

**SALARY CAPS IN PROFESSIONAL SPORTS:
CLOSING THE KOVALCHUK LOOPHOLE IN
NATIONAL HOCKEY LEAGUE PLAYER
CONTRACTS***

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INTRODUCTION

On June 23, 2001, Russian hockey superstar Ilya Kovalchuk was selected by the National Hockey League’s Atlanta Thrashers with the first overall pick in that year’s draft,¹ and since then has led the League in goals scored.² On February 4, 2010, Kovalchuk was traded to the

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¹ Joe Lapointe, *Islanders Create Stir with Trade for Yashin*, N.Y. TIMES, June 24, 2001, at 8.1, available at <http://www.nytimes.com/2001/06/24/sports/hockey-islanders-create-stir-with-trade-for-yashin.html>. The National Hockey League draft is held every year after the season ends. Each club’s draft slot is determined based on its record the previous season, with the last place club drafting first and the first place club drafting last. The first overall pick is often the best player taken in the draft. Previous first overall picks include all-stars Sidney Crosby and Alexander Ovechkin. *The Crosby-Ovechkin Rivalry*, SPORTS ILLUSTRATED VAULT, <http://sportsillustrated.cnn.com/vault/gallery/featured/GAL1150721/1/index.htm> (last visited July 2, 2011).

² *Kovalchuk Traded to Devils*, NHL.COM NETWORK (Feb. 4, 2010, 9:07 PM),

New Jersey Devils,³ and at the conclusion of the season, on July 1, 2010, Kovalchuk became an unrestricted free agent,⁴ allowing him to sign a new contract with any club.

Kovalchuk was described by hockey journalists as being “the most unique free agent ever. . . [and] has a chance to become one of the greatest scorers in [League] history.”⁵ Although many clubs attempted to sign Kovalchuk,⁶ he chose to re-sign with the New Jersey Devils.⁷ The contract between Kovalchuk and the Devils was the longest contract in League history, valued at \$102 million over seventeen years.⁸ The deal was short lived, however, as the League rejected the contract on July 21, 2010.⁹ The League claimed that the contract was a circumvention of the salary cap, as neither the Devils nor Kovalchuk intended for Kovalchuk to play out the term of his contract.¹⁰ As a result, the National Hockey League Players’ Association filed a grievance on Kovalchuk’s behalf on July 26, 2010, protesting the League’s rejection of the contract, which was heard before arbitrator Richard Bloch in August 2010.¹¹ The arbitrator ruled for the League, finding that the contract violated the League’s Collective Bargaining Agreement (“CBA”).¹²

<http://devils.nhl.com/club/news.htm?id=516303>.

³ *Devils Get Kovalchuk!*, HOCKEY INDEPENDENT (Feb. 4, 2010), <http://hockeyindependent.com/blog/devs0304/11003/>.

⁴ See, Dan Rosen, *Kovalchuk Headlines Left-Wing Free Agents*, NHL.COM NETWORK (June 29, 2010, 1:18 PM), <http://flames.nhl.com/club/news.htm?id=533155>. An unrestricted free agent is a player that is “completely free to negotiate and sign a standard player contract with any Club, and any Club shall be completely free to negotiate and sign a [contract] with such Player, without penalty or restriction, or being subject to any Right of First Refusal, Draft Choice Compensation or equalization obligation of any kind.” Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association, § 10.1(a)(i) (2005), <http://www.nhlpa.com/CBA/2005CBA.asp> [hereinafter 2005 NHL CBA]. To become an unrestricted free agent for the 2010–11 season, a player’s most recent contract must have expired and the player must have played seven seasons or be twenty-seven or older as of June 30, 2010.

⁵ *Id.*
⁵ Elliott Friedman, *Kovalchuk Biggest Free-Agent Name, Plus 30 Thoughts*, CBC SPORTS (June 30, 2010, 5:43 PM), <http://www.cbc.ca/sports/blogs/elliottfriedman/2010/06/kovalchuk-biggest-free-agent-name-plus-30-thoughts.html>.

⁶ The Los Angeles Kings, New York Islanders, St. Louis Blues, Vancouver Canucks, Toronto Maple Leafs, and SKA St. Petersburg of Russia’s Kontinental Hockey League all expressed interest in Kovalchuk. James O’Brien, *Top 5 Most Likely NHL Destinations for Ilya Kovalchuk (Plus the KHL)*, NBC SPORTS (June 30, 2010, 4:00 PM), <http://prohockeytalk.nbcsports.com/2010/06/30/top-5-most-likely-nhl-destinations-for-ilya-kovalchuk-plus-the-khl/>.

⁷ Mark Everson, *Kovalchuk Signs with Devils; \$102M over 17 Years*, N.Y. POST (July 20, 2010, 2:11 AM), http://www.nypost.com/p/sports/devils/one_devil_of_deal_GRBXUv2ODeSwnh136CoCEN.

⁸ Dave Caldwell, *Devils’ Deal With Kovalchuk Is Rejected by the N.H.L.*, N.Y. TIMES, July 20, 2010, at B18, available at <http://www.nytimes.com/2010/07/21/sports/hockey/21devils.html>.

⁹ *Id.*

¹⁰ *NHL Rejects Kovalchuk Contract for Salary Cap Circumvention*, TSN (July 21, 2010, 1:20 PM), <http://tsn.ca/nhl/story/?id=328025>. All contracts must be filed with the Central Registry and approved by the League. 2005 NHL CBA, *supra* note 4, § 11.3.

¹¹ Ilya Kovalchuk, (2010) (Bloch, Arb.) at 3 [hereinafter Kovalchuk] (on file with the author).

¹² *Id.* at 20. A collective bargaining agreement is “a contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.” BLACK’S LAW DICTIONARY 299 (9th ed. 2009). In professional sports leagues, CBAs are signed between the

This Note argues that although Bloch acted within the scope of his authority granted by the CBA, the standard for determining which contracts are circumventions of the CBA is overly broad and highly subjective. This allows the League to selectively enforce which contracts to define as a circumvention of the CBA, which may lead to inequitable enforcement. Further, this Note proposes that by switching the current National Hockey League salary cap format to a similar system adopted by the National Basketball Association, a bright-line rule for determining which contracts circumvent the CBA would be created, thereby preventing the League from making arbitrary and abusive decisions in the future.

Part I of this Note discusses the complexities of salary cap systems in general, with special attention devoted to the National Hockey League's salary cap system, as dictated by the 2005 CBA, signed between the League and the Players' Association. Part II discusses the loophole in the CBA exploited by certain clubs, including the Devils in signing Kovalchuk to a standard player contract.¹³ Part III details the arbitration decision concerning Kovalchuk and argues that the standard provided for determining a circumvention of the CBA is too flexible, allowing the League to selectively enforce the provisions in the CBA. This section also discusses previous arbitration decisions in which the arbitrators advocated for fixed standards in defining what constitutes a circumvention, and then details the recent amendments made to the 2005 CBA in light of the rejected Kovalchuk contract. Part IV suggests possible solutions to create a more rigid standard for determining when a contract circumvents the CBA in order to eliminate the League's selective enforcement.

I. BACKGROUND

A. Salary Caps and the 2005 Collective Bargaining Agreement

Leading up to the 2004–05 season,¹⁴ with the National Hockey League's CBA expiring on September 15, 2004, many feared a lockout was likely.¹⁵ The League insisted on cutting costs, a move that

leagues and the players' unions.

¹³ Standard player contract "means the standard form contract . . . which will be the sole form of employment contract used for all Player signings . . ." 2005 NHL CBA, *supra* note 4, art. 1.

¹⁴ League seasons span two calendar years, beginning in the fall and culminating in the spring of the next.

