Major League Practice: bigger sports deals, more legal issues

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As sports deals have become bigger, more complex issues have arisen to challenge lawyers, including morals clauses, ambush marketing and digital platforms

When BCE Inc. and Rogers Communications Inc. began negotiations to purchase a 75 per cent ownership position of Maple Leaf Sports & Entertainment Ltd. from Ontario Teachers' Pension Plan in March 2011, it marked the onset of an 18-month endurance test for Robin Brudner, who was MLSE's Executive Vice President, General Counsel and Corporate Secretary.

The deal, which was consummated for $1.32 billion on August 22, 2012, "was the largest sports transaction in Canada at the time," she says. "It was very time-consuming and very complex and quite a unique transaction [because] Bell and Rogers had joined together to acquire MLSE. It required the approval of three sports leagues [the NHL, NBA and MLS], the Competition Bureau and

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Brudner, who is a lifelong sports fan – she still has an extensive collection of sports memorabilia from her childhood, including the iconic photograph of a horizontal Bobby Orr flying through the air, arms splayed in victory just after he scored the Stanley Cup winning goal in 1970, which she clipped from the newspaper as a four-year-old – was a key member of a small MLSE team, considering the mountain of work that needed to be done. The negotiations had to be kept secret, so "very few knew," she says, explaining the reason for the handful of participants at her end. "It was very late nights and certainly no holidays and not a lot of down time. It was especially challenging because I had my ordinary work to do as well."

Almost 30 years earlier, Toronto lawyer and University of Toronto Adjunct Professor Gordon Kirke, who is considered by many to be the first Canadian to have a general sports law practice, was involved in another significant sports negotiation — the acquisition of a Major League Baseball franchise for the Toronto Blue Jays.

Kirke was acting on behalf of Labatt Breweries, which, along with several other parties, had been awarded entry into the coveted league in March 1976. "At the time it was considered a very big deal," says Kirke, "but the expansion fee was only $7 million, which today is very hard to believe. The deal was done in Tampa and I remember returning to Toronto the next day. The customs officer asked me if I had bought or received anything of value when in the United States. I said, yes, I did: a baseball team for $7 million. I thought it was a really huge amount."

The $7-million price tag indeed seems puny compared to the MLSE sale, which

itself has been somewhat dwarfed by the size of some other transactions involving professional sports entities. “What we’ve seen in North America,” says Jim Rossiter, a transactional lawyer with Dentons Canada LLP in Toronto, who has been involved in the purchase of numerous franchises throughout North America (“I financed the [NHL Arizona] Coyotes more times than I can remember”), is that “the price of teams has shot through the roof.”

To wit: In August 2014, former Microsoft CEO Steve Ballmer ponied up a record US$2 billion for the Los Angeles Clippers basketball team. A month later, the small-market Buffalo Bills of the NFL were sold for US$1.2 billion. Even the Milwaukee Bucks, which Mike Ozanian of *Forbes* magazine calls “the least valuable NBA franchise,” went for US$550 million the same year, a sum that seemed disproportionately high to most observers.

And the big numbers were not just restricted to the purchase price for teams. In November 2014, *Forbes* valued the perennially disappointing Toronto Maple Leafs at US$1.3 billion, tops in the NHL. A year earlier, Rogers showered $5.2 billion on the NHL for the broadcast and multimedia rights to all Canadian NHL games for 12 years, ending in 2025–26, the largest sports-media rights agreement in Canadian history. “The value of media as a revenue source is something you can track,” says Jon Festinger, the principal of Festinger Law & Strategy LLP in Vancouver and a former general counsel to the Vancouver Canucks. “Its growth has been huge over the last decade.”

It used to be that the athletes defined the sports industry, but, arguably, that ended with the retirement of basketball phenomenon Michael Jordan in the early 2000s, says Festinger. “Now business is defining the sports part more than the sports part is defining business.”

Understandably, as the sports landscape has expanded so too has the practice of sports law. “I think the area has grown immensely because the value of the teams has grown immensely, the interest of the public has grown and the amount of money being plowed into pro sport is huge,” says Rossiter.

