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Two Minutes for Unfair Restraint: How the NHL-CHL Player Transfer Agreement Serves as a Catalyst for Abuse of Dominance

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TWO MINUTES FOR UNFAIR RESTRAINT: HOW THE NHL-CHL PLAYER TRANSFER AGREEMENT SERVES AS A CATALYST FOR ABUSE OF DOMINANCE

ALEX DOURIAN*

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I. INTRODUCTION

The NHL-CHL Player Transfer Agreement (“Agreement”) is an arrangement between the National Hockey League (“NHL”) and Canadian Hockey League (“CHL”).¹ It stipulates that an NHL club must return any

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1. See Agreement Between the National Hockey League “NHL” and the Canadian Hockey League “CHL,” NHL-CHL, (2013) [hereinafter NHL & CHL Agreement], <https://olis.oregonlegislature.gov/liz/2018R1/Downloads/CommitteeMeetingDocument>

CHL player drafted and signed to an NHL entry-level contract (“ELC”) to his CHL club if the NHL club does not retain that player on its active roster at the start of the season.² The Agreement applies solely to CHL players ages 18 and 19.³ Its language limits the ability of these players to play in alternative leagues around the world and thus capture adequate compensation pursuant to their market value.⁴ With this restriction on the major junior hockey labor market, the Agreement violates Section 79 of the Canadian Competition Act (“Act”), which prohibits market-dominating entities in Canada from engaging in practices that lessen or prevent substantial competition in a market.⁵

This Comment will explore the CHL’s background, the Agreement itself, as well as the Act, which is Canada’s equivalent to the Sherman Antitrust Act. This Comment will primarily focus on Section 79 of the Act, which provides civil redress against entities engaging in “abuse of dominant position.”⁶ This Comment will also compare various “abuse of dominant position” cases brought before the Competition Tribunal (“Tribunal”), and examine how the Tribunal’s reasoning in cases where it found abuse applies to the CHL’s stranglehold on major junior hockey in Canada. Essentially, by maintaining total market control over major junior hockey and engaging in contractual terms that create an exclusionary effect on the class of player it targets, the Agreement has prevented or lessened competition substantially in both Canadian/North American hockey markets and markets abroad. This Comment will conclude by offering recommendations as to how the League or the Tribunal can alleviate the restrictive conditions placed upon these players.

II. BACKGROUND ON THE CHL AND THE ACT

A. The CHL

The CHL is an umbrella organization consisting of three separate major junior hockey leagues in Canada, all of which play at what is called the “major junior” level: the Ontario Hockey League (“OHL”), the Quebec

/143414.

2. *Id.* at 6, 9.

3. *Id.* at 6–10.

4. *See id.* at 6, 9 (stipulating that NHL clubs must send their unretained underage CHL players back to their respective CHL clubs); *Do Junior Hockey Players Get Paid? The Truth Revealed*, STICKHANDLING PRO (last visited July 19, 2021), <https://www.stickhandlingpro.com/blog/Do-Junior-Hockey-Players-Get-Paid-The-Truth-Revealed/> (noting that junior hockey players receive mere stipends, not salaries).

5. *See* Competition Act, R.S.C. 1985, c C-34, § 79 (Can.).

6. *Id.*

Major Junior Hockey League (“QMJHL”), and the Western Hockey League (“WHL”).⁷ Across the three leagues, the CHL consists of fifty-two Canadian clubs and eight American clubs.⁸ Collectively, these leagues are a major provider of talent for the NHL. On opening night of the 2019–2020 season, 339 former CHL players were listed on NHL rosters, accounting for almost fifty percent of rostered players at that time.⁹ At the 2020 NHL Draft, seventy-eight CHL players were selected, which comprised “more than thirty-five percent of all selections made by NHL teams.”¹⁰ Some of the greatest players in NHL history have emerged from the CHL, such as Mario Lemieux, Bobby Orr, and Sidney Crosby.¹¹ Major junior hockey is the highest level of amateur hockey in Canada, and the CHL is the only league of its kind.¹² Players are drafted to CHL teams through an entry draft system at age fifteen or sixteen, and which league they are drafted to depends entirely on where they live.¹³

Since 2014, the CHL has battled class-action suits brought by current and former players seeking minimum wage pay, overtime pay, and back wages.¹⁴ Arguing that the CHL runs a “for-profit” business, the players maintained that it should be subject to Canadian statutory wage regulations.¹⁵ While the parties reached a settlement in February 2020, the Canadian provincial governments reviewed the issue of player status and clarified that they consider CHL players to be student-athletes, which allows them to be paid less than minimum wage.¹⁶

7. *About the CHL*, CHL, <https://chl.ca/aboutthechl> (last visited July 19, 2021).

8. *Id.*

9. *339 CHL Alumni on 2019–20 Opening Night NHL Rosters*, CHL (Oct. 2, 2019), <https://chl.ca/article/339-chl-alumni-on-2019-20-opening-night-nhl-rosters>.

10. *29 NHL Teams Select CHL Players in 2020 NHL Draft*, CHL (Oct. 18, 2020), <https://chl.ca/article/29-nhl-teams-select-chl-players-in-2020-nhl-draft>.

11. *See Top Ten Junior Players of All Time*, GREATEST HOCKEY LEGENDS.COM: HOCKEY HIST. BLOG (Dec. 27, 2018), <http://www.greatesthockeylegends.com/2013/06/top-ten-junior-players-of-all-time.html>.

12. *See About the CHL*, *supra* note 7 (“The Canadian Hockey League is the world’s largest development hockey league . . .”).

13. *See generally Understanding the CHL’s Major Junior Draft Process*, HEROS (Oct. 8, 2014), <https://heroshockey.com/understanding-the-chls-major-junior-draft-process/> (outlining the various territories each league may select players from).

14. Rick Westhead, *CHL Settles Minimum-Wage Lawsuits for \$30 Million*, TSN (May 15, 2020), <https://www.tsn.ca/chl-settles-minimum-wage-lawsuits-for-30-million-1.1476278>.

15. *Id.*

16. *See id.* (“One source familiar with the matter said the CHL’s 60 teams . . . will pay about \$250,000 apiece and that the league and its insurer will pay for the balance;” the article also quotes a statement from the CHL that says the “provincial governments reviewed the issue of player status and clarified in their legislation that [CHL] players

Little market competition exists for CHL players.¹⁷ As previously noted, players are drafted to CHL clubs through an entry draft system, and their CHL rights are retained by their respective CHL clubs in perpetuity until they age out (at twenty years old) or are traded.¹⁸ Rather than receive salaries, CHL players receive stipends from teams for housing, food, equipment, and other necessities.¹⁹

B. The Agreement

The most current version of the NHL-CHL Agreement came into effect in November 2013.²⁰ It was due to expire upon completion of the 2019–2020 season before the parties agreed to extend it for an additional season in April 2020.²¹ Section C(1)(a) of the Agreement states that any CHL player who is eighteen or nineteen years old, is drafted by an NHL club, and signed to an ELC must be returned to his CHL club if he does not make the final roster.²² In other words, if an NHL club does not keep the player on its roster, it cannot loan that player to any club (including its minor league affiliates) except that which holds his CHL rights.²³ Moreover, once the NHL club returns the player to his CHL club it cannot recall him for the remainder of that season.²⁴ There are some exceptions to this clause, including emergency circumstances and situations where the NHL club is willing to compensate the CHL club for recalling the player.²⁵

are amateur student athletes and not employees covered by minimum wage or employment laws.”).

