The Competition Bureau's 2008 Investigation of the NHL Franchise Relocation Policies: How the Bureau Got it Wrong

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I: 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. Recently, Canadian billionaire Jim Balsillie engaged in a failed attempt to purchase the Nashville Predators hockey club and relocate the franchise to Hamilton, Ontario.[1] 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 Canadian antitrust watchdog, the Competition Bureau (the "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] (the "Act"); however, it appears the decision over-looked important considerations, such as the deterrent effect indemnity payments have upon relocating 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

[1] Currently, Jim Balsillie is attempting to purchase the Phoenix Coyotes franchise for US$212.5 million out of bankruptcy proceedings in Arizona. As of June 25, 2009, Balsillie has failed in his attempt to secure the Phoenix franchise and the court is attempting to field offers form other interested buyers, including Chicago Bulls and Chicago White Sox owner Jerry Reinsdorf. Nonetheless, this paper will focus on the *Competition Act* ramifications from Balsillie's failed bid to purchase the Nashville Predators. To view the failed Phoenix bid, please see Chapter 11 proceeding: *Dewey Ranch Hockey, LLC* 2:09-bk-09488-RTBP, June 15, 2009.

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

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 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 from waiving their veto rights, which causes indemnity fees to become penalties exacted from 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 relocating franchises will be liable to pay the NHL for the expansion opportunity it has taken in relocating its franchise, a fee first outlined in American antitrust case law, and 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. It is now apt to review the applicable provisions of the NHL Constitution.

II: 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 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. No member shall transfer its club and franchise to a different city or borough. 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]

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[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>.

It appears 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. No franchise shall be granted for a home territory within the home territory of a member, without the written consent of such member.[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

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[7] *Ibid*.
[8] *Supra* note 4.
[9] *Supra* note 5. This change is likely a result of the *Raiders I* decision.
[10] *Ibid*.

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]

III: THE BALSILLIE DECISION

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

[11] *Ibid*.
[12] *Ibid*.
[13] *Supra* note 4.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.

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 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 brought before 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

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[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*.

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:

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

> 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 policy as being part of the unique fabric of the professional sports industry. Utilizing the uniqueness of the professional sports league has allowed the Bureau the leniency in departing 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

[27] *Supra* note 19.

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. Such action 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 return again to examine the Act.

[28] *Ibid*. [Emphasis Added]

IV: ANTI TRUST 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 of analysis to a professional sports league due to its unique organizational characteristics, leaving one court to comment, it is difficult to analyze the "negative and positive effects of a business practice in an industry which does

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[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*.

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 the impact of the restraint on competition is.

The courts outlined their initial approach in *San Francisco Seals Ltd. v. NHL*.[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]

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[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*.

Consequently, the court found the NHL was in fact a single entity incapable of conspiring with itself, immunizing it from s.1 of the *Sherman Act*; as well, the court held 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*[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

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[41] Gordon I. Kirke, *Coursepack: Sports Law: Entertainment and Sports Law: Volume 1* (Faculty of Law, Osgoode Hall Law School, 2006) at 8-89.
[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] *Supra* note 41 at 8-83.
[46] *Ibid*.

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

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[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 41 at 8-83.
[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.* at 8-84.
[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*.

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*

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[53] *Supra* note 41 at 8-87.
[54] *Ibid.* at 8-88.
[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.

Board of Trade v. United States.[58] The court added 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 an agreement among two or more persons or distinct business entities; which is intended to harm or unreasonably restrain competition; and 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 it's 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] Regardless, 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

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[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 41 at 8-90.
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.* at 8-91.
[63] *Ibid*. at 8-94.

to the detriment of the consuming public."[64] The court felt the regulation of private profit 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 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 "precompetitive 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

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[64] *Ibid*. at 8-95.
[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).
[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.

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

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[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).

