

Fall 2011

A Delayed Penalty: The Implications of the Ilya Kovalchuk Arbitration Decision on the National Hockey League, 45 J. Marshall L. Rev. 145 (2011)

Morgan Marcus

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Dispute Resolution and Arbitration Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Morgan Marcus, *A Delayed Penalty: The Implications of the Ilya Kovalchuk Arbitration Decision on the National Hockey League*, 45 J. Marshall L. Rev. 145 (2011)

<https://repository.law.uic.edu/lawreview/vol45/iss1/7>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

A DELAYED PENALTY: THE IMPLICATIONS OF THE ILYA KOVALCHUK ARBITRATION DECISION ON THE NATIONAL HOCKEY LEAGUE

MORGAN MARCUS*

The overall structure of this [Standard Player Contract] reflects not so much the hope that [Ilya] Kovalchuk will be playing in those advanced years, but rather the expectation that he will not.¹

I. INTRODUCTION

On September 16, 2004, the National Hockey League (“NHL” or “League”), already in significant economic peril, underwent an owner-induced lockout that rendered the 2004-2005 season canceled.² At the time, the NHL owners contended that \$224 million was lost during the previous season and that without significant change to team payroll and players’ share of League-wide revenue, a lockout was the only remedy.³ For a league struggling to survive, the player/owner standoff had been brewing for some time.⁴

* J.D., The John Marshall Law School 2012. The author would like to thank the various members of the Law Review for their hard work. The author would also like to thank his parents, Jacqueline and Harvey, for their constant support, and for always encouraging him to reach for the stars.

1. Nat’l Hockey League v. Nat’l Hockey League Players’ Ass’n, ___, ___, at 17 (2010) (Bloch, Arb.), available at <http://offsidesportsblog.blogspot.com/2010/08/analysis-of-kovalchuk-decision.html>.

2. *Lockout Over Salary Cap Shuts Down NHL*, ESPN (Feb. 16, 2005, 11:41 PM), <http://sports.espn.go.com/nhl/news/story?id=1992793>.

3. See Michael K. Ozanian, *Ice Capades*, FORBES.COM (Nov. 29, 2004), http://www.forbes.com/free_forbes/2004/1129/124.html (noting the issues of transparency in the NHL’s computation of losses as a significant reason for the labor dispute); see also ARTHUR LEAVITT, JR., LEAVITT REPORT: INDEPENDENT REVIEW OF THE COMBINED FINANCIAL RESULTS OF THE NATIONAL HOCKEY LEAGUE 2002-2003 SEASON (Feb. 5, 2004), available at <http://www.nhl.com/nhlhq/cba/archive/levitt/levittreport.pdf> (illustrating an independent review of the NHL’s Unified Report of Operations (“URO”) for the 2002-2003 season to establish the financial results for that season). The URO results show an operating loss to the NHL for the 2002-2003 season at \$273 million and nineteen out of thirty teams reporting operating losses for the season. *Id.* at 21.

4. See LEAVITT, JR., *supra* note 3, at 2 (stating that “[t]he current relationship between League-wide player costs and League-wide revenues is inconsistent with reasonable and sound business practices. Player costs of

The year-long lockout had far reaching implications not only on the then NHL structure, but also on its economic viability in the future.⁵ With the signing of the Collective Bargaining Agreement (“2005 CBA”) on July 13, 2005, the NHL ushered in a new era dictated by a hard salary cap that sought not only to make the League structurally feasible, economically speaking, but also to make the product on the ice more entertaining in an effort to increase revenue and fan base.⁶

The 2005 CBA included a club payroll range with upper and lower limits, but did not include a luxury tax, something the players demanded.⁷ In the time since the signing of the 2005 CBA, there has been relative labor peace, but like the other major professional sports, (Major League Baseball (“MLB”), National Basketball Association (“NBA”), and National Football League

\$1.494 billion or 75% of revenues substantially exceed such relationships in both the NBA and the NFL as those relationships are set forth in their collective bargaining agreements.”).

5. See Stan Fischler, *Fischler: Happy Days are Here Again for NHL*, HOCKEY JOURNAL.COM (June 9, 2010), http://www.hockeyjournal.com/news/2010/06/09_fischler.php (noting the struggle of the NHL to regain its fan base after the 2004-2005 lockout as “Chicago, home to one of the Original Six—and the country’s third-largest media market . . . muster[ed] a paltry season ticket base of just 3,400 in 2007.”); see also *Majority of U.S. Hockey Market Newspapers not Covering Cup Finals*, ESPN (June 2, 2007, 5:41 PM), <http://sports.espn.go.com/nhl/playoffs2007/news/story?id=2891383> (describing the efforts of the NHL to attempt to increase coverage of the Stanley Cup finals between the Anaheim Ducks and the Ottawa Senators); *NHL Team Valuations*, FORBES.COM (Nov. 8, 2007), http://www.forbes.com/lists/2007/31/biz_07nhl_NHL-Team-Valuations_Income.html (illustrating that based on the 2006-2007 season, half of the League was operating in the red); Tarik El-Bashir & Thomas Heath, *NHL’s Strong Comeback Marred by Poor TV Ratings*, WASH. POST, June 5, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/04/AR200606_0400897.html (describing the economic effects of dropping television ratings as the NHL and ESPN parted ways as ESPN declined to offer upfront rights fees for airing of games). The NHL agreed to a new contract in August 2005 with Comcast-owned Outdoor Life Network [“OLN”], which subsequently changed its name to Versus. *Id.* The NHL national rights fee contract with OLN amounted to about \$2 million per team, in contrast to the NFL, which earned its teams about \$100 million a year. *Id.* As a result, the NHL received little revenue from their OLN contract. *Id.*

6. *NHL Enacts Rules Changes, Creates Competition Committee*, NHL.COM (July 22, 2005), http://www.nhl.com/nhlhq/cba/rules_changes072205.html (noting new rules sought to instill competitive balance).

7. *Commish “A Luxury Tax Will Not Work”*, ESPN (Dec. 1, 2004, 8:20 PM), <http://sports.espn.com/nhl/news/story?id=1935455>; see also Kevin Allen & Mike Brehm, *Black Ice: NHL Season Cancelled*, USATODAY.COM, Feb. 21, 2005, http://www.usatoday.com/sports/hockey/nhl/2005-02-16-season-cancel_x.htm (defining cost certainty as the “limiting [of] player compensation to a fixed percentage of revenue.”). Commissioner Bettman suggested that this cost certainty was critical not only in terms of agreement over the new CBA but also in terms of future promotion of the NHL product. *Id.*

("NFL")) the threat of a strike or lockout due to labor war is omnipresent as the next round of CBA negotiations approaches.⁸ While the NHL has recovered from the negative effects of the lockout, the recent arbitration decision involving Ilya Kovalchuk ("Kovalchuk") is significant enough to send shivers down the spine of any hockey fan with the end of the 2005 CBA looming.⁹

The NHL voided the contract between Kovalchuk and the New Jersey Devils on July 20, 2010, because the NHL deemed that it circumvented the League's salary cap.¹⁰ The NHL Players' Association ("NHLPA") then filed a grievance on behalf of Kovalchuk.¹¹ On appeal, arbitrator Richard Bloch ("Bloch"), agreed with the NHL and voided the contract.¹² The contract offer stood to give Kovalchuk \$102 million over seventeen years.¹³ However, Bloch saw issue with a "no-movement clause" that transitioned into a "no-trade clause" after year eleven of the contract.¹⁴

8. See *Kelly Ousted as Head of NHLPA*, ESPN (Aug. 31, 2009, 8:50 PM), <http://sports.espn.go.com/nhl/news/story?id=4433555> (explaining the reasons why NHLPA head Paul Kelly was removed from his post as executive director); but see Frank Hughes, *Preparing for Worst, Union Stresses Solidarity as Labor Unrest Looms*, SI.COM (Jan. 9, 2010), <http://sportsillustrated.cnn.com/2010/basketball/nba/01/09/hunter.labor/index.html> (articulating the fears of a potential NBA lockout eighteen months before the old CBA was to expire). See John Melloy, *NFL Lockout Fear Sacks DirecTV Stock*, CNBC.COM (June 17, 2010, 3:03 PM), http://www.cnbc.com/id/37756415/NFL_Lockout_Fear_Sacks_DirecTV_Stock (contemplating the hit on DirecTV stock as a result of apprehension over a potential NFL lockout after the 2010 season).

9. Jeff Z. Klein & Stu Hackel, *Slap Shot; A Labor Dispute Still Shapes the N.H.L.*, N.Y. TIMES, Jan. 3, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9A01EEDF173EF930A35752C0A9669D8B63> (discussing that "[n]ever before had an entire North American professional sports season been lost because of a labor dispute. It was not merely the pivotal event of the decade for the NHL; it was perhaps the pivotal event in the modern history of pro hockey.").

10. Allan Muir, *Why Lower the Hammer Now?*, SI.COM (July 21, 2010, 12:28 AM), http://sportsillustrated.cnn.com/2010/writers/allan_muir/07/21/deal.react/index.html.

11. *NHLPA Files Grievance*, SI.COM (July 26, 2010, 2:25 PM), <http://sportsillustrated.cnn.com/2010/hockey/nhl/07/26/kovalchuk.grievance/index.html>.

12. See *Nat'l Hockey League*, *supra* note 1, at 19 (noting that the contract was structured in such a way that it was doubtful that a significant portion of the deal would be performed).

13. *Id.* at 1-2.

14. *Id.* at 18. See Craig Custance, *Kovalchuk Ruling Benefits Long-Term Health of NHL*, SPORTINGNEWS (Aug. 11, 2010), <http://aol.sportingnews.com/nhl/story/2010-08-09/kovalchuk-ruling-benefits-long-term-health-nhl> (noting that:

[t]he transition from a no-move clause to a no-trade clause in the final six years would have given the Devils the flexibility to place Kovalchuk on waivers or send him to the minors during that span. Considering it would give New Jersey an annual salary cap relief of around \$6 million,

More importantly, Bloch condemned the significant front-loading of the contract and its apparent goal to skirt the salary cap provisions of the 2005 CBA.¹⁵ The deal, which would have been the longest in the history of the NHL, stood to pay Kovalchuk ninety-seven percent of the full contract value within the first eleven years of the contract.¹⁶ The NHL argued that the last six years of the deal, the final three percent of the contract value, were illusory, and neither Kovalchuk nor the Devils intended him to fulfill those years of the contract.¹⁷ Therefore, the NHL was able to score a crucial victory over the NHLPA with the upcoming CBA expiration on the horizon.¹⁸

The function of this Comment is to evaluate the significance of the Kovalchuk arbitration decision on the current NHL structure and ultimately to argue how the NHL should approach the impending negotiations over the terms for the new CBA. Part II of this Comment examines the origins of the NHL and the construction of the 2005 CBA. Part II will also illustrate the context for the Kovalchuk decision and the glaring problems of the 2005 CBA. Part III analyzes the impact of Bloch's decision on current NHL players' contracts and a team's ability to utilize its salary cap space to sign players generally. This section also details the importance of the decision in terms of the 2011-2012 negotiations over a new CBA. Additionally, Part III will evaluate how the NHL and NHLPA will rely on the Bloch opinion, along with principles related to labor, contract, and antitrust law to gain leverage in their collective bargaining negotiations.

