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**TRYING HIS LUCK AT PUCK: EXAMINING THE MLBPA'S HISTORY TO DETERMINE DON FEHR'S MOTIVATION FOR AGREEING TO LEAD THE NHLPA AND PREDICTING HOW HE WILL FARE**

*By: Jordan I. Kobritz and Jeffrey F. Levine<sup>1</sup>*

On June 22, 2009, after twenty-six years at the helm of what has been described as the world's most powerful union for athletes,<sup>2</sup> seminal leader Donald Fehr announced his resignation as the Executive Director of the Major League Baseball Players Association (the "MLBPA").<sup>3</sup> During Fehr's time with the MLBPA, he earned both admiration and resentment for his views and actions on baseball's labor relations. Fehr's tenure as the MLBPA's head decision-maker was filled with conflict and constant labor strife; thus, it was unsurprising that Fehr explained his decision to resign by simply quipping that he desired to "take it easy."<sup>4</sup> With a severance package of \$11 million, he certainly could have chosen to enjoy his retirement and stay out of the sports labor relations limelight.<sup>5</sup> However, Fehr's retirement was short lived.

Instead of enjoying retirement, Fehr found a new labor relations challenge, this one in professional hockey. Within months, Fehr was asked to assist the rudderless National Hockey League Players Association (the "NHLPA") in revamping its constitution and finding a new Executive Director.<sup>6</sup> The NHLPA, a union with a long history of leadership mistrust and membership infighting, desperately needed Fehr's experience, steady hand, and guidance.

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<sup>2</sup> Liz Mullen, *MLBPA Veteran Orza Looks Back on Labor Peace as well as War*, STREET & SMITH'S SPORTS BUS. J. (Oct. 11, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/10/20101011/Labor-Agents/MLBPA-Veteran-Orza-Looks-Back-On-Labor-Peace-As-Well-As-War.aspx>.

<sup>3</sup> *Fehr Leaving Post After Quarter-Century*, ESPN.COM (June 23, 2009), <http://sports.espn.go.com/mlb/news/story?id=4278728>.

<sup>4</sup> *Id.*

<sup>5</sup> Amy K. Nelson, *Fehr Receives \$11 Million Package*, ESPN.COM (Oct. 20, 2009), <http://sports.espn.go.com/mlb/news/story?id=4581132>.

<sup>6</sup> Justin Piercy, *Fehr Agrees to Help NHLPA*, CBC.CA (Nov. 12, 2009), <http://www.cbc.ca/sports/hockey/story/2009/11/12/sp-nhlpa-fehr.html>.

Fehr's work with the hockey players was well received, which was confirmed when the NHLPA's own search committee recommended that he be elected as the next union leader.<sup>7</sup> Membership overwhelmingly voted to approve Fehr as the new NHLPA Executive Director,<sup>8</sup> and on December 18, 2010,<sup>9</sup> the union made the election official, thereby launching a pivotal era in the NHLPA's existence.

Fehr's election as the NHLPA's top leader symbolized a transition for him, as he now leads arguably the weakest union in professional sports.<sup>10</sup> The NHLPA's traditional weaknesses are juxtaposed by the strengths of the MLBPA. Baseball players have enjoyed strong and capable leadership for over four decades, first under the incomparable Marvin Miller (1966-82) and, after a brief interlude, by Fehr (1983-2009).<sup>11</sup> Hockey players, in contrast, have endured much less competent leadership from their executives since the union's inception.<sup>12</sup> Several NHLPA Executive Directors were forced to resign amid scandals, and one was even convicted of crimes against the membership on both sides of the border.<sup>13</sup> This distinction in leadership has led to sharply different bargaining relationships within the respective leagues.

With little time to prepare for negotiations on the next Collective Bargaining Agreement (the "CBA"), Fehr must prioritize his goals. His main objectives as he assumes the position of Executive Director of the NHLPA are (1) to change the union's culture of corruption and infighting, (2) educate the membership on the fundamentals of collective bargaining, and (3)

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<sup>7</sup> Jesse Spector, *NHL Players Association committee unanimously recommends Donald Fehr be new executive director*, N.Y. DAILY NEWS (Sept. 12, 2010), [http://articles.nydailynews.com/2010-09-12/sports/27075141\\_1\\_baseball-union-salary-cap-donald-fehr](http://articles.nydailynews.com/2010-09-12/sports/27075141_1_baseball-union-salary-cap-donald-fehr).

<sup>8</sup> Mike Brehm, *Don Fehr Overwhelmingly Approved as NHLPA Chief*, USA TODAY (Dec. 18, 2010), [http://www.usatoday.com/sports/hockey/nhl/2010-12-18-don-fehr-named-nhlpa-executive-director\\_N.htm](http://www.usatoday.com/sports/hockey/nhl/2010-12-18-don-fehr-named-nhlpa-executive-director_N.htm).

<sup>9</sup> *Id.*

<sup>10</sup> Jeff Z. Klein & Stu Hackel, *A High Profile for Fehr in the Players Union*, N.Y. TIMES (Mar. 27, 2010), <http://slapshot.blogs.nytimes.com/2010/03/27/a-high-profile-for-fehr-in-the-players-union/>.

<sup>11</sup> *History of the Major League Baseball Players Association*, MLB PLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Apr. 3, 2012) [hereinafter *MLBPA History*].

<sup>12</sup> BRUCE DOWBIGGIN, *MONEY PLAYERS: THE AMAZING RISE AND FALL OF BOB GOODENOW AND THE NHL PLAYERS ASSOCIATION* 82 (2006).

<sup>13</sup> *Id.*

prepare the players for a critical round of negotiations with the NHL.<sup>14</sup> Needless to say, Fehr has significant challenges before him, some that will be radically different from those he encountered in his prior position with the MLBPA.

For someone who wished to “take it easy” and stay out of the grind of labor relations in sports, Fehr’s involvement with the NHLPA seems odd, considering he is undertaking a significant challenge in the twilight of his professional career. However, to understand his motivation for taking the position, one must delve into the MLBPA’s history, paying careful attention to the years that Miller and Fehr spent at the helm of baseball’s union. Fehr’s leadership and experiences with the MLBPA are vastly different from what he will likely experience as NHLPA Executive Director, which may be one of the reasons why he chose to lead the NHLPA at such a pivotal time.

This article analyzes Fehr’s motivation for becoming the NHLPA Executive Director by examining the history of labor relations between Major League Baseball (“MLB”) and the MLBPA. Part I provides a history of unionism in the MLB and discusses the rights and benefits enjoyed by baseball players, most directly as a result of Miller’s and Fehr’s astute leadership. The section also briefly recounts Fehr’s involvement with the NHLPA and eventual election as Executive Director. Part II speculates on Fehr’s motivation for accepting his new position with the NHLPA, which may be linked to his experiences with the MLBPA. Part III discusses Fehr’s expected approach and style as the leader of the NHLPA. The authors will also point out how they believe Fehr’s experiences with the MLBPA will influence his strategy as he engages NHL owners in forging a new CBA.<sup>15</sup> Part IV provides a brief conclusion.

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<sup>14</sup> *Announcement on NHLPA, Fehr Expected Soon*, THE SPORTING NEWS (Dec. 20, 2010), <http://aol.sportingnews.com/nhl/feed/2010-08/nhlpa-turns-to-fehr/story/announcement-on-nhlpa-fehr-expected-soon>.

<sup>15</sup> *Id.*

**PART I: HISTORY OF UNIONISM IN MAJOR LEAGUE BASEBALL**

***BASEBALL UNIONISM'S EARLY BEGINNINGS***

The history of unionism in the MLB is as old as the game itself.<sup>16</sup> Although the word “union” did not creep into the lexicon of America’s professional baseball labor movement until the 1960’s, there were a number of attempts to organize the players against the iron fist of team owners.<sup>17</sup> Those attempts were not met with any long term – or, in some cases, even short term – success. However, players attempted to organize in response to what they viewed as grim working conditions. The players’ efforts to organize centered primarily on their low salaries and opposition to baseball’s reserve clause.<sup>18</sup>

From the very beginning of baseball’s labor relations, the player reserve system was a major bargaining issue. The reserve clause, or “reserve list” as it was first known, was created in 1879 in response to the recent formation of the National League (the “NL”) by a group of businessmen.<sup>19</sup> Prior to the formation of the NL, players had controlled the sport.<sup>20</sup> Now, businessmen would control the sport. The NL ushered in a new era, one in which the primary motivation for owning a baseball team was profit.<sup>21</sup>

Initially, only five players per team were included on the reserve list.<sup>22</sup> Players considered it an honor to be included on the list because that meant they were viewed by ownership as valuable members of the team. In addition to being paid more than their teammates, the designation symbolized job security. Players on the list were likely to be brought

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<sup>16</sup> MLBPA History, *supra* note 11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Reserve Clause – BR Bullpen*, BASEBALLREFERENCE.COM, [http://www.baseball-reference.com/bullpen/Reserve\\_clause](http://www.baseball-reference.com/bullpen/Reserve_clause) (last visited Oct. 6, 2011) [hereinafter *BASEBALL REFERENCE*].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

back for the following season. However, players soon realized that if they were on the reserve list, they lost their leverage to negotiate with other teams. As a result, player salaries were soon reduced, which was the goal of club owners when they first instituted reserve lists.<sup>23</sup>

In 1883, the NL and its two main rivals, the American Association and the Northwestern League, entered into the “Tripartite Agreement,” later renamed the “National Agreement.”<sup>24</sup> In addition to imposing a salary cap of \$2,000 per player per season, the National Agreement expanded the reserve list to include every player on every team.<sup>25</sup> The reserve clause, as it later became known, was first included in individual player contracts in 1887.<sup>26</sup>

Although simple in language, the reserve clause was highly restrictive in practice. It stated that a player was bound to his team for the period of his contract – usually limited to one year – and for one additional year thereafter.<sup>27</sup> In practice, a renewed contract also contained the reserve clause. In effect, teams had the power to renew contracts indefinitely, which effectively bound a player to one team for his entire career, or until he was traded or released by the team.<sup>28</sup> Players organized opposition to the reserve clause, beginning in 1885.<sup>29</sup>

#### **A. National Brotherhood of Professional Base Ball Players – 1885**

John Montgomery Ward, a star player in the NL (and also a lawyer), along with eight teammates, formed the first recorded union in professional sports.<sup>30</sup> Founded in 1885, this organization was dubbed the National Brotherhood of Professional Base Ball Players (the

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<sup>23</sup> *Id.*

<sup>24</sup> *The Commissionership: A Historical Perspective*, MLB.COM, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com) (last visited Oct. 6, 2011) [hereinafter *MLB HISTORY*].

<sup>25</sup> *The Economic History of Major League Baseball*, ECON. HIST. SERVICES, <http://eh.net/encyclopedia/article/haupert.mlb> (last visited Oct. 6, 2011).

<sup>26</sup> *Id.*

<sup>27</sup> *BASEBALL REFERENCE*, *supra* note 19.

<sup>28</sup> *Id.*

<sup>29</sup> Ben Lisle, *The Brotherhood*, *AM. STUDIES AT THE UNIV. OF VA.* (Dec. 2000), available at <http://xroads.virginia.edu/~hyper/incorp/baseball/ward.html>.

<sup>30</sup> *MLBPA History*, *supra* note 11.



“Brotherhood”).<sup>31</sup> The primary goals of the players were to eliminate the reserve list and to increase salaries, which were, again, capped at \$2,000 per player per season.<sup>32</sup> These were basic goals that were salient to virtually all baseball players. However, the players made no progress on either front. Indeed, they acquiesced to the inclusion of a reserve clause in individual player contracts in 1887, in exchange for an increase in roster size from eleven to fourteen players.<sup>33</sup>

After the NL instituted a uniform classification system that provided a hard salary cap in the winter of 1889,<sup>34</sup> the Brotherhood, backed by would-be owners who were frozen out of the NL, formed the Players League (the “PL”) prior to the 1890 season.<sup>35</sup> A number of NL players defected to the new league, which was an initial success.<sup>36</sup> However, as a result of competition between the NL, the PL, and a third league, the American Association, attendance for all three leagues soon faded.<sup>37</sup> The NL owners had deeper pockets than owners in the PL, and the upstart league soon collapsed, leaving only two professional leagues.<sup>38</sup> Players who had bolted from the NL to the PL returned to the NL and agreed to the reserve clause, whereupon the Brotherhood ceased to exist.<sup>39</sup>

### **B. Players Protective Association – 1900**

The players’ next attempt at unionization occurred in 1900 when the Players Protective Association was formed.<sup>40</sup> Player grievances with the owners had changed very little since the previous effort to organize; specifically, the reserve clause and low salaries, which had only risen

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<sup>31</sup> *Id.*

<sup>32</sup> PAUL D. STAUDOHR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS 15 (1996).

<sup>33</sup> Lisle, *supra* note 29.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> STAUDOHR, *supra* note 32, at 15.

to a paltry maximum of \$2,500 for the most coveted players.<sup>41</sup> A year after the association was formed, the Western League, which would later become the American League (the “AL”), declared itself a major league and immediately began competing with the NL for players.<sup>42</sup> For the next two years, competition over players increased salaries, which was a boon to the players, although the reserve clause remained intact.<sup>43</sup> In 1903, the NL and AL agreed to merge and recognize one another’s rosters, along with the reserve clause.<sup>44</sup> The lack of competition amongst leagues normalized salaries and the Players Protective Association soon faded from existence.<sup>45</sup>

### **C. Fraternity of Professional Baseball Players of America – 1912**

The next attempt at unionization was the Fraternity of Professional Baseball Players of America (the “Fraternity”).<sup>46</sup> The organization was the brainchild of David Fultz, an All-American football and baseball player at Brown University, who later played eight seasons as a professional baseball player in both the NL and AL.<sup>47</sup> In 1910, several players approached Fultz, now a Wall Street lawyer, and complained of ill treatment from the owners.<sup>48</sup> Even though average salaries had risen to \$3,000, Fultz decided to form the Fraternity in 1912.<sup>49</sup> Along with increased salaries, Fultz sought better working conditions for the players.<sup>50</sup> Those goals

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<sup>41</sup> Lisle, *supra* note 29.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> STAUDOHR, *supra* note 32, at 15.

<sup>46</sup> *Id.*

<sup>47</sup> Toru Mihara, Labor negotiations in the Major League Baseball history (2011) (unpublished Ph.D. dissertation, University of Mass., Amherst) (available at <http://www.admsports.biz/PDF/lnitmh.pdf>) at 28.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 29.

resonated with the players, and by 1914, the Fraternity totaled over 1,100 members;<sup>51</sup> however, most of those members were in the minor leagues.<sup>52</sup>

On behalf of the players, Fultz forged an agreement with the leagues called the Cincinnati Agreement.<sup>53</sup> This Agreement was actually with two organizations, the National Commission and the National Board, which handled player/owner disputes in the MLB.<sup>54</sup> The owners, perhaps motivated by the formation of the Federal League in 1914, which saw average salaries rise from \$3,800 in 1913 to \$7,300 in 1914, agreed to eleven of the seventeen points demanded by the Fraternity.<sup>55</sup> Among the demands accepted by the owners were basic items such as paying for players' uniforms and reimbursing travel expenses to Spring Training.<sup>56</sup>

However, the Federal League was short-lived, playing only two seasons, and within a year, the owners reneged on many of the terms in the Cincinnati Agreement.<sup>57</sup> In 1916, the Fraternity filed a number of lawsuits against the National Commission, none of which were successful. While the Fraternity was weighing its options, including calling for a strike, the country was engaged in discussions to join the Allies, which it did in 1918, in what became known as World War I. The grievances of baseball players took a backseat to the war and the Fraternity faded away.<sup>58</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Brian McKenna, *David Fultz*, The Baseball Biography Project, SOCIETY FOR AMERICAN BASEBALL RESEARCH, <http://bioproj.sabr.org/bioproj.cfm?a=v&v=1&bid=2686&pid=4791> (last visited Oct. 11, 2011).

<sup>54</sup> Mihara, *supra* note 47, at 29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 39.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

**D. National Baseball Players Association of the United States – 1922**

In 1922, Milwaukee attorney, Ray Cannon, attempted to form a baseball union.<sup>59</sup> Cannon had gained notoriety for representing several players involved in the 1919 Black Sox scandal.<sup>60</sup> He represented Happy Felsch, who sued Charles Comiskey and the Chicago White Sox for back pay and World Series money and damages, and later represented Buck Weaver, Swede Risberg, and “Shoeless” Joe Jackson.<sup>61</sup> It is likely that Cannon’s association with the Black Sox players inhibited his efforts to form a union.

Cannon’s goal was to allow the players to share in the governance of the game, but there was little enthusiasm for his efforts – among players and owners alike – and the association collapsed almost before it got off the ground.<sup>62</sup>

**E. American Baseball Guild – 1946**

In 1946, Robert Murphy, a Boston labor lawyer, held talks with a number of MLB players, where his efforts resulted in the creation of the American Baseball Guild (the “Guild”).<sup>63</sup> At the urging of the owners, the players elected not to form a union, and instead formed a committee of player representatives who bargained directly with the owners.<sup>64</sup> The players’ main purpose in forming the Guild was to negotiate a number of clauses in the standard player’s contract, including a minimum salary of \$7,500.<sup>65</sup> Up to that point, owners had dictated the terms of the contract with no input whatsoever from the players.

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<sup>59</sup> Brian McKenna, *Raymond Cannon, Union Leader*, BASEBALL HISTORY BLOG.COM (May 25, 2010), <http://baseballhistoryblog.com/567/ray-cannon-union-leader/>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Sport: Baseball in Union Suits*, TIME MAGAZINE (June 3, 1946), <http://www.time.com/time/magazine/article/0,9171,797840,00.html>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Not surprisingly, the players made little headway with the owners and the Guild only lasted for one season.<sup>66</sup> However, negotiations with the owners resulted in several concessions, including a minimum salary of \$5,500 per year, maximum pay cuts of 25%, a promise by the owners to create a pension plan, \$25 per week in living expenses during Spring Training, and daily meal money when the team was on the road.<sup>67</sup> To this day, the players' Spring Training allotment is oftentimes referred to as "Murphy Money."<sup>68</sup>

#### **F. The Interlude – No Formal Organization Representing the Players**

After the demise of the Guild, MLB Commissioner Albert "Happy" Chandler set up what was known as the "Representation Plan," whereby each team would have a player representative who would designate one of their brethren as the league representative (one for the AL and one for the NL).<sup>69</sup> The league representatives would meet with members of the owners' Executive Council to address player concerns.<sup>70</sup> As a result of those meetings, the owners agreed to a minimum salary of \$5,000 and set up a pension plan beginning in 1947.<sup>71</sup> The plan was funded with contributions from the World Series and All-Star Game.<sup>72</sup>

By 1951, the average player salary had increased to \$13,000.<sup>73</sup> However, the players were concerned about the pension system. Teams had not provided the players with an accounting of the contributions to the plan. The players hired attorney J. Norman Lewis to

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<sup>66</sup> *Id.*

<sup>67</sup> Mihara, *supra* note 47, at 36.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 37.

represent them, and after initially refusing to meet with him, the owners did accede to several player requests, those primarily concerned with out-of-pocket expenses.<sup>74</sup>

**MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION (MLBPA)**

**A. The Early Years – 1954-1966**

The origination of today's MLBPA was formed in 1954 by vote of player representatives from each of the sixteen Major League clubs.<sup>75</sup> Bob Feller was the first leader of the MLBPA, assuming the title of President; he served in that capacity until 1959.<sup>76</sup>

The players insisted their organization was not, nor would it ever be, a "union."<sup>77</sup> Players were so intent on maintaining good relations with their employers that they kept Lewis, who was still representing them, in the background for fear of riling up the owners.<sup>78</sup> Lewis captured some gains during his tenure as MLBPA Counsel, including a commitment by the owners in 1954 to revise the pension plan.<sup>79</sup> Beginning in 1957, contributions from the World Series and All-Star Game would increase.<sup>80</sup> In 1958, Lewis negotiated an increase of the minimum salary from \$6,000 to \$7,000.<sup>81</sup>

However, the MLBPA's lack of tangible progress led to a change in leadership. In 1959, the players fired Lewis and hired Judge Robert Cannon, a Wisconsin Circuit Court Judge, as their legal advisor.<sup>82</sup> He assisted the players in negotiating a five-year extension – the third – to the pension plan, which took effect in 1962.<sup>83</sup> Prior to the extension's expiration in 1967, some

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<sup>74</sup> *Id.* at 38-39.

<sup>75</sup> JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST* 64 (Praeger, 1999).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Brian McKenna, *Robert Cannon*, The Baseball Biography Project, SABR, <http://bioproj.sabr.org/bioproj.cfm?a=v&v=l&bid=2660&pid=19645> (last visited Oct. 11, 2011).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

players were concerned that their pension plan, which was being funded by television revenues from the World Series and All-Star Game, was being short-changed as a result of the owners' TV revenue from the Game of the Week contract with ABC.<sup>84</sup> They formed a four-person search committee to find a full-time spokesperson for the MLBPA.<sup>85</sup>

The committee initially focused on Cannon, who had served the MLBPA as Legal Counsel.<sup>86</sup> Ironically, Cannon's father, Raymond, was behind the short-lived National Baseball Players Association, one of the many unsuccessful attempts to organize professional baseball players, as discussed above.<sup>87</sup> Cannon was offered the position of Executive Director in spite of, or perhaps because of, his well-known friendship with the owners.<sup>88</sup> Cannon even harbored the thought of one day becoming the Commissioner of baseball.<sup>89</sup> However, this was still the period during which players believed that owners were their friends, and thus, players had no interest in creating any unnecessary ill will in their relationship with the owners.<sup>90</sup> Cannon turned down the players' offer, perhaps a fortuitous decision for the players.<sup>91</sup>

The committee then turned to Marvin Miller, who had been recommended by Professor George Taylor of the University of Pennsylvania's Wharton School.<sup>92</sup> Miller, an experienced labor leader, was, at first, reluctant to accept the position.<sup>93</sup> He feared that the players did not fully understand the benefits of a union, how it operated, and what it could do for its membership.<sup>94</sup> In fact, many players outwardly opposed the idea of a union.<sup>95</sup> The prevailing sentiment among the players at the time, fostered primarily by the owners, was that players were

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Mihara, *supra* note 47, at 48.

<sup>93</sup> MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL, 39 (Birch Lane Press 1991).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

“privileged to play a kid’s game; that baseball was not a business, and was unprofitable for the owners.”<sup>96</sup> Thus, if he were to take the job, Miller would be tasked with changing the culture in the nascent union.

Before committing to be their next leader, Miller needed to perform some due diligence and become acquainted with membership. To accomplish that, Miller toured the MLB Spring Training camps in 1966, and what he saw and heard partially allayed his fears. Despite his initial reluctance, Miller agreed to sign on as MLBPA Executive Director.<sup>97</sup>

### **B. The Marvin Miller Years – 1966-1982**

Miller had most recently been a negotiator for the United Steel Workers of America Union when he was hired as the first full-time Executive Director of the MLBPA in 1966.<sup>98</sup> He was born in New York City in 1917 and was educated at New York University and the New School for Social Research in economics.<sup>99</sup> Miller worked for the federal government as an economist and hearing officer at the Wage Stabilization Division of the War Labor Board during World War II.<sup>100</sup> He then began his labor career via a three-year stint at the International Association of Machinists; thereafter, Miller moved on to the United Steel Workers of America in 1950.<sup>101</sup> By the time he became involved with the MLBPA, Miller was well versed in the intricacies of labor law, making him a powerful resource to the players.

When Miller began representing the players, the minimum salary in baseball was \$6,000<sup>102</sup> and the average salary was \$19,000.<sup>103</sup> Between 1966 and his retirement in 1982,

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<sup>96</sup> *Id.*

<sup>97</sup> STAUDOHAR, *supra* note 32, at 27.

<sup>98</sup> Joshua P. Jones, *A Congressional Swing and Miss: the Curt Flood Act, Player Control, and the National Pastime*, GA. L. REV. 639, 653 (1999).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



Miller steered the players through negotiations for three extensions to the pension plan and six CBAs.<sup>104</sup> When he left office, the players' pension plan was among the best in organized labor: the minimum salary was \$35,000 and the average salary was \$289,000.<sup>105</sup> These gains were the product of tireless work and sacrifice, and they were not achieved without substantial labor unrest. The Miller-led MLBPA endured four work stoppages, one lockout, and three strikes.<sup>106</sup>

Miller's first negotiation with the owners was over the pension plan, which was set to expire in March 1967.<sup>107</sup> Negotiations began during the All-Star Game in the summer of 1966 and were completed in December, resulting in a three-year agreement.<sup>108</sup> It was the first time an actual "negotiation" between the players and owners took place. Miller recounted the events:

[W]ith my background of collective bargaining, I found the proceedings incredible. The pension and insurance plan, considered a major benefit by the players, was not due to expire for more than nine months. The players had not yet discussed changes or improvements they wanted to propose, so, of course, no proposals had been submitted to the owners. The owners, similarly, had made no proposals for change. In plain English, there had been no collective bargaining. No matter—they were about to make a public announcement that the players' pension plan for the next two years was a settled matter!<sup>109</sup>

The successful negotiation resulted in substantially increased payments to the plan and almost doubled player benefits.<sup>110</sup> More importantly, it established the MLBPA as the bargaining agent for the players, the first time in history that the owners had recognized a players union.<sup>111</sup>

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<sup>103</sup> MLBPA History, *supra* note 11.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>109</sup> MILLER, *supra* note 93, at 88.

