

USING MEDIATION TO GET NHL PLAYERS BACK IN THE WINTER OLYMPICS

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I. INTRODUCTION

In the early years of the Winter Olympics (“Olympics”), participation in the games was limited to amateur athletes.¹ That changed in 1986 when rules were put in place, which changed who determined eligibility to compete in the Olympics.² Eventually, as a result of such a shift, professional athletes began participating in the Olympics and they brought greater excitement to the games as fans were given another opportunity to see their favorite athletes compete at a high level. However, giving professional athletes the opportunity to join the games created unintended conflicts. For example, the dispute between a given country’s professional league and the bodies governing the Olympics and Olympic participation. Disputes between professional sports leagues and the International Olympic Committee (“IOC”) over athlete participation raise novel issues that would best be resolved using sophisticated dispute resolution tactics. A quintessential example of this is the dispute that is currently³ preventing professional hockey players in the United States from participating in the Olympics.

In 2017, the National Hockey League (“NHL”) chose not to pause its season during its 2017–2018 regular season thereby preventing its players from participating in the Olympics.⁴ The NHL is the largest and most popular men’s hockey league in the world and is often considered to be the highest skilled professional hockey league in the world.⁵ NHL players participated in the

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¹ Ross Andrews, *Push to Allow Professional Athletes Took Hold in 1968 Olympic Games*, GLOB. SPORT MATTERS (Oct. 15, 2018), <https://globalsportmatters.com/mexico/2018/10/15/professional-athletes-1968-olympic-games/>.

² *Id.* (“By 1986, the IOC’s long fight over amateurism was waning. Rules were put in place that shifted control of determining who could compete in the Olympics from the IOC to the respective sports’ international federations.”).

³ This Note was written before the COVID-19 outbreak.

⁴ Jennifer Calfas, *The NHL is Not Allowing Players to Compete in the 2018 Winter Olympics. Here’s What to Know*, TIME (Feb. 14, 2018, 10:25 AM), <https://time.com/4947041/nhl-players-2018-winter-olympics/>.

⁵ Eugene Helfrick, *Top 10 Best Ice Hockey Leagues*, HOCKEY WRITERS (July 1, 2020), <https://thehockeywriters.com/top-10-best-ice-hockey-leagues/>.

Olympics from 1998–2014, until the league changed its policy prior to the 2018 Olympics.⁶ Since 1998, the NHL had a total of 706 players play in the Olympics, an average of 141 players per season.⁷ This Note proposes using mediation as a way to resolve this problem and to ideally bring the NHL players back to the Olympics.

Mediation would facilitate a productive discussion between the relevant parties in an effort to work through their respective demands and arrive at a mutually favorable solution. Mediation is a form of alternative dispute resolution (“ADR”), which utilizes a neutral third party, the mediator, in an attempt to find common ground between parties, without whom, might end at an impasse.⁸ Fairness and impartiality are fundamental aspects of mediation.⁹ In fact, large commercial ADR providers, like the American Arbitration Association, have standards of conduct for mediators, which explicitly include impartiality.¹⁰ Mediation is often referred to as a potential “win-win” form of dispute resolution as it allows participants to control their outcomes and does not subject them to the decision of a neutral party, whereas arbitration or litigation would.¹¹

Further, using mediation to resolve this dispute allows two or more parties to participate in a non-adversarial process to come to solutions, compared to litigation where only the parties named in the case have their interests represented.¹² The benefits of multi-party mediation are best summarized by pointing out that a large group of parties, with the assistance of a skilled mediator, can sculpt a flexible resolution meeting the individual needs of all par-

⁶ Dan Rosen, *NHL Will Not Participate in 2018 Olympics*, NHL.COM (Apr. 3, 2017), <https://www.nhl.com/news/nhl-will-not-participate-in-2018-winter-olympics/c-288385598>.

⁷ *Id.*

⁸ Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189, 191 (2014) (citing Richard M. Calkins, *Mediation: A Revolutionary Process That is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 15 (2011)).

⁹ *Id.* at 205.

¹⁰ American Arbitration Association et al., *Model Standards of Conduct for Mediators*, AM. ARB. ASS'N (Sept. 2005), https://www.aaamediation.org/sites/default/files/document_repository/AAA_Mediators_Model_Standards_of_Conduct_10.14.2010.pdf (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”).

¹¹ Rodney A. Max & Joshua J. Campbell, *Formal Mediation in Professional Sports*, 1 AM. J. MEDIATION 1, 5 (Apr. 2007), <http://www.acctm.org/docs/Formal%20Mediation%20in%20Professional%20Sports%20-%20MAX-CAMPBELL-Final%2012-6-06.pdf>.

¹² *Mediating Complex Multi-Party Cases*, MASS. DISP. RESOL. SERVS., <https://www.mdrs.com/mediating-complex-multi-party-cases/> (last visited Nov. 21, 2019).

ties' and thereby avoiding the "win-lose/winner-take-all" result commonly associated with litigation.¹³

II. BACKGROUND

When NHL players participated in the Olympics, the NHL gave them a three-week break in its regular season, as the Olympics occur during the NHL's regular season, so they had the opportunity to participate in the Olympics.¹⁴ Allowing such breaks going forward would present operational issues for the league.¹⁵ Furthermore, during the years the league breaks for its players to participate in the Olympics, it would forgo hosting All-Star games.¹⁶ The decision of the IOC to no longer pay for the NHL players' travel, insurance, accommodations, among other costs, also played a role in the League's decision to no longer allow the players to participate in the Olympics.¹⁷ People familiar with the matter have said that the total costs could be as high as twenty million dollars.¹⁸ However, paying for such costs was not the only issue that stood in the way of the League giving its players a break. This is evidenced by the fact that even after another organization agreed to cover those costs the NHL still refused to allow the players to play.¹⁹

¹³ *Id.*

¹⁴ Rosen, *supra* note 6 ("[O]wners were against Olympic participation for a variety of reasons. Chief among them was the 17-day break in the schedule required in February.").

¹⁵ Kevin Allen, *Wondering Why NHL Players are Not at the 2018 Winter Olympics? Here's Why*, USA TODAY (Feb. 16, 2018, 7:56 AM), <https://www.usatoday.com/story/sports/winter-olympics-2018/2018/02/16/wondering-why-nhl-players-not-2018-winter-olympics-heres-why/344314002/>.

¹⁶ *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, NHL.COM 108 (Feb. 15, 2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLP_A_2013_CBA.pdf [hereinafter *Collective Bargaining Agreement*].

¹⁷ Calfas, *supra* note 4.

¹⁸ Carol Schram, *The 2022 Olympics are on the Agenda as the NHL Sits Down for New CBA Talks*, FORBES (Feb. 10, 2020, 10:47 AM), <https://www.forbes.com/sites/carolschram/2020/02/10/the-2022-olympics-are-on-the-agenda-as-the-nhl-sits-down-for-new-cba-talks/#2c53cb397b41> (explaining that "league commissioner Gary Bettman indicated that the impediments to Olympic participation included insurance and travel costs of up to \$20 million, as well as not being able to feature any Olympic content on the NHL website and other promotional channels").

¹⁹ *Players Unhappy After NHL Decides Not to Participate in 2018 Olympics*, NBC SPORTS (Apr. 3, 2017, 3:58 PM), <https://www.nbcsports.com/bayarea/sharks/players-unhappy-after-nhl-decides-not-participate-2018-olympics> [hereinafter *Players unhappy with NHL decision*].