¹⁵ A lockout is "[a]n employer's withholding of work and closing of a business because of a labor dispute." BLACK'S LAW DICTIONARY 1024 (9th ed. 2009). This differs from a strike, which is "[a]n organized cessation or slowdown of work by employees to compel the employer to meet the employees' demands." *Id.* at 1558. There was good reason for the fear as only ten years earlier, during the 1994–95 season, the League lost 468 games during a 103-day long lockout. Paul Staudohar, *The Hockey Lockout of 2004–05*, MONTHLY LAB. REV., Dec. 2005, at 23, available at <http://www.bls.gov/opub/mlr/2005/12/art3full.pdf>.

jeopardized the players' future earning abilities.¹⁶ Gary Bettman, commissioner of the League contended that the League lost \$1.8 billion between the 1994–95 season and the 2003–04 season,¹⁷ including losses of \$273 million in 2002–03 with nineteen of thirty clubs losing money.¹⁸ The League and its owners wanted a system with salaries tied to revenues;¹⁹ the Players' Association sought to maintain the current free-market system, which caused average individual player salaries to rise from \$558 thousand in the 1993–94 season to \$1.79 million in the 2002–03 season.²⁰ The League and the Players' Association failed to reach an agreement and on February 16, 2005, the League announced the season would be canceled.²¹

Five months later, on July 13, 2005, the League and the Players' Association agreed to a new six-year CBA, which provided that the Players' Association could extend the CBA for a seventh year or elect to re-open negotiations after the fourth year.²² The highlight of the new CBA was a club salary cap, which limits the amount that each club may spend in a given year on players' salaries.²³ The goal of a salary cap is twofold. First, a salary cap provides cost certainty for owners, as player costs must fall below a predetermined level.²⁴ Second, it promotes parity within the league by limiting the amount each club may spend on

¹⁶ The easiest way to cut costs from management's point of view was through the implementation of a salary cap. See Staudohar, *supra* note 15, at 26.

¹⁷ Stefan Fatsis, *Hockey League Locks Out Players*, WALL ST. J., Sept. 16, 2004, at D8, available at <http://online.wsj.com/article/SB109527402265118729.html>.

¹⁸ ARTHUR LEVITT, JR., INDEPENDENT REVIEW OF THE COMBINED FINANCIAL RESULTS OF THE NATIONAL HOCKEY LEAGUE 2002–2003 SEASON 22 (2004). *Forbes*, in a separate analysis, found that the League lost \$123 million, a far cry from what was reported by Levitt. Michael K. Ozanian, *Ice Capades*, FORBES, Nov. 29, 2004, at 124, available at <http://www.forbes.com/forbes/2004/1129/124.html>. Bob Goodenow, Executive Director of the Players' Association at the time, commented on the report for which Levitt was paid \$250 thousand by the League: "[t]he Levitt report is simply another league public-relations initiative. To suggest the report is in any way independent is misleading." Joe Lapointe, *It Doesn't Make Money or Sense, N.H.L. Is Told*, N.Y. TIMES, Feb. 13, 2004, at D4, available at <http://www.nytimes.com/2004/02/13/sports/hockey-it-doesn-t-make-money-or-sense-nhl-is-told.html>.

¹⁹ Staudohar, *supra* note 15, at 25–26. The National Hockey League spent seventy-six percent of total revenues on player costs, compared with sixty-four percent by the National Football League, sixty-three percent by Major League Baseball, and fifty-eight percent by the National Basketball Association. *Salary Cap*, CBC SPORTS, <http://www.cbc.ca/sports/indepth/cba/issues/salarycap.html> (last visited Aug. 25, 2011).

²⁰ Stefan Fatsis, *NHL Says Players' Salaries Put League in Financial Peril; Facing \$300 Million in Losses, Team Owners Call for Pay Caps; Union Disputes Dire Portrayal*, WALL ST. J., Sept. 19, 2003, at B1.

²¹ Staudohar, *supra* note 15, at 26.

²² *Id.* at 27. See also 2005 NHL CBA, *supra* note 4, § 3.1(b). The Players' Association exercised their right to extend the CBA by a year in June 2010. *NHL Players' Association Extends CBA Until 2012*, YAHOO! SPORTS (June 22, 2010), <http://sports.yahoo.com/nhl/news?slug=txunionmeetings>.

²³ See Staudohar, *supra* note 15, at 27.

²⁴ See, e.g., Steve Simmons, *Cap Stifling NHL's Brightest Stars?*, CALGARY SUN (Oct. 13, 2010, 4:38 PM), <http://www.calgarysun.com/sports/hockey/2010/10/13/15680586.html>. One of the additions to the new CBA limits players' cap hits to twenty percent of the upper limit. See *infra* note 49 (discussing the 2005 CBA's twenty percent rule).

player salaries.²⁵ Because the amount that each club may spend on salaries is capped, competition is promoted, as large market clubs cannot take advantage of their larger revenue streams through outspending their opponents on players' salaries.²⁶

In the major North American sports leagues there are two types of salary caps: soft caps and hard caps.²⁷ A soft cap, such as the one implemented by the National Basketball Association, sets the limit on what a club may spend, with a few exceptions, which permit a club to spend in excess of the cap.²⁸ In addition, at a certain predetermined level above the cap, a club is required to pay a luxury tax of one dollar for each dollar spent above the predetermined level.²⁹ This means that upon reaching the predetermined tax level, the cost of signing additional players doubles.³⁰

The second type of salary cap is a hard cap, which is what the National Hockey League instituted in 2005. This system generally does not allow clubs to spend in excess of the cap ceiling, referred to as the upper limit.³¹ The League and the Players' Association agreed to fix the upper limit at \$39 million for the 2005–06 season.³² The League's hard cap also features a lower limit, or salary floor, which sets the minimum allowable salaries clubs must expend. The lower limit for 2005–06 was set at \$21.5 million.³³

In the National Hockey League's salary cap, both the lower and upper limits of the club payroll are subject to annual adjustments,³⁴ determined by establishing the "adjusted midpoint" with the following formula.³⁵ Hockey related revenues³⁶ are multiplied by a percentage

²⁵ See *Larry Coon's NBA Salary Cap FAQ*, <http://members.cox.net/lmcoon/salarycap.htm> (last visited Aug. 28, 2011) ("The basic idea is that a team can only sign a free agent if the total payroll for the team will not exceed the salary cap. So a team with deep pockets is playing on a level playing field with every other team.")

²⁶ *NBA Owner Praises NHL's Hard Salary Cap*, YAHOO! SPORTS (Sept. 29, 2010), <http://sports.yahoo.com/nba/news?slug=txnbaborwizards>.

²⁷ See Paul Staudohar, *Salary Caps in Professional Team Sports*, COMPENSATION & WORKING CONDITIONS, Spring 1998, at 3, 3, available at <http://www.bls.gov/opub/cwc/archive/spring1998art1.pdf>.

²⁸ Among the exceptions are the "Larry Bird Exception," the "Mid-Level Salary Exception," and the "Rookie Exception." See *supra* note 25. The Larry Bird Exception "enables teams to exceed the salary cap to re-sign their own free agents, up to the player's maximum salary." *Id.* The Mid-Level Exception allows teams to sign any free agent up to the league average salary. *Id.* The Rookie Exception "allows teams to sign their first round draft picks to rookie scale contracts even if they will be over the cap as a result." *Id.*

²⁹ *Id.*

³⁰ The tax revenue goes to the National Basketball Association, which then uses the money for "league purposes." *Id.*

³¹ The CBA actually provides two exceptions, whereby a club may spend over the upper limit. See *infra* note 48 (discussing the two exceptions under the CBA).

³² 2005 NHL CBA, *supra* note 4, § 50.5(b)(ii).

³³ *Id.*

³⁴ See *id.* art. 50.

³⁵ The formula employed by the National Hockey League to calculate its salary cap is almost identical to the formulas used by the National Football League and the National Basketball Association to calculate their respective salary caps. See, e.g., Al Lackner, *Salary Cap FAQ*, ASK THE COMMISH, <http://www.askthecommiss.com/salarycap/faq.asp> (last updated January 19,

that varies based upon the total League revenue.³⁷ Preliminary benefits³⁸ are then deducted from this figure.³⁹ This figure is divided by the number of clubs in the League⁴⁰ and is then increased by five percent.⁴¹ Using this adjusted midpoint, the payroll range is calculated by subtracting \$8 million to determine the lower limit and adding \$8 million to determine the upper limit.⁴²

In other professional sports leagues, such as the National Basketball Association and the National Football Association, the salary cap limits the total amount a club may spend in that year.⁴³ The National Hockey League's salary cap works differently. The salary cap measures averaged club salary,⁴⁴ which is the sum of a club's players'

2009). See also *Larry Coon's NBA Salary Cap FAQ*, *supra* note 25.

³⁶ Hockey related revenues are defined as revenue derived or earned from, relating to or arising directly or indirectly out of the playing of NHL hockey games or NHL-related events in which current NHL Players participate or in which current NHL Players' names and likenesses are used, by each such Club or the League, or attributable directly to the Club or the League from a Club Affiliated Entity or League Affiliated Entity.