17. See KEVIN P. MONGEON, REPORT ON THE ECONOMICS OF THE CANADIAN HOCKEY LEAGUE AND ITS TEAM MEMBERS 12 (2016), <https://andrewchernoff.files.wordpress.com/2016/07/317727968-tab-8.pdf>.

18. See *id.* (“[U]pon entry into the league[,] a [player’s] services are retained by their team for the duration of their career. The draft and Player Service Agreement have collectively eliminated the [labor] market for player services. As long as teams are able to trade players and the Leagues are the only supplier of Major Junior Hockey, teams will retain the entire value of a [player’s] services.”).

19. See *id.* at 14 (discussing player stipends).

20. NHL & CHL Agreement, *supra* note 1, at 2.

21. *NHL Extends Player Development Agreements for the 2020–21 Season*, SPORTSNET (Apr. 28, 2020, 1:14 PM) [hereinafter SPORTSNET, *NHL Extends Player Development Agreements*], <https://www.sportsnet.ca/hockey/nhl/nhl-extends-player-development-agreements-2020-21-season/>.

22. See NHL & CHL Agreement, *supra* note 1, at 6–7, § C(1)(a).

23. See *id.*

24. See *id.* at 7, § C(1)(b) (noting exceptions where a player may be recalled by his NHL club).

25. *Id.* (stipulating the player cannot be recalled for more than five NHL games, and also noting that “inconvenient,” for purposes of § C(1)(b), means the recall cannot cause the player to miss one or more of his CHL club’s games).

NHL-signed CHL players merely receive living stipends pursuant to their student-athlete status.²⁶ For CHL players who possess the requisite skill and talent, the earning potential for their age range in alternative leagues varies significantly.²⁷ The following is a breakdown of the salary ranges players may expect in various leagues across the world for the 2020–2021 season:

Estimated Player Salaries by League²⁸

American Hockey League (NHL Minor League Affiliate)	\$51,000-\$70,000
KHL (Russia)	\$100,000-\$1,200,000
SHL (Sweden)	\$93,800-\$293,126
DEL1 (Germany)	\$46,900-\$234,501
LIIGA (Finland)	\$35,175-\$146,563
NLA (Switzerland)	\$109,674-\$493,590
Extraliga (Czech Republic)	\$30,000-\$200,000

26. See Westhead, *supra* note 14 (reporting that CHL players are classified as amateur student athletes).

27. Compare *AHL PHLA CBA*, PRO. HOCKEY PLAYERS ASS'N, <https://phla.com/site/agreements> (last visited July 20, 2021) (noting the minimum AHL salary for the 2020–21 season is \$51,000), with COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION 25–26, art. 9, § 4, (2013) [hereinafter NHL COLLECTIVE BARGAINING AGREEMENT], https://cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf (stipulating the “maximum minor league compensation” for players on entry level contracts for the 2020–21 season is \$70,000), and *Projected Player Salaries 2020–2021: For Europe-Russia-Asia*, 2112 HOCKEY AGENCY, <https://2112hockeyagency.com/salary-expectations/> (last visited Apr. 28, 2021) (illustrating player salaries in Russian, Asian, and European leagues).

28. See *AHL PHLA CBA*, *supra* note 27; NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 27, at 26; *Projected Player Salaries 2020–2021: For Europe-Russia-Asia*, *supra* note 27.

C. *The Competition Act of Canada*

The Act is the Canadian equivalent to the U.S. Sherman Antitrust Act. Its purpose is to promote fair competition in Canada to increase the country's opportunities to participate in global markets while acknowledging the impact that foreign competition has on the domestic market.²⁹ Historically, competition law in Canada had a criminal disposition, which required prosecutors to meet a higher standard of proof in cases.³⁰ Beginning in the mid-1970s, the Canadian government supplanted some of the Act's criminal provisions with civil ones.³¹ Challenges under these new provisions are exclusively reviewed by the Tribunal as opposed to trial courts, although appellate courts may hear appeals from the Tribunal.³² Among these civil provisions is Section 79, which prohibits entities from engaging in what it refers to as an "abuse of dominant position."³³ Abuse of dominant position exists when:

[O]ne or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and the practice has had, is having[,] or is likely to have the effect of preventing or lessening competition substantially in a market³⁴

D. *Cases Brought Under Section 79*

The following discussion will describe the various settings in which the Tribunal has brought abuse of dominance actions, as well as the standard the Tribunal measures allegedly market-constraining activity against. In *Canada (Director of Investigation & Research) v. NutraSweet Co.*,³⁵ the Director of Investigation and Research ("Director") filed an application in part under Section 79 against NutraSweet ("NSC"), an aspartame sweetener producer.³⁶ It was the first time the Tribunal considered a Section 79

29. Competition Act, R.S.C. 1985, c C-34, § 1.1 (Can.).

30. OSLER, HOSKIN & HARCOURT, LLP, CANADIAN COMPETITION LAW 5 (2018) [hereinafter OSLER, CANADIAN COMPETITION LAW], https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/1479421_1.pdf.

31. *Id.*

32. *See id.* (noting the civil standard of proof, "balance of probabilities," is lower than the criminal standard, "proof beyond a reasonable doubt," and that the Government gave the Tribunal "exclusive jurisdiction to hear applications" related to any of these civil provisions).

33. Competition Act § 79(1).

34. *Id.*

35. (1990), 32 C.P.R. 3d 1 (Can. Competition Trib.).

36. *Id.* at para. 1.

application.³⁷ The Director accused NSC of engaging in contractual practices that created an “exclusive supply relationship” with its customers, which created significant barriers to entry in the aspartame market.³⁸ Ultimately, the Tribunal found that NSC’s practices violated Section 79 by meeting all three elements of abuse.³⁹ The NSC possessed clear, substantial control of the Canadian market for aspartame, evidenced by their market share, which accounted for over ninety-five percent of aspartame sales in Canada at the time.⁴⁰ The Tribunal held that such market power, coupled with less-than-ideal entry conditions for competitors and constraints placed upon its biggest customers, amounted to clear and substantial market control.⁴¹ Moreover, NSC engaged in anti-competitive acts by including supply clauses in its customer contracts to keep competitors from entering into the market or expanding any existing market share.⁴² The Tribunal found that the clauses were included primarily for exclusionary purposes than anything else.⁴³ Lastly, the Tribunal held that the exclusionary terms in NSC’s customer contracts catalyzed a substantial lessening or prevention of competition in the Canadian aspartame market.⁴⁴ This was because the terms encumbered an overwhelming majority of the market, and prevented “small scale or ‘toe-hold entry’” into that market — essentially, during the time when a customer contracted with NSC for a supply of aspartame products, no other aspartame supplier could negotiate with or sell to that customer.⁴⁵

37. *See Canada (Dir. Investigation & Rsch.) v. Laidlaw Waste Sys. Ltd.* (1992), 40 C.P.R. 3d 289, para. 1 (Can. Competition Trib.) (noting that this was the second case brought under Section 79 since it went into effect, with *NutraSweet* being the first).

38. *See NutraSweet Co.* (1990), 32 C.P.R. 3d 1, at para. 13 (noting the Director brought a separate claim against NSC, alleging it was selling below its acquisition cost — one of the anti-competitive acts specifically set out in § 78).

39. *See id.* at paras. 154–56.

40. *Id.* at paras. 80, 82 (maintaining that the evidence of NSC’s market power was so compelling that the Tribunal did not need to explore the “boundaries” of substantiality, as NSC’s market control was blatant).

41. *Id.*; *see also id.* at paras. 104, 106, 108 (describing various provisions in NSC’s contracts that created such customer constraints, such as exclusive supply clauses that required the customer to buy all aspartame products from NSC, trademark display clauses that required customers to display NSC’s logo on their packaging, and meet-or-release clauses that effectively gave NSC a right of first refusal in the event another supplier offered a NSC customer aspartame products at a lower price).