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, attaining 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] Relying upon *Raiders I*, the NBA subsequently scheduled the upcoming Clippers' home games in L.A.[80]

In the consequent 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] and 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]

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[77] *Ibid*.
[78] *Ibid*.
[79] *Supra* note 76.
[80] *Ibid*. The Clippers likely obtained the Laker's 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.

The court in *Clippers I* recognized this case consisted of different factual settings than *Raiders I*. In *Clippers I*, the NBA did not forbid the move to Los Angeles, but rather, sought the authority to overview 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*, they were 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

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[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*.

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 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]

V: 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

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[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. counterparty, the *Sherman Act*, see the forced breakup of the monopoly, Standard Oil Company, into 33 different companies.
[100] D. Jeffrey Brown, ed., *Competition Act & Commentary*, 2007 ed. (Markham, Ontario: LexisNexis Canada Inc. 2006) at 5.

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.

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. As in the investigation of the NHL relocation policies, where there is a new or novel issue in Canadian competition law, 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

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[101] *Ibid.*
[102] *Ibid* at 6-7.
[103] *Ibid*. at 7.

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]

Although the Bureau previously 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, which involves the criminal conspiracy provision dealt with under s.45 of the Act; the market restriction provisions outlined in ss.77 (3) of the Act; and once again, abuse of dominance provisions outlined in ss. 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:

> **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,

[104] *Ibid*.
[105] *Supra* note 19.
[106] *Ibid*.
[107] *Supra* note 2.

> (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 is 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

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[108] *Ibid*. at s.45.
[109] *Supra* note 100 at 42.
[110] *Ibid*. at 8-95.
[111] *Ibid*.
[112] *Supra* note 73.

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 outlines a specific statutory exemption of agreements between *affiliates* from liability for the conduct outlined in s.45 (1). 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 gain affiliate status, the league would have to

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[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

illustrate that a single entity is controlling the various franchises of the league. 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, considering affiliate status has not previously been requested by a professional sports league in Canada, the Bureau may look to the US precedent to fill in any *factual* gaps left behind by its statute, and the existing, but limited case law.

Section 2(4) of the Act 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.[115] 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

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(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] *Ibid*. 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.

competition.[116] 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.[117] The NHL could also put forth an argument that its business must be separated into distinct realms that carry the unity of interest necessary to elicit the control provisions in s.2(3) of the Act. Thus, for some areas of operation, the NHL would argue the degree of control the league implements over the franchises are sufficient to be caught by s.2(3), which states, "For the purposes of this Act, a corporation is a subsidiary of another corporation if it is controlled by that other corporation."[118] However, 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.

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 s.79, the abuse of dominance provisions.[120] Accordingly, a company cannot be simultaneously prosecuted under s.45 and have their conduct reviewed under s.79 when it is the same conduct at issue. As explored above, the Bureau may have a difficult time in proving, *beyond a reasonable doubt*, that criminal provisions within the Act were violated, which is likely why the Bureau chose to proceed under the civil provisions within the Balsillie Investigation.[121]

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[116] 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 has not yet been judicially recognized in case law.
[117] *Ibid*.
[118] *Supra* note 2.
[119] *Ibid*. Section 45.1 reads as follows: No proceedings may be commenced under subsection 45(1) against a person against 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*;

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

Part VIII of the *Competition Act* concern reviewable matters of a civil nature, including that of dominant firms. Within these provisions, the Bureau generally addresses unilateral conduct, as a result, whether companies are affiliated with each other, an important criterion for the criminal provisions, is mostly a non-issue.[122] As mentioned above, due to the novelty of the investigation, 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*, ss. 77(3) and sections 78-79.

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

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 a subsequent investigation of NHL relocation policies, "home territory" provisions and restrictions on relocating a franchise may be a violation

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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*.

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 the NHL in substance, provides a veto for 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 within 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

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[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*.

is no effective substitutive competition from outside professional leagues to fill any void within a market. Having 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

[129] *Supra* note 41 at 8-95.
[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.