Part IV proposes a long-term solution for the NHL to incorporate into the new CBA, based upon prior experience and

waiving Kovalchuk would almost be too good an option to pass up for the GM running the team in the 2020s.).

15. See *Nat'l Hockey League*, *supra* note 1, at 17-18 (detailing the effect, rather than the intent, of the agreement between Kovalchuk and the Devils was questioned, specifically because by year eleven of the deal, Kovalchuk would have already received \$98 million of his \$102 million contract).

16. *Id.*

17. See Press Release, Proskauer Rose LLP, NHL Prevails in Arbitration Over Rejected Kovalchuk Contract (Aug. 17, 2010), <http://www.proskauer.com/nhl-prevails-in-arbitration-over-rejected-kovalchuk-contract-08-17-2010/> (noting that "the effect [of the agreement] . . . would defeat the intentions of the parties as outlined in the team payroll range provisions.").

18. See Shawn P. Roarke, *NHL Players Association will not Re-open CBA*, NHL.COM (Jan. 23, 2009), <http://www.nhl.com/ice/news.htm?id=405957> (noting that the NHLPA had an option to re-open the CBA by September 15, 2009, but decided against it). The NHLPA also had an option to extend the CBA for one additional year at the end of the term which they opted to exercise on June 22, 2010. Press Release, NHLPA.com, NHLPA Executive Board Exercises its Option to Extend Collective Bargaining Agreement (June 22, 2010), <http://www.nhlpa.com/News/Media-Releases/Details.aspx?R=753E1E1A-6CF8-41C7-B9C4-2DE654DE7ABF>.

the Bloch decision, to avoid a protracted labor dispute. This reform includes a significant redrafting of Article 26, which deals with circumvention. In support of this modification, the NHL must make concessions to the NHLPA regarding escrow account contributions while at the same time maintaining the general structure of the 2010 amendment to the 2005 CBA, which allowed for greater contractual certainty for long-term contracts. With this structure in place, the NHL should additionally look to add greater flexibility to the CBA through the use of a franchise player, or similar device.

II. BACKGROUND

A. Background Behind the 2004-2005 Lockout

The modern game of ice hockey derives its origins from the late nineteenth century.¹⁹ However, the NHL was not officially in business until 1917, when the League was formed from the ashes of the National Hockey Association.²⁰ At the outset, the NHL was comprised solely of Canadian teams: the Ottawa Senators, Montreal Canadiens, Montreal Wanderers, Toronto Arenas, and Quebec Bulldogs.²¹ Even in its infancy, the NHL was in a constant battle for its survival.²² As the NHL expanded into the United States and became established with more teams and stadiums, the

19. HISTORY OF HOCKEY, http://www.historyofhockey.net/history_of_hockey.html (last visited Sept. 10, 2011); see also STAN FISCHLER, FISCHLER'S ILLUSTRATED HISTORY OF HOCKEY 19 (Warwick Publishing Group 1993) (noting that the foundation for North American professional hockey was the emergence of the National Hockey Association ["NHA"]).

20. HISTORY OF HOCKEY, *supra* note 19; see also John McGourty, *NHL Dropped the Puck 91 Years Ago*, NHL.COM (Dec. 19, 2008, 10:00 AM), <http://www.nhl.com/ice/news.htm?id=398815> (noting that the NHL was established to eliminate one of the owners in the NHA, who, after not being included, brought several lawsuits against the NHL); see MOREY HOLZMAN & JOSEPH NIEFORTH, DECEPTIONS AND DOUBLECROSS: HOW THE NHL CONQUERED HOCKEY 22 (Dundern Press 1989) (describing the circumstances behind the NHL's humble beginnings).

21. McGourty, *supra* note 20; see also FISCHLER, *supra* note 19 (explaining that free agent competition was a significant issue, even then, as the Pacific Coast Hockey Association and NHA were in constant battles over player services).

22. See HOLZMAN & NIEFORTH, *supra* note 20, at 147 (discussing the competition for players amongst the NHA, Pacific Coast Hockey Association, and Western Canada Hockey League (renamed the "Western Hockey League") prior to the creation of the National Hockey League). See also ERIC WHITEHEAD, THE PATRICKS: HOCKEY'S ROYAL FAMILY 143 (Doubleday Canada Limited 1980) (discussing the disintegration of the Pacific Coast Hockey League and the subsequent merger with the Western Hockey League). At this point, the NHL had emerged as the forerunner in terms of profitability and sustainability. *Id.*

League was not met by immediate success.²³ More often than not, the NHL dealt with financial difficulty.²⁴

In 1967, the NHLPA was officially certified as a union and became the exclusive bargaining representative of the NHL players governed under the National Labor Relations Act.²⁵ In the 1970s, the NHL faced significant competition from the World Hockey Association.²⁶ Then, in the 1990s, play came to a standstill with the 1994-1995 104-day lockout.²⁷ The owners were seeking a salary cap,²⁸ changes to free agency, and salary arbitration to curb bulging salaries.²⁹ The players, on the other hand, were fighting for a luxury tax.³⁰ The result of the lockout was, among other concessions, a rookie salary cap, but the sides did not agree on a

23. See FISCHLER, *supra* note 19, at 32-33 (discussing that “[t]he WCHL, which closed after the 1925-1926 season, ultimately proved the prime feeder for the expanding NHL which became a ten-team league split between Canadian and American divisions.”). Even with the increase in teams, clubs on both sides struggled significantly during the Great Depression. *Id.*

24. See *id.* at 65 (noting the advent of the television had a significant effect on NHL attendance, and large market teams like the Boston Bruins and Chicago Blackhawks nearly had to fold due to decreased attendance).

25. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 507 (Praeger Publishers 3d ed. 1992) (noting that NHL players began pursuing unionization in the 1950s but were not recognized as a union by the League until the late 1960s).

26. See FISCHLER, *supra* note 19, at 114 (contending that competition from the World Hockey Association made a significant “dent” in the rosters of many of the NHL teams). The NHL was so concerned by the increased influence of the WHA that by the 1976-1977 season several NHL leaders proposed that a merger take place. *Id.* at 119. The WHA lasted until the 1978-1979 season, when the NHL merged with the WHA, thereby integrating four of the WHA teams (Oilers, Whalers, Jets, Nordiques). *Id.* at 123. See also *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 467 (E.D. Pa. 1972) (discussing that the WHA, seeking a preliminary injunction, challenged the NHL’s “reserve system” under antitrust law, stating that the NHL was acting monopolistic with regard to players services). This action led to the merger of several WHA teams into the NHL. WONG, *supra* note 25, at 474.

27. See *We’ve Been Here Before*, CBC, <http://www.cbc.ca/sports/indepth/cba/features/flashback.html#1994> (last visited Oct. 15, 2011) (explaining that the precursor to the 1994 lockout was the player-induced 1992 strike, which led to concessions regarding marketing rights for the players but only included a two-year deal). Even at this time, a growing concern for the League was the rapidly increasing salaries and the decreasing team revenue. *Id.* At the end of the 2003-2004 season, the owners locked out the players after both sides could not come to terms. *Id.*

28. *Id.*

29. See *id.* (noting that the NHL wanted a sliding tax system that would fine teams who exceeded the League average payroll, but the NHLPA was adamantly opposed to the idea thinking it amounted to a salary cap which would artificially limit salaries).

30. See *id.* (describing the “five percent solution” as a way to help small market teams through revenue sharing). Essentially the NHLPA envisioned a payroll and gate receipt tax of the top sixteen teams in the League. *Id.*

salary cap or luxury tax.³¹ Accordingly, the 1995 CBA was not the answer to the problems facing the League as issues remained over how to properly aid small-market teams, whether through a salary cap or luxury tax.³²

With the 1994 lockout still within memory, the NHL and NHLPA geared up for the 2004 CBA negotiations.³³ In 2004, the owners wanted a harder salary cap, one that provided what NHL Commissioner Gary Bettman (“Commissioner”) referred to as “cost certainty,”³⁴ while the players were again seeking a system similar to MLB with a luxury tax.³⁵ To combat rapidly increasing player salaries, the Commissioner sought to install a salary cap to balance owners’ revenue with players’ salaries.³⁶ The NHLPA shirked the concept of limiting salaries through a cap.³⁷ The NHL and NHLPA agreed to a new CBA on July 22, 2005, but not before the League locked-out the players for the entire season.³⁸ The 2005 CBA was made effective retroactive to September 16, 2004, the day after the 1995 agreement expired, and was to remain effective for five years provided that the NHLPA did not elect for early termination or extend the CBA by one year.³⁹ The NHLPA elected to do the latter.⁴⁰

31. *See id.* (detailing that, rather than a salary cap, the sides agreed on a complex system that put greater limits on free agency in the hopes of curbing escalating salaries).

32. *See id.* (noting that nothing specifically was done to aid small-market teams, something that would come to become a critical issue).

33. Klein & Hackel, *supra* note 9.

34. *Id.* (stating that “[t]he League’s owners’ said they were spending around seventy-five percent of their revenue on salaries and wanted to implement a salary-cap structure that would link players’ salaries to owners’ revenue.”).

35. Jim Kelley, *Independent’ Audit Yields Same Results*, ESPN (Feb. 12, 2004, 8:37 PM), http://sports.espn.go.com/nhl/columns/story?columnist=kelle_y_jim&id=1733827.

36. The Leavitt Report largely served as Commissioner Bettman’s focal point in promoting the hard salary cap as it showed the majority of the League reporting operating losses for the 2002-2003 hockey season. LEAVITT, JR., *supra* note 3, at 3; *see also* *We Can’t Live any Longer’ Under this CBA*, ESPN (May 26, 2004, 3:45 AM), <http://sports.espn.go.com/nhl/news/story?id=1809397> (noting the owners were determined to set in place a hard salary cap to limit the amount players were getting from League revenue).

