

# PROFESSIONAL SPORTS CONTRACTS AND THE PLAYERS' ASSOCIATION<sup>1</sup>

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## INTRODUCTION:

Professional athletes — like many others in our society — have been showing an increasing penchant toward group dealings with their employers. With the emergence of players' associations in all major professional sports, the status of the athlete as a totally independent contractor has, of necessity declined, with the players' association now negotiating matters of "working" conditions which hitherto had been left to each individual player to negotiate. The major aim of this paper is to analyze the reasons for such associations and to examine their present and future role in professional sports. Because this study is being written primarily from a Canadian perspective, professional hockey (National Hockey League: N.H.L.); (World Hockey Association: W.H.A.) and football (Canadian Football League: C.F.L.) will be discussed in the greatest detail. For comparative purposes, however, reference will be made to professional football, baseball and basketball in the United States.

Much of the source material for this article was gathered through interviews with professional hockey and football players and with the management and coaching staffs in these sports. These meetings proved invaluable in obtaining information — and insight — into many of the operations of professional sports which would otherwise have been unavailable. In keeping with the wishes of the majority of those interviewed, anonymity has been maintained for all source material obtained via interviews.

### *Monopoly and Conspiracy in Professional Sports:*

In analyzing the contents of professional sports players contracts, it becomes readily evident that the balance of bargaining power *vis-a-vis* team and player has rested with the former. Although several reasons might be suggested for this situation, the writer feels that two words best summarize the cause of the imbalance: monopoly<sup>2</sup> and conspiracy. It is to this aspect of professional sports that the article will now turn.

"Power corrupts and absolute power corrupts absolutely."<sup>3</sup> Because many professional sports have at varying times operated in a monopoly

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1. The writer wishes to acknowledge the efforts of Mr. Robert Jenion, a third year law student of the Faculty of Law, University of Manitoba, for much of the background research done on this article, which research was carried on during the summer months of 1972. Acknowledgment must also be given to the Faculty of Graduate Studies, University of Manitoba, for funding the research of which this article is the outcome.
  2. For a more detailed (although somewhat dated) discussion of the monopoly concept see: Topkins, J.H. *Monopoly in Professional Sports*, (1949) 58 Yale L.J.
  3. Lord Acton.

market, it was not unnatural for the balance of economic power to become concentrated in the hands of the individual teams and perhaps the governing body of the particular league in question.<sup>4</sup> Faced with the choice of either playing for the single operating league or not playing at all,<sup>5</sup> an athlete was compelled to accept often one-sided contractual terms, and league by-laws<sup>6</sup> as a condition of "practising his profession". Only with the emergence of a rival league was the player able to enjoy the luxury of choosing between alternate employers and thereby carve out for himself the best possible economic deal. The most recent example of this "player's paradise" situation is the current National Hockey League — World Hockey Association rivalry. In professional basketball, fierce competition between the "establishment" National Basketball Association (N.B.A.) and the fledgling American Basketball Association (A.B.A.) has pushed salaries of professional basketball players to the highest level of any North American team sport.<sup>7</sup> One of the additional out-comes of the N.H.L. — W.H.A. battle has been the elimination of the reserve clause<sup>8</sup> from the W.H.A. standard players' contract and its probable removal from future N.H.L. contracts.

Unfortunately — at least from the players' perspective the idyllic situation caused by rival league "price wars" cannot last indefinitely. Were club owners forced to pay annual salaries to players from \$100,000 to \$400,000 (as is presently the case in professional basketball);<sup>9</sup> or to guarantee a player one million dollars simply to sign a contract,<sup>10</sup> the economics of operating a professional sports team at a profit would be impossible. In the final result, one of two things will likely occur. Either the new competition will fold because of inability to compete with the

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4. As we shall soon see, the league governing bodies often turn out to be mere extensions of the team owners.
  5. The most in-depth analysis of how a professional league (here, the National Hockey League) can obtain control over all facets of a sport and dictate whether or not a player can play his sport is found in the decision of Higginbotham, J. of United States District Court, Eastern District of Pennsylvania. The decision was handed down on 8 November, 1972 and involved a consolidation of several actions flowing from the emergence of the World Hockey Association — rival to the National Hockey League. *Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club Inc.* (1972) 351 F. Supp. 457. See also *Boston Professional Hockey Association Inc. v. Cheevers and Sanderson* (1972) 348 F. Supp. 261.
  6. Some of these precise terms and by-laws will be discussed in greater detail below.
  7. For example, Kareem Abdul-Jabbar of the Milwaukee Bucks basketball team earns roughly \$82,500.00 a month for his services while all-star catcher Johnny Bench of the Cincinnati Reds baseball club must be satisfied with a mere \$82,500.00 per year (1972 season). Source: *The Winnipeg Tribune*, 20 October, 1972: "Basketball tops in pay race."
  8. The hockey reserve clause will be discussed in detail later in this work. At this point, suffice it to say that the reserve clause bound a player to one NHL hockey team unless the player either retired from hockey completely or was traded to another club. The decision to trade rested solely with the team management. See paragraph 17 of the NHL Standard Players' Contract (March, 1972). The WHA's answer to the reserve clause is found in paragraph 16 of the WHA Uniform Player's Contract.
  9. *Supra*, footnote 7.
  10. The Winnipeg Jets of the WHA paid this sum to ex-Chicago Blackhawks, superstar, Bobby Hull, to lure him from his former team to, Winnipeg. Because of Hull's drawing-card capabilities, the other teams in the WHA were asked to contribute financially in raising the money to bring Hull to the new league.

established league; or, if the new league proves financially viable an amalgamation will take place between the one-time competitors. The latter occurred when the National Football League and the American Football League officially merged in 1970<sup>10A</sup> and already rumors of merger between the N.H.L. and W.H.A. are rampant, if the new league proves an economic success. When such unions occur, the player is again forced to deal with a monopolistic situation.<sup>11</sup>

The individual player is obviously therefore at a great disadvantage when he has but one league in which to sell his services. Yet even within this single market situation a further restriction exists on the players' ability to choose the team for whom he will play — the draft. Admittedly, the draft system is not conceived to simply stifle freedom of choice, although its effect results in exactly that occurring. Rather, the *raison d'être* of the draft is to maintain relative parity of teams in the league, thereby providing for more evenly matched games, with no team or group of teams constantly dominating the league.<sup>12</sup>

Although each of the two sports has refinements on its system, it is possible to sketch a basic draft system which in essence applies to Canadian football and professional hockey. Annually a list of available players will be circulated to all teams in the league.<sup>13</sup> Order of choice in selecting players on the list is determined by the standing of the team in the prior season, with the last-place team obtaining the first draft choice, the second-last team getting the second draft choice, etc.<sup>14</sup> Once selected in the draft, the player is then placed on the selecting teams' negotiation list, giving that team the *exclusive* right to deal with the player.<sup>15</sup> At no time does the individual player have a say regarding the team for whom he will play.

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10A. Although the two leagues officially merged in 1970 both participated in a common draft beginning in 1967, thereby eliminating the bidding war from that date. The player draft system will be discussed in greater detail further in this work.

11. See p. 379 regarding a possible NHL - WHA merger and the position of the NHL Player's Association in this regard.

12. By contrast, professional soccer in Great Britain has no draft system, with the wealthiest clubs being able to attract the top players. Although the British system allows each player complete freedom of choice regarding the team for whom he will play, the less affluent clubs are rarely contenders for the Football Association (F.A.) Cup and indeed are probably destined to remain mired in the third and fourth divisions of the F.A. League for the lengths of their existence.

13. The draft system described here is essentially an "amateur draft", that is, involving players who have completed their last year of amateur status (in football this would generally be a player's final year in college; in hockey, it would generally be a player's final year of junior hockey). There exist other forms of draft, however, as for example the Inter-League Draft of the NHL (sec. 16 NHL By-Laws). See p. 377.

14. Draft choices can also be traded or sold between clubs in the league, so it is conceivable that in exchange for some consideration, a top-finishing club may wind up with the first draft choice.

15. Under NHL By-law 16(b), the selecting team has *exclusive* rights over the player so long as he remains on that team's negotiation list. In the CFL, the exclusiveness to the player is enforced not by a by-law but a ". . . highly regarded and respected gentleman's agreement . . ." between the various team managements. Source of information on the CFL was from a player in the League, whose name he wished to remain anonymous.

What if a player does not want to play for the selecting team, or what if there is no agreement on terms of employment, such as salary? In the Canadian Football League a player unable to come to terms with the selecting club has the *theoretical* right to negotiate with any other club in the League, but in practice will find it very difficult, if not impossible, to actually sign a contract with the team of his choice. Before another team can bargain with the player, that team must first negotiate the player's release from the original selecting team, the effect of which is to remove the player's name from the selecting team's negotiating list. Needless to say, the likelihood of a team deleting a player from its negotiation list is very remote; since the effect of such removals would be to allow players to gravitate toward the wealthier clubs and to "shop around" for the best possible contract — results which the draft attempts to eliminate. Thus in most cases, the player *must* come to terms with the selecting team if he wishes to play football. Conceivably, he might attempt to play in the National Football League, although the chances of making an N.F.L. team are difficult, especially if the player is Canadian trained.<sup>16</sup>

Under N.H.L. by-law 16(6), the selecting team has the exclusive right to deal with its draft choices while the selected players remain on the teams' reserve list. He can remain on the reserve list so long as the Club offers him a minimum contract of \$10,000. per year for playing in the N.H.L. or a minimum of \$5,000. per annum for performing in the minor leagues. While a player is on the teams' reserve list, no other club in the League may negotiate with that player. In light of these regulations, it is obvious why the emergence of the W.H.A. was greeted with such enthusiasm by professional hockey players.