When it comes to major transactional deals, “sports law is acting on financing,” says Sheldon Plener of Cassels Brock & Blackwell LLP in Toronto. “If you finance a basketball or hockey team, it’s like any other financing in that you’re

borrowing money from the bank against security of the asset. However, each of the leagues has their own rules as to what extent you can leverage a company, because they want to make sure there's some equity left over once you've provided financing to the bank."

If a team gets into financial trouble, Plener says, and the league has to advance money to the team, it wants to make sure it has a priority position and that there's equity left over. "A sports lawyer, therefore, has to be aware of the different types of rules that each league has. If you're lending money on a piece of real estate, a bank might give you 85 per cent. If the guy has a million bucks they'll lend you $850,000. Whereas the NHL or NBA might say, we won't allow you to borrow more than 50 per cent against the asset. So there are different nuances. The sports element is to understand how the league works and what its rules are and then the rest of it is straight financing."

When Kirke was working on the Blue Jays expansion deal, "it didn't require the intensity of the specialty lawyer," he says. "We were really on a sales mission as much as anything else. I think [these types of deals] have become far more specialized and the intensity of the various specialties has increased enormously."

Brian Bellmore of Bellmore & Moore, whose Toronto practice focuses on corporate and commercial litigation, was on the board of directors of the Toronto Maple Leafs in the early 1990s as the nominee of then owner Steve Stavro. "Sports law has really evolved since around that time," he says. "Prior to that there wasn't any one lawyer who would call himself a sports lawyer. When you think of sports law now, however, you think of every area of law starting with basic contract law and labour, and competition law, especially if you're doing business in both the US and Canadian markets. For major acquisitions, you need to heavily rely on corporate securities law experts and tax experts as well as just general knowledge of the basic day-to-day workings of a league."

Prospective team owners, says Rossiter, need to keep in mind that they are not just buying any old asset. "They're entering into a club, a group of people, [maybe] 29 others who have to accept them. This is very unique. There are going to be 29 other strong-willed people around the board of governors' table and that is not always easy. I don't think that exists in any other space."

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Shawna Vogel, who focuses on mergers and acquisitions, as well as sports law, in the Edmonton office of Dentons, adds that very often a prospective owner has to deal with contractual arrangements with the city in which the franchise is located. “One of the things I’ve been involved in hot on the heels of an acquisition,” she says, noting that a top client is Daryl Katz, who owns the Edmonton Oilers, “is the renovation or development of the arena facility. That can bring in a whole host of work as well.”

Both Rossiter and Vogel say that a successful transactional sports-law practice in Canada requires the ability to work on both sides of the 49th parallel. Rossiter, who says he is “all over the place in the US,” adds that the US financial environment is, understandably, more advanced when it comes to the kind of financing most deals entail. “About 20 years ago you started to see the first dedicated sports bankers in New York, and what you began to also see were young lawyers who followed suit and started to become very focused on the space,” he says. “I think what you’re starting to see now is that some of that has shifted to Canada.”

At the same time, he thinks that, “Even the few Canadian banks don’t really have yet the dedicated practices that you see in the US, both with the big banks and the boutiques that have almost all spun off from the big ones.”

Considering the complexity and magnitude of so many current deals involving sports teams, Bellmore quietly observes that they “are not for someone who is just starting out.”

While the lucrative deals and their complexity have escalated dramatically in the past couple of decades, the sports landscape has been confronted with other challenging issues that didn’t exist until recently or were nowhere nearly as prominent as they now are.

“I don’t think there’s been a time in my memory when there’s been more issues going on,” says Dickinson Wright PLLC’s Trevor Whiffen in Toronto, whose litigation practice includes sports and entertainment issues. “[You have] the television deals, the violence against women, the unionization of amateur athletes,

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the drug and concussion litigation and the liability for teams and leagues for what happens in their stands and parking lots." (In July 2014, for example, a jury found the Los Angeles Dodgers negligent, in terms of security measures, in a 2011 assault at their stadium that left a fan permanently disabled. He was awarded US$15 million in civil damages.)