37. Kelley, *supra* note 35; *see also* Klein & Hackel, *supra* note 9 (detailing that the players only accepted the salary cap after fear that they may possibly lose another season).

38. *Collective Bargaining Agreement: Board of Governors Ratifies Collective Bargaining Agreement*, NHL.COM (July 22, 2005), <http://www.nhl.com/ice/page.htm?id=26390>.

39. COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION 11 (July 22, 2005) [hereinafter COLLECTIVE BARGAINING AGREEMENT], *available at* <http://www.nhlfa.com/CBA/2005-CBA.pdf>.

40. *NHLPA Elects to Raise Cap 5 Percent*, NHL.COM (June 22, 2010, 3:53 PM), <http://www.nhl.com/ice/news.htm?id=532352>. *See also* Pierre LeBrun,

B. Kovalchuk's Standard Player Contract with the Devils

Kovalchuk was drafted first by the Atlanta Thrashers in the 2001 NHL Entry Draft and quickly established himself as one of the elite players in the League.⁴¹ In February 2010, at the age of twenty-seven, he was traded to the Devils after the Thrashers and Kovalchuk were unable to come to terms on a long-term extension.⁴² After completing the 2009-2010 season, Kovalchuk became a free agent on July 1, 2010, and teams across the NHL fought to sign him to a long-term contract.⁴³ On July 19, 2010, Kovalchuk came to an agreement with the Devils.⁴⁴

The proposed Standard Player Contract ("SPC") between Kovalchuk and the Devils was structured to terminate after the 2027 season, at which time Kovalchuk would be forty-four years old.⁴⁵ Ending speculation, the League rejected the SPC on July 20, 2010.⁴⁶ The rejection letter stated:

We believe the structure of the SPC on its face constitutes an impermissible "retirement-contract," pursuant to which the parties can have no reasonable expectation of complete performance in

Union Picks up CBA Extension Option, ESPN (June 22, 2010), <http://sports.espn.go.com/nhl/news/story?id=5316505> (noting the decision is significant because the NHLPA remained without an executive director at the time and that teams will be able to use the "performance bonus cushion" provision of the CBA for the 2010-2011 season which allows bonuses beyond the salary cap to be carried over to the next season). The NHLPA also voted to retain the five percent "growth factor," which allows the salary cap to be raised from \$57 million to \$59 million per team. Tripp Mickle, *NHL Expects Total Revenue to Top \$2.7B*, SPORTS BUS. J. (June 28, 2010), available at <http://www.sportsbusinessjournal.com/article/66122>.

41. See *Ilya Kovalchuk*, HOCKEY-REFERENCE.COM, <http://www.hockey-reference.com/players/k/kovalil01.html> (last updated Oct. 16, 2011) (stating that Kovalchuk won the Maurice Richard Trophy for the 2003-2004 season in which he tied Jarome Iginla of the Calgary Flames and Rick Nash of the Columbus Blue Jackets with forty-one goals). The Maurice Richard Trophy is an annual award given to the top goal scorers based on the regular season. *Trophies, Maurice Richard Trophy*, NHL.COM, <http://www.nhl.com/trophies/richard.html> (last visited Oct. 16, 2011).

42. See Pierre LeBrun, *Devils Acquire Kovalchuk*, ESPN (Feb. 5, 2005, 2:35 AM), <http://sports.espn.go.com/nhl/news/story?id=4888109> (describing the reason that the Thrashers decided to trade Kovalchuk rather than resign him to a long-term extension).

43. See Shawn P. Roarke, *Report: Kings Re-Enter the Kovalchuk Fray*, NHL.COM (July 7, 2010, 1:07 PM), <http://www.nhl.com/ice/news.htm?id=533937> (explaining the competition over the summer of 2010 for Kovalchuk's services between the Devils, Los Angeles Kings, New York Islanders, and SKA St. Petersburg in Russia's Kontinental Hockey League).

44. Dave Caldwell, *Devils Keep Kovalchuk but Deal Could Cost Them Some Veterans*, N.Y. TIMES, July 19, 2010, <http://www.nytimes.com/2010/07/20/sports/hockey/20devils.html>.

45. *Id.*

46. *NHL Rejects Kovalchuk's 17-Year Deal with Devils*, NHL.COM (July 20, 2010, 10:31 PM), <http://www.nhl.com/ice/news.htm?id=534717>.

accordance with its terms . . . the SPC in question is intended to or has the effect of defeating or Circumventing the provisions of the CBA.⁴⁷

The NHLPA objected to the League's action and filed a grievance on July 26, 2010.⁴⁸ The grievance was heard before Bloch August 4, 2010.⁴⁹

The NHLPA, represented by John R. McCambridge and Michael P. Conway, argued that the Kovalchuk SPC did not violate any of the CBA provisions, which limit the "form and content" of SPCs.⁵⁰ The NHLPA reasoned that the 2005 CBA did not expressly disallow the terms and content in the Kovalchuk SPC and, therefore, the NHL should accept the contract.⁵¹ On the other hand, the NHL contended the SPC amounted to a circumvention of the 2005 CBA under Article 26.⁵² The League stated:

We believe this SPC constitutes an improper manipulation of payroll room, improperly and currently lowering its average Club salary and potentially giving the Club an artificial and inappropriate increase above the upper limit, although nominally remaining within.⁵³

The NHL contended that the last six years of the Kovalchuk SPC were "illusory" and that there was an expectation between the parties that the last years of the deal would not be

47. *Nat'l Hockey League, supra* note 1, at 2-3.

48. See Dan Rosen, *NHLPA Files Grievance on Kovy Contract*, NHL.COM (July 26, 2010, 1:39 PM), <http://www.nhl.com/ice/news.htm?id=534934> (noting that the NHL and NHLPA would need to mutually agree on the hiring of a system arbitrator, and after appointing an arbitrator, he or she would have forty-eight hours to rule on the grievance).

49. See *Veteran Arbitrator Richard Bloch To Serve NHL/Kovalchuk Case*, SPORTS BUS. DAILY (Aug. 2, 2010), available at <http://www.sportsbusinessdaily.com/article/141120> (discussing arbitrator Bloch's distinguished career with arbitration work in both the private and public sectors). Bloch has previously served as an arbitrator or mediator for the NHL, NBA, NFL, and MLB. He also has extensive experience regarding CBA related grievances. *Id.*; see also *Nat'l Hockey League, supra* note 1, at 2-3.

50. See *Nat'l Hockey League, supra* note 1, at 5 (noting that "[t]here are no negotiated restrictions [in the 2005 CBA] that would serve to restrict the term, annual salary stipends, 'backdive' (decreased payments during the final years) or Move/Trade language."). The NHLPA argued principally that the structure of the SPC was permitted under the 2005 CBA. *Id.*

51. *Id.*

52. *Id.* at 3-4. Article 26 of the 2005 CBA deals with the concept of circumvention. *Id.* The Preamble to Article 26 reads, "[t]his Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention." COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 115.

53. *Nat'l Hockey League, supra* note 1, at 4.

performed.⁵⁴ As a result, the NHL insisted it had the power under Article 11 of the CBA to reject the SPC.⁵⁵

Bloch, under the authority vested by Article 48 and through the consent of the parties, determined that the SPC did in fact have the *effect* of circumventing the provisions of the 2005 CBA.⁵⁶ However, Bloch concluded that neither Kovalchuk nor the Devils operated in bad faith or showed intent to circumvent the salary cap and payroll provisions.⁵⁷

On August 9, 2010, Bloch ruled in favor of the NHL and voided the SPC, which made Kovalchuk an unrestricted free agent.⁵⁸ The decision contained a section regarding the effect of the judgment on other contracts, which was veiled toward the end of the opinion.⁵⁹ It reads: "While the contracts [Chris Pronger, Marc Savard, Roberto Luongo, and Marian Hossa's] have, in fact, been registered, their structure has not escaped League notice: those SPCs are being investigated currently with at least the possibility of a subsequent withdrawal of the registration."⁶⁰ The League was looking into the contracts under the scope of Bloch's opinion.⁶¹

54. *Id.* at 5. The NHL contended that the final six years of the contract were throw away years, designed specifically to lower the salary cap hit. *Id.* There is statistical data to show that their argument has strong merit. *Id.* See *NHL Average Retirement Age Between 1917/18 - 2005/06 Seasons*, QUANT HOCKEY, <http://www.quanthockey.com/Distributions/RetireeAgeDistribution.php#Calc> (last visited Oct. 16, 2011) (illustrating average age of retirement over the course of NHL history).

55. See *Nat'l Hockey League*, *supra* note 1, at 5 (noting that Article 11 covers the rules and procedures governing the SPCs). Section 11.3 states "no SPC shall be valid or enforceable in any manner whatsoever unless and until it has been filed with Central Registry and approved by the League or the Arbitrator." COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 40. Section 11.6 details grounds for when a SPC or offer sheet may be rejected: "(A) [I]t results in the signing Club exceeding the Upper Limit, or (B) because it does not comply with the Maximum Player Salary or (C) because it is or involves a Circumvention of either the Club's Upper Limit or the Maximum Player Salary." *Id.* at 42.

56. See *Nat'l Hockey League*, *supra* note 1, at 19 (noting that the *effect* of the agreement led to the conclusion that it was "reasonably unlikely that the last years of the contract [would] be performed.").

57. See *id.* at 19-20 (discussing this distinction because the showing of an intentional circumvention of the CBA and a violation of the team payroll range would likely bring punishment from the League for the Devils, Kovalchuk's agent, and potentially Kovalchuk himself).

58. Joe Yerdon, *NHL Wins Contract Grievance Case Against Ilya Kovalchuk; Kovalchuk A Free Agent Once Again*, NBC SPORTS (Aug. 9, 2010, 5:26 PM), <http://prohockeytalk.nbcsports.com/2010/08/nhl-wins-contract-grievance-case-against-ilya-kovalchuk-kovalchuk-a-free-agent-once-again.php>.