Once a player signs a contract with the drafting team, he for all intents and purposes remains the exclusive property of that club. Because the team has hitherto bargained from a position of strength in relation to the individual player, it has been able to force players to agree to contractual terms giving the club control not only over present playing conditions, but over the player's future as well. It is these future controls namely the reserve clause in hockey and the option clause in football that shall now be analyzed.

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16. Although no formal agreements exist between the NFL and CFL regarding honouring of each other's negotiation lists, there have been strong suspicions raised concerning "understandings" which the two leagues have in dealing with certain aspects of this area. Thus, there might not even be freedom of choice within the two autonomous leagues. See Parrish, B., *They Call it a Game*, Signet Books, New York, 1972, pp. 146-7.

The NFL Player's Association has recently come out with a statement against any expansion by the NFL into Canada, since any such action would, in the opinion of the Association mean the eventual demise of the CFL and thereby end competition in professional football. The CFL Player's Association has taken a similar stand. Both statements arose out of talk of expansion of the CFL into the United States by the CFL team owners at their 1972 annual meeting. Source: *The Winnipeg Tribune*, 6 December, 1972: "CFL welcome in U.S., but not NFL here."

(a) *Hockey: The Reserve Clause:*

Both professional hockey (N.H.L.) and professional baseball contracts contain a reserve clause in their standard players contract, the effect of which clause is to bind a player in perpetuity to the team with whom he signs. While the baseball reserve clause has been challenged in United States Courts<sup>17</sup> on several occasions, it was only with the emergence of the World Hockey Association in 1972 as a competitor to the N.H.L. that the legality of the hockey reserve clause has been questioned in court.<sup>18</sup> The immediate cause of the litigation over the N.H.L. reserve clause was the defection of several N.H.L. players to various W.H.A. clubs for the 1972-73 season. Despite the fact that only players' whose contracts with the N.H.L. teams had expired were signed by the W.H.A., the National Hockey League took the position that the reserve clause — present in all N.H.L. contracts — gave the N.H.L. teams a perpetual option over the services of such players.

Clause 17 of the N.H.L. Standard Player's Contract (amended form, March, 1972) reads:

The Club agrees that it will on or before September 1st (August 10th in the case of "protected" players and those who played fifty N.H.L. games in the preceding season) next following the season covered by this contract tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto a contract upon the same terms as this contract save as to salary.

The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement, failing which, by arbitration under the Arbitration Agreement between the League and the N.H.L. Players' Association dated March 29th, 1972.

The effect of clause 17, and in particular paragraph two is readily apparent. Because every N.H.L. Standard Player's Contract contains the above reserve clause, each time a player signs the contract, he binds himself to accept the reserve clause in the future. Further, if he does not want to play for that team any longer clause 17 empowers the team to offer the player the same contract (which of course contains a reserve clause) and, if the new contract is not accepted, (that is, the player simply refuses to play for that team any longer) then that player cannot

17. The latest challenge to the baseball reserve clause came in the widely publicized case of *Flood v. Kuhn*, (92 S.C.R. 2099). Here, the Supreme Court of the United States upheld baseball's reserve system on the basis that it could only be overturned by Congress, since that body had specifically exempted baseball from federal anti-trust legislation. The effect of the *Flood* decision was to support the judgment of the Supreme Court in an earlier case dealing with the legality of baseball's reserve clause: *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (Oliver Wendell Holmes). For a further discussion of the Curt Flood case and some of the factors which precipitated the then St. Louis Cardinal outfielder to launch a legal action see: *The Balance of Power in Professional Sports* (1970) 22 Maine L.R. 459 at 468. There are statements in the *Flood* case which indicate that baseball is on a special category and other sport reserve clauses may be found to be illegal.

18. *Philadelphia World Hockey Club v. Philadelphia Hockey Club*: ref. — *supra* — footnote 5.

play for any other hockey team. The effect of the reserve clause is thus somewhat analogous to the perpetual motion machine — the process which binds the player to the team is never ending. Salary is the only term which can be altered between one contract and another where the player's reason for not signing the contract is monetary.<sup>19</sup>

Since an N.H.L. team has this perpetual option on the player's services, the player is effectively precluded from choosing to play with another club in the League. The only way in which the player can change uniforms is to be traded;<sup>20</sup> sold to another team in the League; placed on waivers; or given an outright release; matters resting in the sole discretion of the team management. Even if the player is sold or traded to another team, the new team takes over the terms of the players contract which of course, includes the reserve clause. The end result is that the employer might be different, but the terms of employment remain the same.<sup>21</sup> If the player took the bold step of quitting professional hockey with the intent of possibly playing the game at the amateur level, he would probably find himself barred from playing in any amateur league in either Canada or the United States. The reason this latter event is likely to occur is due to the written agreements between the N.H.L. and the Canadian Amateur Hockey Association (C.A.H.A.) and the Amateur Hockey Association of the United States (A.H.A.U.S.), whereby the N.H.L. and the two amateur hockey associations agree to recognize each others suspensions.<sup>22</sup> And, it would be virtually automatic that a player unwilling to sign a new contract would be suspended, since by virtue of the reserve clause in his prior contract, he is in breach of his agreement with the club.

Thus due to the reserve clause, professional hockey players have had up to now no choice of employers. Because of the agreement between the N.H.L., the minor-league professional clubs under its authority and the amateur leagues in Canada and the United States a renegade player could find himself unable to play organized hockey<sup>23</sup> anywhere in these two countries.<sup>24</sup> The emergence of the W.H.A. as a competitor to the N.H.L. however, raised an important issue. Conceding that the reserve

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19. Where salary is in dispute in the new contract, a single arbitrator acceptable to both the NHL Player's Association and the League, is chosen to give a final and conclusive figure. Prior to this method of arbitration, all salary disputes were settled by, Clarence Campbell, President of the NHL.
  20. The matter of trades will be discussed in more detail later in this study.
  21. Clause 11 of the NHL Standard Player's Contract (amended form March, 1972) sets out the Club's right to sell, assign, etc., a player's contract to another team.
  22. The agreement to honour each other's suspensions is found in the Pro-Amateur Agreement and paragraph 26 of the Joint Affiliation Agreement signed by the NHL, CAHA and AHAUS.
  23. The term "organized hockey" is used here to include the NHL; the minor league professional leagues such as the American Hockey League and Central Hockey League; and all amateur teams falling under CAHA and AHAUS jurisdictions.
  24. For a detailed analysis of the tightly-knit arrangements between the NHL and minor professional and amateur hockey, see *Philadelphia World Hockey Club v. Philadelphia Hockey Club* (ref. — *supra* — footnote 5).

clause was enforceable internally among the N.H.L. teams, and between the N.H.L. and the various leagues and associations with which it had agreements, was it also enforceable against teams in the rival League? Could a player whose N.H.L. contract had expired be prevented from playing in the W.H.A. due to the reserve clause?<sup>25</sup> The answer to these questions would appear to be, "No",<sup>26</sup> and thus for at least the present, competition exists in professional hockey.<sup>27</sup> The future of the reserve clause and the W.H.A.'s attempt to modify the structures of the clause in its own Uniform Player's Contract, will be examined later in this study.

(b) *Football: The Option Clause:*

Professional football in both Canada and the United States and professional basketball use the option clause in their players' contracts. In the Canadian Football League Standard Player Contract, the "option clause" is found at paragraph 15 and reads:

On or before the date of expiration of this contract the Club may, upon notice in writing to the player addressed to ..... renew this contract for a further term until the 1st of June following said expiration, on the same terms as provided by this contract except that (1) the Club may fix the rate of compensation to be paid by the Club to the player during said period of renewal which compensation shall not be less

25. Suspecting that several players whose contracts had expired were planning to sign with WHA teams, letters were sent by various NHL teams to the players concerned. Below is an example of a fairly typical letter. The player to whom the letter was addressed is now performing in the WHA.

Dear \_\_\_\_\_:

It has been reported in the press that you have entered into some kind of an agreement with the World Hockey Association and/or a club affiliated with World Hockey. The purpose of this letter is to:

1. remind you that you are under a contract with the Boston Bruins which requires you to sign with and play for the Boston Bruins for the 1972-73 season, and
2. to notify you that we intend to enforce that contract.

If you have not in fact signed a contract with some other Hockey Club or if you did sign and now have second thoughts, we suggest strongly that you get in touch with Milt Schmidt or me immediately, and we will be very pleased to discuss the matter with you further.

In deciding what you should do at this point we think it extremely important that you take into account recent developments such as the decision in the Flood case, and the reports that certain players who had previously signed with a WHA franchise have now come back to their NHL Clubs and signed for the coming season.