The IOC is a non-profit independent international organization that is committed to building a better world through sports.²⁰ The IOC works with various stakeholders to promote collaboration for successful Olympic games.²¹ In 1986, the IOC ceded control over who was allowed to participate in the Olympics to the respective sports' international federations.²² With respect to men's ice hockey, the governing international federation is the International Ice Hockey Federation ("IIHF").²³ The IIHF presides over ice hockey in the Olympic games and was a key player in allowing NHL players to first partake in the Olympics in 1998.²⁴

However, the costs were not the only issue the league had with its players participating in the games. For example, the league also worried about its players getting fatigued or injured at the Olympics and then having to miss time during the end of the NHL season, or even the playoffs.²⁵ "New York Islanders center John Tavares, Detroit Red Wings center Henrik Zetterberg, Florida Panthers center Aleksander Barkov, and former Panthers forward Tomas Kopecky each sustained a season-ending injury at the 2014 Sochi Olympics."²⁶ Further, New York Rangers' Mats Zuccarello also suffered an injury in the 2014 games.²⁷ In addition to those high profile injuries, other players sustained injuries leading to missed games when the NHL season resumed.²⁸

Moreover, the NHL claims that they do not reap the same benefits that the Olympics does when it essentially lends out its players once every four years for free.²⁹ The NHL is quick to point out that they have not seen an increase in ratings or sales as a result of letting their players play in the Olympics.³⁰ Additionally, the league is frustrated by the Olympics refusal to allow them to

²⁰ *Who We Are*, OLYMPIC, <https://www.olympic.org/about-ioc-olympic-movement> (last visited Nov. 12, 2019).

²¹ *Id.* ("As the leader of the Olympic Movement, the IOC acts as a catalyst for collaboration between all parties of the Olympic family.")

²² Andrews, *supra* note 1.

²³ *The World Governing Body*, IIHF, <https://www.iihf.com/en/statichub/4682/who-we-are> (last visited Nov. 12, 2019).

²⁴ *Id.*

²⁵ Allen, *supra* note 15.

²⁶ Rosen, *supra* note 6. Thomas R. Grenke, *NHL Players' Return to the Winter Olympics May be Closer than Expected*, LEXOLOGY (Feb. 26, 2020), <https://www.lexology.com/library/detail.aspx?g=775e6b24-b25f-4367-9524-6283c9d4c08f>.

²⁷ Grenke, *supra* note 26.

²⁸ *Id.*

²⁹ Nicholas J. Cotsonika, *Plenty of Reasons for NHL to Pass on Olympics*, NHL (Apr. 3, 2017), <https://www.nhl.com/news/history-shows-olympics-dont-help-nhl/c-288389004>.

³⁰ *Id.*

use videos or images from Olympic games to promote NHL players or events.³¹ There are many benefits that the Olympics get from having the best hockey players in the world participate, such as recognizable players, high quality entertaining games, and additional story lines and drama, but the NHL claims it is frustrated by not receiving commensurate benefits.³² After all, the NHL and Olympics both had popular products before NHL players played in the Olympics, so it is not a logical leap to argue they both can again on their own.³³

Mediation is the best method to get parties to work together to come to an agreement. It leaves the power to decide strictly with the parties.³⁴ It calls for the mediator to act as a catalyst between opposing parties, as someone who should attempt to bring them together by defining issues and eliminating obstacles to communication, all while moderating and guiding the process to avoid confrontation and ill will.³⁵ The content, of mediation discussions, is often kept confidential as well, to encourage parties to speak with total candor and facilitate honest negotiations.³⁶ In fact, due to the shared belief of most people, that confidentiality is an “essential” element of mediation, the American Bar Association Model has included it in the Standards of Conduct for Mediators.³⁷ Due to the facilitative nature of mediation, “most federal jurisdictions offer some form of mediation [for parties as a first step before litigation], and many [even] require it.”³⁸ This shows that mediation is an increasingly important tool for dispute resolution in the United States.³⁹

³¹ *Id.*

³² Greg Wyshynski, *The NHL Olympics Debate is a Sham*, ESPN (Feb. 13, 2020), https://www.espn.com/nhl/story/_/id/28692763/the-nhl-olympics-debate-sham.

³³ Nicholas J. Cotsonika, *Plenty of Reasons for NHL to Pass on Olympics*, NHL, (Apr. 3, 2017), <https://www.nhl.com/news/history-shows-olympics-dont-help-nhl/c-288389004> (arguing that the NHL grew the game, promoted the League, and provided great experiences for fans and players for eighty years before its players were allowed to play in the Olympics, so the claim that in order to grow it is necessary to send players to the Olympics is not true).

³⁴ *Mediation Defined: What is Mediation?*, JAMS, <https://www.jamsadr.com/mediation-defined/> (last visited Nov. 12, 2019).

³⁵ *Id.*

³⁶ *Id.*; Kimberly Taylor, *Mediation: Confidentiality and Enforceability of the Process*, JAMS (Apr. 6, 2015), <https://www.jamsadr.com/blog/2015/mediation-confidentiality-and-enforceability>.

³⁷ Taylor, *supra* note 36.

³⁸ Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, CADMUS J. (Nov. 1, 2011), <https://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states#ftn2>.

³⁹ Robert B. Davidson, *The Steady Growth of International Mediation*, ARBITRATE ATLANTA, <http://arbitrateatlanta.org/wp-content/uploads/2013/04/The-Steady-Growth-of-Interna>

Using mediation to resolve disputes between unions and management has a long history in the United States.⁴⁰ Mediation is an effective tool for parties in large labor disputes like the one between the NHL and National Hockey League Players' Association ("NHLPA"). Scholars have pointed out that there has been an increase in grievance mediation in recent years.⁴¹ While this dispute may not include a formal grievance per the terms of the current agreement between the NHL and the NHLPA, many of the same benefits that scholars have discussed would apply here. An added benefit to incorporating this pre-arbitration dispute resolution in labor disputes is that the mediator is often an experienced arbitrator and can give the parties a good prediction as to how an arbitrator would decide if presented with the same issue.⁴² Continuing the established history of using mediation to resolve a complex labor dispute, such as the one at bar, will afford the parties the chance to have greater control of the outcome and ensure all parties have their concerns addressed.

III. DISCUSSION

When the decision not to allow players to participate in the Olympics was first announced in April 2017, the NHLPA, as well as some individual players, put out strong statements against the decision.⁴³ The union specifically stated, "the players are extraordinarily disappointed and adamantly disagree with the NHL's shortsighted decision to not continue our participation in the Olympics."⁴⁴ The union pointed out that the financial dispute between the League, the IOC, and the IIHF had already been re-

tional-Mediation.pdf (last visited Feb. 26, 2020) (showing that "mediation, as an institutionalized way of settling commercial disputes, was rarely used ten to fifteen years ago").

⁴⁰ David B. Lipsky & Ronald L. Seeber, *Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations*, 2 J. ALT. DISP. RESOL. EMP. 37, 39 (2000) (showing that the use of mediation to resolve labor-management disputes in the US originated in the second half of the 19th century, but became an integral part of the system after World War II).

⁴¹ Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 384 (2004) (explaining that in the past twenty years, there has been a resurgence of interest in grievance mediation).

⁴² *Id.*

⁴³ Calfas, *supra* note 4.

⁴⁴ *NHLPA Statement on NHL's 2018 Olympic Winter Games Decision*, NHLPA (Apr. 3, 2017), <https://www.nhlpa.com/news/1-11819/nhlpa-statement-on-nhls-2018-olympic-winter-games-decision> [hereinafter *NHLPA Statement*].

solved and that this decision was “the NHL’s decision, and it’s alone.”⁴⁵ It closed its statement by stating, “it is very unfortunate for the game, the players and millions of loyal hockey fans.”⁴⁶ With almost one third of the league being made up of players from outside of North America, the league has a large contingent of players who grew up watching NHL players play in the Olympics for years.⁴⁷

The IOC has expressed its disappointment with the decision as well.⁴⁸ It claims that the lack of recognizable NHL star players in the Olympics leads to lower viewership numbers, and that the NHL is missing out on a great opportunity to grow the game and expand international interest in NHL hockey.⁴⁹

In 2014, the United States men’s hockey game against the Russian national team had 4.1 million viewers on NBC, a record at the time for a hockey game, while a game that featured the United States and Slovakia in 2018 only had one third as many viewers.⁵⁰ While it is possible that the opponent had some correlation to the television audience, men’s games in Pyeongchang in 2018 averaged just under 4,600 spectators, and attendance dropped as the tournament progressed.⁵¹ Germany’s quarterfinal win over Sweden, an upset of the top-seeded team, was watched by only 2,029 people, according to the IIHF, making it the worst attended Olympic men’s game this century.⁵² NBC Sports chairman Mark Lazarus claimed that hockey viewership for the Olympics was lower than expected

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Grenke, *supra* note 26 (showing that “[w]ith just over 30 percent of league players coming from outside of North America, these international players grew up idolizing players participating in international competitions like the Olympics, World Cup, and other International Ice Hockey Federation (IIHF) competitions”).