59. *Nat'l Hockey League*, *supra* note 1, at 19 n.23. "Each of these players will be 40 or over at the end of the contract term and each contract includes dramatic divebacks." *Id.*

60. *Id.*

61. *Id.*

On August 27, 2010, Kovalchuk and the Devils submitted a new SPC for League approval.⁶² The contract was approved by the League after it agreed with the NHLPA on an amendment to the 2005 CBA covering long-term contracts.⁶³ In addition, the NHL reprimanded the Devils with a penalty for their actions during the negotiations.⁶⁴ The implications of the decision are just now being felt.⁶⁵ What remains to be seen is how the judgment will affect subsequent contract negotiations for other free agents and ultimately the next round of CBA negotiations when the parties can rely on contract, labor, and antitrust law to impose their respective will. Creating a comprehensive collective bargaining agreement that appeases all parties is likely impossible; however, the NHL must look to structure an agreement that provides for a long-term solution, rather than a short-term fix as has been done in the past. That is the only way that labor unrest, and possible antitrust lawsuits, can be avoided.

III. ANALYSIS

The 2005 CBA brought significant change to the structure of the NHL.⁶⁶ By most estimations, the League scored a significant

62. See *Devils Submit Revised Contract for Kovalchuk, Await OK*, CBS SPORTS.COM (Aug. 27, 2010), <http://www.cbssports.com/nhl/story/13832167/devils-submit-revised-contract-for-kovalchuk-await-ok/rss> (reporting the new amount of the contract at \$100 million over fifteen years).

63. See *NHL, NHLPA Reach Agreement Governing Long-Term Contracts*, NHL.COM (Sept. 4, 2010, 3:43 AM) [hereinafter *NHL, NHLPA Reach Agreement*], <http://www.nhl.com/ice/news.htm?id=536880> (noting that the NHL would register the SPC filed with the League August 27th and would cease circumvention investigation into the contracts signed by Marian Hossa, Marc Savard, Roberto Luongo, and Chris Pronger). More significantly, the parties agreed on a new salary cap system regarding the limitations for long-term contracts which would affect contracts of five years or longer, and only contracts executed after September 4, 2010. *Id.*

64. See Allan Muir, *Devils Catch Hell for Kovalchuk Deal*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2010/writers/allan_muir/09/14/kovalchuk.sanctions/index.html (last updated Sept. 14, 2010, 2:53 PM) (noting that the NHL imposed a sanction on the Devils of \$3 million and two high draft picks, which was the maximum penalty imposable under the agreement forged between the NHL and NHLPA after the first Kovalchuk SPC was rejected).

65. *Id.* See also Mickle, *supra* note 40 (explaining that revenue has increased dramatically since the 2005 lockout, but a critical issue in the coming years is generating revenue from television rights); see also Jon Weinbach, *A Line in the Ice: The Kovalchuk Contract and the NHL's Financial Future*, NHL FANHOUSE (July 26, 2010), <http://nhl.fanhouse.com/2010/07/26/a-line-in-the-ice-the-kovalchuk-contract-and-the-nhls-financia/> (noting how the Kovalchuk events have exposed significant issues facing the NHL and NHLPA, such as the League's financial health and the current leadership void in the NHLPA, before the upcoming CBA negotiations).

66. See Klein & Hackel, *supra* note 9 (explaining that as a result of the lockout, the NHL initiated "new rules" to bring back fans and increase

victory as a result of the lockout, and the NHLPA was still licking its wounds.⁶⁷ In the ensuing years following the agreement, the sides have had relative peace, but the bargaining position of the NHLPA has been weakened due to internal concerns.⁶⁸ With the upcoming CBA negotiations nearing, the Kovalchuk arbitration decision has put the hockey world, and the world of professional sports, on notice.⁶⁹ In order to determine the scope and impact of the decision, one must first evaluate the 2005 CBA. Only then is one able to scrutinize the impact of the Bloch opinion, and the resulting League decision on the amended Kovalchuk SPC.⁷⁰ More critically, the Kovalchuk decision can be used to predict the potential implications on the next round of CBA negotiations.

viewership). “[T]he league adopted a sweeping set of changes that opened up the game, following a decade of defensive domination. Rules allowing the two-line pass and cracking down on obstruction put a premium on speed and skill.” *Id.*

67. See BRUCE DOWBIGGIN, *MONEY PLAYERS: THE AMAZING RISE AND FALL OF BOB GOODENOW AND THE NHL PLAYERS ASSOCIATION* 7 (Key Porter Books Limited 2006) (explaining that “[a]fter vowing solidarity forever on the issue of a salary cap in their industry, the players had been crushed in negotiations for a collective agreement, agreeing to virtually all of management’s major issues.”).

68. See *id.* at 9 (detailing the effect of the disastrous CBA negotiations on Goodenow, as his authority over the NHLPA executive counsel and over the players was significantly shattered); see also *Kelley Ousted as Head of NHLPA*, ESPN (Aug. 31, 2009), <http://sports.espn.go.com/nhl/news/story?id=4433555> (describing the firing of NHLPA executive director Paul Kelley and subsequent resignings by other NHLPA top leadership); see also *Players Hope Fehr Takes Leadership Position With NHLPA*, THE CANADIAN PRESS (July 12, 2010), <http://www.tsn.ca/nhl/story?id=327377> (detailing the overall NHL player desire to have Donald Fehr, the former executive director of the MLB Players Association, take the then vacant job as executive director for the NHLPA). Fehr has since been elected by the players as the executive director of the NHLPA. *Donald Fehr Takes Over as NHLPA Boss*, ESPN (Dec. 18, 2010), <http://sports.espn.go.com/nhl/news/story?id=5932671>.

69. See Tab Bamford, *Ilya Kovalchuk Contract Void, Now What for the NHL?*, BLEACHER REPORT (Aug. 9, 2010), <http://bleacherreport.com/articles/432174-ilya-kovalchuk-contract-void-now-what-for-nhl> (noting that the arbitration decision could have a significant impact on the NFL CBA negotiations). See also *League Locks Out Players After Union Decertifies*, NFL.COM [hereinafter *League Locks Out Players*], <http://www.nfl.com/news/story/09000d5d81eb6e46/article/league-locks-out-players-after-union-decertifies> (last updated Mar. 13, 2011) (explaining that the players dissolved the union despite two extensions to the collective bargaining agreement, and the NFL and the owners imposed a lockout of the players after the expiration of the agreement).

70. See Klein & Hackel, *supra* at 9 (noting that previous to the arbitration decision, teams were already forced as a result of the hard salary cap and no-cut contracts to trade players in order to stay under the constraints of the salary cap provisions); see also Kristi Dosh, *The NHL: Where No Contract Is Safe*, FORBES (Aug. 13, 2010), <http://www.forbes.com/sites/sportsmoney/2010/08/13/the-nhl-where-no-contract-is-safe/> (describing the significant increase in long-term contracts as a result of the salary cap).

A. *The Impact of the 2005 CBA on Contract Formation and Evaluation*

In assessing the legality of the Kovalchuk SPC that was rejected by the League and Bloch, both parties relied on the terms of the 2005 CBA to guide their analyses.⁷¹ The 2005 CBA introduced several new elements regarding League structure that brought the League more in line with the Commissioner's "cost certainty" movement.⁷² These changes included a hard salary cap,⁷³ revenue sharing,⁷⁴ a team payroll system including a floor and a ceiling,⁷⁵ two-way arbitration,⁷⁶ and changes to free agency.⁷⁷

These modifications introduced a new economic system that looked to balance team revenues and point the NHL back in the right direction.⁷⁸ More critically, Article 26, which deals with circumvention, was significantly amended from the 1995 CBA to prevent teams from attempting to evade new salary cap provisions that had just been implemented.⁷⁹ These provisions, articulated in the new Article 50, deal specifically with what Commissioner Bettman referred to as "cost certainty."⁸⁰ The Kovalchuk SPC was

71. *Nat'l Hockey League*, *supra* note 1.

72. *See The NHL's New Deal*, CBC SPORTS ONLINE (July 21, 2005), http://www.cbc.ca/sports/indepth/cba/features/issues_deal.html (detailing the different components of the 2005 CBA, specifically a team salary cap and limits to what elite players could earn as a percentage of the team's cap space). The payroll range in 2005-06 was set between \$21.5 million at the lower limit and \$39 million at the upper limit and no player could receive in excess of twenty percent of the team's upper limit. *Id.*

73. *Collective Bargaining Agreement FAQs*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26366>.

74. *See id.* (noting that in order to allow teams to afford competitive payrolls, teams that rank in the bottom half of League revenue are eligible for revenue sharing subsidies).

75. *See id.* (illustrating the link between players' share of League-wide revenue and a teams' salary cap room).

76. *See id.* (detailing that for the first time, teams have the right to elect salary arbitration, where in the past only the players had this ability).

77. *See id.* (noting that the age for unrestricted free agency by the 2008-2009 season and for the duration of the agreement will be set at twenty-seven years old with four accrued seasons, or with seven accrued seasons).

78. Klein & Hackel, *supra* note 9 (explaining that "[b]y agreement, player's salaries were limited to 54 percent of the owners' hockey-related revenue, not only halting salary inflation but also rolling back salaries 24 percent in the cap's first season, when the ceiling per team was set at \$39 million.").

79. *Nat'l Hockey League Collective Bargaining Agreement (1995): Article 26 - No Circumvention*, NHL FANS' ASS'N, http://www.nhlfa.com/CBA/cba_agreement26.asp.

80. *See COLLECTIVE BARGAINING AGREEMENT*, *supra* note 39, at 160 (noting that "[t]his Article [50] creates a fixed relationship between League wide Player Compensation and Hockey Related Revenues, and provides that League wide Player Compensation will rise or fall in direct proportion to a rise or fall in Hockey Related Revenues, and will equal . . . the Player's share.").

drafted by men who understood the CBA and the boundaries that had been imposed by the payroll range system.⁸¹ Why Kovalchuk's SPC was the contract to finally push the NHL to action is not certain, but what is clear is that the 2005 CBA was drafted in a way to give the NHL a significant amount of leeway to challenge such a contract.⁸²

B. How Arbitrator Bloch Interpreted the Kovalchuk SPC

The Kovalchuk SPC was not the first contract to challenge the limits of the 2005 CBA.⁸³ It was, however, the first to be challenged by the NHL under the 2005 CBA.⁸⁴ As a result, there was little precedent to guide Bloch in his analysis.⁸⁵ Like the NHL, he used the terms of the 2005 CBA as a guide to frame his opinion.⁸⁶ These articles and sections will likely come under the most scrutiny when the next CBA is negotiated and will thus be addressed further in the Proposal section.