<sup>110</sup> Paul D. Staudohar, *Player Salary Issues in Major League Baseball*, ARBITRATION JOURNAL, Dec. 1978, at 7-18.

<sup>111</sup> STAUDOHAR, *supra* note 32, at 27.

Miller negotiated the first CBA in professional sports in 1968.<sup>112</sup> Among its key provisions: The CBA increased the minimum salary from \$6,000 to \$10,000 per year, the maximum salary cut was reduced from 25% to 20%, the so-called “Murphy Money” was increased from \$25 per week to \$40 per week, and meal money was increased from \$12 per day to \$15 per day.<sup>113</sup>

Aside from the monetary issues, Miller’s first CBA included four significant accomplishments. First, it was the first time in history that all the provisions that applied to the players were included in a written document, what other unions referred to as a “CBA.”<sup>114</sup> The CBA also required the owners to give the players written copies of every document that affected their contract, including items such as the Major League Rules and the Professional Baseball Rules, which the players never had access to prior to the CBA.<sup>115</sup> Second, Miller convinced the owners to include a copy of the Uniform Player’s Contract in the CBA.<sup>116</sup> The addition effectively made the Uniform Player’s Contract an issue for collective bargaining, so when the owners wanted to make changes to the contract in the future, they could no longer do so unilaterally.<sup>117</sup> Third, the owners agreed to form a joint labor-management committee to study the reserve clause.<sup>118</sup> While the formation of the committee seemed innocuous at the time, it would have a major impact on the elimination of the reserve clause. Owners could no longer claim that the reserve clause was not a subject for collective bargaining.<sup>119</sup> Fourth, the owners agreed to institute a formal grievance procedure when the parties had a disagreement on a

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<sup>112</sup> Staudohar, *supra* note 110.

<sup>113</sup> Mihara, *supra* note 47, at 54.

<sup>114</sup> *Id.* at 55.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

contract/employee matter.<sup>120</sup> Even though it was the Commissioner of baseball, someone who was hired, paid by, and reported to the owners, who served as the final decision maker in all disputes between the players and the owners, this addition became the forerunner to impartial, binding arbitration over player-owner grievances.<sup>121</sup>

The first work stoppage under Miller occurred, not over negotiations on a CBA, but on the next pension agreement.<sup>122</sup> The two-year agreement the players had entered into in December 1966 was set to expire by the end of March 1969. From the outset, the owners were intent on obtaining “give-backs” from the players on the pension contributions agreed upon in the previous negotiation.<sup>123</sup> In December 1968, sensing a lack of progress in the talks, Miller suggested that the players refuse to sign individual contracts for the 1969 season until an agreement on the pension plan was reached.<sup>124</sup> He also advised the players to refuse to report to Spring Training.<sup>125</sup>

Miller’s advice to hold out was radical in comparison to strategies offered by past union leaders. For over one hundred years, the players had been subservient to the owners’ demands, rarely challenging them on any issue. To withhold their services – in a unified front – was unheard of conduct. Yet, in a testament to how much support Miller enjoyed among the membership, the players unanimously agreed to accept his recommendation.<sup>126</sup>

The owners believed the players’ holdout would collapse;<sup>127</sup> however, they would soon be disappointed. After receiving pressure from the television networks, and from their own commissioner, the recently elected Bowie Kuhn, who did not want his first year as

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<sup>120</sup> *Id.* at 56.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 58.

<sup>123</sup> *Id.* at 57.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 59.

<sup>127</sup> *Id.*

Commissioner to be tainted by a labor dispute, it was the owners who caved.<sup>128</sup> They acceded to the players' demands of increased contributions to the pension plan and also reduced vesting options.<sup>129</sup>

Emboldened by their success, which was achieved in large measure due to their unity, the players embarked on the next CBA negotiation. With limited resistance from the owners, the parties agreed on a three-year contract without the threat of a work stoppage.<sup>130</sup> Minimum salaries increased from \$10,000 in 1969, to \$12,000 in 1970, to \$12,750 in 1971, and finally, \$13,500 in 1972.<sup>131</sup> Another key provision of the new CBA was the inclusion of a clause proposed by Miller concerning the reserve system. It read, "[T]his agreement does not deal with the reserve system. The parties have different views as to the legality and as to the merits of such a system as presently constituted."<sup>132</sup> While, again, simple on its face, Miller's maneuvering to include language discussing the reserve clause in the CBA would benefit the union in later negotiations.<sup>133</sup>

Perhaps the key provision of the 1970 CBA was a clause that provided for grievances to be heard before an independent, third-party arbitrator.<sup>134</sup> The 1968 CBA introduced a grievance procedure for the first time, but the arbitrator was the Commissioner who was far from impartial. In the 1970 agreement, the Commissioner retained the right to rule on issues affecting the integrity of the game.<sup>135</sup> However, all other grievances would be heard by an independent, third-

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<sup>128</sup> *Id.* at 59-60.

<sup>129</sup> *Id.*

<sup>130</sup> Jeff Euston, *CBA Summaries, 1970-72*, BIZ OF BASEBALL (Feb. 2, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=681:1970-1972&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=681:1970-1972&catid=45:cba-summaries&Itemid=76).

<sup>131</sup> *Id.*

<sup>132</sup> Miller, *supra* note 93, at 239.

<sup>133</sup> Mihara, *supra* note 47, at 64.

<sup>134</sup> STAUDOHAR, *supra* note 32, at 28.

<sup>135</sup> Mihara, *supra* note 47, at 64.

party arbitrator who had no obligations or connections to either side.<sup>136</sup> Unbeknownst to the owners, this seemingly innocuous change was the beginning of the end of the reserve clause.

The MLBPA's next negotiation concerned the pension plan and resulted in the first organized strike in the history of professional sports.<sup>137</sup> The strike occurred during Spring Training and lasted nine days into the 1972 regular season.<sup>138</sup> To say that both sides "lost" would be an understatement. Although the players gained approximately \$500,000, they lost much more than that in collective wages.<sup>139</sup> The owners' estimated losses were in excess of \$5,000,000.<sup>140</sup>

The owners had learned little from the previous pension negotiation. Still believing the players to be "weak," they dug into their heels on increasing contributions to the pension plan. The players were undeterred. They voted 663-10 to authorize a strike, and went out on April 1.<sup>141</sup> The players "won" when the owners agreed to increase contributions to what was already considered a generous pension plan.<sup>142</sup>

The "win" exerted a cost on the MLBPA and Miller. The owners won the public relations war, with many writers accusing the players of being greedy and attacking Miller as an outsider who was trying to destroy the game of baseball.<sup>143</sup> The negative publicity was something the players would deal with in future negotiations as well, but at the time, few seemed phased. They rallied around Miller and maintained a united front against management.<sup>144</sup> It was

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<sup>136</sup> *Id.*

<sup>137</sup> There had been two previous "boycotts" in MLB. The first one occurred when Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale jointly held out for salary increases during spring training in 1966. The second was when the players, with the advice of Miller, refused to sign their baseball card contracts with Topps in the spring of 1968, holding out for a higher fee and a percentage of sales; see Mihara, *supra* note 47, at 60-61.

<sup>138</sup> STAUDOHR, *supra* note 32, at 28.

<sup>139</sup> Mihara, *supra* note 47, at 65.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 66.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 67.

<sup>144</sup> *Id.* at 69.

the owners, on the other hand, who were fractious. Some wanted to break the union.<sup>145</sup> Others realized they would have to include the players as partners in the game, if not sooner, then certainly later.<sup>146</sup> This lack of unity among the owners made developing and implementing an effective bargaining strategy difficult.

Collective bargaining was overshadowed in 1972 by the U. S. Supreme Court decision in the Curt Flood case.<sup>147</sup> Flood had challenged the reserve clause when he was traded from St. Louis to Philadelphia in 1969 and Commissioner Kuhn refused his request to become a free agent.<sup>148</sup> Flood insisted that, as a thirteen-year MLB veteran, he had the right to refuse a trade.<sup>149</sup> Kuhn countered that under baseball's reserve clause, Flood could be traded at any time against his will.<sup>150</sup>

The Court refused to overturn a line of decisions, beginning with the 1922 Federal Baseball Case,<sup>151</sup> which determined that baseball was exempt from the antitrust laws because it was not "commerce."<sup>152</sup> Those decisions effectively upheld the reserve clause.<sup>153</sup> Although Flood lost his legal battle, the decision would impact the next CBA negotiations slated for 1973 in a profound way.

Although the Court upheld baseball's exemption from the antitrust laws in the Flood decision, Justice Harry Blackmun, who wrote the majority opinion, declared it an "anomaly."<sup>154</sup> Chief Justice Warren Burger passed the buck to Congress, urging legislators to "solve this

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<sup>145</sup> *Id.* at 68-69.

<sup>146</sup> *Id.*

<sup>147</sup> See generally Flood v. Kuhn, 407 U.S. 258 (1972).

<sup>148</sup> Richard Sandomir, *Not Ready to Change Baseball History?* N.Y. TIMES (July 12, 2011), <http://www.nytimes.com/2011/07/13/sports/baseball/the-curious-case-of-curt-flood-revisits-a-suit-against-baseball.html?scp=1&sq=Not+Ready+to+Change+Baseball+History&st=nyt>.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See generally Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

<sup>152</sup> *Id.*

<sup>153</sup> See *id.*

<sup>154</sup> Flood, *supra* note 147, at 282.

problem.”<sup>155</sup> More importantly to the long term benefit of the players, the Court also stated that the reserve clause was not an antitrust issue, but fell under the labor exemption to the antitrust laws, which would make the reserve clause a mandatory collective bargaining issue.<sup>156</sup> That set the stage for the owners and players to bargain over the reserve clause in the next CBA negotiation.

The owners addressed the topic of free agency first. In November 1972, the owners proposed free agency after five years of Major League (“ML”) service for players earning less than \$30,000 and all players after eight years of ML service who were earning less than \$40,000.<sup>157</sup> Under the owners’ proposal, only 5 out of 960 players on MLB rosters would have been eligible for free agency in 1972.<sup>158</sup> Not surprisingly, the offer was a non-starter for the players and the MLBPA turned it down.<sup>159</sup> The owners countered with an offer of salary arbitration, and ignored the reserve clause entirely.<sup>160</sup> However, ownership’s proposal was fraught with conditions that made it unpalatable to the players. They again rejected the owners’ offer.<sup>161</sup>

After intense negotiations that extended into February 1973, the parties agreed on a three-year CBA.<sup>162</sup> The minimum salary would rise to \$15,000 for the 1973 and 1974 seasons, and \$16,000 for the 1975 season.<sup>163</sup> There was no mention of the reserve clause in the agreement.<sup>164</sup> Perhaps the biggest victory for the players was the institution of salary arbitration, beginning

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<sup>155</sup> *Id.* (Burger, C.J., concurring).

<sup>156</sup> *Id.*

<sup>157</sup> Mihara, *supra* note 47, at 75.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 77.

<sup>161</sup> *Id.*

<sup>162</sup> Jeff Euston, *CBA Summaries, 1973 – 1975*, BIZ OF BASEBALL (Feb. 2, 2007),

[http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

with the 1974 season.<sup>165</sup> If a player and team could not agree on a salary, either side could request that a panel of three arbitrators determine the salary after considering submissions from both sides.<sup>166</sup> A majority of arbitrators could select one figure or the other, with no compromising in between.<sup>167</sup>

Prior to the expiration of the 1973 CBA, the players achieved perhaps their greatest victory of all time against the owners, one that practically fell into their lap. Oakland A's owner Charlie Finley had failed to make a \$50,000 deposit into an annuity account as required by the contract between the team and star pitcher James "Catfish" Hunter.<sup>168</sup> The contract stipulated that Hunter had the option of terminating the contract if the A's violated any provision contained therein.<sup>169</sup> Acting on this contractually obligated right, Hunter's attorney sent a letter to Oakland terminating the contract, whereupon the MLBPA asked MLB Commissioner Bowie Kuhn to notify all clubs that Hunter was a free agent.<sup>170</sup> When the commissioner refused, the union filed a grievance.<sup>171</sup>

The matter was referred to Peter Seitz, the third-party independent arbitrator.<sup>172</sup> On December 16, 1974, Seitz declared Hunter a free agent.<sup>173</sup> Bidding for the talented pitcher commenced almost immediately.<sup>174</sup> The Yankees signed Hunter to a five-year, \$3.75 million contract, more than double what any player had previously made.<sup>175</sup> Hunter's contract – both in terms of years and dollars – gave the players a view of what free agency would do for player salaries and security.

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Hal Bock, *Baseball's Emancipation: It was Twenty Years Ago When Catfish Hunter, Sport's Best Pitcher, Was Declared a Free Agent*, L. A. TIMES (Dec. 11, 1994), [http://articles.latimes.com/1994-12-11/sports/sp-7636\\_1\\_catfish-hunter](http://articles.latimes.com/1994-12-11/sports/sp-7636_1_catfish-hunter).

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



While Finley practically handed the MLBPA a victory by violating the terms of Hunter's contract, one must note that without the benefit of the grievance system negotiated into the 1968 CBA, and without an independent arbitrator to hear those grievances (a condition agreed to by the owners in the 1970 CBA), Hunter would not have become a free agent. Those measures were proposed, and eventually adopted, as a result of the foresight and shrewd bargaining position taken by Miller.

Although the groundwork was laid in previous negotiations, Miller's greatest victory was still on deck. In 1975, pitchers Andy Messersmith and Dave McNally decided to play the season without signing a contract.<sup>176</sup> Their strategy, conceived by Miller, was to have an arbitrator declare that the option clause in the Uniform Player's Contract, the so-called reserve clause, only applied to the year after a player's contract terminated, in this case, 1975.<sup>177</sup> If the players were correct, they would become free agents after the 1975 season and would be able to market themselves to all twenty-four MLB clubs, as Hunter had done the previous year.

After holding hearings on the matter, Seitz urged the owners and the players to resolve their differences on the reserve clause via negotiations.<sup>178</sup> However, the owners were adamant that the loss of the reserve clause would be catastrophic to the game and refused to budge from their hard line stance.<sup>179</sup> Faced with no choice, Seitz ruled that the language of the reserve clause meant that players were bound to their teams for only one year beyond the contract term.<sup>180</sup> Of course, that interpretation meant that the players did not have to sign a new contract in order to play the following season and could become free agents.

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<sup>176</sup> Ben Heuer, *The Boys of Winter: How Marvin Miller, Andy Messersmith and Dave McNally Brought Down Baseball's Historic Reserve Clause* (Berkeley Law – Sports Stories, 2007), available at [http://www.law.berkeley.edu/sugarman/Sports\\_Stories\\_Messersmith\\_McNally\\_Arbitration.pdf](http://www.law.berkeley.edu/sugarman/Sports_Stories_Messersmith_McNally_Arbitration.pdf).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

After rendering his decision, the owners summarily fired Seitz.<sup>181</sup> Not satisfied with the arbitration award against them, the owners appealed to the federal courts.<sup>182</sup> The Federal District Court and the Court of Appeals both affirmed Seitz' decision.<sup>183</sup> On February 23, 1976, between those two decisions, the owners attempted to pressure the MLBPA into a settlement by locking them out of Spring Training camps.<sup>184</sup> This tactical decision actually had the opposite effect on the players.

Energized and unified, approximately 150 players remained unsigned for the 1976 season.<sup>185</sup> If they played the 1976 season without signing a contract, they could be declared free agents under the Messersmith/McNally decision.<sup>186</sup> This prospect terrified the owners, but it terrified Miller even more.<sup>187</sup> He knew if a significant number of players became free agents at once, such a surplus of talent would depress demand and lower salaries.<sup>188</sup>

On March 17, 1976, eight days after the Court of Appeals affirmed the Seitz decision, Commissioner Kuhn opened Spring Training camps and both parties went back to the bargaining table.<sup>189</sup> On July 12, the parties finally reached an agreement.<sup>190</sup> The four-year deal included free agency for players after six years of Major League service.<sup>191</sup> As was the case in the prior CBA, players with two years of service remained eligible for salary arbitration.<sup>192</sup> Other provisions of the CBA included minimum salary increases of \$1,000 per year between 1976 and

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 261 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

<sup>184</sup> Mihara, *supra* note 47, at 84.

<sup>185</sup> STAUDOHAR, *supra* note 32, at 35.

<sup>186</sup> *Id.*

<sup>187</sup> Mihara, *supra* note 47, at 85.

<sup>188</sup> *Id.*

<sup>189</sup> Jeff Euston, *CBA Summaries, 1976 – 1979*, BIZ OF BASEBALL (Feb 2, 2007),

[http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=683:1976-1979&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=683:1976-1979&catid=45:cba-summaries&Itemid=76).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

1979, from \$18,000 to \$21,000 per year.<sup>193</sup> Although there were a number of restrictions initially imposed on free agency, the players had achieved a great victory.

In less than two years, thanks to the Messersmith/McNally arbitration decision and CBA negotiations, the players had gone from living with a reserve system that had been in effect for almost a century to free agency and salary arbitration. In 1976, the first year of free agency, the average player salary was \$51,500.<sup>194</sup> By 1980, the figure had risen to \$143,756.<sup>195</sup> Even though the game was more prosperous than ever, the owners were not pleased. They vowed to force the players to give back some of the freedom – and salaries – they had acquired through prior negotiations.<sup>196</sup>

Both sides built war chests and rattled sabers in advance of negotiations on the 1980 CBA.<sup>197</sup> The owners opened the negotiations by proposing the elimination of salary arbitration and substituting a graduated flat salary on all players with one to six years of Major League service.<sup>198</sup> They also proposed that a team losing a free agent could select a player off the signing team's Major League roster, rather than the draft choice that had been agreed upon in the prior CBA.<sup>199</sup>

The MLBPA rejected the owners' flat salary scale and proposed a monetary fund all teams would contribute to as a means to compensate teams that lost free agents.<sup>200</sup> Not surprisingly, the owners rejected the players' offer.<sup>201</sup> Sporadic negotiations continued until the players set a strike deadline of April 1, eight days before the start of the regular season. The owners requested the help of a federal mediator. In response, Ken Moffett, Deputy Director of

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<sup>193</sup> *Id.*

<sup>194</sup> STAUDOHR, *supra* note 32, at 32.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 30.

<sup>197</sup> *Id.*

<sup>198</sup> Mihara, *supra* note 47, at 90.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 91.

<sup>201</sup> *Id.*

the Federal Mediation and Conciliation Service,<sup>202</sup> conducted a nine-hour meeting with the parties on March 30.<sup>203</sup> Neither party budged.

The players, wishing to collect at least a portion of their salary for the season, voted to extend the strike deadline until May 23.<sup>204</sup> Labor and management held fruitless negotiations until the morning of May 23. After an all night negotiating session, the parties agreed on a new four-year CBA.<sup>205</sup> Minimum player salaries would increase again, to \$30,000 in 1980, \$32,500 in 1981, \$33,500 in 1982, \$35,000 in 1983, and \$40,000 when the agreement was later extended for an additional year.<sup>206</sup> Annual pension contributions also increased.<sup>207</sup> Another key provision that favored the players was that players with two years of service time remained eligible for salary arbitration.<sup>208</sup> However, the sides could not negotiate a mutually agreeable solution on all issues.

The issue that had seemed insurmountable, free agent compensation, was referred to a four-man study committee consisting of two representatives from each side.<sup>209</sup> In addition, the owners convinced the players to include an attachment to the CBA that gave management the right to unilaterally impose a restrictive free agent compensation plan if the committee could not agree on the issue prior to February 15, 1981.<sup>210</sup> If the plan was implemented, and the players objected to it, the attachment gave the players the right to set a strike date anytime between February 20 and June 1.<sup>211</sup>

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<sup>202</sup> Moffett would resurface with the MLBPA at a later date.

<sup>203</sup> Mihara, *supra* note 47, at 91.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 92.

<sup>206</sup> Jeff Euston, *CBA Summaries, 1980-1983 (extended to '84)*, BIZ OF BASEBALL (Feb. 2, 2007).

[http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=684:1980-1983-later-extended-to-84&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=684:1980-1983-later-extended-to-84&catid=45:cba-summaries&Itemid=76).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

To no one's surprise, the free agent compensation committee failed to reach a consensus, and on February 19, 1981, the owners announced their unilateral implementation of the terms contained in the CBA attachment.<sup>212</sup> The plan would limit, if not eliminate, the incentive for any team to sign a free agent, thereby eviscerating the rights the players had fought long and hard to achieve. To no one's surprise, shortly after the owners implemented their new free agent compensation plan, the players set a strike deadline of May 29.<sup>213</sup>

When the owners claimed they could no longer pay the skyrocketing player salaries that were a byproduct of free agency, the MLBPA filed an unfair labor practice charge with the National Labor Relations Board ("NLRB").<sup>214</sup> Miller contended that the owners were not bargaining in good faith because they refused to disclose financial information, as required under federal labor law, to substantiate their claim that they could not afford to pay the players.<sup>215</sup> On May 27, 1981 the NLRB found for the MLBPA and sought an injunction in federal court, which would have put off the compensation issue until 1982.<sup>216</sup>

The MLBPA agreed to extend the strike deadline until the court ruled on the injunction.<sup>217</sup> When the injunction was denied, the players went on strike after the games of June 11.<sup>218</sup> Talks between the parties went nowhere. After the owners accused Miller of being an impediment to a settlement, he removed himself from the negotiations for several weeks while the owners conducted talks with player representatives.<sup>219</sup> As the strike continued, Miller rejoined the bargaining group on July 1.<sup>220</sup>

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<sup>212</sup> Mihara, *supra* note 47, at 93.

<sup>213</sup> *Id.*

<sup>214</sup> STAUDOHAR, *supra* note 32, at 30.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Mihara, *supra* note 47, at 94.

<sup>218</sup> *Id.* at 95.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

No progress was made until Lee MacPhail, President of the American League, took charge of negotiations on behalf of the owners. The sides announced a settlement on July 31, 1981.<sup>221</sup> Play resumed with the All-Star Game, which had been rescheduled from July 14 to August 10.<sup>222</sup> Although the players agreed to a complicated compensation formula that allowed teams who lost free agents to draft players off other teams' Major League forty-man rosters, the settlement was not nearly as onerous as the one proposed by the owners.<sup>223</sup>

The 1981 strike proved costly for both sides. The owners reportedly lost \$72 million during the fifty-day strike, even after deducting the proceeds of strike insurance.<sup>224</sup> Although the players lost \$28 million in salary, they still came out victorious.<sup>225</sup> In addition to the monetary gains and the watered down compensation formula, they proved, once again, to the owners that they were unified behind Miller. Their solidarity was in sharp contrast to the fractious actions of the owners.<sup>226</sup>

His ownership's lack of unity, and his own inability to effectively handle CBA negotiations, spelled the beginning of the end for Commissioner Bowie Kuhn. As a result of his inept handling of the negotiation on behalf of owners, especially when compared to the performance of the savvy Miller, a number of the owners asked for Kuhn's resignation.<sup>227</sup> With the backing of a majority of owners, Kuhn managed to hang on for another three years.<sup>228</sup> However, during that time his authority was severely limited.<sup>229</sup>

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<sup>221</sup> *Id.* at 96.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 98.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 100.

<sup>227</sup> *Bowie Kuhn, MLB Commissioner 1969-1984*, THE SPORTS E-CYCLOPEDIA (May 2, 2002)

<http://www.sportscyclopedia.com/mlb/comish/kuhn.html> (last updated Dec. 14, 2007).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

The 1981 negotiations proved to be Miller's last hurrah. After seventeen years as Executive Director of the MLBPA, Miller retired in 1982.<sup>230</sup> During his reign, the minimum salary rose from \$6,000 to \$33,500.<sup>231</sup> The average salary increased from \$19,000 in 1966 to \$241,000 in 1982, and would rise to \$329,000 in 1984, the final year of the last CBA negotiated by Miller.<sup>232</sup> The players' pension plan became the envy of every worker in America. Miller introduced collective bargaining to the game, which begot a grievance procedure, salary arbitration, the elimination of the dreaded reserve clause, and ultimately, free agency.

Miller's contribution to the players, financial and otherwise, cannot be overstated. He taught them about labor law, the benefit of unity, how the salary structure and pension plan affected everyone, stars and rookies alike, and how they had a responsibility to set the stage for those that would follow them in the future.<sup>233</sup> Miller's openness and communication skills were unparalleled and that served the MLBPA well during each of the negotiations with the owners on the CBA and pension plan. The work stoppages – and success against the owners – served to strengthen the resolve and unity of the players. They had successfully weathered three strikes and one lockout, emerging victorious and stronger after each interruption.<sup>234</sup>

What all the previous attempts at organizing the players had sought to accomplish finally came to pass under the leadership of Miller.<sup>235</sup> Miller's contributions laid the foundation for baseball's union and the direction for the next MLBPA leader.

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<sup>230</sup> MLBPA History, *supra* note 11.

<sup>231</sup> Miller, Marvin, JEWS IN SPORTS, <http://www.jewsinsports.org/profile.asp?sport=baseball&ID=169> (last visited Apr. 15, 2012).

