

## **DECISION ON APPEAL (BRAD MARCHAND)**

The National Hockey League Players' Association ("NHLPA"), on behalf of Brad Marchand, has appealed from a February 9, 2022 supplementary discipline decision suspending Mr. Marchand for six (6) games. This shall constitute my determination of Mr. Marchand's appeal. For the reasons described herein, I find that the decision suspending Mr. Marchand for six (6) games was supported by clear and convincing evidence and is, therefore, affirmed.

### **I.**

#### **SUMMARY OF FACTS**

This appeal arises out of incidents involving Mr. Marchand (a forward with the Boston Bruins) near the end of the game between Boston and the Pittsburgh Penguins at the TD Garden on February 8, 2022. I have closely reviewed the video footage of the incident, as captured on the suspension video prepared by the NHL Department of Player Safety ("DPS"). Based on the testimony and argument presented at the appeal hearing, there is no dispute about what happened.

Late in the third period, with Pittsburgh ahead by a score of 4-2, Pittsburgh goaltender, Tristan Jarry, made a save and froze the puck in the goal crease surrounded by multiple Boston and Pittsburgh players. The on-ice officials whistled the play dead with twenty-five (25) seconds remaining in the game. Mr. Jarry remained on his knees in the crease, covering the puck. Mr. Marchand, standing on the side of the right goalpost, then took a step around the referee and delivered a gloved punch to the left side of Mr. Jarry's head. Mr. Jarry was looking down at the ice just prior to the punch and he does not appear to have seen it coming. The force of Mr. Marchand's punch caused Mr. Jarry to be knocked down to the ice, and a scrum ensued. Mr. Marchand was restrained by a linesman, who attempted to escort Mr. Marchand off the ice. As

Mr. Marchand and the linesman were skating past Mr. Jarry, the linesman positioned his body between the two players. As they passed Mr. Jarry, Mr. Marchand, while in the linesman's grasp, pushed toward Mr. Jarry, and used the blade of his stick to deliver a jab to Mr. Jarry's head and neck area, causing Mr. Jarry to recoil.

The Official's Report of Match Penalty states:

With 25 seconds remaining in the game and Pittsburgh leading Boston 4-2. We had a whistle at the net for the Pittsburgh Goalie #35 Jarry making a glove save. All of a sudden #63 Marchand (BOS) comes to the net and sucker punches #35 Jarry (PIT) in the side of the head. A little scrum ensues and as the linesman is escorting #63 Marchand (BOS) off the ice, Marchand turns and comes at #35 Jarry (PIT) who is in his crease and pokes him in the Goalie Mask. #63 Marchand was assessed a minor for roughing and a Match Penalty Rule 21.1 for deliberate attempt to injure. (NHL Ex. 3.)

## II.

### **PROCEDURAL HISTORY**

On February 9, 2022, George Parros (Senior Vice President, DPS) held an in-person supplementary discipline hearing (via Zoom videoconference) relating to this incident. Following the hearing, Mr. Parros issued a decision suspending Mr. Marchand for six (6) games. The analysis and rationale underlying the suspension assessed to Mr. Marchand was fully explained in the DPS video produced and made publicly available in conjunction with the announcement of Mr. Parros's decision. As of the date of this decision, Mr. Marchand has served four (4) games of the six-(6) game suspension.

By email to Deputy Commissioner Bill Daly, dated February 11, 2022, the NHLPA gave notice of an appeal on behalf of Mr. Marchand pursuant to Section 18.12 of the NHL/NHLPA Collective Bargaining Agreement ("CBA").

### **III.**

#### **THE FEBRUARY 16 HEARING**

As set forth in CBA Section 18.12, where (as here), the underlying decision results in a suspension of six (6) or more games, and such decision is appealed, I am required to hold an in-person hearing. I held such a hearing on February 16, 2022 at the League offices in New York. In attendance at the hearing in addition to and on behalf of Mr. Marchand were his agent, Wade Arnott; and John Gerba, Don Zavelo, Steve Webb and Rob DeGregory from the NHLPA. In addition, Boston Bruins General Manager Don Sweeney attended. Bill Daly, David Zimmerman, Julie Grand, Daniel Ages and Katherine Watson attended the hearing on behalf of the League. George Parros, from DPS, appeared at the hearing and he, as well as Mr. Marchand and Mr. Sweeney, testified. Also in attendance on behalf of the League was counsel from Proskauer Rose LLP, Joseph Baumgarten.