2005 NHL CBA, *supra* note 4, § 50.1(a). Hockey related revenues are comprised of, among other things, gate receipts, television and radio broadcast deals, concessions, and arena sponsorships. *Id.* § 50.1(a)(i).

³⁷ *Id.* § 50.4(b)(i). The applicable percentage for 2005–06 was fixed at fifty-four percent. *Id.* § 50.4(b)(i)(A). For all subsequent years the applicable percentage is fifty-four percent when League revenues are below \$2.2 billion, fifty-five percent when League revenues are between \$2.2 billion and \$2.4 billion, fifty-six percent when League revenues are between \$2.4 billion and \$2.7 billion, and fifty-seven when League revenues are above \$2.7 billion. *Id.* § 50.4(b)(i)(B)–(E).

³⁸ “Preliminary Benefits shall mean the entire maximum aggregate amount of Benefits projected to be paid to all Players League-wide for such League Year.” *Id.* § 50.3(b). “Benefits” includes, among other things, pension funding, insurance (life, medical, dental and disability), and bonuses paid by the League to the members of the clubs that reach certain rounds in the playoffs. *Id.* § 50.3(a)(i)(A).

³⁹ *Id.* § 50.5(b)(i).

⁴⁰ *Id.* Currently there are thirty clubs in the League. See List of NHL Clubs, NHL NETWORK, <http://www.nhl.com/ice/teams.htm> (last visited Aug. 24, 2011).

⁴¹ 2005 NHL CBA, *supra* note 4, § 50.5(b)(i). This upward adjustment is fixed at five percent until the League's hockey related revenues reach \$2.1 billion. At that point either the League or the Players' Association may propose a different upward adjustment factor, which needs to be agreed upon by the other party.

⁴² *Id.* This leads to a \$16 million range between the lower and upper limits. Using this formula, the 2006–07 lower limit was \$28 million and the upper limit was \$44 million. The 2007–08 lower limit was \$34.3 million and the upper limit was \$50.3 million. The 2008–09 lower limit was \$40.7 million and the upper limit was \$56.7 million and the 2009–10 lower limit was \$40.8 million and the upper limit was \$56.8 million. Jamie Fitzpatrick, *The NHL Salary Cap Explained*, ABOUT.COM, http://procehockey.about.com/od/learnthegame/a/nhl_salary_cap.htm (last visited Aug. 26, 2011).

⁴³ The NBA salary cap measures the total amount spent in that year although clubs may spend above the cap under certain exceptions and pay a dollar-for-dollar tax at a certain level. See *supra* notes 28–29 and accompanying text. In the NFL, the total amount of salaries and bonuses a club pays to its players in a given year is subject to the League's cap. Lackner, *supra* note 35. However, the 2010–11 National Football League season did not feature a salary cap, as the owners opted out of the final year of their collective bargaining agreement. John Clayton, *NFL Owners Vote Unanimously to Opt out of Labor Deal*, ESPN (May 20, 2008, 10:10 PM), <http://sports.espn.go.com/nfl/news/story?id=3404596>.

⁴⁴ “Averaged Club Salary shall mean the entire aggregate amount committed by each Club in a League Year, calculated daily, as Player Salaries and Bonuses in that League Year . . . with Player Salaries and Bonuses calculated in accordance with the Averaged Amount.” 2005 NHL CBA, *supra* note 4, § 50.5(d)(i).

averaged amounts (“cap hits”). In order to calculate each player’s cap hit, the total value of the contract (salary and bonuses) is divided by the number of years of the contract.⁴⁵ This means that the cap hit for a specific player will not necessarily be the salary the player is paid in that year, but rather the average yearly salary throughout the life of the contract.⁴⁶ Once the regular season begins, no club is permitted to have an averaged club salary below the lower limit⁴⁷ or above the upper limit.⁴⁸

The CBA also imposes several other constraints on individual player contracts. No single contract may contain a salary and bonus that exceeds twenty percent of the upper limit in any given year.⁴⁹ The CBA also implemented the “100 percent rule” for multi-year contracts, which has three provisions.⁵⁰ The first is that the difference between the total compensation of the first two years may not exceed the lesser salary of those two years.⁵¹ The second provision is that the year-to-year salary increase after year two may not exceed the lesser salary amount of the first two years.⁵² The last provision is that the year-to-year salary decrease after year two may not exceed fifty percent of the lesser salary amount of the first two years.⁵³ In addition, there are further technical restrictions set forth in section 50.8 of the CBA.⁵⁴

⁴⁵ *Id.* § 50.5(d)(ii).

⁴⁶ For example, if a player signs a two-year contract that pays him \$1 million in year one and \$2 million in year two, his annual cap hit would be \$1.5 million.

⁴⁷ 2005 NHL CBA, *supra* note 4, § 50.5(c)(i).

⁴⁸ *Id.* § 50.5(c)(ii). The two exceptions where the averaged club payroll may exceed the upper limit are the bona-fide long-term injury/illness exception set forth in § 50.10(d) and the performance bonus cushion set forth in § 50.5(h). The League will not register a contract that will put a club’s averaged amount over the upper limit. *Id.* § 11.6(a)(i).

⁴⁹ Even if the League’s salary ceiling rises, the player is capped at twenty percent of whatever the ceiling was in the year the contract was signed. This clause is known as the “twenty percent rule.” *Id.* § 50.6(a). For example, a player who signed a contract in a year when the upper limit was \$50 million may not earn more than \$10 million annually over the life of the contract.

⁵⁰ *Id.* § 50.7.

⁵¹ For example, if the salary in year one was \$1 million, the salary in year two could not exceed \$2 million because then the difference would be greater than \$1 million, which would be more than the lesser salary of the two years, in this case year one’s salary of \$1 million.

⁵² For example, if the salary in year one was \$2 million and the salary in year two was \$3 million, for the remaining years of the contract, the year-to-year increase can never be more than \$2 million, which is the lesser salary of the first two years. This would cap year three’s salary at \$5 million.

⁵³ For example, if the salary in year one was \$3 million and the salary in year two was \$2 million, the contract may not decrease annually by more than \$1 million, which would be fifty percent of the lesser salary amount of the first two years, year two’s \$2 million salary. This means the minimum salary in year three would be \$1 million.

⁵⁴ 2005 NHL CBA, *supra* note 4, § 50.8. This section restricts option years, voidable years, salary revisions, salary reimbursements, cash transactions in connection with the assignment of player contracts, club bonus plans, contract renegotiations, contract extensions (outside of what is allowable under § 50.5(f)), and salary advances. The CBA also caps the amount a Group I player, defined as a player during his first contract, may earn in bonuses at ten percent of that year’s total compensation. *Id.* §§ 9.1(b), 9.3(b).

II. THE LOOPHOLE

A. Clubs Begin to Exploit

Beginning in the summer of 2007, clubs started to recognize the value in front loading player contracts.⁵⁵ Instead of offering uniform payments over the life of the contract, clubs that generated larger revenues, and therefore had more money on hand than clubs that generated less revenue, could offer contracts that paid substantially more money earlier in the contract to entice players to sign.⁵⁶ There was logic behind this strategy as well; players that sign these types of contracts while they are in their prime are worth more at that point than they will be a few years down the line. Therefore, since they will be contributing less to the club a few years later, it makes sense to compensate them according to their production, paying them more money in the earlier years of the contract and less in the later years.⁵⁷ There was also an added benefit to clubs; by adding extra years on to the contract at a lower salary that still complied with the CBA, clubs were able to lower the players' cap hits, freeing up cap space to sign other players.⁵⁸

On July 1, 2007, the Philadelphia Flyers were able to lure Daniel Brière away from the Buffalo Sabres by offering him an eight-year contract worth \$52 million.⁵⁹ This contract paid out half of its value in the first three seasons and over ninety percent in the first six seasons.⁶⁰ In 2008, Vincent Lecavalier signed an eleven-year deal with the Tampa

⁵⁵ A front-loaded contract is one that pays substantially higher salaries in the early years of the contract than in the later years of the contract. For a discussion on the genesis of front-loaded contracts in the National Hockey League's salary cap era, see, for example, Ryan Porth, *Are Front Loaded Long Term Deals Hurting the Game?*, FROM THE POINT (July 20, 2010), <http://fromthepoint.com/nhl/are-front-loaded-long-term-deals-hurting-the-game>.

⁵⁶ This is the fundamental principle of the time value of money; "money in the future is worth less than the same amount of money today." HOWELL E. JACKSON, ACCOUNTING AND FINANCE 95 (2004).