Pursuant to Section 17 of your Standard Player's Contract we are tendering to you the enclosed new contract for the term commencing October 1, 1972, upon the same terms as your 1971-72 contract, save as to salary. Should you desire a longer term, we would offer that and be glad to discuss it also.

Should the salary reflected in the enclosed contract not be satisfactory to you, Boston is prepared to submit the matter of salary to Arbitration in accordance with Paragraph 17.

In accordance with our usual practice the original and two copies of your contract are enclosed; the original and one copy should be signed and returned to the Bruins, retaining one copy for your files.

Very truly yours,

26. (ref. — *supra* — footnote 5). Here, the Court concluded that the NHL had a monopoly over North American hockey, both at the professional and amateur levels and that such total control was in violation of the *Sherman Act* (U.S.). To uphold the reserve clause by preventing ex-NHL players playing in the WHA would be to increase the NHL's prescribed monopoly. See also: *Boston Professional Hockey Association v. Cheevers and Sanderson* (ref. — *supra* — footnote 5).
27. Should the WHA fold due to lack of fan support or should there be an eventual merger between the WHA and NHL, this desirable state of competition would end.

than ninety percent (90%) of the amount set forth in paragraph 3 hereof and (2) after such renewal the contract shall not include a further option to renew the contract; the phrase "Rate of Compensation" as above used shall not be understood to include bonus payments or payments of any nature whatsoever other than the precise sum set forth in paragraph 3 hereof. (emphasis added)

At first glance, the option clause appears infinitely more favourable to the player and theoretically it is. A player who wishes to play for another team at the termination of his existing contract need play only one additional season, if this option for his services for the additional year is exercised by his team. In effect, the player would be playing this final year without a signed contract, and in the words of the sport, would be "playing out his option". During this "year of limbo", that is, while the player is performing without a written contract, he is governed by the terms of his past contract, subject to the qualifications noted in clause 15 above. However, after the player has played out his option he becomes free to seek employment with any other football club, including any other C.F.L. team, since clause 15 specifically states that this "option year contract" as exercised by the Club "... shall not include a further option to renew the contract . . ." <sup>28</sup> In football, therefore, a player theoretically need play only one additional season for a team which he might want to leave, while his counterpart in the N.H.L. is bound to his Club in perpetuity. Still, the football player who wishes to play out his option, does so at a monetary sacrifice. While the option year is being played out, the Club need only pay the player 90% of his previous contract salary. Further, any bonus arrangements which existed in the previous contract — such as a bonus for scoring over a specified number of touchdowns or gaining so many yards rushing — will not be paid during the option year. As well, additional payments for playing in a semi-final; league final or the Grey Cup Game will not be paid. <sup>29</sup> The obvious intent of these punitive provisions attached to playing out an option is to dissuade players from in fact exercising their right to leave a Club at the player's, rather than the Club's, will. <sup>30</sup>

Even when a football player has played out his option, however, there is no assurance that he can find employment with another club in the C.F.L. In fact, the odds in favour of playing for another team in the

28. Using the vernacular of the sport, a football player who has played at his option becomes a "free agent".

29. Paragraph 26 of the Standard Player's Contract for the Western Football Conference (WFC) of the CFL provides for the following play-off compensation:

(a) Playing in the WFC semi-final	\$ 400.00
(b) Playing in the WFC final	\$ 800.00
(c) Playing in the Grey Cup Game	\$1000.00
(d) Playing and winning the Grey Cup Game	\$ 500.00

It should be noted that paragraph 26 provides that the player must actually play in the above games to be entitled to the bonus money.

30. The option clause in NFL contracts is virtually identical to that in the CFL. See: *The Superbowl and the Sherman Act: Professional Team Sports and the Anti-trust Laws* (1967-68) 81 Harvard L.R. 418 @ 422.



League are very much against the player — unless he falls into the “super-star” category. The reason for this situation is due to the fact that under the by-laws of the C.F.L. the team which has lost the player who has played out his option must be compensated by the team with whom the player eventually signs.<sup>31</sup> Compensation will result in the signing team being forced to assign to the Club which has lost the player one or more of its own players to equalize the loss. Where the two teams cannot agree on the compensation, the League President is empowered to name the compensation and his decision is final and conclusive.<sup>32</sup> League officials and team management<sup>33</sup> will, of course, argue that some form of compensation system is necessary to retain relative parity within the League and indeed to preserve the League’s existence. Without such a system, the wealthiest clubs (in the case of the C.F.L., they are conceded to be the British Columbia Lions and the Toronto Argonauts) would attract all the top players, and would invariably win most games. Eliminate parity so that the results of a game are predictable and you also destroy spectator support, eventually resulting in the demise of the League.<sup>34</sup>

In reality, then, the professional football player is really little better off than his hockey counterpart regarding freedom of choice. The C.F.L. option clause itself operates to discourage a player from playing out his option while the “compensation” by-laws dissuades a team from signing a player who has become a free agent. Perhaps a rival team might be willing to sign a free agent who falls into the “superstar” category, but the average journeyman player (the vast majority of professional athletes) would be hard-pressed to find a team willing to engage his services, even if he were a free agent. The compensation payable to the player’s former team would probably strip the signing team of any strengthening of its roster which it accomplished by signing the player, and in fact could weaken the team. Further, players falling within the definition of “superstar” for the most part do not generally play out their options, since their club will pay them large salaries and “sweeten” their contract with generous bonus clauses and other “extras” to ensure that the player remains with them.<sup>35</sup> Thus, for most professional football

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31. The writer was unable to obtain a copy of the CFL by-laws. The source of information regarding the “compensation” by-law was the General Manager of a CFL team.
  32. The CFL “compensation” by-law is virtually identical to its counterpart in the NFL. In fact, the CFL provisions were adopted from the NFL. The clause has become known as the “Rozelle clause” after Pete Rozelle, Commissioner of the NFL who devised the system. See: **The Superbowl and the Sherman Act: Professional Team Sports and the Anti-trust Laws** (ref. — *supra* — footnote 30) at p. 422.
  33. Source: ref — *supra* — footnote 31.
  34. For a discussion of the need for parity in professional sports, see (ref. — *supra* — footnote 5), **Philadelphia World Hockey Club v. Philadelphia Hockey Club**, at p. 486.
  35. For example, Joe Thiesman, quarterback of the Toronto Argonauts of the CFL was induced to play football in Canada rather than the United States (where he had been an All-American with Notre Dame) by a generous contract, including a “no trade” clause. See: **The Balance of Power in Professional Sports** (1970) 22 Maine L.R. 459 @ 468.

players there is no "option" to change employers nor does the player become "free" when he has played out his option. The realities of the sport virtually forces him to stay with his original team, (unless traded, sold, put on waiver or released, all at the sole discretion of his team) and his theoretical freedom of choice becomes a myth.<sup>36</sup>

(c) *Fines and Suspensions:*

Both the N.H.L.<sup>37</sup> and C.F.L.<sup>38</sup> standard players' contracts contain provisions empowering a team to discipline a player by fine or suspension. Under both contracts, the prerogative to discipline rests solely with the team<sup>39</sup> In certain instances, the power to discipline is probably a necessary technique in administering a professional sporting team and as such is a *bona fide* club (no pun intended) power. Thus, a player might be fined for reporting late to practice; or staying up past the curfew time set by the team. Discipline for such infractions as these is administered via a readily discernible objective standard — a practice is set for 10:00 a.m. and a player reporting at 11:00 a.m. because he slept in should

36. Despite its potential for abuse, the option clause has been upheld as valid in both football and basketball. In the case of football see: *Roeves v. Huffman* (1951) 4 D.L.R. 324 (Man. K.B.); *Philadelphia Eagles Inc. v. Armstrong* (1951) 3 W.W.R. (N.S.) 657 (Man. K.B.). (Note: both Canadian cases deal with the United States football option clause as both defendants were imports. The option clause for Canadian Football is virtually the same); *Dallas Cowboys Football Club Inc. v. Harris* (1961) 348 S.W. 2d. 37. For basketball, see: *Central New York Basketball Inc. v. Barnett* (1961) 181 N.E. 2d 506; but for a contrary decision see, *Connecticut Professional Sports Corp. v. Heyman* (1967) 276 F. Supp. 618. The most recent decision on the basketball option clause involved Wilt (the Stilt) Chamberlain of the Los Angeles Lakers of the N.B.A. Here, a California Superior Court judge has ruled that Chamberlain cannot play for the San Diego Conquistadors of the rival A.B.A. as Los Angeles had exercised its option for Chamberlain's services for the 1973-74 season. *The Winnipeg Tribune*, 11 October, 1973.

37. NHL Standard Player's Contract (March, 1972) paragraph 4. Club Rules; Fines.

The Club may from time to time during the continuance of this contract establish reasonable rules for the government of its Players "at home" and "on the road", and such rules shall be a part of this contract as fully as if herein written and shall be binding upon the Player; and for violation of such rules or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player, the Club may impose reasonable fines upon the Player and deduct the amount thereof from any money due or to become due to the player. The Club may also suspend the Player for violation of any rule so established, and during such suspension the Player shall not be entitled to any compensation under this contract. When the Player is fined or suspended, he shall be given notice in writing, stating the amount of the fine or the duration of the suspension therefor. In the event the Player believes the fine or suspension to be unreasonable, he may, within forty-eight (48) hours of notice of the fine or suspension, request the League President to rule on its reasonableness, and the President's decision shall be binding on Player and Club.