The hearing began at approximately 3:00 p.m. and concluded at approximately 5:15 p.m. All parties were given a full and fair opportunity to be heard and no objection to the proceeding was raised. The record was closed at the conclusion of the hearing. The final transcript of the hearing was received by email on February 17, 2022.

### **IV.**

#### **STANDARD OF REVIEW**

Section 18.12 of the CBA provides for the right to appeal to the Commissioner any decision regarding Supplementary Discipline for On-Ice Conduct. The CBA directs, in connection with any such appeal, that I determine whether the supplementary discipline decision was supported by clear and convincing evidence.

## V.

### THE NHLPA'S CONTENTIONS

Mr. Marchand readily admitted that he had engaged in the conduct described above and in the DPS suspension video. Likewise, neither he nor the NHLPA took issue with the conclusion that his conduct was in violation of the League Playing Rules and amounted to roughing and high sticking. I found Mr. Marchand to be forthright and sincere in expressing remorse for his conduct, which he did not attempt to defend and which he acknowledged was “stupid.” (Tr. 9.)

The sole basis for the appeal is the contention that the supplementary discipline assessed by DPS (a six (6) game suspension) was excessive in light of discipline imposed in purportedly comparable cases. (Tr. 85-89.) In particular, the NHLPA cited a two (2) game suspension imposed on Milan Lucic in 2019 based on a punch delivered to Kole Sherwood (NHLPA Ex. 2); as well as an incident in which Joe Thornton received no supplementary discipline for a punch delivered to goaltender Petr Mrazek in 2019. (NHLPA Ex. 1.) The NHLPA also cited a two (2) game suspension imposed on Radko Gudas in 2019 for high sticking Nikita Kucherov. The NHLPA also presented a list of other players who have been fined and suspended for high sticking. (NHLPA Ex. 3.) I discuss this evidence at pp. 11-13, below.

## VI.

### ANALYSIS

Because the NHLPA and Mr. Marchand do not contest that the conduct in question violated the League Playing Rules, my analysis is limited to whether the six (6) game suspension imposed by DPS is appropriate, *i.e.*, supported by clear and convincing evidence. For the reasons that follow, I find that it is.

As I have noted in prior supplementary discipline opinions, the CBA does not prescribe a formulaic basis for the determination of appropriate supplementary discipline. To the contrary, Article 18 embodies a recognition that each case is unique and must be decided on the basis of its own particular facts and circumstances.

The framework for my inquiry as to the appropriate level of discipline for on-ice conduct in violation of the Playing Rules involves a review of the following factors set forth in Section 18.2 of the CBA:

- (a) The type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.
- (b) Injury to the opposing Player(s) involved in the incident.
- (c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation. (Emphasis in original.)
- (d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.
- (e) Such other factors as may be appropriate in the circumstances.

I review these factors below.

### The Type of Conduct Involved (Section 18.2(a))

There is no question (and no dispute) that Mr. Marchand's conduct involved both roughing and high sticking in violation of League Playing Rules. I note that the on-ice officials also assessed a match penalty against Mr. Marchand for a deliberate attempt to injure under Playing Rule 21.1. (NHL Ex. 3.) However, DPS did not find that Mr. Marchand deliberately attempted to injure Mr. Jarry and, giving Mr. Marchand the benefit of the doubt, I decline to make such a finding here.<sup>1</sup> I accept Mr. Marchand's explanation that he is an aggressive and emotional player who crossed a line (one that he has crossed before), but without any intent to injure Mr. Jarry. (Tr. 10).

There is also no question that the conduct involved was intentional. Mr. Marchand deliberately stepped around the referee in order to deliver the punch to Mr. Jarry well after the play had been whistled dead (*i.e.*, roughing). As he was being escorted off the ice, Mr. Marchand then deliberately, while in the grasp of the linesman, approached Mr. Jarry to deliver an intentional stick jab to Mr. Jarry's head and neck area (*i.e.*, high-sticking).