⁵⁷ The argument made is that since these heavily front-loaded contracts are only given to superstars, as they age and their production declines, the performance of their club declines as well. As the club's performance declines, there is generally less demand for tickets, which means less revenue for the club, and therefore, the clubs have less money on hand to pay their superstar. See Matthew Coller, *Kovalchuk Contract Defies Logic, Not CBA*, THE BIZ OF HOCKEY (July 20, 2010, 5:24 AM), http://bizofhockey.com/index.php?option=com_content&view=article&id=375:kovalchuk-contract-defies-logic-not-cba&catid=46:articles-and-opinions&Itemid=64.

⁵⁸ For example, a club seeks to sign a player to a four-year contract that would pay him \$6 million annually. This would lead to an annual cap hit of \$6 million. If instead, the club tacked on a fifth and sixth year at a salary of \$3 million and \$1 million, respectively, the club would lower the player's cap hit to \$4.67 million. The club would then have an additional \$1.33 million to spend on other players.

⁵⁹ See, e.g., *Brière Signs 8-Year, \$52 Million Deal with Flyers*, CONCORD MONITOR (July 2, 2007), <http://www.concordmonitor.com/article/briere-signs-8-year-52-million-deal-with-flyers>.

⁶⁰ The contract was structured to pay him \$10 million in 2007–08, \$8 million annually in 2008–09 and 2009–10, \$7 million annually for the next three seasons, and \$3 million and \$2 million, respectively, in the final two seasons. Those final two seasons lessen the cap hit by \$2 million, from \$7.833 million to \$5.833 million. See Daniel Brière Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=749> (last visited Aug. 24, 2011).

Bay Lightning worth \$85 million,⁶¹ ninety-two percent of which was paid out over the first eight seasons.⁶²

These deals soon became more prevalent and more unabashedly front loaded. In 2009, Henrik Zetterberg, Chris Pronger, Marc Savard, Roberto Luongo, and Marián Hossa all signed contracts that were heavily front loaded.⁶³ Although the Pronger, Luongo, and Hossa contracts were investigated by the League for potentially circumventing the CBA,⁶⁴ they were eventually registered.⁶⁵

B. *The Final Straw*

On July 19, 2010, Ilya Kovalchuk and the Devils agreed to a contract that would pay Kovalchuk \$102 million over seventeen years.⁶⁶ Under the deal, the Devils would pay Kovalchuk \$6 million annually for the 2010–11 and 2011–12 seasons, \$11.5 million annually for the next five seasons, \$10.5 million in the 2017–18 season, \$8.5 million in the 2018–19 season, \$6.5 million in the 2019–20 season, \$3.5 million in the 2020–21 season, \$750 thousand in the 2021–22 season, and \$550 thousand annually for the remaining five seasons.⁶⁷ It also contained a no-move clause⁶⁸ until June 30, 2017, followed by a no-trade clause⁶⁹

⁶¹ *Lecavalier Signs 11-Year Contract Extension with Lightning*, ESPN (July 13, 2008, 5:26 PM), <http://sports.espn.go.com/nhl/news/story?id=3485453>.

⁶² The contract was structured to pay him \$10 million annually from 2009–10 through 2015–16, \$8.5 million in 2016–17, \$4 million in 2017–18 and \$1.5 million and \$1 million, respectively, in the final two seasons. See Vincent Lecavalier Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=884> (last visited Aug. 24, 2011).

⁶³ The Hossa and Luongo contracts are each twelve years long and pay over ninety percent of their value over the first eight seasons. See Marián Hossa Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=291> (last visited Aug. 24, 2011); see also Roberto Luongo Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=683> (last visited Aug. 24, 2011). The Savard and Pronger contracts are each seven years long and pay over ninety-six percent of their value over the first five seasons. See Marc Savard Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=212> (last visited Aug. 24, 2011); see also Chris Pronger Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=316> (last visited Aug. 24, 2011). Henrik Zetterberg's contract with the Detroit Red Wings has an average salary of approximately \$7.5 million over the first nine seasons and then drops to \$3.35 million for the 2018–19 season, and \$1 million annually for the two remaining seasons. These final three seasons have the effect of lessening the annual cap hit from \$7.52 million to \$6.083 million. See Henrik Zetterberg Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=281> (last visited Aug. 24, 2011).

⁶⁴ The three contracts were alleged to circumvent the CBA's salary cap provision by providing the offending clubs with additional salary cap relief in the form of a lower cap hit. Furthermore, should the players retire at any point prior to the culmination of the contract, there will be no cap hit in years subsequent to their retirement. See Ken Campbell, *Phaneuf Head Shot Needs to Be Penalized*, THE HOCKEY NEWS (Sept. 18, 2009, 1:07 PM), <http://www.thehockeynews.com/articles/27954-THNcom-Blog-Phaneuf-head-shot-needs-to-be-penalized.html>.

⁶⁵ See Ken Campbell, *Luongo Contract the Latest to Circumvent Salary Cap*, THE HOCKEY NEWS (Sept. 2, 2009, 2:02 PM), <http://www.thehockeynews.com/articles/27726-THNcom-Blog-Luongo-contract-the-latest-to-circumvent-salary-cap.html>.

⁶⁶ Dave Caldwell, *Devils Keep Kovalchuk, but Deal Will Cost Them Some Veterans*, N.Y. TIMES, July 20, 2010, at B14, available at <http://www.nytimes.com/2010/07/20/sports/hockey/20devils.html>.

⁶⁷ Kovalchuk, *supra* note 11, at 2.

⁶⁸ 2005 NHL CBA, *supra* note 4, § 11.8(b) (“A no-move clause may prevent the involuntary relocation of a Player, whether by Trade, Loan, or Waiver claim.”).

that extended to the end of the contract.⁷⁰

Pursuant to its authority,⁷¹ on July 20, 2010, the League rejected the Kovalchuk contract.⁷² In a letter to the Devils, the League argued that by leaving just \$3.5 million over the final six seasons, representing under 3.5% of the total value of the contract, those final six seasons were never intended to be played and were merely inserted to lower the averaged club salary from \$8.95 million⁷³ to \$6 million. Further, the transition from a no-move clause to a no-trade clause would allow the Devils to demote Kovalchuk to its minor league affiliate, in which case the League argued Kovalchuk would retire.⁷⁴ By demoting Kovalchuk to its minor league affiliate, the Devils would remove his cap hit from their payroll entirely, freeing up an additional \$6 million to spend on other players.⁷⁵ As a result of the League's rejection of the contract, the National Hockey League Players' Association filed a grievance on Kovalchuk's behalf on July 26, 2010, which was heard before arbitrator Richard Bloch in August 2010.⁷⁶

III. THE ARBITRATION HEARINGS

A. *The Kovalchuk Decision*

The rejected contract between Kovalchuk and the Devils contained five prominent features that the Players' Association argued did not violate the CBA. The first was the term of the contract, which was the longest in the history of the League.⁷⁷ While the League had earlier attempted to negotiate a term limit on contracts in the CBA, it was unsuccessful.⁷⁸ The second prominent feature was the total value of the contract, although this was not the richest contract in League history and there is no restriction in the CBA on total contract value.⁷⁹ The

⁶⁹ While not explicitly defined in the CBA, a no-trade clause is a restriction on trading a player without the player's consent. This differs from a no-move clause in that it still allows clubs to demote players to their minor league affiliates.

⁷⁰ Kovalchuk, *supra* note 11, at 2.

⁷¹ All contracts must be registered by the League to become valid and no player is allowed to play without a League registered contract. 2005 NHL CBA, *supra* note 4, § 11.3.

⁷² Kovalchuk, *supra* note 11, at 2.

⁷³ This reflects \$98.5 million over eleven seasons, with the assumption being that Kovalchuk would not play the final six seasons of the contract, in which he would be paid less than \$1 million, as he would choose to retire, rather than continue to play at a comparatively low salary. See *infra* note 74 and accompanying text.

⁷⁴ Kovalchuk, *supra* note 11, at 4–5.

⁷⁵ However, the Devils would still be required to pay Kovalchuk while he plays for its minor league affiliate. The League argued that upon being demoted to the Devils' minor league affiliate, Kovalchuk's comparatively low six-figure salary would not be enough of an incentive for him to continue playing professional hockey and he would retire. Should Kovalchuk retire, the Devils would not be obligated to pay the remaining value on the contract. See *id.* at 4–5.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 17 n.18.