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 the abilities of 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

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[134] *Ibid*. at 365.
[135] *Ibid*. at 95.
[136] *Ibid*. at 97.
[137] *Supra* note 19.
[138] *Supra* note 100 at 97.

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

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[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.

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 s.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 franchise in the game largely due in part to the loyalty and prosperity of their home territory. A quick review of ticket prices in Alberta, where the Calgary Flames and Edmonton Oilers franchises compete for business demonstrates how markets are affected when two teams in close proximity compete against each other.[151] 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.[152]

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[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.
[151] 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.
[152] 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 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*").[153] Analyzing allegations of joint firms, 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.[154] In addition, where sufficient barriers to entry into a group are coupled with the plausibility of organized activity, the prospect of intra-group rivalry may dissuade the Tribunal from concluding the group of firms profitably coordinates.[155] 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 designation. In addition, the NHL explicitly creates barriers to entry into the relevant market to inhibit intra-group rivalry, which due to the fact the NHL is the exclusive provider of world-class professional ice hockey, leaves the consumer powerless to offset such abuse.[156]

The second step in the analysis is aimed at detecting "*Such person or persons having 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".

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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.

[153] *Supra* note 100 at 403.

[154] *Ibid*.

[155] *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.

[156] *Ibid*.

According to *Canada v. NutraSweet Co.*[157] 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."[158] 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. Consequently, a professional sports league relocation restriction policy will not be explicitly listed under section 78; however, under s.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."[159] As a result, the Tribunal could view subsection 78(h) as analogous to the NHL franchise relocation restrictions, 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.[160] Although it appears the NHL forces its franchises to offer its product (professional hockey) to certain customers (the population within its home territory) with the object of preventing other franchise 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 able to show 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.[161]

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[157] *Canada (Director of Investigation and Research) v. NutraSweet Co.* [1990], 32 C.P.R. (3d) 1 (Comp. Trib.). ["*NutraSweet*"]
[158] *Supra* note 100 at 100.
[159] *Ibid*. at 215.
[160] *Ibid*. at 101.
[161] *Supra* note 19.

Nonetheless, in spite of the NHL's perceived intentions, it is clear that such policies have been used as an exclusionary or disciplinary purpose as it pertains 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.[162]

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

[162] *Ibid*. [Emphasis Added]

indemnity fee in 1993 by the expansion Anaheim Mighty Ducks franchise for that team moving into the Kings' protected home territory.[163] 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 $US100 million.[164] 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 subscribed fee; a situation that may never unfold.

Any fee may be described as a penalty under the definition of Market Restriction listed within s. 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."[165] 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 serves 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

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[163] *Supra* note 4. Ironically, as mentioned above, these two cities were at the heart of the *Raiders I* battle.
[164] *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.
[165] *Supra* note 126.

profitable market.[166] 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 is 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 Decision, 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 *on top of* 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.

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[166] *Supra* note 73.

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 a result of the Bureau concluding section 79(1) (b) was not violated, the abuse analysis was discontinued at this 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 deemed anticompetitive, becoming subject to the remedial provisions contained within the Act. 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.[167] 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.[168] 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.[169] 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

[167] *Supra* note 100 at 102.
[168] *Ibid*. at 103.
[169] *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.

suits were sold, producing $6.25 million in deposits.[170] 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 of 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.

VI: CONCLUSION

Upon consideration of the evidence outlined above, it becomes clear the Balsillie Investigation over-looked crucial factors in its decision; 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 relocating franchise, which acts as both a deterrent and a penalty for relocating hockey clubs. Had the Bureau examined the practical effects of the indemnity payment, it is possible the Bureau would have reached an entirely different conclusion than they had 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

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[170] 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>.

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."[171] Nonetheless, it appears the Bureau has placed an enormous value on the unique characteristics of the professional sports league in rendering 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."[172]

[171] 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.
[172] *Supra* note 41 at 8-100.

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