/Evidence/SINS-E.htm>>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

such are not a service trade, and are therefore not monitored by the NAFTA.⁵⁶

Moreover, while Klassen concedes that “financial inducements by a state to attract a franchise is an investment incentive,” as defined by the agreement, neither the WTO nor NAFTA have remedial procedures for investment incentives.⁵⁷ Klassen recognizes that “[t]here are a few international rules that limit a governments ability ... to use investment incentives to attract business and investors from other jurisdictions,”⁵⁸ but as of yet, there are no remedial procedures to counter such activity. However, preliminary work is underway to extend such a remedy to service trades.⁵⁹

III. THE ALTERNATIVES

A. Legal

Canadian professional sports franchises have approached a fork in the road. Should they accept the opinion of International Trade Lawyer Barry Appleton and expend a large amount of time and effort (not to mention already depleted finances) on pursuing a claim before a NAFTA panel or an international arbitration panel with a vision of compensation? Or should sports teams subscribe to Director General John Klassen’s view that the NAFTA at present is not applicable to the franchise relocation crisis presently underway?

Were Canadian sports franchises to follow the litigation route proposed by Appleton and Neceski, they would be presented with a variety of potential costs and risks. For instance, the complaint might be outright rejected. Moreover, there are no provisions for appeals within the Chapter 11 complaint system, even on matters concerning law.⁶⁰ Another possibility is that a panel might rule in favour of the Canadian complainant in a narrow respect, but fail to comment on forms of practices that could be used to maintain the status quo, or alternatively, find that those practices are in fact consistent with the NAFTA. Public authorities who are told in one particular decision that a practice or set of practices is inconsistent with NAFTA may be inventive when it comes to finding other means of accomplishing their objective of funneling economic support to professional teams.

Furthermore, it may take several years to process a Chapter 11 complaint under NAFTA, including the presentation of oral argument, the actual hearing itself, and the release of reasons by the panel. Yet in the

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ By contrast, the finding of a WTO dispute panel may be appealed on legal questions to an appellate body.

meantime, irreparable damage may have been done to the party originally motivated to bring the complaint. Once a city has lost its professional sports team, it may have little or no desire to continue pursuing litigation.

In addition, the costs of processing a Chapter 11 dispute may be substantial. Aside from the lawyers, the panel itself must also be paid for by the parties to the dispute. These costs of litigation may be enough to deter cash-strapped Canadian organizations from maintaining or even initiating claims.

As previously noted, the NAFTA investor-state claim process does not allow for the striking of inconsistent provisions. This dispute settlement mechanism is merely a compensatory remedy. There are no investor-state dispute provisions to prevent local or state American governments from continuing to offer investment incentives to sports franchises. The United States federal government, however, may attempt to deter governments from making such investments, as it is this body that will be forced to continue dishing into compensatory payment regimes.⁶¹ Yet, depending upon the success of a Canadian investor-state claim, the United States government may be content to continue making such payments, as the amount of compensation ordered by a Chapter 11 tribunal may be quite limited or even non-existent regardless of the presence of a meritorious complaint.⁶² This may be especially true if American public authority subsidization results in the sale of Canadian owner interests to the United States, as the American authority may actually end up financially rewarded.

Alternatively, were Canadian professional sports teams to continue along the path Klassen recommends, little progress would result. American investors would continue to subsidize professional sports in the United States, while Canadian team owners strove to piece together mediocre rosters.

Perhaps an alternative is worth considering. Perhaps the time has come to explicitly and specifically prohibit, through international agreements, the competitive subsidization of professional sports teams. Bringing a NAFTA complaint might actually complement such an approach. The prospect of a successful outcome might encourage the government of the United States to consider resolving the dispute by a formal agreement, rather than leaving the outcome to the uncertain and

⁶¹ It is unknown whether under American constitutional law the United States federal government has the ability to alter the laws of municipal and state governments in this area.

⁶² Appleton & Neceski, *supra* note 10 at 22. However, it is the opinion of the authors that successful litigation of a Canadian investor-state claim would encourage the United States Congress to legislate restrictions on the local authorities who are causing them to be liable at great financial expense.

expensive course of litigation. And perhaps this can be achieved by creating an innovative agreement similar to, yet apart from, the existing NAFTA provisions.

An agreement encompassing the service of professional sports could be established in at least three possible ways. These involve:

- creating a distinct Canada-US bilateral treaty that specifically addresses professional sports and generally prohibits subsidies of all forms – both direct and indirect;
- expanding the present date NAFTA provisions with a side agreement governing the professional sports industry; or
- more globally through an amendment (or alternatively, a side-agreement) to the General Agreement on Trade in Services (GATS).