1. Bloch's Analysis of the 2005 CBA

Bloch looked specifically at Articles 11, 26, and 50.⁸⁷ Article 11 provides the procedures for the approval process for all SPCs.⁸⁸ Bloch simply acknowledged that Article 11 provided the League the right to review or reject the contract; however, it is significant to note other components of Article 11 as well.⁸⁹ Section 11.6(a)(i)

81. See Scott Burnside, *Many Questions in Wake of Nixed Deal*, ESPN (July 21, 2010), http://sports.espn.go.com/nhl/columns/story?columnist=burnside_scott&id=5398555 (explaining that Lou Lamoriello, the president and general manager of the Devils, was intimately involved in the drafting of the 2005 CBA).

82. *Id.*

83. See *Nat'l Hockey League*, *supra* note 1, at 19 n.23 (discussing other players' contracts that were previously registered that have come under scrutiny); see also *id.* at 14 n.13 (describing how previous to the current incarnation of Article 26 under the 2005 CBA and its revised language, arbitrators' looked at players' SPCs on a consideration of the totality of the circumstances, rather than as specific factors that could lead to circumvention).

84. *Id.*

85. See *id.* at 14 n.13 (noting that Bloch relied on the 1998 opinion of arbitrator John Sands and the 2003 opinion of arbitrator Joan Parker to guide his totality of the circumstances analysis in regard to Article 26 challenges).

86. See *id.* at 6-17 (providing the relevant terms and then applying the facts to those terms).

87. *Id.* at 11-17.

88. See COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 40-42 (detailing the procedures by which a SPC is registered or rejected by the NHL); see *id.* at 8 (defining a SPC as the "sole form of employment contract used for all Player signings.").

89. See *Nat'l Hockey League*, *supra* note 1, at 11 (explaining that both parties concede that the individual elements of the SPC do not violate the CBA, but it is the NHL's contention that the SPC as a whole effectively

articulates grounds for why an offer sheet or SPC could potentially be rejected.⁹⁰ In Kovalchuk's case, the rejection primarily had to do with subsection (C) that notes "[a SPC may be rejected] because it is or involves a Circumvention of either the Club's Upper Limit or the Maximum Player Salary."⁹¹ Additionally, Subsection 11.5(e) and 11.6(b) provide grounds for a subsequent challenge by the League of a previously registered SPC.⁹² For players with contracts bordering on circumvention, the terms of Article 11 were not encouraging.⁹³

Both the NHL and NHLPA were able to contort Article 26 to conform to their specific arguments.⁹⁴ Bloch ultimately sided with the NHL, largely because of the provisions embedded in Article 26.⁹⁵ The two most significant parts of Article 26 in regard to the opinion are Subsections 26.3(a) and 26.10(d).⁹⁶ Subsection 26.3(a) states that a team may not enter into a SPC with a player that has the intention or effect of circumventing the provisions of the team payroll range.⁹⁷ Ultimately, Bloch looked to the provisions of Article 26 to provide a more complete examination of a SPC.⁹⁸ More critically, subsection 26.10(d) allows for unlimited time to consider possible circumvention of NHL SPCs.⁹⁹

Article 50, like Article 11, is structured to provide formal guideposts for the formation of a SPC.¹⁰⁰ It is Article 50 that sets

circumvents the provisions of the CBA).

90. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 42.

91. *Id.*

92. *See id.* at 41, 44-45 (noting that a SPC may be challenged under Article 11, concerning either a circumvention of a team's upper limit or the maximum player salary, within sixty days from when the alleged circumvention became known or reasonably should have been known).

93. Under Article 11, the use of power to review questionable SPCs would be difficult to prove because the NHL likely had access to all suspect SPCs during the approval process. *Id.* at 44-45.

94. *See Nat'l Hockey League, supra* note 1, at 5 (articulating the use by the NHLPA of the Preamble to Article 26 to attempt to demonstrate that the provisions of Kovalchuk's contract were permitted under a literal reading of the text). However, the NHL broadly interprets the Preamble, which reads "[t]his Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention." COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 115.

95. *See Nat'l Hockey League, supra* note 1, at 15 (detailing the expansive reading of Article 26 that Bloch determines allows the clauses in Article 26 to be read in accord).

96. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 115, 120.

97. *Id.*

98. *Nat'l Hockey League, supra* note 1, at 12.

99. This provision allows for unlimited challenges to the legality of SPCs, a term which gives the NHL broad, almost absolute power. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 120.

100. *See id.* at 160 (noting that player compensation will be based in direct proportion to hockey related revenues).

forth the salary cap provisions regarding team payroll range and illustrates the methods by which a player's salary is calculated.¹⁰¹ This is significant because the NHL, prior to the Kovalchuk arbitration, counted the salary cap hit per year of a SPC as the average of the salary over the course of the long-term contract.¹⁰² Thus, the Kovalchuk arbitration illuminated the glaring issues with Article 50's payroll range system: a SPC stretched over a long period of time could dramatically lower the salary cap hit on the team, and this loophole enabled agents, players, and teams to structure innovative contracts aimed at stretching the upper limit of the team payroll range.¹⁰³ These articles and sections must be amended to more readily protect against potential cap circumvention.

C. Implications of the Kovalchuk SPC on Other Players' Contracts

In the wake of the Kovalchuk arbitration decision, the initial reaction was unease over the possibility of the League re-examining past SPCs under its Article 26 authority.¹⁰⁴ In utilizing Bloch's opinion, the League could in effect establish its own arbitrary limits on contract length, dollar amount, and compensation terms.¹⁰⁵ Although a literal reading of Article 26 certainly implies such an interpretation, in looking back to agreements where the possible circumvention may not have been as overt, and the *effect* of the agreement may not have been as clear, the use of Bloch's opinion by the NHL as precedent was a significant power play.¹⁰⁶ Likely appreciating some of these arguments, the NHL and NHLPA agreed, contemporaneously with the registering of the Kovalchuk SPC, to amend the 2005 CBA to

101. See *id.* at 204 (noting that the players' salaries and bonuses are averaged over the length of the contract by dividing the aggregate amount of the SPC by the number of years of the contract).

102. See Dosh, *supra* note 70 (explaining that by allowing this averaging of salary over the course of the SPC to determine the salary cap hit, the NHL effectively created a massive loophole that has allowed these cap breaking contracts).

103. *Id.*

104. See *Nat'l Hockey League, supra* note 1, at 19 (detailing that "[w]hile the contracts [of other players] have, in fact, been registered, their structure has not escaped League notice: those SPCs are being investigated currently with at least the possibility of a subsequent withdrawal of the registration.").

105. See *id.* at 15 (noting that on their own, these restrictions in the SPC do not amount to circumvention). The 2005 CBA does not speak of these terms explicitly, but Bloch interprets the agreement as a whole, rather than the terms specifically. *Id.* As the NHLPA asserts, "there are no negotiated restrictions that would serve to restrict the term, annual salary stipends, backdive, or the Move/Trade language." *Id.* at 5 (although Bloch takes the agreement as a whole, this language is telling in looking to other agreements where the circumvention is not quite as clear).

106. *Id.*

insulate against the review of previously approved contracts and to enact new regulations to confront the issues highlighted by Bloch's decision.¹⁰⁷

The amendment agreed to by the parties specifically looked to curb the exploitation of long-term deals for players entering their late thirties and early forties, which included dramatic reductions in salary.¹⁰⁸ The new salary cap procedures were implemented to long-term contracts defined as those of five years or longer in two principal ways: First, long-term contracts, that include or extend past a player's forty-first birthday, are calculated by totaling the compensation amount before the forty-first birthday, and then dividing by the number of years played.¹⁰⁹ In the years including the forty-first birthday and after, the player's salary cap amount is determined by the amount paid to the player during those years.¹¹⁰ Second, the amendment provided that for a long-term contract with an average of more than \$5.75 million for the three highest-compensation seasons, the salary cap amount for ages thirty-six to forty must be a minimum of \$1 million.¹¹¹

The amendment was significant not only because it provided more contractual certainty for the League, but also because it allowed Kovalchuk's new SPC to stand and the League agreed to cease investigation into the contracts of Marian Hossa, Chris Pronger, Roberto Luongo, and Marc Savard.¹¹² Additionally, it showed the ability and the willingness of the parties to work together.¹¹³ In setting this agreement in place, even though the new rules will not necessarily be part of the future CBA, teams and players are better able to structure SPCs and allocate space under their salary caps.¹¹⁴ More significantly, the agreement provided a template for the NHL to reference for the upcoming

107. *NHL, NHLPA Reach Agreement*, *supra* note 63.

108. *Id.*

109. *Id.* A player's salary cap number, after the 2005 CBA, was determined by averaging the total amount of the contract over the course of the SPC, thus allowing teams to lengthen contracts to lower the cap hit. Dosh, *supra* note 70.

110. *NHL, NHLPA Reach Agreement*, *supra* note 63.

111. *Id.*

112. *See id.* (noting that the contracts in question were grandfathered in by the NHL).

113. *See* Tom Gulitti, *NHL and NHLPA Reach Agreement, Kovalchuk Deal To Be Approved*, FIRE & ICE (Sept. 3, 2010), http://blogs.northjersey.com/blogs/fireice/reports_nhl_and_nhlpa_reach_agreement_kovalchuk_deal_to_be_approved/ (noting that the NHLPA's thirty-member player board gave the negotiators preapproval to agree to the amendment). This is especially significant because twenty votes are typically needed for an amendment to be accepted. *Id.*

114. *See NHL, NHLPA Reach Agreement*, *supra* note 63 (detailing that the agreement provides clarity to agents and general managers in the negotiation of new contracts).

CBA negotiations.

*D. Ramifications of the Kovalchuk SPC on the 2011-2012
CBA Negotiations*

It is uncertain what the 2011-2012 negotiations will bring, but the NHL is at a significant advantage by going through the process after the NFL, NBA, and MLB all go through their CBA negotiations.¹¹⁵ What is certain is that issues of contract, labor, and antitrust law will be utilized to achieve the NHL and NHLPA's bargaining demands.¹¹⁶

While sports antitrust suits have been associated mostly with MLB and the NFL, the NHL has also experienced significant antitrust challenges.¹¹⁷ Ironically, it is the NFL, and a suit by American Needle, that ensured that the NHL players would have the ability to assert claims for antitrust violations under Section I of the Sherman Antitrust Act.¹¹⁸ Once the current agreement expires, should the League decide to push forward and make the new amendment to the CBA a part of the next CBA, the NHL players, as a union, may elect to decertify the union and bring an antitrust action.¹¹⁹ Any threat of union decertification, as seen recently in the NFL and the NBA, is always reason for concern to the League.¹²⁰ Strikes or decertification in professional sports can

115. See Kristi Dosh, *The NHL Extended It's Labor Agreement – Now What?*, FORBES (June 29, 2010), <http://blogs.forbes.com/sportsmoney/2010/06/29/the-nhl-extended-its-labor-agreement-now-what/> (explaining that “[t]he NFL’s agreement expires in March 2011, the NBA and NHL’s after the 2010-2011 season, MLB’s following the 2011 season.”); see also Judy Battista, *N.F.L. Players Union to Vote on Decertification*, N.Y. TIMES, Sept. 11, 2010, <http://www.nytimes.com/2010/09/12/sports/football/12nfl.html> (noting that NFL teams have begun the process of voting to give the NFLPA permission to decertify in the event of an owner induced lockout of the players).

