NHL Franchise Relocation Policies and the *Competition Act*

By: Brian Donnelly[1]
Osler, Hoskin & Harcourt LLP

Author's Note: This article is a revised version of the paper that won the 2009 James H. Bocking Memorial Award presented by the National Competition Law Section of The Canadian Bar Association. After the article was first written, Jim Balsillie attempted to purchase the Phoenix Coyotes franchise for US$212.5 million out of bankruptcy proceedings in Arizona. Balsillie's bid was rejected and the Phoenix franchise was later sold to the National Hockey League. (To view the failed Phoenix bid, please see Chapter 11 proceeding: *Dewey Ranch Hockey, LLC* 2:09-bk-09488-RTBP, June 15, 2009.) The focus of this paper is on Mr. Balsillie's prior bid to purchase the Nashville Predators, and the *Competition Act* investigation it led to.

Introduction

Few fans are as passionate about hockey as those located in Southern Ontario; in fact, hockey has become a part of many residents' identity. In 2007-2008, Canadian billionaire Jim Balsillie engaged in a failed attempt to purchase the Nashville Predators hockey club and relocate the franchise to Hamilton, Ontario. The National Hockey League (the "NHL"), opposed to relocating the Predators from Nashville, placed the league on notice that any franchise owner wishing to relocate his or her franchise would be subject to the rigorous and restrictive franchise relocation policies outlined in the NHL Constitution. In light of the NHL's tough stance on relocation, the interests of the Competition Bureau were piqued among concerns that the NHL policies outlining franchise relocation involved an unreasonable restraint of trade. In what may be a surprise decision, the Bureau concluded on March 31, 2008 (the "Balsillie Investigation") that NHL policies on ownership transfers and franchise relocations did not contravene the abuse of dominant position provisions within the *Competition Act*[2]; however, it appears the decision over-looked important considerations, such as the deterrent effect indemnity payments have upon the relocation of franchises, while placing far too much emphasis on the unique characteristics of the professional sports league in an effort to immunize the NHL from antitrust scrutiny. In an interesting twist, the Bureau also departed from established practice and referenced U.S. antitrust jurisprudence in rendering, and perhaps justifying, its decision; a move that illustrates the complexities of the fact-specific analysis involved in applying antitrust law to professional sports leagues.

This paper will examine the NHL relocation rules and policies contained within the NHL Constitution and conclude that the Bureau incorrectly deemed the NHL policies competitive in light of the NHL's standard practice of requiring relocating franchises to pay a substantial indemnity fee to secure their relocation site. Further, this paper will suggest that upon review

of the abuse of dominant position provisions previously examined in the Balsillie Investigation, NHL franchise relocation policies should be deemed anti-competitive in light of the Bureau's narrow fact-driven analysis as it relates to the utilization of a home franchise veto right as granted within the NHL Constitution. The Bureau failed to apply the appropriate weight to the role indemnity payments play in persuading franchise owners to waive their veto rights, which causes indemnity fees to become penalties exacted by home territory franchises for the privilege of relocating into that territory. The fees act as a penalty to franchise owners wishing to relocate, and must be considered "anti-competitive" as defined within section 79(1)(b) of the Act. Finally, this paper will argue that payment by a relocating franchise to the NHL for the expansion opportunity it has taken in relocating its franchise, a fee first outlined in American antitrust case law, is likely to stand up to the Act; however, any indemnity fees paid to existing NHL clubs should be considered penalties as per section 77 of the Act.

The Applicable Provisions of the NHL Constitution

Rules and policies restricting franchise movement are common in professional sports leagues. In particular, preventing other teams from operating within the restricted "home territory" of another franchise(s) is a nearly universal aspect of a professional sports league constitution.[3] Sections 4.1, 4.2 and 4.3 of the NHL Constitution are the primary rules outlining the relocation and territorial rights of the league and its member clubs. According to section 4.1(c) "each Member Club shall have exclusive territorial rights in the city in which it is located and within fifty miles of that city's corporate limits."[4] This section, known as the franchise "home territory" clause, provides the NHL's member teams the ability to veto any relocation or location of existing or newly-formed franchises into a 50 mile, or 80 kilometre, radius that constitutes its "home territory".[5] Section 4.2 of the NHL Constitution states:

> The League shall have exclusive control of the playing of hockey games by Member Clubs in the home territory of each member, subject to the rights hereinafter granted to members. The members shall have the right to and agree to operate professional hockey clubs and play the League schedule in their respective cities or boroughs as indicated opposite their signatures hereto. <u>No member shall transfer its club and franchise to a different city or borough</u>. No additional cities or boroughs shall be added to the League circuit without the consent of three-fourths of all the members of the League. Any admission of new members with franchises to operate in any additional cities or boroughs shall be subject to the provisions of section 4.3.[6] [emphasis added]

It appears that section 4.2 outlines an unqualified ban over the proposed relocation of existing franchises unless they comply with the very restrictive section 4.3. Section 4.3 states:

> Each member shall have exclusive control of the playing of hockey games within its home territory including, but not being limited to, the playing in such home territory of hockey games by any teams owned or controlled by such member or by other members of the League. Subject only to the exclusive rights of other members with respect to their respective home territories as hereinabove set forth, nothing herein contained shall be construed to limit the right of any Member Club to acquire any interest in any hockey team, whether professional or amateur in any league which recognizes and honors the territorial rights, contracts and reserve lists of the National Hockey League, except as limited by Section 8.1(a) of this Constitution. No other member of the League shall be permitted to play games (except regularly scheduled League games with the home club) in the home territory of a member without the latter member's consent. <u>No franchise shall be granted for a home territory within the home territory of a member, without the written consent of such member.</u>[7] [emphasis added]

Section 4.3 translates into an individual team's right to veto the relocation of any club within their market and appears to be in contravention of the antitrust legislation in both the U.S. and Canada; however, the NHL has also enacted specific bylaws intended to cure any perceived antitrust violations.[8]

Bylaw 36 allows any planned relocation of existing franchises to be determined by a majority vote of the Board of Governors, which is intended to over-ride individual vetoes outlined in section 4.3 of the Constitution.[9] A relocation vote initiated under bylaw 36 does not render automatic approval, however, as any franchise owner seeking to transfer his or her team is first required to comply with an extensive process that includes a written application to the NHL Commissioner no later than January 1 of the year prior to the proposed relocation.[10] The application requires justification for the transfer, complete with supporting documentation, which leads to the Commissioner striking a committee to review the merits of the application and reporting back to the Board of Governors.[11] Prior to the vote, the franchise seeking relocation has the chance to present to the Board and answer questions.[12] Upon a simple reading of bylaw 36 it appears in compliance with general antitrust legislation in form, but in substance, may provide a veto all but in name to the NHL and the club whose territory is being invaded.[13]

The Balsillie Investigation

The NHL franchise relocation and transfer of ownership policies have come under the scrutiny of the Bureau on previous occasions, most notably in 1993 when the Edmonton Oilers franchise threatened to relocate to Hamilton, Ontario.[14] At the request of Peter Pocklington, the owner of the Edmonton Oilers, the Bureau provided a confidential preliminary inquiry into the NHL's

relocation rules, which expressed concern over the home territory provisions. In particular, the Bureau noted section 4.3 of the NHL Constitution had the "clear effect of precluding or dissuading franchise mobility to markets with existing franchises;" continuing, "If the transfer is prevented by either Toronto or Buffalo through the exercising of their veto rights this may raise an issue."[15] Importantly, no final analysis was ever conducted as Mr. Pocklington decided against relocation, causing the Bureau to close the file before producing a final opinion.[16] The Bureau also investigated NHL relocation policies in July 2006, in anticipation of another team relocating to Hamilton, Ontario.[17] Allegedly, the Bureau asked the NHL to provide written assurance that any relocation would be subject to a majority vote by the NHL Board of Governors, and not a unanimous vote; after receiving this assurance, the matter was closed.[18] However, in June 2007, NHL franchise relocation restrictions arose in the media once more, with the Bureau again expressing concern.

On June 14, 2007, the Competition Bureau commenced an inquiry (the Balsillie Investigation) to determine whether the NHL's policies for the transferring of ownership and relocation of franchises violated the Act.[19] In particular, the Bureau focused upon whether the NHL's policies constituted a practice of anti-competitive acts that lessened or prevented competition substantially in a relevant market, contrary to section 79 of the Act.[20] As outlined in section 79, the Act stipulates a three step test to determine whether an abuse of dominance has occurred. Any case reviewed by the Bureau under the abuse of dominance provisions must satisfy each of the elements outlined in section 79(1):

(a) One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

(b) That person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and

(c) The practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.[21]

Examining these elements, the Bureau concluded the NHL had not violated subsection 79(1)(b), engaging in a practice of anti-competitive acts; thus, the Bureau discontinued its analysis of the remaining elements.[22] Moreover, the Bureau stated it was "satisfied that the NHL's policies and procedures regarding the process that would be applicable to any future attempts to relocate NHL franchises to Southern Ontario do not give rise to concerns under the Act."[23] Richard Taylor, Deputy Commissioner of Competition, further noted, "We are confident that the NHL's policies are not anticompetitive. We conducted an extensive investigation which established that the NHL's policies were directed at furthering legitimate interests of the NHL, and not to prevent competition."[24]

The Balsillie Investigation focused upon two central questions. First, the Bureau considered the NHL's rules and policies regarding the request of an NHL owner to transfer ownership

in a franchise, in particular, the standard seven-year non-relocation covenant contracted into with any prospective franchise purchaser prior to the NHL approving that purchaser's request to obtain a team. The Bureau was satisfied that these policies do not lessen competition, but instead, further the goals of the league in ensuring the viability of professional hockey in each franchise's community.[25] Second, the Bureau examined franchise relocation policies, noting how the process whereby franchise relocation is subject to a majority vote of NHL owners was sufficient to protect the league's interest in only relocating franchises in extreme circumstances, while ensuring the league was not stifling competition. However, if the NHL were to allow a franchise to possess a veto right to ensure no other team could enter that franchise's territory, the Bureau would re-evaluate its decision.[26]

The Balsillie Investigation must be viewed as a victory for the NHL, which insists upon controlling the location and operations of its franchises. The Bureau relied heavily upon the unique characteristics of a professional sports league in rendering its decision:

> For a professional sports league to be successful, it must have the capacity to exercise certain rights and powers over individual franchises, including final determination as to who may own a franchise and where it can be located. Properly circumscribed restrictions on the location of a franchise can serve a number of legitimate interests of the league; such as: (i) creating and enhancing spectator interest by preserving traditional team rivalries and fostering the development of new ones; (ii) encouraging investment by private parties and municipalities in arena construction and related infrastructure; (iii) respecting the investment made by private parties in the supply of refreshments, parking, transportation, and team and league paraphernalia relating to the franchise; (iv) attracting spectators and corporate sponsors by showing a strong commitment to a local market and the league as a whole; (v) ensuring that the sport is being appropriately promoted and that the reputation and goodwill of the league and its individual teams are not being compromised; and (vi) maximizing revenues generated by the league in the form of television and media coverage rights by promoting the overall stability of the franchises that constitute the league and creating an appropriate regional balance to ensure that the greatest number of spectators is reached.[27]

The aforementioned goals and unique characteristics served as one of the key tenets of the reasoning behind the Balsillie Investigation. Placing such large emphasis on the characteristics of the professional sports league, it appears the Bureau protected the NHL policies from a deep and scathing review under the Act, thereby allowing the Bureau to "explain away" the deficiencies in the policies as being part of the unique fabric of the professional sports industry. Utilizing the uniqueness of the professional sports league has allowed the Bureau to depart from first principles

reasoning, permitting policies that have the clear effect of preventing and restricting competition in proven markets, and insulating NHL policies from antitrust scrutiny in Canada.

As mentioned above, the Bureau referenced the application of U.S. antitrust law to professional sports leagues in concluding its investigation. Considering the unique factors encompassing a professional sports league, and the fact that antitrust legislation in both Canada and the United States operate under similar mandates and goals (namely, the restriction of monopolies and cartels to protect the consumer by fostering competition), such a result appears logical. Nonetheless, the utilization of U.S. jurisprudence by the Bureau in its ruling is unexpected; in fact, American jurisprudence is rarely, if ever utilized by the Bureau in rendering its decisions. As a result, it is surprising the Bureau would look to the U.S. case law for help in deciding, and perhaps justifying, its decision:

> Sports leagues have attracted competition scrutiny in a number of jurisdictions, including the United States and European Community. For example, U.S. courts have considered claims by prospective owners seeking to acquire control of a professional sports franchise and claims by teams seeking to relocate a franchise. These courts have upheld the right of sports leagues to determine who will be allowed to own a franchise and have also recognized that properly circumscribed restrictions on the relocation of professional sports franchises are valid.[28]

The Bureau's decision appears to include an overly broad synopsis of the U.S. case law, which leads the reader to believe that American antitrust laws do not offer much resistance to tough franchise relocation and transfer policies within the professional sports league context, which is simply not the case. Within the Balsillie Investigation, the Bureau does not expand upon the U.S. case law, failing to explain how the American application of antitrust law to the professional sports league lends itself to the Balsillie Investigation. This failure is troubling from an academic perspective since the Balsillie Investigation adopts many of the antitrust principles and unique factors of a professional sports league identified and expanded upon in the American jurisprudence. Consequently, in order to appreciate the entire context of the Bureau's decision, including why the Bureau referenced the American jurisprudence, this paper will examine the U.S. antitrust case law as it relates to professional sports leagues and then return again to examine the Act.