<sup>232</sup> MLBPA History, *supra* note 11.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

**C. The Interlude Between Miller and Fehr 1982-1983**

When Miller stepped down as MLBPA head in December 1982, Ken Moffett was hired to succeed the venerable labor leader.<sup>236</sup> Moffett had some experience with baseball's labor relations, having previously served as the federal mediator during the 1980-81 CBA negotiations. The players' level of familiarity with Moffett seemed to make the former mediator a good fit for the position, but his term with the union was short lived.

As a professional mediator, Moffett's style was to seek consensus, rather than to represent his constituency.<sup>237</sup> His approach to dealing with the owners was in stark contrast to Miller's. Moffett served the MLBPA for less than a year.<sup>238</sup> His tumultuous term was highlighted by several actions that infuriated the players.<sup>239</sup> Moffett was willing, indeed eager, to work with the owners on developing a drug testing program for the players.<sup>240</sup> He refused to demand greater pension contributions from the owners after they struck a TV deal that would increase the league's revenue nearly four-fold.<sup>241</sup> Moffett made his own schedule and was infrequently seen around the MLBPA office.<sup>242</sup> This did not sit well with the players.<sup>243</sup>

When Moffett was fired in November 1983, Miller agreed to return in an interim capacity, which lasted less than three weeks.<sup>244</sup> MLBPA Legal Counsel, Don Fehr, was elected as acting Executive Director of the MLBPA in December 1983.<sup>245</sup> Fehr served in that capacity

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<sup>236</sup> STAUDOHR, *supra* note 32, at 28.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 29.

<sup>240</sup> *Id.*

<sup>241</sup> Mihara, *supra* note 47, at 104.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Don Fehr Announces Retirement, MLBPLAYERS.COM (June 22, 2009).

[http://mlb.mlb.com/pa/news/article.jsp?ymd=20090622&content\\_id=5470258&vkey=mlbpa\\_news&fext=.jsp](http://mlb.mlb.com/pa/news/article.jsp?ymd=20090622&content_id=5470258&vkey=mlbpa_news&fext=.jsp).



for two years until membership formally elected him as the full-time Executive Director in December 1985.<sup>246</sup>

#### **D. The Don Fehr Years 1983-2009**

Marvin Miller originally hired Don Fehr as the union's General Counsel in 1977.<sup>247</sup> Fehr served in that capacity until he succeeded Miller as acting Executive Director in December 1983.<sup>248</sup> Fehr profoundly impacted the welfare of his membership over the course of his career as MLBPA Executive Director. At the time Fehr became acting Executive Director, the average player salary was \$289,000 per season.<sup>249</sup> When Fehr announced his retirement in 2009, the average player salary was \$3.3 million.<sup>250</sup>

Fehr achieved many financial gains for his membership; however, they came at a great cost to the game. During his time as Executive Director, there was a brief strike in 1985, a thirty-two day lockout in 1990, and a strike in August 1994 that lasted almost eight months.<sup>251</sup> During the 1994 strike, Commissioner Bud Selig was forced to cancel the World Series, the first time a World Series had not been played since 1904.<sup>252</sup> The strike also delayed the start of the 1995 season.<sup>253</sup> These labor disruptions would test the resolve of Fehr's union.

Miller had laid a strong foundation for Fehr. One may argue that Fehr – or anyone else who succeeded Miller for that matter – merely had to follow the blueprint Miller had created for his successor to be successful. On the other hand, Miller's successor would also have difficulty

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> MLBPA History, *supra* note 11.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Baseball Almanac, Year in Review, 1994*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr1994n.shtml> (last visited Apr. 15, 2012).

<sup>253</sup> *Baseball Almanac, Year in Review, 1995*, BASEBALL ALMANAC <http://www.baseball-almanac.com/yearly/yr1995n.shtml> (last visited Apr. 15, 2012).

living up to his predecessor's accomplishments, analogous to a player who followed a Hall-of-Famer on the field. However, both viewpoints are gross oversimplifications.

While the Miller years are best described as a period where the players made continuous and significant gains in their negotiations with MLB owners, the Fehr years signified a period where ownership made repeated attempts to obtain concessions from the players, particularly in the areas of salary arbitration and free agency.<sup>254</sup> Fehr was in the unenviable position of trying to maintain the gains acquired during the Miller era while living up to his predecessor's string of accomplishments. In reality, Fehr was frequently casted in a defensive position.

Fehr's first negotiation was on the new CBA beginning in 1985. Two key issues were an increase in contributions to the players' pension plan as a result of the owners' new six-year national television contracts with ABC and NBC (which began in 1984), and the salary arbitration system.<sup>255</sup> Players wanted the opportunity to go to arbitration after one year while the owners wanted to delay arbitration until three years of service.<sup>256</sup>

It was painfully obvious to owners that the arbitration system was the main culprit behind the escalation of salaries.<sup>257</sup> Players who were not eligible for free agency could use contract figures of free agents for comparison purposes in their arbitration hearings.<sup>258</sup> If a three-year player had statistics comparable to a free agent's, he could use the salary of that free agent to argue for a raise.<sup>259</sup> Thus, the arbitration system, as ownership assessed the situation, had escalated salaries to a point that was financially untenable for the state of baseball.<sup>260</sup>

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<sup>254</sup> Mihara, *supra* note 47, at 103.

<sup>255</sup> STAUDOHR, *supra* note 32, at 42.

<sup>256</sup> *Id.* at 43.

<sup>257</sup> Mihara, *supra* note 47, at 105.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 106.

In February 1985, after no progress in talks, owners agreed to turn over financial information to the union in an attempt to convince the players of their financial plight.<sup>261</sup> This was a first for baseball.<sup>262</sup> Although the owners had raised the issue of their adverse financial condition during negotiations in 1981, they had refused to open the books to the union.<sup>263</sup> Providing financial information to the players would bring significant consequences for both sides.

While negotiations continued, the MLBPA turned over the teams' collective books to Roger Noll for his analysis.<sup>264</sup> Noll, a Stanford University economist, had a reputation as an authority on the business of baseball.<sup>265</sup> The owners claimed twenty-two of the twenty-six teams lost money in 1984 and, collectively, the industry suffered losses totaling \$43 million.<sup>266</sup> However, Noll saw things differently. He determined that teams averaged between \$1 million and \$2 million in profits during the same period,<sup>267</sup> and that the alleged losses stemmed from creative, if not disingenuous, bookkeeping methods.<sup>268</sup> Teams included non-baseball activities in their financial results and operated certain revenue producing activities, such as parking and concessions, through other entities.<sup>269</sup> This distorted the actual numbers and led the players to doubt the owners' assertions.

The owners' attempt at transparency had the opposite effect once Noll analyzed the financial information. Players were more convinced than ever that the owners' sole goal in negotiations was to roll back the players' prior gains.<sup>270</sup> On July 15, 1985 the MLBPA set a

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<sup>261</sup> STAUDO HAR, *supra* note 32, at 45.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 43.

<sup>264</sup> *Id.* at 44.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Mihara, *supra* note 47, at 106.

<sup>269</sup> *Id.*

<sup>270</sup> STAUDO HAR, *supra* note 32, at 44.

strike deadline for August 6.<sup>271</sup> Owners submitted a proposal that targeted two main issues: (1) the length of time required for salary arbitration eligibility, and (2) an increase in pension contributions.<sup>272</sup> Fehr rejected the proposal, claiming it was nothing more than a salary cap in disguise.<sup>273</sup>

When the sides failed to reach an agreement by the strike deadline of August 6, the players walked.<sup>274</sup> With the urging of Commissioner Peter Ueberroth, who had succeeded the bumbling Kuhn, owners dropped their demands for a salary cap.<sup>275</sup> On August 7, the parties settled on a compromise five-year deal.<sup>276</sup> Although the percentage of national television revenue players would receive as contributions to their pension plan were reduced, the dollar contribution to the plan more than doubled.<sup>277</sup> Benefits to retired players increased substantially.<sup>278</sup> Under the new plan, a ten-year veteran would receive \$91,000 at age 62.<sup>279</sup> Under the earlier plan, a twenty-year veteran would have received \$57,000 at age sixty-five.<sup>280</sup>

Players received additional concessions. Minimum salaries would increase from \$40,000 in 1984 to \$60,000 in 1985 and 1986.<sup>281</sup> Increases for the 1987-89 seasons would be tied to cost of living adjustments.<sup>282</sup> Henceforth, teams losing a free agent would no longer receive a Major League player as compensation; such compensation would be limited to amateur draft picks.<sup>283</sup> Owners also agreed to establish a \$20 million fund from the proceeds of their national television

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Mihara, *supra* note 47, at 108.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Jeff Euston, *CBA Summaries, 1985-89*, BIZ OF BASEBALL (Feb. 2, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=685:1985-1989&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=685:1985-1989&catid=45:cba-summaries&Itemid=76).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

contracts to assist franchises that were losing money, the forerunner of what is, today, referred to as revenue sharing.<sup>284</sup>

For the owners, the settlement also provided some cost relief. Eligibility for salary arbitration was increased from two years to three, a clear giveback by the players from the previous deal.<sup>285</sup> Free agent contracts would no longer serve as comparisons in salary arbitration cases.<sup>286</sup> Only contracts for players with similar service time and statistics could be used in arbitration hearings.<sup>287</sup>

At the time of the settlement, it was difficult to determine which side “won.” However, looking back, it is clear that within the MLBPA, the settlement favored veteran players over those with low service time. Miller did not find the “giveback” of an additional year of service time as a condition of arbitration amusing. He wrote in his book, “From a personal standpoint the 1985 negotiations were unsatisfactory.”<sup>288</sup> The comment was a not-so-subtle swipe at Fehr, although Miller speculated that the huge salary gains obtained by the players in previous agreements had made it difficult to maintain unity during the 1985 negotiation.<sup>289</sup>

While some players were unsatisfied with the terms of the 1985 agreement, the same could be said of the owners. Many of them sensed the players were not as united as they had been in prior negotiations and Ueberroth’s intrusion into the negotiations – the Commissioner was accused by some owners as being opposed to a strike for his own personal benefit – had prevented them from striking an even better deal with the players.<sup>290</sup> However, Ueberroth would

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>288</sup> Miller, *supra* note 93, at 335.

<sup>289</sup> *Id.*

<sup>290</sup> Jeffrey S. Moorad, *Major League Baseball’s Labor Turmoil: The Failure of the Counter-Revolution*. 4 VILL. SPORTS & ENT. L. J. 53 (1997).

soon make up for his presumed disloyalty to the owners in the short term in a manner that would prove incredibly costly to them in the long term.

The 1985 free agent season was not what the players had expected. Few teams elected to participate in the free agent process and those that did made similar offers to the available players.<sup>291</sup> The free agent markets of 1986 and 1987 were similar to 1985.<sup>292</sup> Fehr was incensed, convinced that “collusion” was behind the lack of offers and the similarities between what few offers the players did receive.<sup>293</sup> The MLBPA filed grievances against the owners for the years 1985-1987.<sup>294</sup> In what turned out to be a great victory for Fehr, arbitrators Thomas Roberts and George Nicolau agreed with the union regarding the collusion charges.<sup>295</sup> The MLBPA was awarded damages to reimburse the players for what they had lost as a result of the collusion by the owners, a scheme that had originated with Ueberroth.<sup>296</sup> The monetary awards for all three years, including treble damages and interest, totaled \$280 million.<sup>297</sup> Ironically, it was the owners who had insisted on including a treble damage provision in the CBA to deter the players from colluding against the owners.<sup>298</sup> However, the owners were the ones who ended up paying a hefty price for collusion.

The collusion awards served to loosen up the free agent market. After the 1989 season, many players received lucrative offers.<sup>299</sup> Top salaries increased 50%, from the \$2 million per year range to \$3 million per year.<sup>300</sup> Team owners were flush with cash because of increased

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<sup>291</sup> MLBPA History, *supra* note 11.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> STAUDOHR, *supra* note 32, at 38.

<sup>297</sup> *Id.* at 39.

<sup>298</sup> Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 WAYNE L. REV. 601, 608 (2008).

<sup>299</sup> STAUDOHR, *supra* note 32, at 39.

<sup>300</sup> *Id.*

league revenues.<sup>301</sup> Although Ueberroth will be remembered as the mastermind of collusion, he should also be thought of as a shrewd negotiator, having negotiated a number of lucrative national television contracts that doubled the owners' television revenue and increased merchandise revenue for each club from \$35,000 per year to \$2.5 million per year.<sup>302</sup>

Negotiations on the next CBA began in late 1989, with the owners proposing a salary cap that would be tied to a percentage of industry revenue that would be set aside for the players and a pay-for-performance proposal.<sup>303</sup> The proposal was summarily rejected by the MLBPA.<sup>304</sup> In an effort to pressure the players, on February 16, 1990, the owners announced a Spring Training lockout.<sup>305</sup> Shortly after the lockout began, newly installed Commissioner Fay Vincent convinced the owners to drop their proposals for a percentage of league revenues, a salary cap, and pay-for-performance.<sup>306</sup> The remaining stumbling block for the players was the eligibility period for salary arbitration.<sup>307</sup> During the 1985 negotiations, players had agreed to add a year to the eligibility requirements, from two years to three, in part due to the alleged financial plight of the owners. Now, with the owners flush with cash, the union wanted to revert to the previous eligibility period of two years.

After a number of counterproposals from both sides, on March 18, 1990 the parties agreed to a compromise that would allow 17% of the two-year players, those with the most service time, to file for arbitration.<sup>308</sup> The four-year agreement also provided for an increase in the minimum salary to \$100,000 per year, up from the previous figure of \$68,000, substantial

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<sup>301</sup> Mihara, *supra* note 47, at 113.

<sup>302</sup> *Id.*

<sup>303</sup> STAUDOHR, *supra* note 32, at 46.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 48.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Jeff Euston, *CBA Summaries, 1990-93*, BIZ OF BASEBALL (Feb. 2, 2007),

[http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=686:1990-1993&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=686:1990-1993&catid=45:cba-summaries&Itemid=76).

increases to the pension plan, and an agreement to form a committee to study revenue sharing and other economic issues affecting the industry.<sup>309</sup>

During the negotiations, the unity of the players was again suspect, so much so that Fehr requested assistance from Miller.<sup>310</sup> On March 17, 1990, the day before a settlement was reached, Miller addressed the players and gave them a history lesson on what the MLBPA had accomplished, in large measure due to the steadfast unity of its membership.<sup>311</sup> He urged membership to maintain solidarity and assured them that if they did so, they would achieve their goals.<sup>312</sup> The players voted to reject the owners' offer, but on the next day, the parties reached an agreement.<sup>313</sup>

One clause in the new CBA allowed either party to re-open contract negotiations after the 1992 season.<sup>314</sup> The owners exercised their option to do so, but not before making a change in leadership. Displeased with Vincent's intervention in the 1990 negotiations, the owners forced him to resign and appointed one of their own, Milwaukee Brewers' owner Allan "Bud" Selig, as acting Commissioner.<sup>315</sup> Owners believed they finally had someone to truly represent their collective interests in negotiations as Selig had spent two decades in baseball as an owner and had built many relationships with his fellow owners.

The economic landscape had changed since the signing of the previous CBA. Teams were losing money and the disparity in revenue between large market and small market clubs was creating a divide amongst teams.<sup>316</sup> In order to unify as many owners as possible,

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<sup>309</sup> *Id.*

<sup>310</sup> Mihara, *supra* note 47, at 116.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Euston, *supra* note 307.

<sup>315</sup> MLB HISTORY, *supra* note 24.

<sup>316</sup> STAUDOHAR, *supra* note 32, at 49.



management proposed a salary cap tied to revenue sharing.<sup>317</sup> However, the proposal lacked a salary floor.<sup>318</sup> If players accepted a proposal that did not include a floor, small market clubs could spend as little on salary as they wished.<sup>319</sup> Not surprisingly, the MLBPA would not bite on such a proposal.<sup>320</sup>

Negotiations continued throughout the 1993 season with no agreement in sight.<sup>321</sup> For the 1994 season, the parties continued operating under the terms of the 1990 CBA, even though it had expired in 1993.<sup>322</sup> In addition to making revenue sharing contingent on a salary cap, the owners proposed eliminating salary arbitration and reducing eligibility for free agency from six years to four.<sup>323</sup> Both sides made a number of proposals and rejected the other side's counterproposals. On July 28, the players set a strike date of August 12.<sup>324</sup>

When no agreement was reached by the strike deadline, the players walked out.<sup>325</sup> After the strike commenced, each side made counterproposals that were rejected by the other side.<sup>326</sup> On September 14, Commissioner Selig announced the cancellation of the remainder of the season and the playoffs, including the World Series.<sup>327</sup> With no end in sight, President Bill Clinton appointed a highly respected federal mediator, William J. Uery, to help resolve the stalemate.<sup>328</sup> His efforts also proved fruitless.<sup>329</sup>

In an attempt to exert more pressure on the players, owners had announced in July they were not obligated to make the pension payment as agreed to in the previous CBA because the

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 50.

<sup>321</sup> *Id.* at 49.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 50.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Our Top Ten Stories: MLB Strike: Selig Cancels World Series*, STREET AND SMITH'S SPORTSBUSINESS DAILY (Sept. 21, 2004), <http://www.sportsbusinessdaily.com/Daily/Issues/2004/09/Issue-7/Special-Report-Brsbds-10Th-Anniversary/Our-Top-Ten-Stories-MLB-Strike-Selig-Cancels-World-Series.aspx> [hereinafter SPORTSBUSINESS DAILY].

<sup>328</sup> STAUDOHR. *supra* note 32, at 50.

<sup>329</sup> *Id.*

agreement had expired.<sup>330</sup> The players filed an unfair labor practice claim against the owners.<sup>331</sup> On December 14, 1994, the NLRB found for the players.<sup>332</sup>

The owners were intent on achieving a salary cap, either through negotiation or by operation of law.<sup>333</sup> Federal labor law allowed management to impose their last proposal on the union if both sides negotiated to an impasse.<sup>334</sup> The owners made numerous attempts to declare a bargaining impasse but the union thwarted their efforts by continually making counterproposals, all of which were rejected.<sup>335</sup> On December 23, 1994, the owners attempted to take definitive action to end the stonewalling by finally declaring an impasse, and unilaterally imposed a salary cap and eliminated salary arbitration.<sup>336</sup> The players immediately filed another unfair labor practice claim with the NLRB.<sup>337</sup>

In January 1995, the owners announced they would begin the season with replacement players.<sup>338</sup> Spring Training camps opened on March 2 with a collection of minor leaguers, retired players, and other aspiring MLB players.<sup>339</sup> However, on March 26, the NLRB, in response to the union's unfair labor claim against the league, voted to seek an injunction against the owners forcing them to abide by the terms of the old CBA until a new one was negotiated.<sup>340</sup> The request was referred to Federal District Court Judge Sonia Sotomayor on March 27.<sup>341</sup> On March 29, the players voted to end their strike if the injunction was granted.<sup>342</sup> On March 31, Judge Sotomayor granted the injunction and ordered both parties back to the bargaining table.<sup>343</sup>

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<sup>330</sup> Mihara, *supra* note 47, at 121.

<sup>331</sup> STAUDOHR, *supra* note 32, at 51.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Mihara, *supra* note 47, at 122.

<sup>337</sup> *Id.* at 123.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 124.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> Sean Gregory, *How Sotomayer 'Saved' Baseball*, TIME MAGAZINE (May 26, 2009).

The owners abandoned their replacement plan on April 2 and agreed to start what would be an abbreviated season on April 25, with teams playing a 144-game schedule.<sup>344</sup> The 234-day strike finally ended. However, negotiations on a new CBA continued for the next two years until the sides finally reached an agreement in December 1996.<sup>345</sup>

The new CBA was a four-year deal, five years if the players wished to extend the accord.<sup>346</sup> The new agreement increased the minimum salary to \$150,000 for 1997, and, ultimately, reaching \$200,000 in the last year of the CBA.<sup>347</sup> Three-person arbitration panels would now be employed in salary arbitration cases instead of a single arbitrator deciding a case.<sup>348</sup> Interleague play was instituted for the first time along with a luxury tax and expanded revenue sharing among the clubs.<sup>349</sup> Approximately 34% of local revenues would be contributed to the revenue sharing fund, with at least \$250,000 distributed annually to lower revenue-generating clubs.<sup>350</sup>

A unique item was introduced into the 1996 CBA as a means to address competitive balance. Although the mechanism was officially called the Competitive Balance Tax, many labeled it the “luxury tax.”<sup>351</sup> The concept was proposed by the owners in an attempt to discourage the higher revenue clubs, particularly the Yankees, from spending whatever amount they wished on player salary. The agreement provided for a tax on salaries above a certain ceiling. After much bickering over the rate and the amount – the players favored a higher ceiling and a lower rate, the owners sought the reverse – the agreement provided for a rate of 17.5% on

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<http://www.time.com/time/nation/article/0,8599,1900974,00.html>.

<sup>344</sup> STAUDOHR, *supra* note 32, at 51.

<sup>345</sup> Mihara, *supra* note 47, at 125.

<sup>346</sup> Jeff Euston, *CBA Summaries, 1997-2000*, BIZ OF BASEBALL (Feb. 2, 2007),

[http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=688:1997-2000--2001-union-option&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=688:1997-2000--2001-union-option&catid=45:cba-summaries&Itemid=76).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

payments above \$117 million.<sup>352</sup> Both the rate and the ceiling would increase in subsequent years and teams exceeding the ceiling in multiple seasons could be hit with a tax of up to 40% on the excess.<sup>353</sup>

While the players maintained their solidarity throughout the strike and the two years of negotiations that followed, it was the first time the owners had also remained united.<sup>354</sup> That unity was attributed to Selig, who understood the importance of consensus-building amongst owners and who continuously made proposals that addressed the needs of large market clubs as well as small market franchises. Taking a page from Marvin Miller's playbook, Selig worked the phones and kept owners apprised of developments throughout the negotiations.<sup>355</sup> Selig's efforts paid off in producing a united ownership front that resulted in a CBA that met the interests of both sides, and would ultimately lead to prolonged labor peace and prosperity for the sport.<sup>356</sup>

The players elected to continue the 1996 CBA for an additional year, so the next CBA would begin with the 2002 season.<sup>357</sup> Revenue sharing and the luxury tax were primary issues of concern for the owners.<sup>358</sup> Selig announced early in the negotiations that there would not be a lockout "during the season," although he made no mention of what might happen after the season if the parties failed to reach an agreement.<sup>359</sup> That statement led Fehr to suggest that there might be a lockout after the season, creating some tension in the negotiations.<sup>360</sup>

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<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Allan H. "Bud" Selig, MLB.COM, [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_9](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_9) (last visited Oct. 15, 2011) [hereinafter SELIG HISTORY].

<sup>355</sup> Steve Fainaru, *Angelos, Selig Last Men Standing in D.C.'s Way*, WASHINGTON POST (June 29, 2004), <http://www.washingtonpost.com/ac2/wp-dyn/A13386-2004Jun28?language=printer>.

<sup>356</sup> SELIG HISTORY, *supra* note 354.

<sup>357</sup> Euston, *supra* note 346.

<sup>358</sup> Doug Pappas, *A Contentious History: Baseball's Labor Fights*, ESPN.COM (Sept. 5, 2007), <http://static.espn.go.com/mlb/columns/bp/1427632.html>.

<sup>359</sup> *Selig to players: No lockout this season*, SPORTS ILLUSTRATED (Mar. 26, 2002), [http://sportsillustrated.cnn.com/baseball/news/2002/03/26/selig\\_lockout\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2002/03/26/selig_lockout_ap/).

<sup>360</sup> *Id.*

One contentious issue during negotiations was the proposal by the owners to contract two clubs, the Minnesota Twins and the Montreal Expos.<sup>361</sup> Despite the unsettled nature of the negotiations, owners were able to convince the players to take an anonymous survey to determine the extent of steroid use in the game, an issue that management had pressed throughout the negotiations.<sup>362</sup>

The sides bargained during the season, but on August 12, 2002 the union set a strike deadline of August 30.<sup>363</sup> Issues surrounding revenue sharing and the luxury tax remained the two most difficult bargaining topics.<sup>364</sup> However, the parties avoided a work stoppage by agreeing to a four-year agreement at the eleventh hour.<sup>365</sup> Revenue sharing was increased.<sup>366</sup> The luxury tax threshold would also be increased during the life of the agreement, from a threshold of \$117 million in 2003 to \$136.5 million in 2006.<sup>367</sup> Minimum salaries increased from \$200,000 to \$300,000.<sup>368</sup> Although the parties agreed to a worldwide draft, they also agreed to continue negotiating the details.<sup>369</sup> The owners also agreed not to contract any clubs during the length of the agreement, in effect, a roster-saving provision that benefitted the union and its membership.<sup>370</sup>

Both sides were beginning to see the benefits of labor peace. Learning from their earlier experience, the two sides did not wait for the eleventh hour to reach an agreement on the next CBA. Prior to Game 3 of the 2006 World Series, more than two months before the expiration of

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<sup>361</sup> Zombie Monta, *Baseball avoids another lockout*, SBINATION (Aug. 30, 2010), <http://www.inhistoric.com/2010/8/30/1065675/8-30-2002-baseball-avoids-another>.

<sup>362</sup> Maury Brown & Jeff Euston, *CBA Summaries, 2003-2006*, BIZ OF BASEBALL (Feb. 2, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=689:2003-2006&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=689:2003-2006&catid=45:cba-summaries&Itemid=76).

<sup>363</sup> Monta, *supra* note 361.