The influence of social media and the seemingly never-ending emergence of new digital platforms has greatly affected "branding and IP, sponsorship, endorsement and marketing lawyers like me," says Leonard Glickman of Cassels Brock in Toronto. "These platforms are creating all kinds of new and interesting issues. A few years ago you certainly didn't have too many agreements that had a tweet requirement."

Whiffen, whose first sports client was Don Cherry of Coach's Corner fame (Whiffen still works with him), mentions an endorsement deal he recently negotiated for a well-known golfer. "One of the things we talked about was social-media platforms," he says. "You cover off Facebook, Twitter, Instagram, Pinterest, YouTube and any other similar media or platforms that may evolve in the fullness of time in the course of the contract."

The contract often includes conditions likely not even considered a few decades ago. "I've even included clauses where, if the athlete dramatically changes their appearance, we reserve the right to exit the contract," says Whiffen. "Say, for example, a baseball player like Johnny Damon, when he was with the [Boston] Red Sox, with the big flowing locks, gets a contract with a shampoo manufacturer. If he shaves his head bald, how can he endorse the product?"

The risks involved with abusing social media were clearly evident in November 2014, when two prominent players in the Ontario Junior Hockey League were each suspended 15 games by the league for having used "vulgar and abusive language in conversations with women on a social media site." More dramatic was the expulsion of triple jumper Paraskevi Papachristou from Greek's Olympic team in 2012 for a perceived racist tweet prior to the Games.

One of the new issues some sports lawyers have to contend with is ambush marketing, says Brandon Potter, who focuses on general corporate commercial, intellectual property and brand management work for high-perfor-

mance sports clients, in the Calgary office of Norton Rose Fulbright Canada LLP. “This is where advertisers try to capitalize on an event without being official sponsors or paying official sponsor fees.”

Potter cites, as an example, a ploy by the Netherlands-based company, Bavaria Brewery, during the 2010 FIFA World Cup held in South Africa. “They sent about 30 or so female fans in special clothes, including orange miniskirts, that were the colours of the brewery into the stands,” he says, adding that they were strategically seated in a stadium section that constantly appeared on TV. “You would think of Bavaria Brewing the whole time even though Bavaria was not a sponsor. Other breweries were.”

Another tactic, he says, is for a company to publish congratulatory messages to a team in advance of an event. “In reading the ads, you’d think the company has some affiliation with the team, when in fact it didn’t.”

In most cases, Potter says, the official sponsors try to counteract the marketing trespasses with a light rather than a heavy hand. “Perhaps a sponsor can have other clothing on site that can go over what the people are wearing. You also want to work in advance of an event to anticipate possible infringements.”

Governments often help with this. In 2007, as a lead-up to the 2010 Vancouver Winter Olympics, Canada’s federal government passed Bill C-47, the *Olympic and Paralympic Marks Act*. Intended to protect Olympic marks and official sponsors, its primary purpose was to prevent ambush marketing.

Schedule 3, for example, included a list of names, such as “Games” and “Gold” and “Winter” and “XX1st,” according to a 2007 McMillan Binch Mendelsohn LLP *Advertising & Marketing Bulletin*, that “normally could not be registered or protected under the *Trade-Marks Act* due to their general, unspecific nature. However, under the new Act, the courts are required to consider these phrases and their use to determine whether or not a company has engaged in ambush marketing. It is important to note that schedules 2 and 3 contain a so-called ‘sunset clause’ and will expire at the end of 2010.”

The seemingly endless reporting of athletes’ unwise, bad or criminal behaviour has heightened the need for sports lawyers to ensure that clearly worded

morals clauses, if not covered by a collective agreement, are firmly in place when contracts and endorsement deals are negotiated.

How do the leagues, teams, players, agents and sponsors react when faced with a situation such as the video showing Baltimore Ravens running back Ray Rice punching his then fiancée in the face in an elevator? Or the case of Sheffield United player Ched Evans, who served two years in prison for rape and then wanted to return to his soccer team or, at least, another team in the league? Or the case of Minnesota Vikings' star running back Adrian Peterson, who was sentenced to probation after pleading no contest to a misdemeanor charge of reckless assault for using a wooden switch to discipline his four-year-old son?