⁷⁹ See Kyle Palantzas, *Top 10: Biggest NHL Contracts*, THE HOCKEY NEWS (July 21, 2010, 4:10 PM), <http://www.thehockeynews.com/articles/34567-THNcom-Top-10-Biggest-NHL-contracts.html>. In 2008, fellow countryman, Alexander Ovechkin signed a thirteen-year, \$124

third feature was the division of the annual payments. The CBA provides a number of restrictions on annual compensation including the “twenty percent rule,”⁸⁰ the “100 percent rule”⁸¹ and the requirement to keep the club payroll below the upper limit.⁸² The annual payments in Kovalchuk’s contract complied with all the CBA provisions. The fourth prominent feature of the contract was the backdive, which is a dramatic decrease in salary from the earlier years to the later years. Again, the “100 percent rule” dictates the amount by which the annual payments can vary year-to-year, and the terms of the Kovalchuk contract complied with the CBA. Last was Kovalchuk’s age; Bloch stated, “the agreement contemplates [Kovalchuk] playing until just short of his forty-fourth birthday.”⁸³ Although Bloch argued that it is “markedly rare”⁸⁴ for a player to play to that age, it is not impossible that Kovalchuk would play through the term of the contract.⁸⁵

Further, the Players’ Association pointed to the preamble of Article 26, which provides that the Article 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.”⁸⁶ Further, the CBA states “[a]ny act, conduct, or activity that is permitted by this Agreement shall not be a Circumvention.”⁸⁷

Arbitrator Bloch ruled that the Players’ Association’s interpretation of the CBA was too narrow.⁸⁸ Article 26 of the current CBA is much more comprehensive than Article 26 of the previous CBA, which contained only two sections and was described by Bloch as

million contract with the Washington Capitals. See *Ovechkin, Capitals Signs 13-Year, \$124 Million Contract Extension*, ESPN (Jan. 13, 2008, 5:30 PM), <http://sports.espn.go.com/nhl/news/story?id=3190712>.

⁸⁰ See *supra* note 49.

⁸¹ See *supra* notes 50–53 and accompanying text.

⁸² See *supra* note 48.

⁸³ Kovalchuk, *supra* note 11, at 17. Kovalchuk was actually born on April 15, 1983 and therefore will be forty-four at the culmination of the contract in spring 2027, strengthening Bloch’s point. See Ilya Kovalchuk Profile, NHLPA, <http://nhlpa.com/Players/11361/Ilya-Kovalchuk> (last visited Aug. 24, 2011).

⁸⁴ See Kovalchuk, *supra* note 11, at 17.

⁸⁵ Bloch cited the statistic that “[c]urrently, only one player in the League has played past 43 and, over the past 20 years only 6 of some 3400 players have played to 42.” *Id.* While the information Bloch cited is accurate, it is portrayed in a misleading manner. First, he cited the past twenty years as the period. However, the six players alluded to that played over the past twenty years actually retired within the past six seasons implying that perhaps the current trend is players are staying in the League longer. Furthermore, if Bloch were to include players that had played until forty-one, another four players would be added to the tally, all of whom retired over the past six seasons. Last, if Bloch extended the group to include players who played until the age of forty, there would be another sixteen players added to the list, with all but two of the players retiring in the past nine seasons. NHL Players Forty and Older, HOCKEY-REFERENCE.COM, <http://hkref.com/tiny/UfD9k> (last visited Aug. 24, 2011). This is not to say that Bloch lied; it merely shows that data may be manipulated to support almost any position and should be evaluated with a careful eye.

⁸⁶ 2005 NHL CBA, *supra* note 4, art. 26; see also Kovalchuk, *supra* note 11, at 7.

⁸⁷ 2005 NHL CBA, *supra* note 4, § 26.3(i).

⁸⁸ See Kovalchuk, *supra* note 11, at 12.

“relatively brief, even cryptic.”⁸⁹ Article 26 of the current CBA includes sixteen sections and the following language:

No Club or Club Actor, directly or indirectly, may: (i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind, whether express, implied, oral or written, including without limitation, any [contract], Qualifying Offer, Offer Sheet, or other transaction, or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intension [sic] of the parties as reflected by the provisions of this agreement, including without limitation, provisions with respect to the financial and other reporting obligations of the Clubs and the League, Team Payroll Range, Player Compensation Cost Redistribution System, the Entry Level System and/or Free Agency.⁹⁰

This language, Bloch ruled, is “comprehensive, explicitly prohibiting ‘*understandings of any kind.*’”⁹¹ This reading of the CBA prohibits a contract in which the individual terms are in compliance with the CBA, but when the contract is taken as whole, it is apparent that it has the effect of circumventing the CBA, whether intentionally or not.⁹² Because this contract, taken as a whole, will “artificially extend the term of [the] agreement, thereby decreasing the annual salary cap figure and increasing the Club’s payroll room in a manner that serves to defeat the intentions of the parties as manifested in the Team Payroll Range provisions,”⁹³ Bloch held the League met its burden in demonstrating that its rejection of the contract was warranted, pursuant to the CBA.⁹⁴

“This is a case of contract interpretation. The Arbitrator’s charge, in such instances, is not to somehow construct his own notions of

⁸⁹ *Id.* at 13.

⁹⁰ 2005 NHL CBA, *supra* note 4, § 26.3.

⁹¹ Kovalchuk, *supra* note 11, at 15. Although not explicitly stated by Bloch in his decision, his italicization implies that he viewed the contract between Kovalchuk and the Devils as a ploy to get each party what they bargained for: Kovalchuk would get an extremely lucrative contract and the Devils would get a superstar at manageable cap hit. However, at the end of the decision, Bloch noted that there was no intent on the part of Kovalchuk or the Devils to circumvent the CBA: “Nothing in this Opinion should be read as suggesting that either the Club or Mr. Kovalchuk operated in bad faith or on the basis of any assumption other than that the [contract] was fully compliant with the CBA.” *Id.* at 19. The League seemingly disagreed with Bloch’s characterization of the deal as done in good faith and fined the Devils \$3 million and made them forfeit two high draft picks. *See, e.g., Devils Penalized over Kovalchuk Deal*, ESPN (Sept. 13, 2010, 9:35 PM), <http://sports.espn.go.com/new-york/nhl/news/story?id=5569258>.

⁹² Kovalchuk, *supra* note 11, at 15.

⁹³ The League argued that adding illusory years to the contract reduces Kovalchuk’s annual cap hit, thereby providing the Devils with more cap room to spend on other players. Kovalchuk, *supra* note 11, at 19.

⁹⁴ *Id.* at 2 (explaining that the contract was rejected “because it is or involves a Circumvention of . . . the Club’s Upper Limit”); 2005 NHL CBA, *supra* note 4, § 11.6(a)(i).

industrial justice or perceived equities, but to read and apply the CBA's bargained terms."⁹⁵ Bloch perfectly summarized his charge as laid out by the League and the Players' Association in the CBA⁹⁶ and acted within the scope of his power. However, because the standard for determining a circumvention of the CBA is so subjective, it allows the League to pick and choose contracts to target as circumventions of the cap in an inequitable manner.⁹⁷

Bloch acknowledged that both the Players' Association and the League agreed that the contract's individual terms complied with the CBA.⁹⁸ However, according to Bloch, mere compliance with the individual provisions of the CBA did not suffice. Bloch read the expanded Article 26 as proof that the League foresaw the need for a more comprehensive evaluation of contracts than the Players' Association argued for in the Kovalchuk case.⁹⁹ The old CBA's anti-circumvention language stated:

No Club or Player shall enter into any Player Contract, Offer Sheet or other agreement that includes any terms which are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement, including without limitation, provisions with respect to Entry Level System or Restricted Free Agency. However, any conduct permitted by this Agreement shall not be considered to be a violation of this provision.

No Player or Club shall induce any Player or Club or cause any Player or Club to be induced to make or enter into an agreement or make an offer which violates the undertaking in section 26.1 above.¹⁰⁰

Because, as Bloch alleged, the League saw the need to have a broader reading of contracts, Article 26 was redrafted in the new CBA. The new Article 26 contains examples of what constitutes circumvention,¹⁰¹ procedures to follow in the event of a suspected

⁹⁵ Kovalchuk, *supra* note 11, at 10.

⁹⁶ See 2005 NHL CBA, *supra* note 4, § 48.5(f).