<sup>364</sup> *Id.*

<sup>365</sup> Brown & Euston, *supra* note 362.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

the 2002 CBA, Fehr and Selig held a joint news conference to announce a new five-year agreement, the longest deal in baseball history.<sup>371</sup> It was the first CBA to be reached in advance of the expiration of the previous agreement, and one that was reached without apparent acrimony in the discussions.<sup>372</sup> When the existing CBA expired after the 2011 season, MLB and its players enjoyed a total of sixteen years of uninterrupted play.<sup>373</sup>

The threshold for the luxury tax would be increased during each year of the new agreement, from \$143 million in 2007 to \$178 million in 2011.<sup>374</sup> The rate for multiple violators of the previous threshold would be 40%.<sup>375</sup> The minimum salary increased from \$327,000 in 2006 to \$380,000 in 2007, and \$400,000 for each year thereafter, with a further cost of living increase for 2010 and 2011.<sup>376</sup> Signing deadlines for a team's free agents were eliminated,<sup>377</sup> and, once again, the owners agreed there would be no contraction during the length of the agreement.<sup>378</sup> Players selected in the June Rule Five Draft who have college eligibility remaining, must sign with their drafting team by August 15 or they go back into the following year's Draft.<sup>379</sup> Teams that do not sign their first round pick by the deadline receive a compensation pick in next year's Draft.<sup>380</sup>

As mentioned above, the latest agreement was reached without any rancor and without the usual dueling press conferences that characterized previous negotiations. The parties were basically satisfied with the status quo as baseball was in the midst of an unprecedented period of

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<sup>371</sup> Maury Brown & Jeff Euston, *CBA Summaries, 2007-2011*, BIZ OF BASEBALL (Feb. 2, 2007), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=690:2007-2011&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=690:2007-2011&catid=45:cba-summaries&Itemid=76).

<sup>372</sup> *Id.*

<sup>373</sup> *Bud Selig talks labor, state of MLB*, ESPN.COM (Mar. 31, 2011), <http://sports.espn.go.com/mlb/news/story?id=6273310> [hereinafter STATE OF MLB].

<sup>374</sup> Brown & Euston, *supra* note 371.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

revenue growth.<sup>381</sup> This is in stark contrast to the historical relationship between baseball's management and players. It seems that the tumultuous times during Miller's leadership, as well as the early years of Fehr's administration, laid the foundation for the labor peace baseball is experiencing today.

With little left to prove, Fehr retired as MLBPA Executive Director on June 22, 2009.<sup>382</sup> However, not long into retirement, Fehr accepted an invitation to serve as an unpaid advisor to the National Hockey League Players Association ("NHLPA").<sup>383</sup> The NHLPA had been in a state of flux for the previous four seasons as it struggled to recover from a costly labor battle with the National Hockey League ("NHL") owners that had resulted in the cancellation of the NHL's entire 2004-05 season.<sup>384</sup>

Since the lockout, the NHLPA has been plagued by infighting over the union's leadership. This power struggle resulted in three Executive Directors and one interim Director in five years.<sup>385</sup> Initially, Fehr was charged with assisting the players in revamping the union's constitution and in its search for a new NHLPA leader.<sup>386</sup> However, it was not long before Fehr's role with the NHLPA would increase.

## **PART II: DON FEHR ELECTED EXECUTIVE DIRECTOR OF THE NHLPA**

Don Fehr's election as the new NHLPA Executive Director was hardly a surprise. A relationship between the MLBPA and the NHLPA had existed for a number of years before Fehr was asked to assist the NHLPA in an unpaid capacity. Fehr had been an advisor to the union

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<sup>381</sup> STATE OF MLB, *supra* note 373.

<sup>382</sup> MLBPA History, *supra* note 11.

<sup>383</sup> Fehr's retirement lasted until November 12, 2009, to be exact; see Justin Pearcy, *Fehr agrees to help NHLPA*, CBC.CA (Nov. 12, 2009), <http://www.cbc.ca/sports/hockey/story/2009/11/12/sp-nhlpa-fehr.html>.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

since at least 2007<sup>387</sup> and has a long-standing relationship with former NHLPA Executive Director Bob Goodenow.<sup>388</sup> Goodenow resigned as NHLPA head in 2005 after he lost the support of membership during hockey's lockout season.<sup>389</sup> The union had capitulated to the owners' demands for a salary cap, something Goodenow had made clear during collective bargaining the union would never accept.<sup>390</sup> Goodenow's steadfast refusal to accept any form of a salary cap made his tenure with the NHLPA in the salary cap era impossible.

After Goodenow's successor, Ted Saskin, was fired for intercepting players' emails,<sup>391</sup> Mike Weiner, then General Counsel of the MLBPA and one of Fehr's right hand men, was approached about taking over the leadership of the NHLPA.<sup>392</sup> While he was General Counsel to the MLBPA, Weiner also worked with the NHLPA in salary arbitrations, so he was familiar with professional hockey players and their union.<sup>393</sup> However, since he was being groomed as Fehr's successor, Weiner turned down the NHLPA's request and subsequently succeeded Fehr as head of the MLBPA in 2009.<sup>394</sup> After Weiner rebuffed the NHLPA's overture, the union turned to Boston attorney and former college hockey player Paul Kelly.<sup>395</sup>

Kelly had become familiar with NHL players in his role as an Assistant United States Attorney who successfully prosecuted former NHLPA boss Alan Eagleson on a multitude of illegal and unethical conduct charges.<sup>396</sup> Although he sought to build consensus among his

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<sup>387</sup> Damien Cox, *Cox: Questions still surround Fehr's rise to top of NHLPA*, THE TORONTO STAR (Mar. 12, 2011), <http://www.thestar.com/sports/hockey/nhl/article/953174--cox-questions-still-surround-fehr-s-rise-to-top-of-nhlpa>.

<sup>388</sup> Kevin Paul Dupont, *Fehr on steadier ground as head of players union*, THE BOSTON GLOBE (Dec. 26, 2010), [http://www.boston.com/sports/hockey/articles/2010/12/26/fehr\\_on\\_steadier\\_ground\\_as\\_head\\_of\\_players\\_union/](http://www.boston.com/sports/hockey/articles/2010/12/26/fehr_on_steadier_ground_as_head_of_players_union/).

<sup>389</sup> *NHLPA leader Goodenow leaves after 15 years*, ESPN.COM (July 29, 2005),

<http://sports.espn.go.com/nhl/news/story?id=2118641>.

<sup>390</sup> *Id.*

<sup>391</sup> *NHLPA fires executive director Ted Saskin*, CBCSPORTS.CA (May 10, 2007),

<http://www.cbc.ca/sports/hockey/story/2007/05/10/nhlpa-saskin-fired.html>.

<sup>392</sup> Ken Campbell, *Campbell's Cuts: Bettman's silence speaks volumes*, THE HOCKEY NEWS (Sept. 26, 2007),

<http://www.thehockeynews.com/articles/9608-Campbells-Cuts-Bettmans-silence-speaks-volumes.html>.

<sup>393</sup> *Id.*

<sup>394</sup> Jerry Crasnick, *'Regular genius' to be next union chief*, ESPN.COM (June 22, 2009),

[http://sports.espn.go.com/mlb/columns/story?columnist=crasnick\\_jerry&id=4279621](http://sports.espn.go.com/mlb/columns/story?columnist=crasnick_jerry&id=4279621).

<sup>395</sup> *Players select Paul Kelly as NHLPA executive director*, NHLPA.COM (Oct. 24, 2007), <http://www.nhlpa.com/News/Media-Releases/Details.aspx?R=2F6CAA1F-D64E-41E8-88F0-6FB52B0A3003>.

<sup>396</sup> *Id.*



membership and heal the wounds caused by his predecessor, Ted Saskin,<sup>397</sup> Kelly's tenure with the NHLPA was brief. His detractors argued that Kelly enjoyed too close of a relationship with NHL Commissioner Gary Bettman<sup>398</sup> and lacked an adversarial tone in discussions with management.<sup>399</sup> Ultimately, Kelly was dismissed after the players' Executive Board convened for a marathon meeting to discuss his conduct.<sup>400</sup> Kelly was summoned into the players' room at approximately 3:00 AM on August 31, 2009 only to be summarily fired by the Executive Board for the alleged misconduct.<sup>401</sup>

In the aftermath of Kelly's sudden firing, Fehr was asked by the NHLPA Executive Board to help stabilize the union; specifically, to help find Kelly's replacement and to assist in re-drafting the union's constitution, which he agreed to do as an unpaid advisor.<sup>402</sup> Fehr's efforts with the NHLPA were well received. He impressed the players so much that in March of 2010, a group of player agents and the union's Executive Board asked Fehr to accept the position of Executive Director.<sup>403</sup> Fehr declined, however, explaining that he wanted to focus on changes to the NHLPA constitution prior to considering any long-term commitment.<sup>404</sup>

Fehr's concern, apparently, was the lack of authority vested in the Executive Director by the union's constitution.<sup>405</sup> The constitution gave the Executive Board almost unlimited authority over the Executive Director, which resulted in the dismissal of the previous two

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<sup>397</sup> Kelly ousted as head of NHLPA, ESPN.COM (Aug. 31, 2009), <http://sports.espn.go.com/nhl/news/story?id=4433555>.

<sup>398</sup> For example, the anti-Kelly camp would most likely not approve Kelly spending extended time with NHL Commissioner Gary Bettman outside of a bargaining capacity; see Maki: Kelly, Bettman are hangin' out, THE TORONTO GLOBE AND MAIL (Nov. 2, 2007), <http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/maki-kelly-bettman-are-hangin-out/article794651/>.

<sup>399</sup> See e.g., The Candian Press, Bettman interviews NHLPA boss Kelly, SPORTSNET.CA (Jan. 24, 2008), [http://www.sportsnet.ca/hockey/2008/01/24/bettman\\_kelly/](http://www.sportsnet.ca/hockey/2008/01/24/bettman_kelly/).

<sup>400</sup> Ken Campbell, THN.com blog: Hargrove tells his side of NHLPA story, THE HOCKEY NEWS (Nov. 13, 2009), <http://www.thehockeynews.com/articles/29316-.html?media=videos>.

<sup>401</sup> Id.

<sup>402</sup> Ken Campbell, NHLPA brings on MLBPA executive director Donald Fehr to help find Kelly replacement and draft new constitution, THE HOCKEY NEWS (Nov. 9, 2009), <http://www.thehockeynews.com/articles/29192-NHLPA-brings-on-MLBPA-executive-director-Donald-Fehr-to-help-find-Kelly-replacement-and-draft-new-constitution.html>.

<sup>403</sup> Pierre LeBrun, Fehr appears, doesn't tip hand, ESPN.COM (Mar. 25, 2010), [http://espn.go.com/nhl/blog/\\_name/lebrun\\_pierre/id/5028914](http://espn.go.com/nhl/blog/_name/lebrun_pierre/id/5028914).

<sup>404</sup> Id.

<sup>405</sup> See Jim Kelly, Fehr emerging out of the NHLPA's bloody palace intrigue, SPORTS ILLUSTRATED (July 15, 2010), [http://sportsillustrated.cnn.com/2010/writers/jim\\_kelley/07/15/donald.fehr.nhlpa/index.html](http://sportsillustrated.cnn.com/2010/writers/jim_kelley/07/15/donald.fehr.nhlpa/index.html).

Executive Directors by a small group of players.<sup>406</sup> After the players approved changes to the constitution in 2010 that gave the Executive Director additional authority, Fehr agreed to stand for election as the full-time Executive Director.<sup>407</sup> He was overwhelmingly approved by the entire union membership and officially took the reigns as head of the union on December 18, 2010.<sup>408</sup> The Donald Fehr era at the NHLPA was officially underway.

After such a storied career with the MLBPA and his admitted desire to “take it easy,” one wonders what motivates a sixty-two year old with an \$11 million severance payment<sup>409</sup> from his previous employment to jump into the fray as the Executive Director of the NHLPA. The answer may lie in the history of the MLBPA as discussed above.

Don Fehr was a youthful thirty-six-year old when Miller retired as MLBPA Executive Director and had only been with the union for six years as its General Counsel.<sup>410</sup> Those factors may explain, in part, why membership first turned to Ken Moffitt, the former federal mediator, as Miller’s immediate successor. That move proved to be disastrous, resulting in Miller’s return on an interim basis in November 1983.<sup>411</sup> Less than a month later, and a year after Miller first retired, the union elected Fehr as interim Executive Director.<sup>412</sup> The interim tag was removed two years later.<sup>413</sup> However, even after he left the union for a second time, Miller remained involved with MLBPA affairs, acting as an unofficial advisor/confidant to Fehr.<sup>414</sup> Although Miller did not have an “official” role with the union, he was never far from the scene.

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<sup>406</sup> Scott Burnside, *New leader will inherit dysfunction*, ESPN.COM (Sept. 3, 2009),

[http://sports.espn.go.com/nhl/columns/story?columnist=burnside\\_scott&id=4442804](http://sports.espn.go.com/nhl/columns/story?columnist=burnside_scott&id=4442804).

<sup>407</sup> See Mike Brehm, *Don Fehr overwhelmingly approved as NHLPA Chief*, USA TODAY (Dec. 18, 2010),

[http://www.usatoday.com/sports/hockey/nhl/2010-12-18-don-fehr-named-nhlpa-executive-director\\_N.htm](http://www.usatoday.com/sports/hockey/nhl/2010-12-18-don-fehr-named-nhlpa-executive-director_N.htm).

<sup>408</sup> *Id.*

<sup>409</sup> Nelson, *supra* note 5.

<sup>410</sup> MLBPA History, *supra* note 11.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> STAUDOHAR, *supra* note 32, at 29.

MLB owners may have sensed a weakness in the combination of Fehr's age and lack of experience when he first became head of the union. The owners had arguably lost every battle and every negotiation with Miller and, after he retired, they were determined to take back some of the leverage they had conceded to the players.<sup>415</sup> Rather than attempting to wrestle new concessions from the owners, as Miller had done, Fehr seemed to constantly be in a defensive position, trying to hang on to the rights and benefits union membership had acquired under his predecessor.<sup>416</sup> Unfortunately, for him and the players he represented, he was not always successful in that regard. One example is the "giveback" of arbitration years, from two years of service time to three in 1987.<sup>417</sup> The union was able to restore the two-year provision for the top 17% of players beginning in 1991.<sup>418</sup> However, during his tenure at the union, Fehr found his decisions and strategy being compared with how his predecessor might have acted.

After Miller retired, the media never hesitated to seek him out for a quote or a comment on the union's position regarding labor issues of the day or the status of current negotiations with the owners.<sup>419</sup> Miller's aura loomed large over Fehr throughout his twenty-six years as Executive Director and one wonders if Fehr ever felt entirely free from the long shadow cast by his predecessor.

In addition, whether intentional or otherwise, Miller never hesitated to criticize the union's stance on issues or suggest that he would not have agreed to positions taken by Fehr.<sup>420</sup> Examples include revenue sharing and the Competitive Balance Tax, both of which the union agreed to during Fehr's reign.<sup>421</sup> Miller opined that those items were an end-around on the issue

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<sup>415</sup> Mihara, *supra* note 47, at 103.

<sup>416</sup> *Id.*

<sup>417</sup> Euston, *supra* note 277.

<sup>418</sup> Euston, *supra* note 308.

<sup>419</sup> See Jon Wertheim, *Marvin Miller on Barry Bonds, drug testing, and the NFL labor situation*, SPORTS ILLUSTRATED (Apr. 12, 2011), [http://sportsillustrated.cnn.com/2011/writers/jon\\_wertheim/04/12/marvin.miller/](http://sportsillustrated.cnn.com/2011/writers/jon_wertheim/04/12/marvin.miller/).

<sup>420</sup> JOHN HELYAR, *THE LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL*, 415 (Random House Publishing Group 1994).

<sup>421</sup> Clark C. Griffith, *Unlikely allies in MLB's economic wars*, SPORTSBUSINESS J. (July 23, 2001),

of a salary cap, which, under his leadership, the union had always adamantly opposed.<sup>422</sup> Miller argued that those items effectively act as a drag on player salaries, especially when teams do not spend their revenue sharing receipts on Major League payroll.<sup>423</sup>

Miller had also been outspoken in his belief that the players should never have agreed to steroid testing, beginning with the survey conducted during the 2003 season that led to the permanent implementation of a drug testing policy on players in 2004.<sup>424</sup> While Fehr argued against drug testing for the better part of two decades, consistently maintaining that it was an infringement on civil liberties, under the combined weight of congressional pressure, media criticism, and a vocal minority of union members, he finally acquiesced and agreed to drug testing.<sup>425</sup> Succumbing to further pressure, Fehr also agreed to open up the CBA, not once, but twice, to amend the original drug testing policy to include stiffer penalties against players who tested positive.<sup>426</sup> Those decisions were a significant departure from how a Miller-run MLBPA most likely would have responded.

Right or wrong, Miller's opinions set him apart from Fehr and could be interpreted as criticism of his successor. While Fehr never publicly commented when Miller took a position contrary to what the union agreed to do, it is not difficult to imagine that he was not entirely pleased with the public comments of his predecessor. Now, as Executive Director of a hockey players' union that has been repeatedly beaten down, Fehr is presented with an opportunity similar to the one afforded to Miller in 1966. Fehr can now engrain into the NHLPA the fundamentals of labor law that worked so well for Miller and the nascent MLBPA, and take the

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<http://www.sportsbusinessdaily.com/Journal/Issues/2001/07/20010723/This-Weeks-Issue/Unlikely-Allies-In-MlBs-Economic-Wars.aspx?hl=Clark%20Sports&sc=0>.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> Jerry Crasnick, *Miller: Athletes victims of witch hunt*, ESPN.COM (Feb. 10, 2009),

<http://sports.espn.go.com/mlb/news/story?id=3896888>.

<sup>425</sup> Mel Antonen, *Donald Fehr: Timing right to step down as MLB union head*, USA TODAY (June 23, 2009),

[http://www.usatoday.com/sports/baseball/2009-06-22-donald-fehr-steps-down\\_N.htm](http://www.usatoday.com/sports/baseball/2009-06-22-donald-fehr-steps-down_N.htm).

<sup>426</sup> *Id.*

offensive to win meaningful concessions from an ownership that is currently firmly in control of the negotiating relationship between the parties.<sup>427</sup> In summary, Fehr's foray into collective bargaining with the NHLPA could cement his legacy as a labor leader.

It is not difficult to imagine that part of Fehr's motivation for accepting the challenge of NHLPA Executive Director is to finally remove himself from Miller's shadow. Fehr is now on his own, in a different sport, where his every move will not be compared to his MLBPA predecessor.<sup>428</sup> The history of the NHLPA suggests that, even if Fehr moderately approaches the success he had as MLBPA Executive Director, he will have accomplished more than all the prior NHLPA leaders combined.<sup>429</sup> However, the hockey union, in its current form, is in dire shape.<sup>430</sup> Fehr is still tasked with the difficult job of instilling player solidarity and finally healing the inter-union factionalism that has fermented as a result of the 2004-05 lockout and the various scandals that have impeded the union's progress.<sup>431</sup> He must also prepare membership for the upcoming CBA negotiations to reach a new accord when the current agreement expires on September 15, 2012.<sup>432</sup> After he leads the players through negotiations against ownership, Fehr is also tasked with the important responsibility of locating and training a new leadership team that will guide the NHLPA beyond his tenure, which is expected to be brief.<sup>433</sup>

Fehr's current situation is vastly different from what it was when he was first elected as the leader of the MLBPA. When Fehr ascended to the position of Executive Director of the MLBPA, the union was in great shape.<sup>434</sup> Miller had organized and educated the players for

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<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> Damien Cox, *Cox: New NHLPA boss strikes Fehr into hockey fans*, THE TORONTO STAR (Dec. 18, 2010), <http://www.thestar.com/909320>.

<sup>430</sup> Kelly, *supra* note 405; *see also* Robert Cribb, *NHLPA interim executive director Ian Penny resigns*, THE TORONTO STAR (Oct. 30, 2009), <http://www.thestar.com/sports/article/718851--nhlpa-interim-executive-director-ian-penny-resigns>.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Cox, *supra* note 429.

<sup>434</sup> STAUDOHAR, *supra* note 32, at 29.

eighteen years.<sup>435</sup> Even the eleven-month term of the incompetent Moffitt did not adversely affect the solidarity and effectiveness of the union.<sup>436</sup> That state of affairs is radically different from the situation Fehr inherited after assuming leadership of the NHLPA in 2010. The hockey union has been a dysfunctional organization for most of its existence, no more so than in the period since the owners locked out the players for the entire 2004-05 season.<sup>437</sup> In the past five years, four Executive Directors, including an interim one, have led the union.<sup>438</sup> In addition to the four leaders, there were two periods between 2005-10, including the fifteen months immediately prior to Fehr's election, during which there was no designated leader.<sup>439</sup> Into the breach stepped Fehr.

At the time he stepped in as an unpaid advisor, Fehr had two primary goals in mind. One, Fehr needed to put an end to the infighting that had existed seemingly forever among the union's membership and he had to unify the players behind one leader.<sup>440</sup> Second, and perhaps most importantly, he had to educate the players on labor law and the need for, and benefits of, a union, similar to what Miller had done with great success after he began working with the MLBPA.<sup>441</sup>

Fehr agreed to do three things, all designed to accomplish his avowed goals. First, he agreed to help the union revise and strengthen its constitution.<sup>442</sup> The constitution placed too much power in the union's Executive Board, which consisted of one player representative from each of the thirty NHL teams.<sup>443</sup> The concentration of power in the Executive Board was by design, perhaps an over-reaction from the days of Alan Eagleson, the NHLPA's inaugural

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<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> Bruce Dowbiggin, *Inside the Most Dysfunctional Union in Sports*, Vol. 82, Issue 17, Canadian Business, Sept. 29, 2009.

<sup>438</sup> Cribb, *supra* note 430.

<sup>439</sup> *Id.*

<sup>440</sup> Cox, *supra* note 429.

<sup>441</sup> *Id.*

<sup>442</sup> George Malik, *The Donald Fehr as potential NHLPA ED freakout*, MLIVE.COM (Mar. 24, 2010), <http://blog.mlive.com/snapshots//.html>.

<sup>443</sup> Dowbiggin, *supra* note 437.

Executive Director, who basically ran the union like a dictatorship until he was forced to resign.<sup>444</sup> However, the language in the constitution went overboard, giving the Executive Board the power to dismiss Fehr's two predecessors, Paul Kelly and Ted Saskin, without any input from union membership.<sup>445</sup> Before a new Executive Director could be elected, Fehr knew this provision needed to be changed. Second, Fehr helped the union come up with the selection criteria for the next Executive Director.<sup>446</sup> Third, he aided in the search for that new Executive Director.<sup>447</sup> The fact that he led a search that ended in his election sounds a bit self-serving, if not a direct conflict of interest.<sup>448</sup> Fehr would not completely disagree with that conclusion, given that he is now the Executive Director, hired based on the criteria he helped establish and operating under a constitution he helped draft. In a conference call with reporters after he was officially named the new Executive Director of the NHLPA, Fehr said:

What this does is to put the director almost precisely in the position of a prime minister. That is to say that the director has significant authority and responsibility, but so long as – and only so long as – that individual can maintain significant majority support among the Executive Board and among the players[.]<sup>449</sup>

Fehr went on to ask a rhetorical question: “Would I have taken the position without that amendment [he helped make to the NHLPA Constitution]? Um, the answer is, I don't know for sure, but it would have been a vastly more difficult choice without the new constitution.”<sup>450</sup> Although Fehr did not answer the question directly, it is safe to assume the answer is no. Fehr had seen what a constitution that gave virtually unlimited power to the union's Executive Board

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<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> Damien Cox, Cox: *Questions still surround Fehr's rise to top of NHLPA*, THE TORONTO STAR (Mar. 12, 2011), <http://www.thestar.com/953174>.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> Cribb, *supra* note 430.

<sup>450</sup> *Id.*

could do. He knew that his two immediate predecessors fell victim to the whims of a few player representatives who were able to subvert the union's democratic process based on the loose language contained in the NHLPA Constitution. It is reasonable to assume Fehr was not about to subject himself to the same possibility.

In fairness to Fehr, he could have assumed the position of Executive Director in the Spring of 2010 based on his performance as an unpaid advisor to the union. During that time, Fehr seemingly impressed everyone he came in contact with, from the players, to the agents, to the employees at the union's headquarters.<sup>451</sup> That should not surprise anyone, given Fehr's vast knowledge of labor matters and his experience in the role of a labor leader.<sup>452</sup> Even though some Executive Board members sought to elect Fehr almost immediately, he insisted that a vote must be taken by the entire membership prior to his election.<sup>453</sup> That approach is straight out of the Marvin Miller playbook. Miller was steadfast in his belief that the players should control their destiny and all voices should be heard on an issue.<sup>454</sup> Similar to Miller visiting every MLB Spring Training camp in 1966<sup>455</sup> prior to assuming the leadership of the MLBPA, Fehr visited with players on every NHL team during training camp and early in the 2010-11 season prior to a vote on his candidacy.<sup>456</sup> When the votes were counted, Fehr had won the election overwhelmingly.<sup>457</sup>

Another oft-mentioned reason for Fehr's eagerness to embrace the challenge of leading the hockey players is the way his term as MLBPA Executive Director ended. Fehr received blame in many circles for his – and his administration's – willingness to turn a blind eye to the

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<sup>451</sup> Cribb, *supra* note 430.