By definition, the conduct involved excessive and unnecessary force because there was no justification for any force being applied given that the play had been whistled dead. To make matters worse, Mr. Marchand twice struck Mr. Jarry, an unsuspecting opposing goaltender who was not in a position to defend himself. In the first instance, Mr. Jarry was already in a compromised position (on his knees, covering the puck) when Mr. Marchand approached him from the side and punched him, so it is not surprising that the unanticipated punch knocked Mr. Jarry to the ice. It is also apparent from the video that Mr. Jarry did not anticipate (nor did he have any reason to anticipate) that Mr. Marchand would deliver a stick jab to his head (which

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<sup>1</sup> Had there been a deliberate attempt by Mr. Marchand to injure Mr. Jarry, I cannot imagine that the discipline imposed would not have been significantly greater.

was applied with sufficient force to cause Mr. Jarry's head to turn sharply) while Mr. Marchand was being escorted off the ice.

In short, the conduct here was far from a "hockey play."<sup>2</sup> And, although Mr. Jarry did not suffer an injury, it is clear that Mr. Marchand's actions were taken with reckless disregard for Mr. Jarry.

Injury to The Opposing Player (Section 18.2(b))

Mr. Jarry was not injured as a result of Mr. Marchand's actions.

The Status of The Offender (Section 18.2(c))

CBA Section 18.2(c)'s underlined language highlights the significance of this factor: "Players who repeatedly violate League Playing Rules will be more severely punished for each new violation." The reason for this emphasis is self-evident. As I have stated previously, the goal of supplementary discipline is not simply to punish conduct that is in violation of League Rules, but also to deter future misconduct. The plain language of the CBA makes clear that this is true whether or not the repeat offense(s) involve the identical conduct.

No active player has been suspended more times than Mr. Marchand; this is his ***eighth*** (***8<sup>th</sup>***) suspension. (NHL Ex. 1.) In addition, he has been fined four (4) times for physical fouls.<sup>3</sup> Although the on-ice penalty calls that resulted in supplementary discipline have varied in their specifics, all have involved serious violations, including elbowing, slew footing, clipping, roughing, spearing, cross-checking and (now) high sticking. It is, to say the least, an unenviable record. And (again), to make matters worse, Mr. Marchand's most recent suspension prior to this one occurred less than three months ago, when he was suspended for three (3) games for

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<sup>2</sup> Mr. Sweeney aptly characterized the conduct as an "immature move" that was "completely unnecessary." (Tr. 34.)

<sup>3</sup> This excludes a fine for diving/embellishment, which I find to be irrelevant in the context of this matter.

slew footing Vancouver Canucks player Oliver Ekman-Larsson on November 28, 2021.

Recently (in the appeal of Nazem Kadri's suspension in 2021), the NHLPA argued forcefully that the application of Section 18.2(c) should take account of a player's change in behavior over time and that "[w]hen a Player goes a significant amount of time without receiving Supplementary Discipline, that must be taken into account. It furthers the very point of a progressive discipline system and that's to change behavior."<sup>4</sup> That conclusion may have merit in appropriate circumstances. Indeed, it no doubt has been applied to Mr. Marchand, whose November 2021 suspension of three (3) games was less than his next most recent prior suspension of five (5) games in January 2018 (notwithstanding an intervening fine and other Playing Rule violations that warranted warnings from DPS).

But the converse is also true. When a player repeatedly commits multiple violations worthy of supplementary discipline within a relatively short period of time, the principle of progressive discipline clearly warrants an escalation in the quantum of discipline. That is particularly true where, as here, the Player is one whose career has been marked by repeated prior instances of supplementary discipline.

In short, both Mr. Marchand's record of eight (8) suspensions and four (4) fines, and his recent experience involving separate infractions twenty-one (21) games apart from one another, call for discipline significantly over and above the three (3) game suspension imposed in November 2021.

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<sup>4</sup> In the Matter of the Appeal Of Nazem Kadri, (Das) June 4, 2021 Tr. at 16. Ironically, the NHLPA's comparator list in the Kadri appeal included Mr. Marchand and the NHLPA argued there that Mr. Marchand "was actually the more frequent recipient of Supplemental Discipline." In the Matter of the Appeal of Nazem Kadri, (Bettman) May 27, 2021 Tr. at 32. At the time, Mr. Marchand had been suspended a total of six (6) times.



### The Situation of The Game (Section 18.2(d))

Section 18.2(d) calls for consideration of the situation of the game, and provides by way of example whether the conduct occurs “late in the game, lopsided score.” In such a circumstance, a penalty called by the on-ice officials may be meaningless and supplementary discipline therefore necessary to punish and deter violations.