42. *Id.* at para. 121.

43. *Id.*

44. *Id.* at para. 144.

45. *Id.* at paras. 140, 144; *see also id.* at paras. 118–19 (noting, however, various “meet-or-release” clauses in NSC’s contracts, which stipulated that when an aspartame competitor offered services to a NSC customer, the customer could invoke the clause which would provide NSC an opportunity to match the offer; the Tribunal found these clauses did not mitigate any entry-barring effects created by exclusivity, since

A generally applicable principle the Tribunal promulgates in *NutraSweet* is the idea that when determining whether a particular entity possesses market power for purposes of Section 79, one can look to whether significant entry barriers exist that either lessen or completely prevent competition from outside competitors or market entrants.⁴⁶

In *Commissioner of Competition v. Toronto Real Estate Board*,⁴⁷ the Tribunal Commissioner filed an application against the Toronto Real Estate Board (“TREB”), alleging that certain information-sharing practices that TREB engaged in violated Section 79.⁴⁸ These dissemination practices pertained to the display of information taken from the Multiple Listing Service (“MLS”) database on the Virtual Office Websites (“VOWs”) of real estate brokers.⁴⁹ In essence, TREB members were prohibited from displaying pertinent information from the MLS database on their VOWs.⁵⁰ The disputed information included data pertaining to sold and pending homes, terminated listings, and “offers of commission” to the brokers representing the home purchaser.⁵¹ The Commissioner argued that the restrictions disincentivized innovation of real estate services in favor of more traditional practices, resulting in traditional brokers maintaining market control.⁵² In ruling against TREB, the Tribunal found that TREB’s conduct met all three elements of the abuse of dominant position test.⁵³ Firstly, TREB “substantially or completely control[led] the supply of MLS-based residential real estate brokerage services [in the Greater Toronto Area (GTA)] because it control[led] how its Members compete[d] through its rule-making ability.”⁵⁴ Secondly, TREB intended, both subjectively and

competitors would still be discouraged by the fact that NSC could match any price offered to a particular customer).

46. *See id.* at para. 74 (noting how any definition of market control invariably includes a consideration of market entry conditions).

47. 2016 Comp. Trib. 7 (Can.).

48. *Id.* at para. 2.

49. *Id.*

50. *Id.* *See generally id.* at paras. 70–72 (describing the MLS database as a “system which allows agents to share information and provide maximum exposure of properties listed for sale;” such information included how long a property was on the market, images of the property, historical data, and more).

51. *See id.* at para. 14 (noting two other important VOW restrictions: “prohibitions on (i) the use of information included in the VOW Data Feed for any purpose other than display on a website and (ii) the display on a VOW” of the disputed data).

52. *See id.* at para. 19(c) (adding that, by restricting broker access to VOWs, the MLS restrictions effectively “[discouraged] entry and expansion by brokers wishing to introduce innovative services” and further “entrenched” the positions of more traditional brokers).

53. *Id.* at para. 4.

54. *Id.* at paras. 253–54 (outlining the various reasons why the Tribunal agreed with

objectively, to engage in the practice of anti-competitive acts.⁵⁵ Lastly, but for those practices, competition in the Greater Toronto real estate market would have been substantially greater.⁵⁶ The Tribunal came to this conclusion after finding that in the absence of MLS and VOW restrictions, real estate services and offerings in the GTA market would have been far more competitive, innovative, and ultimately more beneficial for consumers.⁵⁷ More specifically, it found that the MLS restrictions perpetuated and entrenched “static traditional brokerage” and disincenitized firms from innovating and developing new services.⁵⁸ The Tribunal found abuse of dominant position here after determining that the data-sharing restrictions had “substantially reduced the degree of non-price competition in the supply of [real estate brokerage services] in the [GTA], relative to the degree that would likely exist in the absence of those restrictions.”⁵⁹ The “but for” test emerged from *TREB* as a major method of determining whether a practice or act significantly disrupts the development of competition in a particular market.⁶⁰

In *Commissioner of Competition v. Vancouver Airport Authority*,⁶¹ the Commissioner submitted a Section 79 application against the Vancouver Airport Authority (“VAA”).⁶² The application alleged that the VAA’s policy of permitting only two in-flight caterers to operate at the Vancouver International Airport (“YVR”) excluded competitors from entering the

the Commissioner’s assertion); *see also id.* at para. 174 (explaining that a substantial degree of market power is needed to establish dominance). *But see id.* at para. 166 (noting that the reality of markets is that “firms often have *some* market power”).

55. *See id.* at para. 319 (“TREB had a subjective intention to exclude, through the VOW Restrictions, potential entrants into the relevant market and existing TREB Members who were poised to disrupt the traditional residential brokerage business model that is followed by TREB’s other Members in the [Greater Toronto Area.]”); *see also id.* at para. 433 (“[I]t was reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on VOW-based competitors.”).

56. *See id.* at para. 504 (concluding that when compared to a world where the VOW restrictions did not exist, their “incremental adverse effect” on competition was substantial; “these anti-competitive effects [took] the form of increased barriers to entry, increased costs for VOWs, reduced range and quality of brokerage services, and reduced innovation.”).

57. *Id.* at para. 27 (finding that the MLS restrictions “negatively affected the range and quality of services” offered).

58. *Id.*

59. *Id.* at para. 4 (noting the adverse impact the data-sharing practices had “on innovation, quality and the range of residential real estate brokerage services that likely would be offered . . . in the absence of [such] restrictions”).

60. *See id.* at para. 27 (discussing the “but for” test).

61. 2019 Comp. Trib. 6 (Can.).

62. *Id.* at para. 1.

Galley Handling Market, and denied the market the benefits that competition would afford it.⁶³ The Tribunal found that the VAA substantially controlled the Airside Access Market at YVR and subsequently the Galley Handling Market as well.⁶⁴ The VAA held sole discretion over which suppliers could compete in the market.⁶⁵ As a result, it could indirectly influence the level of competition and, therefore, the price and non-price characteristics of competition in that market.⁶⁶ For a supplier to compete in the Galley Handling Market, it required access to the airside, which the VAA had sole authority to provide.⁶⁷

While the Tribunal found that the VAA controlled the relevant markets at YVR, it could not find that the VAA violated the second element of the abuse of dominant position test because it had a legitimate, overriding purpose in excluding additional servicers from the market, which outweighed any anti-competitive effects of the exclusionary practice.⁶⁸ At the outset, the Tribunal concluded that while the VAA did not directly compete in the relevant Gallery Handling Market, it did have a plausible competitive interest in it, such that the VAA benefitted from the exclusion of additional services in the market.⁶⁹ However, the Tribunal, determined that VAA's conduct had legitimate business motives that counterbalanced its exclusionary nature.⁷⁰ As a result, any actual or reasonably foreseeable anti-competitive effects of such conduct were not disproportionate to the VAA's efficiency and pro-

63. *Id.* at para. 2.

64. *See id.* at paras. 445–46.

65. *See id.* at para. 453 (“Firms that are not able to obtain VAA’s authorization to access the airside at [the airport] do not, and cannot, compete in the Galley Handling Market there VAA is able to control who competes and who does not compete, as well as how many firms compete Through this control, VAA [can] indirectly influence . . . the price and non-price dimensions of competition in that market.”).

66. *Id.*

67. *Id.*; *see also id.* at para. 41 (describing the airside as the part of the airport that lies within “the security perimeter,” and includes runways, taxiways, and the area where the aircrafts are parked).