<sup>452</sup> See generally *id.*

<sup>453</sup> Jeff Z. Klein, *Fehr expects to lead hockey union in talks toward labor deal*, N.Y. TIMES (Sept. 11, 2010), <http://www.nytimes.com/2010/09/12/sports/hockey/12nhl.html?ref=sports&pagewanted=>

<sup>454</sup> STAUDOHAR, *supra* note 32, at 28.

<sup>455</sup> *Id.*

<sup>456</sup> *Players to vote on Fehr in camp*, ESPN.COM (Sept. 11, 2010), <http://sports.espn.go.com/nhl/news/story?id=5558946>.

<sup>457</sup> Matthew Sekeres, *Fehr officially takes over NHLPA*, THE TORONTO GLOBE AND MAIL (Dec. 18, 2010), <http://www.theglobeandmail.com/sports/hockey/fehr-officially-takes-over-nhlpa/article1843514/>.



steroid scandal that engulfed baseball in the first decade of the 21st century.<sup>458</sup> While MLB Commissioner Bud Selig was viewed, perhaps too charitably, as a hawk on steroid use,<sup>459</sup> arguing for the inclusion of drug testing in the CBA and stiff penalties for players who tested positive for drug use,<sup>460</sup> Fehr only reluctantly agreed to steroid testing for his players.<sup>461</sup> As mentioned above, Fehr and the union held out on drug testing on the grounds that it was an invasion of the players' civil liberties.<sup>462</sup> While he may have provided a sound legal argument, public sentiment was overwhelmingly against the union's position.<sup>463</sup>

As a result of the public scrutiny over the use of performance enhancing drugs in professional baseball, Fehr's union had to concede to changes in MLB's drug testing policy. In the end, the union not only agreed to a drug testing policy, but also agreed to re-open the CBA (twice) in order to amend the policy and to impose harsher penalties, something the union was not required to accept.<sup>464</sup> However, the union's tacit cooperation on drug testing seemed to matter little in the court of public opinion. Fehr appeared before several congressional hearings where he was excoriated by committee members as an impediment to drug testing. Only after he feared that Congress would step in and impose drug testing on all professional athletes, including MLB players, did Fehr and the union capitulate and finally agree to drug testing.<sup>465</sup>

Unlike baseball players, hockey players have never been accused en masse of steroid use.<sup>466</sup> However, it is unrealistic to assume that drug abuse, including steroids, is absent in the

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<sup>458</sup> Christine Brennan, *Fehr leaves a damaged game behind him*, USA TODAY (June 24, 2009), [http://www.usatoday.com/sports/columnist/brennan/2009-06-24-fehr-selig-legacy\\_N.htm](http://www.usatoday.com/sports/columnist/brennan/2009-06-24-fehr-selig-legacy_N.htm).

<sup>459</sup> Michael S. Schmidt, *MLB report casts doubt on rigor of drug testing*, N.Y. TIMES (May 5, 2011), [http://www.nytimes.com/2011/05/06/sports/baseball/06steroids.html?\\_r=1](http://www.nytimes.com/2011/05/06/sports/baseball/06steroids.html?_r=1).

<sup>460</sup> *Selig wants current rule changed*, ESPN.COM (July 14, 2009), <http://sports.espn.go.com/mlb/news/story?id=4327069>.

<sup>461</sup> Christine Brennan, *Baseball union chief Fehr leaves a damaged game behind him*, USA TODAY (June 24, 2009), [http://www.usatoday.com/sports/columnist/brennan/2009-06-24-fehr-selig-legacy\\_N.htm](http://www.usatoday.com/sports/columnist/brennan/2009-06-24-fehr-selig-legacy_N.htm).

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> Howard Bryant, *Friction and fractures erode faith in Mitchell investigation*, ESPN.COM (Dec. 11, 2007), <http://sports.espn.go.com/mlb/news/story?id=3142651>.

<sup>465</sup> Brennan, *supra* note 461.

<sup>466</sup> Justin Bourne, *Bourne blog: Steroids in hockey; why current testing is inadequate*, YAHOO SPORTS (Sept. 16, 2010), [http://sports.yahoo.com/nhl/blog/puck\\_daddy/post/Bourne-Blog-Steroids-in-hockey-why-current-tes?urn=nhl-270208](http://sports.yahoo.com/nhl/blog/puck_daddy/post/Bourne-Blog-Steroids-in-hockey-why-current-tes?urn=nhl-270208).

NHL.<sup>467</sup> Nevertheless, the NHL enjoys a more positive perception, compared to MLB, when it comes to performance enhancing drugs.<sup>468</sup> Although there is a drug testing policy in effect in the NHL, it is much weaker than MLB's policy.<sup>469</sup> In his new role, Fehr is basically starting fresh on the steroid use issue, and if no scandal arises during his term, he could provide detractors with a much different perception of his role on the issue of drugs in professional sports than the one he currently enjoys.

Another issue that may haunt Fehr is the perception that he is a hawk on labor issues.<sup>470</sup> During his time with the MLBPA, players were involved in five work stoppages, although Miller led two of those labor interruptions.<sup>471</sup> While two of the work stoppages under Fehr were lockouts rather than player strikes, the legal distinction is lost on fans and most members of the media. One of the lasting memories of Fehr's reign as MLB Executive Director is the 1994 strike.<sup>472</sup> After the players walked out on August 18, the World Series was cancelled for the first time since 1904.<sup>473</sup> Baseball did not return until the following season after the courts determined that the owners had committed an unfair labor practice by threatening to use replacement players.<sup>474</sup> However, again, Fehr was casted in the role of villain.<sup>475</sup>

It should come as no surprise that Fehr's election as NHLPA Executive Director immediately triggered mass speculation that he would lead the players in a strike once the current CBA expires on September 15, 2012.<sup>476</sup> This conjecture was fueled in part by Fehr's reputation and the fact that his predecessor, Paul Kelly, was summarily fired in part because he

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<sup>467</sup> *Id.*

<sup>468</sup> Arabella Coward, *MLB – A history of steroid use*, THENHLSHOT.NET (Mar. 31, 2011), <http://www.thenhspot.net/?p=111>.

<sup>469</sup> Cox, *supra* note 429.

<sup>470</sup> Richard Griffin, *Inside the mind of Donald Fehr*, THE TORONTO STAR (Aug. 26, 2010), <http://www.thestar.com/853214>.

<sup>471</sup> STAUDOHAR, *supra* note 32, at 28.

<sup>472</sup> Griffin, *supra* note 470.

<sup>473</sup> SPORTSBUSINESS DAILY, *supra* note 327.

<sup>474</sup> Michael O'Keefe & Nathaniel Vinton, *Supreme Court nominee, Sonia Sotomayor, made her mark in baseball*, N.Y. DAILY NEWS (May 27, 2009), [http://articles.nydailynews.com/2009-05-27/sports/17922223\\_1\\_work-stoppage-supreme-court-sonia-sotomayor](http://articles.nydailynews.com/2009-05-27/sports/17922223_1_work-stoppage-supreme-court-sonia-sotomayor).

<sup>475</sup> Griffin, *supra* note 470.

<sup>476</sup> *Id.*

was perceived as not being tough enough with the owners.<sup>477</sup> However, Fehr may not necessarily be at fault for the strikes that occurred during his time with the MLBPA.

When reminded of the labor stoppages in baseball during his reign, Fehr deflected the blame. He faulted the owners for having bargained in bad faith.<sup>478</sup> He was also emphatic in defending the use of a strike to obtain player benefits. In justifying and describing the use of a strike, particularly in light of the NHL's labor woes, Fehr chose his words carefully: "We treat a work stoppage – a strike – as a last resort."<sup>479</sup> He went on to opine about the NHLPA's potential use of a strike in the upcoming negotiations:

[A strike is] something you consider only when you believe that all alternatives have failed. We certainly hope, and I certainly believe, that the [NHL's] owners will treat it as a last resort. So, if you were to ask me: Do I anticipate a work stoppage? The answer is 'No.' And I certainly don't hope that we have one.<sup>480</sup>

Fehr went on to say,

When it comes to labor negotiations, I can tell you...that you have an obligation to negotiate in good faith with the owners and we will do that. They have an obligation to negotiate in good faith with the players and I trust and hope that they will do that also.<sup>481</sup>

Fehr's insinuation is that a strike will not be necessary if the owners join the players in negotiating in good faith. Hockey fans may not have been appeased by Fehr's comments, preferring instead to focus on the MLB work stoppages that took place under his watch. However, the reality is more complicated than simply linking Fehr to strikes. For example, the

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<sup>477</sup> *Paul Kelly dumped as head of NHL players' association*, THE HOCKEY NEWS (Aug. 31, 2009), <http://www.thehockeynews.com/articles/27690-Paul-Kelly-fired-as-head-of-NHL-Players-Association-source-says.html>.

<sup>478</sup> Brehm, *supra* note 8.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

players initiated their 1994 strike in reaction to the owners' attempt to break the union.<sup>482</sup> After the owners vowed to begin the 1995 with replacement players, the courts sided with the players, effectively forcing the owners back to the bargaining table.<sup>483</sup> The bottom line is that Fehr's union, as proven by the legal system, was right and the owners were wrong. Yet, Fehr is the one who is most often criticized for the work stoppage.<sup>484</sup>

While Fehr is quick to point out that baseball has enjoyed 16 years of labor peace since the last work stoppage, the fact remains that the 1994 strike and loss of the World Series took place on Fehr's watch.<sup>485</sup> If he is able to forge a more amicable working relationship with NHL owners than he had with MLB owners early in his career and create a better working environment for hockey players without a labor stoppage, Fehr's reputation as a labor leader will undoubtedly be enhanced. Negotiating a new CBA in the NHL without any labor stoppage may help Fehr distance himself from any perceived lingering negativity.

It is also possible that Fehr's appointment, rather than leading to a work stoppage, will help to accomplish just the opposite. Given Fehr's knowledge, experience, and credentials as a labor leader, and the strength of the baseball union he left behind after thirty-three years, hockey owners may choose not to push as hard during the upcoming negotiations<sup>486</sup> as they did when they perceived that the union was fractious and led by seemingly weak and incapable leaders.<sup>487</sup> That realization may encourage owners to negotiate in good faith and be reasonable in their demands, knowing that the players are led by an effective leader and are unlikely to collapse at the last minute as they so often have done in the past.<sup>488</sup> Also, because both Fehr and the owners

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<sup>482</sup> STAUDO HAR, *supra* note 32, at 50.

<sup>483</sup> Sotomayor, *supra* note 472.

<sup>484</sup> Cox, *supra* note 429.

<sup>485</sup> Brehm, *supra* note 8.

<sup>486</sup> Ed Willes, *Where does Fehr fit?* THE PROVINCE (Mar. 26, 2010),

<http://www2.canada.com/theprovince/columnists/story.html?id=40426a26-44a0-4128-ad8e-27d760eccdc5>.

<sup>487</sup> *NHLPA plan didn't include salary cap*, ESPN.COM (Sept. 9, 2004), <http://sports.espn.go.com/nhl/news/story?id=1878368>.

<sup>488</sup> Willes, *supra* note 486.

know from experience how damaging a work stoppage can be for a sport, it may cause both sides to drop any pretense of bravado and bargain in good faith.

Any work stoppage has significant repercussions, financial and otherwise. Many pundits have predicted that hockey cannot afford a second work stoppage following the 2004-05 lockout, which saw the cancellation of an entire season and resulted in the loss of substantial revenues, fan support, and precious credibility within the sport and business communities.<sup>489</sup> Players lost an estimated \$1 billion in salaries, and owners forfeited an estimated \$2 billion in lost revenue from tickets, media, sponsorships, and concessions.<sup>490</sup> If a new CBA is reached without a work stoppage, Fehr is more likely to be viewed as a savior than a pariah.

Money may also be a motivating factor in Fehr's decision to take a position with the NHLPA. Fehr's compensation as head of the MLBPA was never more than \$1 million per year.<sup>491</sup> Although it is commonly agreed that MLB players have enjoyed the best leadership, the strongest union, and the greatest benefits among professional athletes, their leaders have always been the lowest paid of any professional sports unions. Miller established that trend, and although Fehr could have demanded a higher salary than his predecessor, again, the shadow of Miller was always present.

Fehr's compensation in his new position will reportedly be \$3 million per year, marking the first time in his long career that Fehr will be compensated for his ability and experience and be on a par with other sports labor leaders.<sup>492</sup> He also received \$1.5 million for the work he did on behalf of the players prior to his election as Executive Director of the union,<sup>493</sup> which means

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<sup>489</sup> Malik, *supra* note 442.

<sup>490</sup> Paul D. Staudohar, *The Hockey Lockout of 2004-05*, MONTHLY LAB. REV., Dec. 2005 at 26.

<sup>491</sup> Nelson, *supra* note 5.

<sup>492</sup> Cox, *supra* note 429.

<sup>493</sup> *Id.*

he received more in one year as a “volunteer” than he ever made on an annual basis as the Executive Director of the MLBPA.<sup>494</sup>

The hockey players also acquiesced to other demands made by Fehr to give him greater control of the union. One request included allowing him to bring along his brother, Steve, to act as an attorney for the union.<sup>495</sup> Steve Fehr was an outside counsel to the MLBPA for many years while his brother was Executive Director.<sup>496</sup> In reality, Don Fehr will have greater control over the affairs of the NHLPA than he ever had over the MLBPA. That control gives him the opportunity and the ability to achieve great things for hockey players, something that has never been accomplished in the history of NHL labor relations.<sup>497</sup> On the other hand, Fehr also, once again, risks being publically viewed as the bad guy if the sport fails to reach an agreement that works for both sides.

### **PART III. HOW WILL FEHR APPROACH HIS JOB AS EXECUTIVE DIRECTOR OF THE NHLPA?**

One may gain insight into how Fehr will approach his new role as Executive Director by examining a decision he helped the union make last year. One issue that Fehr helped the NHLPA address during his time as an unpaid advisor was whether to extend the CBA for an additional year.<sup>498</sup> The sides agreed to the current CBA after the 2004-05 lockout, a six-year contract that took effect beginning with the 2005-06 season.<sup>499</sup> However, the players had an

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<sup>494</sup> Nelson, *supra* note 5.

<sup>495</sup> Cox, *supra* note 429.

<sup>496</sup> Maury Brown, *MLBPA names Steve Fehr as special counsel*, BIZ OF BASEBALL (Mar. 10, 2010), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=4171:mlbpa-names-steve-fehr-as-special-counsel&catid=30:mlb-news&Itemid=42](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=4171:mlbpa-names-steve-fehr-as-special-counsel&catid=30:mlb-news&Itemid=42).

<sup>497</sup> Dowbiggin, *supra* note 437.

<sup>498</sup> Terry Koshan, *No fear in Fehr*, THE TORONTO SUN (Mar. 26, 2010), <http://www.torontosun.com/sports/hockey/2010/03/26/13362331.html>.

<sup>499</sup> *Collective Bargaining Agreement, FAQs*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26366> (last visited May 7, 2010).

option of extending the agreement through the 2011-12 season.<sup>500</sup> Although players had expressed a number of concerns with the existing CBA, especially the provision that required them to escrow a portion of their paychecks in the event league revenues fell short of estimations,<sup>501</sup> there was little benefit in allowing the agreement to expire on September 15, 2011. The union's constitution, which had been undergoing revisions since Fehr signed on as an unpaid advisor in November 2009, remained in flux.<sup>502</sup> The union did not have an Executive Director in place, and therefore no one was installed to lead them in negotiations with the owners.<sup>503</sup> To no one's surprise, Fehr convinced the players to roll the existing CBA over for an additional year while he helped the union get its house in order.<sup>504</sup>

This subtle move speaks volumes about Fehr and why he enjoyed so much success as head of the MLBPA. While he was with the MLBPA, Fehr went into every negotiation with the owners fully prepared on every issue.<sup>505</sup> Nothing was left to chance. As a newcomer to hockey, Fehr wanted to familiarize himself with the nuances of the sport, the mindset of the players, their concerns about the existing CBA, and to prepare a strategy for negotiating with the owners.<sup>506</sup> Thus, Fehr's approach seemed to say that it was better to live with the concerns of the existing CBA than to immediately enter into negotiations on a new agreement unprepared.

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<sup>500</sup> *Id.*

<sup>501</sup> Andrew Gross, *NHL, union hope to avoid work stoppage*, THE RECORD (June 17, 2011), [http://www.northjersey.com/sports/124054394\\_NHL\\_\\_union\\_hope\\_to\\_avoid\\_brawl.html?csort=1](http://www.northjersey.com/sports/124054394_NHL__union_hope_to_avoid_brawl.html?csort=1).

<sup>502</sup> Brehm, *supra* note 8.

<sup>503</sup> Cribb, *supra* note 430.

<sup>504</sup> *NHLPA votes to extend CBA; salary cap to go up next season*, PROHOCKEYTALK (June 22, 2010), <http://prohockeytalk.nbcsports.com/2010/06/22/nhlpa-votes-to-extend-cba-salary-cap-to-go-up-next-season/>.

<sup>505</sup> Jesse Spector, *Fehr factor: NHL players thrilled to have former MLBPA head at helm for next labor negotiation*, N.Y. DAILY NEWS (Dec. 25, 2010), [http://articles.nydailynews.com/2010-12-25/sports/27085527\\_1\\_negotiation-donald-fehr-lockout](http://articles.nydailynews.com/2010-12-25/sports/27085527_1_negotiation-donald-fehr-lockout).

<sup>506</sup> See Kristie Ackert, *NHL Players' Association members vote overwhelmingly to name Donald Fehr new executive director*; N.Y. DAILY NEWS, (Dec. 19, 2010), [http://articles.nydailynews.com/2010-12-19/sports/27084796\\_1\\_baseball-union-donald-fehr-work-stoppage](http://articles.nydailynews.com/2010-12-19/sports/27084796_1_baseball-union-donald-fehr-work-stoppage); see also Jeff Blair, *Donald Fehr brings order to NHLPA*, THE TORONTO GLOBE AND MAIL (Oct. 4, 2011), <http://www.theglobeandmail.com/sports/hockey/donald-fehr-brings-order-to-nhlpa/article2191316/>; see also Associated Press, *NHLPA boss Fehr about season, CBA negotiations* (Oct. 5, 2011), <http://www.macon.com/2011/10/05/1732498/nhlpa-boss-fehr-about-season-cba.html>.

Fehr will be sixty-four when the next CBA takes effect.<sup>507</sup> His reign as Executive Director is likely to end soon after the players and owners reach a new agreement.<sup>508</sup> In his first public remarks after the official announcement of his election, Fehr acknowledged that he was a short timer: “[For] anybody my age, the time horizon is a finite one. It’s pretty unlikely I’m going to be here for 10 or 12 years,”<sup>509</sup> he said in a telephone conference shortly after his election. That admission suggests that Fehr will be involved in only one CBA negotiation. The current CBA expires on September 15, 2012 and Fehr said negotiations on a new CBA are not likely to take place prior to the spring of 2012.<sup>510</sup>

In the meantime, Fehr said he had work to do, including “absorbing as much detailed knowledge”<sup>511</sup> of the professional hockey industry, the current CBA, determining which provisions benefit the players and which ones are negative, understanding the revenue sharing system in the NHL, and hockey’s economics.<sup>512</sup> Fehr will also continue meeting with the players in an effort to determine what they consider to be the important issues heading into negotiations on the next CBA.<sup>513</sup>

One tactic Fehr is guaranteed to continue using is one he learned from his predecessor, Marvin Miller. Beginning in 1966, the MLBPA, under the steady guidance of Miller, succeeded in wresting many concessions from the owners. The gains achieved by the MLBPA over the course of four and a half decades are, first and foremost, a tribute to the players’ ability to unite

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<sup>507</sup> Cox, *supra* note 429.

<sup>508</sup> Klein, *supra* note 453.

<sup>509</sup> Craig Custance, *New NHLPA executive director Donald Fehr has time, opportunity on his side*, SPORTING NEWS, (Dec. 20, 2010), <http://aol.sportingnews.com/nhl/feed/2010-08/nhlpa-turns-to-fehr/story/new-nhlpa-executive-director-donald-fehr-has-time-opportunity-on-his-side>

<sup>510</sup> *Donald Fehr officially takes over NHLPA with eye on CBA talks*, SPORTSBUSINESS DAILY (Dec. 20, 2010), <http://www.sportsbusinessdaily.com/Daily/Issues/2010/12/Dec-20/Leagues-and-Governing-Bodies/Fehr.aspx>.

<sup>511</sup> Jeff Z. Klein, *Fehr Denies a Hiring Was Meant as a Message*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/sports/hockey/29fehr.html>.

<sup>512</sup> *Id.*

<sup>513</sup> See Nicholas J. Cotsonika, *Fehr: ‘Pretty Hard’ to see players give up a lot again*, YAHOO SPORTS (Sept. 15, 2011), [http://sports.yahoo.com/nhl/news?slug=nc-cotsonika-nhlpa\\_boss\\_don\\_fehr\\_on\\_cba\\_091511](http://sports.yahoo.com/nhl/news?slug=nc-cotsonika-nhlpa_boss_don_fehr_on_cba_091511).



and align themselves for the collective good of the membership.<sup>514</sup> From his first day in office, Miller made it a point to educate the players on the principles of labor law and instilled in them the concept of rallying around the goal of working as one against management.<sup>515</sup> By remaining unified under Miller, the union was able to accomplish things that prior generations of ballplayers only dreamed about – shedding the reserve clause, achieving free agency, obtaining salary arbitration, increasing salaries and pension benefits – and made the MLBPA the envy of every other labor union in the country.<sup>516</sup>

In his initial dealings with the NHLPA membership, Fehr exhibited the same go-slow, educate-the-players approach he learned from Miller.<sup>517</sup> For fifteen months, Fehr served as a volunteer to assist the NHLPA in drafting a new constitution and hiring a new Executive Director.<sup>518</sup> During that period, Fehr met with the players on every NHL team, soliciting advice and input.<sup>519</sup> He also met with player agents to keep them apprised of his progress and goals for the union.<sup>520</sup> Those were the same tactics that Miller employed to lay the successful foundation for the MLBPA, which resulted in the benefits baseball players have enjoyed for years.<sup>521</sup>

One can expect Fehr to continue this approach and solicit input from both the players and their agents.<sup>522</sup> The reasons are obvious: Fehr wants – indeed, needs – to know what his constituents' concerns are and what they want from the union.<sup>523</sup> He also wants them to know

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<sup>514</sup> Mihara, *supra* note 47, at 69.

<sup>515</sup> *Id.*

<sup>516</sup> MLBPA History, *supra* note 11.

<sup>517</sup> See generally The Canadian Press, *Fehr voted in as executive director of NHLPA*, TSN.CA (Dec. 18, 2010), <http://www.tsn.ca/nhl/story/?id=345965>.

<sup>518</sup> *No Decision Expected on Next NHLPA Exec Dir at Today's Meeting* SPORTSBUSINESS DAILY (Mar. 25, 2010), <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=archive>.

<sup>519</sup> *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> STAUDO HAR, *supra* note 32, at 29.

<sup>522</sup> Kevin Paul Dupont, *Fehr on steadier ground as head of players union*, THE BOSTON GLOBE (Dec. 26, 2010), [http://www.boston.com/sports/hockey/articles/2010/12/26/fehr\\_on\\_steadier\\_ground\\_as\\_head\\_of\\_players\\_union/](http://www.boston.com/sports/hockey/articles/2010/12/26/fehr_on_steadier_ground_as_head_of_players_union/).

<sup>523</sup> Cotsonika, *supra* note 513.

that they can count on him to be their leader in every sense of the word, someone who works for the membership and speaks for them in discussions with the owners.<sup>524</sup>

In an interview in March 2010 after meeting with player agents, Fehr was asked about the difference he found between baseball players and hockey players in his time as an unpaid advisor to the NHLPA:<sup>525</sup> “All I can tell you is that in my experience, one of the reasons the baseball players’ association has been effective is that it’s a unified whole,”<sup>526</sup> Fehr said, “and one of the tasks of this organization is to make sure the hockey players’ union functions that way, too.”<sup>527</sup>

Fehr’s predecessor at the NHLPA, Paul Kelly, believes it is crucial for Fehr to involve the membership: “He’s got to get the guys more involved, and more invigorated,”<sup>528</sup> said Kelly, “The players have to pay more attention. It’s hard. Partially because of the history of the NHLPA, players have grown disillusioned with having to involve themselves in union business.”<sup>529</sup>

Toronto Blue Jays President, Paul Beeston, a former “foe” of Fehr’s after he joined the office of MLB in the mid-1990’s, thinks Fehr can see the “big picture” today, unlike in 1994 when he led the MLBPA into a disastrous strike.<sup>530</sup> In an interview with Elliotte Friedman of Hockey Night in Canada, Beeston said, “I think at one time [Fehr] thought about the players, first, foremost and solely. I think how he looks at them [now] is first, foremost, but not solely. I

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<sup>524</sup> *Id.*

<sup>525</sup> Ken Campbell, *Campbell’s Cuts: Fehr at helm would be dream for NHLPA, nightmare for NHL*, THE HOCKEY NEWS (Mar. 25, 2010), <http://www.thehockeynews.com/articles/32441-Campbells-Cut-Fehr-at-helm-would-be-dream-for-nhlpa-nightmare-for-nhl>.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

<sup>528</sup> Interview with Paul Kelly, former NHLPA Executive Director, on Puck Daddy Radio, Sirius Satellite Radio (Dec. 20, 2010), available at <http://radio.thescore.com/programs/puck-daddy-radio>.