⁴⁸ Karolos Grohmann, *IOC Expresses Regret over NHL’s Olympic No-Show*, REUTERS (Apr. 4, 2017, 3:43 AM), <https://www.reuters.com/article/us-olympics-icehockey-nhl/ioc-expresses-regret-over-nhls-olympic-no-show-idUSKBN1760LJ>.

⁴⁹ Alex Putterman, *NBC Sports Chairman Mark Lazarus Acknowledges Olympic Hockey Ratings are Down Dramatically with NHL Players Sitting out*, AWFUL ANNOUNCING (Feb. 19, 2018), https://awfulannouncing.com/nbc/nbc-olympic-hockey-ratings-down-dramatically-with-nhl-players-sitting-out.html?utm_source=dlvr.it&utm_medium=twitter; *NHLPA Statement*, *supra* note 44.

⁵⁰ Tal Pinchevsky, *Without N.H.L., Olympic Hockey Takes Hit in Ratings and Interest*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/sports/hockey/olympic-nhl-hockey.html>.

⁵¹ *Olympic Hockey Struggles to Draw Crowds Without NHL Players*, USA TODAY (Feb. 24, 2018, 6:01 AM), <https://www.usatoday.com/story/sports/olympics/2018/02/24/olympic-hockey-struggles-to-draw-crowds-without-nhl-players/110779258/>.

⁵² *Id.*

by roughly the “high 20’s” or “low 30’s” in terms of percentage, and he was also quick to point out that NHL viewership for most teams was lower than average for the same period.⁵³ Regardless of Lazarus’s claims, other statistics show that the overall viewership of the games in 2018 was lower compared to 2014.⁵⁴ The broader economic interest of the IOC is that NHL players are some of the most famous athletes in the world and having them compete will inevitably lead to more people watching Olympic hockey games in person, on television, or on the internet. Which, leads to more lucrative advertising and sponsorship deals for the Olympics as a whole.

That said, the NHL claims to have conducted a poll to see if fans are opposed to the season taking a break for the Olympics and it claims that seventy-three percent of respondents said they were not in favor of said break.⁵⁵ In Canada, fifty-three percent voted against the Olympic break.⁵⁶ Despite some high-profile injuries, the impact of having players play in the Olympics is not black and white when it comes to the impact on their respective NHL teams. For example, the Detroit Red Wings sent a league-high ten players to the 2014 Sochi Olympics and lost in the first round of the playoffs.⁵⁷ The Los Angeles Kings sent six and won the Stanley Cup.⁵⁸ The Detroit Red Wings and Colorado Avalanche each sent ten players to 2006 Torino Olympics and lost in the first and second round of the playoffs, respectively.⁵⁹ The Carolina Hurricanes sent five players and won the Stanley Cup.⁶⁰

The NHL does not have any obligation to keep the interests of the Olympics, the IOC, or the IIHF in mind, but those respective organizations, along with the NHLPA, believe the league can benefit in the long run from the added exposure. As the NHLPA mentioned in their statement regarding the decision, the argument goes

⁵³ Kevin Skiver, *NHL Banning Players from Winter Olympics Drastically Affects NBC’s Hockey Ratings*, CBS SPORTS (Feb. 20, 2018, 1:16 PM), <https://www.cbssports.com/nhl/news/nhl-banning-players-from-winter-olympics-drastically-affects-nbcs-hockey-ratings/>.

⁵⁴ Grenke, *supra* note 26 (showing “[A]t the 2018 games, the Men’s Ice Hockey final was down 76 percent in ratings and 71 percent in viewership from 2014 and down a staggering 96 percent in both measures from 2010”); Paulsen, *Olympic Ratings: NBCSN, Men’s Hockey, Men’s Curling, Late Night*, SPORTS MEDIA WATCH (Feb. 27, 2018), <https://www.sportsmediawatch.com/2018/02/olympic-mens-hockey-ratings-curling-nbcsn/>.

⁵⁵ Rosen, *supra* note 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

that the NHL could grow internationally from the added exposure of having its best players demonstrate their skills in front of a global audience.⁶¹ The current Collective Bargaining Agreement (“CBA”) between the NHL and the NHLPA does not guarantee that NHL players will be able to participate in the Olympics. It does mention that the league and the players association shall continue to work together to “jointly create and exploit other international projects and initiatives involving NHL Players other than International Hockey Games, including games, series, events or contests (e.g., the World Cup of Hockey, European Champions’ League, Victoria Cup Competition, Olympic participation, etc.).”⁶²

The current CBA was ratified in 2012, containing a sunset provision for September 2022. However, the CBA afforded both the NHL and the NHLPA the ability to opt out of the deal in September 2019.⁶³ Neither the owners nor the players chose to opt out of the current deal when the time came.⁶⁴ The players had until September 15, 2019 to opt of the current agreement.⁶⁵ The union initially had a deadline of Sunday, September 15, 2019 to notify the league about its decision, but there is a provision in the CBA that allowed the deadline to be pushed back a day.⁶⁶ After exercising the provision, the NHLPA had until the end of the day Monday, September 16, 2019, to notify the league.⁶⁷ By the deadline, the NHLPA informed the league that it would not re-open the CBA and it will remain in effect until its scheduled end in September 2022.⁶⁸ Four years ago, in 2016, the NHL made a formal proposal to the NHLPA where it offered to allow players to participate in the 2018 Olympics in exchange for a three-year extension to the current CBA, but the players rejected that proposal.⁶⁹ Much to the

⁶¹ *NHLPA Statement*, *supra* note 44 (“Instead this impedes the growth of our great game by walking away from an opportunity to reach sports fans worldwide.”).

⁶² *Collective Bargaining Agreement*, *supra* note 16, at 155.

⁶³ *Id.* at 11.

⁶⁴ Shanna McCarriston, *NHL Owners will Not Opt out of Current CBA, here’s what that means for the players and the league*, CBS SPORTS (Aug. 30, 2019, 6:16 PM), <https://www.cbssports.com/nhl/news/nhl-owners-will-not-opt-out-of-current-cba-heres-what-that-means-for-the-players-and-the-league/>.

⁶⁵ *Collective Bargaining Agreement*, *supra* note 16, at 11.

⁶⁶ *NHLPA pushes CBA Decision to Monday*, TSN (Sept. 14, 2019), <https://www.tsn.ca/nhlpa-pushes-collective-bargaining-agreement-re-opener-decision-to-monday-1.1365715>.

⁶⁷ *Id.*

⁶⁸ *NHLPA Declines to Reopen Collective Bargaining Agreement*, NHL (Sept. 16, 2019), <https://www.nhl.com/news/nhl-players-association-declines-to-reopen-collective-bargaining-agreement/c-309172368> [hereinafter *NHLPA declines to reopen agreement*].

⁶⁹ *NHLPA Rejects NHL’s Offer of Olympics for CBA extension*, NHLPA (Dec. 2, 2016), <https://www.nhlpa.com/news/1-11975/nhlpa-rejects-nhls-offer-of-olympics-for-cba-extension>.

frustration of the NHLPA, the NHL is of the position that the Olympic participation issue should be resolved in the next round of collective bargaining, whereas the NHLPA believes that the current CBA adequately covers this dispute.⁷⁰ With the current CBA being left in place, there remains an opportunity for the use of mediation in resolving the dispute.

Whenever large collective bargaining agreements, similar to the one at bar, are involved in a dispute, there looms the constant threat of a strike until the massive contract is renegotiated, and the contested terms are worked out and updated.⁷¹ Large labor stoppages come with obvious costs like lost revenue, lost wages, and messy public relations battles that can often sour the relationship between the parties.⁷² In this case, a strike is not the best tactic to reach a solution because overall both parties are still relatively happy with the deal (this is evidenced by the fact that when given the chance to renegotiate the deal earlier in the process both sides declined to take advantage of such an opportunity).⁷³ Additionally, strikes or other typed of work stoppages can be extremely damaging to a company (or league's) public reputation. During the most recent NHL lockout, the 2012–2013 season, a Canadian consulting firm focusing on brand analysis, concluded in their report that the damage done in terms of the league's public reputation was comparable to the damage the BP Oil spill had on BP's brand image.⁷⁴ Those results are demonstrative of the costliness of a strike, which should deter both sides from pushing towards a work stoppage and encourage them to work together in mediation.