38. CFL Standard Player's Contract, paragraph 8:

The player agrees that should he at any time or times, or in any manner, fail to comply with the covenants or agreements on his part herein contained, or any of them, or should the player at any time be intemperate, immoral, careless or indifferent, or conduct himself in such manner, whether on or off the field, as in the opinion of the Club, endangers or prejudices the interests of the Club, or fails to attain when requested, first class physical condition, or fails to maintain first class physical condition throughout the football season, then the Club shall have the right to discipline, fine, suspend for any period or indefinitely, or cancel the contract in such manner as the Club shall deem fit and proper, and in case of a fine being imposed by the Club, the player agrees to pay such fine or the Club may withhold an equivalent amount from any salary due or to become due in payment thereof.

39. Under clause 18 of the NHL Standard Player's Contract, provision is made for the submission of disputes (except those relating to salary) between an aggrieved player, and a team to the League President. It is not specified if the "dispute" can relate to fines or suspensions. In discussing this matter with an NHL player, however, he advised that before there is a grievance on a fine, the amount must be (in his words) "... quite substantial" and cited \$500.00 as a floor figure. The WHA provision regarding arbitration on discipline is much more precise regarding the player's right of appeal, and will be discussed further in this work.

rightly face some type of discipline. However, when discipline is based on subjective judgments, inequities for players can result. Thus, fines have been imposed on hockey players because the team coach — in his sole opinion — has decided that the particular player has not been playing to his maximum ability during a game or series of games.<sup>40</sup> Further, a coach has been known to fine a player \$25.00 for taking more than two steps over the blue line before shooting the puck;<sup>41</sup> or taking his car to the rink for a practice rather than walking, as decreed by the coach.<sup>42</sup>

Conceding that a team must hold some power of sanction over its players to maintain discipline,<sup>43</sup> inequities for players result when management exercises the power in an arbitrary and unfair manner. As noted above, no right of appeal lies from discipline decisions. Further, discipline can be exercised in ways other than through a suspension or the imposition of a fine. Thus, trades or demotions to the minor leagues can be effective weapons against recalcitrant players.<sup>44</sup> Indeed, the N.H.L. Standard Player's Contract specifically refers to the assignment of a player's contract being pursuant to disciplinary action:

The Club shall pay the actual moving expenses incurred by a player during the playing season when such move is directed by the Club *and is not part of disciplinary action.* (emphasis added)

Should a player refuse to report to his assigned team because he deems the form of discipline unfair, then he is in breach of his contract and faces suspension and loss of salary:

If the Player fails to report to such other Club he may be suspended by such other Club and no salary shall be payable to him during the period of such suspension.<sup>45</sup>

In discussing assignment of contracts as a form of discipline with several professional hockey and football players, it was learned that this form of sanction is very real and is particularly feared by players because of disruptions in family life caused through moving. One particularly telling incident of discipline through trade was related to the author by a professional hockey player and involved a player that the club management regarded as a "troublemaker" and a "loudmouth" because of his alleged irreverent attitude to the coach and general manager.

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40. **Source:** interview with professional hockey player currently playing with a team in the NHL.
  41. **Source:** interview with current NHL player.
  42. Conacher, Brian: **So You Want to be a Hockey Player** (Pocketbooks, Richmond Hill, Ontario, 1971) p. 68 (first published in 1970 as **Hockey in Canada: The Way It Is** (Gateway Press).
  43. The need for team rules and regulations and the imposition of penalties for their breach was acknowledged by all players interviewed.
  44. Clause 11 of the Standard Player's Contract (March, 1972) (NHL). For football, see clause 14 of CFL Standard Player Contract.
  45. Clause 11, NHL Standard Player's Contract. Although the CFL Standard Player Contract is not as specific as that of the NHL in relations to assignment of contracts as a disciplinary measure, a football player refusing to report to his new team would also be in breach of his contract, and liable to a suspension and loss of salary.

Management had decided to assign the player's contract to one of its farm teams as a disciplinary action but the player was not informed of the assignment until he was seated on a chartered bus with his teammates waiting to go to what he thought was his next game with the team. To add insult to injury that particular player's suitcase was at the rear of the bus' baggage compartment and he was forced to retrieve it himself by moving all other baggage aside. The point the player interviewed wished to make was that the team purposefully set out to humiliate the player in front of his teammates as an added measure of punishment, as if the contract assignment were not sufficient. Obviously, management had known well in advance of the trade, but chose this very inopportune time to inform the player of it.

(d) *Blacklisting*<sup>46</sup>

Blacklisting is a method used by team management to get rid of an "undesirable" player who has not breached his contract and therefore cannot be fined or suspended. Since a coach has the unabridged power to cut a player from a team's roster, it is possible for an "undesirable" player to be removed from the team on the pretext that he is not good enough to make, or stay with, the team.<sup>47</sup> Why would a player — especially a competent one — be blacklisted? Bernie Parrish, a former defensive star with the Cleveland Browns of the N.F.L. suggests that he was blacklisted because of his activities in the N.F.L. Player's Association.<sup>48</sup> An ex-professional football player with whom the author spoke stated that blacklisting is used against a player who "... refuses to accept rigid authority" or who has "... different values either morally or otherwise than a coach." In short, the blacklist can be used against any player whom the team management (including the coach) feels is a "trouble-

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46. Information on blacklisting was obtained primarily through interviews with two former CFL players.

47. See Clause 10, CFL Standard Player Contract. A portion of the clause reads: "... If, in the opinion of the Head Coach, the player fails at any time during the term of this contract to demonstrate sufficient skill and capacity to play football of the calibre required by the Conference or by the Club, or if, in the opinion of the Head Coach, the player's work or conduct in the performance of this contract is unsatisfactory, or where exists a limit to the number permitted of a certain class of player, and in the opinion of the Head Coach, the player being within that class should not be included amongst the permitted number, the Club shall have the right to terminate this contract upon notice to the player. It is agreed by both parties that the Club's Head Coach shall be the sole judge as to the competency and satisfaction of the player and his services. (emphasis added)

48. Parrish, Bernie, *They Call it a Game* (ref. — *supra*, footnote 16) Chapter Eleven: Blacklisting. Parrish also provides other alleged examples of blacklisting in the NFL and CFL.

Another more recent example involves John Mackey, one of the NFL's finest tight-ends who was ignored by 25 clubs in the NFL after being placed on waivers of \$100.00 by the Baltimore Colts. Mackey also happened to be President of the NFL Player's Association. Eventually, Mackey was signed by the San Diego Chargers. *The Winnipeg Tribune*, 19 September, 1972.

See also *Radovich v. National Football League* (1956) 352 U.S. 445 (U.S. Court of Appeals, ninth circuit) where, *inter alia*, the issue of blacklisting was raised.

maker" or whom the club feels is becoming too political or a "clubhouse lawyer".<sup>49</sup>

The effects of blacklisting can be devastating to a player's career. Once a player is placed on a team's blacklist, no other team will deal with him, as all other clubs in the league have been advised that the player is on the blacklist. Theoretically free to negotiate with any team since he has been cut from his former club's roster, the blacklisted player will find it impossible to get any other team in the league to sign him, or even give him a tryout. Team management, of course, denies the existence of a blacklist,<sup>50</sup> but evidence in support of its existence remains strong as evidenced by Bernie Parrish's experience;<sup>51</sup> and the fact that the C.F.L. Players' Association has allegedly proposed to the League that a player's name could remain on blacklist for no longer than one year.<sup>52</sup> In blacklisting we have perhaps the most potentially dangerous effects of inter-team conspiracy working to the detriment of the individual player.<sup>52A</sup>

(e) *The Competition Act and Professional Sports:*

Although restrictive covenants in professional sporting contracts — and in particular the N.H.L. reserve clause — have been challenged in United States Courts,<sup>53</sup> no similar litigation has taken place in Canada. The proposed federal *Competition Act*<sup>54</sup> if ever enacted, could provide a basis for eliminating some of the most inequitable aspects of professional sporting contracts which have been fostered by the various leagues' monopolistic positions. Section 19 of the proposed *Competition Act* touches directly on professional sports monopoly and reads:

- 19(1) No person shall conspire, combine agree or arrange with any other person,
- (a) to limit unduly the opportunities for any other person to participate, as a player or competitor in professional or amateur sport or to

49. Parrish, **Bernie They Call it a Game** (ref. *supra* footnote 16) at p. 172.

50. The use of blacklisting was unequivocally denied by the general managers of a CFL football team and WHA hockey team in interviews with the author.

51. *Supra*, footnote 42.

52. **Source:** Interview with ex CFL player.

52A. Recently two Winnipeg Blue Bomber football players were released from the team because of narcotic charges. (again, see footnote 38, *supra* for the teams power of discipline over a player). The players, Mack Herron and Jim Thorpe, could both be classed as "star" players, with the term being especially appropriate for Herron who had been an All-Canadian running back in 1972. Despite the obvious talents of these players, no other CFL team picked them up when placed on waivers by Winnipeg. Earl Lunsford, General Manager of the Bombers, emphatically denied that the other CFL teams had discussed Herron and Thorpe with the result that no team would pick them up. To quote Lunsford:

I've been in the League six years and no player or players was ever discussed in this kind of situation. There has never been what you'd call a blackball, never an arrangement at any table — **The Winnipeg Tribune**, 14 June, 1973.