<sup>529</sup> *Id.*

<sup>530</sup> Elliotte Friedman, *Fehr big believer in revenue sharing*, CBC SPORTS (Dec. 18, 2010), <http://www.cbc.ca/sports/blogs/elliottfriedman/2010/12/fehr-big-believer-in-revenue-sharing.html>.

think the reality of the situation is that Don wanted to be part of the solution.”<sup>531</sup> Beeston went on to say,

We sat down and said, ‘Let’s not let this happen again. Let’s learn from our mistakes...we can be adversaries, but we don’t have to be enemies.’ And that I think was the key. It went from an enemy relationship to an adversary relationship. What hockey fans should know is that they’re dealing with someone who realizes the importance of the job and, the job is to get a deal done. [A]t the same time [his job is] to protect the players, but more importantly to grow the game of hockey. One thing that Don does understand...the more money that is generated by the game, the more money there is for the players.<sup>532</sup>

Aubrey Kent, a Canadian sports industry expert and Director of the Sport Industry Research Center at Temple University, said players and fans have a lot to like in the new appointment: “Even the most jaded sports fan at this point has to realize that having the balance of power too far in favor of either the owners or players ends up being detrimental to the business of the game itself.”<sup>533</sup> Thus, as Kent suggests, Fehr’s election should come as a welcomed event because he can help restore some of the balance between the league and the beaten down union.

Fehr’s involvement may, however, tilt the balance of power too far in favor of the players. Some could argue that the state of baseball with Miller, and later Fehr, at the helm of the MLBPA as squarely tilted in favor of the players.<sup>534</sup> Fehr never lost a court battle or an arbitration case against MLB owners.<sup>535</sup> He also felt strongly enough about a salary cap that he was willing to cause a work stoppage, regardless of the damage to the owners, the players, or the game.<sup>536</sup>

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<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> Cribb, *supra* note 430.

<sup>534</sup> Griffin, *supra* note 470.

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

In response to speculation that one of his goals will be to lead the hockey players in a crusade to overturn the NHL's salary cap, Fehr opined:

All sports are different. The economics of all sports are different. The makeup of the membership is different. In the end, you have to make judgments based upon those kinds of things. It doesn't necessarily mean that what works in one place works in another. On the other hand, it also isn't necessarily true that, just because something doesn't work somewhere, means it won't work here.<sup>537</sup>

Unlike the NFL and the NBA, where teams generate little local revenue and revenue sharing is the norm, NHL teams generate considerable amounts of local revenue, similar to MLB teams.<sup>538</sup> It is more accurate to say "some" NHL teams generate significant local revenue, which means that revenue sharing may be a bigger issue in the next negotiations than the salary cap.<sup>539</sup> Of course, Fehr has extensive experience dealing with revenue sharing. During the 1994 baseball strike, Fehr and his membership were adamantly opposed to the owners' attempts to impose a salary cap, stating emphatically that the issue was the owners' inability to apportion revenues among themselves.<sup>540</sup> Ultimately, the players won, and revenue sharing was introduced on a wide scale in baseball.<sup>541</sup>

As unpopular as Fehr is in the United States, he may be almost as unpopular in Canada for the same reason. Fehr is often accused as the mastermind behind the 1994 strike that led to the loss of the World Series for the first time since 1904.<sup>542</sup> But Canadians also remember the 1994 strike as the beginning of the end for the Montreal Expos.<sup>543</sup> The Expos were acknowledged to have the best team in baseball that year and were leading the National League

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<sup>537</sup> *Players to vote on Fehr in camp*, ESPN.COM (Sept. 11, 2010), <http://sports.espn.go.com/nhl/news/story?id=5558946>.

<sup>538</sup> Jake I. Fisher, *The NFL's Current Business Model and the Potential 2011 Lockout*, Harv. Sports Analysis, 5 (May 4, 2010), <http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf>.

<sup>539</sup> Sekeres, *supra* note 457.

<sup>540</sup> STAUDOHAR, *supra* note 32, at 50.

<sup>541</sup> *Id.* at 51.

<sup>542</sup> Damien Cox, *A new Mr. unpopular?* THE TORONTO STAR (Dec. 20, 2010), <http://thestar.blogs.com/thespin/2010/12/a-new-mr-unpopular.html>.

<sup>543</sup> *Id.*

East Division by six games when the players went on strike on August 18.<sup>544</sup> Rather than having the chance to do the expected, win the World Series, the Expos' '94 season came to an abrupt end and the team was dismantled beginning with the 1995 season.<sup>545</sup> The Expos were never in contention again.<sup>546</sup> MLB later purchased the Expos who became the Washington Nationals.<sup>547</sup>

There is little doubt that Fehr's unpopularity in the U.S. stemming from the 1994 strike in baseball had an impact on how he approached future dealings with the owners.<sup>548</sup> As Beeston said, it was a major factor in the 16 consecutive years of labor peace that followed.<sup>549</sup> Whether the 1994 strike in baseball and the 2004-05 lockout in hockey will have any impact on how Fehr approaches his new role is difficult to determine. However, the fact that Fehr has been through work stoppages before can work in one of two ways. He realizes they are a tactic that both the players and the owners can use, although both sides have much to lose in a work stoppage.<sup>550</sup> Fehr is also aware of the adverse effect a labor stoppage has on fan support. After the 1994 baseball strike, attendance in MLB took years to rebound to its pre-strike levels.<sup>551</sup>

Both sides in the NHL should be averse to a work stoppage. In a perfect world, the parties work out a compromise that avoids such an event. It remains to be seen what type of bargaining relationship the newly led NHLPA will take with the NHL, as the sides have engaged in limited interaction on meaningful bargaining topics since Fehr's involvement.<sup>552</sup>

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<sup>544</sup> *Montreal Baseball History*, BASEBALLCHRONOLOGY.COM, <http://www.baseballchronology.com/Baseball/Teams/Montreal/> (last visited Oct. 15, 2011).

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> Friedman, *supra* note 530.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> Victor A. Matheson, *The effect of labor strikes on consumer demand: A re-examination of Major League Baseball*, College of Holy Cross Faculty Research Series (October 2004), available at [http://academics.holycross.edu/files/econ\\_accounting/Matheson\\_Attendance.pdf](http://academics.holycross.edu/files/econ_accounting/Matheson_Attendance.pdf).

<sup>552</sup> *Donald Fehr Officially Takes Over NHLPA With Eye on CBA Talks*, SPORTSBUSINESS DAILY (Dec. 20, 2010), <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=>.

One bargaining issue that did surface between the sides occurred in the Spring of 2010 while Fehr was acting as an unpaid advisor to the union. The league was attempting to adopt a new rule regarding headshots.<sup>553</sup> The league was intent on implementing the new rule immediately, but the players requested time to review the proposal, even though they had previously asked the league to address the issue.<sup>554</sup> The NHL believed that under league rules, it could have enacted the new rule without the players' consent, although the union believed otherwise.<sup>555</sup> Ultimately, the new rule was implemented after the league received the unanimous endorsement of the NHL/NHLPA Competition Committee and the NHLPA Executive Board.<sup>556</sup>

However, during the period between the league's announcement of the new rule and its implementation, the NHL took a hard-line approach and portrayed the union as uncooperative and ineffective.<sup>557</sup> NHL Deputy Commissioner, Bill Daly, expressed his frustration with the union, saying:

This is a rule that's intended to make the game safer for the players...The PA needs a hockey person, or at a minimum, a player, who is willing to take charge, to step up and make a decision in the best interests of the game...Someone needs to show leadership, and they need to do it fast.<sup>558</sup>

Daly's comments suggested that the NHL was upset with the officially leaderless union's lack of an immediate response to the headshot issue. However, that is not how things are handled between the owners and the union in MLB, and it is doubtful if that is how issues will be addressed in the future in the NHL with Fehr leading the union.

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<sup>553</sup> Pierre LeBrun, *NHLPA has yet to approve rule*, ESPN.COM (Mar. 24, 2010), <http://sports.espn.go.com/espn?id=5022885>.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> *Rule prohibiting lateral, back-pressure or blind-side hit to head will take effect*, NHL.COM (Mar. 25, 2010), <http://www.nhl.com/ice/news.htm?id=522691>.

<sup>557</sup> LeBrun, *supra* note 554.

<sup>558</sup> *Id.*

**PART IV: CONCLUSION**

During his three-plus decades at the MLBPA, Fehr acquired the knowledge and experience that has previously been lacking at NHLPA headquarters.<sup>559</sup> In addition to his knowledge and experience, Fehr's personal characteristics impressed everyone he came into contact with during his time as an unpaid advisor to the union. Player agents gushed over his preparation on issues, his confidence and demeanor, along with his ability to convey his position.<sup>560</sup> Players raved about how he involved them in discussions on issues that were of concern to them. All of those characteristics will come in handy for Don Fehr as he negotiates the minefield and backroom politics that passes for labor relations in the NHL.<sup>561</sup>

A new era is about to dawn for the NHLPA. In addition to the issues that Fehr will likely address with owners, what else can one expect to see from Fehr during the next round of negotiations? The authors' predictions include a sharp increase in player education and unity regarding collective bargaining issues, support – rather than backstabbing – from the agents, no strikes (although avoiding a lockout is less certain), and an agreement between the parties on a new CBA to replace the 2005 agreement, although perhaps not until the eleventh hour.

Although the authors anticipate that the sides will display some acrimony during the upcoming bargaining process, both sides possess the leadership necessary to strike a mutually beneficial accord that will ensure that hockey's recent financial gains and popularity will continue to rise. Fehr's intelligence, expertise, and incentive to exit the labor law realm as a hero, rather than a villain, means that the NHLPA, led by their new Executive Director, will score in the immediate years ahead.

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<sup>559</sup> Dowbiggin, *supra* note 437.

<sup>560</sup> *Speak Softly: Donald Fehr Silent on His Future With the NHLPA*, SPORTSBUSINESS DAILY (Aug. 27, 2010), <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=>

<sup>561</sup> Dowbiggin, *supra* note 437.

**TRAGEDY AT FUJAIRAH: RISK MANAGEMENT AND LEGAL ISSUES ON THE DEATH OF FRAN CRIPPEN**

*By: John T. Wendt and John J. Miller<sup>1</sup>*

On October 23, 2010, the city of Fujairah, United Arab Emirates (“UAE”) hosted the eighth and final race of the 2010 Fédération Internationale de Natation (“FINA”) 10K Marathon Swimming World Cup. Eighty-two swimmers, both men and women, entered the water. Eighty-one finished the race. Fran Crippen of the United States did not. For some time, race officials and fellow swimmers did not realize that he was missing. When the swimmers, not officials, realized he was missing, they raced back into the water in search of him. After more than a two hour search, coast guard and police divers found his body near the last buoy on the course, about 400-500 meters from land and 7-8 meters underwater.<sup>2</sup> Crippen was carried to shore and taken to Fujairah Hospital, where he was pronounced dead.

Crippen was an outstanding swimmer. He was a six-time U.S. National Champion, a Gold Medalist in the 10K at the 2007 Pan American Games, a Bronze Medalist in the 10K at the 2009 World Championships, a Silver Medalist in the 10K at the 2010 Pan Pacific Championships, and he finished fourth in the 10K (and fifth in the 5K) at the 2010 World Championships.<sup>3</sup> Crippen came from a family of accomplished swimmers: his sister, Maddy,

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<sup>2</sup> Tucker Reals, *U.S. Swimmer Fran Crippen Dies of “Overexertion”*, CBSNEWS.COM (Oct. 26, 2010), <http://www.cbsnews.com/stories/2010/10/25/sportsline/main6988762.shtml>.

<sup>3</sup> *Passages: Fran Crippen, 26-FINA, USA Swimming, USOC Release Statements*, USA SWIMMING WORLD MAGAZINE (Oct. 24, 2010), <http://www.swimmingworldmagazine.com/lane9/news/25369.asp>.



was an Olympian in 2000, and his other two sisters, Claire and Teresa, were both NCAA finalists.<sup>4</sup>

*ISSUES AT THE RACE*

Although the most severe, the death of Fran Crippen was just the culmination of a series of problems of the race. Originally, the race was supposed to be held at Sharjah, but was later moved to Fujairah. The change of venue only gave organizers five days to prepare the course and the facilities for an international competition.<sup>5</sup> The night before the race, coaches and managers questioned the safety of the course, including water temperature and shading.<sup>6</sup> Although organizers provided some safety boats, many questioned if there were enough to maintain safety standards. There were also disagreements as to the location of the boats and which ones the swimmers were to follow.<sup>7</sup>

Organizers were not prepared for Crippen's situation. As one witness at the scene said, "There was no response on that. It was really disorganized [sic]. It made an impact on everyone there. There was a feeling of hopelessness and a belief that no-one knew what they were supposed to be doing."<sup>8</sup> It was the other competitors who first took to the water to find Crippen. After two hours of searching, Crippen's body was found about 400-500 meters from the finish line. The winner of the race, Thomas Lurz of Germany, noted the dangers of the course and the lack of preparation by the organizers: "It was unacceptable that swimmers were searching for

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<sup>4</sup> *Id.*

<sup>5</sup> Craig Lord, *Fran Crippen: The Questions Facing Fina*, SWIM NEWS (Jan. 26, 2011), <http://www.swimnews.com/news/view/8382>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

another swimmer . . . swimmers go under water in seconds. There need[ed] to be more boats, jet skis, [and] canoes who can take care of every swimmer.”<sup>9</sup>

*THE IMMEDIATE AFTERMATH*

FINA is the international governing body for the aquatic sports of swimming, diving, water polo, synchronized swimming, and open water swimming.<sup>10</sup> The President of FINA, Julio Maglione, and FINA Technical Delegate at Fujairah, Valerijus Belovas, stated that all safety rules were followed:

The organisation [sic] of the competition in Fujairah did not differ at all from what I have been observing for as long as 15 years. I would like to emphasize that what happened during the World Cup in Fujairah could happen during any competition. We need new specifications, requirements to the organization of safety during competitions and it is namely us who have to do this. I am very sorry about what has happened and declare that there were no violations of the competition organization applied in our usual practice during the World Cup in Fujairah.<sup>11</sup>

FINA appointed a task force, and USA Swimming established an open water commission, to review the circumstances surrounding Fran Crippen’s death and make recommendations for future events.<sup>12</sup>

Ideally, organizations should try to manage potential event risks because if they do not, they may be consumed by the risk.<sup>13</sup> Event managers must understand and appreciate the need

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<sup>9</sup> *Thomas Lurz Rips Race Conditions*, ESPN.COM (Oct. 25, 2010), <http://sports.espn.go.com/oly/swimming/news/story?id=5722846>

<sup>10</sup> *Structure*, FINA.ORG, [http://www.fina.org/H2O/index.php?option=com\\_content&view=article&id=602&Itemid=359](http://www.fina.org/H2O/index.php?option=com_content&view=article&id=602&Itemid=359) (last visited Apr. 15, 2012).

<sup>11</sup> Lord, *supra* note 5.

<sup>12</sup> *FINA Announces Task Force to Investigate Fran Crippen’s Death*, SWIMMINGWORLDMAGAZINE.COM (Oct. 28, 2010), <http://www.swimmingworldmagazine.com/lane9/news/25411.asp?q=FINA-Announces-Task-Force-to-Investigate-Fran-Crippen%27s-Death>; see also Vicki Michaelis, *USA Swimming investigating causes of Fran Crippen’s death*, USATODAY.COM (Oct. 26, 2010), [http://www.usatoday.com/sports/olympics/2010-10-25-fran-crippen-death-investigation\\_N.htm](http://www.usatoday.com/sports/olympics/2010-10-25-fran-crippen-death-investigation_N.htm).

<sup>13</sup> See generally J. DAVIDSON FRAME, *MANAGING RISK IN ORGANIZATIONS* (2003).

to develop and implement a risk management plan specific to competitive open-water activities. This awareness is the first step in managing risks at such events. Sport event managers who desire for their organizations to efficiently manage risks must recognize the value of foreseeability as well as understand the participants' level of assuming the risks to lessen the chance of a catastrophic event occurring. In the following sections, the concepts of foreseeability and assumption of risk will be discussed as they pertain to managing competitive open water swimming risks. The liabilities and duties discussed are not meant to be an in-depth examination of the doctrine of assumption of risk; rather, they are meant to be discussed from the perspective of an organization conducting open water swimming competitions and the importance for the development and implementation of a risk management plan.

### **PART I: LEGAL FRAMEWORK**

Many commentators have examined the issue of negligence in international sport.<sup>14</sup> Although the Crippen incident occurred overseas, open water swimming competition also takes place in the U.S., but with two major differences. The first is that competitors in U.S. competitions are counted at each turn in case someone has dropped out. Second, in U.S. championship races, organizers require all competitors to wear electronic chips, which allow organizers the capability of keeping track of competitors during the race.<sup>15</sup> The inherently

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<sup>14</sup> Natasha Schot, *Negligent Liability in Sport* (2005), SPORTS LAW EJOURNAL, available at <http://epublications.bond.edu.au/slej/2/>; see also Mark James, *Sports Torts and the Development of Negligence in England*, 2 INT'L SPORTS L.J. 17-19 (2003); Ronald Fitzgerald, *Yacht Racing: A Legal Perspective*, 29 J. MAR. L. & COM. 267-273 (1998).

<sup>15</sup> 2008 USA Swimming 10K Open Water World Championship Trials, USA SWIMMING (2008), [http://www.usaswimming.org/\\_Rainbow/Documents/3436e65e-5802-436b-942c-b8d807fd35d5/Open%20Water%20World%20Champ%20Trials.pdf](http://www.usaswimming.org/_Rainbow/Documents/3436e65e-5802-436b-942c-b8d807fd35d5/Open%20Water%20World%20Champ%20Trials.pdf).

dangerous nature of such events is the primary reason for such precautions since it takes only a matter of seconds to lose sight of an individual in the open water.

### ***Foreseeability***

Foreseeability may be regarded as the most significant consideration in determining the extent to which a person is owed a duty of reasonable care.<sup>16</sup> In a case such as Crippen's, foreseeability is the degree to which the organization knew, or should have known, that a participant may be exposed to the probability of injury. Foreseeable danger provides a basis by which the risk of injury to another person, and the duty to exercise care for a person injured on a premise, is determined.<sup>17</sup>

In *Mintz v. State of New York*, the theory of foreseeability was utilized to determine the proximate cause of the injuries.<sup>18</sup> If a harmful situation on a premise was foreseeable and an individual was harmed, the lack of safety may be the reason or proximate cause of the damage.<sup>19</sup> As a matter of foreseeability, Ayman Saad, the Executive Director of UAE Swimming, said that the water temperature (one of the issues in question) had been tested the morning of the event as well as during the actual race. The water temperature in the morning was recorded at 29°C (85°F) and had risen to 30°-31°C (86-88°F) at the time of the race, which was then deemed to be acceptable.<sup>20</sup>

Yet, several of the swimmers openly questioned the safety of the event in such conditions. Christine Jennings was a four-time All-American swimmer, U.S. 5K Champion, and

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<sup>16</sup> *Rodriguez v. Sabatino*, 120 F.3d 589, 592 (5th Cir. 1997).

<sup>17</sup> 57A Am. Jur. 2d *Negligence* § 124 (2012).

<sup>18</sup> 362 N.Y.S.2d 619 (App. Div. 1975).

<sup>19</sup> *Turpen v. Granieri*, 985 P.2d 669, 673 (Idaho 1999).

<sup>20</sup> Lord, *supra* note 5 (stating in Celsius, water freezes at 0°C and water boils at 100°C; whereas in Fahrenheit water freezes at 32°F and water boils at 212°F. The formula to convert Celsius to Fahrenheit is  $T_c = (5/9) * (T_f - 32)$  whereas the formula to convert Fahrenheit into Celsius is  $T_f = (9/5) * (T_c + 32)$ ).

PanPacific Games Champion and she, too, had difficulty with the conditions.<sup>21</sup> She became dizzy, veered off course, and vomited several times in the water.<sup>22</sup> During an open water race, if an athlete has difficulty and needs assistance they are instructed to roll over on their back and raise an arm in the air to signal for help. Safety boats are then supposed to come to the aid of the distressed swimmer. Jennings signaled for help, but no safety boats came to her rescue.<sup>23</sup> She was eventually helped by a fellow swimmer and was taken to the hospital and treated for dehydration and heat exhaustion.<sup>24</sup> Recounting the incident, Jennings said, “I’m floating on my back for several minutes, thinking ‘Why isn’t anybody checking on me?’ FINA needs to understand what happened and not brush this off as some freak incident, [because] it wasn’t . . . They need to make changes.”<sup>25</sup> Moreover, Thomas Lurz, nine-time open water World Champion, stated after the incident:

I am afraid Fina [sic] has not been addressing this aspect as much as we would have liked. Does it take a sacrifice like this one [the death of Crippen] to highlight an issue? We deserve good conditions. Nothing will bring Fran [Crippen] back to us, but we still need to question and find out why this incident happened. Fina [sic] needs to be more professional and they need to bring in the changes so as to safeguard and treat the swimmers in the right way.<sup>26</sup>

### *Assumption of Risk*

The basic concept of assumption of risk is that, “A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for

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<sup>21</sup> Amy Shipley, *Fellow Competitor Blames Heat, Safety Lapses in Death of Swimmer Fran Crippen*, WASHINGTON POST (Oct. 25, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102503766.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Alaric Gomes, *Top Swimmers Allege Fina Neglect*, GULF NEWS (Oct. 26, 2011), <http://gulfnews.com/sport/other-sports/top-swimmers-allege-fina-neglect-1.701738>.

such harm.”<sup>27</sup> Originally stated by Judge Cardozo in *Murphy v. Steeplechase Amusement Co.*,<sup>28</sup> this concept has caused much confusion over the years. In *Murphy*, the plaintiff was a customer at an amusement park which featured a ride called “The Flopper,” a moving conveyor belt running through a room with padded walls. As patrons stepped onto the belt they would be jostled, and would frequently fall. The plaintiff, during his participation, fell and broke his kneecap. Cardozo stated:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary... The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility... He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.<sup>29</sup>

In a sports setting, *Knight v. Jewett* is the definitive case on assumption of risk.<sup>30</sup> *Knight* distinguished between “primary” and “secondary” assumption of the risk.<sup>31</sup> Regarding primary assumption of risk, the *Knight* court stated that, although the defendant owed no legal duty to the participants for the inherent risks of the sport, the defendant did have a duty not to increase those risks (over and above what was inherent in the sport). Concerning secondary assumption of risk, the court held that the defendant owed the plaintiff a duty, but after considering the respective faults of the parties, the judge directed the jury to apportion the damages. In other words, secondary assumption of risk is an assessment of comparative negligence.<sup>32</sup>

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<sup>27</sup> RESTATEMENT (SECOND) OF TORTS: ASSUMPTION OF RISK § 496A (1965).

<sup>28</sup> *Murphy*, 166 N.E. 173, 173 (N.Y. 1929).

<sup>29</sup> *Id.* at 174.

<sup>30</sup> *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

<sup>31</sup> *Id.* at 703.

<sup>32</sup> *Id.* at 708; see also RESTATEMENT (SECOND) OF TORTS § 496A (2011); E. H. Schopler, *Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (1962); 57B Am. Jur. 2d Negligence § 764 (2001); 65A C.J.S. Negligence § 405 (2011).

The application of the doctrine of assumption of risk has proven to be a legal maze.<sup>33</sup> As a result, the doctrine has come under fire from courts and commentators,<sup>34</sup> although it is clear that this defense is still being shaped and applied differently in various jurisdictions.<sup>35</sup>

The traditional view has been that plaintiffs have a choice to participate in the activity, and assume the risk, or not participate at all. Kenneth Simons, author and Boston University law professor, has argued for a new model he calls “full risk preference.”<sup>36</sup> Simons noted that, “In this world, difficult choices must be made.”<sup>37</sup> Specifically applied to sports, Simons argued that, “A player will ordinarily expect to incur some risk of injury from an athletic contest, and he obviously prefers taking that risk to not playing. But what is his full preference?”<sup>38</sup> Simons went on to say, “We cannot simply ask whether plaintiff agreed to the limited choice to play or not. Rather, we must ask whether defendant can reasonably demand that plaintiff play on these terms if he is to play at all.”<sup>39</sup> Ultimately, according to Simons:

We should not simply ask whether plaintiff voluntarily and knowingly encountered the risk that defendant created, when she could have avoided that risk. Rather, we should ask whether [the] plaintiff *fully* preferred to take the risk, i.e., whether she preferred the risky alternative that she chose *to the alternative that [the] defendant tortuously [sic] failed to offer.*<sup>40</sup>

Donald Horton, author and Loyola law professor, noted extreme sports are growing in popularity, and the “penchant for recreational risk-taking may be the defining characteristic of an

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<sup>33</sup> *Tiller v. Atlantic Coast R.R.*, 318 U.S. 54, 58 (1943).

<sup>34</sup> David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599 (2004); Christ Gaetano, *Assumption of Risk: Casuistry in the Law of Negligence*, 83 W. VA. L. REV. 471 (1981); Edward J. Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?*, 7 S. ILL. U.L.J. 371, 371, 376, 400-01 (1982).

<sup>35</sup> Keya Denner, *Taking One For The Team: The Role Of Assumption Of The Risk In Sports Torts Cases*, 14 SETON HALL J. OF SPORTS & ENT. L. 209, 236 (2004).