Antitrust and the *Sherman Act*

The *Sherman Antitrust Act*[29] ("*Sherman Act*") was passed by the U.S. government with the primary goal of restricting monopolies and cartels. Section 1 focuses on cartels and market division agreements by prohibiting all contracts, combinations, and conspiracies in restraint of trade or commerce in order to prevent agreements that "restrict production, raise prices or otherwise

control the market to the detriment of purchasers or consumers of goods and services."[30] Section 2 focuses on monopolization, and provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[31]

In general, applying the *Sherman Act* involves a determination of whether the trade or commerce within a relevant market is affected by monopolistic restraints.[32] Next, one must determine whether the activity involves "concerted action *and* an express contract or agreement."[33] If the answer is yes, then a court must decide whether to apply the *per se* rule of invalidity or the rule of reason analysis.[34] According to case law, courts are reluctant to apply the *per se* rule to a professional sports league due to its unique organizational characteristics, leaving one court to comment that it is difficult to analyze the "negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context."[35] Thus, the courts will determine professional sports antitrust cases utilizing the rule of reason analysis.

> The rule of reason analysis requires the fact finder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is *per se* unlawful. Where judges lack the expert understanding of an industry's market, structure and behavior, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition.[36]

Generally, when applying the rule of reason analysis, the court focuses on three questions: does the agreement suppress competition; is there any justifiable reason for the restraint; and what is the impact of the restraint on competition.

The courts outlined their initial approach in *San Francisco Seals Ltd. v. NHL* (*Seals*).[37] The San Francisco Seals, an NHL franchise, sued the NHL under the *Sherman Act* after the NHL Board of Governors denied the franchise's request to relocate to Vancouver.[38] In reaching its decision, the court outlined the rule of reason analysis, first focusing on the relevant market, and then determining whether the commerce within that market was affected.[39] The court determined there was no antitrust violation because:

> The relevant product market was the production of professional hockey games and the relevant geographical market was the United States and Canada. The team was not seeking to compete with the league, but to participate in the league. The organizational scheme of the league did not impose any restraints upon trade or commerce in the relevant market, but actually made possible a segment of commercial activity that could

> hardly have existed without it. The team did not have standing for a § 2 violation because the area of economy endangered by the league's alleged conspiracy to monopolize was that in which rival pro hockey leagues competed.[40]

Consequently, the court found the NHL was in fact a single entity incapable of conspiring with itself, immunizing it from section 1 of the *Sherman Act*; as well, the court held that the denial of the proposed relocation to Vancouver had no anticompetitive effects.[41] Nonetheless, *Seals* was distinguished and overturned after only a few short years.

Leaning on the favourable antitrust decision in *Seals*, the National Football League (the "NFL") attempted to gain single entity designation in order to avoid antitrust liability in *NFL v. North American Soccer League* (*NASL*).[42] The United States Court of Appeals for the Second Circuit, upon hearing the single entity defence put forth by the NFL, soundly rejected this argument pointing to the "economic independence of the NFL member clubs, and emphasizing the league's organizational form rather than its substance."[43] This case, while placing the single entity status of a traditionally organized sports league on hold, paved the way for the leading case on franchise relocation and antitrust laws in the U.S.: *L.A. Memorial Coliseum v. NFL v. Oakland Raiders*.[44]

L.A. Memorial Coliseum Commission v. NFL v. Oakland Raiders (Raiders I)

In 1978, the owner of the Los Angeles Rams relocated his NFL franchise to Anaheim, California; consequently, the Rams' former landlord, the L.A. Coliseum, was left vacant and searching for a new tenant.[45] Al Davis, managing general partner of the Oakland Raiders franchise, made a request to the NFL to approve his team's proposed relocation to the L.A. Coliseum and its more profitable territory of Los Angeles.[46] As per the NFL Constitution, any application for relocation was governed by Rule 4.3,[47] which required three-quarter approval of the NFL Executive Committee (comprised of one voting member from each NFL team).[48] Unfortunately for Mr. Davis, the L.A Coliseum was still considered to be within the "home territory" of the Rams, allowing the franchise to retain its rights over the Los Angeles area.[49] Rule 4.1 of the NFL Constitution explains its definition of home territory as follows: "the city in which a club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the *extent of 75 miles in every direction from the exterior corporate limits of such city*..."[50] A vote was held pursuant to Rule 4.3 on Mr. Davis' application to relocate; the results came back 22-0 against the move.[51] Unsatisfied, Mr. Davis filed an antitrust suit against the NFL for unduly restricting his franchise's movement.

The NFL put forth the single entity defense approved in *Seals* as its main shield, which was quickly rejected by the court based on *NASL*.[52] The court felt uncomfortable immunizing the NFL from antitrust scrutiny, explaining that to "tolerate such a loophole would permit league members

to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects."[53] The Circuit found the NFL did not satisfy the essential requirements of a single entity enterprise, namely concerted action, explaining NFL corporate policies were set by each separate team acting jointly, not by an individual or parent corporation.[54] In analyzing the voting structure of the NFL Executive Committee, the court relied upon Article 1 of the NFL Constitution, highlighting the stated purpose of the NFL, which is declared as the promotion and cultivation of the primary business of League members.[55] As a result, there can be no assumption that the teams comprising the Executive Committee make decisions for the common good.[56] This is further evidenced by the fact that profits and losses are not shared, a feature common to single entities.[57]

Turning to its next stage of analysis, the court noted the division of territories among owners is presumed illegal under section 1, since such practice allows for unreasonable and arbitrary pricing due to the absence of market forces; nonetheless, as stated above, the *per se* illegal approach is not utilized in an analysis of professional sports leagues. Instead, the court borrowed the rule of reason analysis outlined in *Chicago Board of Trade v. United States*.[58] The court added that the analysis calls for a "thorough investigation of the industry at issue and a balancing of the arrangement's position and negative effects on competition. This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition."[59] In order to establish a cause of action, one must show (i) an agreement among two or more persons or distinct business entities, (ii) which is intended to harm or unreasonably restrain competition and (iii) which actually causes injury to competition.[60] The court ruled a cause of action was made out, and turned to examining the conduct in question.

On its face, Rule 4.3 is an agreement intended to "control, if not prevent, competition among the NFL teams through territorial elements".[61] Although the court found Rule 4.3 reasonably serves the legitimate collective concerns of owners by promoting franchise stability and community loyalty, there were still concerns these rules permit franchises to reap excess profits at the expense of the consuming public.[62] The U.S. Supreme Court had previously rejected the idea that "ruinous competition" can be a defense to restraint of trade.[63] As a result, the court found the competitive harms of Rule 4.3 to be "plain", stating "exclusive territories insulate each team from competition within the NFL market, allowing [teams] to set monopoly prices to the detriment of the consuming public."[64] The court felt that the regulation of private profit was best left to the marketplace rather than private agreement; this is particularly true in the NFL where a franchise owner would not quickly abandon an established fan base in order to pursue an insecure profit.[65] The court added that future votes on proposed relocation must recognize certain objective factors, including fan support, territorial population, economic projections, stadia and regional balance.[66] In short, upon concluding Rule 4.3 was accurately described as unreasonable by the jury,[67] the court left the following guide for future relocation decisions: If the consumer is hurt by higher ticket or merchandise prices, an unreasonable finding by the

court is likely; however, if the "procompetitive benefit outweighs the anticompetitive effects", Rule 4.3 will comply with antitrust law.[68]

Raiders I was later complimented by the decision in *Los Angeles Memorial Coliseum Commission v. National Football League*[69] (*Raiders II*), which focused on the "expansion opportunity" and the subsequent financial windfall bestowed upon the Raiders in their move from Oakland to L.A.[70] The court found the Raiders, by claiming the Los Angeles territory, reaped a significant additional benefit, and should compensate the NFL for taking this expansion opportunity. As a result, the court felt the judgment in *Raiders I*[71] should be offset by the value of the expansion opportunity.[72]

Franchise Movement after *Raiders I*: The "Expansion Opportunity" Fee

After *Raiders I*, U.S. professional sports leagues were put on notice that to restrict franchise movement would bring them under the scrutiny of federal antitrust laws. In 1983, the owner of the NHL's St. Louis Blues announced that he intended to sell the franchise to a group that planned on relocating the team to Saskatoon, Saskatchewan.[73] NHL President, John A. Ziegler, Jr., in a candid moment, admitted the league had two options: it could either avoid potential antitrust liability by approving a team relocation it felt was unwise, or place itself within potential antitrust liability by enforcing the NHL Constitution.[74] The NHL rejected the Saskatoon bid, and approved a competing bid to different buyers that would keep the team in St. Louis. The rejection of the Saskatoon bid led to an antitrust suit for $60 million, which was settled out of court in June 1985.[75]

The National Basketball Association ("NBA") franchise relocation policies came under antitrust review in *NBA v. SDC Basketball Club, Inc.*[76] (*Clippers I*). As a direct result of *Raiders I*, Alan Rothenberg, President of the San Diego Clippers franchise, announced on May 14, 1984 that he was immediately relocating the team to Los Angeles, which was already home to the Lakers franchise. At issue in this case was Article 9 of the NBA Constitution, a provision similar to former Rule 4.3 of the NFL Constitution.[77] Article 9 provided that no team could relocate into a territory operated by an existing franchise without that franchise's consent.[78] Mr. Rothenberg went ahead with the move as planned, obtaining approval from the Lakers to move into their territory; however, Rothenberg issued a warning to the NBA: interfere with this relocation, and be met with an antitrust lawsuit.[79] In light of *Raiders I*, the NBA subsequently scheduled the upcoming Clippers' home games in L.A.[80]

In the subsequent court case, the NBA argued that the league as a whole must be permitted to consider franchise relocations to ensure such movement remains in the best interests of the league.[81] Thus, the issue was whether "the mere requirement that a team seek [NBA] Board of Governor approval *before* it seizes a new franchise location violates the *Sherman Act*."[82] The NBA also sought declaratory relief regarding the Clippers' move to L.A.,[83] including that it may

impose upon the Clippers a fee for the independent appropriation of the "franchise opportunity" in relocating to the Los Angeles market.[84]

The court in *Clippers I* recognized this case consisted of different factual circumstances than *Raiders I*. In *Clippers I*, the NBA did not forbid the move to Los Angeles, but rather sought the authority to oversee such a decision.[85] In addition, the league was threatened by the Clippers with potential antitrust liability, which accounted for the NBA's suit for declaratory relief.[86] The ruling reversed the district court's granting of summary judgment against the NBA and remanded the case back to the district court for trial.[87] As a result, the NBA relocation rules contained in Article 9, and the subsequently revised Article 9A[88] were not analyzed by the court under federal antitrust laws.[89] Nonetheless, the court was firm that sports franchise relocation restrictions must be decided according to *Raiders I* and *Raiders II*.[90] Finally, the issue of the expansion opportunity fee was refined in *St. Louis Convention & Visitors Commission v. NFL*[91] (*CVC*).

In 1995, the Los Angeles Rams NFL franchise relocated to St. Louis, after which, in accordance with *Raiders II*, it was charged a $29 million relocation fee by the NFL.[92] The St. Louis Convention & Visitors Commission (the "Commission"), which was liable to pay a portion of this fee as part of the Rams relocation agreement, brought an action against the NFL alleging claims in both antitrust and tort law.[93] In a complex argument, the Commission alleged that the existence of franchise relocation rules, such as Rule 4.3, created an anticompetitive atmosphere making franchises unwilling to relocate due to the high relocation fees involved.[94] Consequently, a one-buyer market for the St. Louis stadium lease was created and the Commission was forced to agree to terms with the Rams it would not have agreed to in a competitive market.[95] The court determined that the relocation rules and accompanying high relocation fees did not constitute a violation of section 1 of the *Sherman Act*;[96] nor did they constitute tortious interference between the Commission and the Rams.[97] Thus, while *CVC* signals that professional sports leagues may not bar a franchise from relocating to another territory without violating the *Sherman Act*, the case law also suggests that professional sports leagues have a powerful weapon at their disposal to deter unilateral relocation: the "franchise opportunity" relocation fee.[98]

NHL Policies and the *Competition Act*

Canada enacted its first antitrust legislation in 1889 with the passing of the federal *Competition Act*. Unlike the *Sherman Act*, Canada's antitrust legislation carried little weight among the economic affairs of Canadians during most of its lifetime.[99] Canadian political and economic forces held back antitrust laws in an effort to foster and develop the Canadian economy, which was premised on economic theory dictating a relatively concentrated industrial structure.[100] In addition, Canada's small domestic market, and a heavy reliance on international trade resulted in Canadian economic policy advisors encouraging economic structures with significant concentration of ownership.[101] Canada's economic policy underwent a paradigm shift with the increasing globalization of the economy, which paved the way for re-enforcing and strengthening the Act.

Professional Sports Leagues

In 1975, amendments to the *Competition Act* broadened the application of the legislation to services, and made market restriction a reviewable practice.[102] A second overhaul occurred in 1986 when Parliament toughened the Act's criminal conspiracy provisions, while adding, among other provisions, civil reviewability for abuse of dominant position.[103] Such revisions over the past thirty years have helped shape the Act into a tougher piece of legislation, similar to that of the *Sherman Act*. As the Act has been of limited application during this time, there is a corresponding dearth of case law, which leads to most analyses under the Act, including the analysis of the NHL relocation policies, becoming fact-specific and statute-driven.

The Act holds jurisdiction over the NHL, an organization based out of New York City, since the league carries on business in Canada. Such business includes the regulation and operation of six incorporated Canadian franchises located within British Columbia, Alberta, Ontario and Quebec. Where there is a new or novel issue in Canadian competition law, as in the investigation of the NHL relocation policies, the Bureau will examine how the conduct fits within the statutory framework in conjunction with the small body of case law existing to augment the statute. In order to reach a determination on the validity of the NHL rules and policies governing franchise relocation, one must analyze the territorial rights provisions to determine whether the NHL policies "protect each team's economic interest and investment or whether they are contrary to the public interest and amount to undue restriction of competition."[104] Such an investigation would be largely fact-specific, as explained in the Balsillie Investigation: "Enforcement decisions are made on a case-by-case basis and the conclusions... are specific to the present matter and not binding on the Commissioner of Competition."[105] Further, the Bureau "conducted interviews and obtained relevant records, such as emails and letters, from numerous parties, including prospective purchasers and vendors of NHL franchises, and NHL governors and senior officials."[106]

Whereas the Bureau conducted a narrow inquiry into NHL franchise relocation policies by examining the abuse of dominance provisions in the Balsillie Investigation, this paper will probe further into each of the possible areas of the Act that the NHL may be in violation of: the criminal conspiracy provision dealt with under section 45 of the Act, the market restriction provisions outlined in section 77(3) of the Act, and, once again, the abuse of dominance provisions outlined in sections 78 and 79 of the Act.