Here, the incident occurred with twenty-five (25) seconds left in the game, and with Pittsburgh leading by a score of 4-2. Down by two goals with twenty-five seconds left, the game was likely out of reach for Boston. This is precisely the kind of game circumstance contemplated by Section 18.2(d).<sup>5</sup>

### Other Factors As May Be Appropriate (Section 18.2(e))

It is difficult to imagine any kind of provocation that might have served to justify or mitigate the conduct involved here, but I note that virtually no evidence of provocation was offered at all. Mr. Marchand testified only that his punch was prompted by Mr. Jarry’s comment (after making the save): “How about that f—g save?” (Tr. 14.) To say that Mr. Marchand overreacted to that comment would be an understatement. Mr. Marchand himself admitted as much, testifying that Mr. Jarry’s comment was “nothing really out of line or derogatory in any kind of way[.]” (Tr. 8.) Mr. Marchand also admits that he overreacted, stating: “my emotions got the best of me and I made a poor decision.” (Tr. 18.)

That overreaction was compounded when Mr. Marchand inexplicably re-engaged with Mr. Jarry while he was being escorted from the ice by the linesman. Any NHL player (and certainly a player as experienced as Mr. Marchand) knows full well that his obligation under

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<sup>5</sup> Not surprisingly, Mr. Sweeney testified that his initial reaction to seeing Mr. Marchand’s conduct was that it would raise a concern on the part of DPS in light of the “heightened awareness” to situations “where the game may be already over, the outcome determined and an [incident] occurs.” (Tr. 37-38.)

those circumstances is to leave the ice without further incident rather than “[go] through” the linesman (to use Mr. Marchand’s words (Tr. 17)) in order to “send ... a message” (Tr. 18-19) by striking Mr. Jarry again.<sup>6</sup> To the extent there is otherwise any doubt as to the correct quantum of discipline based on the factors discussed above, resisting the direction of a linesman in order to re-engage with an opponent is an additional aggravating factor.

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Weighing the factors described above, I find that a six (6) game suspension is appropriate in light of the following undisputed facts:

- Mr. Marchand’s conduct was intentional and involved an excessive and unnecessary use of force.
- The conduct consisted of two incidents – an unprovoked punch, followed by a high stick delivered after and despite the intervention of a linesman – that violated two League Playing Rules. The conduct was potentially dangerous and that danger was exacerbated by the fact that it was directed against an unsuspecting player who was not in a position to defend himself.
- Mr. Marchand is not only a “repeat offender,” as that term is defined in Article 18, he has now been suspended a total of eight (8) times in his career and been fined four (4) times. In addition, his most recent prior suspension (for three (3) games) occurred only twenty-one (21) games (and less than three (3) months) before the incident at issue.

I believe the factors discussed immediately above are more than adequate to constitute “clear and convincing evidence” sufficient to affirm the six (6) game suspension imposed by

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<sup>6</sup> This obligation is reflected in Playing Rule 46.5, which provides that a player “who resists a Linesman in the discharge of his duties shall, at the discretion of the Referee, incur a misconduct or game misconduct penalty in addition to any penalties imposed.”

DPS. To the extent there is any doubt on that subject, I find that the factors prescribed in Sections 18.2(d) and (e), as discussed above, provide further support for this conclusion.<sup>7</sup>

The NHLPA's position (stated near the end of the hearing) is that the maximum reasonable suspension applicable here would be four (4) games. (Tr. 89.) The NHLPA "calculated" this number by: (i) assuming a one (1) game suspension for the punch to Mr. Jarry (the mid-point between the two (2) game suspension imposed on Milan Lucic in 2019 for punching Kole Sherwood and no suspension imposed on Joe Thornton for punching Petr Mrazek in 2019); (ii) assuming (at most) an additional one (1) game suspension for high sticking based on the fact that the circumstances here are less egregious than the two (2) game suspension imposed on Radko Gudas for high sticking Nikita Kucherov in 2019; and (iii) doubling the two (2) games in light of Mr. Marchand's disciplinary history. (Tr. 85-89.) I do not believe this analysis is appropriate for the following reasons.