Herron has subsequently been signed by the New England Patriots of the NFL.

53. **Philadelphia World Hockey Club v. Philadelphia Hockey Club** (ref. *supra*, footnote 5).

54. **Bill C-256**.

- impose unreasonable terms or conditions on those persons who so participate or
- (b) to limit unduly 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 professional or amateur sport.
2. In determining whether or not an agreement or arrangement violates subsection (1), any court before which such a violation is alleged shall have regard to:
- (a) whether the sport in relation to which the violation is alleged is organized on an international basis, and if so, whether any limitation, terms or conditions alleged are, for that reason, reasonable in Canada, and,
  - (b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the sport.

If ever enacted, the *Competition Act* is bound to strengthen the professional athletes' bargaining position *vis-a-vis* the teams in the league. Section 19(1)(a) would appear aimed at mergers between rival leagues (which of course, effectively destroys competition for the player's services) and also appears to be directed at perpetual option clauses in contracts such as the N.H.L. reserve clause. Although Section 19(1)(b) seems directed at the draft system, the saving provisions provided by subsection 2 and in particular clause (b) would undoubtedly allow the retention of the existing draft system in the C.F.L. and N.H.L. in the interests of team parity.

### *The Effect of the World Hockey Association on the Professional Hockey Player:*

All professional hockey players with whom the author spoke — both from the N.H.L. and W.H.A. — agreed that the emergence of a competitor to the N.H.L. was a blessing to the players in the game since the first time, professional hockey players were operating in a competitive market. For those players emerging from the amateur ranks or for those N.H.L. and minor league players whose contracts terminated in 1972, the new league offered not only a genuine option for their services, but also inflated salaries to an unusually high level because of the "price war" with the N.H.L.<sup>55</sup> Needless to say, players coming into the N.H.L. or those whose contracts terminated in 1972 and who chose to remain with the established league, also profited by the birth of the W.H.A. since the N.H.L. was forced to raise salaries to remain competitive.<sup>56</sup>

55. Thus, Bobby Hull was enticed from the Chicago Black Hawks (NHL) to the Winnipeg Jets of the WHA for a signing bonus of one million dollars plus a ten year contract which reportedly was also for one million dollars. Derek Sanderson of the Boston Bruins (NHL) accepted a contract in excess of one million dollars to sign with the Philadelphia Blazers of the WHA.

56. According to Alan Eagleson, executive director of the National Hockey League Player's Association, the average NHL salary for the 1972-73 season was \$40,000.00 - \$45,000.00. Eagleson noted that in years past NHL salaries increased approximately ten percent per year, but with the emergence of the WHA, they rose about forty percent for one season. *The Winnipeg Tribune*, 6 December, 1972. Eagleson has predicted that for the 1973-74 season, average salaries will be \$55,000 to \$60,000. *The Winnipeg Tribune*, 1 August, 1973.

In addition to raising the general salary level in professional hockey, the W.H.A. also modified some of the most restrictive covenants contained in the N.H.L. Standard Player's Contract. The most important of these changes undoubtedly concerned the reserve clause, which was effectively challenged by the W.H.A. in United States District Court.<sup>57</sup> Since the W.H.A. took the position that the reserve clause was illegal as being in breach of United States anti-trust laws,<sup>58</sup> it could not very well have such a provision in its own Uniform Player's Contract. The result was clause 16 of the W.H.A. Uniform Player's Contract — a clause which sets out in the detail steps to be followed where a signed player cannot agree on the terms for a new contract.

### 16.1 — *Player Negotiations:*

If the Player and the Club fail to sign a new contract for the season following the termination of this contract before June 1, the arbitration procedure outlined in this Paragraph 16 shall automatically go into effect.

### 16.2 — *Arbitration Procedure:*

16.2.1 — On or before July 4 following the last playing season of this contract, in the event the Player and the Club fail to enter into a new contract, the Player and the Club shall each appoint one person to hear and determine the dispute preventing the signing of such new contract. If these persons are able to reach agreement on or before July 15 of the year of the dispute, no further proceedings are necessary. If they are unable to reach agreement on or before that date, then they shall immediately select a third impartial arbitrator whose decision shall be reached on or before July 31 of the year of the dispute.

16.2.2 — Player and Club agree to arbitrate in good faith.

16.2.3 — If the Player and Club agree that the decision of the impartial arbitrator is fair, a new contract will be executed embodying the terms of his decision.

16.2.4 — If either the player or the Club disagree with the decision of the impartial arbitrator, they may refuse to enter into a contract and the Player automatically enters into a special "secondary draft" pool on August 1 of the year of the dispute.

### 16.3 — *Secondary Draft:*

16.3.1 — Once a Player enters the secondary draft pool, he may sign a contract with any other club until he is drafted.

16.3.2 — The League will hold, in accordance with its normal draft procedure, a "secondary draft" on or above August 15 of each year. Teams will draft in the same order as in the normal yearly draft.

16.3.6 — The Club with which the Player was under contract immediately prior to the draft may *not* draft the Player in this manner.

57. Ref. *supra*, footnote 5. This victory is only on an interim basis pending the outcome of the trial of the NHL reserve clause and its possible violation of the Sherman Anti-Trust laws. The outcome of this decision will probably go to the United States Supreme Court for an ultimate ruling. Higginbottom's decision may serve as guideline in the final outcome however.

58. The reason that United States monopoly laws in regard to professional sports was tested was because the United States teams in the NHL chose to sue their players — such as Bobby Hull (Chicago Black Hawks) and Johnny McKenzie (Boston Bruins) — for alleged breach of the reserve clause. Although Canadian NHL clubs also lost players to the WHA (e.g.: Bernie Parent from the Toronto Maple Leafs to the Philadelphia Blazers; J. C. Tremblay from the Montreal Canadiens to the Quebec Les Nordiques), legal action was not taken by any Canadian team in regard to the reserve clause.

### 16.4 – *Subsequent Secondary Drafts:*

In the event the Player and the Club that drafted him in the secondary draft are unable to reach an agreement by September 1, the Player will enter a pool for a new secondary draft, the date of which will be determined by the League President.

### 16.5 – *Costs of Arbitration:*

The costs of the arbitration, including costs expended by the President and his staff if his services are required, will be borne by the Club and the Player, and the Player hereby authorizes his employing club to deduct his share of the expenses from the first payment due the Player under the next contract he signs.

The strict wording of clause 16 would allow an unsigned player to become a free agent once he had followed the arbitration and secondary draft steps outlined above. Two points should, however, be noted in regard to clause 16. By clause 16.3.2, the "secondary draft" is held near the middle of August – a time dangerously close to when professional hockey training camps generally open.<sup>59</sup> A player without a team at this time might tend to become somewhat uneasy, as he faces possible unemployment for at least a season.<sup>60</sup> With these thoughts in mind, a player might be reluctant to exercise his rights under clause 16. The second point worth noting is that clause 16 applies only to players who have previously signed a contract with a W.H.A. team and not to newly drafted players. A draft choice player would therefore appear to be locked into the club which originally drafted him and would not have available the possibility of playing for a W.H.A. team of his choice. However, to ensure that top draft choices remain within the league rather than sign with an N.H.L. club, it has been W.H.A. policy – during its initial season at least – to allow a player with whom the drafting team cannot come to terms – to sign with any other W.H.A. where an agreement can be reached.<sup>61</sup> Whether this "gentlemen's agreement" will last, as the league becomes established and the teams more competitive is conjecture at this stage. The answer to the problem is, of course, to amend clause 16 to include drafted as well as signed players.

Another significant difference between the W.H.A. Uniform Player's Contract and its N.H.L. counterpart is in the area of club fines and rules. Under clause 4 of the W.H.A. contract,<sup>62</sup> the Club is still em-

59. Hockey training camps usually open in September - October of each year.

60. For an insight into the problems faced by an unsigned player at training camp see: Conacher, Brian: *So You Want to be a Hockey Player*: Chapter VII: "First Year Pro, 1985-86."