Section 45 of the *Competition Act*

Section 45(1) of the Act makes it a criminal offence for "any person to conspire, combine, agree or arrange with another to prevent or lessen competition unduly."[107] As a criminal offence, the Crown's burden is the elevated standard of beyond a reasonable doubt, which is coupled with the onerous task of proving both the *actus reus* and *mens rea* of the offence. Section 45(1) reads as follows:

Professional Sports Leagues

> **S.45.** (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.[108]

Subsections 45(1)(a)-(c) outline the specific forms of anti-competitive conduct that are prohibited, such as allocating customer or geographic markets or preventing or impeding the entry of a competitor into the marketplace.[109] When the NHL attempts to restrict the relocation of an NHL franchise into a viable market, subsections 45(b) and (c) are likely triggered. An antitrust issue arises as a result of the upward manipulation of the price of admission and confectionary items at NHL games as normal market conditions that would counter such upward manipulation are absent.

If the NHL were to restrict the access of an NHL franchise into the Hamilton market, one could look to the judgment in *Raiders I* for factual guidance. The court in *Raiders I* determined that dividing market territories within a professional sports league and restricting entry into the "home territories" of franchises allows for unreasonable and arbitrary pricing since normal market forces are absent.[110] In addition, the court outlined various harms the consumer of the NFL product would be subjected to, including higher ticket and merchandise prices, which are a direct result of the market being free of competition.[111] The court in *Clippers I* discovered similar results when the court determined Article 9 of the NBA Constitution unreasonably restrained trade and harmed competition by foreclosing direct competition between teams in a market.[112] The court focused on the injurious effects relocation restrictions have upon the consumer in a given product market, which should be similarly recognized within any analysis under the *Competition Act* as such effects occur regardless of jurisdiction or applicable law.

As a defense, the NHL could point to the inherent differences between the Canadian and American sports markets, which includes the absence of competitive college sports teams, as

well as a significant difference in population and sponsorship money between the two countries. In addition, for the NHL to exist and thrive in Canada, the league would need these relocation restrictions to help promote the league throughout Canada and ensure franchise stability and local continuity in their existing markets. However, the court in *Raiders I* determined that "ruinous competition" was not a defense to antitrust law, a finding that has a history of being upheld under the Act as well.

The NHL could also look to the affiliation defense outlined in subsection 45(8). Subsection 45(8) of the Act contains a statutory exemption from liability under section 45 for agreements between affiliates. Affiliates are defined with reference to subsections 2(2) through 2(4) of the Act, covering all persons, partnerships and corporations that are by law controlled by the same person, or by law control each other.[113] The emphasis is on by law; what matters is that a person controls securities entitling them to more than 50% of the votes to elect directors or, in the case of a partnership, entitling it to more than 50% of the assets upon dissolution and profits of the business.[114] In order for the NHL to argue affiliate status, the league would have to illustrate that a single entity is controlling the various franchises of the league.

Section 2(3) of the Act explains that a "corporation is a subsidiary of another corporation if it is controlled by that other corporation."[115] The NHL could argue that the uniqueness of the professional sports league should warrant a dual distinction being granted to the league to allow it to fall within section 2(3). Separating the business of the NHL into distinct realms may allow for a credible argument that certain areas critical to the survival of professional hockey in Canada carry the unity of interest and degree of control necessary to elicit the provisions in section 2(3) of the Act.[116] The Bureau has noted most strategic alliances do not raise issues under the Act since they generally lead to positive innovation and efficiency gains on competition.[117] However, the Bureau has cautioned that where strategic alliances raise serious competition issues, such as market restrictions that prevent or lessen competition, the Bureau may have second thoughts.[118] Consequently, even if the league were to be granted a dual distinction, it is unlikely it would be applied to any practice restricting markets from competition.

American single entity case law could provide a sound starting point for the factual analysis of the operation of a sports league; however, one must immediately recognize inherent differences between the *Sherman Act* and the *Competition Act* when dealing with single entity designations. Most notably, the *Competition Act* regulates the designation of an affiliate using its statute as a guide (subsections 2(2) through 2(4)), whereas single entity status is generally case law driven under the *Sherman Act*. Although subsections 2(2) through 2(4) generally provide enough clarity and insight into what constitutes an affiliate organization, given that affiliate status has not previously been requested by a professional sports league in Canada, the Bureau may look to the U.S. precedent to fill in any factual gaps left behind by its statute and the existing, but limited, case law.

It is important to note section 45.1 of the Act[119] states that no proceeding may be commenced under section 45(1) if an order is sought under section 79, the abuse of dominance provisions.[120] Accordingly, a company cannot be simultaneously prosecuted under section 45 and have their conduct reviewed under section 79 when it is the same conduct at issue. The Bureau may have a difficult time in proving, beyond a reasonable doubt, that criminal provisions of the Act were violated, which is likely why the Bureau chose to proceed under the civil provisions in the Balsillie Investigation.[121]

Civil Provisions of the *Competition Act*: Sections 77(3), 78 and 79

Part VIII of the *Competition Act* concerns reviewable matters of a civil nature, including abuse of dominant position. Within these provisions, the Bureau generally addresses unilateral conduct. As a result, whether companies are affiliated with each other, an important issue under the criminal provisions, is mostly a non-issue.[122] As mentioned above, where the investigation is novel in nature, the Bureau must examine how the conduct fits within the statutory framework of the Act, in conjunction with the small body of case law existing to augment the statute. When examining the NHL relocation policies, it is prudent to examine two areas of the *Competition Act*, section 77(3) and sections 78-79.

Section 77(3) of the *Competition Act*: Market Restriction

Market restriction[123] is "any practice whereby a supplier of a product, as a condition of supplying the product, requires a customer to supply any product only to a defined market, or exacts a penalty from the customer if the customer fails to supply any product only to a defined market."[124] If the market restriction is "likely to substantially lessen competition" for a certain product because it is "practiced by a major supplier or is widespread in relation to a product," an order may be made that will restore or stimulate competition in the market.[125] In any future investigation of NHL relocation policies, "home territory" provisions and restrictions on relocating a franchise may be a violation of this provision, as the reward of an exclusive territory to one NHL franchise precludes other NHL franchises from competing in that market. Coupled with Bylaw 36, it appears that the NHL, in substance, provides a veto to the original franchise in the disputed territory, which is contrary to the public consumer interest.

In a discontinued case from 2001, the Bureau investigated an allegation that certain commercial terms forced upon tenants of a shopping centre outside of Sherbrooke, Quebec, breached the market restriction provisions of the *Competition Act*.[126] The commercial terms under dispute involved a radius clause in the tenant lease agreements that prevented mall tenants from establishing other businesses within an area surrounding the mall.[127] The investigation was discontinued after the Bureau concluded that despite the radius clauses being larger than the industry norm, their presence would not substantially lessen competition, nor prevent a large number of retailers from locating outside of the prohibited zone.[128] A radius may be viewed as

akin to the "home territory" provision in the NHL Constitution; however, these two provisions are quickly distinguished upon closer review.

One major distinction between the Sherbrooke case and the Balsillie Investigation is that outside competition from merchants who were not subject to the commercial lease could freely enter the market place, ensuring normal market forces prevailed. As illustrated in *Raiders I*, a professional sports league effectively precludes normal market forces by monopolizing certain territories for the benefit of a single club; as a result, relocation restrictions placed upon professional sports teams are significant in that there is no effective substitutive competition from outside professional leagues to fill any void within a market. The absence of a comparable product substitute is a known harm as described in *Raiders I*, in which the court stated "exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public."[129] As well, the court in *Clippers I* outlined how a rule intending to prohibit franchise movement that results in exclusive territories forecloses direct competition, and exposes the public to monopoly pricing.[130] Thus, it may be considered that denying a franchise the opportunity to compete in a market that already has an NHL team would amount to an unfair market restriction.

Sections 78 and 79 of the *Competition Act*: Abuse of Dominant Position

The abuse of dominant position provisions contained within sections 78 and 79[131] of the Act are aimed at limiting the conduct of a firm, or group of firms, that substantially or completely control any "class or species of business" by eliminating the practice of anti-competitive acts that "have had or are likely to have the effect of substantially lessening or preventing competition in that market."[132] An abuse is said to occur when a dominant entity engages in conduct that represents "exclusionary, disciplinary or predatory behaviour towards competitors or potential competitors, with the result that competition is prevented or lessened substantially."[133] Thus, section 79 is not intended to stop dominance in a market *per se*; rather, it attempts to tackle dominance where abuse causes the prevention or lessening of competition.[134]

In order to combat anti-competitive effects, the Act imposes constraints on dominant entities to prevent the "unilateral or joint abuse of their dominant position."[135] Such provisions center around the goal of promoting effective competition, rather than protecting individual competitors; thus, when a dominant entity acts in such a way as to eliminate or punish a competitor or to discourage future entry by new competitors, with the result that competition is prevented or substantially lessened in the market, an abuse of dominance is created.[136] When the Bureau investigates allegations under section 79, three steps must be established before the Tribunal may grant an order. In accordance with section 79, the Tribunal must find that.

1. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

2. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and

3. the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.[137]

In addition, within each of these steps, the Commissioner breaks the statutory language down into various elements that must be proven before moving forward with the analysis.

The first step in the analysis is to determine whether "one or more persons substantially or completely control, throughout Canada, or any area thereof, a class or species of business."[138] This analysis begins by identifying the product market, or "class or species of business", in which the abuse is alleged. The parameters of the relevant market(s) are defined by estimating what the price level for the relevant product(s) will be in the absence of anti-competitive practices.[139] The analysis then turns to considering whether competition from other product sources limits the ability of the entities in question to exercise market power.[140] As discussed in *Canada v. Laidlaw Waste Systems Ltd.*[141], and later in *Canada v. The D&B Companies of Canada Ltd.*,[142] this analysis focuses on whether there are close substitutes for the products in question that would allow buyers to switch over to these substitutes if the product price was raised above competitive levels.[143] Qualitative factors are also used to determine the relevant product market, which includes ascertaining the views of buyers in a market as well as trade views.[144] For our purposes, the relevant product market is professional hockey, which has almost no competition from outside sources to limit the NHL market power. The only credible competition would stem from another NHL franchise located in the same market.

The second stage within step one is to ascertain the geographic market,[145] which is synonymous with the phrase, "throughout Canada or any area thereof". To qualify as a dominant firm, control must be exercised over a given product market throughout Canada or any area within the nation.[146] To determine the relevant geographic market, the Tribunal will take into account similar qualitative factors as seen in the product market definition above,[147] as well as transportation costs, shipment patters and competition from foreign entities.[148] In the case of an NHL franchise holding exclusive territorial rights over a defined market, the geographic area is relatively straight-forward. For our purposes, the geographic market is Canada, more specifically, Southern Ontario.

The third stage within step one involves determining market power, which is referenced by the phrase, "substantially or completely control" in section 79 of the Act. Consequently, once the relevant product and geographic markets have been defined, the Commissioner will then attempt to illustrate the firm in question "substantially or completely control" those markets.[149] A firm is said to dominate a market when they are able to profitably raise prices above competitive levels for a considerable period of time.[150] Using ticket prices as objective evidence, it is clear the NHL and the Toronto Maple Leafs hold substantial market power over Southern Ontario. The Toronto franchise has some of the highest ticket prices, and is annually ranked as one of

the most valuable franchises in the game largely due to the loyalty and prosperity of their home territory. For instance, according to a recent survey by Chicago-based Team Market Report, a ticket for a Toronto Maple Leafs game costs an average of $117.49 (all figures from this report are in U.S. dollars), which is more than double the NHL average of $51.41.[151] Further, the "Fan Cost Index", which is the Team Market Report's calculation of the cost of taking a family of four to a Toronto Maple Leafs home game, has been estimated at $585.57.[152] As seen throughout the first half of the 2009 NHL season, it appears the Toronto market has provided hard evidence that tickets are over-priced, which has been illustrated through the natural correction process that occurs on the secondary market.[153] Additional, but less compelling evidence that may be utilized to satisfy this criterion may be seen when examining ticket prices in Alberta, where the Calgary Flames and Edmonton Oilers franchises compete for business as a demonstration of how NHL markets are affected when two teams, each representing a similar fan base, are in close proximity to each other.[154] Once combining the aforementioned ticket price information with the fact the NHL relocation policies prohibit entry of another franchise into the market, one may view this criterion as satisfied.[155]

The final stage of step one contemplates a scenario where a group of firms, none of which is dominant by itself, may collectively possess market power ("one or more persons").[156] Analyzing allegations of joint dominance, the Bureau will consider: whether the group of firms collectively accounts for a large share of the relevant market; whether there is coordinated behavior and whether such behavior is anti-competitive; barriers to entry into the group, as well as barriers to entry into the relevant market; whether actions have been taken by members of the group to inhibit intra-group rivalry; and whether customers can exercise countervailing market power to offset the attempted abuse.[157] Further, where sufficient barriers to entry are coupled with the plausibility of organized activity, the possibility of intra-group rivalry may dissuade the Tribunal from concluding a group of firms profitably coordinate.[158] Each of the aforementioned criterions appears to be violated by the NHL relocation restrictions, and the organizational structure of the NHL in general lends itself well to a joint dominance designation. In addition, the NHL explicitly creates barriers to entry into the relevant market to inhibit intra-group rivalry, which given the fact the NHL is the exclusive provider of world-class professional ice hockey, leaves the consumer powerless to offset such abuse.[159]