68. *Id.* at paras. 458, 511; *see also id.* at paras. 457, 459–62 (outlining the analytical framework the Tribunal must undertake when determining whether a firm that does not compete in the relevant market has engaged in anti-competitive practices).

69. *See id.* at para. 510 (holding “that VAA has a PCI in the Galley Handling Market because the evidence . . . provides [an] *objectively ascertainable factual basis* to believe that VAA has a competitive interest in that market”).

70. *See id.* at paras. 512–13 (noting that entrants coming into the market pose three significant risks: (1) ramp-up time of new providers, (2) new entrants would cause airlines and consumers to experience disruptions in service for an extended period of time, and (3) the manifestation of the first two risks would diminish the VAA’s ability to compete with other airports).

competitive rationales.⁷¹ This suggests that where the introduction of new entrants would pose substantial risks to a particular market in the form of service or production disruption, an entity may have a legitimate interest in preventing or lessening competition.⁷² Such an interest may outweigh any anti-competitive or exclusionary effects the practice creates, thus justifying those effects.⁷³

III. APPLYING SECTION 79'S FRAMEWORK TO THE AGREEMENT

The three aforementioned cases identify the Tribunal's framework for evaluating cases under Section 79. In applying these considerations to the Agreement, one can see how it contravenes Section 79 requirements. Thus, constituting an abuse of dominant position by the NHL and CHL.

A. Substantial Control

The first element of the dominant position test is that an entity must possess substantial or complete control of a market.⁷⁴ Substantial and complete control is synonymous with the term "market power."⁷⁵ When determining what market power is, there is no "one size fits all" test; rather, one must look at the specific context of the case and facts at hand to determine whether a particular entity possesses substantial market power.⁷⁶ Generally, the Tribunal has looked at several factors in ascertaining whether the entity in question has such influence.⁷⁷ These include, but are not limited to, "evidence of high market share, barriers to entry, limited excess capacity in [competitors' possession] . . . [and] limited penetration of competitors" in the market.⁷⁸ For instance, in *NutraSweet*, the Tribunal remarked how NSC

71. *Id.* at para. 513.

72. *Id.* at paras. 512–13.

73. *Id.*

74. See Competition Act, R.S.C. 1985, c C-34, § 79(1)(a) (Can.) ("[O]ne or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business . . .").

75. See OSLER, CANADIAN COMPETITION LAW, *supra* note 30, at 45 ("The Tribunal has consistently interpreted the words *substantially or completely control* as being synonymous with market power, namely, 'an ability to set prices above competitive levels for a considerable period of time.' This position was endorsed . . . in *Canada Pipe*.").

76. See *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.* (1990), 32 C.P.R. 3d 1, para. 73 (Can. Competition Trib.) ("The specific factors that need to be considered in evaluating control or market power will vary from case to case.").

77. See, e.g., OSLER, CANADIAN COMPETITION LAW, *supra* note 30, at 47 (noting that the Tribunal usually finds market power in Section 79 cases where a firm has more than 80% of the market share and barriers to entry into the market exist).

78. *Id.*

showed signs of two of the aforementioned indicators of market power: it had an extremely high market share, about ninety-five percent, and its contracts with customers created significant barriers to entry.⁷⁹ Market power may exist even where high market share and barriers to entry are less apparent than what the Tribunal has previously considered in other cases.⁸⁰ In such instances, the Tribunal or court will utilize a “but for” test in asking whether the practice in question substantially impairs competition.⁸¹ The Tribunal applied the “but for” test in *TREB*, where it concluded that but for TREB’s restrictions on the supply of real estate information, consumers would have more competitive and innovative service offerings at their disposal.⁸²

The CHL owns the entire major junior hockey market, as all three major hockey junior leagues in Canada (the OHL, QMJHL, and WHL) fall under its umbrella.⁸³ As a result, any hockey player wishing to play major junior hockey must submit to the CHL’s rules and regulations.⁸⁴ Upon being drafted into one of the three leagues, players’ respective CHL clubs hold their major junior rights in perpetuity unless the club trades them, which effectively eliminates competition between major junior teams.⁸⁵ Not only does the CHL possess the entire major junior hockey market, it grants its clubs “exclusive geographic territories rights and local monopoly in Major Junior Hockey.”⁸⁶ Such a benefit allows these clubs to increase ticket prices

79. See *NutraSweet Co.* (1990), 32 C.P.R. 3d 1, at para. 82 (“The evidence that NSC possesses appreciable market power given its market share[,] . . . entry conditions[,] and the constraints operating on its largest customers is sufficiently compelling so that the boundaries of *substantial* need not be explored. Its ‘control’ is clearly substantial.”).

80. See OSLER, CANADIAN COMPETITION LAW, *supra* note 30, at 47 (“For cases in which market power and barriers to entry are less obvious . . . a rule of thumb is to ask whether . . . levels of non-price competition [would be] substantially higher, in the absence of the impugned practice. If so, then market power may exist.”); see also *NutraSweet Co.* (1990), 32 C.P.R.3d 1, at para. 74 (“[I]t is difficult to see how any definition of control, including the dictionary definition, could exclude a consideration of conditions of entry.”).

81. See *Canada (Comm’r of Competition) v. Toronto Real Est. Bd.*, 2016 Comp. Trib. 7, para. 27 (Can.).

82. *Id.*

83. See *About the CHL*, *supra* note 7.

84. See *id.*

85. See MONGEON, *supra* note 17, at 12 (“The OHL and WHL have eliminated all intraleague competition for players. First, players gain entry into the league via the entry-level draft that involves teams picking players. Second, upon entry into the league a player’s services are retained by their team for the duration of their career. The draft and Player Service Agreement have collectively eliminated the labor market for player services. As long as teams are able to trade players and the Leagues are the only supplier of Major Junior Hockey, teams will retain the entire value of a player’s services.”).

86. *Id.* at 10.

at their discretion, further perpetuating the exploitation of these players.⁸⁷ For players who believe the major junior hockey route is the best path for their development, their only option is to play for a CHL-affiliated league, which then places significant restrictions on where they can play once drafted and signed by an NHL club.⁸⁸

B. Anti-Competitive Practices

The second element of the abuse of dominant position test is that the entity enjoying substantial market control must engage in anti-competitive practices.⁸⁹ A “practice” generally consists of more than one isolated act; however, for the purposes of Section 79, courts have ruled that a singular act may satisfy the “practice” requirement if it is “sustained and systemic” and has a lasting impact on the market.⁹⁰ The Tribunal or the courts generally will not consider an act to be anti-competitive unless it has a “predatory, exclusionary or disciplinary purpose.”⁹¹ In determining whether an act is conducted for anti-competitive purposes, courts will weigh both the subjective and objective intent of the entity in question.⁹² Section 78 of the Act outlines specific types of conduct that are considered anti-competitive under Section 79; however, while the list of proscribed conduct is extensive, it does not expressly limit the types of anti-competitive conduct to those mentioned therein.⁹³

87. *See id.* (describing that without competition from other teams for ticket sales, CHL teams can exercise “profit-maximizing” behavior by increasing ticket prices).

88. *See id.* at 8, 10.

89. Competition Act, R.S.C. 1985, c C-34, § 79(1)(b) (Can.) (“[The entity has] engaged in or [is] engaging in a practice of anti-competitive acts . . .”).

90. *See Canada (Comm’r of Competition) v. Canada Pipe Co.*, 2006 FCA 233, para. 60 (Can.) (remarking how the Tribunal found that the term “practice” may entail more than a single act but may also be “one occurrence that is sustained and systemic, or that has had a lasting impact on competition”).