⁹⁷ The Players' Association argued in the Kovalchuk arbitration hearing that the League was selectively enforcing this provision of the CBA, and pointed to eleven separate contracts that were structured similarly to Kovalchuk's challenged contract. Among the eleven contracts were those of Pronger, Luongo, and Hossa, three of the players whose contracts were egregious enough to warrant investigation by the League, but were ultimately accepted. Kovalchuk, *supra* note 11, at 19 n.23; see also *supra* notes 64–65 and accompanying text.

⁹⁸ Kovalchuk, *supra* note 11, at 11.

⁹⁹ *Id.* at 12.

¹⁰⁰ Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, art. 26 (1995) [hereinafter 1995 NHL CBA] (on file with the author).

¹⁰¹ See 2005 NHL CBA, *supra* note 4, art. 26. Among other things, a club may not provide a player with anything of value, except as provided in his contract, a club may not provide any money to certified agents, and a player may not enter into a sponsorship deal with an entity that does business with his club that pays him in excess of fair market value for his services. *Id.* §§ 26.3(g), 26.6, 26.15(c).

circumvention,¹⁰² and penalties imposed for circumventions of the CBA.¹⁰³

The problem, though, is section 26.3 of the current CBA casts a very wide net, which may be selectively enforced by the League. Bloch was correct; the language is “comprehensive.”¹⁰⁴ Any contract for which an argument could be made that it circumvents the CBA, no matter how weak the argument is, would come under the purview of section 26.3. Because the scope is so great, encompassing “agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind, whether express, implied, oral, or written . . . [that] is intended to or has the effect of defeating or Circumventing the provisions of this Agreement,”¹⁰⁵ the League may read into any contract as it sees fit. This allows the League to pick and choose which contracts to challenge as circumventions under the CBA. As Lou Lamoriello, President and General Manager of the Devils, said, “I think there should be lines where everybody knows exactly what they are. Uncertainties create confusion.”¹⁰⁶

B. *Not A New Problem*¹⁰⁷

On February 18, 1998,¹⁰⁸ the Carolina Hurricanes and Sergei Fedorov agreed to an offer sheet,¹⁰⁹ which provided a \$26 million signing bonus; \$14 million to be paid upon signing and \$12 million to be paid in four equal, annual payments beginning in August 1998.¹¹⁰ However, if the club qualified for the conference finals in the 1997–98 season, the \$12 million payment would be accelerated and paid in full

¹⁰² *Id.* § 26.13(a).

¹⁰³ *Id.* § 26.13(c)(i)–(vii).

¹⁰⁴ Kovalchuk, *supra* note 11, at 15.

¹⁰⁵ 2005 NHL CBA, *supra* note 4, § 26.3.

¹⁰⁶ *Lamoriello Says Kovalchuk Deal Done in Good Faith*, CBC SPORTS (Sept. 4, 2010, 3:47 PM), <http://www.cbc.ca/sports/hockey/story/2010/09/04/sp-devils-good-faith.html#ixzz1GcGJr0bd>.

¹⁰⁷ Flexible standards have previously been criticized by arbitrators due to their subjectivity and potential for abuse. However, the two discussed arbitration decisions occurred before 2005, and are therefore governed by the 1995 NHL CBA, which did not feature the greatly expanded Article 26 of the 2005 NHL CBA.

¹⁰⁸ Although offer sheets are usually signed prior to the start of the season, Sergei Fedorov and the Detroit Red Wings were unable to agree to a new contract during the offseason, and Fedorov held out until February when Carolina sent Fedorov an offer sheet. See David Lee, *February 20, 1998 – An Important Date in Franchise History*, KUKLA’S KORNER (July 22, 2010, 1:36 AM), http://www.kuklaskorner.com/index.php/rbh/comments/february_20_1998_an_important_date_in_franchise_history/.

¹⁰⁹ When a player is a restricted free agent, he may accept contract offers from clubs other than his current club. If the player wishes to accept one of these offers, he must give his current club a completed certificate that outlines the principal terms of the offer. This must contain the salary, as well as any signing or reporting bonuses. Within seven days of receipt, the prior club may exercise its right of first refusal, which has the effect of binding the prior club and the player to a new contract based upon the principal terms of the contract offered by the new club. If the prior club does not give notice within seven days or declines to match the principal terms of the contract offer, the player and the new club are deemed to have entered into a binding contract based on the previously agreed upon terms. 1995 NHL CBA, *supra* note 100, § 10.3(a)–(e).

¹¹⁰ Sergei Fedorov (1998) (Sands, Arb.) at 2 [hereinafter Fedorov] (on file with the author).

on July 1, 1998.¹¹¹ The League alleged that this offer sheet put a greater burden on Fedorov's then-current club, the Detroit Red Wings, because they had a greater "likelihood" of qualifying for the conference finals based upon the two clubs' respective standings at that point in the season.¹¹² Based on this greater "likelihood," the League argued that the acceleration clause's purpose was to "defeat or circumvent the CBA's restricted free agency provision by imposing an improper burden on Detroit's exercise of its right to match."¹¹³ Arbitrator John Sands rejected the League's position noting that the "likelihood" standard that the League advanced is ripe for abuse:¹¹⁴ "I find persuasive . . . Carolina's concern about the potential mischief of the League's 'likelihood' standard. . . . So flexible a standard requires careful monitoring."¹¹⁵

Five years later, in June 2003, arbitrator Joan Parker's task was to determine the permissibility of three contracts signed in the summer of 2001¹¹⁶ that the League alleged were structured to circumvent the January 11, 2000 Agreement between the League and Players' Association, which prohibited guaranteeing salaries in strike or lockout years.¹¹⁷

The League contended that these three contracts, structured as flat salaries in the initial years with signing bonuses approximately equivalent to the lost salary during the expected lockout year of 2004–05, were a blatant circumvention and violation of the January 11, 2000

¹¹¹ *Id.* This clause is referred to as the acceleration clause. *Id.* at 6.

¹¹² The top eight clubs in each conference make the playoffs. The Stanley Cup Playoffs feature four rounds: conference quarterfinals, conference semifinals, conference finals, and the Stanley Cup Finals. As of February 23, 1998, the Detroit Red Wings were tied for second place in the Western Conference with seventy-four points. The Carolina Hurricanes were outside the playoff picture in the Eastern Conference, trailing the eighth place club, the Buffalo Sabres, by seven points with twenty-five of eighty-two games remaining in the regular season. *Id.* at 6. See also Listing of NHL Club Standings During the 1997–98 Season, N.Y. TIMES, Feb. 23, 1998, at C10.

¹¹³ Fedorov, *supra* note 110, at 6.

¹¹⁴ Sands rejected the League's position for a few reasons. First, the \$12 million bonus is a fixed amount. All that changes is when the payment is to be made, which is expressly permitted under the CBA. As well, there was no violation of Article 26, as any provision in the offer sheet between Carolina and Fedorov that would burden Detroit would equally burden Carolina. *Id.* at 9.

¹¹⁵ *Id.* at 11.

¹¹⁶ The decision also features Parker's ruling on the validity of the contract Owen Nolan signed with the San Jose Sharks that summer. However, for the purposes of this Note, Nolan's contract is irrelevant.

¹¹⁷ Joe Sakic, Rob Blake, Pierre Turgeon, and Owen Nolan, (2003) (Parker, Arb.) at 8 [hereinafter Sakic] (on file with the author). At issue was the impending League lockout of 2004–05. The three contracts at issue were those of Rob Blake, Joe Sakic, and Pierre Turgeon. Blake's contract would pay him \$9 million annually for the first three years with no signing bonuses. In 2004–05 through 2006–07, his base salary would drop to \$6 million, but he would receive an annual \$2 million signing bonus in those final three seasons. Sakic's contract would pay him \$9.5 million in each of the first three years with no signing bonuses. In 2004–05 through 2006–07 his base salary would drop to \$6 million, but he would receive an annual \$2.3 million signing bonus in those final three seasons. Turgeon's contract would pay him \$6 million in 2001–02 through 2003–04, \$5 million in 2004–05, and \$6.5 million in 2005–06, as well as a signing bonus of \$1.5 million in 2003–04, \$2 million in 2004–05, and \$1 million in 2005–06. *Id.* at 10.