The second step in the analysis is aimed at determining whether "such person or persons have engaged in, or are engaging in, a practice of anti-competitive acts." This step may be broken down into two parts: establishing "anti-competitive acts" and "practice". According to *Canada v. NutraSweet Co.*[160] an act is considered anti-competitive under section 79 if there is an element of "anti-competitive design, purpose or object that is predatory, exclusionary or disciplinary."[161] Section 78 is used as a guide to define potentially anti-competitive acts; however, this list is not exhaustive and the Tribunal has shown a willingness to look outside of this list. A professional sports league relocation restriction policy is not explicitly listed under section 78; however, under section 78(h), the Act does account for the practice of "requiring or inducing a supplier to sell only or primarily to certain customers... with the object of preventing a competitor's

entry into, or expansion in, a market."[162] As a result, the Tribunal could view the NHL franchise relocation restrictions as analogous to section 78(h), perhaps using U.S. case law to supplement their factual analysis. The definition of "practice" merely denotes more than an isolated act, unless that single act is sustained over a period of time.[163] Although it appears the NHL forces its franchises to offer their product (professional hockey) to certain customers (the population within their home territory) with the object of preventing other franchises from entering the territory of its member clubs, the Bureau ruled that due to the unique nature of the NHL, this aspect of the test was not met and the restrictions were not a violation of the Act:

> Overall, the Bureau does not consider the restrictions on transfers of ownership or the relocation of franchises as applied by the NHL in the present matter to constitute a practice of anti-competitive acts for the purpose of section 79 of the Act. The Bureau found that in the present circumstances, the NHL's policies were not implemented with an intended predatory, exclusionary or disciplinary purpose. Rather, such policies were applied in furtherance of the legitimate business interests of the NHL as discussed above.[164]

Nonetheless, in spite of the NHL's perceived intentions, it is clear that such policies have been used for an exclusionary or disciplinary purpose as applied to franchise owners wishing to relocate their club as illustrated through the Balsillie Investigation. In fact, the Bureau appears to have provided the NHL with carte blanche in regards to its policies that further the "legitimate business interests" of the NHL, whether or not these policies lead to higher prices in markets with little competition, such as Southern Ontario.

One justification for the Bureau's reasoning appears to be that the alleged home team "veto" granted through the NHL Constitution has not been utilized by a member club since at least 1993; a fact that over-looks the reasons for the veto not being utilized:

> The Bureau found no instance where a "veto" was exercised by an incumbent team to protect its local territory from entry by a competing franchise. Since at least 1993, no franchise has been permitted to exercise a veto to prevent a team from entering into its local territory. Further, under the NHL's rules and procedures, in respect of the proposed relocation of a franchise to Southern Ontario, the NHL would not permit any single team to exercise a veto, but would only require a majority vote. The Bureau may have concerns under the Act if a single team were entitled to exercise a veto to prevent a franchise from entering into its local region within Canada, but such concerns would have to be evaluated having regard to the facts and law applicable at the time such an event occurred.[165]

It is not unreasonable to conclude the veto power has yet to be utilized as a result of the large indemnity payments that have been made to home territory clubs to obtain their permission, and thus, their commitment not to utilize their veto rights. Indemnity fees serve multiple purposes, including acting as a deterrent to existing franchises from relocating out of their unprofitable territories into those markets that are proven profitable, and more importantly to garner the support of the existing territory to approve the relocation. Past examples of indemnity fees include the NHL requiring the Colorado Rockies to pay the New York Rangers and New York Islanders when the franchise relocated to New Jersey in 1982; in addition, the Los Angeles Kings were paid a hefty indemnity fee in 1993 by the expansion Anaheim Mighty Ducks franchise for that team moving into the Kings' protected home territory.[166] Not surprisingly, after exacting what one may term a "penalty", the resident franchise in the above examples had no need to veto the inclusion of an additional team into its territory, and allowed the relocation. In the case of Southern Ontario, the Toronto Maple Leafs and Buffalo Sabres would likely demand substantial indemnity payments prior to approving any relocation into the area, with some reports suggesting a figure of US$100 million.[167] While the Bureau would express concerns if a "single team were entitled to exercise a veto to prevent a franchise from entering into its local region", the Bureau notes such concerns over a veto would have to be evaluated "having regard to the facts and law applicable *at the time such an event occurred*." Consequently, the Bureau will not investigate the indemnity payment until a relocating club refuses to pay the fee; a situation that may never unfold.

Any fee may be described as a penalty under the definition of market restriction in section 77(1), which outlines a form of market restriction that occurs when the dominant entity "exacts a penalty of any kind from the customer if he supplies any product outside a defined market."[168] Any franchise requested to pay such a fee would likely counter by arguing that an indemnity fee is a penalty, and thus invalid under the Act. U.S. case law provides some guidance on this matter, particularly *Raiders II* outlined above. The court in *Raiders II* focused on the "expansion opportunity" and the subsequent windfall bestowed upon a franchise in a move from a less profitable to a more profitable market.[169] The court ruled the sports league should be compensated for this expansion opportunity, but did not approve or disapprove the idea of an indemnity fee. In addition, the case of *CVC* ruled the expansion fee charged by the NFL to the relocating Los Angeles Rams was valid under the "franchise opportunity" determination. Such a fee was not paid to another league franchise; instead, it was the estimated value of the lost franchise entry fee for a new team to enter the league and operate in that market.

Based upon U.S. case law, and the leniency of the Bureau in the Balsillie Investigation, it appears the expansion opportunity fee would pass the scrutiny of the Act; however, it is also possible to view the fee as being a sword for the NHL to deter future relocations. As mentioned above, recent developments have led to Jim Balsillie attempting to purchase the Phoenix Coyotes franchise out of bankruptcy court in Arizona. Published reports suggest the NHL will demand US$100 million from Mr. Balsillie in order to approve the relocation of the Phoenix Coyotes franchise to Hamilton <u>on top of</u> the reported US$212.5 million offer to purchase the team. Such a fee would

represent an increase of nearly 300% over the highest fee ever paid by a relocating franchise. The Bureau now has a real life example of a relocation fee, whether termed an indemnity payment or an expansion opportunity fee, being utilized as a sword in a lengthy court battle to stop Mr. Balsillie from gaining entry into the NHL ownership circle. Based upon the sheer size of this rumoured fee, it appears the NHL is attempting to ensure that Balsillie, as a competent businessman, withdraws his current and perhaps future offers to purchase NHL clubs by raising the price tag to such a level that Balsillie would be forced to walk away from his NHL ownership dreams. Such a scenario illustrates how the indemnity fee and/or an unreasonable expansion opportunity fee could be used to lessen competition in a market.

The third and final step in determining abuse of dominant position involves identifying the practice of anticompetitive acts, which includes past, present or future conduct that results, or is likely to result in a substantial prevention or lessening of competition in a market. As the Bureau concluded in the Balsillie Investigation that section 79(1)(b) was not violated, the abuse analysis was discontinued at that stage; however, upon review of section 79(1)(c), had the Bureau continued its analysis, it is likely the NHL policies would have satisfied the remaining criterion and been deemed anticompetitive, becoming subject to the remedial provisions contained within the Act as a result. According to *NutraSweet*, the test is whether the conduct serves to "preserve, entrench or enhance the market power of the dominant firm or group of firms," which will depend on a case by case basis.[170] According to the *Abuse of Dominance Guidelines*, if effective competition could emerge within a reasonable time (i.e. 2 years) in the absence of the anti-competitive acts, that would constitute a substantial lessening or prevention of competition.[171] In any case, the degree of dominance, the nature and severity of the anti-competitive acts, and the degree of competition remaining in the market will all form part of this determination.[172] The Southern Ontario hockey hotbed would surely produce another team within two years if the franchise relocation restrictions were removed from the NHL Constitution. As evidence, Jim Balsillie, in a move to demonstrate the market capacity in Hamilton, took deposits for potential season tickets in the event his purchase and relocation of the Predators was approved. Within eight hours, 7,200 season tickets and sixty executive suits were sold, producing $6.25 million in deposits.[173] It is not out of the question to assume that had the Predators purchase and relocation been approved to Hamilton, these figures, which are based on the chance of relocation, would jump exponentially upon the official announcement by the NHL detailing relocation. In light of these results, at least one savvy NHL owner would consider relocating their franchise from an unprofitable market such as Nashville or Phoenix to the hockey hotbed that is Hamilton.

Conclusion

Upon consideration of the evidence outlined above, it becomes clear the Bureau over-looked crucial factors in the Balsillie Investigation; factors that may have resulted in the NHL franchise relocation policies being found in violation of the *Competition Act*. In particular, it appears the Bureau over-looked the practical effect of the possibility of a large indemnity payment being

forced upon a franchise wishing to relocate, which payment acts as both a deterrent and a penalty for relocation. Had the Bureau examined the practical effects of the indemnity payment, it is possible the Bureau would have reached an entirely different conclusion than it did in the Balsillie Investigation. It is interesting to note that the concept of an indemnity payment was not mentioned in the investigation; as well, the Bureau's over-reliance on the fact that no veto has been utilized since at least 1993 overlooks the reasons behind the veto not being utilized. In the end, one would suggest that if an indemnity payment is forced upon a relocating club in the future, the Bureau would have no choice but to declare the fee a penalty under section 77 of the Act; however, any reasonable expansion opportunity fee would likely be allowed under the Act. This conclusion closely follows the results from the U.S. jurisprudence, which has led to the relocating franchise becoming obligated to only compensate the league for the difference "in the estimated fair market value of the franchise opportunity taken, less the estimated fair market value of the franchise location abandoned by the relocation franchise."[174] Nonetheless, it appears the Bureau has placed an enormous value on the unique characteristics of the professional sports league in reaching its conclusion, which has had the effect of inappropriately explaining away many of the deficiencies in its reasoning, and protecting the NHL from antitrust scrutiny. Consequently, if NHL franchise owners are adamant on challenging the franchise relocation restrictions within the NHL Constitution, they may be ironically left with the same option the court in *Raiders I* left the NFL: "to the extent the [franchise owner] finds the law inadequate, it must look to [Parliament] for relief."[175]

Notes

[1] Brian Donnelly is an associate in the Real Estate Practice Group at Osler, Hoskin & Harcourt LLP.

[2] *Competition Act*, R.S.C. 1985, c. C-34.

[3] Terence Corcoran, "Bureau has no business in NHL Hockey" *Financial Post* (07 June 2007), online: Financial Post http://www.canada.com/nationalpost/columnists/story.html?id=3ab11ae2-5524-4c0e-8679-fc810200d304&p=1.

[4] Theresa Tedessco, "NHL Policies Examined: Competition Bureau said to be reviewing relocation practices for hockey teams" *The National Post* (06 June 2007), online: NationalPost.com http://www.canada.com/nationalpost/news/story.html?id=2ee34bd7-d43a-4cf5-bd9c-4aa1ccdbecf7. See also, *infra* note 6.

[5] Theresa Tedesco, "Relocation Rules, policies enforceable, NHL says" *National Post* (07 June 2007) online: National Post http://www.canada.com/nationalpost/story.html?id=a4ce4ea0-22ca-4956-b388-14f9ffae22db. Note section 4.1(c) defines "home territory"

[6] National Hockey League, *Constitution of the National Hockey League*, online: TheStar.com, http://multimedia.thestar.com/acrobat/0e/bf/faddf06240c5bf8d958eb8855bec.pdf located in, Kevin McGran, "NHL spills its secrets in court" *Toronto Star* (07 June 2009), online: TheStar.com http://www.thestar.com/sports/hockey/article/646901.

[7] *Ibid.*

[8] *Supra* note 4.

[9] *Supra* note 5. This change is likely a result of the *Raiders I* decision.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Supra* note 4.

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] Competition Bureau Canada, "Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies" (31 March 2008).

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] Competition Bureau Canada, Announcement, "NHL Ownership Transfer and Relocation Policies Reviewed by Competition Bureau" (31 March 2008).

[25] *Ibid.*

[26] *Ibid.*

[27] *Supra* note 19.

[28] *Ibid.* [emphasis added]

[29] *Sherman Antitrust Act*, 15 U.S.C. § 1 (1982).

[30] Mark Adam Wesker, "Franchise Flight and the Forgotten Fan: An Analysis of the Application of Antitrust Laws to the Relocation of Professional Football Franchises" (1986) 15 Baltimore L. Rev. 567 at 568.

[31] *Sherman Antitrust Act*, 15 U.S.C. § 2 (1982).

[32] *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (1974) ["*Seals*"].

[33] Daniel B. Rubanowitz, "Who Said "There's No Place Like Home?", Franchise Relocation in Professional Sports", Casenote, (1990) 10 Loy. L.A. Ent. L.R. 163 at 185.

[34] *Ibid.*

[35] *Ibid.* at 177

[36] *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders I)*, 726 F.2d 1381 (9th Cir. 1984) (QL) ["*Raiders I*"]

[37] *Seals, supra* note 32.

[38] Myron C. Grauer, "Recognition of the National Football League as a Single Entity under Section 1 of the *Sherman Act*: Implications of the Consumer Welfare Model" (1983) 82 Mich. L. Rev. 1 at 52.

[39] *Supra* note 32.

[40] *Ibid.*

[41] *Supra* note 36.

[42] *National Football League v. North American Soccer League*, 459 U.S. 1074 (1982). ["*NASL*"]

[43] Clifford Mendelsohn, "*Fraser v. Major League Soccer*: A New Window of Opportunity for the Single-Entity Defense in Professional Sports" (Spring 2003), 10 Sports Law. J. 69 at 76-77.

[44] *Supra* note 36.