Currently, there have not been any allegations of a breach of the CBA, therefore, a traditional breach of contract claim would

⁷⁰ Greg Wyshynski, *The NHL Olympics Debate is a Sham*, ESPN (Feb. 13, 2020), https://www.espn.com/nhl/story/_/id/28692763/the-nhl-olympics-debate-sham.

⁷¹ Katie Shonk, *Collective Bargaining Negotiations and the Risk of Strikes*, HARV. L. SCH. (June 29, 2020), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/collective-bargaining-negotiations-risk-strikes/#:~:text=Collective%20Bargaining%20Negotiations%20and%20the%20Risk%20of%20Strikes,%E2%80%94on%20June%2029th%2C%202020%20%2F%20Negotiation%20Skills>.

⁷² Michael Wayland, *Federal Corruption Probe, Strike Loom over UAW's Voting on Proposed Labor Contract with GM*, CNBC (Oct. 21, 2019, 1:26 PM), <https://www.cnbc.com/2019/10/21/federal-corruption-probe-strike-loom-over-uaws-voting-on-gm-deal.html> (showing the damage a large-scale strike can have both on workers and management).

⁷³ McCarriston, *supra* note 64; *NHLPA declines to reopen agreement*, *supra* note 68.

⁷⁴ Roy MacGregor, *NHL Lockout Doing 'Alarming' Damage to Brand*, GLOBE & MAIL (Dec. 17, 2012), <https://www.theglobeandmail.com/sports/hockey/nhl-lockout-doing-alarming-damage-to-brand/article6500907/> ("A disastrous map would be the one Level5 created following the BP PLC oil spill in the Gulf of Mexico in 2010. It was the worst the company had seen—until it got around to the NHL this month.").

prove difficult in resolving the issue. As mentioned, the current CBA only makes vague reference to the Olympics and states that both the NHLPA and NHL would work together to “jointly create and exploit other international projects and initiatives involving NHL Players.”⁷⁵ Furthermore, while the CBA does seem to favor arbitration as a means of dispute resolution, it does not explicitly mention it as the only available method of dispute resolution in this circumstance.⁷⁶ The CBA states that all grievances need to be resolved exclusively in accordance with the terms of Article 17.⁷⁷ Article 17 indicates that arbitration is the preferred method of dispute resolution.⁷⁸ However, grievance is defined as “any dispute involving the interpretation or application of . . . any provision of this [A]greement.”⁷⁹ As mentioned, the current CBA does not guarantee that the players would be allowed to participate in the Olympics, but rather it only makes vague reference to the NHL and the NHLPA working together to jointly create and exploit international initiatives.⁸⁰ To avoid being forced to use arbitration to resolve the Olympics dispute, the parties could stipulate to the fact that they do not have a disagreement about a provision of the CBA, as the heart of their dispute—Olympic participation—is hardly mentioned in the CBA itself.

Even if the NHLPA concluded that the conduct of the NHL amounted to a breach of contract, the NHLPA would have to seek an injunction to preempt the league from preventing the NHL players from participating in the Olympics. This is different than a court’s normal preference of awarding damages for a breach of contract claim.⁸¹ On top of all that, litigation is expensive and much more uncertain, especially given the ambiguous nature of Article 17.

There would be little motivation for the parties to agree to go to arbitration for this specific dispute because neither party would want to subject itself to the binding decision of an arbitrator. Arbitration does not leave the same flexibility for creative approaches because it gives the final say to the arbitrator as opposed to the

⁷⁵ *Collective Bargaining Agreement*, *supra* note 16, at 155.

⁷⁶ See generally *id.*

⁷⁷ *Id.* at 109–15.

⁷⁸ *Id.*

⁷⁹ *Id.* at 109.

⁸⁰ *Id.* at 155.

⁸¹ *Remedies for Breach of Contract*, UNIV. NEW MEX. JUD. EDUC. CTR., <http://jec.unm.edu/education/online-training/contract-law-tutorial/remedies-for-breach-of-contract> (last visited Nov. 25, 2020).

specific parties to the dispute. Lastly, negotiation would not be a useful dispute resolution technique in this circumstance because the best resolution would involve bringing more than two parties into the discussions to resolve this complex issue. A mediator would help organize all of the different concessions the respective parties are making and guide the process as a whole. This is where mediation stands out as being the best ADR method to resolve this issue.

The American Arbitration Association (“AAA”) recommends that parties analyze the exact nature of their disagreement before entering mediation to make the process smoother.⁸² The AAA first recommends that the parties determine whether they have a dispute, a conflict, or both.⁸³ The AAA defines a dispute as “an argument or debate over contending views, positions, or interests, and is related to rights and responsibilities” and a conflict as “discord or strife resulting in a severance of friendly relations.”⁸⁴ According to the AAA, if the parties have a dispute, the outcome they are seeking is resolution to the issues; if the parties have a conflict, they are seeking reconciliation of the relationship; and if the parties have both then they need to prepare for both a resolution and reconciliation.⁸⁵ The disagreement between the NHL and the NHLPA would best be characterized as a dispute, since the key issue is whether the players have the right to participate in the Olympics. Therefore, the parties would have to be prepared to enter mediation seeking a resolution to the issue of Olympics participation.

IV. PROPOSAL

This Note proposes to use mediation to resolve the dispute of whether NHL players should be allowed to play in the Olympics. The parties have attempted to negotiate a solution to this dilemma but, unfortunately, have not been able to come a conclusion.⁸⁶ Ne-

⁸² *Mediation Services*, AAAMEDIATION.ORG, <https://www.aaamediation.org/mediation-services> (last visited Nov. 16, 2019).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (“Consider whether you have a dispute, a conflict, or both . . . If you have both, you need to prepare for both resolution and reconciliation.”).

⁸⁶ *Players Unhappy with NHL Decision*, *supra* note 19 (showing the IOC and IIHF have already made some concessions in talks with the NHL, mainly paying for the players’ insurance and travel, but the NHL is still refusing to allow the players to go).

gotiation is a great place to start in ADR. However, when negotiations fail, as they have here, mediation is an excellent next step for the parties.⁸⁷ In employer-employee disputes, specifically ones that involve large collective bargaining agreements like the NHL's, arbitration is often discussed as a potential solution; however, this Note seeks to show how mediation can be a more useful exercise in this circumstance. A mediator can play a crucial role in ensuring that all the parties have their voices heard.

This issue is not a situation where there needs to be a declared *winner* and *loser*. All the relevant parties have potential benefits to gain, whether they be financial incentives, emotional satisfaction, or professional goals. However, at the same time, all the parties have to recognize that there are sacrifices that will likely need to be made to come to a creative solution. The American Bar Association emphasizes that mediation affords parties the opportunity to describe the issues; discuss their interests, understandings, and feelings; provide each other with information; and explore ideas for the resolution of the dispute.⁸⁸ Another important feature of mediation is that when utilized, the parties involved in the mediation resolve the dispute, as the mediator does not have decision making power.⁸⁹ This structure is critical because it allows the parties to be creative in how they approach a solution.

In mediation it is common for the mediator to begin the process by using "shuttle diplomacy" by employing private caucuses in separate areas with the respective parties.⁹⁰ During these private meetings, each party has the chance to suggest possible solutions, and the mediator is tasked with finding common ground between the parties.⁹¹ Shuttle diplomacy is an important feature of mediation because it allows the parties to speak openly and honestly without the fear of insulting the other parties, thereby avoiding the "acrimony common in arbitration."⁹²

⁸⁷ Michael Roberts, *Why Mediation Works When Negotiations Fail*, MEDIATE.COM (2002), <https://www.mediate.com/articles/roberts4.cfm>.

⁸⁸ *Mediation*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/ (last visited Nov. 16, 2019).