Can the league enact any punishment it deems fit (the NFL's indefinite suspension of Rice was quashed by former US District Judge Barbara S. Jones)? Can a player be denied a second chance or be deprived of what can be many millions of dollars even after an offence has been dismissed or a punishment served?

"It's a controversial area of the law and a very interesting area for lawyers," says Kirke. "What rights do teams and leagues have to discipline or to deal in some way, from an employment point of view, to somebody who has gotten involved in a controversial or criminal situation away from the field of play?" These are not issues, he says, that sports lawyers had to deal with very often in the past when most transgressions, albeit not the most egregious ones, went unreported. "That's how the landscape has changed the most. The press covers these things much more now. In the past, there was an understanding among the press, who rode the trains with the players and chummed together, not to report a lot of things that they saw."

The recent spate of negative off-field incidents involving athletes resulted in the American Bar Association hosting a panel entitled, "SCANDALS, SCANDALS, SCANDALS: Morals Clauses in Celebrity Endorsement Agreements," at its 2014 Forum on the Entertainment and Sports Industries, held in Los Angeles. Moderated by Leonard Glickman, "it was all about morals clauses," he says. "What happens in the scenarios where you have negotiated a sponsorship or endorsement agreement and then [a negative] situation happens? How do you manage it from a legal and a communications point of view?"

Interestingly, the panel also “talked about a concept called a reverse morals clause,” he says. “What if you’re an athlete and have signed up to endorse a company and something bad happens with it, such as with Enron,” which, from 1999 to 2002, owned the name for the stadium where the Houston Astros played, until a financial scandal made the company a poster child for corporate malfeasance.

Although there’s no question that the sports-law arena has grown and become more complex, is there actually such a creature as a sports lawyer? That’s a question lawyers involved in the field often bring up.

Plener, who has extensive experience in major sports matters, such as negotiating the terms of the Toronto Raptors expansion agreement with the NBA and the acquisition of the Ottawa Senators Hockey Club and its arena, Scotiabank Place (now the Canadian Tire Centre), balks at being described as a sports lawyer. “I don’t know if I want to pigeonhole myself as only being a sports lawyer because I would say most of my practice is business law, mergers and acquisitions,” he says. “Some years it could be 85 per cent M&A and 15 per cent sports and other years 50-50, depending on what’s going on.”

Kirke, who receives several messages a day from young lawyers seeking advice about how to become a sports lawyer, urges them “to get the most in-depth and broadest knowledge and training in law that you can without focusing unduly on sports law.”

Plener, who thinks he probably does as much sports law work as anyone in Canada, cautions young lawyers not to idealize the profession. “There’s a lot of glamour to it,” he says, “but it’s a tough business [and] only a few people make it. It’s not easy because a lot of the teams now have in-house counsel and they only send out the difficult stuff.”

Working on major deals is anything but glamorous, says Vogel. “It loses its sexiness pretty quick. We bought the [Edmonton] Oilers in 2008 and we really just finished the arena deal in terms of getting the structure in place last spring

[2014], so it takes a lot of stamina, a lot of drafting. It's solicitor's work."

Lawyers working for teams, or in close contact with the athletes and other key participants, often describe their experience in the opposite way. Festinger, who has taught sports law, among other subjects, for almost three decades, says students always ask him if it's going to be fun if they work with a team, as he did with the Vancouver Canucks. "I have to tell them the truth," he says, "which is that it's *way* more fun than even they think it is."

Kirke concurs. "I've had a great ride," he says. "Some areas of law are more lucrative and get you more recognition in a scholastic way but there's nothing I would have rather done than sports law."

Lawyer(s):
Gordon I. Kirke, Jonathan B. Festinger, Sheldon Plener, Brian P. Bellmore, Shawna K. Vogel, Trevor S. Whiffen, Leonard Glickman, Brandon Potter

Firm(s):
Cassels Brock & Blackwell LLP, Dentons Canada LLP

Practice Area(s):
Entertainment Law, Corporate Commercial Law

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