[45] *Ibid.*

[46] *Ibid.*

[47] Rule 4.3 originally required unanimous approval of all 28 NFL team representatives comprising the NFL Executive Committee to approve a team's proposed relocation into the home territory of another. This rule was modified in 1978, right before litigation to require a more reasonable, three-quarters approval.

[48] *Supra* note 36.

[49] *Ibid.* The L.A. Rams move to Anaheim, California was quickly approved by the NFL under Rule 4.3 since the city of Anaheim is located within the Rams' home territory centered in Los Angeles. The epicenter for the Rams' 75 mile radius remained Los Angeles under the move.

[50] *Ibid.* [emphasis added]

[51] *Ibid.*

[52] The court in *Raiders I* explicitly ignored the precedent from *Seals* despite the close similarities between the NHL and NFL constitutions, which is footnoted within the decision itself, and discussed as follows: the reasons in *Seals* were not "so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under s.1 of the *Sherman Act*." In addition, according to Myron C. Grauer, *supra* note 38, Grauer argues the only factual distinctions between the two cases is that the NHL Constitution precluded there being more than one team in one city, while the NFL did not. Thus, it is safe to conclude the Court simply chose to go a different direction in *Raiders I*.

[53] *Supra* note 36.

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.* Based upon the decision in *Copperweld Corp. v. Independence Tube Corp.*, 457 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d. 628 (1983), in which the Court ruled that a parent corporation and its wholly owned subsidiary can have unitary economic interests, and thus, cannot conspire to restrict trade, professional sports leagues again unsuccessfully attempted to gain single entity status, and thus, immunity from the *Sherman Act*. See: *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); *Sullivan v. N.F.L.* 34 F.3d 1091 (1st Cir. 1994); and *Chicago Professional Sports Ltd. v. N.B.A.* 95 F.3d 593 (7th Cir. 1996). Note the single entity distinction was granted to Major League Soccer in *Fraser v. Major League Soccer, LLC, 180 F.R.D. 178 (D. Mass. 1998)*. However, MLS was specifically structured from its creation to avoid antitrust liability, which makes the case inapplicable to traditionally organized sports leagues. Finally, as of June 29, 2009, the United States Supreme Court has decided to take on a case that will once again litigate whether the NFL can obtain single entity status. See: *American Needle v. National Football League*, 08-661.

[58] *Chicago Board of Trade v. United States*, 246 U.S. 321, 238, 38 S. Ct. 242, 244 (1918). See also, *supra* note 32, whereby the *Seals* court explained the rule as follows: The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

[59] *Supra* note 36.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.* The court left open the possibility of the NFL winning on the reasonableness of a rule regulating team relocation in a future antitrust suit validating the rule; unfortunately, the court did not provide a hard and fast rule for sports leagues and franchise relocation.

[68] Travis T. Tygart, "Antitrust's Impact on the National Football League and Team Relocation" (2000) 7 Sports Lawyers Journal 29 at 45.

[69] *Los Angeles Memorial Coliseum Commission v. National Football League, 791* F.2d 1356 (9th Cir. 1986), *cert denied.* 108 S. Ct. 92 (1987). [*Raiders II*]

[70] *Supra* note 33 at 170. The expansion opportunity consists of the fee the NFL would accumulate if they were to enfranchise a new team into the marketplace. For instance, according to data available online, the Jacksonville Jaguars and Carolina Panthers each paid a $140 million expansion fee in 1995, while the Houston Texans are said to have paid a staggering $700 million expansion fee in 2002 upon joining the league. This fee would have been lost if an NFL team unilaterally relocated to these cities beforehand.

[71] The judgment found the NFL liable to the Raiders for antitrust violations, which included the threat of treble damages for such actions, as well as enjoining the NFL from preventing the relocation.

[72] *Supra* note 33 at 170.

[73] Daniel S. York, "The Professional Sports Community Protection Act: Congress' Best Response to *Raiders*?", Note, (1987) 38 Hastings L.J. 345 at 351.

[74] *Ibid*. At the time of the decision, the NHL Constitution prohibited franchise relocations through a rule similar to the NFL's Rule 4.3, except any approval required a unanimous majority.

[75] *Ibid*. Considering *Raiders I*, a favourable settlement to the Saskatoon bidders was likely attained.

[76] *National Basketball Association, et al., v. SDC Basketball Club, Inc.*, 86 F.2d 562 (9th Cir. 1987) (QL).

[77] *Ibid*.

[78] *Ibid*.

[79] *Supra* note 76.

[80] *Ibid*. The Clippers likely obtained the Lakers' support through a substantial indemnity payment.

[81] *Supra* note 33 at 185. The court dealt with Article 9 as follows: "without concerted action, which is essential to a section 1 violation, non-competitive unilateral conduct, such as a franchise relocation rule, would not be a violation. The 9th circuit refused to accept the argument that the NFL, with 28 separate legal entities and no common owners, is one single enterprise. Given the rule of reason analysis and holding of *Raiders I*, the NBA had no choice but to declare void their own relocation restriction article 9."

[82] *Ibid*. at 191.

[83] Specifically, the NBA brought a primary suit for declaratory judgment that it could, as a league, consider the Clippers' move to Los Angeles, and issue sanctions to relocating teams for skipping such review. The NBA also sought damages from the Clippers on a variety of state-law claims, including breach of fiduciary duty and breach of contract. The NBA sought damages from the Coliseum for tortious interference with the contractual relations between the Clippers and the NBA. The Clippers and the Coliseum responded and counterclaimed against the NBA and individually against its member teams for declaratory judgment that consideration by the NBA of the Clippers' move would violate the antitrust laws.

[84] *Supra* note 76.

[85] *Ibid*.

[86] *Ibid*.

[87] *Ibid*.

[88] *Supra* note 33 at 191. Under 9A, relocation requires, among other things, a simple majority vote.

[89] *Supra* note 76.

[90] *Supra* note 33 at 166.

[91] *St. Louis Convention & Visitors Commission v. NFL*. 154 F. 3d. 853 (8th Cir. 1998).

[92] Angela Scafuri, "Restraint on Trade – National Football League Relocation Policies do not Create an Anticompetitive Environment", Case Comment, on *St. Louis Convention & Visitors Commission v. National Football League*, (1999) 9 Seton Hall J. Sport L. 575 at 577.

[93] *Ibid*.

[94] *Ibid*. at 578.

[95] *Ibid*.

[96] *Ibid*. The NFL once again raised the issue of single entity defence; however, this argument was quickly rebuffed by the court through the doctrine of collateral estoppel.

[97] *Supra* note 68 at 49.

[98] *Supra* note 92 at 596.

[99] To compare the relative strength of the *Competition Act* in its early days to its U.S. counterpart, the *Sherman Act*, see the forced breakup of Standard Oil Company, an established monopoly, into 33 different companies.

[100] D. Jeffrey Brown, ed., *Competition Act & Commentary*, 2007 ed. (Markham, Ontario: LexisNexis Canada Inc. 2006) at 5.

[101] *Ibid*.

[102] *Ibid* at 6-7.

[103] *Ibid*. at 7.

[104] *Ibid*.

[105] *Supra* note 19.

[106] *Ibid*.

[107] *Supra* note 2.

[108] *Ibid*. at s.45.

[109] *Supra* note 100 at 42.

[110] *Supra* note 36.

[111] *Ibid*.

[112] *Supra* note 73.

[113] *Supra* note 2. *Du jure* control is another definition used under this section.

[114] *Ibid*. The relevant portions of the section read as follows:

(2) For the purposes of this Act,

(*a*) one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person;

(*b*) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and

(3) For the purposes of this Act, a corporation is a subsidiary of another corporation if it is controlled by that other corporation.

(4) For the purposes of this Act,

(*a*) a corporation is controlled by a person other than Her Majesty if

(i) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation.

[115] *Supra* note 2.

[116] See also section 2(4) of the Act, which explains that an association of independent franchisees, such as the NHL, are not affiliates of each other or of the franchisor under the Act unless the franchisor owns voting securities entitling it to cast more than 50% of the votes of each franchisee. Nonetheless, the NHL could put forth an argument similar to that in *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276; 164 L. Ed. 2d 1; 2006 U.S. LEXIS 2023 to highlight its unique characteristics, however, that case was decided under the *Sherman Act*, and is likely inapplicable to an analysis under the Act.

[117] James Musgrove, Francois Tougas & Steve Szentesi, ed., "US Supreme Court Antitrust Cases Impact Canadian Business: The Lawful Use of Joint Ventures" *Competition & Antitrust Brief* (April 2006), 1 at 2. Musgrove also comments that Canadian practitioners have noted the Bureau may change its perspective on treatment of joint ventures and view them as single entities for antitrust purposes in the context of a merger; however, this had not yet been judicially recognized in case law.

[118] *Ibid*.

[119] *Supra* note 2. Section 45.1 reads as follows: No proceedings may be commenced under subsection 45(1) against a person whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection.

[120] *Supra* note 100 at 184.

[121] As well, NHL policies such as bylaw 36 may be too complex to render a guilty verdict under this high burden of proof. For instance, examining the bylaw, the policy appears to comply with the *Competition Act*;

however, upon examination of the substance of the bylaw, the effect appears to render the vote to approve relocation of a franchise, *subject to* the veto of the home territory team.

[122] *Supra* note 2. A careful review of Part VIII of the *Competition Act* provides evidence for this distinction.

[123] *Supra* note 100 at 213. The offence under market restriction is described in section 77(3) as follows: (3) "Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product."

[124] *Ibid*. at 91.

[125] *Ibid*.

[126] Canada, Competition Bureau, Annual Report of the Commissioner of Competition for the year ending March 31, 2002, (Ottawa: Industry Canada, 2002) at 48.

[127] *Ibid*.

[128] *Ibid*.

[129] *Supra* note 36.

[130] *Supra* note 76.

[131] *Supra* note 100 at 98. Section 78 of the Act outlines a non-exhaustive catalog of the types of practices that may be caught under section 79 of the Act. Working together, section 79 sequentially lists the potential remedies available to deter dominant firms from lessening competition in a market.

[132] *Ibid*. at 93.

[133] *Ibid*. at 372.

[134] *Ibid*. at 365.

[135] *Ibid*. at 95.

[136] *Ibid*. at 97.

[137] *Supra* note 19.

[138] *Supra* note 100 at 97.

[139] *Ibid*. at 98-99. An essential concern is the presence or absence of barriers to entry into the market.

[140] *Ibid*. at 377.

[141] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd*. [1992], 40 C.P.R. (3d) 289 (Comp. Trib.) ["*Laidlaw*"]

[142] *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd*. [1995], 64 C.P.R. (3d) 216 (Comp. Trib.) ["*Nielson*"]

[143] *Supra* note 100. Generally a sustained price increase of 5% over a given year satisfies this criterion.

[144] *Ibid*. at 378.

[145] *Ibid*. at 99. The Tribunal has described the relevant geographic market as "an area [that] is sufficiently isolated from price pressures emanating from other areas so that its unique characteristic can result in prices differing significantly for any period of time from those in other areas"

[146] *Ibid*.

[147] Qualitative factors include: buyers' and trade views, strategies and behavior, switching costs, price relationships and relative prices, and barriers to entry.

[148] *Supra* note 100 at 99.

[149] *Ibid*. at 100.

[150] *Ibid*. A real price increase of 5 percent sustained for a period of one year is often used to determine whether market power exists.

[15] Robert Cribb, "Is Hottest Ticket in Town Cooling Off?" *Toronto Star* (17 October 2009), online: http://www.thestar.com/sports/hockey/nhl/mapleleafs/article/711779--is-hottest-ticket-in-town-cooling-off.

[152] *Ibid.*

[153] *Ibid.* According to Cribb, the Toronto secondary market for tickets has seen lower bowl seats routinely sell for less than half of face value. Such activity on the secondary market may be linked to the decision of Maple Leafs Sports Entertainment to raise ticket prices in March 2009, despite the Leafs suffering through another losing season. Arguably this has as much to do with the Toronto Maple Leafs' poor showing in the latter half of 2009; however, the secondary market provides hard evidence that ticket prices in the Toronto market would be significantly lower, regardless of the standing of the team in question, if a second franchise were to enter the Greater Toronto Area.

[154] Performing a simple search on ticketmaster.com during the time of the Bureau's investigation (November 2007), the highest available single game ticket price at a Calgary Flames game is $280.00 plus applicable Ticketmaster fees; the Edmonton Oilers highest single game ticket price available at ticketmaster.com is $215.00 plus applicable Ticketmaster fees. Compare these prices to the Toronto Maple Leafs, whose highest single game ticket is $405.00 according to ticketmaster.com.

[155] In *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), and *Nielson*, the Tribunal found a *prima facie* market power, or control, with the absence of evidence that there are no barriers to entry. For our purposes, barriers to entry are clear: the NHL explicitly prohibits encroachment into another franchise's home territory. In addition, other factors are utilized by the Bureau to measure market power directly, which include market share, including share stability and distribution, and other market characteristics such as extent of excess capacity.

[156] *Supra* note 100 at 403.

[157] *Ibid.*

[158] *Ibid.* This is a caveat that could possibly deter the Bureau from viewing the market power as abuse; however, in the case of the NHL, they explicitly deter intra-group rivalry from an economic perspective.

[159] *Ibid.*

[160] *Canada (Director of Investigation and Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.). ["*NutraSweet*"]

[161] *Supra* note 100 at 100.

[162] *Ibid.* at 215.

[163] *Ibid.* at 101.

[164] *Supra* note 19.

[165] *Ibid.* [emphasis added]

[166] *Supra* note 4. Ironically, as mentioned above, these two cities were at the heart of the *Raiders I* battle.

[167] *Supra* note 33. The expansion New York Islanders paid US$4-million in 1972 to the New York Rangers; Colorado was rumoured to have paid US$35-million in 1982 in their move to New Jersey, with the Philadelphia and the two New York franchises splitting this fee; Anaheim was rumoured to have paid US$25-million over 10 years in 1993 to the Los Angeles Kings. Rumours persist that the league may request a fee of $100 million for any team wishing to relocate into Southern Ontario.