Because the crisis in Canada appears primarily to have North American roots, perhaps a bilateral treaty preventing competitive subsidization would suffice. The bilateral route has a number of advantages. Obviously, the fewer the negotiating partners, the easier it is to reach agreement. In addition, Canada and the United States largely share the same leagues, media, and ancillary industries (endorsements, tee shirts, cards, lotteries, etc.). Any Canada-United States agreement would resolve most of Canada's professional sporting relocation difficulties, with the exception of players or teams lost to Europe or other foreign locations.

The bilateral route, however, also has its disadvantages. One potential complicating factor concerns trade concessions made under bilateral agreements. Under the compulsion of the NAFTA, GATT, or GATS, trade concessions might have to be extended to third parties, regardless of concessions made to Canada or the United States by the third party. Whether this complicating factor is of any real significance would partly depend on the features of a particular agreement. It must also be appreciated that once the United States' public authorities adopt the changes needed to avoid running into conflict with commitments to Canada, they may have already taken the necessary steps to avoid causing any trade or investment injury to third parties. If, for example, authorities stop subsidizing stadiums in order to satisfy commitments to Canada, no third country would have any need or basis to make a complaint regarding the luring away of teams or players by unfair subsidies.

Processing an agreement as a side-deal to NAFTA might be advantageous for the reason that free trade arrangements are recognized by the GATT/WTO system as exceptions to various most favoured nation (MFN) and national treatment obligations. For instance, article XXIV of the GATT allows members to trade more favourably amongst themselves than with non-member countries. The member countries must ensure that "trade restrictions are eliminated with respect to 'substantially all trade' between the constituent territories" and "customs duties shall not

be higher thereafter than the duties prevailing on average... prior to the formation of a customs union or free trade area."⁶³ Article V of the GATS is similar.⁶⁴

One disadvantage, however, in pursuing the NAFTA route concerns Mexico's required involvement – the party to the agreement that may have no real interest in the sporting issues that concern Canada. Furthermore, in pursual of an agreement via the NAFTA route, negotiations may become entangled with trade concerns that are wholly unrelated. The United States, for instance, may state that it will not agree to any concessions on the professional sports industry front unless and until Canada, in return agrees that the NAFTA should not continue to provide leeway generally protecting cultural industries.

For actors in the professional sports industry, however, relying on the present day NAFTA provisions to resolve the franchise relocation crisis may prove futile. As previously mentioned, at present there exists much disagreement among experts regarding the applicability of this agreement's provisions to the professional sports service.

A bilateral or NAFTA agreement could lay the basis for an experiment that would provide inspiration, ideas, and practical lessons to the global trade system should it decide to tackle, in a specific agreement or sub-agreement, the issue of professional sports. A virtually global solution might eventually be found in an amendment to the GATS – the multilateral treaty covering trade in services –which specifically addresses sports. Such an amendment would recognize that sports constitute a distinct service.⁶⁵ While the GATS, within its annexes,

⁶³ M. Trebilcock & R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995) at 77.

⁶⁴ GATS, Article V, *Economic Integration*: 1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: (a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through: (i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV *bis*.

⁶⁵ Utilizing the present GATS system to combat the professional sports subsidy war has various difficulties. For instance, merely listing professional sports in the agreement leaves all kinds of uncertainties regarding how subsidies are to be treated under the GATS system, perhaps resulting in having to resolve matters by litigation. In other words, attempting to deal with sports in general will result in great uncertainty. Alternatively, creating a specific sub-agreement under the GATS will result in the challenge of trying to persuade over 130 countries to focus their attention on an issue that is of concern only to a small number of them. This is then confounded by the problem of trying to achieve consensus in a highly emotional forum such as professional sports.

acknowledges the diversity of international trade (as compared to trade in goods)⁶⁶, it may be necessary to incorporate a special distinction for professional sports as its movement of “natural persons” is unlike that of any other industry. The exceptional mobility of labour in professional sports franchises, coupled with the intense emotional attachment and life-long loyalties to state sponsored teams competing for world titles in domestic markets, demands recognition of professional sports as unique.

Utilizing the present GATS system to combat the professional sports subsidy war has various difficulties. For instance, merely listing professional sports in the agreement leaves several uncertainties regarding how subsidies are to be treated under the GATS system, as the GATS does not at present contain a detailed set of rules that define and discipline subsidies. This perhaps leaves such matters to be resolved through costly and time-consuming litigation. In other words, attempting to deal with sports in a general means will result in great uncertainty. Alternatively, creating a specific sub-agreement under the GATS will result in the challenge of trying to persuade over 130 countries to focus their attention on an issue that is only a concern to a small number of them. This is then confounded by the problem of trying to achieve consensus in a highly emotional forum such as professional sports. The GATS also does not contain any provisions for a private investor to bring a complaint directly against an allegedly non-compliant government.⁶⁷

