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# LABOR RELATIONS IN THE NATIONAL HOCKEY LEAGUE: A MODEL OF TRANSNATIONAL COLLECTIVE BARGAINING?

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## I. INTRODUCTION

Professional sports leagues make up a world of their own in which the best athletes, employed by various teams, display their talents before thousands of spectators. The National Hockey League (NHL) is undoubtedly the most popular professional sports league in Canada.

The NHL is composed of thirty teams, six in Canada and twenty-four in the United States<sup>1</sup> that compete every year for the Stanley Cup, the archetypal dream of every professional hockey player. Since it was created in 1917,<sup>2</sup> the NHL has grown into an industry that generates billions of dollars in revenues, which are shared by a handful of players and franchise owners across North America.

Given the billions of dollars involved from revenues generated by spectator ticket sales, television rights, and the sale of related products, the

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1. Nat'l Hockey League (NHL), *Teams*, NHL.COM, <http://www.nhl.com/ice/teams/.htm> (last visited Jan. 20, 2008).

2. NHL, *Hockey for Dummies*, NHL.COM, Sept. 20, 2006, <http://www.nhl.com/ice/news/htm?id=381958>.

NHL is now considered a major industry in which the players and the owners compete for the largest market share. On the one hand, the owners have a legitimate interest in making sure their teams remain profitable, and if that proves to be impossible, to decide, in some cases, to move their franchises to more lucrative markets or to sell to potential investors.<sup>3</sup> On the other hand, the players' desire to secure the best possible annual salary is just as legitimate, especially given that their careers are relatively short.<sup>4</sup> To this end, they are constantly seeking new ways to negotiate, to sell themselves more effectively, and to ensure that the contracts they enter into are lucrative.<sup>5</sup> Conversely, the owners seek ways to increase their savings when it comes to player salaries, with the goal of increasing their profit margins, or at the very least, avoid going into deficit.

It was in the context of this ideological and economic confrontation that a labor relations system was gradually and autonomously put in place; a system that is quite novel, since it was set up outside of existing labor laws. This system reached its full maturity in 2005 when the Collective Bargaining Agreement (CBA)<sup>6</sup> came into effect following negotiations between the NHL and the National Hockey League Players' Association (NHLPA). From the mid-1990s, labor relations between the two parties had been rather strained, leading to the first strike in the history of professional hockey in 1992, and to the first lockout in 1994-1995.<sup>7</sup> This was followed by a second lockout in 2004-2005, this time leading to the cancellation of the entire hockey season, including the playoffs, a first in the history of professional sports in North America.<sup>8</sup> This second lockout led to the signing of the CBA.

This sector-based collective agreement, which applies across North America, unilaterally stipulates the great majority of working conditions for all NHL players, regardless of the team for which they play. Moreover, it directly regulates the negotiations of individual employment contracts between players and teams by imposing a whole set of standards covering various aspects of the employment relationship.<sup>9</sup>

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3. Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 190 (2003).

4. *Id.*

5. *Id.*

6. See generally NATIONAL HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NHL AND THE NHLPA (2005), available at <http://www.nhlpa.com/About-Us/CBA/> [hereinafter CBA].

7. Aubut, *supra* note 3, at 194.

8. See generally *Trois Mois de Lock-Out en 1994-1995*, RADIO-CANADA.CA, <http://archives.radio-canada.ca/sports/hockey/clips/9066/> (last visited Nov. 1, 2009).

9. See generally CBA, *supra* note 6.

Beyond the curious fact that a team—the employer—has the right to *trade* one of its own players—the employee—to another competing team without this player having the right to oppose this decision,<sup>10</sup> the system that has been put in place is certainly of relevance to anyone with an interest in the theory of labor law and the fundamental challenges it presently faces.

## II. QUEBEC LABOR LAW

It should be noted that, historically, labor law, in particular that which is applied in Quebec, was built on the basis of two distinct but interrelated sets of rules.<sup>11</sup> The first set, which mainly emerged in 1925, is characterized by direct state intervention: that is to say that minimum working conditions began at that time to be imposed for employees tied to their employer by an employment contract. For example, the Act Respecting Labour Standards, which is applied in particular to any employer doing business in Quebec, stipulates the protection that will be provided to employees: minimum wage, maximum working hours, annual leave, notice of termination, etc., making it clear that these are minimum standards and that they are of public order.<sup>12</sup> The second set of rules is based on the principle of the “collective autonomy” of the parties in an employment relationship: this refers to the collective system of labor relations established in Quebec in 1944.<sup>13</sup> In establishing this system, the legislature was acknowledging a practice which already existed in several workplaces; that is, employees were forming associations, and through their unions, collectively bargaining to establish the details of collective agreements, in the case where the employer freely accepted to enter into such a bargaining process, or did so under constraint, following pressure tactics that were effectively exerted by the employees.<sup>14</sup> This system is characterized by some specific components, which are now consecrated in the Quebec Labour Code.<sup>15</sup>

First, employees, by majority vote, can choose a representative—the union—that can be “certified” to become their exclusive representative with regard to all aspects covered by the negotiation, application, and

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10. Except in the case where a player’s employment contract includes a non-trade clause. *Id.* at art. 11.8.

11. FERNAND MORIN ET AL., *LE DROIT DE L’EMPLOI AU QUÉBEC* 77 (3d ed. 2006); PIERRE VERGE ET AL., *LE DROIT DU TRAVAIL PAR SES SOURCES* 29 (Editions Thémis 2006).

12. Act Respecting Labour Standards, R.S.Q., ch. N.1-1, § 93 (2009).

13. See *Quebec Leads Again*, THE SHAWINIGAN STANDARD, Mar. 1, 1944, at 2.

14. See *id.*

15. See Quebec Labour Code, R.S.Q., ch. C-27 (2009).

administration of the collective agreement;<sup>16</sup> in such a case, the parties will be under the obligation to negotiate, diligently and in good faith, the conditions of employment of employees forming a group within a given enterprise.<sup>17</sup> Once it has been concluded, the collective agreement sets out the conditions of employment that will apply to all present and future employees included in the group concerned, as well as to the employer, subject to public order.<sup>18</sup> Since the right to strike and to a lockout can only be exercised during the negotiation of the initial collective agreement or when this agreement comes up for renewal, it follows that these pressure tactics remain prohibited during the period of the collective agreement.<sup>19</sup> Lastly, arbitration is the exclusive and compulsory means of settling grievances relating to the interpretation and application of the collective agreement; consequently, the courts of law are excluded from this adjudicating role.<sup>20</sup>

These initial observations reveal the limitations of labor laws, which are essentially applicable at the national, or even in the case of Canada, provincial level. Such territoriality means that, with few exceptions,<sup>21</sup> such laws are designed to apply at the local level only.<sup>22</sup> The transnational dimension of the employer's activities and of labor relations with employees is therefore not addressed. For example, the collective system of labor relations is binding at the level of a specified employer's enterprise. Certification is granted to one association only with respect to a group of employees under one employer or at a firm, branch, or department coming under this employer.<sup>23</sup> Multi-employer certification is therefore prohibited. Moreover, only one collective agreement governs the conditions of employment for this group of employees.<sup>24</sup>

In this era of trade globalization and internationalization, in which transnational firms have become major players,<sup>25</sup> the labor relations system that has been established in the NHL presents a very interesting model of transnational union representation and collective bargaining. This Article aims to sketch only a broad outline of the main characteristics of this system, which

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16. §§ 21, 47.2, 141.

17. § 53.

18. §§ 62, 67.

19. §§ 106, 107.

20. §§ 100, 101.

21. Act Respecting Labour Standards, ch. II.

22. PIERRE VERGE & SOPHIE DUFOUR, CONFIGURATION DIVERSIFIÉE DE L'ENTREPRISE ET DROIT DU TRAVAIL 107 (2003).

23. Quebec Labour Code § 21.

24. § 67.

25. BOB HEPPLER, LABOR LAWS AND GLOBAL TRADE 6 (2005).

has made it possible to go beyond the inherent territoriality of labor law, whether state-based or conventional, and the inherent limitations of its effectiveness. Moreover, this system indisputably has transnational and multi-employer normative import. Lastly, the binding effect and enforceability of its rules are ensured by an arbitration mechanism binding the parties.