[168] *Supra* note 126.

[169] *Supra* note 73.

[170] *Supra* note 100 at 102.

[171] *Ibid.* at 103.

[172] *Ibid.* at 369. In fact, rumours persist that there are at least four groups interested in relocating hockey franchises to Southern Ontario, including Hamilton, downtown Toronto and Vaughan.

[173] David Shoalts, "Hamilton NHL ticket deposits leap past Nashville's base" *Globe and Mail* (15 June 2007) online: http://www.globesports.com/servlet/story/RTGAM.20070615.wsptpreds15/ GSStory/GlobeSportsHockey/home.

[174] Kenneth L. Shropshire, "Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based Upon Contract Strike a Balance?" (1989) 22 Loy. L.A. L. Rev. 569 at 573.

[175] *Supra* note 36.

A NOTE ON U.S. ANTITRUST LAW AND PROFESSIONAL SPORT: *AMERICAN NEEDLE* AND THE IMPLICATIONS FOR CANADIAN COMPETITION LAW

By: J. Kevin Wright and Jonathan Gilhen[1]
Davis LLP

On June 29, 2009, the U.S. Supreme Court granted *American Needle*, Inc.'s petition for certiorari to review the Seventh Circuit Court of Appeals' decision in *American Needle, Inc. v. National Football League*.[2] The decision to grant the petition follows a string of other recent high-profile U.S. cases[3] visiting the issue of antitrust and professional sport.[4]

The structure of professional sports leagues presents a unique challenge for antitrust policy: concerted conduct lies at the heart of antitrust regulation, however, without collaboration, professional sports leagues could not exist; though teams are independently owned organizations, they must cooperate if a product is to be produced at all. In *American Needle*, the Seventh Circuit Court of Appeals held that the interdependence of member teams means a professional sports league ought to be treated as a "single entity" when examining certain facets of league operations and, therefore, teams are legally incapable of conspiring contrary to antitrust law. *American Needle* is a significant departure from U.S. Supreme Court precedent holding leagues are a type of joint venture between member teams and their conduct is subject to a "rule of reason" analysis.

Pursuant to the *Competition Act*,[5] agreements relating to professional sport are governed either by the general conspiracy regime or a provision addressing specific categories of such agreements. Effective March 12, 2010, amendments to the Act will come into force that will more closely align Canada's general conspiracy regime with the framework developed by U.S. courts applying section 1 of the *Sherman Act* ("Section 1").[6] While Canadian courts are not bound by U.S. precedent, the U.S. Supreme Court's ruling in *American Needle* may influence how Canada's new conspiracy laws will apply to professional sports leagues.

The Evolution of the Single Entity Theory

In 1964, Walter Neale wrote that "the 'firm' in professional sports is indeed in a peculiar position vis-à-vis our accepted way of looking at the firm in a competitive market."[7] Like economists, U.S. courts have had difficulty characterizing sports leagues when applying antitrust laws.[8] The need for individual teams to coordinate to produce an ultimate product presents a legal "peculiarity"; while antitrust laws are circumspect regarding concerted action, cooperation in the sports context is a necessary activity if the product is to be produced at all.[9] As Grusd wrote:

Professional Sports Leagues

> Sports leagues ... present a far more complex case than the typical horizontal agreement ... unlike in most horizontal agreements where an entity can produce output without its competitors, the sports teams cannot produce games without entering into agreements with other teams.[10]

Professional sports leagues have argued the interdependence of teams means they should be viewed as a "single entity" for the purposes of Section 1, and leagues have tried this argument in relation to virtually every aspect of operations, from player restraints to broadcasting. The consequence of characterizing league members as a single entity for the purposes of Section 1 is that league activities would be effectively exempt from Section 1 since an entity cannot conspire with itself. Section 1 would, however, apply to the initial formation of the league.[11]

Alternatively, the courts have viewed sports leagues as a type of joint venture to which Section 1 applies and a rule of reason analysis is the appropriate framework. In *NCAA*, the U.S. Supreme Court held the rule of reason framework is appropriate for sports leagues because "it would be inappropriate to apply a *per se* rule ... what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." [12] Therefore, the interdependence of league members does not immunize such leagues from Section 1 scrutiny, rather such interdependence means that concerted action which otherwise might be *per se* offensive of Section 1 is properly subject to a rule of reason analysis. Interdependence should therefore constitute a factor in the rule of reason analysis but not provide a league with an antitrust exemption.

Only a few courts have accepted the single entity defence[13] while it seems most have treated professional sports leagues as subject to a rule of reason analysis.[14] The single entity defence has also been the subject of considerable academic debate.[15]

Copperweld

Copperweld[16] provided the U.S. Supreme Court with an opportunity to address the narrow issue of intra-enterprise conspiracies:[17] can a parent company and its wholly-owned subsidiary conspire with each other in a legal sense (*i.e.* for the purposes of Section 1).[18]

Chief Justice Berger reflected on the philosophical and functional difference between Section 1 and section 2 of the *Sherman Act*, which prohibits monopolization. Unilateral conduct is only prohibited where it threatens monopolization, whereas concerted action is prohibited by Section 1 if it is an "unreasonable" restraint because "[c]oncerted activity inherently is fraught with anticompetitive risk."[19] Unilateral conduct is afforded more lenient treatment because it "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[20]

The Court held that coordinated conduct between a parent and its wholly-owned subsidiary is guided by one mind: a delegation of activity rather than the coordination of previously independent actors. An agreement between a parent and a wholly-owned subsidiary cannot be said to bring together separate economic actors that were previously pursuing divergent goals. Therefore, such agreement does not "raise the antitrust dangers that 1 was designed to police" [21] nor does it "[deprive] the marketplace of the independent centers of decision making that competition assumes and demands".[22] Chief Justice Berger summarized:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for 1 scrutiny.
>
> ... a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.[23] [emphasis added]

Bulls II

In *Bulls II*, the Seventh Circuit Court of Appeals held that *Copperweld* does not stand for the proposition that only conflict-free enterprises may constitute a single entity, rather that the antitrust standard applicable to conduct in a particular circumstance should be dictated by the relative functions of Section 1 and section 2 of the *Sherman Act*, as discussed in *Copperweld*. The characterization of a professional sports league, such as the NBA, for antitrust purposes may therefore be contextual and depend on the function the league is exercising in relation to the conduct in question:

> Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld's* functional question one league at a time – and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood

as a joint venture when curtailing competition for players who have few other market opportunities.[24]

Dagher

Dagher[25] was a private action alleging the pricing policy of a joint venture (approved by federal and state antitrust regulators upon formation) *per se* contravened Section 1. The *Dagher* court held the co-venturers acted as investors, not competitors, in respect of the joint venture's output and pricing. In other words, the "pricing policy ... amounts to little more than price setting by a single entity – albeit within the context of a joint venture – and not a pricing agreement between competing entities."[26]

Dagher is arguably consistent with *Copperweld* in that once the "legitimate" joint venture is formed, there is a complete unity of interest (to the extent operations have been delegated to the joint venture) and, therefore, such activities are those of a single entity. However, the *Dagher* Court only held that the internal decisions of a legitimate joint venture should have been challenged pursuant to the rule of reason and not the *per se* rule, consistent with *NCAA*,[28] not that Section 1 should not apply – "[t]o the extent *Dagher* is relevant, it supports holding the NFL teams subject to Section 1".[29] The *Dagher* Court did not actually rule on the single entity issue (in fact, the court expressly provided it was not considering such arguments),[30] therefore the Court's use of the term "single entity" was likely "a functional description, and not a statement about the applicability of [Section 1]."[31]

American Needle

In *American Needle*, the plaintiff, American Needle Inc. ("American Needle"), brought suit against the NFL, its member teams, NFL Properties LLC ("NFLP") (collectively, the "NFL Defendants") and Reebok International Ltd. ("Reebok") alleging, *inter alia*, that an exclusive licensing agreement between NFLP and Reebok violated Section 1. NFLP was formed in 1963 for the purpose of allowing member teams to collectively license their intellectual property via NFLP. In this regard, each of the member teams authorized NFLP to grant licences to vendors who would, in turn, use the member team logos etc. to make and sell various types of products. American Needle held a licence from NFLP to make NFL headwear for over 20 years. However, in 2000, the NFL member teams authorized NFLP to solicit bids to obtain the exclusive licence to make and sell headwear, which was eventually awarded to Reebok.

The Seventh Circuit Court of Appeals adopted the reasoning in *Bulls II*, embracing the idea that, in some contexts, a professional sports league could be considered a single entity under *Copperweld* what Circuit Judge Kanne referred to as a "compartmentalization of *Copperweld*."[32]

The Seventh Circuit Court of Appeals rejected American Needle's argument that individual teams could compete against each other in the licensing of their intellectual property and, therefore, that

the exclusive licensing agreement deprived the market of sources of economic power. Holding, in reliance on *Bulls II*, that member teams need not be conflict-free to be considered a single entity, Circuit Judge Kanne reasoned:

> ... though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity.[33]

The Court went on to explain that "... NFL teams can function only as one source of economic power when collectively producing NFL Football ... [i]t thus follows that only one source of economic power controls the promotion of NFL Football."[34] However, the latter does not logically flow from the former. The first type of cooperation is necessary for the league to exist while the same cannot be said for the second. Collective licensing of intellectual property is "hardly essential for the NFL to function,"[35] therefore this restraint should be assessed in the same manner as any other potentially anticompetitive restraint – the rule of reason analysis is the well-settled framework for assessing relative competitive effects.[36]

Courts applying *Copperweld* have severely eroded the "complete unity of interest" required by the U.S. Supreme Court and have also failed to consider the other "branch" of its reasoning. *Copperweld* held that the complete unity of interest <u>and</u> no sudden joining of previously independent economic units meant that arrangements between a parent and wholly-owned subsidiary "[do] not raise the antitrust dangers that 1 was designed to police."[37] As the Court in *Raiders* observed: "[a]lthough the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel."[38]

Allowing joint ventures or other collaborations that do not have the complete unity of interest mandated by *Copperweld* to be immune from Section 1 scrutiny weakens the very foundations upon which Section 1 was enacted. As noted in *Copperweld*, the marketplace assumes and demands independent centers of decision making, and Section 1 is designed to prevent collaborations that unreasonably restrain this independence because "[c]oncerted activity inherently is fraught with anticompetitive risk."[39] Professional sports leagues and their members often have divergent interests, and the members do not always act for the benefit of the league, therefore, the anticompetitive risk identified in *Copperweld* is always present.[40] That is not to say professional sports leagues are inherently anticompetitive. Indeed many collaborations by league members are likely pro-competitive.[41] However, consumers and market participants alike should not be deprived of the ability to put league restraints to the test.

Courts in the United States have had numerous opportunities to address antitrust issues related directly and indirectly to professional sports leagues. *American Needle* is the latest in a string of cases to expand the scope of *Copperweld*.[42] However, the decision of the U.S. Supreme Court in *NCAA* is still authoritative. With the U.S. Supreme Court being invited to pronounce broadly on

the characterization of such leagues for antitrust purposes, it may be that this topic will finally take a large step toward certainty. While *American Needle* may be the impetus for clarity in the United States, the resulting policy may impact how Canada applies its own conspiracy laws, which will be substantially amended in March 2010.[43]

Canadian Competition Law – Uncharted Water

Conspiracy regulation in Canada is founded largely on the same principles as those underlying the *Sherman Act* in the United States.[44] Unlike United States antitrust statutes, the Act has both a general regime governing all conspiracies as well as a provision, section 48 ("Section 48"), that addresses specific categories of conspiracies relating to professional sport. Joint conduct between enterprises within professional leagues might also be subject to the abuse of dominance provision, set out in section 79 of the Act. Private rights of action lie only for violation of the criminal provisions (e.g. Sections 45 and 48).[45]

Section 48 – Conspiracy Relating to Professional Sport[46]

Section 48 was introduced in 1976 when the Act was amended to cover services, including professional sports. The rationale for a provision specifically addressing professional sports leagues was "to permit professional leagues to exist;"[47] if the general conspiracy provision applied to professional sports leagues, "there would be no leagues" [48] Section 48 therefore targets certain core agreements relating to professional sport, such as the employment of players and the granting and operation of franchises:

> 48(1) Every one who conspires, combines, agrees or arranges with another person
>
> *(a)* to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or
>
> *(b)* to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league
>
> is guilty of an indictable offence …
>
> […]
>
> (1) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements

> between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.[49] [emphasis added]

Courts have had few opportunities to address Section 48, and when they have considered the provision, have provided little direction.[50] Similarly, the Competition Bureau has not offered much in the way of guidance on Section 48.

At the time Section 48 came into force, the government recognized that "for some purposes, the teams of a league should be treated as a single economic unit"[51] because certain arrangements, particularly relating to the granting and operation of franchises, "are usually made for the prime purpose of ensuring that the various teams preserve a reasonable balance of competitive ability."[52] Similarly, the international nature of many professional leagues meant that some flexibility was needed to accommodate foreign antitrust regulation while not ceding jurisdiction completely.[53] To this end, when applying the reasonableness standard, courts must consider (i) whether the sport is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada, and (ii) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.[54]

Section 48 only prohibits "unreasonable" limitations, as compared to the "undue" limitation applicable to conspiracies generally. The deliberate choice of reasonableness provides leagues with some flexibility to impose restraints that might not be available because of a rigid application of the "undue" standard.[55] As such, while Section 48 creates an offence, this provision is effectively an exemption from the general conspiracy offence for restraints that are reasonable and necessary for a particular professional league to exist and function.