<sup>36</sup> Kenneth Simons, *Assumption of Risk and Consent in the Law Of Torts: A Theory of Full Preference*, 67 B.U.L. REV. 213, 218 (1987).

<sup>37</sup> *Id.*, at 229.

<sup>38</sup> *Id.*, at 274.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 279.

entire generation of young people.”<sup>41</sup> Dylan Kletter, Connecticut-based litigation attorney, noted that while past research applied legal principles to traditional sports, such as football or baseball, it might not work well with new “high risk” or “extreme” sports.<sup>42</sup> There has been no clear definition of the term “extreme sport,” and, in fact, the term is “increasingly amorphous.”<sup>43</sup> Kletter asked, “How instructive is precedent [when] analyzing the risks associated with a pick-up football game [and] determining liability involving BASE jumping [sic] or a trek through the Andes?”<sup>44</sup>

Simons presented the following scenario as a critique of the tradition application of the doctrine of assumption of risk:

Suppose I decide to engage in hang gliding. I join an outing organized by the defendant, who warns me of the serious but unavoidable risks (I can avoid the risks only by declining to engage in hang gliding altogether). I am injured in a regrettably predictable way. I cannot recover damages. Why? Because I was negligent in encountering the risk? But then defendant was presumably negligent in offering me the choice to encounter it. The dubious result is that I might recover some portion of the damages under comparative negligence. Alternatively, perhaps I cannot recover because my conduct in encountering the risk was indeed reasonable -- and so was defendant's conduct in offering me the choice to encounter it. But again, we have a difficulty. Would a reasonable person engage in such risky conduct?...No doubt, one could interpret the ‘reasonable person’ standard to approve of hang gliding. But it is more useful to focus on the distinctive aspect of this case. I truly prefer a risky alternative; I would rather have the opportunity to hang glide, with the necessary incidental risks, than be restricted to the opportunity of flapping my arms as I run along the ground.<sup>45</sup>

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<sup>41</sup> Horton, *supra* note 34, at 663.

<sup>42</sup> Dylan Kletter, *Negligence in the [Thin] Air: Understanding the Legal Relationship Between Outfitters and Participants in High Risk Expeditions Through Analysis of the 1996 Mount Everest Tragedy*, 40 CONN. L. REV. 769, 796 (2008); see also Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249, 287 (1998).

<sup>43</sup> Horton, *supra* note 34.

<sup>44</sup> *Id.*

<sup>45</sup> Simons, *supra* note 36, at 216-17.



Increasingly, athletes are taking on greater risks.<sup>46</sup> In an attempt to attract a broader youth market, Olympic organizers are adding new sports with greater risk. New Olympic sports, such as snowboarding and snowcross, attract a younger audience, but are more dangerous.<sup>47</sup> The 2014 Winter Olympic Games are set to introduce half-pipe skiing, while slope-style skiing and a team parallel competition in alpine are being considered.<sup>48</sup> All of these events could be considered high-risk sports.<sup>49</sup>

This is not to say that these new disciplines are more dangerous than those with longer histories. Recognized as an Olympic event in 1994, freestyle aerial skiing features athletes launching off jumps made of metal and covered in snow. The athletes propel themselves nearly fifty feet into the air, performing multiple twists and flips, before landing on a 34°-39° hill.<sup>50</sup> Emily Cook is a U.S. aerialist. In pursuit of her dream to compete in the Olympics, she suffered numerous bone dislocations and fractures, as well as torn ligaments. She has endured two major surgeries, with months of rehabilitation.<sup>51</sup> It was the thought of walking into the 2006 Winter Olympic Games Opening Ceremonies that drove her to overcome her injuries and setbacks.<sup>52</sup> Using Simons' argument, would Emily Cook prefer to run down the hill and jump in the air? What risks is she willing to endure for her sport? "Extreme sports participants compete within a hierarchy where willingness to gamble with physical safety is the coin of the realm."<sup>53</sup>

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<sup>46</sup> Denner, *supra* note 35.

<sup>47</sup> *Death and Injuries Raise Safety Concerns at Winter Games*, PBS NEWSHOUR (Feb. 12, 2010), [http://www.pbs.org/newshour/bb/sports/jan-june10/olympics\\_02-15.html](http://www.pbs.org/newshour/bb/sports/jan-june10/olympics_02-15.html).

<sup>48</sup> *Six New Events Added to the Olympic Winter Games Programme in Sochi*, INTERNATIONAL OLYMPIC COMMITTEE (Apr. 6, 2011), <http://www.olympic.org/sochi-2014-winter-olympics?articlenewsgroup=1&articleid=124134>.

<sup>49</sup> Lars Engebretsen et al., *Sports Injuries and Illnesses During the Winter Olympic Games 2010*, 44 BRITISH J. SPORTS MEDICINE 772, 780 (2010).

<sup>50</sup> *Freestyle Aerial Skiing*, THE SKI CHANNEL (Nov. 11, 2011), [http://www.theskichannel.com/sport\\_detail.php?name=Freestyle%20Aerial%20Skiing](http://www.theskichannel.com/sport_detail.php?name=Freestyle%20Aerial%20Skiing).

<sup>51</sup> Terry Zeigler, *Overcoming Adversity to Compete*, SPORTS MD (Mar. 28, 2011), [http://www.sportsmd.com/SportsMD\\_Articles/id/345.aspx](http://www.sportsmd.com/SportsMD_Articles/id/345.aspx).

<sup>52</sup> *Id.*

<sup>53</sup> Horton, *supra* note 34, at 628.

Although open water swimming competitions have existed in some form since the ancient times, its current form as a competitive, regulated Olympic level sponsored sport is relatively young. As such, the rules as applied to traditional racing in a swimming pool may not be applicable in open bodies of water. Open water events take place in rivers, lakes, oceans, or water channels<sup>54</sup> and at distances of five, ten, and twenty kilometers.<sup>55</sup> Chloe Sutton, one of the rising stars of the U.S. National Team, recently said, “Open water is like the extreme sport of swimming; we’re like the wet X Games . . . I think people see it and are like ‘Wow. That’s hardcore.’”<sup>56</sup>

In open water swimming, athletes face a number of risks. Specifically, a swimmer in open water conditions faces external hazards such as currents, rogue waves, dangerous sea life, seaweed, algae, and shifting water depth. The swimmer also faces internal hazards familiar to any swimmer, like cramping, hyperventilation, and inhalation of water, but the notable difference is that the distance of the swimmer from land amplifies the dangers. Other risks include hypothermia (dangerously low body temperature) and hyperthermia (dangerously high body temperature).<sup>57</sup> Hyperthermia is particularly insidious because athletes can quickly advance through heat exhaustion without recognizing its warning signs and develop heatstroke. These are risks that open water swimmers assume—these risks are integral to the essence of the sport.

At the Fujairah event, the air temperature was nearly 100°F and the water temperature was about 87°F. These temperatures made it very difficult for athletes to dissipate heat, and the salt content of the water added greatly to the dehydration risk. In addition, contestants also wore

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<sup>54</sup> *OWS 1 Definitions*, FINA.ORG, [http://www.fina.org/H2O/index.php?option=com\\_content&view=article&id=291:ows-1-definitions&catid=83:open-water-swimming-rules&Itemid=184](http://www.fina.org/H2O/index.php?option=com_content&view=article&id=291:ows-1-definitions&catid=83:open-water-swimming-rules&Itemid=184) (last visited Apr. 15, 2012).

<sup>55</sup> *OWS 5 The Venue*, FINA.ORG, [http://www.fina.org/H2O/index.php?option=com\\_content&view=article&id=295:ows-5-the-venue&catid=83:open-water-swimming-rules&Itemid=184](http://www.fina.org/H2O/index.php?option=com_content&view=article&id=295:ows-5-the-venue&catid=83:open-water-swimming-rules&Itemid=184) (last visited Apr. 15, 2012).

<sup>56</sup> Joanne C. Gerstner, *Sutton Excels in Open Waters, Pool*, SWIMMING TEAM USA (July 5, 2010),

<http://swimming.teamusa.org/news/2010/07/05/sutton-excels-in-open-waters-pool/37029>.

<sup>57</sup> Mayo Clinic Staff, *Heat Stroke*, MAYO CLINIC (Sept. 2, 2011), <http://www.mayoclinic.com/health/heat-stroke/DS01025>.

swimming caps, which further inhibited heat dissipation. One participant reported that, “Not only were we out in midday [sic] sun in boiling water but we were getting very dehydrated from having salt water in our mouths. I could hardly speak after the race, it was so bad.”<sup>58</sup> There is a discrepancy in the water temperatures that witnesses have provided, the figure varying between 29°C and 34°C, with many agreeing that the thermometer attached to the pontoon at the start of the race read 31°C. Needless to say, there was no apparent monitoring of surface temperatures.

Kletter noted that in traditional sports (such as baseball), there is nothing that would cause an athlete’s mental faculties to be compromised because mind and bodily functions remain in their normal state.<sup>59</sup> However, in extreme sports, such as mountain climbing, mental acuity drop to 30% of normal levels to the point where basic arithmetic is virtually impossible and can even be accompanied by hallucinations.<sup>60</sup> The result is that “little errors, things that are black and white down here aren’t really black and white up there. You know, the decision-making process is a little bit more muddled.”<sup>61</sup>

The FINA task force noted that factors contributing to the death of Crippen were hyperthermia, hypo-hydration (loss of fluids), and exercised induced asthma.<sup>62</sup> By all accounts, Crippen was a strong, healthy young athlete. However, “[Even] healthy people can develop heat-related disorders in only moderately hot environments during heavy exercise, particularly if water and salts lost through sweat are not replenished”<sup>63</sup> One of the more deleterious effects of

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<sup>58</sup> Lord, *supra* note 5.

<sup>59</sup> Kletter, *supra* note 42, at 779.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 780.

<sup>62</sup> *FINA Task Force Report Part 7 - Francis Crippen*, FINA.ORG, [http://www.fina.org/H2O/index.php?option=com\\_content&view=article&id=2062:fina-task-force-report&catid=288:special&Itemid=179](http://www.fina.org/H2O/index.php?option=com_content&view=article&id=2062:fina-task-force-report&catid=288:special&Itemid=179) (last visited Apr. 15, 2012).

<sup>63</sup> G.C. Donaldson et al., *Cardiovascular Responses to Heat Stress and their Adverse Consequences in Healthy and Vulnerable Human Populations*, 10 INT. J. HYPERTHERMIA 225, 235 (2003).

heatstroke is its impact on brain function.<sup>64</sup> The excessive heat overload Crippen suffered impaired his body's cooling system (hypo-hydration), and this overload could have led to brain dysfunction.<sup>65</sup> Heat induced brain injury is, after all, the third largest killer of athletes.<sup>66</sup>

The defense of assumption of the risk "arises when the plaintiff knows of and appreciates a risk and voluntarily chooses to encounter it."<sup>67</sup> However, the plaintiff's "awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of [his] skill and experience . . . and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport."<sup>68</sup> Crippen was a professional open water swimmer, and like Emily Cook, dreamt of competing at the Olympic Games. As a professional swimmer, he was probably aware of some of the dangers of hyperthermia. However, was that awareness diminished *by* the hyperthermia, and possible brain dysfunction, that occurred while he was competing?

Open water swimming has risks. Crippen was willing to assume those inherent risks of open water swimming. But, that is only half of the analysis. As Simons argued, the more pertinent question is whether or not the defendant can reasonably demand that the plaintiff either play on defendant's terms, or not play at all. Should FINA and UAE Swimming demand that athletes compete in salt water with an air temperature of 100°F and water temperature of 87°F? Supposedly, race organizers were to have a third station where the swimmers could rest and rehydrate. They did not. Is that a risk inherent in open water swimming? And once that race started, could Crippen, in a state of hyperthermia, continue to make the right decisions?

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<sup>64</sup> H.S. Sharma & P.J. Hoopes, *Hyperthermia Induced Pathophysiology of the Central Nervous System*, 19 INT. J. HYPERTHERMIA 325, 354 (2003).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Leakas v. Columbia Country Club*, 831 F. Supp. 1231, 1236 (D. Md. 1993).

<sup>68</sup> *Maddox v. City of New York*, 487 N.E.2d 553, 556-57 (N.Y. App. Div. 1985); see also Darryll M. Halcomb Lewis, *An Analysis Of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263, 282 (2002).

**PART II: EFFECTS OF WARM WATER SWIMMING**

According to noted physician and author Ken Kamler, 87° is too high of a temperature for this type of event.<sup>69</sup> At that temperature, water can easily cause hyperthermia or overheating of the body. When the body's temperature control system is overloaded, people experience heat-related illness. Although the body usually cools itself by sweating, under some circumstances, sweating is not sufficient. Because the body dissipates heat through the skin, it is more difficult for the body to purge this heat when the water is warm. The resulting heat build-up can lead to muscles not functioning in correct sequence, which can cause muscle spasms. As muscles cease to function properly, breathing becomes difficult, and this loss of control can result in an individual aspirating water and drowning. Additionally, the heat build-up can affect the heart, creating an arrhythmia to the point that the heart pumps inefficiently.<sup>70</sup>

Exercising in heat places high demands on the body's thermoregulatory centers. Heat production during exercise is 15–20 times greater than heat produced at rest, and this level is sufficient to cause dehydration.<sup>71</sup> If there are no thermoregulatory adjustments, muscle tissue activity can raise core body temperature 1°C every five minutes.<sup>72</sup> This heat, as well as any ambient heat absorbed from the outside environment, must be offset by the body's heat transfer mechanisms or else the body will experience hyperthermia. These cooling mechanisms include

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<sup>69</sup> Madison Park & Ashley Fantz, *Swimming in Warm Water Can Take Deadly Toll on Body*, CNN (Oct. 26, 2010), <http://www.cnn.com/2010/HEALTH/10/25/swim.temperature.factors/index.html>.

<sup>70</sup> *Id.*

<sup>71</sup> Gary Mack et al., *Role of Cardiopulmonary Baroreflexes During Dynamic Exercise.*, 65 JOURNAL OF APPLIED PHYSIOLOGY, 1827, 1827-32 (1988).

<sup>72</sup> Ethan Nadel et al., *Physiological Defenses Against Hyperthermia of Exercise*, 301 ANNALS N.Y. ACADEMY OF SCI. 98, 109 (1977).

conduction, convection, evaporation (perspiration), and radiation.<sup>73</sup> As ambient temperature rises, the contributions of conduction, convection, and, particularly, radiation become increasingly insignificant. In these situations, the evaporation of sweat becomes the most important mechanism for temperature control.<sup>74</sup> Any factor that limits evaporation, such as high humidity or dehydration, will have profound effects on physiological function and athletic performance, and will increase the risk for heat illness in the exercising individual.<sup>75</sup>

The two most common forms of hyperthermia are heat exhaustion and heatstroke. Of the two, heatstroke is especially dangerous and requires immediate medical attention. Heat exhaustion is the most common form of heat illness and is characterized by the inability to continue exercising in the heat.<sup>76</sup> It typically occurs under conditions of high external temperature and dehydration.<sup>77</sup> Core body temperature may rise above 38°C, but will, by definition, remain lower than 40.5°C.<sup>78</sup> Onset of heat exhaustions are usually sudden.<sup>79</sup>

Heatstroke is the most serious of the heat illness syndromes. Body temperature is elevated to a level that causes damage to body tissues, affecting multiple organs.<sup>80</sup> Distinguishing features of heatstroke are a core body temperature elevation of greater than 40.5°C, failing sweating mechanisms—often complete cessation of sweating—and moderate to

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<sup>73</sup> Jurgen Wemer, *Temperature Regulation During Exercise: An Overview*, EXERCISE, HEAT, AND THERMOREGULATION 49, 77 (David R. Lamb & Carl V. Gisolfi, eds., 1993).

<sup>74</sup> Jurgen Wemer, *Temperature Regulation during Exercise: An Overview*, in EXERCISE, HEAT, AND THERMOREGULATION 49-77 (David R. Lamb & Carl V. Gisolfi, eds., 1993); see also Lawrence Armstrong & Carl Maresh, *The Induction and Decay of Heat Acclimatisation in Trained Athletes*, 12 SPORTS MED. 302, 312 (1991).

<sup>75</sup> Douglas Casa et al., *National Athletic Trainers' Association Position Statement: Fluid Replacement for Athletes*, 35 J OF ATHLETIC TRAINING 212, 224 (2000), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1323420>; see also Lawrence Armstrong et al., *Influence of Diuretic-Induced Dehydration on Competitive Running Performance*, 17 MED. & SCI. IN SPORTS & EXERCISE 456, 461 (1985).

<sup>76</sup> Armstrong and Maresh, *supra* note 74.

<sup>77</sup> Teofilo Lee-Chiong, Jr. & John Stitt, *Heatstroke and Other Heat-Related Illnesses. The Maladies of Summer*, 98 POSTGRADUATE MED. 26, 36 (1995); see also Randall Wexler, *Evaluation and Treatment of Heat-Related Illness*, 65 AM. FAMILY PHYSICIAN 2307, 2314 (2002).

<sup>78</sup> Michael Barrow & Katherine Clark, *Heat-Related Illnesses*, 58 AM. FAMILY PHYSICIAN (September 1, 1998).

<sup>79</sup> Armstrong et al., *supra* note 75.

<sup>80</sup> Abderrezak Bouchama & James Knochel, *Heat Stroke*, 346 NEW ENG. J. MED. 1978, 1988 (2002).

severe mental status impairment. Heatstroke is a medical emergency involving total thermoregulatory failure and will not reverse without external cooling measures. Mortality rates may exceed 10%.<sup>81</sup> Signs and symptoms are similar to those seen in heat exhaustion, with the addition of acute significant neurological impairment including ataxia, marked confusion, and often coma.<sup>82</sup>

Heatstroke can be categorized into classic and exertional forms. Classic heatstroke can develop slowly over several days and can occur with minimally elevated core temperatures. Conversely, exertional heatstroke is characterized by rapid onset—often developing in hours—and is frequently associated with high core temperatures. Exertional heatstroke can occur in healthy athletes and is commonly seen in poorly acclimatized young persons involved in strenuous physical activity in a hot environment.<sup>83</sup> It should be noted that while the range of water temperatures for pool competitions is 77°-82°F (25°-27.7°C), no such rule had been identified by FINA for open water races. At the time of the event in the UAE, the air temperature was 100°F (37°C) and the water temperature was 87°F (30.5°C). To put the temperature in perspective, the ideal temperature of a person passively sitting in a hot tub is 100°F for no more than 20 minutes.<sup>84</sup> Furthermore, not only were the competitors expending significant amounts of energy for nearly two hours in the heat, but pontoons (where they could re-hydrate themselves) were not available in the last leg of the race.

Maintaining a normal state of hydration is thought to be critical for the prevention of heat-related illness, such as heat exhaustion or heatstroke.<sup>85</sup> Dehydration of approximately 2-3%

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<sup>81</sup> Barrow and Clark, *supra* note 78.

<sup>82</sup> *Id.*

<sup>83</sup> Rajat Khosla & Kalpalatha Guntupalli, *Heat-Related Illnesses*, 15 CRITICAL CARE CLINICS 251, 263 (1999).

<sup>84</sup> CPSC Warns of Hot Tub Temperatures, U.S. CONSUMER PRODUCT SAFETY COMM'N (1979), available at <http://www.cpsc.gov/cpscpub/prereel/prhtml79/79071.html>.

<sup>85</sup> Sandra Fowkes Godek et al., *Sweat Rate and Fluid Turnover in American Football Players Compared with Runners in a Hot and Humid Environment*, 39 BRITISH J. SPORTS MED. 205, 211 (2005).

of body mass routinely occurs in healthy patients during intermittent high-intensity exercise, especially when the ambient temperature is high.<sup>86</sup> This is particularly evident when thirst is relied upon to trigger fluid intake, which may not occur until the patient is already 5% dehydrated.<sup>87</sup> At this point, however, does the person or organization understand the risks that they may be assuming?

Under the doctrine of assumption of risk, two factors are considered: whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm that caused injury, and whether the plaintiff had both knowledge and full appreciation of the danger involved and voluntarily and deliberately exposed himself to the risk.<sup>88</sup> Event organizers are under no duty to protect competitors from the inherent risks associated with their respective sports. However, the organizers have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.<sup>89</sup> As such, it would be incumbent on a sports event manager to develop and maintain a risk management plan. This notion is further discussed in the next section.

### **PART III: HEAT-RELATED ILLNESS RISK MANAGEMENT**

Ayman Saad, Executive Director of UAE Swimming, contended that the water temperature at the Fujairah event was 84°F, all safety measures were in place, and the race

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<sup>86</sup> Stuart Galloway, *Dehydration, Rehydration, and Exercise in the Heat: Rehydration Strategies for Athletic Competition*, 24 CANADIAN J. APPLIED PHYSIOLOGY 188, 195 (1999).

<sup>87</sup> Barrow and Clark, *supra* note 78.

<sup>88</sup> *Tacrendi v. Dive Makai Charters*, 823 F. Supp. 778, 788 (D. Haw. 1993), *overruled on other grounds by McClenahan v. Paradise Cruises, Ltd.*, 888 F. Supp. 120 (D. Haw. 1995).

<sup>89</sup> *Kahn v. East Side Union High Sch. Dist.*, 75 P.3d 30, 38 (Ca. 2003).



protocol was approved by FINA.<sup>90</sup> In a chilling statement, the UAE Swimming Federation Secretary, Saeed Al Hamour, stated that, “We’ve organized so far 14 competitions and championships and never had any deaths.”<sup>91</sup> If an incident has never occurred, how foreseeable are the potential risks for an individual who lacks experience and/or education? Probability is a subjective component that can vary from one person to the next depending on the individual’s experience and/or education.<sup>92</sup> Simply because an incident has never occurred does not mean the organization is logically omniscient.<sup>93</sup> By having hard data, such as the effects of heat-related illness during physical activity, the organization can better develop, implement, or manage a risk management plan in a reasonable fashion.<sup>94</sup>

The theory of probability follows that once the frequency of an incident occurring over time becomes small enough, effectively equaling zero, the potential of the incident occurring may be viewed as outside the range of appropriate concern.<sup>95</sup> Thus, the notion of probability is equal to the number of cases that are directly known by the observer to be possible,<sup>96</sup> and the probability lies between possibility and necessity.<sup>97</sup> The theory of probability, in regard to the lack of the development, implementation, and management of risk management, could be the result of the respondents not having previous involvement in litigation, thereby negating the necessity of written risk management plan, even though they indicated the possibility of an injury may occur in the future.

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<sup>90</sup> Nick Eilerson, *Swim Standout Crippen Passes Away Mid-Race*, CAVALIER DAILY (Oct. 25, 2010), available at <http://www.cavalierdaily.com/2010/10/25/swim-standout-crippen-passes-away-mid-race/>.

<sup>91</sup> Craig Lord, *Fran Crippen: Inquiry Must Be Independent*, SWIM NEWS (Oct. 25, 2010), <http://www.swimnews.com/news/view/8179>.

<sup>92</sup> T.V. Reeves, *A Theory of Probability*, 39 BRITISH J. FOR THE PHILOSOPHY OF SCI. 161, 161 (1988).

<sup>93</sup> John Vickers, *Logic, Probability, and Coherence*, 68 PHILOSOPHY OF SCI. 95, 95 (2001).

<sup>94</sup> Keith Korcz, *The Causal-Doxastic Theory of the Basing Relation*, 30 CANADIAN J. PHILOSOPHY 525, 551 (2000).

<sup>95</sup> See NICHOLAS RESCHER, *RISK: A PHILOSOPHICAL INTRODUCTION TO THE THEORY OF RISK EVALUATION AND MANAGEMENT* (1983).

<sup>96</sup> Reeves, *supra* note 92, at 179.

<sup>97</sup> Vickers, *supra* note 93.

There is not an express legal requirement to practice risk management per se. The risk management process may be viewed as the process of deterring a risk to the point that is regarded by society as acceptable.<sup>98</sup> As a managerial strategy, Sharp, Moorman, and Claussen stated, “The safety and well-being of all your constituents should be one of your core values, and risk management is an important tool to carry out that imperative.”<sup>99</sup> Risk management should be used to assist sport event managers in providing a reasonably safe environment for their patrons. As such, risk management may be perceived as constituting a fundamental way in which decisions makers solve problems.<sup>100</sup>

Taken in this light, the decision to conduct an open water swimming contest must fully consider both the “value” dimension and the legal dimension. The implementation of a methodical approach to risk assessment<sup>101</sup> and the implementation of safety measures serve to support the event manager in developing a plan to prevent legal disputes from occurring and intervening when a potentially litigious situation arises.<sup>102</sup> It is somewhat less clear whether having a well-defined process for assessing and addressing risks meets the legal test of reasonableness, and thus providing a valid defense for the lack of such process. It is clear, however, that a formalized approach serves as a “road map” and as evidence of the presence of a risk management plan.<sup>103</sup>

Operationally speaking, when there is not a clearly articulated view of the risk policy and its relationship to overall strategy and policy, risk management becomes ineffective. As such, it

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<sup>98</sup> Rao Kolluru, *Risk Assessment and Management: A Unified Approach*, in *Risk Assessment and Management Handbook for Environmental, Health, and Safety Professionals*, 1.3-1.4 (1995).

<sup>99</sup> Linda Sharp et al., *SPORT LAW: A MANAGERIAL APPROACH* (2007).