91. *See OSLER, CANADIAN COMPETITION LAW*, *supra* note 30, at 48 (“In *Canada Pipe*, the [Court] endorsed this position regarding objective intent and then adopted a competitor-oriented approach to determining whether conduct constitutes a practice of anti-competitive acts, focusing on whether there were (objectively) intended predatory, exclusionary or disciplinary effects on a *competitor*.”).

92. *Id.*

93. *See* Competition Act § 78 (listing acts that are considered anti-competitive); *see also OSLER, CANADIAN COMPETITION LAW*, *supra* note 30, at 48 (“However, significantly, the Tribunal has found many other types of practices . . . to constitute anti-competitive acts as well, with the result that the category of anti-competitive acts is by no means restricted to those listed in § 78.”).

While the Agreement is a single act, e.g., a singular agreement between two parties, the parties in privity to the Agreement intended it to have a long lasting and systemic effect on CHL players who are drafted by NHL clubs and subsequently signed to ELCs.⁹⁴ This type of enduring restraint is akin to the customer supply clauses in *NutraSweet*, where the Tribunal held that the clauses constituted a “practice” because they appeared in every customer contract and had a long-lasting effect on not only those customers but the industry as a whole.⁹⁵ Like the customer supply clauses in *NutraSweet*, the Agreement’s restraints apply to all entry-level contracts entered into between an NHL club and a prospect drafted from the CHL.⁹⁶ Moreover, akin to the exclusionary and anti-competitive terms in *NutraSweet*’s customer contracts, the CHL clearly intended the terms of the Agreement to serve an exclusionary purpose because they expressly limit where the players can play once signed to an ELC and, indirectly, how much they can make.⁹⁷ The framework of the Agreement intends to exclude this specific class of player from participating in any other professional hockey market in the world, except for the CHL or NHL.⁹⁸

A neutral body examining the Agreement and overall business of the CHL may consider some legitimate business justifications for the CHL’s actions which counterbalance its anti-competitive nature.⁹⁹ These justifications would likely include the argument that if the NHL club could loan these players to alternate leagues, the quality of competition in the CHL would diminish substantially, causing a decrease in fan enthusiasm and ultimately

94. See NHL & CHL Agreement, *supra* note 1, at 2, § A (providing the Agreement will be in effect for seven seasons); see also SPORTSNET, *NHL Extends Player Development Agreements*, *supra* note 21 (noting the NHL and CHL extended the agreement for one more year).

95. See *Canada (Dir. Of Investigation & Rsch.) v. NutraSweet Co.* (1990), 32 C.P.R. 3d 1, paras. 104, 109 (Can. Competition Trib.) (explaining that the exclusive supply clauses constituted a “practice” because they appeared in most supply contracts and required the customer to agree to use NSC aspartame as the sole or primary sweetener in its Canadian-produced products throughout the duration of the agreement and purchased all its NutraSweet aspartame requirements from NSC itself, rather than intermediaries).

96. See NHL & CHL Agreement, *supra* note 1, at 6–7, § C(1)(a).

97. See *id.*; see also *Do Junior Hockey Players Get Paid? The Truth Revealed*, *supra* note 4 (mentioning how CHL players receive mere stipends in lieu of salaries).

98. See NHL & CHL Agreement, *supra* note 1, at 6–7, § C(1)(a).

99. See generally *Canada (Comm’r of Competition) v. Toronto Real Est. Bd.*, 2016 Comp. Trib. 7, para. 279 (Can.) (requiring that prior to a finding of an anti-competitive practice “engaged in by [an entity that] does not compete in the relevant market,” the Commissioner must establish that the entity “has a plausible competitive interest in the market”); see also *id.* at para. 280 (“In the case of a trade association, this may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market.”).

revenue.¹⁰⁰ In analyzing this potential argument, one should first understand that the CHL produces between thirty and forty percent of each NHL draft class.¹⁰¹ NHL clubs collectively drafted seventy-eight CHL players in the 2020 NHL Draft.¹⁰² Out of those, only forty-three have signed NHL entry-level contracts and thus must bear the Agreement's burdens as of July 10, 2021.¹⁰³ Using the 2020 NHL draft class as an example for future draft classes, one can conclude the Agreement's constraints do not affect many players in any one particular year because in each draft, 217 players are selected, which means that for the 2020 draft class specifically, only 19.8% of the players are subject to the Agreement's constraints.¹⁰⁴ For those players that fall into that percentage, however, the Agreement places heavy limitations on them as to where they can play and how much money they can make.¹⁰⁵ Considering that ice hockey is the most popular sport in Canada, it is unlikely that the loss of such a small group of players to other leagues would cause the CHL to experience substantial revenue loss or any other deleterious effect.¹⁰⁶

100. See Tony Ferrari, *Redesigning the CHL–NHL Agreement*, DOBBER PROSPECTS (Mar. 3, 2021), <https://dobberprospects.com/2021/03/03/re-designing-the-chl-nhl-agreement/>. See generally *78 CHL Players Selected in 2020 NHL Draft*, CHL (Oct. 7, 2020) [hereinafter *CHL Players Selected*], <https://chl.ca/article/78-chl-players-selected-in-2020-nhl-draft> (noting how six of the top ten draft picks in the 2020 draft were players from the CHL).

101. See Bob Duff, *Number of NHL Draftees From CHL In Steady Decline*, FEATURD (June 23, 2019), <https://stories.featurd.io/2019/06/23/number-of-nhl-draftees-from-chl-in-steady-decline/>.

102. See *CHL Players Selected*, *supra* note 100 (remarking that CHL players consisted of more than 35% of the 217 total picks made by NHL teams at the 2020 NHL Draft, including nineteen first round picks, six top ten picks, and the first overall pick, Alexis Lafreniere).

103. *2020 NHL Entry Draft*, CAPFRIENDLY, <https://www.capfriendly.com/draft> (last visited July 20, 2021).

104. See Wayne Jones, *How the NHL Entry Draft Works: A Complete Guide*, HOCKEY ANSWERED, <https://hockeyanswered.com/how-the-nhl-entry-draft-works-a-complete-guide/> (last visited July 20, 2021) (stating the draft is seven rounds long and that each round has thirty-one draft picks, totaling 217 players drafted in all).

105. See NHL & CHL Agreement, *supra* note 1 (limiting where CHL players can play if signed to an NHL contract but not retained on the roster); Westhead, *supra* note 14 (stating that Canadian provincial governments consider CHL players as student athletes, which means minimum wage and other employment laws do not cover them).

106. See generally *Top 10 Most Popular Sports of Canada in the year 2020–21*, NEO PRIME SPORT (Jan. 29, 2021), <https://neoprimesport.com/top-10-most-popular-sports-of-canada-in-the-year-2020-21/> (noting that ice hockey is the official national sport of Canada).

C. Substantial Lessening/Prevention of Competition

The third element in the abuse of dominant position test is that the act had the effect of preventing or lessening competition substantially in a market.¹⁰⁷ The Tribunal has not applied this element directly to labor markets.¹⁰⁸ In *Commissioner of Competition v. Canada Pipe*,¹⁰⁹ however, the Court of Appeal noted that the appropriate test for determining whether the conduct substantially prevented or lessened competition examines whether the relevant markets would be more competitive “but for” the allegedly restrictive act or practice.¹¹⁰ In determining whether this is the case, the Tribunal has focused on whether, in the absence of such dominance, the “prices [of products or services] would be significantly higher . . .”¹¹¹ Analogizing this line of reasoning to the Agreement, one can reasonably conclude that players’ salaries and earning potential at age eighteen or nineteen would be significantly higher “but for” the Agreement’s restraints.