The term "competitor" is used in Section 48(1) when making it an offence to unreasonably limit opportunities to participate, as opposed to the use of the term "franchise" in Section 48(3) which limits the applicability of Section 48. As such, it is unclear whether agreements relating to the granting and operation of franchises "are effectively excluded from the operation of the Act"[56] or whether the reference to franchises in Section 48(3) "probably indicat[es] that franchise restraints are subject to the 'reasonable' test".[57] If Parliament intended to exclude franchise restraints from the application of the Act it should have done so explicitly, as was done for amateur sport. As such, agreements relating to the granting and operation of franchises that have the effect (but not the exclusive purpose) of unreasonably limiting participation in professional sports, per section 48(1), are likely subject to Section 48.

Section 48 is consistent with the policy set out by the U.S. Supreme Court in *NCAA*: the inherent need for collaboration renders the less flexible undueness standard otherwise applicable to ordinary competitor collaborations unsatisfactory in the professional sports context, therefore Parliament subjected certain agreements to a reasonableness standard. Section 48 should be interpreted in such a way as to capture core agreements which are necessary for the particular league to function – such as player and franchise restraints – and evaluate these restraints on the reasonableness standard. In the event the conduct does not fall within the ambit of Section 48, the general criminal conspiracy provision, the new Section 45, may be considered.

Sections 45 and 90.1 – General Conspiracy Regulation

Currently, the Act prohibits agreements or arrangements between persons if the agreement or arrangement, if put into effect, would prevent or lessen competition "unduly." However, effective March 12, 2010, the general conspiracy offence ("Section 45") will be substantially amended to effectively "Shermanize" Canada's conspiracy enforcement regime. The amended Section 45(1) will make it *per se* unlawful for "competitors" to agree to fix prices, to allocate sales, territories, customers or markets, or to control the supply of a product (among other things). A civil provision regulating anti-competitive agreements ("Section 90.1") will also be introduced into the Act, whereby the Competition Tribunal may make certain behavioural orders if the agreement or arrangement is likely to lessen or prevent competition substantially – an effects-based test akin to the rule of reason framework in the United States.[58]

Since 1976, the Act has had an exemption from the general criminal conspiracy provision for agreements between "affiliates."[59] Accordingly, a *Copperweld*-type doctrine has not emerged. The new Section 45 will continue to have an exception for agreements and arrangements entered into only by parties that are affiliates of each another.[60]

An offence under the new Section 45 is only committed where the persons are "competitors". The Competition Bureau takes the position that persons must be actual or potential "competitors" with respect to the products that are the subject of the agreement, and must be "offering, or, in the absence of the agreement, would likely offer, the same or otherwise competing products in the same or otherwise competing regions."[61] Similarly, Section 90.1 also applies to agreements between competitors. For those agreements or arrangements that do not fall within the ambit of Section 48, for example agreements related to intellectual property (as in *American Needle*) and game broadcasting, an important issue to consider is whether the interdependence of members of a professional sports league make them incapable of being "competitors", and therefore immune from scrutiny under Section 45 or 90.1. To be sure, the existence of Section 48 precludes any notion that the Act should not apply to a league ultimately found to be a single entity, either generally or in respect of a particular facet of operations, however the application of Section 45 or 90.1 is not so settled. If a league is not found to be a single entity, the interdependence of member teams may simply mean that Section 90.1 is a more appropriate mechanism to regulate professional sports leagues than Section 45.

It is in the assessment of these issues that the U.S. Supreme Court's ultimate decision in *American Needle* may influence Canadian competition law. If members of a professional sports league could successfully argue they are a single entity per *American Needle*, then it may be that they are not competitors within the meaning of such term in the new conspiracy provisions.[62] For professional sports leagues, such a proposition is indeed inviting.

Although the Competition Bureau previously chose to assess the NHL under the abuse of dominance provision of the Act, on the limited issue of conspiracy regulation it appears the Bureau's position is that Section 90.1 would apply to professional sports leagues: Section 45 applies to "'naked restraints' on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture),"[63] a position consistent with the U.S. Supreme Court's position in *NCAA*.

Unfortunately, in Canada, a private litigant only has a right of action pursuant to Section 45 or Section 48, as the Commissioner of Competition has exclusive authority to bring applications to the Competition Tribunal under the civil regime. Therefore, in the context of private actions, the issues stated above take on added significance.[64] Assuming the Competition Bureau's interpretation of the expression "competitor" is correct, Canadian courts may narrow the scope of the collaboration to a particular "product", effectively engaging in a "compartmentalization of *Copperweld*" as was done in *American Needle* – analyzing a league one facet at a time (per *Bulls II*). In doing so, the Court can focus its inquiry to the subject matter of the collaboration and determine whether the particular circumstances warrant application of the *per se* rule, rather than brushing any such notion aside because of the general interdependence of professional sports teams.

In applying new Section 45(1), a Court would have to consider the application of a statutory exception for restraints that are ancillary and reasonably necessary to give effect to a broader and otherwise legitimate agreement.[65] With some force, the leagues would likely argue that the creation and operation of the league itself is legitimate and that the restrictions on pricing, markets or output are ancillary and not criminally blameworthy, if at all (though such a finding would not preclude the Competition Bureau from pursuing the matter under Section 90.1).

Section 79 - Abuse of Dominance

The Competition Bureau could elect to pursue an arrangement by professional sports league members under the abuse of dominance provision of the Act. Generally, abuse of dominance concerns anti-competitive practices: acts which are exclusionary, disciplinary or predatory towards a competitor resulting in a substantial lessening or prevention of competition.[66]

Similar to section 2 of the *Sherman Act* in the United States, the abuse of dominance provision would be the primary alternative in the event members of professional sports leagues were held to be acting as a single entity: dominance is the Canadian counterpart to monopolization.

Dominance is predicated on significant market power in the relevant market, which may be held by one person or jointly by two or more persons.

To be jointly dominant, firms need not have a formal agreement or arrangement; the test is not so restrictive.[67] Professional sports teams strongly argue their interdependence is so significant it makes them a single entity: therefore, it would be difficult for them to argue against joint dominance.

The Competition Bureau had an opportunity to signal its view of professional sports leagues when it reviewed the NHL's franchise ownership transfer and relocation policies under the abuse of dominance provision of the Act. The Competition Bureau investigation arose in the context of a failed proposal to acquire and relocate the NHL's Nashville Predators in 2008.[68] Unfortunately, in its published Backgrounder, the Competition Bureau did not delve into the element of "dominance" (i.e. if it had proceeded on a theory of unilateral versus joint dominance). Instead, the Bureau addressed whether the NHL's policies constituted an "anti-competitive practice." The Bureau also did not articulate why Section 48 or the general conspiracy provision did not apply to the NHL's policies that were the subject of the Bureau's investigation.

The Competition Bureau's failure to address explicitly the issue of "dominance" mitigates the usefulness of the Backgrounder as regulatory precedent. Implicitly, the Bureau must have assumed the league's structure could otherwise support a finding of abuse of dominance. However, an important question remains: why did the Bureau not address the possible application of the one provision of the Act dealing specifically with professional sports? Speculating on the Bureau's motives for making particular enforcement decisions or imputing to the Bureau any particular position on policy as a result of such decisions should only be done with caution: the Bureau may have had any number of practical or other reasons to investigate the NHL under the abuse of dominance provision. In light of the amendments to the Act about to come into force, perhaps the more intriguing question is whether the Bureau would have taken a different approach investigating the NHL's policies if it had had the benefit of the new civil provision regulating anti-competitive agreements (Section 90.1).

Concluding Remarks

American Needle may yet influence the treatment of professional sports leagues under the new Canadian conspiracy laws. Specifically, *American Needle* may answer the question of whether the conspiring parties are "competitors" with respect to a product; if they are not competitors, there is no offence under the new Section 45 Further, the general statements of antitrust policy that will presumptively flow from the U.S. Supreme Court's decision may inform how Canadian authorities apply the new conspiracy laws as well as assist Canadian courts in the event they are faced with private actions.

Canadian and U.S. conspiracy regulation are both designed to protect the many benefits competition bestows on the public, including lower prices or greater value, enhanced consumer choice, innovation and, most importantly, efficiency creation and improvement. With Canada substantively moving toward U.S. antitrust treatment of conspiracies, Canadian courts and competition enforcement agencies may be inclined to follow the principles expected to be set down by the U.S. Supreme Court in *American Needle*. However, if the Seventh Circuit Court of Appeals' decision in *American Needle* is upheld, Canadian courts should hesitate to apply those principles and instead interpret Canada's competition laws in a manner consistent with their purpose. Section 45, through the ancillary restraints defence, and Section 48, through the reasonableness standard, provide adequate safeguards against any chilling effect on pro-competitive conduct engaged in by members of a professional sports league. Such an approach allows for a balancing of competitive effects, thereby reinforcing the traditional efficiency-focused purpose of Canada's competition law and policy. If broad-based exemptions to the Act are to be created for professional sports leagues, such exemptions should remain at the discretion of Parliament (as was provided for amateur sports).

Notes

[1] J. Kevin Wright is Chair of Davis LLP's Competition and Antitrust Law Practice Group. Jonathan Gilhen is an Associate in Davis LLP's Competition and Antitrust Law Practice Group. The authors wish to thank Stephen F. Ross (Professor, Pennsylvania State University) and Richard Elliott (Partner, Davies Ward Phillips & Vineberg LLP) for providing comments on an earlier draft of this article. The authors also wish to acknowledge Macauley Deck (Articled Student), Tijana Gavric (Summer Articled Student) and the Davis LLP library staff for their assistance.

[2] 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3326 (U.S. June 29, 2009) (No. 08-661) [*American Needle*].

[3] See, for example, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (arguing MLB's collective licensing scheme violates antitrust laws), and *Madison Square Garden, L.P. v. National Hockey League*, 270 Fed. Appx. 56 (2d Cir. 2008) (antitrust challenge to NHL's policy on internet and website operations). In addition, Coyotes Hockey, L.L.C. sought an injunction against the National Hockey League from enforcing its transfer and relocation terms, all in connection with the Chapter 11 proceedings. See *In re* Dewey Ranch Hockey, LLC., No. 2:09-bk-09488-RTBP, 414 B.R. 577 (Bankr. D. Ariz. Sept. 30, 2009).

[4] For the purposes of this paper, the "major" professional sports leagues are the National Hockey League ("NHL"), the National Football League ("NFL"), the National Basketball Association ("NBA") and Major League Baseball ("MLB"). Major League Soccer ("MLS"), another professional sports league, was structured in such a way as to, *inter alia*, avoid the antitrust problems other professional sports leagues had encountered (see Robert M. Bernhard, "Comment: MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defence?" (2008) 18 Marquette Sports Law Review 413; see also Michael P. Waxman, "Fraser v. MLS, L.L.C.: Is There a Sham Exception to the *Copperweld* Single Entity Immunity?" (2001-2002) 12 Marquette Sports Law Review 487), though the First Circuit Court did express some concern as to whether MLS could truly be a single entity (see *Fraser v. Major League Soccer L.L.C.*, 97 F. Supp. 2d 130 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002); see also Bernhard, *supra*).

[5] *Competition Act*, R.S.C. 1985, c. C-34.

[6] 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ..."). Section 2 of the *Sherman Act* (monopolization) is beyond the scope of this paper, however most advocates of single

entity treatment concede that section 2 would apply to a league that is found immune from section 1 scrutiny on the basis that they are a single entity. The characterization of a professional sports league as a "natural monopoly" has been debated by a number of commentators (see, for example, Neale, *infra* note 7; Stephen F. Ross, "Monopoly Sports Leagues" (1995) 73 Minnesota Law Review 643; and Robert C. Heintel, "The Need for an Alternative to Antitrust Regulation of the National Football League" (1996) 46 Case Western Reserve Law Review 1033). Section 2 of the *Sherman Act* does not condemn a fairly acquired natural monopoly. See *Union Leader Corporation v. Newspapers of New England Inc.*, 284 F.2d 582 (1st Cir. 1960) ("... a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred." [citations omitted]).

[7] Walter C. Neale, "The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition" (1964) 78(1) The Quarterly Journal of Economics 1.

[8] MLB has a judicial exemption from antitrust laws stemming from the U.S. Supreme Court's decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), holding that professional baseball did not involve interstate commerce. The scope of MLB's exemption was limited by the *Curt Flood Act of 1998*, 15 U.S.C. §26b (2004) such that it no longer applies to labour relations. The U.S. Congress has also intervened in the area of antitrust and professional sport (see, for example, the *Sports Broadcasting Act*, 15 U.S.C. §§ 1291-1295 (1982), exempting agreements between professional sports leagues and broadcasting enterprises for telecasting and broadcasting games from antitrust review, and the *Football Merger Act of 1966*, Pub. L. No. 89-800, 80 Stat. 1508 (1966), approving the merger of the National Football League and the American Football League).

[9] "[T]he marketing of contests between competing clubs 'would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed' ... 'horizontal restraints on competition are essential if the product is to be available at all.'" See Stephen F. Ross & Stefan Szymanski, "The Law & Economics of Optimal Sports League Design" (2003) Illinois Public Law and Legal Theory Research Papers Series - Working Paper No. 03-14 at 4, citing *National Collegiate Athletics Association v. Board of Regents*, 468 U.S. 85, 101 (1984) [*NCAA*].

[10] Brandon L. Grusd, "The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements" (1999) 1 Virginia Journal of Sports and Law 1 at 24 [citations omitted]. See, however, Stephen F. Ross & Stefan Szymanski, *Fans of the World, Unite! A (Capitalist) Manifesto for Sports Consumers* (Stanford, Ca.: Stanford University Press, 2008) arguing leagues could be vertically organized in a manner similar to the National Association for Stock Car Auto Racing (NASCAR), with a for-profit independent competition organizer that contracts with teams and venues to put on sporting events.