<sup>100</sup> Ronald Baron, *RISK MANAGEMENT MANUAL* (2004).

<sup>101</sup> Betty van der Smissen, *Tort Liability and Risk Management in the Management of Sport: Its Foundation and Application*, 177-98 (Bonnie Parkhouse eds. 2001).

<sup>102</sup> John Miller et al., *Fourth Amendment Considerations and Application of Risk Management Principles for Pat-Down Searches at Professional Football Games*, 20 J. LEGAL ASPECTS OF SPORT 108, 125 (2010).

<sup>103</sup> John Miller & Frank Veltri, *Security Issues in Public Recreation Centers*, 13 J. LEGAL ASPECTS OF SPORT 265, 265 (2003).

is important to emphasize that present-day risk management is developed and implemented as a broad process for assessing and addressing risks—a process in which operational risk management is but one part. Risk management practices identify and assess the broadest possible range of risks in less structured settings.<sup>104</sup> Thus, risk management offers the organizational decision-makers an opportunity to advance a wide-ranging organizational policy for managing risks. Governing bodies of the sports medicine community have published recommendations for minimizing heat illness risk.<sup>105</sup> Yet, although FINA rules set a minimum water temperature for which competitions may be held (16°C, 60.8°F), FINA does not list a maximum temperature. Thus, an event may be cancelled if the water is too cold, but the rules do not provide for a cancellation if the water is too hot.

Risk management institutes a course of action for the continual assessment of risks with the final goal of making it an accepted part of the organizational culture.<sup>106</sup> To accept risk management as part of the organizational culture, there are three key characteristics to consider for its effective application regarding heat-related illnesses. First, top management, such as the FINA rules committee, must be engaged in the establishment of the risk policy. In order to determine the level of safety needed to protect a swimmer's well-being, the upper management should assess a wide number of factors related to the event. Risk factors that may increase the likelihood of experiencing heat-related illness include:

1. Environment - air temperature, combined with humidity, wind speed, and the amount of radiant heat can decrease heat dissipation;
2. Dehydration - thirst is a poor indicator of hydration;
3. Pre-activity hydration status - if alcohol or supplements were consumed;

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<sup>104</sup> Miller et al., *supra* note 102, at 108.

<sup>105</sup> Armstrong et al., *supra* note 75.

<sup>106</sup> Miller et al., *supra* note 102; *see also* Peter Young & Steven Tippins, *MANAGING BUSINESS RISK: AN ORGANIZATION-WIDE APPROACH TO RISK MANAGEMENT* (2000).

4. Acclimatization/fitness levels - individuals not yet acclimatized to the heat or inadequately conditioned are at increased risk;
5. Febrile Illness – athletes who currently or recently exhibit a fever may be at increased risk;
6. Medications – diuretics and stimulants may increase risk; and
7. Sickle Cell Trait - presents an increased susceptibility to heat illness.<sup>107</sup>

Second, when attaching responsibility to a risk management decision-making model, administrators must analyze several assessments. The first assessment to be analyzed is the significance of the threat (threat assessment). The second assessment relates to the potential vulnerabilities in and around the sport facility (vulnerability assessment). The third assessment prioritizes the vulnerabilities and implements action to diminish the likelihood of harmful incidences (criticality assessment). Once these assessments have been analyzed, the upper administrator should be able to apply appropriate risk management measures. Should organizational decision-makers overlook the perceived importance of these assessments, lack risk awareness, or simply ignore the need to develop, implement, and enforce safeguards, it may be only a matter of time before an incident, such as Crippen's, happens.<sup>108</sup>

The third key characteristic to consider for risk management application regarding heat-related illnesses involves the risk policies being communicated regularly to all coaches and athletes, especially if they are impacted by outside environmental conditions such as heat. Early recognition and prompt treatment are essential elements to the prevention of morbidity and mortality from heat illness. Although coaches may observe athletes vomiting, becoming fatigued, confused, or agitated, individuals with heatstroke often progress through heat

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<sup>107</sup> American Academy of Orthopaedic Surgeons, *Heat Injury and Heat Exhaustion*, <http://orthoinfo.aaos.org/topic.cfm?topic=A00319> (last visited Oct. 11, 2011).

<sup>108</sup> Greg Alston, *HOW SAFE IS SAFE ENOUGH?*, 9 (2003).

exhaustion without recognition of the condition. Coaches and event organizers have a responsibility to not *increase* the risks inherent in the sport.<sup>109</sup> In order to do so, they must be able to foresee potential exposure of harm to the athlete, understand the elements of the risk management plan, as well as how to implement it. This last statement is important because heat illnesses occur most frequently while practicing or playing a sport.<sup>110</sup>

Thematically, risks are often a highly interconnected assortment of items that need to be managed—not just in response to the individual characteristics of a particular risk, but with a specific eye on understanding the interrelationships of all risks in question.<sup>111</sup> Various models of risk management have been put forth to epitomize the relationships between risk perceptions and behavior.<sup>112</sup> For example, John Adams, Emeritus professor at University College London, explored the perception of risk management actions and the response to them.<sup>113</sup> Whereas the traditional, operational view of risk management has tended to consider responses to be uniformly favorable (athletes perceiving that coaches recognize the symptoms of heat-illness), Adams has also shown that perceptions can lead to undesirable responses (athletes eschewing water because they perceive the coach will recognize if they are in trouble and pull them out of the competition).<sup>114</sup>

In the case of heat-related illness, the undesirable responses would most likely be risk mitigation due to misperceptions (athletes do not drink to toughen themselves) or risk shifting

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<sup>109</sup> Kahn v. East Side Union H.S. Dist., 75 P.3d at 38 (Cal. 2003).

<sup>110</sup> James Gilchrist et. al., *Heat Illness Among High School Athletes — United States, 2005–2009*, 59 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT 1009, 1009; see also Frederick Mueller & Robert Cantu, *Catastrophic Sports Injury Research: Twenty-Sixth Annual Report*, UNIV. N. C. AT CHAPEL HILL NATIONAL CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH (2008), <http://www.unc.edu/depts/nccsi/AllSport.pdf>; Frederick Mueller & Bob Colgate, *Annual Survey of Football Injury Research: 1938-2008*, UNIV. OF N. C. AT CHAPEL HILL NATIONAL CENTER FOR CATASTROPHIC SPORT INJURY RESEARCH (2009), <http://www.unc.edu/depts/nccsi/>.

<sup>111</sup> Torben Andersen & Peter Schröder, *STRATEGIC RISK MANAGEMENT PRACTICE* (2010).

<sup>112</sup> John Adams, *RISK* (2001); see also Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 *PSYCHOLOGICAL SCI.* 322, 322-25 (2006).

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

from the coaches to the athletes (athletes know how much they should drink, so no supervision is necessary). This insight tends to emphasize that modern risk management not only entails the consideration of the interconnectedness of risks, but also anticipation of what is called “risk reflexivity”—that is, responses to risk management measures do not just occur in favorable terms. Thus, a kind of multi-dimensional game-theory approach to risk management becomes necessary.

### *Findings of the Commissions*

The USA Swimming Commission, chaired by former International Olympic Committee Vice President Richard Pound, was very critical of the non-cooperative attitude of FINA. Issued on April 12, 2011, the essential premise of the USA Commission’s report was that, “There must be immediate recognition when a swimmer is struggling or loses consciousness; there must be immediate rescue when loss of consciousness occurs; and there must be immediate resuscitation to address medical emergencies.”<sup>115</sup> The report stated no open water plan should be sanctioned unless there was an approved safety plan.<sup>116</sup> Included in that safety plan would be: certified lifeguards with open water experience, the ability to reach distressed swimmers within twenty seconds, a minimum of one safety craft per every twenty swimmers, a communications system with water-to-water, water-to-land, and land-to-water communications, and tracking devices to track athletes in open water races.<sup>117</sup> Finally, regarding temperatures, the USA Commission

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<sup>115</sup> *Open Water Review Commission Recommendations*, USA SWIMMING (Apr. 12, 2011), available at [http://www.usaswimming.org/\\_Rainbow/Documents/7446603a-b37d-44eb-b8c2-18b5eccc7ca3/Open%20Water%20Review%20Commission%20Recommendations.pdf](http://www.usaswimming.org/_Rainbow/Documents/7446603a-b37d-44eb-b8c2-18b5eccc7ca3/Open%20Water%20Review%20Commission%20Recommendations.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2-3.

recommended the implementation of minimum and maximum water temperatures for open water swimming:

1. If the water temperature is below 16°C (60.8°F), no race can be held;
2. For races of 5K and above, if the water is above 31°C (87.8°F), no race can be held;
3. If the air temperature and water temperature added together in Celsius are less than a total of 30°C, no race can be held; and
4. If the air temperature and water temperature added together in Celsius are greater than 63°C, no race can be held.<sup>118</sup>

Recall, the Fujairah 10K contest was held with water temperature of 31°C (87°F) and air temperature of 38°C (100°F). Thus, the combined water-plus-air temperature for the contest was 69°C, where the new maximum requires cancellation at or about 63°C. Many of the swimmers have concerns over the maximum 31°C. Christine Jennings, who competed at Fujairah said, “Crazy. . . [e]ven 86 degrees is pushing it. You’re able to do it if you prepare well. They have some homework to do.”<sup>119</sup> Alex Meyer, who led the search for Crippen at Fujairah said, “Outrageous . . . like a lukewarm hot tub.”<sup>120</sup>

The FINA Commission noted that the current open water rules were “rather general and should be revised to keep up with the evolution of the sport[.]”<sup>121</sup> For example, under the current rules, there is no mention of the minimum requirements or certifications of safety personnel.<sup>122</sup> Additionally, under the current rules, the host committee are required to provide safety boats, but again there is no mention of the quality of the boats or the certifications and qualifications of the

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<sup>118</sup> *Id.* at 5-6.

<sup>119</sup> Bonnie Ford, *FINA’s Lack of Cooperation in Fran Crippen Investigation Leaves Mark*, ESPN.COM (Apr. 13, 2011), [http://sports.espn.go.com/oly/swimming/columns/story?columnist=ford\\_bonnie\\_d&id=6347356](http://sports.espn.go.com/oly/swimming/columns/story?columnist=ford_bonnie_d&id=6347356).

<sup>120</sup> *Id.*

<sup>121</sup> *Report: FINA Task Force Report Part 2 - Open Water Swimming in FINA*, FINA.ORG, [http://www.fina.org/H2O/docs/report/FCrippen/Report\\_FC\\_2.pdf](http://www.fina.org/H2O/docs/report/FCrippen/Report_FC_2.pdf) (last visited Apr. 15, 2012).

<sup>122</sup> *Id.*

personnel in charge of the safety boats. The FINA Commission concluded that “the inadequate surveillance and safety measures made it difficult, at times impossible, to recognize and act upon an athlete in distress.”<sup>123</sup>

The FINA Commission specifically recommended that FINA should develop a working group to address risk assessment, including developing disaster plans, relocation contingency plans, safety and emergency plans, escort boats and safety boats ratio, safety personnel qualifications, search and rescue plans, and a medical action plan.<sup>124</sup> Presumably, either there were no such plans at Fujairah, or they failed. FINA also addressed maximum and minimum temperatures, recommending a minimum temperature of 18°C (64.4°F) and a maximum temperature of 28°C (82.4°F), with the temperature taken at a depth of 40 cm.<sup>125</sup> Importantly, in order to create a system of checks and balances, the temperature should be measured in the presence of randomly selected coaches, swimmers, or delegates at three different places on the course the day before the race and again before its start.<sup>126</sup> Finally, FINA should look at the combination of the water and air temperature ratios and demand a water quality report from the site to be confirmed by international health organizations.<sup>127</sup> The Task Force noted that the open water rules and regulations need to be revised immediately with an organizational commitment to athlete safety as a top priority stating, “This commitment to athlete safety as a priority extends also to the responsibility of the Federations and needs to be embraced at the level of the coaches and athletes themselves to receive the proper training and education to both demand appropriate race safety measures as well as recognize risk warnings.”<sup>128</sup>

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<sup>123</sup> Report: FINA Task Force Report Part - Francis Crippen, FINA.ORG,  
[http://www.fina.org/H2O/docs/report/FCrippen/Report\\_FC\\_8.pdf](http://www.fina.org/H2O/docs/report/FCrippen/Report_FC_8.pdf) (last visited Apr. 15, 2012).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*



In light of numerous rules “inadequately fulfilled” at Fujairah, FINA has now dropped the UAE from the 10K Marathon Swimming World Cup.<sup>129</sup> FINA may also be taking more actions in light of the tragedy at Fujairah, as FINA, on May 7, 2011, decided to cancel the Grand Prix event at Sumidero Canyon, relying on the recommendation of the FINA Sports Medicine Committee to “not expose its swimmers to unsafe water conditions.”<sup>130</sup> This was the first time an event like this was cancelled due to event conditions.

The heat also caused havoc at the recent 2011 FINA World Championships in China. The open water event was conducted in Jinshan City Beach, southwest of Shanghai.<sup>131</sup> The start of the race was moved up, to 6:00 A.M., because of the heat.<sup>132</sup> At the time the race started, the water temperature was already 30.5°C (87°F), just under the suggested guideline maximum of 88°F.<sup>133</sup> When the race ended, the air temperature was 90°F with 68% humidity.<sup>134</sup>

Of the thirty-five men that entered the race, six decided not to start, ten pulled out before the end, and only nineteen finished.<sup>135</sup> Seven of the twenty female starters withdrew.<sup>136</sup> U.S. officials literally forced U.S. swimmer Claire Thompson to stop swimming in fear that she could succumb to heat exhaustion.<sup>137</sup> Valerio Cleri, of Italy, the defending 25K champion, withdrew after four hours saying it was “too hot and too dangerous” to continue.<sup>138</sup> Cleri went on to say,

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<sup>129</sup> Anna Zacharias, *UAE Will not Hold World Swim Meet*, THE NATIONAL (Apr. 24, 2011), <http://www.thenational.ae/thenational/news/uae-news/uae-will-not-hold-world-swim-meet>.

<sup>130</sup> *PR 26 - Sumidero Canyon leg has been cancelled*, FINA.ORG (Apr. 24, 2011), [http://www.fina.org/H2O/index.php?option=com\\_content&view=article&id=2087:pr-26-sumidero-canyon-leg-has-been-cancelled&catid=275:2011&Itemid=246](http://www.fina.org/H2O/index.php?option=com_content&view=article&id=2087:pr-26-sumidero-canyon-leg-has-been-cancelled&catid=275:2011&Itemid=246).

<sup>131</sup> *Jinshan City Beach: Shanghai Sports*, FINA.ORG (Feb. 11, 2010), <http://www.shanghai-fina2011.com/13/2011/0210/121.html>.

<sup>132</sup> Justin Bergman, *Heat Plays Havoc With Open-Water Racing in China*, ASSOCIATED PRESS (July 23, 2011), <http://abcnews.go.com/Sports/wireStory?id=14140704>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Organisers Criticised for Allowing Races in “Too Hot and Dangerous” Water*, BBC SPORT (July 23, 2011), <http://news.bbc.co.uk/sport2/mobile/swimming/14260705.stm>.

<sup>136</sup> *Id.*

<sup>137</sup> Mark Ralston, *Officials Drag US Swimmer from 25km Marathon at Worlds*, AFP (July 23, 2011),

<http://my.news.yahoo.com/officials-drag-us-swimmer-25k-marathon-worlds-053148476.html>.

<sup>138</sup> Bergman, *supra* note 132.

“There’s not enough attention on the athletes...[t]here should not have been a race here. The jury was irresponsible.”<sup>139</sup> Women’s champion, Linsy Heister, of the Netherlands, also withdrew. Her coach Marcel Wouda said, “After a long discussion with medical staff, we decided to withdraw Linsy...[i]t is irresponsible to swim for five to six hours in water of about thirty degrees. Besides that its life threatening, it would take a very long recovery afterwards.”<sup>140</sup> Wouda also went on to say, “You’d think FINA would have learned an important lesson [with Fran Crippen’s death]...I, as a coach, am of the opinion that the swims should be cancelled. This is irresponsible, and I hope other coaches will [follow suit].”<sup>141</sup> Alex Meyer, of the U.S., also pulled out of the race before it began. Meyer, a teammate of Fran Crippen, said, “What’s the point in making rules and recommendations if you’re just going to blow them off at events like this. . . [i]t’s like, did you not learn your lesson? Do you not remember what happened last time?”<sup>142</sup>

Cornel Marculescu, FINA Executive Director, denied any allegations that the conditions were dangerous saying, “In general, in 25K races you have swimmers pulled out. The race was completed in a perfect manner.”<sup>143</sup> Julio Maglione, FINA President, dismissed the criticism saying, “All necessary safety measures were taken within the regulations.”<sup>144</sup> FINA’s liaison for open water swimming, Dennis Miller, also dismissed the criticism saying, FINA has “to take into account how the swimmers are actually looking in the water, how the coaches are feeding the swimmers. It is really the coach’s responsibility, their duty to care for their athletes. There were

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<sup>139</sup> *Id.*

<sup>140</sup> *Marcel Wouda Pulls World Champion From World Championships*, OPEN WATER SOURCE (July 21, 2011), <http://www.dailynewsofopenwaterswimming.com/2011/07/marcel-wouda-pulls-world-champion-from.html>.

<sup>141</sup> *FINA World Championships, Open Water: Swann Oberson, Thomas Lurz Capture 5K Crowns*, SWIMMING WORLD MAGAZINE (July 21, 2011), <http://www.swimmingworldmagazine.com/lane9/news/27609.asp>.

<sup>142</sup> BBC Sport, *supra* note 135.

<sup>143</sup> Press Association, *Tom Daley and Pete Waterfield in Final at World Championships*, THE GUARDIAN (July 23, 2011), <http://www.guardian.co.uk/sport/2011/jul/23/tom-daley-diving-world-championships>.

<sup>144</sup> BBC Sport, *supra* note 135.

obviously a group of athletes who were better prepared than others...[t]he majority of the swimmers finished.”<sup>145</sup> Meyer, Crippen’s teammate, fired back, “And if these Fina [sic] guys say, ‘Oh you’re not in good shape, you’re not a good enough swimmer’...[n]o, it’s not because I’m not a good swimmer, it’s because it’s too hot.”<sup>146</sup>

Needless to say, there is a need to revisit the temperature controversy. Dennis Miller, of FINA, emphasized that 88°F degrees was a “guideline...not a rule.”<sup>147</sup> After the race, Cornel Marculescu, FINA Executive Director, announced that FINA and the International Olympic Committee are working with a New Zealand university to refine the temperature limits.<sup>148</sup> Marculescu said, “The target is to be ready by the end of this year and it will be included in the rules for 2012 and the Olympics.”<sup>149</sup> One can only hope.

#### **PART IV: CONCLUSION**

Fujairah was a disaster waiting to happen and happened as a backdrop of warnings went largely unheeded. Unfortunately, it did not result in any changes demanded by coaches, managers, and the swimmers themselves. Although Fran Crippen is the only competitive open water swimmer to have died during a competition, his death was most likely due to the effects of exertional heatstroke.<sup>150</sup> Additionally, heat-related illnesses can incapacitate a person by permanently injuring the brain and other organs. Many similar incidences, including Fran

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<sup>145</sup> *Heat Plays Havoc with 25K Open Water Events at World Championships: Open Water Contenders Withdraw*, ASSOCIATED PRESS (June 23, 2011), [http://espn.go.com/olympics/swimming/story/\\_/id/6795536/heat-plays-havoc-25k-open-water-events-world-championships](http://espn.go.com/olympics/swimming/story/_/id/6795536/heat-plays-havoc-25k-open-water-events-world-championships).

<sup>146</sup> BBC Sport, *supra* note 135.

<sup>147</sup> ASSOCIATED PRESS, *supra* note 145.

<sup>148</sup> *Controversy at World Open Water Swimming*, RTE SPORT (July 24, 2011), <http://www.rte.ie/sport/swimming/2011/0723/swimming.html>.

<sup>149</sup> *Id.*

<sup>150</sup> *Report: FINA Appointed Task Force Part 7—Francis Crippen*, FINA.ORG, [http://www.fina.org/H2O/docs/report/Fcrippen/Report\\_FC\\_7.pdf](http://www.fina.org/H2O/docs/report/Fcrippen/Report_FC_7.pdf).

Crippen's death, may have been preventable if the organizers had understood the foreseeable aspects that indicated that heat-related illnesses would most likely occur. While FINA should have addressed the heat issues and should have been better prepared, Crippen, by all accounts, was a thoughtful and intelligent individual who was concerned about the elevated air and water temperatures in which he and his fellow swimmers had to compete. When he started the race he may have assumed some of the risks, but his decision-making capacity was likely compromised by hyperthermia and hypo-hydration. When assigning responsibility, risk management tends to employ a prospective decision-making model. This model is often applied retrospectively and constructs a moment of decision to draw the "right" conclusions. Dick Pound, former Vice President of the International Olympic Committee, former President of the Canadian Olympic Committee, and Olympic swimmer himself, commented:

An athlete should never lose his or her life in a sport competition, but when such an incident occurs, it is the duty of the sport community to conduct a thorough and complete review of the situation and factors that may have caused or failed to prevent such a tragedy.<sup>151</sup>

Many of the elite open water swimmers have signed a petition calling for a maximum of 28°C (82.4°F), believing that 31°C is too high.<sup>152</sup> After the fiasco at the 25K event at the 2011 FINA World Championships in Shanghai, U.S. Swimming revised their standards. United States Aquatic Sports ("USAS") is the recognized member federation of FINA and is responsible for the sports of swimming, diving, synchronized swimming, and water polo in the U.S.<sup>153</sup> At the

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<sup>151</sup> Richard Pound to Chair Open Water Review Commission, USA SWIMMING, (Nov. 9, 2010) <http://www.usaswimming.org/ViewNewsArticle.aspx?TabId=1&itemId=3045&mid=8712>; *Swimming USA Swimming Makes Safety Recommendations after Crippen Death*, ASSOCIATED PRESS, <http://www.universalsports.com/news-blogs/article/newsid=529511.html#usa+swimming+releases+report> (last visited Apr. 15, 2012).

<sup>152</sup> Bonnie Ford, *Open Water Safety Still an Issue at Worlds*, ESPN.COM (July 18, 2011), [http://espn.go.com/blog/olympics/post/\\_id/995/open-water-safety-still-an-issue-at-worlds](http://espn.go.com/blog/olympics/post/_id/995/open-water-safety-still-an-issue-at-worlds).

<sup>153</sup> USAS - *Who We Are!*, UNITED STATES AQUATIC SPORTS, <http://www.usaquaticsports.org/pages/aboutus.htm> (last visited Apr. 9, 2012).

2011 USAS Convention, the House of Delegates lowered the maximum temperature from 31°C to 29.45°C (85°F) for all USA Swimming open water events of 5K or longer.<sup>154</sup> Additionally, all host committees are required to have an Independent Safety Monitor to assure that the approved safety plan is implemented and that adequate safety precautions are in place.<sup>155</sup> The Independent Safety Monitor has the authority to withdraw an official sanction if conditions change and become a concern.<sup>156</sup>

The rub in this problem is that, as Dennis Miller of FINA said, the 31°C maximum is a “guideline . . . not a rule.”<sup>157</sup> Do the athletes have a “full preference” choice? In order to qualify for the Olympic Games, they have to compete in FINA events. Christine Jennings put it into perspective, “We can’t fight it at this point...it sucks. But it’s Olympic qualifying and we can’t boycott it.”<sup>158</sup> Risk management provides a fundamental way in which decision-makers solve problems.<sup>159</sup> Additionally, the duty to provide emergency care requires the education and training of coaches, athletes, and event organizers to be prepared for the foreseeable heat-related illness that happened in the Fujairah open water swimming competition. This requirement creates an emphasis on the top management, such as FINA, to make certain that a reasonably safe environment is provided for the competitors. Thus, risk management generates a cycle of responsibility in the development and effective implementation of risk management. The most tragic fact surrounding heat-related deaths, such as Fran Crippen’s, is that the condition can be

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<sup>154</sup> *USA Swimming Institutes Open Water Maximum Temperature Requirement*, SWIMMING WORLD MAGAZINE (Sept. 17, 2011), <http://www.swimmingworldmagazine.com/lane9/news/OpenWater/28073.asp?q=USA-Swimming-Institutes-Open-Water-Maximum-Temperature-Requirement>.

<sup>155</sup> *USA Swimming Passes Open Water Safety, Athlete Petition Legislation at USAS Convention*, SWIMMING WORLD MAGAZINE (Sept. 20, 2011), <http://www.swimmingworldmagazine.com/lane9/news/USA/28084.asp?q=USA-Swimming-Passes-Open-Water-Safety,-Athlete-Protection-Legislation-at-USAS-Convention>.

<sup>156</sup> *USA Swimming 2012 Rule Book*, USA SWIMMING, [http://www.usaswimming.org/\\_Rainbow/.../2012%20Rule%20Book.pdf](http://www.usaswimming.org/_Rainbow/.../2012%20Rule%20Book.pdf) (last visited Apr. 15, 2012).

<sup>157</sup> ASSOCIATED PRESS, *supra* note 145.

<sup>158</sup> Ford, *supra* note 152.

<sup>159</sup> Miller et al., *supra* note 102, at 125.

totally averted. Ironically, the preventable nature of heat-related deaths among open water swimmers provides the opportunity to prepare for the potential occurrences and decrease their frequency.