One argument the CHL could make in rebutting application of the third element to the Agreement is that it has a legitimate business justification in keeping these players in the CHL. It may argue that if they left for other leagues, the CHL would experience a diluted on-ice product and substantial revenue loss.¹¹² Such a deleterious result, the CHL could say, would cause

107. Competition Act, R.S.C. 1985, c C-34, § 79(1)(c) (Can.) (“[T]he practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market . . .”).

108. See generally, e.g., *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.* (1990), 32 C.P.R. 3d 1 (Can. Competition Trib.) (addressing exclusive supply contracts for aspartame); *Canada (Comm’r of Competition) v. Toronto Real Est. Bd.*, 2016 Comp. Trib. 7 (Can.) (considering real estate information dissemination practices); *Canada (Comm’r of Competition) v. Vancouver Airport Auth.*, 2019 Comp. Trib. 6 (Can.) (reviewing market exclusion practices); *Canada (Comm’r of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (Can.) (discussing loyalty rewards programs); *Canada (Comm’r of Competition) v. Direct Energy Mktg. Ltd.*, 2015 Comp. Trib. 2 (Can.) (examining water heater markets).

109. 2006 FCA 233 (Can.).

110. See *id.* at para. 38 (“I would therefore endorse the formulation of the legal test proposed by the appellant: the question that must be assessed for the purposes of paragraph 79(1)(c) is, would the relevant markets — in the past, present, or future — be substantially more competitive but for the impugned practice of anti-competitive acts?”).

111. See OSLER, CANADIAN COMPETITION LAW, *supra* note 30, at 49–50 (providing an example of this test considered by the Bureau with respect to Apple’s supply terms with wireless carriers, in which it found that while evidence existed showing how these terms affected wireless carriers’ negotiations with competitors, the effects did not amount meaningfully to the point where the Bureau could conclude they placed a significant impact on Apple’s competitors or consumers).

112. See Taylor Haase, *Primer: Understanding NHL-CHL Transfer Agreement*, DK PITTSBURGH SPORTS (June 24, 2019), <https://legacy.dkpittsburghsports.com/2019/06/24/nhl-chl-transfer-agreement-faq-rules-penguins-tlh/> (arguing that the Agreement actually keeps the leagues optimally competitive since they retain their top players); see

a significant disruption for those who consume the CHL product because of the diminished on-ice product. This line of reasoning parallels the VAA's argument in *Vancouver Airport Authority*, which maintained that if new competitors entered the Galley Handling Market at YVR, customers would suffer a disruption of service for an extended period of time.¹¹³ The VAA argued that such a disruption would have the detrimental effect of impeding its ability to compete with other airports for new airlines, as well as new routes from existing airlines.¹¹⁴ The difference in these two particular situations, however, is that whether the CHL would experience a significantly diminished on-ice product is not entirely certain. As mentioned previously, only forty-three CHL players from the 2020 NHL draft class have signed NHL ELCs as of July 10, 2021.¹¹⁵ Even if all twenty-six players decided that other leagues better suit them, the thirty-five NHL-drafted CHL players who have not signed ELCs would remain in the CHL and thus likely contribute to keeping the product in adequate form.

Moreover, whether the CHL would lose substantial revenue as a result of these players leaving is unclear at best, as the member-leagues and clubs have multiple methods by which they generate profit.¹¹⁶ While economic studies indicate that individual players do contribute to the bottom lines for their respective CHL clubs, it is likely that alternative profit-generating methods would offset any loss in revenue a club would experience from losing any one particular player.¹¹⁷ One such method is through multi-platform broadcasting.¹¹⁸ While the CHL never disclosed the financial details of its 2014 broadcast rights agreement with Canadian sports network

also Patrick Johnston, *The NHL-CHL Agreement Doesn't Help Development of Canadian Juniors One Bit*, THE PROVINCE (July 17, 2019), <https://theprovince.com/sports/hockey/nhl/patrick-johnston-fire-the-nhl-chl-agreement-into-the-sun> (hypothesizing that keeping the top players in the CHL could theoretically attract more fans to games).

113. *Vancouver Airport Auth.*, 2019 Comp. Trib. 6, at paras. 512–13 (“VAA has been concerned that some airlines and consumers would suffer a significant disruption of service for a transition period of at least several months.”).

114. *Id.*

115. See *2020 NHL Entry Draft*, *supra* note 103.

116. See MONGEON, *supra* note 17, at 8–10 (noting how the CHL exhibits “profit-maximizing” behavior through “patterns of relocation and expansion,” as well as exclusive geographic territory rights, which create local monopolies for each team and allow them to increase ticket prices as a result).

117. *Id.* at 11 (“The expected difference in attendance for teams with a winning percentage of 0.450 to 0.550 is 400 spectators per game.”).

118. See David Cushman, *CHL Extends Sportsnet Deal Until 2025/26*, SPORTSPRO (Feb. 20, 2014), https://www.sportspromedia.com/news/chl_extends_sportsnet_deal_until_2025_26 (stating that in 2014, Sportsnet and the CHL agreed to a twelve-year extension of their broadcast rights agreement).

Sportsnet, it is likely that CHL clubs enjoy a considerable bump in revenue from the deal.¹¹⁹

In *Canada Pipe*, the Federal Court of Appeal endorsed the “but for” test when looking at whether the anti-competitive practice had the effect of lessening or preventing competition substantially in a market.¹²⁰ The test looks at whether the “relevant markets — in the past, present or future — [would] be substantially more competitive but for the impugned practice of anti-competitive acts.”¹²¹ Applying this test in the Agreement’s context, one can surmise that but for the Section C(1)(a) of the Agreement, hockey labor markets all over the world would be substantially more competitive. If not for Section C(1)(a), the affected class of player would have substantially more freedom to play in any league in which his NHL rights holder deems appropriate.¹²² As a result, the market in those leagues would become more competitive as it would see an influx of talent, and the player entering those leagues would have more opportunities to earn a salary that is proportionate with what his free-market value demands.¹²³

Studies have shown that aside from affecting players’ current earning potential, the Agreement’s constraints may have detrimental effects on earning potential later on in players’ careers as well.¹²⁴ According to a study of data accumulated from draft classes between 2005 and 2014, players drafted out of the top Swedish and Finnish leagues generally made the NHL earlier and more frequently than their CHL counterparts.¹²⁵ As a result, there

119. *See id.*

120. *See* Canada (Comm’r of Competition) v. Canada Pipe Co., 2006 FCA 233, paras. 38, 41 (Can.), (endorsing the “but for” test and noting that such an interpretation of Section 79(1)(c) of the Act is consistent with the Tribunal’s interpretations in previous Section 79 cases; the test bespeaks the “plain meaning” of the statute’s language and is consistent with the Tribunal’s analysis in previous cases).

121. *Id.* at para. 38; *see id.* at para. 40 (quoting *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000)) (acknowledging that the “but for” discussion has appeared in American antitrust jurisprudence as well: there is a difficult yet required task of “construct[ing] . . . a ‘but for’ market free of the restraints and conduct alleged to be anticompetitive”); *see also* Canada (Dir. of Investigation & Rsch.) v. Laidlaw Waste Sys. Ltd. (1992), 40 C.P.R. 3d 289, para. 164 (Can. Competition Trib.) (“[T]he substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.”).

122. *See* Johnston, *supra* note 112 (“[T]here’s nothing stopping players from outside the CHL from playing pro as teens, or more drastically, moving to Europe where you can immediately start making a wage . . .”).