In addition, in regards to the theory of labor law, the system described here involves many pertinent aspects worth reflecting upon. The system is, first and foremost, a private initiative and is strictly contractual in nature. It is essentially based on mutual will, as was typically the case, and will be seen as this Article examines the era that preceded its adoption, starting in 1944, of the laws that introduced collective labor relations systems in Canada. Thus, it fits neatly into a “collective autonomy” approach,<sup>26</sup> at least in the sense intended by the first major labor law theorists; that is, first, a group of workers demanding better working conditions from their employer, and then, to legal standards governing labor that are applicable to a given community, such as a factory, plant, firm, or industry developed through “collective bargaining” and set out in a “collective agreement” that then becomes “law” for the parties concerned.<sup>27</sup> However, it is also possible to see in this system an example of “legal pluralism:”<sup>28</sup> having been constructed, developed, and sanctioned independently from the state, its norms and their effective implementation are situated, definitively and almost exclusively, outside of state-based labor laws.<sup>29</sup>

That said, this system involves two levels of negotiation. Collective labor relations take place at the sectoral level. The collective negotiation of working conditions is definitely centralized, since it involves representatives of all the parties concerned, that is, the team owners and NHL directors, as well as all of the hockey players employed by any of these teams. The CBA, signed in 2005 as a result of this process, standardizes some working conditions for players

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26. PIERRE VERGE & GUYLAINE VALLEE, UN DROIT DU TRAVAIL? ESSAI SUR LA SPÉCIFICITÉ DU DROIT DU TRAVAIL 25-30 (1997).

27. Hugo Sinzheimer, *La théorie des sources et le droit ouvrier*, LE PROBLÈME DES SOURCES EN DROIT POSITIF, 1934, at 73; see generally GEORGES GURVITH, LE TEMPS PRÉSENT ET L'IDÉE DE DROIT SOCIAL (1931); “Pensées allemande et européenne.” Ulrich Zachert, *La légitimité des rapports juridiques de travail. À propos de la conception de la légitimité chez Max Weber et Hugo Sinzheimer*, LA LÉGITIMITÉ DE L'ÉTAT ET DU DROIT. AUTOUR DE MAX WEBER 306 (Michel Coutu & Guy Rocher eds., 2005).

28. Guylaine Valée, *Le droit du travail comme lieu de pluralisme juridique*, in CÉLINE SAINT-PIERRE & JEAN-PHILIPPE WARREN, SOCIOLOGIE ET SOCIÉTÉ QUÉBÉCOISE: PRÉSENCES DE GUY ROCHER 241 (Céline Saint-Pierre & Jean-Philippe Warren eds., 2006).

29. *Id.*; see generally Harry Arthurs, *Labor Law Without the State?*, 46 U. TORONTO L.J. 1 (1996).

across the NHL.<sup>30</sup> However, above all, it includes an innovative mechanism for determining the salary that each team can pay its players, that is, a salary cap.<sup>31</sup> This point will be elaborated on further in this Article.<sup>32</sup>

As regards individual labor relations, these take place at the local level, that is, at the level of *the firm*. Although, indeed, the CBA significantly regulates the negotiation of the employment contract between the player and the team, this negotiation remains decentralized and individual, taking place between these two parties alone. If the parties reach a deadlock and if the object of the negotiation involves determining the salary to be paid to the player, the parties can, under certain circumstances, go to salary arbitration, according to a sophisticated procedure that will be analyzed in detail further on. The same is true for grievances concerning the interpretation or application of the collective agreement or the individual employment contract.<sup>33</sup>

### III. COLLECTIVE LABOR RELATIONS IN THE NATIONAL HOCKEY LEAGUE

The labor relations system that the NHL set up involves a centralized multi-employer system for negotiating working conditions across North America.<sup>34</sup> This collective bargaining process resulted in the signing of a new collective agreement in 2005, which was intended, on the one hand, to standardize some working conditions across the NHL, and on the other hand, to harmonize the salary paid to players by instituting a salary cap.<sup>35</sup>

#### *A. Collective Bargaining of Working Conditions: A Centralized Multi-Employer Process at the North American Level.*

The main area of activity of the NHL involves producing and marketing sports competitions engaged in by the NHL's teams. The preamble to the 2005 CBA states that the NHL is a "joint venture<sup>36</sup> organized as a not-for-profit unincorporated association . . . which is recognized as the sole and

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30. See generally CBA, *supra* note 6.

31. *Id.* at art. 42.

32. The CBA's innovative mechanism for determining the salary cap will be generally discussed *infra* Part III.

33. Arbitration for both salary disagreements and grievances will be discussed *infra* Part IV.

34. The system for negotiating working conditions will be discussed *infra* Part IV.A.

35. The salary cap will be discussed *infra* Part IV.B.

36. A *joint venture* is "a business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project." BLACK'S LAW DICTIONARY 856 (8th ed. 2004).

exclusive bargaining representative of the present and future Clubs of the NHL . . . .”<sup>37</sup> Thus, the NHL is a common legal entity that the team owners created in order to set up a professional hockey league. It is also, according to this definition, the exclusive representative of its present and future teams for the purposes of collective labor negotiations with the NHLPA, and as such, it closely resembles an employers’ association as understood in Quebec labor law.<sup>38</sup> In this respect, however, it should be pointed out that each individual team remains the real employer of its players and that the ultimate power, when it comes to negotiating, rests in the hands of the teams.

Lastly, having its head office in New York City, the NHL is directed and supervised by a board of governors, made up of one member from each team.<sup>39</sup> The NHL grants franchises to team owners, bestowing upon them the privilege of joining the other teams that make up the League.<sup>40</sup> The board of governors decides to whom a franchise should be granted to and at what price, as well as, when the case arises, whether a franchise can be sold or relocated.<sup>41</sup> The NHL also has the power to withdraw a franchise from its owner if he does not respect his contractual obligations, violates NHL rules, or is headed for bankruptcy. In this case, the NHL then decides to whom the franchise can be sold to and where it can be relocated.<sup>42</sup>

The NHLPA represents all NHL players.<sup>43</sup> Its headquarters are in Toronto and, in its present form, the NHLPA dates back to June 1967.<sup>44</sup> It all began with a resolution by player representatives from the six original teams who elected a Toronto Maple Leafs player, Bob Pulford, as the NHLPA’s president, and appointed Alan Eagleson, an influential player agent at the time, as its executive director.<sup>41</sup> According to the archives, on Eagleson’s advice,

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37. CBA, *supra* note 6, at pmb1.

38. “[E]mployers’ association: a group organization of employers having as its objects the study and safeguarding of the economic interests of its members, and particularly assistance in the negotiation and application of collective agreements.” Quebec Labour Code § 1(c).

39. *National Hockey League*, FUNDINGUNIVERSE.COM, <http://www.fundinguniverse.com/company-histories/National-Hockey-League-Company-History.html> (last visited Oct. 27, 2009).

40. GIL STEIN, *POWER PLAYS: AN INSIDE LOOK AT THE BIG BUSINESS OF THE NATIONAL HOCKEY LEAGUE* 37 (1997).

41. *Id.*

42. *Id.*

43. NHL Players Ass’n (NHLPA), *About the NHLPA*, NHLPA.COM, <http://www.nhlpa.com/About-Us> (last visited Jan. 20, 2008) [hereinafter NHLPA].