61. Source: Winnipeg lawyer involved in the negotiation of contracts for several WHA and NHL players.

62. Clause 4 of the WHA Uniform Player's Contract reads:

**Club Rules: Fines.**

The Club may from time to time during the continuance of this contract establish reasonable rules for the government of its Players "at home" and "on the road", and such rules shall be a part of this contract as fully as if herein written and shall be binding upon the Player; and for violation of such rules or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player, the Club may impose reasonable fines upon the Player and deduct the amount thereof from any money due or to become due to the Player. The Club



powered to establish rules of conduct and impose fines and suspensions for their breach, but the aggrieved player is now given a specific right of appeal to the League President as to the reasonableness of the penalty imposed. The decision of the President is binding on both the team and the player.<sup>63</sup>

### *The Players' Association:*

#### (a) *Introduction:*

Like the objectives of the trade union movement generally, the goal of the players association in professional sports is to correct the imbalance of power existing in favour of the employer. The major North American spectator sports — football,<sup>64</sup> hockey,<sup>65</sup> baseball,<sup>66</sup> and basketball<sup>67</sup> — all have associations to represent member players on a multitude of matters, from minimum salaries to pension plans.<sup>68</sup> It would appear that team owners originally resisted the movement of players toward collective action, thus creating a parallel with the trade union movement.<sup>69</sup> Finally, the existing players associations have chosen different routes to arrive at a common destination — improvement of the player's economic position and working conditions. Thus, the National Football League Player's Association has, obtained formal certification as exclusive bargaining agent for N.F.L. players, through the National Labour Relations Board.<sup>70</sup> In hockey, the N.H.L. Players Association<sup>71</sup> has not obtained

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may also suspend the Player for violation of any rules so established, and during such suspension the Player shall not be entitled to any compensation under this contract. When the Player is fined or suspended, he shall be given notice in writing, stating the amount of the fine or the duration of the suspension and the reason therefor. In the event the Player believes the fine or suspension to be unreasonable, he may, within forty-eight (48) hours of notice of the fine or suspension, request the League President to rule on its reasonableness, and the President's decision shall be binding on Player and Club.

63. Again, see footnote 39 regarding discipline appeals in the NHL.

64. Canadian Football League Player's Association (Canada); National Football League Player's Association (United States).

65. National Hockey League Player's Association; World Hockey Association Player's Association.

66. Major League Baseball Player's Association.

67. National Basketball Association Player's Association; American Basketball Association Player's Association.

68. Although this study deals essentially with the players associations in the "major" or "big" leagues, "minor" leagues — such as the American Hockey League — also have their associations. From interviews with present and former minor league players, it would appear that the players' associations in the minor leagues do not have the strength of their major league counterparts due to the fluid nature of the minor leagues. (most players here view their stay in the minors as a stepping stone to an eventual permanent position with the majors)

69. Again, note the comments of ex NFL player Bernie Parrish; ref. *supra*, footnote 42. Further, interviews which the author conducted with several professional hockey players indicated that active members of the players associations in that sport are still looked on by many owners with a degree of suspicion — especially for players associations at the minor league level. Another player — one who had played in the NHL during the 1950's — was of the opinion that certain players active in the formation of the NHL players association during that period, were traded because of their association activities.

70. Region 18, Minneapolis, Minnesota.

71. The WHA players have also recently formed an Association, but as it is still in the infancy stage, no details are available on its activities.

formal certification<sup>72</sup> but rather has been granted recognition from all N.H.L. teams and has negotiated a series of agreements with the league and teams covering matters of importance to players, such as the agreement of 29 March, 1972, allowing salary disputes to be settled by a neutral arbitrator rather than the League President.<sup>73</sup> The C.F.L. Player's Association, although a functioning association is, according to one of its executive members, at least five years behind the N.F.L. Player's Association in terms of relative strength to management, but is moving toward closing this gap.<sup>74</sup> Regardless of their stage of development or methods of negotiation, however, it is obvious that professional athletes are no longer prepared to rely on the benevolence of club owners in obtaining better working conditions.<sup>75</sup> Both from a popular and legal point of view, player's associations — be they formally certified or not — are in essence trade unions<sup>76</sup> and have in recent years stressed this role by either threatening to use or actually employing organized labour's strongest weapon — the strike.<sup>77</sup>

(b) *Scope of Players' Associations:*

(i) *Monetary benefits:*

Traditionally, players associations have concentrated their activities in such areas as player pensions,<sup>78</sup> medical plans; bonus arrangements for play-off games;<sup>79</sup> increased meal money on road trips; training camp

72. In regard to certification, both the NHL and WHA present a potential problem because both leagues contain United States and Canadian teams. This problem will be discussed in more detail later in this study.

73. Bargaining between the NHL Players Association and the NHL is carried out through the medium of an Owner-Player Council, which meets regularly. *Philadelphia World Hockey Club v. Philadelphia Hockey Club* — ref. supra, footnote 5 at p. 482.

74. Source: interview with ex CFL player and former executive member of the CFL Player's Association.

75. Again, see footnote 39 regarding discipline appeals in the NHL. See *Unionization and Professional Sports* (1962-63) 51 Geo. L.J. 749 at 772 for a description of baseball's "representative" system for settling player-team problems, noting especially the fact that player representatives acted as mere conduits to the team owners who had the final power of decision over player grievances or suggestions.

76. This view was expressed by counsel for the NBA Players Associations. *Ibid.* @ p. 773.

77. In April, 1972, the Major League Baseball Players Association called a strike against the National and American Baseball Leagues which lasted 13 days and represented the first walkout in baseball history. A threatened strike by players against the Canadian Football League was avoided by an eleventh hour settlement between the League and the Association, just hours before the opening of the 1972 CFL season.

78. All sports in which there are players associations have pension plans varying in their operation. In the NHL, for example, the teams contribute all monies to the pension plan, while in the CFL, contributions are made by both the team and the players. It was the dispute over player pensions which was the root cause of the 1972 baseball strike.

79. One player interviewed related an incident regarding play-offs in the American Hockey League during the 1970-71 season. At the end of the regular season, an extra game was required to decide which of the two tied teams would get into the play-offs. It is quite rare for such extra games ever to be required as generally, play-off position can be determined on a won-lost or goals for-and-against average *vis-a-vis* the tied clubs which will enter the play-offs. The agreement between the league and the players association had no provision for remuneration where such an extra game was necessary. When management indicated that the participating players would receive no extra money for the game, the association, speaking for the players, demanded \$125.00 for each participant, or no game would be played. Management finally acceded to the association's demands and the game was played. The player was of the opinion that, but for the association, the players would have received no extra money although they had played an extra game, with of course, added gate receipts for the club owners.

expenses, etc. In short, the initial thrust of such associations has been toward the economic betterment of players. A recent "box score"<sup>79A</sup> of the accomplishments of the Major League Baseball Player's Association between 1967 and 1973 vividly illustrates the improvement in the lot of the average major league ballplayer. The majority of items noted below would also apply equally to football and hockey, subject to variations on minimum salaries and expenses among the different sports:

*Six-year comparison of Players' status salaries:*

	1967	1973
	(Estimated)	
Major League minimum .....	\$7,000	\$15,000
Maximum cut in one year .....	25%	20%
Maximum cut over two years .....	44%	30%
EXPENSES:		
Per diem on road in season .....	\$12.00	\$19.00
Per week in spring training .....	\$25.00	\$55.00
SEVERANCE PAY:		
If released during spring training .....	0	30 days' pay
If released between opening day and May 15 .....	30 days	60 days' pay
If released after May 15 .....	30 days	full years' pay
MOVING EXPENSES:		
If traded in season, within Majors .....	Yes	Yes
If traded out of season .....	No	Yes
If sent to minors .....	No	Yes
If called up from minors .....	No	Yes

(ii) *Job Security:*

Together with seeking increased economic benefits for their members, players' associations have also pressed for job security on behalf of players. The question of job security becomes important in a sport such as hockey where National Hockey League Clubs are supported by a network of minor league teams, with each N.H.L. team either owning and operating or having an affiliation agreement with a "player development team" (in other words, a minor professional league club).<sup>80</sup> In times prior to the advent of the Player's Association, any N.H.L. player at anytime could be sent down to a minor league team even if he were a protected player.<sup>81</sup> Primarily through the efforts of the Player's Associa-

79A. Source: *The Winnipeg Tribune* (1973).

80. See *Philadelphia World Hockey Club v. Philadelphia Hockey Club* (ref. supra; footnote 5 @ p. 474). The minor professional hockey leagues in North America which "support" the NHL are the American Hockey League (AHL); Western Hockey League (WHL) and the Central Hockey League (CHL).

81. Prior to the inter-league and amateur draft in the spring of each year, every NHL club would declare a list of its "protected players", namely those players on the team from the season which had ended who could not be drafted by any other team in the league. Naturally the protected players were those with the greatest ability. Currently, each NHL team is allowed to protect 18 players. The object of the inter-league draft is to allow weaker and expansion clubs to bid on some players from the stronger teams in the League.

tion, a protected player today cannot be sent down to the minor leagues unless he either consents<sup>82</sup> or is first waived through the league.<sup>83</sup> Since a team is reluctant to place one of its protected players on waivers for fear of losing him to another team, the player who finds himself in this advantageous category is accorded a degree of protection in remaining in the major league. If however, a protected player is put on waivers and waived through the League (that is, no other team picks him up) his club may do with him as it wishes, including sending him to the minors without his consent. Practically, however, it would be rare for a protected player to be waived through the League without some team picking him up, unless an "agreement" existed within the League not to deal with the particular player.<sup>84</sup>

(iii) *Salaries:*

In the area of individual player's salaries, the players' association exhibits possibly its greatest difference from its trade union counterpart. Whereas in the industrial sector the collective agreement supercedes any individual contracts of employment<sup>85</sup> and stresses standard wages for equal work, contracts of service in professional sports are basically individual contracts of employment, with each player negotiating his particular salary based on his, and the team's, assessment of his abilities relative to his peers. The only role of the players' association in the area of salaries is the setting of a minimum rate which must be paid a player. However, even in the area of minimum salaries, the role of the players' association would appear to be minor. In the C.F.L. for example, the Players' Association has not seen fit to negotiate for minimum salaries.<sup>86</sup> While the N.H.L. has a floor salary in the neighbourhood of \$10,000, it is apparently unheard of for a new player to sign at this figure, nor would most N.H.L. teams consider making an offer at the minimum.<sup>87</sup> All hockey and football players interviewed agreed that it was not the function of their association to attempt to equalize salaries and emphasized that professional athletes preferred to keep salary negotiations on an individual basis, although one player interviewed stated that he would like to see guidelines for negotiations sent out to players, showing

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82. When a protected player is asked to go to the minors it is generally for conditioning purposes (for example, after returning to active play following an injury) and for a relatively short period of time (usually two weeks).