[11] See *Copperweld*, *infra* note 16 at 777 ("A corporation's initial acquisition of control will always be subject to scrutiny under 1 of the *Sherman Act* ..."); see also *Dagher*, *infra* note 25 at n. 2 ("Had respondents challenged [the joint venture] itself, they would have been required to show that its creation was anticompetitive under the rule of reason.").

[12] *NCAA*, *supra* note 9 at paras. 100 - 101.

[13] See, for example, *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 at 969 - 970 (C.D. Cal. 1974) [*San Francisco Seals*] ("[teams] are not competitors in the economic sense in this relevant market. They are, in fact, all members of a single unit competing as such with other similar professional leagues"). The U.S. District Court Central District of California defined the relevant market as "... the production of professional hockey games before live audiences [in] the United States and Canada." See *San Francisco Seals* at 969. See also *American Needle*, *supra* note 2.

[14] See, for example, *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d. 1381 at para. 34 (9th Cir. 1984) [*Raiders*] ("[the NFL is] an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under Sec. 1 of the *Sherman Act*"). Note, however, the dissent of Judge Spencer Williams: "What these courts have recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's 'downstream output'. In the case of the member clubs, this 'downstream output' is professional

football, and the organ of regulation is ... the N.F.L.. There is virtually no practical distinction between the League ... and the member clubs; the N.F.L. represents to all clubs ... the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product." See *Raiders* at 137. See also *St. Louis Convention & Visitors Commission v. National Football League*, 154 F.3d 851 (8th Cir. 1998); *Chicago Professional Sports L.P. v. National Basketball Association*, 874 F. Supp. 844 (N.D. Illl.l. 1995), *vacated by*, 95 F.3d 593 (7th Cir. 1996) [*Bulls II*]; *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995); *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), *aff'd*, 887 F.2d (2d Cir. N.Y. 1989); *NCAA*, *supra* note 9; *North American Soccer League v. National Football League*, 670 F.2d 1249 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982) [*NASL*]; *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

[15] See, for example, James T. McKeown, "2008 Antitrust Developments in Professional Sports: To The Single Entity and Beyond" (2009) 10 Marquette Sports Law Review 363; Bernhard, *supra* note 4; Marc Edelman, "Why the 'Single Entity' Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports" (2008) 18(4) Fordham Intellectual Property, Media & Entertainment Law Journal 891; Thomas A. Piraino, Jr., "The Antitrust Analysis of Joint Ventures after the Supreme Court's Dagher Decision" (2008) 57(4) Emory Law Journal 735; Waxman, *supra* note 4; Grusd, *supra* note 10; Kenneth Lehn & Michael Sykuta, "Antitrust and Franchise Relocation in Professional Sports: An Economic Analysis of the Raiders Case" (1997) 42 Antitrust Bulletin 541; Michael S. Jacobs, "Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo" (1991) 67 Indiana Law Journal 25; Lee Goldman, "Sports, Antitrust and the Single Entity Theory" (1989) 63 Tulane Law Review 751; Gary R. Roberts, "The Single Entity Status of Sports Leagues Under Section 1 of the *Sherman Act*: An Alternative View" (1987) 60 Tulane Law Review 562; Thane N. Rosenbaum, "The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era" (1987) 41 University of Miami Law Review 729; Gary R. Roberts, "Sports Leagues and the *Sherman Act*: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry" (1984) 32 UCLA Law Review 219; John C. Weistart, "League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry" (1984) 6 Duke Law Journal 1013; Myron C. Grauer, "Recognition of the National Football League as a Single Entity Under Section 1 of the *Sherman Act*: Implications of the Consumer Welfare Model" (1983) 82 Michigan Law Review 1.

[16] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) [*Copperweld*]. *Copperweld* is popularly cited as the legal foundation for modern single entity arguments.

[17] *See ibid.* at 767 ("We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly-owned subsidiary are capable of conspiring in violation of section 1 of the *Sherman Act*. We do not consider under what circumstances, if any, a parent may be liable or conspiring with an affiliated corporation it does not completely own.").

[18] The U.S. Supreme Court was considering the so-called "intra-enterprise conspiracy doctrine" purportedly arising in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) (see also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)).

[19] *Copperweld*, *supra* note 16 at 768 - 769.

[20] *Ibid.* at 768.

[21] *Ibid.* at 769.

[22] *Ibid.* at 769.

[23] *Ibid.* at 771 772.

[24] *Bulls II*, *supra* note 14 at 600.

[25] *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) [*Dagher*].

[26] *Ibid.* at para. 4. Justice Thomas also pointed out that the approval of the joint venture by federal and state regulators required some divestments and modifications, but did not place restrictions on pricing. See *ibid.* at para. 2.

[27] See *Copperweld*, *supra* note 16 at 777 ("That [antitrust] statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court

would today be different in the absence of an intra-enterprise doctrine."). See also, for example, Piraino Jr., *supra* note 15 at 781.

[28] See *Dagher*, *supra* note 25 at 4 ("If [the joint venture's] price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful."). *Dagher* also cited *NCAA* with approval.

[29] *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3326 (U.S. June 29, 2009) (No. 08-661) (Brief for National Football League Players Association et al. as amici curiae in support of Petitioner at 27).

[30] See *Dagher*, *supra* note 25 at n. 2.

[31] *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3326 (U.S. June 29, 2009) (No. 08-661) (Brief for American Antitrust Institute and Consumer Federation of America as amici curiae in support of Petitioner at 14) [AAI Brief].

[32] *American Needle*, *supra* note 2 at 742.

[33] *Ibid.* at 743.

[34] *Ibid.*

[35] AAI Brief, *supra* note 31 at 20.

[36] See *ibid.* at 17 ("The analytical framework for assessing otherwise anticompetitive constraints that are related to an efficiency-enhancing integration is well-settled: where the restraint is necessary to achieve the pro-competitive benefits of the integration, the restraint is analyzed under the rule of reason. In contrast, when a facially anticompetitive restraint by a joint venture is not necessary to achieve the pro-competitive benefits of the integration, it is treated more harshly.").

[37] *Copperweld*, *supra* note 16 at 769.

[38] *Raiders*, *supra* note 14 at para. 33.

[39] *Copperweld*, *supra* note 16 at 768 - 769.

[40] For example, franchise location decisions often put the best interests of the league at conflict with territorial restrictions provided to member teams. See, for example, Ross & Szymanski, *supra* note 10 at 8 - 9, discussing the problems the Montreal Expos had relocating to Washington, D.C. over the objections of the Baltimore Orioles, as well as Al Davis' difficulties relocating the Oakland Raiders to Los Angeles.

[41] A number of *amici* briefs filed with the U.S. Supreme Court argued the pro-competitive effects of such collaborations, including in the marketing of intellectual property. However, the fact an arrangement may have pro-competitive elements does not justify eliminating rule of reason scrutiny – if anything, it supports the application of the rule of reason principles. See *Leegin Creative Leather Products Inc. v. PSKS, Inc.*, 551 U.S. 877 at 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of §1.").

[42] *Copperweld* has also been considered in the non-sports context. See, for example, *Jack Russell Terrier Network of Northern California v. American Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005); *City of Mount Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988). See also *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133 at paras. 32 - 34 (9th Cir. 2003) (establishing three "guidelines" for single entity analysis).

[43] Courts and the Competition Tribunal have often considered United States antitrust law and policy when ruling on Canadian competition matters (though not always accepting the U.S. position). See, for example, *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417 (Comp. Trib.), aff'd (2003), 23 C.P.R. (4th) 316 (F.C.A.) (discussing the differences between U.S. and Canadian treatment of efficiencies in merger review); *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (Ont. S.C.) (rejecting reliance on U.S. Supreme Court precedent as U.S. antitrust policy may differ from the values underlying Canadian competition laws); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*NSPS*] (comparing the general conspiracy provision of the Act to section 1 of the *Sherman Act*).

[44] *NSPS*, *ibid.* at 649-650 ("... prohibition of conspiracies in restraint of trade is the epitome of competition law ... [c]ompetition is presumed by the Act to be in the public benefit. The only issue is whether the agreement

impairs competition to the extent that it will attract liability.").

[45] Section 36 of the Act gives private parties who have suffered loss or damage due to a violation of the criminal provisions in Part VI the right to bring a civil action against the wrongdoers. This is in addition to possible prosecutions.

[46] Section 6 of the Act excludes amateur sports, defined as sports where participants receive no remuneration, from the application of the Act. In Canada, the highly successful junior hockey leagues, considered amateur leagues for most purposes, are likely not amateur sports for the purposes of the Act. See, for example, Ouellet Testimony, *infra* note 47 at 18 ("It is quite clear that the Junior A, which call themselves amateurs, according to this legislation are not amateurs ... they are so organized that even if they call themselves amateurs, they are not amateurs, they are professionals ... they are treated as professionals."). See also *Sheddon v. Ontario Major Junior Hockey League* (1978), 19 O.R. (2d) 1 (Ont. H.C.J.).

[47] "The only thing that this legislation does ... is to make sure that we are not ... preventing professional sports taking place in Canada. Everyone would object to it if, because [the Act] includes services in Canada it would no longer be possible for Montreal or Toronto teams to assemble a group of players into a team playing in a league and make arrangements or regulations for the playing of hockey, football or other sports. Therefore, section [48] allows for some agreements or arrangements to take place to permit professional leagues to exist, and that is all it does [emphasis added]." See *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, Issue No. 61 (19 November 1975) at 19 (Hon. André Ouellet, Minister of Consumer and Corporate Affairs) [Ouellet Testimony].

[48] *Ibid*. At that time, and until March 12, 2010, the essence of the test for criminal conspiracy under the Act is whether the agreement or arrangement, if put into effect, would prevent or lessen competition unduly.

[49] *Competition Act, supra* note 5, ss. 48(1), (3).

[50] See, for example, *Reed v. Canadian Football League* (1988), 62 Alta. L.R. (2d) 347 (Alta Q.B.) (whether or not certain limitations imposed on a professional football player are reasonable limitations *per* section 48 is a serious issue that will have to be tried); *Yashin v. National Hockey League* (2000), 192 D.L.R. (4th) 747 (Ont. S.C.) (s. 48 cannot be used to set aside a collectively bargained agreement).

[51] Department of Consumer and Corporate Affairs, *Background Documentation: Sports* (Ottawa: Department of Consumer and Corporate Affairs, November 13, 1973) at 2.

[52] *Ibid*.

[53] See, for example, John Barnes, "Competition Law and Labour Law" in *Sports and the Law in Canada* (Markham: Butterworths Canada, 1996) at 132 - 133.

[54] *Competition Act, supra* note 5, s. 48(2).

[55] See Ouellet Testimony, *supra* note 47 at 19 ("If you do not have section [48] it means that the very fact that the officials of the leagues get together to limit the movement of players, or the agreements concerning teams, is an offence under [the Act]".). See also Stephen F. Ross, "The NHL Labour Dispute and the Common Law, the Competition Act, and Public Policy" (2004) 37(2) U.B.C. Law Review 343 at 372 - 373 ("courts have interpreted the phrase 'unduly' to permit almost any restraint agreed to by firms facing substantial outside competition, while refusing to consider any justifications at all concerning agreements that restrain trade in virtually the entire market ... the statutory standard of 'unreasonableness' is judicially interpreted to permit consideration of goals deemed essential to the vitality and survival of professional sports leagues.").

[56] Bruce Dunlop, Davis McQueen & Michael Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book Inc., 1987) at 149.

[57] Barnes, *supra* note 53 at 132.

[58] With Section 90.1 about to come into force, Section 48(3) should be amended to permit scrutiny under Section 90.1. The premise of that Section 48(3) is that either Sections 48(1) or 45 will regulate conspiracies involving members of professional sports leagues, when in fact, the most appropriate conspiracy provision may be Section 90.1.

[59] *Competition Act, supra* note 5, s. 45(8).

[60] S.C. 2009, c. 2, s. 410.

[61] Competition Bureau, Canada, *Competitor Collaboration Guidelines* (Ottawa: Competition Bureau,

Canada, 2009) at 11 12 [Collaboration Guidelines]. Under the current conspiracy provision, the parties to the agreement need not be competitors, however they must have some degree of market power to be able to act independently of the market. See *NSPS, supra* note 43.

[62] "Competitor" is not defined in the Act, though the new provision will clarify that persons not competing as a result of the conspiracy are competitors for the purposes of the conspiracy provision. As such, and consistent with the Collaboration Guidelines, league members that do not compete because of league territorial restrictions may still be considered competitors or potential competitors.

[63] Collaboration Guidelines, *supra* note 61 at 9.

[64] There is also a potential gap in relation to combinations. A combination between competitors that has been approved by the Competition Bureau may still be a *per se* violation of Section 45 and therefore potentially subject to a private action. In this instance, the exception for ancillary restraints should be applied in a more flexible manner.

[65] In his dissent in *NASL*, Justice Rehnquist considered the NFL's ban on cross-ownership to be a legitimate ancillary restraint, being ancillary to the joint venture (the league), however the reasons were based largely on principles typically argued in favour of single entity treatment for a league. In assessing ancillary restraints, antitrust laws only impose a reasonableness standard, not a standard of absolute necessity one may find in constitutional law. As such, the "ancillary" restraint need not be the least restrictive to survive antitrust scrutiny, but must be reasonable. See dissent of Justice Rehnquist, *NASL, supra* note 14 at 1077 - 1080.

[66] The analytical structure of Section 48 bears some similarity to the abuse of dominance provision, as both may be directed at unreasonable behaviour towards actual or potential competitors.

[67] The Competition Bureau recently issued draft guidelines on the abuse of dominance signaling joint dominance could be established where firms are engaging in similar anti-competitive practices, sometimes referred to as "conscious parallelism" See *Updated Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (January 2009) [Draft for Public Consultation], online: Competition Bureau, Canada http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html.

[68] See *Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies* (March 31, 2008), online: Competition Bureau, Canada http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html ("Backgrounder"). The Bureau has also examined particular incidents involving the Canadian Football League.