44. *Id.*

41. Boston: Ed Johnston; Chicago: Pierre Pilote; Detroit: Norm Ullman; Montreal: Bobby Rousseau and Jean-Claude Tremblay; New York: Rod Gilbert, Harry Howell and Bob Nevin; Toronto: Bob Pulford. Heather Engel, *History of NHLPA Executive Directors*, SUITE101.COM, Aug. 31, 2009, <http://national-hockey-league-nhl.suite101.com/article/>



Pulford delivered an ultimatum to team owners at a meeting, declaring that if they refused to recognize the new NHLPA, the players would join the powerful Teamsters Union and seek certification under Canadian labor laws.<sup>45</sup>

The owners were obviously against this proposal, but as pointed out by one observer, the “notorious Teamsters Union was beginning to cause some rumblings with the league, [so] Eagleson seemed to be the lesser of two evils.”<sup>46</sup> Consequently, the NHLPA was recognized by the team owners and thus gained its present status as, to use the words of the CBA itself, “the sole and exclusive bargaining representative of the present and future Players in the NHL.”<sup>47</sup>

It is interesting to note that the parties appear to have chosen a United States law, the National Labor Relations Act (NLRA),<sup>48</sup> to govern their labor relations.<sup>49</sup> The United States Congress adopted this law in accordance with its authority to govern trade between states, as set out in the United States Constitution.<sup>50</sup> A National Labor Relations Board decision<sup>51</sup> established that the NLRA has jurisdiction over and can be applied to professional sports leagues in the United States, including the NHL.<sup>52</sup> By recognizing the principle of freedom of association,<sup>53</sup> the NLRA not only allows players to form their own association and negotiate their working conditions collectively, but also implicitly, to exercise the right to strike, since it specifies that they can engage in other concerted activities for the purpose of collective bargaining.<sup>54</sup> Moreover, the extraterritorial scope of this law leaves no doubt as to its applicability in Canada.

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cfm/history\_of\_nhlpa\_executive\_directors.

45. NHLPA, *supra* note 43.

46. James Baillie, *An Investigation into the Collective Bargaining Relationship Between the NHL and the NHLPA, 1994-2005* 17 (August 2005) (unpublished Master's thesis, Queen's University) (on file with the Industrial Relations Center, Queen's University), *available at* <http://irc.queensu.ca/articles/an-investigation-into-the-collective-bargaining-relationship-between-the-nhl-and-the-nhlpa-1994-2005>.

47. CBA, *supra* note 6, at pmb1., art. 2.1. Article 2.1 restates similar language found in the Preamble. *See generally id.* at art. 2.1.

48. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

49. PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 240 (2d ed. 1998).

50. *Id.* at 250.

51. *See generally* American League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969).

52. Aubit, *supra* note 3, at 190.

53. The NLRA also specifies that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157.

54. § 158.

With respect to extraterritoriality, a situation arose that is worth looking at and analyzing here: it occurred in October 2005, during the lockout that was ordered by the NHL. At the time it did not appear that the labor dispute, which had already led to the cancellation of the 2004-2005 hockey season, was going to be resolved quickly. The NHL was therefore considering the possibility of using replacement players for the 2005-2006 season. Under the NLRA, it would have been possible, in accordance with a complex legislative mechanism, to use replacement workers, or “scabs” in the case of a deadlock in negotiations.<sup>55</sup> The NHL may, in fact, only have wanted to put pressure on the players by reminding them that it could resort to such action. In any case, the NHLPA reacted to this threat by turning to Quebec law, which has included anti-scab provisions since 1977,<sup>56</sup> and applying to be certified to represent all players in the Montreal Canadiens hockey club.<sup>57</sup> Lawyers for the Montreal Canadiens and the NHL argued that the parties concerned—the NHL and the NHLPA—had been subject to the NLRA for over forty years, and that the NLRA had extraterritorial scope, whereas the Quebec Labor Code did not.<sup>58</sup> This led to the application of the estoppel rule and, subsequently, of the doctrine of *forum non conveniens* pursuant to article 3135 of the Civil Code of Quebec.<sup>59</sup> Consequently, the Commission des Relations de Travail (CRT) refused to take jurisdiction over this matter, referring it instead to the National Labor Relations Board in the United States, which it deemed better suited to rule on this dispute.<sup>60</sup> Moreover, it concluded that the certification unit requested by the NHLPA was not appropriate, as it should have included all NHL players rather than just those of the Montreal Canadiens hockey club.<sup>61</sup> In the end, the NHLPA, which had wanted to use this means to respond to pressure from the NHL, dropped its request for certification.

During the same labor dispute, the NHLPA applied for certification to represent all Vancouver Canucks players under the law relating to collective labor relations in British Columbia.<sup>62</sup> However, on July 31, 2007, the British Columbia Labour Relations Board (the “Board”), in an administrative review, reversed the June 2006 decision by a labor commissioner who had concluded

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55. § 158.

56. Quebec Labour Code § 109.1.

57. See generally *Association des Joueurs de la Ligue Nationale de Hockey v. Club de Hockey Canadien Inc.*, 2005 QCCRT 354.

58. *Id.*

59. Civil Code of Québec, S.Q., ch. 64 (1991).

60. *Association des joueurs de la Ligue nationale de hockey*, 2005 QCCRT, at 354.

61. British Columbia Labour Relations Code, R.S.B.C., ch. 244, § 22(1) (2009).

62. *Orca Bay Hockey Ltd. P'ship and Nat'l Hockey League*, BCLRB, no. B172/2007, ¶ 6 (2007).

that the bargaining unit in question was “appropriate” in accordance with Section 22(1) of British Columbia’s Labour Relations Code.<sup>63</sup> The history of labor relations between the parties, and the particular nature of the professional sports industry and of the collective representation and bargaining system that had been set up in the NHL, were listed as the determining factors in refusing the requested certification.<sup>64</sup>

Could this decision, which in a way, grants priority to “collective autonomy” at the North American level over collective labor relations at the local level, be easily transposed into Quebec law? This could come up, for example, if an application for certification on the part of players from the Montreal Canadiens was once again brought before the CRT. A brief analysis of all the arguments put forward by the parties and laid out in the two Board decisions leads us to conclude that a ruling in favor of certification of these players under the Quebec Labour Code does not appear likely, even though such a possibility cannot be completely ruled out. It is true that the players belonging to the Canadiens, the employer under the Quebec Labour Code, may form a “separate group,” which would allow them to be granted certification, provided, of course, that the association applying for certification was able to establish that it was representative of the majority of employees.<sup>65</sup> The main question nevertheless remains whether this certification unit would be deemed to be “appropriate,” that is, whether “this unit, in accordance with the particular circumstances of time and place, [will] be considered to have the attributes that would make collective labour relations truly workable.”<sup>66</sup>

Certainly, it must be recognized that the existence of the CBA, which has the value of a signed contract between private parties, does not in itself constitute a structural obstacle to the players being granted certification,<sup>67</sup> nor, if the case should arise, to a collective agreement being negotiated between a team and the association representing the players working for this team. These steps are fundamental components of the legal collective labor relations system, essential components that are undeniably of public order. Moreover, the existence of an individual contract, or several individual contracts, does not in itself undermine the right to certification requested by an association of employees who would otherwise be legally entitled to it.<sup>68</sup> However, the difficulties that could potentially stem from the implementation of collective

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63. *Id.* ¶ 76.

64. *Id.* ¶¶ 58-74.

65. Quebec Labour Code § 21.

66. MORIN ET AL., *supra* note 11, at 927. This is the authors’ translation from French to English.

67. Quebec Labour Code § 21.

68. § 21.

labor relations within an NHL team, in accordance with the Quebec Labour Code, in particular the fact that the CBA standardizes working conditions and harmonizes salaries for all NHL players, were clearly pointed out in the first Board decision, and these potential problems cannot be ignored.<sup>69</sup> The decision rendered by the Board in an administrative review is unequivocal in this regard. Ultimately, the Board decided to reject the application for certification concerning the Vancouver Canucks players, citing the following reasons:

Orca Bay is the employer, but Orca Bay itself is an integral part of the NHL, just as the BC-NHLPA is an integral part of the NHLPA, and the Canucks players, as a team, are an integral part of the hockey league within which they play. All three elements – the employer Orca Bay, the union BC-NHLPA, and the employee Canuck players – are well served by their current league-wide bargaining structure. This is a crucial factor in our finding that the applied for bargaining unit is inappropriate. If this circumstance were to change, such that either or both parties were no longer well served by the existing bargaining structure, it may be that we would have to revisit our decision. However, in light of the present circumstances, we find that the bargaining unit applied for is inappropriate.<sup>70</sup>

Consequently, if the CRT was one day asked to decide on the appropriateness of such a certification unit, it seems doubtful that the latter would meet the standard criteria related to coherence in the group of employees, the history of labor relations between the parties, the organizational structure of the enterprise operated by the employer, its geographical environment, and the goal of industrial peace, especially given that the only requests that have actually been made for such certification were made during the most contentious moments of a stormy collective labor dispute between the NHL and the NHLPA. The contractual system, which has been put in place and involves both a history of collective bargaining and a collective sector-based employment contract, is functioning effectively. Indeed, there is no reason to believe that its legitimacy or legality will be challenged in the short term by the parties concerned.