⁸⁹ *Id.*

⁹⁰ ADAM EPSTEIN, *SPORTS LAW* 410–11 (South-Western, Cengage Learning 1st ed. 2013).

⁹¹ *Id.* at 411 ("During a caucus, each party has the chance to suggest possible solutions to the conflict, and the mediator's skills are useful in engaging with the parties to explore numerous options and suggestions for the ultimate compromise.")

⁹² Grabowski, *supra* note 8, at 200 ("During the mediation process, an experienced mediator can avoid the acrimony common in arbitration through the use of "private caucuses" in which the mediator talks with each party confidentially, away from the other side.")

The NHL has a successful history of using mediation to resolve large scale disputes. In 2013, the league was close to cancelling the entire season because the owners and players could not come to an agreement on a new CBA.⁹³ After losing part of the season due to a work stoppage, the parties agreed to mediate and, with the help of a mediator, agreed to terms for a new CBA and salvaged the season from being cancelled entirely.⁹⁴ This is important because it shows that the executives in both the players' union and the league, critical entities in the Olympics dispute, have first-hand experience with how mediation can be used to resolve such disputes. Not only do two of the critical parties, the NHL and the NHLPA, have a proven track record of reaching agreements via ADR, ADR also allows for the parties to come to a solution that works best for them.⁹⁵

Mediation may also serve as a useful tool as the parties currently appear far apart in their negotiations. After both parties opted against re-opening the current CBA, negotiations on critical issues for the next one picked up.⁹⁶ While both parties report to have shared business interests, the players asserted, unequivocally, that Winter Olympic participation is important to them; a diametric opposition to the opinion of the league. Bill Daly, deputy commissioner of the NHL, characterized the Olympics as highly disruptive to the NHL season, because it puts NHL players in jeopardy of injury with no financial benefit to the NHL or its clubs.⁹⁷ Early reports indicate that players have other financial issues, more important to them than Olympic participation. As such, while the topic of Olympics may come up in CBA negotiations, many speculate the players would be willing to concede the Olympics in return for greater financial concessions.⁹⁸

The fact that the players have financial concerns they consider more important in CBA negotiations than Olympic participation, does not necessarily mean that the Olympics dispute isn't resolved.

⁹³ *Id.* at 190.

⁹⁴ *Id.* at 191.

⁹⁵ *Id.* at 192 ("Following sixteen additional hours of negotiating, players and owners hammered out a deal, thus saving the NHL season.")

⁹⁶ Lyle Richardson, *Winter Olympics Participation a Potential Roadblock in NHL CBA Talks*, SPORTING NEWS (Oct. 8, 2019), <https://www.sportingnews.com/us/nhl/news/winter-olympics-a-potential-roadblock-in-nhl-cba-talks/rueebkqce4kv1di2o6y1bvtj8>.

⁹⁷ *Id.*

⁹⁸ *Id.* (arguing that the current model of escrow deductions constituting a 15% claw-back in player paychecks, of which players get little back by the end of the season, is the biggest concern for players going into the next round of collective bargaining).

In fact, mediation would enable the players to address both of the aforementioned concerns. This would involve using a form of mediation that is popular in complex construction mediation cases, multiple party mediation.⁹⁹ Multiple party mediation, simply refers to mediation involving more than two parties in a dispute and is often resolved using two (co-mediation) or more (multiple-mediation) mediators.¹⁰⁰ In multiple party mediation, two or more caucuses can be occurring simultaneously, rather than having to wait until the single mediator concludes a caucus with one party prior to moving onto the next.¹⁰¹ This unique approach to mediation could prove critical in getting the NHL players back in the Olympics.

The multiple-party mediation in this scenario would involve the NHL, the NHLPA, and the IOC. It is important to note that multiple party mediation requires more preparation and effort than traditional mediation, and as such, can be more expensive than traditional two-party mediation.¹⁰² However, presumably, because this is an issue effecting sophisticated entities with higher budgets, the added expense will not deter the parties from pursuing this course of action. In such a mediation the players could use the leverage they have over the IOC, specifically the increased popularity they bring to Olympic hockey, to demand the IOC to implement some sort of revenue sharing system where the IOC would either directly pay the NHL for the right to “borrow” its players or promise the NHL a certain percentage of the revenue produced by Olympic hockey sponsorship rights, ticket sales, jersey sales, concession sales, etc. Additionally, the NHL would demand the right to use videos or highlights of NHL players in the Olympics in promotional materials to help grow the league internationally.¹⁰³ This would be possible if the parties agreed that payments or revenue produced was considered “Hockey-Related Revenue” under the NHL and NHLPA collective bargaining agreement.¹⁰⁴ Currently, Hockey Related Revenue “is a term that encompasses direct or

⁹⁹ *About Co-mediation and Multiple-Mediation*, CONSTR. DISP. RESOL. SERV., https://www.cdrslc.com/co%20mediation_and_multiple%20mediation.htm (last visited Nov. 21, 2019).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* (“There is more preparation necessary to prepare for a multiple issue or multiple party mediation than is required to prepare for a standard mediation.”)

¹⁰³ Cotsonika, *supra* note 29 (“The NHL has been allowed to capture its Olympic moments in words only, not in video or images.”).

¹⁰⁴ Taylor Haase, *Primer: Understanding the NHL’s Escrow System*, DKPITTSBURGHSPORTS.COM (Sept. 2, 2019), <https://www.dkpittsburghsports.com/2019/09/02/nhl-escrow-lockout-cba-tlh/>.

indirect ways the league earns money,” including ticket sales, concessions and merchandise sales, broadcasting agreements, sponsorships, and parking.¹⁰⁵ Under the CBA, the NHL and the NHLPA agreed to evenly split Hockey Related Revenue. There are fluctuations in incoming Hockey Related Revenue, as compared to the consistent salary payments to the players, this creates the need to have escrow accounts to redistribute some revenue to guarantee an even 50-50 split.¹⁰⁶

The additional money going to the NHL would help reduce the escrow burden on NHL players, as it would provide the league with another revenue stream therefore, decreasing the league’s need to much of the players’ salaries aside in escrow.¹⁰⁷ It follows that this system would only be possible if the players were allowed to participate in the Olympics, establishing this issue as critical to the negotiations. By tying the financial escrow issue to the Olympics issue and involving the IOC in the Olympic participation mediation the players would be able solve two problems at once.

The IOC would have strong motivation to work towards a deal under that scheme to bring back the international excitement that comes with NHL players playing in the Olympics. Leading in to the 2018 Olympics, The Angus Reid Institute conducted a study that determined that fewer Canadians were excited about the upcoming Olympics because it would not feature NHL players.¹⁰⁸ Canada won the previous two Olympic hockey gold medals, 2014 and 2010, yet the study concluded that 43% of respondents would still watch, but be more ambivalent toward the games; 40% of respondents would still watch with the same level of interest; and 17% of respondents would not watch.¹⁰⁹ Hockey is more popular in Canada than almost anywhere else in the world, yet without NHL players, 60% of respondents in Canada claimed that they were less interested in, or would not watch hockey in the Olym-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (“The players and league divide all hockey-related revenue evenly, 50-50. Sometimes, the combined salaries of all players exceeds their 50 percent share of revenue that season.”).

¹⁰⁷ *Escrow Tops NHL Players’ List of Concerns Ahead of CBA Talks*, USA TODAY (June 16, 2019, 2:58 PM), <https://www.usatoday.com/story/sports/nhl/2019/06/16/escrow-tops-nhl-players-list-of-concerns-ahead-of-cba-talks/39589943/> (arguing that the most important contractual term to NHL players in the next round of CBA negotiations are the terms of the escrow payments and that at under the current system escrow payments can cost players up to 10% of their original salaries).

¹⁰⁸ *Canadians Less Interested in Olympic Hockey Without NHL Players: Angus Reid*, GLOB. NEWS (Feb. 7, 2018, 12:37 PM), <https://globalnews.ca/news/4010926/canadians-less-interested-in-olympic-hockey-without-nhl-players-angus-reid/>.