Agreement.¹¹⁸ The League relied on Article 26 of the CBA, “which prohibits a player and a Club from negotiating [a contract] provision that is designed to circumvent the parties’ intent as reflected in the Collective Bargaining Agreement.”¹¹⁹ The League argued that allowing clubs and players to allocate salaries and bonuses without restriction would render the restriction on salary guarantees during lockouts moot, and give the players all the power in the case of a lockout.¹²⁰ As the League stated, “the absence of a militant player’s income during a work stoppage may moderate his militancy.”¹²¹

Parker ruled that the League’s circumvention argument was flawed because of its inability to delineate a clear standard.¹²² When asked how the League determined whether a contract violated the January 11, 2000 Agreement, William Daly, Senior Vice President of the League responded:

It’s a materiality test, you know, as I indicated on Direct there are a number of different structures we’ve seen where I believe the structure was impacted by a general intent to minimize the impact of a work stoppage. When it’s generally reasonable we have registered contracts in that scenario. When it is clear on its fact that the parties were expressly attempting to essentially guarantee part of the contract during a work stoppage at least in our mind we have rejected contracts.¹²³

Parker went on to say, “[t]he difficulty Daly had in articulating the standard by which the League challenged the [three contracts] is troublesome, particularly because several provisions of the Collective Bargaining Agreement suggest that Clubs and players have substantial flexibility to negotiate compensation packages as they wish.”¹²⁴

Both Sands and Parker made it clear that they did not trust the standards advanced by the League because they are flexible and ripe for

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.* at 12. “No Club or Player shall enter into any Player Contract, Offer Sheet, or other agreement that includes any terms which are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement, including without limitation, provisions with respect to the Entry Level System or Restricted Free Agency. However, any conduct permitted by this Agreement shall not be considered to be a violation of this provision.” 1995 NHL CBA, *supra* note 100, § 26.1.

¹²⁰ A group of professional football players advanced a similar argument in its suit against the National Football League. There, the National Football League and its owners structured their lucrative television contracts to guarantee revenue for themselves during the expected lockout of the 2011–12 season. Structuring the television contracts in this manner would give the League and its owners an immense bargaining advantage as they, unlike the players, would still be guaranteed revenue during the lockout. *See White v. National Football League*, 766 F.Supp.2d 941 (D. Minn. 2011).

¹²¹ Sakic, *supra* note 117, at 12.

¹²² *Id.* at 21.

¹²³ *Id.* at 21–22.

¹²⁴ *Id.* at 22.

abuse. As Sands argued about the League's "likelihood" standard, "[s]o flexible a standard requires careful monitoring."¹²⁵ Parker echoed Sands's sentiment when she stated that the League's "failure to delineate a clear standard is particularly troublesome."¹²⁶ These flexible standards allow the League to selectively target contracts at its discretion with no notice provided to players and clubs of what contracts violate the CBA.¹²⁷ Further, because the new CBA added a vastly expanded section 26.3,¹²⁸ it is likely that an arbitrator could find a violation even in marginal cases.

C. *An End to the Matter?*

On September 4, 2010, the League agreed to register the reformed contract of Ilya Kovalchuk.¹²⁹ The new contract has a value of \$100 million over a shortened term of fifteen years.¹³⁰ This contract, although still containing low salary years, does not feature the dramatic backdive of the previous contract. By comparison, the lowest value of the new contract is \$1 million as opposed to \$550 thousand in the initial, rejected contract. Furthermore, the lowest payment years are no longer the final years, meaning Kovalchuk has a great incentive to play out the term of the contract, unlike the rejected contract, in which the lowest salary years were the final few seasons, minimizing Kovalchuk's incentive to play out the remainder of the contract.

The League also agreed to stop investigating the contracts of Chris Pronger, Marc Savard, Roberto Luongo, and Marián Hossa, the four contracts explicitly mentioned in Bloch's decision as being similar to

¹²⁵ Fedorov, *supra* note 110, at 11.

¹²⁶ Sakic, *supra* note 117, at 21.

¹²⁷ Some have suggested that the reason Kovalchuk's contract was challenged, while the contracts of Chris Pronger, who signed a seven-year deal with the Philadelphia Flyers, and Marc Savard, who signed a seven-year deal with the Boston Bruins, were registered is because of the relationship Commissioner Gary Bettman has with Ed Snider and Jeremy Jacobs, owners of the Flyers and Bruins, respectively, and not with the owner of the New Jersey Devils, Jeff Vanderbeek. Jim Kelley, *Devils Making NHL Sweat, Another Miscarriage of Justice*, *More Notes*, SPORTS ILLUSTRATED VAULT (Oct. 15, 2010), <http://sportsillustrated.cnn.com/vault/article/web/COM1175859/index.htm>. Another possible explanation was that the League did not challenge the Pronger and Savard contracts because Snider and Jacobs are among the more powerful owners in the League. Jim Kelley, *NHL Had to Deal Carefully with Kovalchuk Contract*, SPORTS ILLUSTRATED (Sept. 2, 2010, 6:52 PM), http://sportsillustrated.cnn.com/2010/writers/jim_kelley/09/02/niemi.kovalchuk.notes/index.html.

¹²⁸ See *supra* note 105 and accompanying text.

¹²⁹ See Greg Wyshynski, *Deal Before Dawn: The NHL, NHLPA CBA Amendment Is Official*, YAHOO! SPORTS (Sept. 4, 2010, 10:20 AM), http://sports.yahoo.com/nhl/blog/puck_daddy/post/Deal-before-dawn-The-NHL-NHLPA-CBA-amendment-i?urn=nhl-267414.

¹³⁰ The revised payment schedule is as follows: \$6 million annually in 2010–11 and 2011–12, \$11 million in 2012–13, \$11.3 million annually in 2013–14 and 2014–15, \$11.6 million in 2015–16, \$11.8 million in 2016–17, \$10 million in 2017–18, \$7 million in 2018–19, \$4 million in 2019–20, \$1 million annually in 2020–21 through 2022–23, \$3 million in 2023–24, and \$4 million in 2024–25. See Ilya Kovalchuk Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=339> (last visited Aug. 24, 2011). The rejected contract had a value of \$102 million over seventeen years. See *supra* note 67 and accompanying text.

the Kovalchuk contract¹³¹ in exchange for the Players' Association agreeing to a few amendments to the current CBA.¹³² The amendments to the CBA only govern contracts that are "long-term," defined as contracts that are five years or longer.¹³³ Further, the amendments only apply as of September 4, 2010; all previously signed contracts will be immune to the new amendments.¹³⁴ The amendments to the CBA dictated first, that the cap hit for any contract that features a term of five years or more, and carries to the player's forty-first birthday and beyond, will be determined by the average of the yearly salaries until the League year in which the player turns forty. The cap hit for all subsequent years will be the actual salary of those final years of the contract.¹³⁵ Additionally, for any long-term contract that averages more than \$5.75 million for the three highest paying seasons, the following rule will apply: the player's salary for the years when the player will be between the ages of thirty-six and forty will be valued at a minimum of \$1 million, even if the actual salary is less.¹³⁶

The goal of these amendments is "to close the long-term [contract] loopholes"¹³⁷ By adding these two provisions to the CBA, the League is attempting to prevent additional contracts in the vein of the rejected Kovalchuk contract. No longer will players be able to sign "retirement contracts" containing dramatic backdives that lessen their overall cap hits. Now, contract years where a player will be above forty will be viewed as separate contracts that will not affect the cap hit for the earlier years.¹³⁸ Similarly, the second amendment to the CBA lessens the effect of the backdive in the player's late thirties, by requiring a minimum cap hit of \$1 million per year.

¹³¹ Kovalchuk, *supra* note 11, at 19 n.23.

¹³² See Wyshynski, *supra* note 129.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ For example, if a player signs an eight-year contract on his thirty-fifth birthday that paid him \$6 million annually for the first six seasons, and then \$3 million and \$1 million for the final two seasons, respectively, then for the purposes of determining his annual cap hit, the contract would be viewed in two parts. The seasons before the player turns forty-one, which are the first six seasons, would be calculated like any other contract; the total value of those years (\$36 million) would be divided by the term (six years) leading to an annual cap hit of \$6 million. The last two seasons of the contract, the seasons in which the player will be forty-one and forty-two, will have annual cap hits of \$3 million and \$1 million, respectively, reflecting the salaries paid in those seasons.