123. *See id.*

124. *See id.*

125. *See* Prashanth Iyer, *Evaluating Nordic Drafting — A Potential Market*

is potential for CHL players to lose out on earning potential as more European players secure lucrative NHL contracts over them.¹²⁶

Moreover, in *NutraSweet*, the Tribunal articulated another test for this element that asked whether the anti-competitive acts engaged in by the entity preserve or add to its market power.¹²⁷ In the NHL-CHL Agreement context, one can conclude that the Agreement's constraints contribute to the CHL's market power by creating exclusivity where CHL players signed to NHL ELCs can play if the NHL club wishes to loan the player instead of retaining him on its roster.¹²⁸ This type of exclusivity is comparable to that considered in *NutraSweet*, where aspartame buyers were prohibited from purchasing aspartame products from any other supplier but NutraSweet.¹²⁹ In forcing these players to return to their CHL club once cut by their respective NHL clubs, the CHL retains its influence in major junior hockey in North America and over the affected players because it prevents these top-tier talents from playing anywhere else.¹³⁰ Moreover, the ruling by various provincial legislatures that CHL players are considered "student-athletes" further contributes to the league's market stranglehold as it can employ, market, and profit off the players without returning any portion of the proceeds to them.¹³¹

Inefficiency, HOCKEY GRAPHS (July 1, 2019), <https://hockey-graphs.com/2019/07/01/evaluating-nordic-drafting-a-potential-market-inefficiency/> (noting that this phenomenon makes sense as these European professional leagues more readily prepare these players for the transition into the NHL).

126. See Johnston, *supra* note 112 ("[T]he agreement is putting major junior draftees behind their peers in terms of long-term development, suppressing their hopes of NHL stardom.").

127. See *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.* (1990), 32 C.P.R. 3d 1, para. 139 (Can. Competition Trib.) ("The issue with respect to the contract terms associated with exclusivity . . . is the degree to which these anti-competitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry."); see also *id.* at para. 144 ("The tribunal is convinced that the exclusivity in NSC's contracts, which includes both the clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes 'toehold entry' into the market and inhibits the expansion of other firms in the market. Since exclusive use and supply clauses appear virtually in all of NSC's 1989 contracts, and thus cover over 90 percent of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.").

128. See Johnston, *supra* note 112 ("If you are 18 or 19 and were drafted [to the NHL] from a [CHL club], you can't go and play pro hockey at any level outside of the NHL for two years.").

129. *Id.*; see also *NutraSweet Co.* (1990), 32 C.P.R. 3d 1 at para. 162 (discussing the exclusive dealings between NutraSweet and its clients).

130. See Johnston, *supra* note 112.

131. See Westhead, *supra* note 14 ("All Canadian provincial governments reviewed the issue of player status and clarified in their legislation that our players are amateur

In conjunction with the “but for” test, the Tribunal in *TREB* noted that an “appropriate focus of assessment under Section 79(1)(c) of the Act should be upon the *incremental* effect of the [restrictions] on competition.”¹³² While in any one year the Agreement’s restrictions may not affect a substantial number of players, its incremental effect of preventing or lessening competition in multiple markets over the years has caused these players to lose high-earning potential during the early stages of their career and possibly later on.¹³³ In the absence of Section C(1)(a), competition would be substantially greater than it is currently or is likely to be in the future if it remains intact.¹³⁴ Moving forward, players could earn a salary that reflects their actual worth in the hockey labor market, whereas, currently, they must accept earning literal cents for every hour they work.¹³⁵

IV. WHAT REMEDIES ARE AVAILABLE?

From a curative perspective, the Tribunal has the power to issue various types of remedies once it finds an entity has violated Section 79.¹³⁶ For one, it may issue administrative monetary penalties (“AMPs”).¹³⁷ The Competition Bureau categorizes these penalties as civil remedies and

student athletes and not employees covered by minimum wage or employment laws.”).

132. *Canada (Comm’r of Competition) v. Toronto Real Est. Bd.*, 2016 Comp. Trib. 7, para. 503 (Can.) (“More specifically, the specific focus of this stage of the assessment is upon whether competition would be substantially greater in the absence of the VOW Restrictions than it is at the present time, or is likely to be in the future, if they remain unchanged.”); *see also id.* at para. 500 (“The issue is whether the VOW Restrictions have insulated, are insulating, or are likely to insulate TREB’s Members from new forms of rivalry that, in aggregate, would likely substantially increase competition in their absence, as reflected in materially lower prices or in materially greater non-price benefits of competition. When a group of rivals . . . insulates itself from increased competition, they are in essence exercising a cognizable form of market power.”).

133. *See Johnston*, *supra* note 112 (noting that players outside of the CHL can move to Europe before or after being drafted to begin making money and arguing that because European players generally make the NHL earlier and more frequently than North American players, CHL players may be losing earning potential as the Europeans secure more contracts and dollars from NHL clubs).

134. *Id.*

135. *See* Colin Perkel, *Junior Hockey Employment Lawsuit on Thin Ice; Judges Refuse to OK \$30-million Deal*, CBC SPORTS (Oct. 28, 2020, 3:48 PM), <https://www.cbc.ca/sports/hockey/chl-junior-hockey-employment-lawsuit-judges-refuse-sign-off-1.5780550> (mentioning that according to the plaintiffs in the CHL employment lawsuit, some players earned as little as \$35 per week while technically working anywhere from 35–65 hours weekly).

136. Competition Tribunal Act, R.S.C. 1985, c 19, §§ 8, 11 (Can.).

137. *See* OSLER, CANADIAN COMPETITION LAW, *supra* note 30, at 5–6 (“[E]mpowering the Tribunal to order AMPs of up to \$10 million for violation of the abuse of dominance provision (or \$15 million for a subsequent violation) . . .”).

distinguishes them from fines, which it says derive from criminal conduct.¹³⁸ According to the Bureau, the primary purpose of AMPs is to promote compliance with the Act.¹³⁹

In addition to AMPs, the Tribunal may issue an order prohibiting the anti-competitive conduct from continuing.¹⁴⁰ In *NutraSweet*, the Tribunal submitted an order prohibiting NSC from, inter alia, entering into contracts with customers that contained terms requiring the customer to buy all of its aspartame supplies from the respondent.¹⁴¹ The Tribunal found these terms severable from the overall agreement in that it did not invalidate the entire NSC contract but merely the terms that enhanced exclusivity in the market.¹⁴²

Turning to the NHL-CHL Agreement, the relevant provision is Section C(1)(a), which states in the pertinent part, “[a] signed Player age 18 or 19 who has been claimed from the CHL and who is not retained by his NHL Club, must be assigned to the Junior Club of the CHL for whom he last played or with whom he owes contractual obligations.”¹⁴³ The Agreement, which spans fourteen pages, contains terms having to do with matters other than player rights.¹⁴⁴ Therefore, a strike-down of the entire Agreement is likely unnecessary to perpetuate the type of remedy the affected player class deserves. Instead, it makes more sense to invalidate Section C(1)(a) only, keeping the rest of the Agreement intact while also providing the affected players flexibility in seeking alternative employment with clubs that can provide compensation consistent with their market value.¹⁴⁵

138. *Frequently Asked Questions — Amendments to the Competition Act*, GOV'T OF CAN., <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03046.html> (last updated Nov. 5, 2015) (“Administrative monetary penalties, or ‘AMPs,’ are civil remedies, and quite distinct from fines (which are criminal).”).

139. *Id.* (“The purpose of an AMP is to promote and encourage compliance with the *Competition Act*, and failure to pay one may be enforced civilly as a debt due to the crown.”).

140. See OSLER, *CANADIAN COMPETITION LAW*, *supra* note 30, at 50 (“In addition to its power to impose AMPs, the Tribunal may issue an order prohibiting the continuation of the practice in question and, if such an order would not restore competition in the market, direct any or all of the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice in the market.”).