To sum up, the fact that the employers' representative voluntarily recognized the NHLPA as the players' representative and that a private system of transnational and multi-employer collective bargaining was put in place, merits some consideration. This process took place outside of the legislative framework provided by American or Canadian labor laws, under which, as has

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69. Orca Bay Hockey Ltd. P'ship and Nat'l Hockey League and British Columbia Chapter of the Nat'l Hockey League Players' Ass'n, BCLRB, No. B138/2006, ¶ 163 (2006).

70. Orca Bay Hockey Ltd. P'ship and Nat'l Hockey League, BCLRB No. B172/2007, ¶ 77.

been seen, the only authorized level of collective representation and collective bargaining is that of the firm. The parties concerned thus created a system that has made it possible to negotiate working conditions collectively at the sectoral level, for all the players and teams across the NHL.

*B. The CBA: Standardizes Working Conditions and Harmonizes Players' Salaries Across the NHL*

The CBA came into force retroactively as of September 16, 2004, for a duration of six years.<sup>71</sup> However, the NHLPA has the option of reopening negotiations after four years—that is, at the end of the 2008-2009 hockey season—or of extending it for another year upon expiry, that is, for the 2011-2012 season.<sup>72</sup> This highly complex document determines the respective rights and obligations of all the parties concerned, but also, mainly, the set of working conditions that apply to all NHL players and teams.<sup>73</sup> In short, the content of the CBA contractually imposes a “minimum public order.”<sup>74</sup> Furthermore, it binds the parties, that is, the teams and their players, to respect its provisions, including those of the individual employment contract,<sup>75</sup> called the Standard Player Contract (SPC).<sup>76</sup>

The following subjects, among others, are covered in the SPC, in the same order as in the CBA: drafting amateur players,<sup>77</sup> the specific parameters of the first contract,<sup>78</sup> the process leading to free agent status,<sup>79</sup> signing the SPC,<sup>80</sup> salary arbitration,<sup>81</sup> the rules concerning “waivers”<sup>82</sup> and loans of players to minor league teams,<sup>83</sup> training camp and related expenses engaged in for

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71. CBA, *supra* note 6, at art. 3.1 (a).

72. *Id.* at art. 3.1 (b).

73. *See generally id.*

74. Act Respecting Labour Standards, ch. N.1-1, § 93.

75. CBA, *supra* note 6, at art. 2.1, Exhibit 1.

76. The SPC constitutes Exhibit 1 of the CBA. *See also id.* at art. 1. “‘Standard Player Contract’ or ‘SPC’ means the standard form contract attached hereto as Exhibit 1 which will be the sole form of employment contract used for all Player signings after the execution of this Agreement.” *Id.*

77. *Id.* at art. 8.

78. *Id.* at art. 9.

79. *Id.* at art. 10.

80. *Id.* at art. 11.

81. *Id.* at art. 12.

82. “‘Waivers’ means the process by which the rights to a Player are offered to all other Clubs pursuant to the procedure set forth in Article 13 of this Agreement and shall include Regular, Re-Entry and Unconditional Waivers.” *Id.*

83. *Id.* at arts. 13-14.

players,<sup>84</sup> the grievance and arbitration process,<sup>85</sup> per diem allowances for players,<sup>86</sup> the pension plan,<sup>87</sup> group insurance coverage,<sup>88</sup> international competitions,<sup>89</sup> sponsorships and licensing,<sup>90</sup> an anti-doping program,<sup>91</sup> and the establishment of a “salary cap,”<sup>92</sup> which is one of the distinctive features of the labor relations system set up in 2005 by the CBA that will be examined in more detail later on in this Article.

The NHL and the NHLPA in effect agreed to limit the expenditures devoted to players’ salaries, in proportion to the NHL’s overall revenues. On the one hand, for each season, the teams’ payroll expenditures cannot exceed a specified maximum amount, which is determined annually. This is what in sports jargon, is referred to as the salary cap. On the other hand, again on an annual basis, the CBA establishes a “maximum player salary.”<sup>93</sup> The teams must remain within the limits of this system when distributing their total payroll. Consequently, salary negotiations between the player and the team are strictly regulated by the mechanism set out in the CBA.

There are three factors that must be considered before the annual salary cap can be established: Hockey Related Revenues (HRR),<sup>94</sup> the Applicable Percentage,<sup>95</sup> and Benefits.<sup>96</sup> Once these factors have been worked out, it is possible to calculate the salary cap,<sup>97</sup> as well as the maximum salary that can be paid to any single player.<sup>98</sup>

#### 1. Calculating the salary cap.

The salary cap, or Team Payroll Range System,<sup>99</sup> to use the exact term

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84. *Id.* at art. 15.

85. *Id.* at art. 17.

86. *Id.* at art. 19.

87. *Id.* at art. 21.

88. *Id.* at art. 23.

89. *Id.* at art. 24.

90. *Id.* at art. 25.

91. *Id.* at art. 47.

92. *Id.* at art. 50.

93. *See id.* at art. 50.6.

94. *Id.* at art. 50.1(a).

95. *Id.* at art. 50.4(b).

96. *Id.* at art. 50.3.

97. Calculating the salary cap will be further discussed *infra* Part IV.B.1.

98. Calculation of the maximum salary that a team can pay to any single player will be further discussed in Part IV.B.2.

99. The expression “salary cap” does not appear anywhere in the CBA, which prefers the term “Team Payroll Range System.” CBA, *supra* note 6, at art. 50. Nevertheless, there is no doubt that a

used in the CBA, establishes a direct relationship between the total payroll that is available for each team and the NHL's HRR, which is the first factor taken into consideration. Thus, since the 2005-2006 season, the total amount in salaries paid annually to players has varied in proportion to a rise or fall in HRR, depending on the year. A new calculation is made each year,<sup>100</sup> based on a formula set out in the CBA.<sup>101</sup> In other words, HRR is used as a starting point in the NHL's new system for calculating salaries. The term HRR must be broadly interpreted and includes, among other things, "the operating revenues . . . from all sources, whether known or unknown, whether now in existence or created in the future . . . of each Club or the League . . . derived or earned from, relating to or arising directly or indirectly out of the playing of NHL hockey games or NHL-related events . . ." <sup>102</sup> In short, all NHL revenues are truly included in the HRR, and can be redistributed to the players in the form of salaries, as explained below.

The second factor considered when calculating the salary cap is the Applicable Percentage.<sup>103</sup> Each season, the players receive a percentage of the NHL's total HRR. As was mentioned above, this percentage increases or decreases, in relation to a rise or fall in the HRR, in accordance with the following distribution grid:<sup>104</sup>

<i>Applicable Percentage</i>	<i>HRR</i>
54%	Under \$2.2 billion
55%	\$2.2 to \$2.4 billion
56%	\$2.4 to \$2.7 billion
57%	Over \$2.7 billion

The third factor considered relates to the Benefits that players receive.<sup>105</sup> This includes all sums paid out in pensions; government programs, such as

salary cap does exist in the NHL. *Id.* at art. 50.1.

100. *Id.*

101. *Id.* at art. 50.5(b)(i).

102. *Id.* at art. 50.1(a).

103. *See id.* at art. 50.4(b).

104. *Id.* at art. 50.4(b)(i). It should be noted that the Applicable Percentage must be readjusted in accordance with the HRR if the latter are situated between two levels. *Id.* at art. 50.4(b)(ii). For example, if the HRR came to \$2.3 billion (half-way between 2.2 billion and 2.4 billion), a rate of 55.5% would be applied (half-way between 55.0% and 56.0%).