116. See Battista, *supra* note 115 (detailing the potential labor and antitrust issues if the NFL owners decide to lockout the players).

117. *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Phila. World Hockey Club, Inc.*, 351 F. Supp. at 462; *Madison Square Garden, L.P. v. NHL*, 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008).

118. See *Am. Needle Inc. v. NFL*, 130 S. Ct. 2201, 2215-16 (2010) (determining that the NFL is not a “single entity” but rather a joint venture subject to scrutiny under Section 1 of the Sherman Antitrust Act for restricting competition).

119. See Mike Ozanian, *Supreme Court Hands Pro Athletes Big Victory*, FORBES (May 24, 2010), <http://blogs.forbes.com/sportsmoney/2010/05/24/supreme-court-hands-pro-athletes-big-victory/?boxes=businesschannelsections> (noting that the *American Needle* decision provides the NHL players significant power to sue on Antitrust grounds should the union decide to decertify).

120. Battista, *supra* note 115. See also *League Locks Out Players*, *supra* note 69 (explaining that by dissolving the union, the players were able to bring class-action lawsuits against the NFL attacking “the league’s policies on the draft, salary cap and free-agent restrictions such as franchise-player tags.”);

be even more dramatic due to the difficult nature of finding replacement players with comparable skill.

While the Kovalchuk decision highlights the NHL and NHLPA's ability to come to agreement, the dispute over the SPC illustrates that the parties continue to dispute significant elements of the 2005 CBA.¹²¹ The NHL, in rejecting Kovalchuk's SPC, seemed to be trying to do what they could not achieve in the 2005 CBA, effectively setting a limitation on contract length; the reality of which cannot sit well with the NHLPA.¹²² These are factors the NHL players will certainly consider before coming to the negotiating table for the 2011-2012 CBA negotiations.¹²³

With regard to potential labor law issues, another option for the players and the League is that of a strike or lockout to induce the other side into action and to bring unfair labor practice charges to the National Labor Relations Board.¹²⁴ This is not an attractive option for several reasons, the main being what the League experienced in 1992, 1995, and 2004.¹²⁵ A strike or lockout is a significant economic weapon for both sides, as there is a substantial amount of money at stake; however, another long lockout would be devastating for the NHL. Another possibility, as discussed above, would be for the players to decertify the union.¹²⁶

Marc Stein, *NBA Players Reject Owners' Offer*, ESPN, http://espn.go.com/nba/story/_id/7234180/nba-lockout-players-not-accept-deal-seek-disband-billy-hunter-says (last updated Nov. 15, 2011, 12:52 PM) (noting that the players voted unanimously to file a "disclaimer of interest" that will dissolve the union.)

121. See Dosh, *supra* note 115 (noting that in deciding to exercise their option to extend the 2005 CBA by one year, the determination had more to do with the fact that there are so many issues for the parties to resolve than the possibility that both sides are content with the current terms of the 2005 CBA).

122. See Allan Maki, *NHL, Devils Make Kovalchuk Deal*, GLOBE AND MAIL (Sept. 3, 2010, 2:55 PM), <http://www.theglobeandmail.com/sports/hockey/nhl-devils-make-kovalchuk-deal/article1695576/> (noting that the NHL "[l]eague officials had tried to get a cap on contract lengths in bargaining talks five years ago but were unsuccessful. When Kovalchuk's original New Jersey contract was rejected, the NHL was able to push for and get limits on future deals, something it failed to secure in bargaining.").

123. *Id.*

124. DOWBIGGIN, *supra* note 67, at 176-77.

125. See *id.* (discussing the concessions of the NHLPA from the 1995 lockout which resulted in a rookie salary cap, highly restricted free agency, and significantly limited salary arbitration).

126. Battista, *supra* note 115. See also Gabriel A. Feldman, *The Legal Issues Behind the NBA Players' Decertification Strategy*, HUFFINGTONPOST.COM, Nov. 8, 2011, http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_2_b_1081107.html (noting that there are multiple steps to decertify a union, while the process for disclaimer of interest is much simpler). The process for decertification is as follows: (1) At least thirty percent of the players must sign a petition stating they no longer want the union to represent them; (2) the petition must be filed with the National Labor

Either of these uses of labor law weapons would have dramatic ramifications.¹²⁷

Regardless of whether the NHL players decide not to decertify or utilize a strike, negotiations will certainly include subjects that were examined in the Kovalchuk SPC like the “No Circumvention” clauses in Article 26 and the salary cap clauses of Article 50.¹²⁸ While the sides are in negotiations over a new CBA, the NHL will be protected from antitrust suits by the non-statutory labor exemption, as long as the players do not decertify the union.¹²⁹

By challenging the Kovalchuk SPC, the League effectively opened the negotiation process a year early.¹³⁰ In this initial battle, both parties were able to take away something, with the League implementing significant restrictions on long-term contracts, and the NHLPA getting the League to drop its investigations of other suspect SPCs and “grandfathering” in Kovalchuk’s SPC.¹³¹ The League was also able to close the loophole in the 2005 CBA with the amendment and thereby effectively prevented future SPCs from similar circumventions.¹³² However, it is likely that creative agents and teams will find more loopholes in the current CBA to exploit before the new negotiations.¹³³ What is

Relations Board, which then must verify the petition and schedule an election; and (3) an election will be held where at least fifty percent of the voting players must opt to decertify the union. *Id.*

127. See Mike Florio, *Goodell Says Decertification Talk Could Hurt CBA Talks*, NBC SPORTS (Sept. 13, 2010, 4:44 PM), <http://profootballtalk.nbcsports.com/2010/09/13/goodell-says-decertification-talk-could-hurt-cba-talks/> (noting that should the players decertify the NHLPA, the owners may elect to change mandatory subjects of bargaining as long as they do not violate antitrust laws).

128. Dosh, *supra* note 115.

129. See *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (noting that if the *Mackey* three-prong test is met, then the League is shielded from antitrust challenges by the non-statutory labor exemption). The test is that: (1) the restraint must only affect the parties to the collective bargaining relationship; (2) the exemption must be related to a mandatory subject of bargaining; and (3) the agreement must be the product of bona fide arm’s-length negotiations. *Id.*

130. Maki, *supra* note 122.

131. See *NHL, NHLPA Reach Agreement*, *supra* note 63 (discussing the terms of the agreement); see also Allan Muir, *NHL, NHLPA Bargain a Win-Win for Future Negotiations*, SI VAULT (Sept. 4, 2010), <http://157.166.255.4/vault/article/web/COM1174087/1/index.htm> (explaining that contractual clarity is a win for the League, but also that the preapproving agreement from thirty player representatives was a significant win for the NHLPA).

132. *NHL, NHLPA Reach Agreement*, *supra* note 63.

133. See Jim Kelley, *Devils Making NHL Sweat, Another Miscarriage of Justice*, SI VAULT (Oct. 14, 2010, 5:40 PM), http://sportsillustrated.cnn.com/2010/writers/jim_kelley/10/14/lamoriello.hjalmarsson.notes/index.html (noting that another current loophole in the 2005 CBA is being able to send a player to the minor leagues to avoid their cap hit, and a critical issue could be minimum roster size).

clear is that Article 11 continues to grant the League the ability to review SPCs, and the NHL may still retroactively review contracts under Article 26, albeit not the ones that have been certified as a component of the amendment.¹³⁴

The agreement of the parties indicates that both the NHL and NHLPA are prepared to bargain to bring more certainty to SPCs.¹³⁵ What is uncertain is whether or not that will translate to bargaining success when faced with potential antitrust and labor issues.¹³⁶ If the NHL can amend the CBA to reflect a viable long-term structure, then they will be able to avoid a potential labor shutdown.

IV. PROPOSAL

The NHL should permanently incorporate the 2010 amendment and slightly modify Articles 11, 26, and 50 to further prevent SPCs that either intentionally or inadvertently circumvent the salary cap provisions of the CBA.¹³⁷ Based on recent experience with CBA negotiations between the NHL and NHLPA, the forecast for the 2011-2012 negotiations does not look promising; however, the Kovalchuk arbitration decision and resulting amendment to the 2005 CBA may be a push in the right direction.¹³⁸ While the negotiations are set to begin in less than one year, the Kovalchuk arbitration provides a significant precedent for the NHL to rely on for future debate over the merits of a salary cap, the averaging of a player's salary as it relates to the cap implications, and the NHL's Article 26 powers to review SPCs.¹³⁹ Now that a salary cap is in place, the likelihood of returning to a deregulated system where the market determines salaries is slim to none.¹⁴⁰ The salary cap is here to stay; the question now is how the NHL and NHLPA can best allocate the

134. *NHL, NHLPA Reach Agreement*, *supra* note 63.

135. Muir, *supra* note 131.

136. *See* Dosh, *supra* note 115 (noting that some critical issues to be determined at the next CBA negotiations are a new television contract, how the salary cap will be determined, and player escrow withholdings).

137. While these must be considered significant changes to the 2005 CBA, practicing a "win-win" philosophy and returning to a partnership relationship will be key in order to maintain the stability of the League. GIL STEIN, *POWER PLAYS: AN INSIDE LOOK AT THE BIG BUSINESS OF THE NATIONAL HOCKEY LEAGUE 104-05* (Birch Lane Press 1997).

138. *See* DOWBIGGIN, *supra* note 67, at 301 (noting that "[h]ow the NHL copes with the next crisis . . . will eventually say whether the lockout of 2004-05 was a proper correction of the market or simply a delaying tactic before tackling its real issues head-on").

139. *See NHL, NHLPA Reach Agreement*, *supra* note 63 (detailing the amendments to the 2005 CBA as a result of the Kovalchuk arbitration).