First, I reject the NHLPA's suggestion that Mr. Marchand's conduct was less serious than Mr. Lucic's. Both involved a punch to the head of an unsuspecting (and, therefore, defenseless) player. If anything, the conduct here is even more concerning, as it was completely unprovoked, occurred after the play had been whistled dead and involved a punch and a high stick delivered to an unsuspecting goaltender.

Second, I do not find the punch delivered by Mr. Thornton to Petr Mrazek (which resulted in no on-ice penalty or supplementary discipline) and Mr. Marchand's punch to Mr. Jarry to be sufficiently similar such that it should (or can) be used as a persuasive comparator. The video of that incident clearly shows that Mr. Mrazek swiped at Mr. Thornton with his stick as the latter skated past him and then left the goalie crease to confront Mr. Thornton behind the

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<sup>7</sup> I have taken into account the fact that Mr. Jarry did not suffer an injury. Had there been an injury, Section 18.2(b) would have called for a longer suspension.

net. Mr. Mrazek was not defenseless; in fact, he initiated the confrontation and was prepared, or should have been prepared, for a physical response.

I do believe the Thornton-Mrazek incident is significant – just not for the reason the NHLPA argued. Its significance lies in the fact that it was the only incident that anyone was able to identify as even a potential comparator. Stated another way, nobody could identify any instance in which a skater punched an unsuspecting goaltender in his crease after the whistle had blown. The fact that the NHLPA was relegated to having to place such a significant reliance on the Thornton-Mrazek incident as a “comparable” highlights the highly unusual – and serious – nature of this incident. Standing alone, the action (an unprovoked punch to an unsuspecting goaltender after play had stopped) would have justified a suspension of multiple games for Mr. Marchand, even without the high sticking and even with a less problematic disciplinary history.

Third, the NHLPA’s quest to find a player with a “comparable” disciplinary history necessarily falls short. There simply is no player who has a disciplinary history comparable to Mr. Marchand’s. Mr. Lucic’s 2019 suspension was his fourth (4<sup>th</sup>) suspension since 2009 and he had been fined three times for physical fouls in the same period.<sup>8</sup> At the time of the Mrazek incident (December 2019), Mr. Thornton had been suspended five (5) times (and fined four (4) times) since 2000, with three (3) of those suspensions occurring almost two decades earlier (between 2000 and 2002).<sup>9</sup> By contrast, Mr. Marchand has now been suspended eight (8) times and fined four (4) times since 2011, a disciplinary record that is considerably more troubling than either of those players and one which stands unmatched by any other active NHL player. (NHL Ex. 2.) As discussed above, the fact that those suspensions involved a variety of penalties (rather

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<sup>8</sup> I am excluding two (2) fines for using an obscene gesture.

<sup>9</sup> After the 2001/02 season, Mr. Thornton was next suspended in 2010 and again in 2019.

than multiple penalties for the same conduct) does not help him in light of the language of Section 18.2(c).

Fourth, I do not agree with the NHLPA's assertion that Mr. Marchand's high sticking violation warranted only a fine or (at most) a one game penalty. As the NHLPA itself observed, there has been a range of discipline imposed for high sticking violations and the two game suspension imposed on Mr. Gudas was prompted by the fact that his conduct was intentional and because he was a repeat offender who had previously been disciplined (in the form of a ten (10) game suspension) for similar (but more egregious) conduct. While the circumstances may differ, Mr. Marchand's conduct was also intentional and, as I have discussed, he has a lengthy disciplinary record of his own.

Finally, in reaching my conclusions I have given careful consideration to Mr. Marchand's testimony concerning his efforts to control his emotions in order to excel as an impact player who plays aggressively, but within the rules. I believe that he has already made significant strides towards achieving this goal. Unfortunately, however, Mr. Marchand's behavior and lack of judgment in respect of these incidents did not meet acceptable NHL standards. He created a distraction which reflected poorly on himself, on his team and on the League as a whole, and as such, I find he also deserves the penalty he received. Having said that, I encourage Mr. Marchand to reflect on this experience and to use it positively in furtherance of his efforts to refine and improve his on-ice image and game for everyone's benefit.

## **VII.**

### **CONCLUSION**

For the foregoing reasons, the decision of the Department of Player Safety suspending Brad Marchand for six (6) games is hereby affirmed.

*Gary B. Bettman*

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Gary B. Bettman

Dated: February 18, 2022