As such, for Canadian professional sports teams to rely on this agreement is to get ahead of the franchise relocation game. At present, this competitive subsidy-driven taxpayer sport is played on home turf. Therefore, the most appropriate solution (at present) is to begin with a distinct bilateral or NAFTA treaty, leaving open the option of eventually bringing sports to the GATS table. If successful, with growth and increased familiarity with the GATS, this regional treaty solution may be expanded (when required) to a global treaty solution. Such an expansion would forever eliminate the private sector subsidy war and put an end to massive-million dollar expenditures on purchasing, maintaining, and improving sports teams and their facilities. This would perhaps even prevent the estimation by industry experts of a \$7 billion dollar public sector investment into sporting facilities by 2006 from becoming a reality.⁶⁸

Even if Canadian efforts do not result in the formation of a treaty agreement, formally proposing the need for negotiation might have many useful effects. Professional sports receive intense media coverage. A

⁶⁶ Or alternatively, the provision of a multitude of services in a multitude of ways (trade in services) as compared to the transporting of products from one country to another (trade in goods).

⁶⁷ All of this is then compounded by the difficulty in distinguishing professional from amateur sports.

⁶⁸ Noll & Zimbalist, *supra* note 14.

formal and reasoned proposal by Canadian sports franchises might attract considerable attention, perhaps even drawing the American public eye to the massive and inequitable level of subsidization that has taken place within the sports industry. The extent to which the poor are subsidizing the rich in this respect may be unappreciated, and may result in congressional response when more fully recognized. Canada's complaints may resonate with many small markets in the United States whose teams are also departing, or have become non-competitive as a result not of ordinary economic operations but of the higher level of subsidization that is being dispensed in other locales. A more informed public debate might result in reform on all or any of the following fronts: congressional or state action to prohibit local sports subsidies, changes in United States tax laws that limit the extent to which corporations can write off costs of ticket purchases to sporting events, restructuring of economics by various leagues as a result of agreements among owners or between owners and players (including greater revenue sharing), and/or changes to competition laws that would reduce the extent to which franchises can secure "territories" from which other teams are excluded.

B. Non-legal

Should Canadian professional sports teams continue to find themselves unable to compete with their American expansionist counterparts, they may want to consider changing the rules of the game. In other words Canada can avoid direct competition with American dominated leagues by creating its own version of hockey or baseball similar to the CFL with its distinctive rules. Perhaps it has come time to commence a Canadian hockey or basketball league with height restrictions, five not six players on the ice resulting in more skating, more scoring and less hitting. Perhaps a game is needed that will emphasize the need for smaller not larger players, and a game in which local talent coddles fan interest.

The natural operation of competitive market forces has led to the realization that big teams go to big markets. Small town community involvement in expansionist leagues such as the NHL, MBA, and NBA is far too costly – literally and spiritually. The precious building of community morale through sport must be carried out in ulterior ways. Communities that feel the need to subsidize sport in order to maintain meaning in the words "our team, our game" may do so through amateur or post-secondary sport, a more economically feasible and realistically affordable regime. Moreover, community members may directly participate in amateur sporting activities. Whether it be through cheering, coaching, refereeing, or even playing on the community team, such participation does far more to promote community morale than jointly cheering for imported mercenaries at the urging of stadium

organists. As a result, this would eliminate the need to construct new facilities to increase owner profits. In addition, local politicians with “some sense of democratic accountability to local taxpayers” would preside over sporting issues, “cooler heads” would resound when confronted with facility enhancements, and investments in sports teams would move beyond community dollars to community spirit.⁶⁹

For many Canadians, taking pride in oneself involves taking pride in one’s community – one facet of which may be developed through local sport. At present, our remaining sense of pride is vamped on foreign names outstretched across flashy jerseys as viewed by businessmen in high-priced box seats at lavish sports complexes. If we wish to rejuvenate this sense of pride, we must step back from the plate, and return to the “early days of pro sports” where sports facilities were financed by team revenues and local boys were recruited to fill rosters.⁷⁰

IV. CONCLUSION

UNDOUBTEDLY, THE PROFESSIONAL SPORTS franchise relocation problem has left many Canadian cities uprooted and awestruck with the effects of expansionist leagues. To use the existing NAFTA agreement to remedy this North American plague is to invest wholly in an outcome that is far from certain. Rather, it must be recognized that the professional sports industry encompasses a distinct forum and as such requires a distinct solution. Perhaps the most favourable solution to this primarily North American problem lies in developing a distinct bilateral Canada-United States agreement in which subsidization of professional sports teams by government bodies is prohibited. In turn, this solution should be developed in such a way as to permit incorporation into the global trade system, should it be required. Admittedly, while it is unknown whether our American competitors will submit to such an agreement, placing this agenda before a negotiating table will result in long-deserved international recognition of the Canadian competitive disadvantage in this taxpayer subsidy-driven game.

⁶⁹Cagan & deMause, *supra* note 11 at 195-196.

⁷⁰*Ibid.* at 43.