105. *Id.* at art. 50.3(a).

social insurance premiums paid by the team, as the employer; compensation under group insurance programs including life, medical, and dental coverage; playoff pool amounts paid by the League; and individual performance bonuses paid by the League, in accordance with Exhibit 5-B Individual “B” Bonuses, of the CBA.<sup>106</sup> It includes, in fact, all of the employee benefits actually received by the players. From this total amount, a figure of \$6.5 million was established for each of the 2005-2006 and 2007-2008 seasons.<sup>107</sup> The figure established for each of the subsequent years covered by the CBA is \$6.75 million.<sup>108</sup>

Once this last factor has been determined, it becomes possible to calculate the annual salary cap that will be imposed on the teams. It should be pointed out that this salary cap (the “Upper Limit”) is accompanied by a salary floor (the “Lower Limit”).<sup>109</sup> Calculating the Upper and Lower Limits of the total annual salaries that can be paid out by the NHL teams thus involves three steps, and the final amounts are determined on the basis of the HRR, the Applicable Percentage and Benefits:<sup>110</sup>

Midpoint = [(HRR × Applicable Percentage) – (Benefits)] ÷ 30 (the number of teams in the NHL);

Adjusted Midpoint = Midpoint × 1.05 (adjusted by 5% every year to account for inflation);

Lower Limit = Adjusted Midpoint – \$8 million;

Upper Limit = Adjusted Midpoint + \$8 million.

This means that, if, for example, the HRR came to \$2.3 billion and the Benefits were evaluated at \$66 million, then, for the following season, the Lower Limit would be set at \$34.4 million, while the Upper Limit would be set at \$50.4 million, as illustrated below:

Midpoint = [(\$2.3 billion × 55.5%) – (\$66 million)] ÷ 30 = \$40.35 million

Adjusted Midpoint = \$40.35 million × 1.05 = \$42.4 million

Lower Limit = \$34.4 million and Upper Limit = \$50.4 million

Once the Lower Limit and Upper Limit have been worked out for a given season, it then becomes possible to determine the maximum salary that can be paid to any player for that season.

106. *Id.* at art. 50.3(a)(i)(A)(1)-(5).

107. *Id.* at art. 50.3(a)(i)(B).

108. *Id.* at art. 50.3(a)(i)(B).

109. *Id.* at art. 50.5(a).

110. *Id.* at art. 50.5(b)(i).



## 2. Calculating the Salary Cap or Upper Limit.

The maximum annual salary is a new feature, introduced in the 2005 CBA.<sup>111</sup> Accordingly, the annual salary of any player, including individual performance bonuses, can never exceed twenty percent of the Upper Limit.<sup>112</sup> Thus, for the example shown above, no player could earn more than \$10.08 million for the season in question. In the case of a contract lasting longer than one season, the maximum salary allowed for the subsequent seasons would correspond to the maximum salary established when the SPC was signed.<sup>113</sup>

That said, in order to avoid confusion and, especially, a wave of salary increases across the NHL, it is essential that the SPC, concluded between a team and a player, specify the annual salary in terms of an exact dollar figure.<sup>114</sup> Therefore, it is prohibited to state that a player will receive a certain percentage of the salary cap.<sup>115</sup> What would happen if total HRR went down, leading to a drop in the salary cap, and if, the following season, a player therefore earned more than twenty percent of the salary cap? It should be pointed out here that the contracts are signed on the basis of a predetermined rather than an indefinite term. The team must respect the contract, and thus, the player would be entitled to keep his entire salary even if it went over the twenty percent threshold set by the Upper Limit.<sup>116</sup> On the other hand, this amount, paid out in salary, would be deducted from the team's total payroll.<sup>117</sup> This rule encourages teams to show restraint. They must, in effect, avoid granting the maximum salary allowed a player so as not to unjustifiably lower their room for maneuver in the years to come, especially in case overall NHL revenues were to drop.

In conclusion, the system of union representation and collective bargaining of working conditions that has gradually been put in place in the NHL is characterized by its transnationalism and multilateralism and presents a model of private regulation of working conditions. The collective bargaining of working conditions is centralized at the sectoral level, involving the owners of the thirty teams, the NHL directors, and representatives of all the hockey players in the League. The CBA, signed in 2005 as the result of

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111. *E.g.*, *id.* at art. 50.

112. *Id.* at art. 50.6(a). It should be noted that the CBA also sets out the minimum annual salary that can be paid to a player: \$475,000 for the 2007-2008 and 2008-2009 seasons; \$500,000 for the 2009-2010 and 2010-2011 seasons; and \$525,000 for the 2011-2012 season. *Id.* at art. 11.12.

113. *Id.* at art. 50.6(a).

114. *Id.* at art. 50.6(b).

115. *Id.*

116. *Id.* at art. 50.6(a).

117. *Id.*

this bargaining process, aims to standardize a whole set of working conditions across the NHL and to limit, through a salary cap or Upper Limit mechanism, the salary that can be paid to the players. Thus, it establishes a compulsory framework for decentralized bargaining relating to the individual employment contract between the player and his team.

#### IV. INDIVIDUAL LABOR RELATIONS IN THE NHL

Individual labor relations in the NHL take place at the level of “the firm.” The negotiation of the employment contract between the player and the team, which is intended mainly to determine the salary and duration of the contract, must be conducted in accordance with the rules specified in the CBA.<sup>118</sup> In the event of a dispute over salary determination, an arbitrator can be called upon to settle the matter; the same applies, more generally, to disputes over the interpretation or application of the CBA, or over the individual employment contract concluded outside this agreement.<sup>119</sup>

##### *A. Negotiating the Employment Contract Between a Player and a Team*

Apart from being subject to the CBA as a group, the players are also individually bound to their respective teams—the real employer at the legal level—by an employment contract called the SPC. Exhibit 1 of the CBA contains the eleven-page SPC, and Article 11 of the CBA stipulates the standards governing such contracts.<sup>120</sup> In particular, the aspects that are negotiated individually between a team and a player are as follows: the annual salary, set in accordance with the rules explained above, and in some cases, bonuses and “non-trade” clauses.<sup>121</sup> The duration of the contract is also negotiated on an individual basis, except when this involves a first contract signed by the player in the NHL.<sup>122</sup> All other aspects of the contract are already covered in the SPC.<sup>123</sup> Thus, by accepting the terms of the SPC, the player “agrees to give his services and to play hockey in all NHL Games, All

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118. The rules regarding negotiation of the player contract will be further discussed *infra* Part IV.B.

119. CBA, *supra* note 6, at arts. 12, 17. Arbitration will be further discussed *infra* Part IV.C.

120. *Id.* at Exhibit 1.

121. CBA, *supra* note 6, at arts. 11.7, 50.2(b) (discussing bonuses). Pursuant to a nontrade or nonmove clause, the team undertakes to not trade the player to another team for the duration of the SPC. *Id.* at art. 11.8.

122. In such a case, the duration of the contract varies based on the player’s age at the time his SPC was signed. *Id.* at art. 9.1. For example, the first contract signed by a player aged 18 to 21 is for the duration of three seasons.

123. *Id.* at Exhibit 1.

Star Games, International Hockey Games, and Exhibition Games to the best of his ability, under the direction and control of the Club in accordance with the provisions hereof.”<sup>124</sup>

The obligations imposed by the SPC on a player are, among others, to report to his team’s training camp, at the time and place specified by the team, in good physical condition;<sup>125</sup> “to keep himself in good physical condition at all times during the season;”<sup>126</sup> to play hockey only for the team with which he signed his SPC;<sup>127</sup> to cooperate with his team and participate in all reasonable promotional activities to which he is assigned by the team, as it deems appropriate;<sup>128</sup> “to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play, and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League, or professional hockey generally;”<sup>129</sup> and to report for practice at such time and place as the team may designate.<sup>130</sup> Lastly, the SPC contains provisions related to the fines and suspensions that the team may impose on a player who violates the club’s internal rules,<sup>131</sup> as well as provisions relating to salary and medical expenses related to an injury.<sup>132</sup>

Nevertheless, the principal issue of the SPC negotiation is still unquestionably that of salary. Thus, the CBA set up, for certain categories of players, a private mechanism for settling disputes—salary arbitration.<sup>133</sup>

#### *B. Private Arbitration as Compulsory Means of Settling Disputes Between a Player and a Team*

The absolute jurisdiction of an arbitrator appointed under the CBA varies according to whether the subject of the dispute involves the player’s salary<sup>134</sup> or the interpretation or application of the CBA or the SPC concluded between the player and his team.<sup>135</sup>

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124. *Id.* at Exhibit 1, art. 2.