¹⁰⁹ *Id.*

pics.¹¹⁰ Despite the immense popularity of hockey, people in Canada indicated they would have less interest in the games without the world's best players. In countries where hockey is already not as popular to begin with, it is not hard to imagine the results of a similar poll being even more dramatic.¹¹¹ This shows that the IOC has a significant amount to gain by getting the NHL players back to the Olympics, at least in terms of the global interest in the games. The NHL would benefit from having the additional income from whatever deal they come to with the IOC, and lastly the players would get the benefit of being able to play in the Olympics again, and be able to improve the uncertainty of the current escrow system.

Another rationale behind using multi-party mediation for this issue because the NHLPA will need to spend at least a little bit of time convincing the IOC that it is worthwhile to make concessions to the NHL to get the NHL players back in the Olympics. Some people who watched hockey at the 2018 Olympic games argued that the games were still “excellent hockey” and that they served a different purpose.¹¹² They argued that the games provided hockey fans with an opportunity to watch some of the best young players in the world who have not yet made it to the NHL, but are on their way.¹¹³ The same people claimed that the games were still competitive and there was not as much of a difference in the talent level than people initially thought.¹¹⁴ The IOC could therefore rely on these arguments against making serious concessions to the NHL in mediation. They could say that the games were still competitive because removing the NHL players affected all teams equally and

¹¹⁰ *National Sports of Canada Act*, JUST. LAWS WEBSITE, <https://laws-lois.justice.gc.ca/eng/acts/n-16.7/page-1.html> (last visited Nov. 24, 2019) (showing that Ice Hockey is the national winter sport of Canada according to the Canadian government).

¹¹¹ Diana C. Nearhos, *NHL Should Send its Players to Olympics*, TAMPA BAY TIMES (Feb. 17, 2020), <https://www.tampabay.com/sports/lightning/2020/02/17/the-nhl-should-send-its-players-to-the-olympics/> (showing that American fans agree that “[I]t is universally acknowledged that Olympic hockey is better with NHL players” and that the “2018 tournament was predictably lackluster”).

¹¹² Adam Kilgore, *Without NHL Players, Olympic Men's Tournament Gives a Glimpse of the Future*, WASH. POST (Feb. 18, 2018, 5:31 AM), https://www.washingtonpost.com/sports/olympics/without-nhl-players-olympic-mens-tournament-gives-a-glimpse-of-the-future/2018/02/18/e2c70974-1475-11e8-9065-e55346f6de81_story.html.

¹¹³ *Id.* (“For connoisseurs, the tournament serves as a unique glimpse at some of the sport's brightest prospects, who typically don't play on national television or with Olympic-level stakes. . . . It's a lot of young players who are eventually going to be big stars in the National Hockey League.”).

¹¹⁴ *Id.* (“You see the Russian team, the Finns, the Swedes—their second-tier players are NHL-caliber. Maybe they just missed an opportunity, certain things didn't work out.”).

the games showcased the future the of the sport, players not yet in the NHL.

Despite these arguments, there is credibility behind the notion that the quality of play decreased without the participation of NHL players.¹¹⁵ This is why the NHL would still have leverage in demanding that the IOC make concessions to the NHL in mediation. Not only is there evidence that the games had both lower attendance and viewership ratings, but the IOC is stuck in an awkward middle ground without NHL players. The hockey enthusiasts might love the chance to see some of the sport's rising stars on a large stage, but they will be disappointed by the lower quality of play in games, whereas the more casual fans might forgive the sloppy finer points, but there are no superstars to draw them in in the first place.¹¹⁶ In mediation, the NHLPA would likely focus on those points in making its case to the IOC when arguing the NHL players are critical to the success of Olympic hockey.

Additionally, upon examination of the argument that the Olympics will become a showcase for young stars not yet in the NHL, it is clear that many participating countries are not treating the games in this matter. While it seems plausible that teams would turn to younger players to replace the NHL players, in 2018 the average age of the men's hockey roster was older than the previous two Olympics.¹¹⁷ In 2018 the average age was 29.4 compared to 27 in 2014 and 26.6 in 2010; in fact, the 2018 team had the third highest average age of a USA hockey roster in the last thirty eight years.¹¹⁸ This shows that the United States is turning to older players who are no longer in the NHL instead of younger players who have not yet had their chance.

This trend can be seen in many of the countries who played in the 2018 Olympics as well. Every team who participated had at least one player with NHL experience on its roster and six teams had at least 1,000 games of NHL experience on their rosters.¹¹⁹

¹¹⁵ *Id.* ("But the quality of play makes it clear that . . . the best players in the world are not contending for a gold medal.")

¹¹⁶ *Id.*

¹¹⁷ Terrence Doyle, *NHL Players Aren't at The Olympics. So Who are These Guys?*, FIVETHIRTYEIGHT (Feb. 7, 2018), <https://fivethirtyeight.com/features/nhl-players-arent-at-the-olympics-so-who-are-these-guys/>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* ("Each team has at least one skater with NHL experience on its roster, and six teams (Canada, Czech Republic, Germany, Russia, Sweden and the United States) can count at least 1,000 combined NHL games played in their ranks. In total, the tournament boasts a combined 17,419 NHL games played.")

This illustrates that instead of taking advantage of an opportunity to showcase young talent, countries are turning to players who are past their prime to fill the Olympic rosters. Based on this, the IOC's argument that the games can become a platform to promote young talent should not be given much merit, if any at all.

Another argument to use mediation to resolve this dispute is that it allows the parties to avoid the detrimental public relations battle that can come with other forms of dispute resolution. The last time the NHL and the NHLPA worked with mediators, in 2012, the mediators requested a news blackout on the proceedings and kept the location of the proceedings quiet.¹²⁰ Prior to this, the parties were in a "public relations chess" match, with both sides releasing ugly press releases aimed at the other.¹²¹ However, even if the dispute would not end in a work stoppage, disparaging public attacks, such as those aimed at the other side during the dispute resolution process, would not help the league grow¹²² and may lead to a decrease in overall revenue. Therefore, the media blackout would be advantageous to both sides in this mediation.

Working with a mediator would also allow both parties to make concessions without having to appear weak to their constituents.¹²³ Joseph Folger, a Temple University professor who teaches courses in conflict resolution and mediation calls this the "Mediation-made-me-do-it Syndrome."¹²⁴ Specifically, he states, "the side that makes what it perceives as the biggest concessions can 'save face by implying it was pressure from the mediator that caused it. It wasn't that they caved, but they went with something the mediator [suggested].'"¹²⁵ This highlights another reason mediation is ideal for this conflict: it allows the actual representatives negotiating a deal to remain credible in the eyes of the constituents.

¹²⁰ Kevin Allen, *NHL, Players Meet with Mediators, Plan to Talk Again*, USA TODAY (Nov. 28, 2012, 8:10 PM), <https://www.usatoday.com/story/sports/nhl/2012/11/28/nhl-mediation-labor-talks/1731793/>.

¹²¹ Mark Jones, *NHL Lockout: How Mediation Could Save the 2012-2013 Season*, BLEACHER REP. (Nov. 29, 2012), <https://bleacherreport.com/articles/1426327-nhl-lockout-how-mediation-could-save-the-2012-2013-season> ("Given the plethora of PR ploys and press-conference duels that both sides have employed.").

¹²² MacGregor, *supra* note 74 (showing that a work stoppage can seriously damage the league's perception among fans).

¹²³ Sam Carchidi, *Timing is Key in NHL Mediation, Expert Says*, PHILA. INQUIRER (Nov. 29, 2012), https://www.inquirer.com/philly/sports/flyers/20121129_Timing_is_key_in_NHL_mediation_expert_says.html.