83. When a player is placed on waivers, a team which picks him up must pay the player's club a waiver fee of \$30,000.00 in addition to assuming the player's contract. The player gets no part of the waiver fee.

84. Again, see p.p. 370-71 *supra*.

85. *Le Syndicat Catholique des Employés de Magasins de Québec Inc. v. La Compagnie Paquet Ltee.* (1959) 18 D.L.R. (2d) 346 (S.C.C.).

86. *Source:* General Manager of a CFL team interviewed for this article.

87. It was emphasized by the hockey players interviewed that any player good enough to make an NHL team was worth more than the minimum salary and as a result, the floor figure is not considered seriously. The emergence of the WHA has, of course, further strengthened the player's bargaining position.

the highest, lowest and median salaries for a particular position.<sup>88</sup> Indeed, if a players' association ever attempted to standardize salaries, there would undoubtedly be an exodus of the "star" players from the ranks of the association, thereby undercutting the foundation of the players' association and eventually leading to its demise. For in terms of straight dollars and cents, the better the player, the less he requires the association. Bobby Orr<sup>89</sup> would be able to command high salaries; attractive fringe benefits and outside endorsements without a players' association. In the final analysis it is the average, journeyman player who will reap the greatest reward from his association.

In the collective agreement between the National Football League Players' Association effective 1 February, 1970, to 31 January, 1974, the preamble contains the following paragraph emphasized the individual nature of each player's contract:

Whereas, the NFLPA has negotiated with the NFLPRA on behalf of all the players in the NFL with respect to the terms and conditions of employment and it is specifically understood that each individual player has a right to negotiate with his club for regular season compensation in excess of the minimums established in this Agreement including bonuses and any form of deferred or other compensation . . .

(iv) *League Mergers:*

Since the merger between the National Football League and the American Football League, players' associations in other sports have actively contested or threatened to contest amalgamation between rival leagues. As a result of this position, a planned merger between the National Basketball Association and the American Basketball Association has been enjoined as a result of legal action instituted by the N.B.A. Players' Association.<sup>91</sup> When rumors of a merger between the National Hockey League and the World Hockey Association erupted in early 1973,<sup>92</sup> the NHL Player's Association voiced its strong opposition to the proposal, going so far as retaining counsel to launch legal proceedings to prevent any union of the two leagues.<sup>93</sup> As of the writing of this article (May, 1973) it would appear that merger talks between the two professional hockey leagues have been postponed for at least one year<sup>94</sup> but if resumed would undoubtedly face opposition from the players' associations of both leagues.

88. It would appear that CFL players receive a salary survey with such information, according to an ex-player interviewed. Anonymity is the rule in such surveys.

89. Defenceman for the Boston Bruins of the NHL.

90. Quarterback for the Toronto Argonauts of the CFL.

91. *Robertson et al v. National Basketball Association et al.*, 1970 Trade Cases 73, 282 (S.D.N.Y. 1970) (temporary restraining order granted; preliminary injunction then issued which remains in force to this date); 5 Trade Reg. Rep. 74, 406 (S.D.N.Y. 1973) (ruling on contempt proceedings).

92. *The Winnipeg Tribune*, 4 April, 1973.

93. *The Winnipeg Tribune*, 7 April, 1973. The NHL Players' Association hired Ira M. Millstein of the New York City law firm of Weil, Gotshal and Manges to represent it in regard to the merger issue. Mr. Millstein had also represented the NBA Players' Association in its successful bid to prevent the NBA-ABA merger (see footnote 91, *supra*).

94. *The Winnipeg Tribune*, 11 April, 1973; 12 April, 1973.

(v) *Restrictive Covenants: The Reserve and Option Clauses.*

Although the NHL reserve clause has been legally attacked through the courts by the WHA,<sup>95</sup> its exact status *internally* within the NHL is still in doubt, with the result that the reserve clause continues to remain a part of every Standard Player's Contract.<sup>96</sup> It is reported, however, that the NHL Players' Association is seeking to have the controversial clause amended to prevent a team having a perpetual option for the services of a player.<sup>97</sup> The proposed clause would bind a player to a club for five years. The fifth season could be used by the player to play out his option, after which he would become a free agent. A player could exercise the option any time after he had been in the NHL four seasons.

Following the upholding of the baseball reserve clause in *Flood v. Kuhn*,<sup>98</sup> the Major League Baseball Players' Association presented the club owners with proposals to mode by the rigidity of the reserve clause. A summary of the Associations' submissions is as follows:

(a) After five years as a professional player, three in the major leagues, a player would become a free agent if he is earning less than the average league salary. After seven years, five in the majors, he would be able to make his own deal if not earning 1½ times the average and after nine years if not making twice the average.

(b) Regardless of salary, a player would become a free agent after seven, 12 and 17 years in the majors.

(c) Each year, ten players from a teams' master roster of 40 and five from the varsity roster of 25 would be freed of the reserve clause restrictions.<sup>99</sup>

Although the Commissioner of Baseball, Bowie Kuhn, has apparently conceded that changes would be necessary in baseball's reserve clause,<sup>100</sup> the 1973 baseball season opened without amendments to the clause, despite the Association's proposals as outlined above. Indications were that the reserve clause would be tabled for further joint Association - League study.<sup>101</sup>

It is probably safe to assume that the reserve clause will be modified in both hockey and baseball in the relatively near future. The major obstacle to be overcome is to devise a formula which allows not only for

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95. *Supra*, footnotes 5 and 57.

96. However, Clarence Campbell, President of the NHL has been quoted as follows: "... We must move to live within legal acceptability because perpetual option is impossible and nobody is seriously contending for it." *The Winnipeg Tribune*, 5 December, 1972. Yet the history of bargaining between the NHL Players' Association and the League would appear to demonstrate great resistance on the part of the club owners to modify the clause. See *Philadelphia World Hockey Club v. Philadelphia Hockey Club* (ref. — *supra*, footnote 5).

97. *The Winnipeg Tribune*, 22 March, 1973.

98. *Supra*, footnote 17.

99. *The Winnipeg Tribune*, 8 December, 1972.

100. *The Winnipeg Tribune*, 7 July, 1972. Kuhn's comments were made shortly after the United States Supreme Court's ruling in *Flood v. Kuhn*. (ref. — *supra*, footnote 17).

101. *The Winnipeg Tribune*, 26 February, 1973.

greater player mobility, but also ensures relative parity among teams within the league.<sup>102</sup>

Regarding football, there appears to be no concern by the players associations over the option clause as such. The major fear over the option clause, however, is its potential for abuse due to management conspiracy.<sup>103</sup> Properly and honestly applied, however, the option clause or some modification thereof is probably the best formula for achieving the mobility - parity objective in professional sports. It will therefore not be surprising if the modified reserve clause of the future turns out to contain the basic principle behind today's football option clause.

(vi) *Interleague trades.*

All players interviewed from both football and hockey agreed that trades were a necessary part of league operations and accepted them as an occupational hazard.<sup>104</sup> It was generally felt that a players association should not attempt to interfere with the practice of trades except to the extent of providing for payment of moving expenses for player and family. Where players seek protection from the disruptive effect of a trade, he must do so on an individual basis with the club. A player falling into the "super-star" category might therefore be able to negotiate a "no trade" clause in his contract,<sup>105</sup> while another may have a provision in their contracts stipulating that he may be traded only during the off-

102. During the course of the research being done for this article, a possible alternative to the reserve (and perhaps option) clause was formulated. Through a "compulsory trade clause" a player could give notice to a club that he wished to be traded to another league team. The club would then have a specific time period after notice has been given (two or three years) to attempt to induce the player to stay by added contract benefits; or could make a trade for him to their best advantage. If the club and player could not come to terms at the end of the specific time period allowed, or a trade is not made, then the player would become a free agent. For player protection, it would be imperative that the club not be allowed to decrease the player's salary or otherwise negatively alter the contract under which he was operating prior to notice being given.

Under the "compulsory trade clause", the player would acquire greater bargaining power, since once he is a free agent, any club in the league could pick him up without fear of retaliation from other league teams. Further, the club would not be prejudiced by the clause since it would have ample time to make either a profitable trade for the player; find a replacement for him, or come to terms with the player. It should be noted that the effectiveness of the above-described system is premised on the fact that the "losing" team is not entitled to automatic compensation as is currently the practice in the CFL. (See *supra*, p. 367).

103. *Supra*, p.p. 366-68.