141. See *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.* (1990), 32 C.P.R. 3d 1, para. 181 (Can. Competition Trib.) (“We will therefore issue an order prohibiting NSC from enforcing, or entering into, certain terms of contracts for the supply of aspartame to Canadian customers . . . which require the purchaser to purchase or use only NSC aspartame . . .”).

142. See *id.*

143. NHL & CHL Agreement, *supra* note 1, at 7, § C(1)(a).

144. See *id.* at 2–6, 11–12, 14–15, §§ B, E, G (discussing other topics, such as advertising rights, insurance, and league funding).

145. See *Projected Player Salaries 2020–2021: For Europe-Russia-Asia*, *supra* note

The CHL may argue that if NHL clubs can loan these players to the AHL or overseas, the quality of competition in the CHL-member leagues would diminish, which could affect the leagues' earnings through decreased ticket, advertisement, or television revenue.¹⁴⁶ Of the seventy-eight CHL players selected in the 2020 NHL Draft, only forty-three have signed NHL ELCs thus far.¹⁴⁷ Therefore, fifty-two CHL players, not signed to NHL contracts, remain with their CHL clubs, thus largely maintaining the quality of competition.¹⁴⁸ Furthermore, even if 18 or 19-year-olds can play in the AHL or abroad, there is no guarantee they would do so — the players may feel that playing in the CHL is best for their development, or, rather, they are unable to secure a contract that makes the jump worth it. Either way, just because the CHL would lose its stranglehold on these players, it does not follow that the CHL clubs would undoubtedly lose them to other leagues.

Invalidating Section C(1)(a) of the Agreement would enable NHL clubs, in conjunction with its prospects, to determine the most suitable development route on a situational basis.¹⁴⁹ If the parties, i.e., the player and the NHL club he is signed with, believe playing in Europe is best for the player's development, he could go and do so while earning a respectable salary. In referring to the various league salary estimates, the player would generate substantially more income — even at the lower end — than he would playing for his CHL club.¹⁵⁰

Moreover, giving NHL clubs the freedom to choose where to develop their CHL prospects may ultimately help the CHL retain the top-tier talent it craves. For example, when Toronto Maple Leafs' forward Auston Matthews was seventeen, NHL scouts unanimously considered him the top prospect in his draft class.¹⁵¹ Matthews is American-born, which provided for the unique

27 (providing salary estimates for the major professional hockey leagues in Europe); see also *AHL PHPA CBA*, *supra* note 27 (noting the minimum AHL salary for the 2020–21 season is \$51,000).

146. See MONGEON, *supra* note 17, at 6 (“An important outcome of the co-production of games is the fact individual team revenues, as well as league-wide revenues, are a function of the contribution of players throughout the entire league.”).

147. See *2020 NHL Entry Draft*, *supra* note 103.

148. *Id.*

149. See generally Johnston, *supra* note 112 (discussing how NHL clubs are able to fully dictate the development path for their European prospects, including whether to start them immediately in the AHL or keep them with their European clubs, as opposed to CHL prospects who must return to the CHL).

150. See *Projected Player Salaries 2020–2021: For Europe-Russia-Asia*, *supra* note 27 (providing salary estimates for the American Hockey League and each of the major European leagues).

151. Mike Johnston, *Person of Interest: The 411 on Auston Matthews*, SPORTSNET (May 7, 2015, 8:49 PM), <https://www.sportsnet.ca/hockey/nhl/person-of-interest-the>

opportunity of an American-born player being selected first overall in the NHL Draft.¹⁵² Before the beginning of his draft year season (2015–16), however, Matthews decided to play in the NLA, the top professional league in Switzerland, which created a considerable amount of attention from hockey pundits and fans alike.¹⁵³ By playing in the NLA, Matthews was able to choose his own development path and concurrently earn a legitimate salary.¹⁵⁴ However, his decision came at the expense of the Everett Silvertips, the CHL club that drafted him in 2012.¹⁵⁵ Since Matthews' decision, many pundits have contemplated the possibility of similar prospects doing the same.¹⁵⁶ By removing the Agreement's constraints surrounding player mobility, the CHL could theoretically entice more players like Matthews to join the CHL rather than forgo it in lieu of other leagues that currently allow more flexibility.

If the Tribunal or a court issued an order invalidating Section C(1)(a), players like Matthews would be more inclined to play their pre-NHL hockey in North America knowing an NHL club could draft them, sign them to an ELC, and decide the best development route, which could include playing in the AHL. Ultimately, this could keep the players playing in North America,

411-on-auston-matthews/.

152. *See id.* (noting the previous six American players drafted first overall in the NHL Entry Draft).

153. *See* Chris Peters, *Auston Matthews, Top NHL Draft Prospect, Signs With Swiss Pro Team*, CBS SPORTS (Aug. 7, 2015, 8:05 AM), <https://www.cbssports.com/nhl/news/auston-matthews-top-nhl-draft-prospect-signs-with-swiss-pro-team/> (noting several benefits of Matthews signing in Switzerland, including developmental, scheduling, and coaching reasons, as well as the fact that he would receive a real salary, compared to the NCAA and WHL).

154. *See* Joseph Gravellese, *Auston Matthews Adds New Twist to NCAA vs. CHL Hockey Wars*, BC INTERRUPTION (May 13, 2015, 7:00 AM), <https://www.bcinterruption.com/2015/5/13/8597115/auston-matthews-adds-new-twist-to-ncaa-vs-chl-hockey-wars> (“[B]ut all available data suggest that for first team players, a low-end salary is around 75,000 Swiss francs per year, or about \$82,000. Salaries for ex-NHLers playing in Switzerland can top \$300,000. It’s fair to say that wherever Matthews’ potential salary would fall in that range, it’s a lot more than the stipends players receive for playing in the CHL, or the \$0 for playing in the NCAA.”).

155. *Tips Prospect Matthews to Play Professionally in Europe*, EVERETT SILVERTIPS (Aug. 7, 2015), <https://everettsilvertips.com/tips-prospect-matthews-to-play-professionally-in-europe>.

156. *See* Jonathan Willis, *The Question Isn't “Why Would Auston Matthews go to Switzerland?” It's “Why Don't More Top NHL Draft Prospects do the Same?”*, EDMONTON J. (May 12, 2015), <https://edmontonjournal.com/sports/hockey/nhl/cult-of-hockey/the-question-isnt-why-would-auston-matthews-go-to-switzerland-its-why-dont-more-top-nhl-draft-prospects-do-the-same> (explaining that players drafted out of Europe, as opposed to the CHL, have more versatility in where they can play after being drafted and can earn legitimate wages for their services, which may be attractive to many prospects of Matthews’ caliber).

which would enable them to build their brands here, with North American hockey fans watching them. As a result, fans would have deeper interests in these players, which could help television ratings, endorsements, ticket revenue, and much more down the road.

V. CONCLUSION

The Canadian legislature enacted Section 79 of the Competition Act to dissuade entities from abusing situations where they hold dominance in a market. In the case of the CHL, the League dominates the Canadian major junior hockey market. Moreover, the umbrella leagues do not pay their players wages commensurate with their market values, providing them only living stipends. The non-compensatory model of the CHL, coupled with the market exclusivity that Section C(1)(a) of the Agreement creates, has a significant anti-competitive effect on the players' ability to compete for fair market compensation and substantially lessens labor competition not only in Canada, but all over the world as well. If the Tribunal or a court invalidated Section C(1)(a) on abuse of dominant position grounds, NHL clubs could choose the best development path for their respective CHL prospects, and the CHL prospects themselves would be able to seek wages in various leagues that are commensurate with their market value.