¹²⁴ *Id.*

¹²⁵ *Id.*

Involving a third-party mediator can help facilitate a smoother dispute resolution process here than traditional arms-length negotiations. Now, more than ever, the NHLPA should advocate to resolve this dispute via mediation. The ever-shifting court of public opinion may be tilting back in favor of the NHLPA, and though it is often difficult for people to sympathize with individuals being paid millions of dollars to play a sport, there is a chance that is happening for NHL players. Greg Wyshynski from ESPN captured this feeling best when he tersely stated that it is “getting very . . . hard to sympathize with the . . . [l]eague when it comes to Olympic participation.”¹²⁶ As recently as February 2020, the IOC, the NHL, the IIHF, and the NHLPA, all met to re-open Winter Olympic participation discussions and the IOC proposed restoring funding to its previous levels and exploring partnerships on things ranging from media rights to promotional opportunities,¹²⁷ demonstrating a willingness to negotiate that a mediator can help bring out of the parties. Representatives from the NHLPA were surprised by the proposed concessions.¹²⁸ Some of the concessions, in addition to outright covering some of the costs, the IOC made in trying to re-open the negotiations are allowing the league to use the Beijing Olympics logo and event highlights across NHL and NHLPA platforms.¹²⁹ People familiar with the IOC’s previous bargaining tactics were quick to point out that the IOC is very controlling of access to its content.¹³⁰

Those that follow the league, including Wyshynski, believe that the NHL is stalling to use Olympic participation as a bargaining chip in the next round of CBA negotiations, as the current CBA is set to expire in 2022.¹³¹ NHL players should use their pub-

¹²⁶ Wyshynski, *supra* note 70.

¹²⁷ *Id.*; Gabriel Fernandez, *NHL Players May Return to Next Winter Olympics Following Progressive Talks with IOC*, CBSSPORTS.COM (Feb. 8, 2020, 10:15 PM), <https://www.cbssports.com/nhl/news/nhl-players-may-return-to-next-winter-olympics-following-progressive-talks-with-ioc/> (showing that the IIHF has also come forward with concessions to help get the NHL players back in the winter Olympics).

¹²⁸ Wyshynski, *supra* note 70.

¹²⁹ Elliotte Friedman, *31 Thoughts: Will NHL Players Suit Up at 2022 Winter Games?*, SPORTSNET (Feb. 12, 2020, 2:21 PM) <https://www.sportsnet.ca/hockey/nhl/31-thoughts-nhl-players-beijing-2022-winter-olympics/> (“There were also opportunities presented for use of the Beijing Olympic logo and event highlights across NHL/NHLPA platforms, a breakthrough both wanted.”).

¹³⁰ *Id.* (“The IOC is notoriously stingy about access for non-rightsholders. Think of a mother bear protecting her cub.”).

¹³¹ Wyshynski, *supra* note 70 (“It’s become abundantly clear that Olympic participation is nothing more than a collective bargaining chip for the NHL.”).

lic influence to feed this narrative in their requests to settle this dispute via mediation instead. If the NHLPA and IOC were both publicly stating that they were willing to settle the dispute via mediation, and the IOC is outspoken about its willingness to make concessions to the NHL, then public pressure would mount on the league to join the other parties at the bargaining table via mediation. Public pressure can be a significant impetus for one party to come to the mediation table this situation.¹³² Aiding the NHLPA and IOC are the public comments made by the NHL about its wishes to grow the international hockey audience. The league has put in the work to lay the groundwork for a solid fan base in China for years and has stated many times that is a top priority for the league.¹³³ The fact that the league sent Alexander Ovechkin to China to host youth clinics, the league played pre-season games there in 2017, 2018, and plans to play more there before the 2020-2021 season are all evidence of the league's efforts to build a large fan base in China. The players believe this will be hindered by not participating in the Olympics.¹³⁴ Beyond just public pressure, the 2022 Beijing Olympics can also put pressure on the NHL to open up to the idea of mediation.¹³⁵ Some experts close to the matter believe the potential Chinese NHL fans could be a critical point for the players in the discussions.¹³⁶

The actual dynamics of the mediation would require a skilled mediator because, despite these strong bargaining points, it appears the sides are not nearing an agreement. As of February 21, 2020, the NHL Commissioner, Gary Bettman, said that he still does not anticipate the NHL players being allowed to play in the

¹³² Friedman, *supra* note 129 (“Eliminating that [financial] concern puts the NHL in position for public flogging, which is one reason I’m inclined to believe it gets worked out.”).

¹³³ Wyshynski, *supra* note 70 (“[T]he NHL has been laying the groundwork in the Chinese market for a few years, having played preseason games in Shanghai, Beijing and Shenzhen. Putting a spotlight on the players in the nation’s most important moment for winter sports—and China has made a commitment to get 300 million people playing winter sports.”).

¹³⁴ Grenke, *supra* note 26 (noting that the NHL sent “Alex Ovechkin to Beijing as the NHL’s International Ambassador to conduct youth hockey clinics); *Coronavirus Could Foil NHL Hope for China Pre-Season Games*, YAHOO SPORTS (Feb. 26, 2020, 2:19 PM), <https://sports.yahoo.com/coronavirus-could-foil-nhl-hope-china-pre-season-191906468—nhl.html> (stating that the NHL plans to have pre-season games in China before the 2020-2021 season like it did in the 2017 and 2018 pre-seasons).

¹³⁵ Fernandez, *supra* note 127.

¹³⁶ Friedman, *supra* note 129 (“There’s zero reason to consider playing any further regular-season or exhibition games in China if this opportunity disappears. It’s a waste.”).

2022 Beijing Olympics.¹³⁷ Additionally, he indicated that he would be willing to discuss moving hockey to the Summer Olympics, so as to not interfere with the NHL regular season.¹³⁸ This is an important topic that the parties would need to work through with the help of the mediator. The NHL would argue that this is the best compromise possible because it does not interrupt the NHL season, the parties can work out the revenue distribution, and the players would still get to represent their countries in a high-level international competition. Moreover, the NHL may argue that even this agreement is a concession and marked risk because allowing star players the opportunity to play opens the players up to the potential of getting hurt and missing NHL games. There is somewhat of a precedent for this, as the first men's hockey Olympic games were played during the Summer Olympics, however, this was a time before the existence of the Olympics.¹³⁹

There are several strong arguments against moving the men's hockey games to the Summer Olympics. First, it would be awkward playing an ice sport in the summer. Second, it would be unclear if the women's hockey games would be moved to the summer as well, or what those separate negotiations would even entail. Third, it is also unclear if it would even be profitable to move hockey to an already crowded Summer Olympic schedule. Lastly, it is unclear if the IOC and IIHF would even support the decision, and it is similarly unclear if the players would want to sacrifice their offseason.¹⁴⁰ Moving hockey to the Summer Olympics would be a critical proposition that the parties would need to work through in mediation.

The fact that the IOC and IIHF have already made public concessions, yet the NHL is still refusing to cooperate, is a good indicator that mediation, with a neutral third-party conversation facilitator, is necessary in resolving this dispute. A multi-party mediation to resolve this dispute should involve mutually selected

¹³⁷ Tom Schad, *Gary Bettman Doesn't Believe NHL Players Will Go to 2022 Beijing Games*, USA TODAY (Feb. 23, 2018, 3:20 PM), <https://www.usatoday.com/story/sports/nhl/2018/02/23/gary-bettman-nhl-players-2022-beijing-games-2018-winter-olympics/367908002/>.

¹³⁸ *Id.*

¹³⁹ Mary Clarke, *Moving Hockey to the Summer Olympics Would be in the NHL's Best Interest*, SB NATION (Apr. 4, 2017, 2:39 PM), <https://www.sbnation.com/nhl/2017/4/4/15178834/nhl-2018-olympics-hockey-summer-olympics-ioc-gary-bettman>; Mike Commito, *Hockey's Unusual History at the Summer Olympic Games*, SPORTSNET (Aug. 2, 2016, 1:11 PM), <https://www.sportsnet.ca/hockey/nhl/hockeys-unusual-history-summer-olympic-games/>.