140. Lyle Richardson, *Potential Issues for NHL's Next Round of CBA Talks*, FOX SPORTS (Sept. 4, 2009, 12:15 PM), http://community.foxsports.com/spectator/blog/2009/09/04/potential_issues_for_nhls_next_round_of_cba_talks_.

resulting revenue between the teams, the League, and the players.¹⁴¹ By amending the 2005 CBA to better reflect the current economic landscape, the parties will be able to largely retain the structure of the old CBA and integrate a long-term solution.¹⁴² Additionally, the NHL should look to other sports to incorporate increased flexibility into the cap.¹⁴³

The opportunity to have the NBA, NFL, and MLB go through the CBA negotiations first will allow both sides additional insight into potential bargaining strategy.¹⁴⁴ The fact that Donald Fehr will take the reins as executive director of the NHLPA is good news for the players association, a union desperately in need of leadership, but could also spell the makings of protracted labor strife.¹⁴⁵

A. *Retain the Framework of the 2005 CBA but Overhaul Circumvention and Salary Cap Provisions*

The NHL must largely retain the current structure of the CBA, albeit incorporating the 2010 amendment into the 2005 CBA.¹⁴⁶ This clearly is an attractive option for NHL fans, and something that is likely to materialize even with some contentious issues that the 2005 CBA has not fully remedied for both parties.¹⁴⁷ With some quid pro quo changes to the salary cap

141. See Pierre LeBrun, *Points to Ponder on Future of the CBA*, ESPN (Oct. 1, 2010, 3:55 PM), http://sports.espn.go.com/nhl/preview2010/columns/story?columnist=lebrun_pierre&id=5636853 (noting that the percentage of League revenue players will receive under the new salary cap will be a critical term of the new CBA).

142. Prior to 1991, the NHL and NHLPA bargained as a partnership, and the CBAs were negotiated well before the CBA was to expire. STEIN, *supra* note 137, at 105. During this time, CBAs were amended, but largely retained fidelity to the past agreement. *Id.*

143. See Richardson, *supra* note 140 (noting that as of 2009, the League was interested in implementing a system that incorporated nonguaranteed contracts, something the players would be vehemently against that could dramatically reshape the identity of the salary cap). Another key issue is that the current CBA allows teams to stash players in the minor leagues or in Europe to avoid the players' salary cap hit. LeBrun, *supra* note 141.

144. Dosh, *supra* note 115. See also Feldman, *supra* note 126 (noting that "players are required to make a choice between labor law (and collective bargaining) and antitrust law (and individual bargaining and litigation).").

145. See Jeff Levine, *Labor Issues, Fehr-Bettman Relationship, Take Center Stage as 2010-11 Season Looms*, THE BIZ OF HOCKEY (Oct. 4, 2010, 4:10 PM), http://bizofhockey.com/index.php?option=com_content&view=article&id=399:1-labor-issues-fehr-bettman-relationship-take-center-stage-as-2010-11-season-looms&catid=46:articles-and-opinions&Itemid=64 (discussing the collective fear that Fehr may adopt a more militant approach to bargaining, similar to the approach that was successful for Goodenow in the late 1990s).

146. See LeBrun, *supra* note 141 (noting that the League is generally satisfied with the system in place).

147. See Levine, *supra* note 145 (detailing that the financial interests of both

structure and escrow account contributions, along with subtle redrafting to the CBA, the parties could emerge from the negotiations process relatively unscathed.¹⁴⁸ With new leadership and a solidified union, the parties could come out as a stronger partnership, but this is largely dependent upon the relations of Bettman and Fehr.¹⁴⁹ It will certainly encourage the negotiation process if the players do not resort to a decertification of the union.¹⁵⁰

The players would get significant changes to escrow account contributions along with a CBA that still allows for significant contracts to free agents.¹⁵¹ The NHL players currently give back a portion of their salaries for escrow contributions to protect the League in the event that it overpays the players; a cap on these contributions would go a long way toward appeasing the players.¹⁵² On the other hand, the League would get further changes to the salary cap structure.¹⁵³ If the 2010 amendment is maintained, the League will have already secured a significant victory in being able to set limits on contract term length, which ultimately affects the total dollar amount available under the cap.¹⁵⁴ The owners should also look to adjust the age when players

the NHL and NHLPA will be a contentious issue that will drive the negotiations for both sides).

148. *See id.* (noting that the main issues that will be negotiated will be the “percentage of hockey-related revenue . . . which is allocated toward paying player salary” and the player escrow account contributions).

149. *Id.*

150. Battista, *supra* note 115.

151. *See* Richardson, *supra* note 140 (noting that, like the salary cap, escrow account contributions, a creation of the 2005 CBA, are likely here to stay). In October 2010, Zdeno Chara of the Boston Bruins signed a seven-year, \$45.5 million extension, which was one of the first SPCs to invoke the newly minted Kovalchuk amendments to the 2005 CBA. James Murphy, *Zdeno Chara Signs 7-Year Extension*, ESPN (Oct. 10, 2010, 7:39 AM), <http://sports.espn.go.com/boston/nhl/news/story?id=5665335>. This deal indicates that similar “long-term” deals can be structured for veteran players that extend the term of the contract into their forties. *Id.*

152. LeBrun, *supra* note 141. Once final calculations for hockey-related revenue [HRR] are determined, the players receive a portion of the escrow money back, but this return is certainly not guaranteed. *Id.* For example, the NBA has an escrow cap for the 2010-2011 season that is set at eight percent. Jonathan Givony, *NBA CBA Principal Deal Points, Rookie and Minimum Salary Scales*, DRAFTEXPRESS (Aug. 2, 2005), <http://www.draftexpress.com/article/NBA-CBA-Principal-Deal-Points,-Rookie-and-Minimum-Salary-Scales-1065/nba.php>.

153. *See* LeBrun, *supra* note 141 (noting that lowering the percentage of the players’ share of the League-wide revenue and allowing a larger gap between the salary range are topics that will likely be discussed during the next CBA negotiations).

154. *See generally* NHL, NHLPA *Reach Agreement*, *supra* note 63 (illustrating the potential long-term benefits of the amendment).

reach unrestricted free agency to control salary.¹⁵⁵

At the same time, significant aspects of Article 26 must be restructured both in the interests of the League and the NHLPA.¹⁵⁶ Specifically, the Preamble to Article 26, Section 26.3(i), and 26.10(d) must be amended to provide further certainty to future negotiations over SPCs.¹⁵⁷ By further articulating which agreements could rise to the level of circumvention, the NHL and NHLPA will better be able to prevent teams from exploiting potential loopholes in the next CBA.¹⁵⁸

The Preamble to Article 26 should be changed to incorporate language inferred in the Kovalchuk arbitration agreement that would further specify circumventing behavior.¹⁵⁹ The Preamble currently reads: "This Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention."¹⁶⁰ By supplementing the Preamble with words indicating a heightened standard of review of SPCs, the text would come more in line with the intent of the agreement.¹⁶¹ This could be achieved as set forth:

and prevent conduct that Circumvents the terms of this Agreement, including, but not limited to, conduct that, based on the totality of the circumstances, intends to or has the effect of defeating or Circumventing the provisions of this Agreement or the intention of the parties as reflected by the provisions of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement . . .

.¹⁶²

155. LeBrun, *supra* note 141. The key elements that lead to higher salaries for players are "free agency (especially unrestricted free agency), salary arbitration, guaranteed contracts, no salary tax or cap, [and] the right to license players' images for profit." DOWBIGGIN, *supra* note 67, at 177-78.

156. Kristi Dosh, *Understanding Subsequent Challenges to NHL Contracts*, FORBES (Aug. 17, 2010, 4:40 PM), <http://www.forbes.com/sites/sportsmoney/2010/08/17/understanding-subsequent-challenges-to-nhl-contracts/> (explaining that "[t]here is no guidance as to which article prevails in the event of a circumvention related to a player contract—Article 11 with its 60-day time frame and minimal penalties or Article 26, which gives the Commissioner unlimited time to investigate and carries the possibility of substantial penalties."). The confusion between which article is to be relied on leaves Commissioner Bettman with a tremendous amount of power to review contracts unilaterally. *Id.*

157. *Id.*

158. *See id.* (noting that the conflict between Article 11 and Article 26 is one instance where the drafting of the CBA can be better composed to provide guidance to the agents, players, and teams).

159. *Id.*

160. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 115.

161. *See Nat'l Hockey League*, *supra* note 1, at 14 n.13 (noting the need, based on recent arbitration decisions, to allow for review based on the "totality of the circumstances," and not "specific benchmarks").

162. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 115.

The revised Preamble represents a more comprehensive illustration depicting the intentions of both the NHL and NHLPA.¹⁶³ While the rewording is closer in line with the NHL's interpretation, as dictated by Bloch's decision, this broad interpretation allows for greater certainty as both parties seek to negotiate a SPC.¹⁶⁴ The parties negotiating the SPC must be even more vigilant to guard against potential circumventing behavior by knowing that conduct as a whole may trigger the circumvention.¹⁶⁵ Section 26.3(i) would also need to be similarly amended.¹⁶⁶ It would read: "Any act, conduct, or activity that is permitted by this Agreement[, based on the totality of the circumstances,] shall not be a Circumvention."

While this amendment to the Preamble would certainly be a concession for the players, a concession for the owners could be a modification of the reviewability of SPCs under Article 26.¹⁶⁷ The power of the Commissioner currently under 26.10(d) allows for unlimited review of a SPC for potential circumvention.¹⁶⁸ This level of review should be modified to align with review under Article 11.¹⁶⁹ Article 11.6(b) states that:

[A]n approved and registered SPC may be subject to subsequent challenge and/or de-registration by the League . . . in the case of a Circumvention relating to either the Club Upper Limit or the Maximum Player Salary, within sixty (60) days from the date upon which the facts of the Circumvention became known or reasonably should have been known to the NHL¹⁷⁰

To come more in line with the principles of certainty that the League dictates in terms of its finances, it would be in the interest of the NHL to make Article 26 review more consistent with Article 11 review.¹⁷¹

163. *Nat'l Hockey League*, *supra* note 1, at 14.

164. *Id.* at 15. Bloch determined that it was the intention of the parties to read Article 26 very broadly in order to give power to the words of the 2005 CBA. *Id.*

165. *Id.* at 14.

166. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 118.

167. Article 26 currently allows for a much broader and expansive review of player contracts than Article 11.

168. *Id.* at 120.

169. *See* Dosh, *supra* note 156 (noting the differences in the processes for review of SPCs under Articles 11 and 26).