125. *Id.* at art. 2(a).

126. *Id.* at art. 2(b).

127. *Id.* at art. 2(c).

128. *Id.* at art. 2(d).

129. *Id.* at art. 2(e).

130. *Id.* at art. 3.

131. *Id.* at art. 4.

132. *Id.* at art. 5.

133. *E.g., id.* at art. 12.

134. Salary arbitration will be further discussed *infra* Part V.B.1.

135. Grievance arbitration will be further discussed *infra* Part V.B.2.

### 1. Disputes over salary negotiations.

In sports law, salary arbitration is a tool that is made available to the parties in order to settle their disputes over the negotiation of a contract between a player and a team. The hearing is held before an independent arbitrator, with each party generally being represented by their lawyers, plus the agent for the player, and the general manager or his assistant for the team.<sup>136</sup> The arbitrator decides on issues related to the player's salary only.<sup>137</sup> There are just two professional leagues in North America that use this system—the NHL and Major League Baseball (MLB).<sup>138</sup> The National Basketball Association and the National Football League have not adopted this system in their respective collective agreements.<sup>139</sup>

The NHL was the first professional league to introduce salary arbitration, as early as 1970, followed by the MLB in 1973.<sup>140</sup> The introduction of this mechanism stemmed from the dissatisfaction generated by the *option clause*, a rule that was inserted in the NHL's SPC in 1958.<sup>141</sup> This clause stipulated that when a player's contract expired, the team could unilaterally extend it for the same duration as that of the previous contract, at the level of salary determined by the team.<sup>142</sup> Since this clause was automatically integrated into the player's new contract, it was thus possible for the team to continually renew this contract without any real negotiations being conducted between the parties.<sup>143</sup> Moreover, at that time, salary disputes were submitted to the NHL president for resolution.<sup>144</sup> The latter rendered an irrevocable decision, which determined the salary to be paid to the player.<sup>145</sup> However, there was a real conflict of interest since the president of the NHL was appointed, it should be noted, by the owners of the various teams.<sup>146</sup> Finally, following a report published in 1969 that criticized the perverse effects of the system on the competitiveness of NHL teams among themselves, the players were able to

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136. WEILER & ROBERTS, *supra* note 49, at 336.

137. Aubut, *supra* note 3, at 191.

138. However, there are significant differences between the two systems, which will not be addressed in this study. *See generally id.*

139. *See id.* at 211-22.

140. WEILER & ROBERTS, *supra* note 49, at 336.

141. Joseph Weiler, *Legal Analysis of the NHL Player's Contract*, 3 MARQ. SPORTS L.J. 59, 70 (1992); Aubut, *supra* note 3, at 193.

142. Aubut, *supra* note 3, at 193.

143. *Id.*

144. *Id.*

145. *Id.*

146. STEIN, *supra* note 40, at 37.

negotiate through their new union association, an arbitration system that made it possible to settle salary disputes between players and their respective teams.<sup>147</sup>

*a. Eligibility for arbitration.*

Salary arbitration can be requested by the player<sup>148</sup> and, henceforth—a novelty introduced in the CBA—by the team.<sup>149</sup> To be eligible, the player must first be a member of Group 2,<sup>150</sup> that is, a “restricted free agent.”<sup>151</sup> He must then meet the conditions listed explicitly in the CBA:<sup>152</sup>

Age at signing of first SPC	Minimum number of years of professional experience required to be eligible
18-21	3 years
22-23	2 years
24 or older	1 year

To be granted a full year of professional experience, a player aged eighteen or nineteen must have played at least ten games in the NHL during the same season, whereas a player aged twenty must have played ten or more games at the professional level under an SPC.<sup>153</sup> Lastly, the player must have received a qualifying offer from his team beforehand.<sup>154</sup> This offer, whose

147. Weiler, *supra* note 141, at 70; Aubut, *supra* note 3, at 193.

148. CBA, *supra* note 6, at art. 12.1.

149. *Id.* at art. 12.3.

150. *Id.* at art. 12.1(b).

151. If he is not an unrestricted free agent according to Article 10.1, or a Group 1 or 4 player, the player becomes a Restricted Free Agent (Group 2 player), when his SPC expires. *Id.* at art. 10.2. The other teams will then be free to offer him a new contract, but the team with whom he played previously will have the opportunity to equalize the offer. *Id.* at art. 10.3. Otherwise, it will nevertheless receive a draft choice compensation. *Id.* at art. 10.4.

152. *Id.* at art. 12.1(a).

153. “‘Professional Games’ includes the following: any NHL Games played, all minor league regular season and playoff games and any other professional games played, including but not limited to, games played in any European league or any other league outside North America, by a Player pursuant to his SPC.” *Id.* at art. 1. If a player is drafted at age seventeen, signs his first SPC at eighteen, and plays in the NHL at nineteen, he will need a minimum of four years professional experience before becoming eligible for salary arbitration when his SPC expires. *Id.* at art. 12.1(a).

154. *Id.* at art. 10.2 (a)(ii).

term is limited to one season only, allows the team to maintain some rights over the player.<sup>155</sup> If the team fails to make such an offer, the player becomes an unrestricted free agent.<sup>156</sup> The qualifying offer must be made by June 25 of each year, or the first Monday following the draft of the player's last year under the SPC; it must also comply with the following:<sup>157</sup>

Salary during last year of SPC	Qualifying offer
Under \$660,000	110%
From \$660,000 to US\$1,000,000	105% <sup>158</sup>
Over \$1,000,000	100%

After having received a qualifying offer, the player who meets all the previously mentioned conditions can request salary arbitration, but only if he thinks that he can obtain a more advantageous annual salary.<sup>159</sup> Otherwise, he can simply agree to play the following season under the terms of the qualifying offer or refuse the offer in question and not request arbitration.<sup>160</sup> In the jargon of the trade, he will then be characterized as a "hold out" or a "striking player." In this case, the team can file a request for arbitration before July 6 if it deems it appropriate to do so, or let the player continue to strike.<sup>161</sup> The striking player has until December 1<sup>162</sup> to come to an agreement with his team; otherwise he will not be able to play during the season in question. It must be mentioned that the team can, at any time, offer more than what is specified in the qualifying offer, which may lead to a short- or long-term agreement if the player accepts it.<sup>163</sup>

As was explained above, the team can also request salary arbitration.<sup>164</sup> However, it can only do so in two very specific cases.<sup>165</sup> First, the team can

155. *Id.* at arts. 10.3, 10.4.

156. For a player's status to change to Unrestricted Free Agent, the team must not have already requested arbitration. *Id.* at art. 10.2(a)(iv).

157. *Id.* at art. 10.2(b)(ii)(A)-(C).

158. *Id.* However, the amount must not exceed \$1,000,000. *Id.* at art. 10.2(a)(ii)(B).

159. *Id.* at art. 10.2(a).

160. *Id.*

161. *Id.* at art. 12.4(b).

162. *Id.* at art. 11.4. This is the "Signing Deadline for Group 2 Players." *Id.*

163. *Id.* at art. 10.3

164. *Id.* at art. 12.3.