¹⁴⁰ Mary Clarke, *Moving Hockey to the Summer Olympics Would be in the NHL's Best Interest*, SB NATION (Apr. 4, 2017, 2:39 PM), <https://www.sbnation.com/nhl/2017/4/4/15178834/nhl-2018-olympics-hockey-summer-olympics-ioc-gary-bettman>.

mediators to help ensure its legitimacy in the eyes of the respective parties. The contents of the mediation should be kept private to encourage open and honest discourse. The NHL is in the unique position of having already gone through a successful mediation in the recent past, so it makes sense to try to replicate that as much as possible.¹⁴¹ In 2012, the NHL ended its labor dispute with the NHLPA with the help of mediator Scot L. Beckenbaugh and the Federal Mediation & Conciliation Service (“FMCS”).¹⁴² Beckenbaugh is widely credited with being a key contributor to ending the 113-day lockout, after helping the parties reach an agreement after a sixteen-hour mediation session.¹⁴³

Beckenbaugh currently works as the Deputy Director/National Representative for the FMCS, having worked at the agency since 1988.¹⁴⁴ He serves as the agency’s master mediator of high-profile collective bargaining disputes.¹⁴⁵ Especially because he has experience successfully leading a high-profile mediation involving the NHL, Beckenbaugh is the ideal mediator for this dispute. The FMCS is an independent government agency whose mission is to preserve and promote labor-management cooperation.¹⁴⁶ The agency provides mediation services to industries, including the NHL in 2012, government agencies, and communities.¹⁴⁷ Among the different services the FMCS offers, Grievance Mediation is the best option here. The FMCS describes Grievance Mediation as a method for helping labor and management improve their relationships by quickly resolving contractual disputes and improving communication.¹⁴⁸ The process encourages cooperative problem solving between labor and management and is meant to be used before contractual arbitration.¹⁴⁹ Lastly, there is no cost for FMCS

¹⁴¹ PON Staff, *Dispute Resolution, NHL Style*, PROGRAM ON NEGOT., HARV. L. SCH. (Dec. 31, 2019), <https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-nhl-style/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *About us, Office of the Director*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/aboutus/agency-departments/office-of-the-director/> (last visited Feb. 26, 2020).

¹⁴⁵ *Id.*

¹⁴⁶ *About us*, FMCS.GOV, <https://www.fmcs.gov/aboutus/> (last visited Feb. 26, 2020).

¹⁴⁷ *Id.*; PON Staff, *supra* note 141.

¹⁴⁸ *Grievance Mediation*, FMCS.GOV, <https://www.fmcs.gov/services/resolving-labor-management-disputes/grievance-mediation/> (last visited Feb. 26, 2020).

¹⁴⁹ *Id.*

Grievance services, there would be no financial dispute between parties.¹⁵⁰

To initiate the FCMS Grievance Mediation process, the NHLPA would need to propose that the NHL is violating the CBA the parties signed, specifically the section wherein the NHL agreed to work *with* the NHLPA to jointly create and explore international projects involving NHL players, including Olympic participation.¹⁵¹ The NHLPA may claim that the NHL's denial of allowing players to participate in the Olympics, is in direct violation of the CBA. This would lay the groundwork for Grievance Mediation, because FCMS states that questions of contract interpretation are appropriate for Grievance Mediation, and here the contract clause in question would be whether the NHL is doing enough to jointly work with the NHLPA on exploiting an international opportunity, the Olympics.¹⁵²

The next step, in the process, would be the parties agreeing, in writing, to a formal request for Grievance Mediation services including, *inter alia*, a short description of the dispute at issue.¹⁵³ The FMCS does not advertise whether it does multiple party mediations, however, it also does not say anywhere that it does not, so the NHLPA should propose that the FMCS begin to accept a multiple party mediation. After all, one of the greatest benefits of ADR is the flexibility the process allows for the parties.¹⁵⁴ Additionally, multiple party mediations can be an innovative solution to complex problems, such as disputes between parties with relative authoritative imbalances, as seen here between the NHL, the IOC, and the IIHF.¹⁵⁵ If the FMCS does not allow them to host a multiple party mediation, then the NHLPA, IOC, and IIHF would have to come to an agreement on how their interests are aligned so they could formally enter the mediation as one party.

¹⁵⁰ *Grievance Mediation FAQs*, FMCS.GOV, <https://www.fmcs.gov/resources/faqs/#gm-faqs> (last visited Feb. 27, 2020) (explaining that “the FMCS receives appropriated funding to provide its labor-management services. There is no charge to the parties for grievance mediation.”).

¹⁵¹ *Collective Bargaining Agreement*, *supra* note 16 (emphasis added).

¹⁵² *Grievance Mediation*, FMCS.GOV, <https://www.fmcs.gov/resources/faqs/#gm-faqs> (last visited Feb. 26, 2020).

¹⁵³ *Id.*

¹⁵⁴ *About Co-mediation and Multiple-Mediation*, *supra* note 99 (showing there is no right or correct way to utilize the co-mediation or multiple-mediation ADR processes.).

¹⁵⁵ Edmund J. Sikorski Jr., *Multiparty Mediation*, A.B.A. (Dec. 5, 2016), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2016/multiparty-mediation/>.

V. CONCLUSION

Mediation is a cheaper, and potentially more effective, alternative in resolving the dispute regarding the issue of NHL players involvement in the Olympics, between the NHL and the NHLPA. Arbitration has historically dominated when there is a dispute involving a large collective bargaining agreement, like the dispute between the NHL and the NHLPA, but I propose that mediation can be used to resolve the dispute before it gets to the formal adversarial process of arbitration. Both sides have something to gain and sacrifice by having the players play in the Olympics and a winner take all process like arbitration may not produce the best results for all parties. Further, relying on contract negotiations may not resolve the issue either. The CBA is meant to be a long-term agreement, evidenced by the current one being for a ten-year term, and it therefore may be difficult for both sides to agree to a firm commitment for such a long period of time. That leaves mediation as a viable middle ground to reach a solution. If there is pressure from the fans to come to an agreement allowing the NHL players participation in the Olympics, and all parties agree to mediation, then there is a good chance that the parties will come to an agreement, because the dispute is widely in the public eye.¹⁵⁶

Mediation would provide the much-needed spark to get reach an agreement. The longer this dispute drags on, the worse it is for everyone. Before making potential concessions to get the deal done in February 2020, the president of the IIHF, Rene Fasel, said in January 2020 that he wants a final decision on whether or not the NHL players will be going seventeen months before the Olympics starts at the latest.¹⁵⁷ That deadline still means that the dispute could drag on for many more months before there is a final resolution. It should be noted that widely publicized disputes that drag on, rarely provide a benefit to the parties involved. The reason Fasel has publicly set that deadline is that he wants to ensure countries, specifically the North American countries, have an adequate amount of time to put together a competitive team that can get

¹⁵⁶ Carchidi, *supra* note 123 (One of the dynamics that may help the NHL and the players union, Folger said, is that their battle ‘is in the public eye.’ There can be pressure to close the deal because the sides don’t want to hear that ‘they couldn’t even get it done with a mediator.’).

¹⁵⁷ The Canadian Press, *NHL Faces August Deadline on 2022 Olympic Decision, Says IIHF Chief*, CBC (Jan. 5, 2020, 11:41 AM) <https://www.cbc.ca/sports/hockey/nhl/rene-fasel-olympic-decision-august-nhl-1.5415591> (stating that “Fasel said he wants a decision at least 17 months prior to the opening ceremony to make appropriate plans one way or the other”).

some experience playing together.¹⁵⁸ Fasel ultimately believes that the goal of putting on entertaining hockey games in the Olympics is all about growing the sport of hockey.¹⁵⁹

NHL players have made it clear that they want to return to the Olympics.¹⁶⁰ The fans, based on viewership metrics, made it clear that they watched games more when NHL players were playing.¹⁶¹ Furthermore, the IOC and IIHF have already tried to return to the negotiation table and make public concessions, signaling a desire to end the dispute.¹⁶² All of these factors make this dispute ripe for mediation. It is possible to reach a solution that will satisfy a portion of each parties' requests, enabling the parties to save their reputations by appearing as reasonable entities willing to make compromises. The fans would benefit as they would have more chances to see the best hockey players on the planet compete. The Winter Olympic games would keep an exciting team sport event and the participating countries would have another team to rally behind and drum up patriotic fervor. There is no reason that the Olympics should not feature the best possible athletes in the respective events.

Multiple-party mediation provides a unique opportunity for more than two organizations to work together to achieve a common goal to resolve a widely publicized dispute while also benefiting the macrocosmic ADR community. Multiple-party mediation would receive more public recognition as being a worthwhile dispute resolution option not known to the masses.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Paulsen, *supra* note 54.

¹⁶² Friedman, *supra* note 129.