104. Although most athletes are prepared to accept trades as an occupational hazard, there is no denying that at times, trades can be sudden, cruel and impersonal for the player involved. A good example is with Curt Flood who after 12 years as a star centre fielder with the St. Louis Cardinals was notified by a two sentence letter that he was being traded to another team. Flood had not been consulted of the trade and the letter was his first notice of it:

Dear Curt:

Enclosed herewith is player report notice No. 614 covering the outright assignment of your contract to the Philadelphia Club of the National League, October 8, 1968. Best of luck.

Sincerely yours,  
Bing Devine,  
General Manager.

(*The Balance of Power in Professional Sports* (1970) 22 Maine L.R. 459 @ 468).  
It was this trade which prompted Flood's challenge of the baseball reserve clause. *Flood v. Kuhn* (ref. *supra*, footnote 17).

105. *Supra*, footnote 35.

season.<sup>106</sup> Because of the competition for players with the NHL, some players on at least one WHA club have a "trade with consent" clause in their contracts, the effect of which is that the player can refuse to be traded in which event the team must honour his contract until it expires.<sup>107</sup>

(vii) *Commercial Promotions.*

A former executive member of the CFL Players' Association was of the opinion that the Association would become increasingly involved in commercial promotions, a forecast which would equally apply to players' associations in other sports. Thus, the CFL Players' Association has gone into competition with CFL Properties Ltd. regarding the marketing of items bearing the CFL insignia, with profits going to the Association. Since the value of sports promotions and endorsements depends essentially on the publicity of the player,<sup>108</sup> the Association maintains that the players, rather than the teams, should garner the biggest reward from commercial promotions.

(viii) *Miscellaneous Problems.*

A problem facing certain players in all professional sport is that of being kept on a club's roster as an "insurance man". When an unfortunate player falls into this category, he finds himself technically still a member of the team, but practically he is little more than an observer, since his only opportunity for playing will come if an active player is injured. A player with pride in his skills will naturally resent being caught in this position and may plaintively ask his coach: "Play me or trade me".

Unfortunately, the player who finds himself "riding the bench" as an "insurance" man has little, if any, control over the amount of game time he will get nor can he demand to be traded or sold to another team; given his release, or be placed on waivers, since these areas fall within the exclusive prerogative of the team executive and coaching staff.<sup>109</sup> A recent example of the hardship felt by a player in this unenviable situation concerned Tom Matte, veteran running back of the Baltimore Colts of the NFL. Matte remained technically a member of the team, but played in no games and was not permitted to participate in team practices. In a public statement, the troubled player stated:

I am discovering that my self-respect and a sense of pride which every football player has, which has carried me through 12 seasons with injuries and adversities as well as great personal and team successes, has been jeopardized to the point I can no longer sustain the situation.

106. One of the players interviewed advised that a prominent NHL goalkeeper had such an off-season trade clause in his contract.

107. Source: interview with the general manager of a WHA team.

108. In 1969 the CFL sold to CFL Properties Ltd. the right to market items bearing the CFL insignia.

109. See p. 368 *supra*.



My hope is that by being placed on waivers, I will be free to join another team where my 12 years of professional experience can make a significant contribution.<sup>110</sup>

However, despite Matte's request, Baltimore would not place him on waivers. In reply to the request Colts coach, John Sandusky stated:

Matte is our only insurance. I told Tom we needed him for protection.<sup>111</sup>

A possible solution to the Matte and like situations is for there to be a minimum amount of playing time given a player in order to keep him an active member of the club. Should a player perform below the minimum, he could demand to be placed on waivers so that another club might use his services to advantage. Details on minimum playing time could be worked out between the players' association and the league. By becoming involved in this area, the players' association would be making significant inroads into the individual players' gaining control over his own future.<sup>112</sup>

(c) *The Players' Association in the Future.*

The approaching years will likely see players' associations becoming increasingly similar to the traditional trade union, subject to the unique problems and factors associated with professional sports, some of which have been discussed above. Evidence of the association to trade-union trend is seen in such factors as the recent incidence of strikes or threats of strikes;<sup>113</sup> the growing power of, and membership in players' associations,<sup>114</sup> and the use of labour boards both for purposes of certification<sup>115</sup> and allegations of unfair labour practices. In regard to the latter point, the NFL Players' Association has successfully challenged an NFL owner's decision to fine automatically any player leaving the bench for a fight, the NLRB holding that such automatic fines constitute an unfair labour practice.<sup>116</sup> Further, the NLRB has ruled that artificial turf is a manda-

110. *The Winnipeg Tribune*, 21 November, 1972.

111. *Ibid.* For the lively and humorous account of an insurance quarterback in the NFL who capitalized on his "second string" status by becoming somewhat of a celebrity — with all its financial rewards — see: Ratterman, George: *Confessions of a Gypsy Quarterback*. Coward: McCann Inc., New York, 1962.

112. Whereas it would virtually be impossible for a player under contract to obtain a release if another team offered a more attractive contract, the same rule does not apparently apply to coaching staff (who are regarded as management). Thus, Bud Grant, former head coach of the Winnipeg Blue Bombers was allowed to sign with the Minnesota Vikings of the NFL even though he had just signed a five-year contract with the Bombers (Winnipeg Free Press, 11 March, 1967). More recently, two assistant coaches of the Bombers, Jim Stanley and Dave Smith, signed contracts with the Oklahoma State Cowboys, while still under contract with Winnipeg (Winnipeg Free Press, 25 March, 1972; 30 March, 1972).

113. *Supra*, footnote 77.

114. Both the CFL and NHL Players' Associations have virtually 100% player membership according to players and management interviewed, although a precise percentage could not be given.

115. The NFL Players' Association has obtained certification from the National Labour Relations Board. See collective agreement between the NFL Players' Association and the NFL, effective 1 February, 1970.

116. *The Winnipeg Tribune*, 1 November, 1972.

tory subject for collective bargaining, since its installation constitutes a change in working conditions.<sup>117</sup>

It is probably just a matter of time before players' associations in the other major spectator sports arrive at the trade union stage reached by the NFL Players' Association. In a league where all teams are within one country — such as the NFL and CFL — there is little problem in an association becoming certified after determining which labour law, federal or provincial (state) applies. In the case of Canadian professional football, it is probably safe to say that federal labour laws would apply to the CFL Players' Association given the interprovincial nature of the league.<sup>118</sup> Hockey, however, poses a problem given the international character of both the NHL and WHA, each league having teams in both Canada and the United States. If the players' associations in these leagues were to seek certification would they apply in the dominant country — the one which had the most teams<sup>119</sup> — or would application be made in both countries? Could a labour board decision of one country be applied to a team and players based across the border? These are some of the questions which would have to be answered if professional hockey were to enter into the area of formal certification.

Because players' associations in the various sports face common problems and have similar goals, it would not be surprising if the associations formed an "association" to deal with matters of common concern. The NFL Players' Association has reportedly formed a committee to set up a formal relationship with the CFL Players' Association.<sup>120</sup> Should formal ties be set up between the two associations, we would have the first "international union" in the area of sports. Further, Bernie Parrish, the ex-NFL player and key figure in the NFL Players' Association has conceived of the players' associations in baseball, basketball, football and hockey merging into one union with four divisions which union, in Parrish's own words would be ". . . large and powerful enough to deal effectively with matters common to all professional sports, and still allow each division to deal with problems unique to its own support."<sup>121</sup> Although the plan has not as yet come to fruition, we can probably ex-

117. *Ibid.* The NFL Players' Association has asked the League for a moratorium on further installation of artificial turf pending a study to determine if it increases injuries. *The Winnipeg Tribune*, 13 January, 1973.

118. There are no reported Canadian decisions on the matter of certification for either individual teams or a player's association. It is submitted that if the CFL Players' Association were to seek formal certification, federal labour laws would apply by virtue of the Peace, Order and Good Government provision of s.91; and s.91(2) (trade and commerce) of the B.N.A. Act. It is, of course, assumed that professional football players are "employees" within the definition of the *Canada Labour Code* R.S.C. 1970, c.L.1.

119. Of the 16 NHL franchises, three are Canadian (Montreal, Toronto and Vancouver). In the WHA, five of the 13 league teams are based in Canada (Quebec, Toronto (formerly Ottawa), Winnipeg, Edmonton and Vancouver (formerly Philadelphia)).

120. *The Winnipeg Tribune*, 13 January, 1973.

121. Parrish, Bernie: *They Call It a Game*, (ref. *supra*, footnote 16), @ pp. 251-263.

pect increased co-operation and exchanges of information between the associations with formal ties not inconceivable at some time in the future.

## CONCLUSION

If there has been an inexorable movement of the players' association to a position relatively parallel to that of a traditional trade union, the impetus for this movement has stemmed originally from a need to redress the player-team contract inequality which has existed in professional sports. Today, the players' association in North America has become increasingly involved in matters which once were left to the bargaining resources of the individual athlete, to the extent that professional sports can no longer be regarded as one of the last strongholds of rugged individualism where "union" or even "association" are looked at as fighting words. Facing a gargantuan figure in terms of a closely-knit unit of team owners and management, the individual player has come to see the need for a strong association to represent him on key issues and appears to be willing to entrust even greater authority to his association in the future. What the players' association has succeeded in doing is to provide the countervailing power in the professional sports arena to the ultimate benefit of the individual player.

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