165. *Id.* at art. 12.3(a)-(b).

request salary arbitration when the player has rejected the qualifying offer and has not requested arbitration himself.<sup>166</sup> In this case, the team must offer him a salary equal to or higher than the last salary level agreed on under the previously concluded SPC.<sup>167</sup> Second, with regard to a player who earned a salary of \$1.5 million or more during the last year of his SPC, the team can refer the matter directly to an arbitrator instead of making a qualifying offer.<sup>168</sup> Thus, it can ask the arbitrator to grant a decrease in salary equivalent to a maximum of fifteen percent of the player's most recent annual salary.<sup>169</sup> It should be noted that, in all cases, the player is eligible for only one session of team-elected salary arbitration during his career.<sup>170</sup> Similarly, a team cannot request more than two sessions of salary arbitration per year.<sup>171</sup>

*b. The arbitration process and the powers of the arbitrator.*

To be eligible for salary arbitration, the player must file his request by July 5 at 5:00 p.m. (EST).<sup>172</sup> The team, on the other hand, must take action before June 15 or forty-eight hours after the conclusion of the Stanley Cup Finals, whichever is later, again by 5:00 p.m. (in the case of arbitration involving a player who earned a salary of \$1.5 million or more during the last year of his SPC).<sup>173</sup> All arbitration cases must be heard between July 20 and August 4 of each year.<sup>174</sup> The NHL and the NHLPA jointly choose eight salary arbitrators, all members of the National Academy of Arbitrators in the United States.<sup>175</sup> The latter are appointed to hear the cases filed.<sup>176</sup> The hearing takes place before a single arbitrator chosen by the parties according to a pre-established process.<sup>177</sup> At least forty-eight hours before the hearing, the parties must send both the arbitrator and the opposing party a brief that is, at most, forty pages long (excluding annexes) detailing the positions, arguments,

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166. *Id.* at art. 12.3(b)(i).

167. *Id.* at art. 12.3(b)(ii).

168. *Id.* at art. 12.3(a)(i).

169. *Id.* at art. 12.3(a)(ii).

170. *Id.* at art. 12.3(c).

171. *Id.* at art. 12.3(d).

172. *Id.* at art. 12.2.

173. *Id.* at art. 12.4(a). With regard to a player who rejected the qualifying offer and has not requested arbitration himself, the team must act by 5:00 p.m., July 6. *Id.* at art. 12.4(b).

174. *Id.* at Exhibit 15.

175. *Id.* at art. 12.6.

176. *Id.*

177. *Id.* at art. 12.7(c).

and statistics put forward to back up their claim.<sup>178</sup> During the hearing, each party has a specified period of time in which to argue their case directly (the “Direct Case”) and then refute the allegations of the opposing party or present their rebuttal case.<sup>179</sup>

Each party has a maximum of ninety minutes to present their Direct Case and respond to the arguments of the other party.<sup>180</sup> The player, the team, the NHL, and the NHLPA are party to the procedure and can be represented by their respective agents or lawyers.<sup>181</sup> At the hearing, the parties can produce any documents and declarations under oath to back up their allegations and call the witnesses they deem pertinent, subject to restrictions specified in the CBA.<sup>182</sup> The weight of the evidence submitted to the hearing is assessed exclusively by the arbitrator and the latter is not bound by any particular rule of evidence, except those listed explicitly in the CBA.<sup>183</sup> The following types of evidence are declared admissible: (1) the overall performance, including official statistics prepared by the NHL (both offensive and defensive), of the player in the current season or preceding seasons;<sup>184</sup> (2) the number of games played by the player, his injuries or illnesses during the preceding seasons;<sup>185</sup> (3) the player’s number of years of experience in the NHL or the team;<sup>186</sup> (4) the overall contribution of the player to the success or failure of the team in the preceding season;<sup>187</sup> (5) any special qualities of the player, such as leadership or personal commitment to the community;<sup>188</sup> (6) the overall performance in

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178. *Id.* at art. 12.9(b).

179. *Id.* at art. 12.9(d). The order of argument depends on the party who filed the request, unless the order is determined by the arbitrator or mutually agreed upon by the parties. *Id.* at art. 12.9(k).

180. *Id.* at art. 12.9(d). If the party presenting second introduces new substantive issues or new players or “comparable players,” the other party will have ten additional minutes for surrebuttal. *Id.*

181. Aubut, *supra* note 3, at 204; CBA, *supra* note 6, at art. 12.9(a).

182. CBA, *supra* note 6, at art. 12.9(g)(i). The following categories of evidence are inadmissible: the terms of any player’s SPC when he was not a “Group 2 Player;” the SPCs signed by an “Unrestricted Free Agent;” the SPC of any player who has not been presented as a comparable player; qualifying offers made by the team; offers made during negotiations; newspaper columns, press game reports or similar materials; and any reference to walk-away rights. For further discussion, see *infra* Part IV.B.1.c. Any compensation awarded by a salary arbitrator leading to the use of the walk away right by a club; the financial situation of a team or of the NHL; any reference to the “Lower Limit” or “Upper Limit,” as well as to the “Players’ Share;” any reference to an arbitral decision issued in summer 2005; and lastly, any reference to the salary information contained in previous arbitration decisions. *Id.* at art. 12.9(g)(iii).

183. *Id.* at art. 12.9 (g)(i).

184. *Id.* at art. 12.9(g)(ii)(A).

185. *Id.* at art. 12.9(g)(ii)(B).

186. *Id.* at art. 12.9(g)(ii)(C).

187. *Id.* at art. 12.9(g)(ii)(D).

188. *Id.* at art. 12.9(g)(ii)(E).



the previous season or seasons of any player(s) who is alleged to be “comparable” to the player whose salary is in dispute;<sup>189</sup> and (7) the annual salary of players alleged to be “comparable.”<sup>190</sup>

These “comparable statistics” have been sanctioned by the arbitral jurisprudence as the most important items of evidence,<sup>191</sup> and the arbitrator’s decision is largely based on them. The NHL and the NHLPA must jointly create a comparable exhibit setting out the financial terms contained in the SPCs of all players alleged to be “comparable” players for the arbitration session;<sup>192</sup> this involves players who have signed their current contract as a restricted free agent. Moreover, for a player to be used by the arbitrator as a comparable player, the parties must necessarily refer to him in their briefs.<sup>193</sup>

Finally, the arbitrator renders his or her decision not later than forty-eight hours after the hearing is adjourned.<sup>194</sup> The arbitrator’s decision typically includes the salary to be paid to the player,<sup>195</sup> the duration of the contract between the player and the team,<sup>196</sup> a “minor league clause,”<sup>197</sup> if applicable, and the reasons supporting the decision.<sup>198</sup> The parties must comply with the orders issued by the arbitrator and draft the SPC accordingly.<sup>199</sup> Lastly, each party pays for the expenses generated by their own representation and shares equally the responsibility to reimburse the cost of the arbitration process.<sup>200</sup>

### *c. The Walk-Away Right.*

Although the arbitral decision is imperative, the team can refuse to comply

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189. *Id.* at art. 12.9(g)(ii)(F).

190. *Id.* at art. 12.9(g)(ii)(G).

191. Daniel Dumais et al., *Présentation sur L’Arbitration Salariale* at the Conference Heenan Blaikie (April 2006) (unpublished).

192. CBA, *supra* note 6, at art. 12.9(g)(v).

193. *Id.* at art. 12.9(g)(ii)(G).

194. *Id.* at art. 12.9(n)(i).

195. *Id.* at art. 12.9(n)(ii)(B). The arbitrator can decide to award the player a salary equal to one of the two offers made by the parties or any amount between the two offers. *Id.*

196. *Id.* at art. 12.9(n)(ii)(A). The term will be one year or two years, based on the player’s decision, in the case where the team filed for arbitration; or based on the team’s decision, in the case where the player filed for arbitration. *Id.* It should be noted that if the player reaches full autonomy, “Group 3 Player” status at the end of the season following the arbitration session, the team will not be able to decide on a two-year term. *Id.* at art. 12.9(c).

197. *Id.* at art. 12.9(n)(ii)(C).

198. *Id.* at art. 12.9(n)(ii)(D).

199. *Id.* at art. 12.5(a).