170. COLLECTIVE BARGAINING AGREEMENT, *supra* note 39, at 44-45.

171. *See id.* As further support for this argument, the current Article 11 of the 2005 CBA never at any point references Article 26. *Id.* Article 26.10 states that approval under Article 11 of a SPC does not limit Article 26's review, but that is the extent of the correlative text. *Id.* at 119-20.

B. Look to Other Sports as a Guide for Increased Flexibility

The salary cap system must be replaced with a structure that allows for increased flexibility to retain players of all wage levels.¹⁷² With Fehr in place, the NHLPA certainly could try to assert its collective muscle and attempt to balance the parties' bargaining power.¹⁷³ The League and NHLPA should look to what other sports have done recently in their CBAs to allow for flexibility under the salary cap.¹⁷⁴ This could include having a player's actual salary attributable to that year count towards the salary cap,¹⁷⁵ allowing players to receive guaranteed money with the possibility of releasing players similar to the current NFL system,¹⁷⁶ adding a franchise player similar to the NFL,¹⁷⁷ or adding exceptions similar to how the NBA functioned under their previous collective bargaining agreement.¹⁷⁸

The current NHL CBA has put a premium on teams' management of their cap space.¹⁷⁹ Teams have been forced to trade

172. See LeBrun, *supra* note 141 (noting that the current salary cap structure is one of the most contentious issues between small-market and large-market teams, and alternatively between the players and the League). The likely changes will be the age that players can reach unrestricted free agency and potentially a modification of how a player's salary cap impact is calculated over the course of his SPC. *Id.*

173. See Levine, *supra* note 145 (explaining that if and when Donald Fehr becomes the executive director of the NHLPA, it is more likely that he will take a more moderate stance in negotiating with Bettman and the NHL).

174. See *CBA: The NFL Model*, ANDREW'S DALLAS STARS PAGE (Dec. 14, 2003), <http://www.andrewsstarspage.com/CBA/12-14cba.htm> (detailing the need to look to the NFL for guidance as to revenue sharing and the salary cap before the 2005 NHL agreement was formulated).

175. See Dosh, *supra* note 70 (explaining that the NHL is the only league to utilize a system where the cap hit is not the actual salary attributable to that year of the contract). This was effectively the main conduit that teams used to circumvent the salary cap provisions. *Id.* Moving to a system like the other major sports will require teams to be more creative in utilizing the salary cap to construct their respective teams. *Id.*

176. See Ross Tucker, *Guaranteed Contracts Are Risky Business for NFL Teams*, SPORTS ILLUSTRATED (Mar. 4, 2009, 1:02 PM), http://sportsillustrated.cnn.com/2009/writers/ross_tucker/03/04/guarantees/index.html (noting the increase in contracts relying on guaranteed money, but also the inherent risks involved in such deals).

177. See *Franchise and Transition Tender Amounts*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d806a24a3&template=without-video&confirm=true> (last visited Nov. 14, 2011) (detailing the difference between exclusive and nonexclusive franchise tags and how the franchise tag allows teams to retain their top free agent players).

178. See *NBA Salary Cap*, SPORTSCITY, <http://www.sportscity.com/NBA/Salary-Cap/> (last visited Nov. 14, 2011) (stating the fact that the NBA functions under a soft cap that allows for several exceptions including a Mid-level exception, the Larry Bird exception, and the Rookie exception).

179. See Klein & Hackel, *supra* note 9 (discussing that "[m]anaging the complicated provisions of the cap system quickly became an essential part of building a team [after the 2005 CBA], and it didn't take long until clubs were

away players they have wanted to retain, either because of bad management decisions or mismanagement of the cap.¹⁸⁰ The NHL hard cap puts a serious stress on strong management decisions because there is currently little room for error with guaranteed, no-cut contracts.¹⁸¹ If the NHL finds itself more economically stable after the 2011-2012 season, a move toward allowing flexibility in the salary cap would decrease player movement and allow more players to remain with their current teams.¹⁸² This could be achieved by framing SPCs with guaranteed money with the possibility of release.¹⁸³ This would minimize the need for teams to “hide” unwanted players in the minors or abroad and allow teams to be as competitive as possible, while still retaining the salary cap principles.¹⁸⁴ The main issue here is that any talk of player release would likely bring a labor dispute, but a combination with a cap on escrow account contributions, or similar concession, could ameliorate the players’ concerns.

Also, exceptions should be structured for teams to exceed their salary cap ceiling to retain players, even if it is just for a year.¹⁸⁵ The NBA has experimented with a series of exemptions that give an advantage to a player’s original team in order to limit player movement.¹⁸⁶ The use of these exceptions is likely only

forced to trade players to stay under the cap.”). Teams can bury mistakes to some degree by sending players to the minors or abroad to Europe, but for the most part teams have been forced to truly deliberate before handing out cap breaking SPCs. *Id.*

180. *Id.*

181. One of the few exceptions to this rule is for players to be sent to the minors or abroad. *See, e.g., Blackhawks Send G Cristobal Huet to Swiss Team*, ASSOCIATED PRESS, Sept. 27, 2010, <http://www.nhl.com/ice/news.htm?id=538821> (relating that the Chicago Blackhawks were able to send Cristobal Huet to a Swiss team and continued to pay his \$5.6 million annual salary, but that salary had no salary cap implications).

182. *See generally* Ken Berger, *Should NBA adopt NFL-like Player Movement Rules?*, CBSSPORTS.COM (July 30, 2010), <http://www.cbssports.com/nba/story/13683901/should-nba-adopt-nfl-like-player-movement-rules-good-question> (noting that providing the NBA with flexibility from a franchise tag would allow teams to limit player movement).

183. *See id.* (explaining that guaranteed contracts that allow for cuts are more prevalent in the NFL where players are considered more easily replaceable than players in the NBA).

184. *See Blackhawks Send G Cristobal Huet to Swiss Team*, *supra* note 181 (exemplifying a case where a player was transferred abroad). Contracts that leave open the possibility of release encourage players to play at a high level, while at the same time maximizing salary cap space. Richardson, *supra* note 140.

185. *See LeBrun*, *supra* note 141 (noting that flexibility is especially critical for players thirty-five and older, because currently teams are reluctant to sign such players for fear of being stuck with the cap hit if the player retires).

186. *See generally* Jorge Castillo, *NBA Free Agency: Salary Cap Exceptions Explained*, WASH. POST, July 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/02/AR201007020202011.html> (discussing the various

feasible for large-market teams that can compensate players beyond the salary cap, but the use of one exception may allow more franchise flexibility to maintain the structure of the teams.¹⁸⁷ While small-market teams may still not have the finances to keep their players, the concern here for small-market teams would be alleviated by an exception to the cap that allows teams to add additional years and compensation to a contract, beyond what other teams can offer, to retain their players.

Finally, the NHL should consider allowing teams to “franchise” a player.¹⁸⁸ Small-market teams would be thrilled to implement a system with franchise players as they would be able to retain players for a lower cost, even if it is just for a year or two.¹⁸⁹ These potential exceptions to a hard salary cap will allow players to keep making money, and at the same time allow teams to retain elite players at reasonable costs.¹⁹⁰ Of these exceptions to the hard salary cap, a “franchise” tag is the most integral to the future success of the NHL. While it would break with the tradition of the hard salary cap, it would allow small-market teams to retain their elite players.

V. CONCLUSION

While the full significance of the Kovalchuk arbitration decision will not be realized until the actual negotiations begin over a new CBA, the initial impact of the decision has already been felt.¹⁹¹ When the NHL and NHLPA agreed to amend the 2005 CBA to prevent cap circumventing SPCs, thereby allowing Kovalchuk’s contract and other similar contracts to stand, both parties demonstrated their willingness to negotiate. However, they also showed their readiness to do battle over the terms of the CBA that have significant impact on League and player economics.¹⁹²

With the insertion of Fehr into the ranks of NHLPA

exceptions to the NBA soft salary cap).

187. *Id.*

188. *Franchise and Transition Tender Amounts, supra* note 177.

189. *See id.* (explaining that:

[c]lubs can designate an exclusive franchise player by offering a one-year contract for an amount no less than the average of the top five salaries at the player’s position at the end of the restricted free agent signing period, or a 20 percent increase over his 20[10] salary, or the average of the top five salaries at his position at the end of last season - whichever of the three is greater.)

190. *See id.* (noting that in the case of nonexclusive franchising, a team may be compensated with two first-round draft choices if the player elects to negotiate with a different team).

191. *See NHL, NHLPA Reach Agreement, supra* note 63 (noting that the terms of the agreement will apply to long-term contracts that are executed after September 4, 2010, and will apply to contracts that are signed between now and the end of the CBA but will not carry over into a new CBA).

192. *Id.*

leadership as executive director, the NHLPA looks to be solidifying itself as a legitimate negotiating power, something that the League has to somewhat fear.¹⁹³ That is why establishing a long-term solution for the CBA as suggested in the Proposal section is critical.¹⁹⁴ With a League where popularity and revenue streams appear to be rising, the prospects for future viability and success seem limitless.¹⁹⁵ The impact of the Kovalchuk decision on not only the NHL, but also on MLB, the NFL, and the NBA, CBA negotiations could be dramatic.¹⁹⁶

What is certain is that sports leagues and players alike will now look to Bloch's decision as a guidepost as to how to frame their collective bargaining agreements. By reaching an agreement that is in the interests of both parties, based upon Bloch's decision and past NHL/NHLPA collective bargaining experience, the NHL will be able to avoid a labor dispute or antitrust suit, and truly cement itself as a legitimate money-making enterprise.

193. Levine, *supra* note 145.

194. *Id.*

195. See Dan Shaughnessy, *NHL's Winter Classic Makes Every New Year's Day a Hockey Day*, SI.COM (Dec. 28, 2009, 12:15 PM), http://sportsillustrated.com/2009/writers/dan_shaughnessy/12/28/winter.classic/index.html (noting the significance of the Winter Classic on rebuilding the NHL image); see also *NHL TV Negotiations Will Be All About Exposure*, SPORTINGNEWS (Oct. 26, 2010, 4:18 PM), <http://www.sportingnews.com/nhl/story/2010-10-26/nhl-tv-negotiations-will-be-all-about-exposure> (detailing the need for the NHL to look to generate more of a cash flow from its next television contracts).

196. Dosh, *supra* note 115. See also Feldman, *supra* note 126 (noting that the players will likely challenge under antitrust law "the NBA's salary cap, the player draft, and other player and free agency restrictions.").