200. *Id.* at art. 12.9(o).

with it under certain circumstances.<sup>201</sup> However, the player does not have this prerogative.<sup>202</sup> The Walk-Away Right exists only when it is the player who filed for arbitration.<sup>203</sup> Moreover, the team is entitled to exercise

its right to walk away only if the player obtains an annual salary of \$1,042,173 or more at the close of the arbitration session.<sup>204</sup> This right is usually exercised when the team considers that the salary awarded to the player is too high in relation to what it is prepared to pay.

Nevertheless, the direct consequences of exercising this right are as follows: (1) if the duration of the SPC submitted to arbitration was one season only, the player will become an unrestricted free agent;<sup>205</sup> he will then be in a position to negotiate with any other team, including that which used the Walk-Away Right; and (2) if the duration of the SPC covered by the arbitral decision was two seasons, the Walk-Away Right will only apply to the second season, such that the SPC will consequently become a one-season contract; after that season, the player will become an unrestricted free agent; he will then be in a position to offer his services to a team of his choice.<sup>206</sup>

In both cases, the team must exercise its Walk-Away Right within forty-eight hours following the decision rendered by the arbitrator.<sup>207</sup> On the other hand, where the team must attend subsequent salary arbitration sessions with one or more players and still has a Walk Away Right, it can exercise this right within forty-eight hours following the last arbitral decision rendered in these cases, since this will allow it to decide for which player, if any, to use its Walk Away Right.<sup>208</sup>

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201. *See id.* at art. 12.10.

202. *See id.* at art. 12.10(e).

203. *Id.*

204. *Id.* at art. 12.10(a). This amount is raised proportionally, based on the average salary set in the NHL as of the 2007-2008 season. *Id.* at art. 12.10(d).

205. *Id.* at art. 12.10(a).

206. *Id.* at art. 12.10(b).

207. *Id.* at art. 12.10(a).

208. *Id.*

Lastly, the number of Walk Away Rights authorized per season and for each team depends on the volume of cases filed by its players:<sup>209</sup>

Number of Walk Away Rights per year per team	Number of players having filed for arbitration
1	1 or 2
2	3 or 4
3	5 or more

## 2. Disputes over the interpretation and application of the Collective Bargaining Agreement and the Standard Player Contract.

Grievance arbitration should be distinguished from salary arbitration, mainly because the outcome sought by this mechanism is not the same. In labor law, grievance arbitration is the judicial means of settling all disputes between an employer and a certified union over the interpretation and application of a collective labor agreement.<sup>210</sup> The CBA, for its part, defines the term “grievance” as follows:

any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement, including any SPC. All Grievances will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this Agreement.<sup>211</sup>

Some specific grievances will be subject exclusively to the mechanism of Article 48.<sup>212</sup> For all other grievances, the NHL and the NHLPA are the only authorized initiators.<sup>213</sup> The player involved in a grievance does not have to be bound by an SPC at the time the grievance arises or when it is filed or

209. *Id.* at art. 12.10(c).

210. MORIN ET AL., *supra* note 11, at 1140.

211. CBA, *supra* note 6, at art. 17.1.

212. A “System Grievance” is any dispute involving the interpretation or application of or compliance with the provisions of Article 49 Player Compensation Cost Redistribution System, Article 50 Team Payroll Range System, those provisions of Article 26 No Circumvention, Article 9 Entry Level Compensation, Article 10 Free Agency, and any other articles in which the grievance resolution could affect the interpretation or application of the provisions of Article 49 or 50. *Id.* at art. 48.1.

213. *Id.* at art. 17.2(a). A grievance should be initiated within sixty days, from the date of the events giving rise to the grievance or sixty days from the date when the parties learned or should have learned the facts giving rise to the grievance. *Id.* at art. 17.2(b).

heard.<sup>214</sup> Written notice of the grievance must be sent to the opposing party by facsimile; the notice must put forward the reasons the grievance was filed, explanations concerning the CBA provisions, which have been violated, and a report detailing the solutions envisaged.<sup>215</sup> After being served with a grievance, the opposing party has ten days to respond;<sup>216</sup> it can either acknowledge or deny the alleged facts.<sup>217</sup>

At this stage, only the parties involved in the grievance participate in the process and continue to do so until the case is brought before the grievance arbitrator. However, before proceeding to hearing, the parties must first seek to settle their disputes before the Grievance Committee.<sup>218</sup> This involves a meeting between the NHL and the NHLPA once a month following the day the grievance was filed, in an effort to settle the dispute before resorting to an arbitrator.<sup>219</sup> The discussions and offers of settlement made during this meeting are not admitted as evidence before the arbitrator, if the process goes that far.<sup>220</sup> If the grievance is not resolved between the parties during this meeting, the grieving party can bring the case before a grievance arbitrator.<sup>221</sup> Just as for salary arbitration, the grievance arbitrator, jointly appointed by the parties, must be a member of the National Academy of Arbitrators.<sup>222</sup> The arbitrator renders his or her decision within thirty days following the hearing; he or she has the power to interpret and apply the CBA provisions, including the players' SPCs.<sup>223</sup> However, the arbitrator must not add to, subtract from, or alter in any way the provisions of the CBA or any SPC.<sup>224</sup> Lastly, the decision of the grievance arbitrator is final, without possible appeal, that is, it puts an end to the dispute and is binding on the parties.<sup>225</sup>

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214. *Id.* at art. 17.2(b).

215. *Id.* at art. 17.3(a).

216. *Id.* at art. 17.3(b).

217. *Id.* at art. 17.3(c).

218. *Id.* at art. 17.4(d). However, in some exceptional cases, called "Expedited Arbitration," the parties may be exempt from this process. *Id.* at arts. 17.4 (d), 17.17.

219. *Id.* at art. 17.4(a).

220. *Id.* at art. 17.4(b).

221. *Id.* at art. 17.5.

222. *Id.* at art. 17.6. The selection process of this arbitrator is specified in Article 17.6. *Id.* The grievance hearing is governed by Articles 17.8 and 17.9. *Id.* at arts. 17-18.

223. *Id.* at art. 17.13.

224. *Id.*

225. *Id.*

## V. CONCLUSION

The labor relations system that has been set up in the NHL is certainly interesting from a theoretical perspective and contains approaches that are worth exploring further, given the contemporary and fundamental issues currently faced by labor law. Thus, due to its particular nature, this system differs considerably from the international framework agreements concluded between international union federations and transnational companies, even though a number of convergent aspects can be observed.<sup>226</sup> First, this system was constructed on a voluntary basis, since the NHL accepted the NHLPA as the players' representative and negotiated a collective agreement that determines the working conditions for all players across the NHL. In this sense, the system that has been set up precedes national legislation on collective labor relations, since the latter's norms and effective implementation do not generally cover the transnational dimension of NHL activities and the labor relations between the players and the teams, or the multi-employer nature that transcends such laws. In fact, the working conditions stipulated in the CBA must be respected by the thirty teams and all of the players in the NHL. Having been negotiated at the global level rather than at the local level, the working conditions constitute the required point of reference for individualized negotiation between a team and a player. Such is the predominant legal impact of this truly collective contract. And while, on the whole, the CBA is intended to standardize working conditions, the rules relating to the establishment of a real salary cap,<sup>227</sup> in effect, harmonize salaries across the NHL. Lastly, a private mechanism for salary and grievance arbitration has been developed,<sup>228</sup> thus ensuring the binding effect and enforceability of CBA provisions.

In other words, the working conditions observed in the CBA are the net result of an advanced process of multi-employer collective bargaining. The provisions that it contains are contractually binding, fully and comprehensively on multiple employers—the thirty teams in the NHL—in their relations with some of their employees—the players of the NHL—in a specific industry—a professional sports league—spanning across North America in two different countries.

The professional sports industry in North America is certainly a world in itself. Without harboring too many illusions, it is nevertheless our view that

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226. Renée-Claude Drouin, *Les accords-cadres internationaux: enjeux et portée d'une négociation collective transnationale*, 47 CAHIERS DE DROIT 703, 703 (2006).

227. CBA, *supra* note 6, at art. 40.

228. *Id.* at arts. 11, 17.

this trans American model of “collective autonomy”—an enlightened example of “legal pluralism”—represented by the NHL’s labor relations system, can serve as an inspiration to other industries wishing to follow its example.