¹³⁶ Joe Yerdon, *NHL and NHLPA CBA Amendments in the Wake of the Kovalchuk Signing*, NBC SPORTS (Sept. 3, 2010, 7:22 PM), <http://prohockeytalk.nbcsports.com/2010/09/03/nhl-and-nhlpa-cba-amendments-in-the-wake-of-the-kovalchuk-signing/>. For example, assume a player signs an eight-year contract when he is thirty-three years old that will pay him \$6 million annually for the first three seasons, \$3 million in the fourth season, and \$500 thousand annually for the remaining four seasons. Prior to this amendment, the contract would have a total value of \$23 million, so there would be an annual cap hit of \$2.875 million. However, under the new amendment, an imaginary \$2 million is added to determine the cap hit because the player will make under \$1 million in the four seasons he is between the ages of thirty-seven and forty and because the average of the three highest paying seasons is greater than \$5.75 million. This results in an effective annual cap hit of \$3.125 million.

¹³⁷ *Id.*

¹³⁸ See Wyshynski, *supra* note 129.

IV. FIXING THE CBA

A. *Remaining Loopholes*

The amendments to the CBA are steps in the right direction. They provide players and clubs with more of a bright-line rule for what type of contract is acceptable under the CBA and what type of contract is unacceptable. Unfortunately, these amendments do not go far enough; loopholes still exist.

Under the current CBA, a player may become an unrestricted free agent¹³⁹ as early as his twenty-fifth birthday.¹⁴⁰ This could create a situation where a twenty-five year old signs a ten-year contract that features a prominent backdive, similar to the one found in the rejected Kovalchuk contract. For example, the contract could be structured to pay \$10 million annually over the first seven seasons, \$5 million in the eighth season, and \$525 thousand annually over the final two seasons. This hypothetical contract is fully compliant with the 2005 CBA, as well as the recent amendments. However, it is still quite similar to the rejected Kovalchuk contract in that it contains a long term, high total value, and a substantial backdive. The final two years of this contract have the effect of lowering the annual cap hit from \$9.375 million to \$7.605 million. So while the amendments have the right idea by attempting to prevent contracts like Kovalchuk's rejected contract, uncertainties remain.

B. *Flawed Solutions*

1. League-Issued Advisory Opinions

One way to deal with this problem is to have the League issue an advisory opinion to the arbitrator prior to a hearing, providing guidance as to what should be considered by the arbitrator when making his or her ruling. This system would allow the League to continually battle clubs and players that seek to expose and capitalize on newfound loopholes in the CBA. As the loopholes become apparent, the League would issue orders to the arbitrator detailing the relevant provisions of the CBA, what the provisions were intended to prevent, and how the club and player had circumvented it.

¹³⁹ An unrestricted free agent

means a Player who: (a) has either never signed [a contract] or whose [contract] has expired, or has been terminated or bought out by a Club; and (b) who otherwise is not subject to any exclusive negotiating rights, Right of First Refusal, or Draft Choice Compensation in favor of any Club

2005 NHL CBA, *supra* note 4, art. 1.

¹⁴⁰ A player who enters the League at the age of eighteen will have played the requisite seven seasons by his twenty-fifth birthday and become an unrestricted free agent. A player may also become an unrestricted free agent by the time he turns twenty-seven, regardless of the number of seasons the player spent in the League. *Id.* § 10.1(a)(i).

The problem with this approach is twofold. First, the League already has a similar system in place. After rejecting a contract, but before the hearing, the League has the opportunity to submit to the arbitrator a report from an independent investigator documenting the circumstances that led to the arbitration,¹⁴¹ and to file a complaint directly with the arbitrator.¹⁴² The second, and bigger problem is that since the League and the Players' Association jointly appoint the arbitrator,¹⁴³ it would prejudice the Players' Association to allow only the League to issue instructions to the arbitrator. Furthermore, allowing the Players' Association a chance to jointly submit the instructions would be impracticable, as it is highly unlikely the two parties would agree on instructions to give the arbitrator. Lastly, allowing both the League and Players' Association the opportunity to submit separate instructions to the arbitrator is unlikely to provide any additional benefit to the current system, in which the arbitrator hears testimony from both parties.¹⁴⁴

2. Amend Section 26.3

Another possible remedy is to have the League and Players' Association amend section 26.3 of the current CBA.¹⁴⁵ It is clear that both the League and Players' Association are not averse to the possibility of amending the CBA generally, as they recently added two amendments to the CBA governing contracts for players that include years the player will be thirty-six and older.¹⁴⁶ Amending section 26.3 and to create a more concrete definition of what constitutes a circumvention, instead of keeping the language vague, will provide a bright-line rule as to acceptable contracts.¹⁴⁷

This, however, only suggests a prospective fix. If the League and Players' Association tighten up the language of section 26.3, and subsequently, a club figures out a new way to circumvent the CBA, that club could be immune to punishment. This is problematic as circumventions are anti-competitive and bad for the League as a whole.¹⁴⁸ At the same time, it seems unjust to allow the League to punish clubs retroactively while the club was operating within the confines of the CBA.

¹⁴¹ *Id.* § 26.10(e).

¹⁴² *Id.* § 26.11.

¹⁴³ *Id.* § 17.6

¹⁴⁴ *Id.* §§ 17.8, 17.9.

¹⁴⁵ See *supra* note 90 and accompanying text.

¹⁴⁶ See Yerdon, *supra* note 136.

¹⁴⁷ For example, the CBA could explicitly prohibit contracts longer than eight years, or require either a fixed percentage or a minimum percentage of the contract's total value to be paid in the final two seasons.

¹⁴⁸ If the league were to only punish prospectively, at least one club would benefit from having the foresight and ingenuity to exploit a loophole. This model would lead to certain clubs gaining an unfair competitive advantage.

3. National Basketball Association Approach

Some have suggested that the easiest way to close this loophole is by making players' annual cap hits equal to their annual compensation,¹⁴⁹ similar to the way the National Basketball Association's salary cap functions.¹⁵⁰ This would prevent players from being paid substantial amounts of money in a year while their cap hits are significantly less.¹⁵¹ Implementing this system would eliminate any debate about whether a contract contains "illusory" years, as those years would not affect the cap hit of the earlier years.¹⁵²

There are several problems with this approach. Because clubs' salaries must fall between a fairly narrow range due to the structure of the League's salary cap, clubs face a difficult task in a few common situations. The first is that small market clubs with lower revenue streams (e.g. Phoenix Coyotes, Columbus Blue Jackets) may wish to keep salaries down in seasons where they have accelerated operating expenses.¹⁵³ Forcing those clubs to spend to the lower limit, which has shot up from \$21.5 million in 2005–06¹⁵⁴ to \$43.4 million in 2010–11,¹⁵⁵ may force clubs into dire financial situations. Allowing clubs like the 2007–08 Columbus Blue Jackets,¹⁵⁶ the 2008–09 Atlanta Thrashers,¹⁵⁷ and the 2009–10 New York Islanders¹⁵⁸ to spend below the lower limit in certain years gives them the opportunity to allocate money towards other areas, such as scouting and training that could improve the club and help draw greater revenue in subsequent years.

Another common situation in which clubs spend outside the confines of the salary cap window is where large market clubs with larger revenue streams (e.g. New York Rangers, Toronto Maple Leafs)

¹⁴⁹ See, e.g., Joseph Romano, *Fixing the Biggest Loophole in Salary Cap History*, THE HOCKEY WRITERS (Aug. 10, 2010), <http://thehockeywriters.com/fixing-the-biggest-loophole-in-salary-cap-history/>.

¹⁵⁰ See *supra* note 43.

¹⁵¹ As discussed, the National Basketball Association's salary cap measures actual salary paid, unlike the National Hockey League's salary cap system. See *supra* note 43.

¹⁵² Because the cap hit would reflect the actual salary paid during the year, it is irrelevant what a player would be paid at the very end of the contract, and therefore there will be no debate about whether the player will actually play through the term of the contract.

¹⁵³ For example, a club may have greater costs for renovations to an existing arena or for the construction of a new one.

¹⁵⁴ 2005 NHL CBA, *supra* note 4, § 50.5(b)(ii).

¹⁵⁵ *NHL Salary Cap Set at \$59.4 Million for 2010–11 Season*, TSN (June 23, 2010, 4:52 PM), <http://tsn.ca/nhl/story/?id=325481>.

¹⁵⁶ The Columbus Blue Jackets' payroll was \$28.01 million when the lower limit was \$34.3 million. 2007–08 NHL Salaries by Club, USA TODAY, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2007> [hereinafter 2007–08 NHL Salaries] (last visited Aug. 24, 2011).

¹⁵⁷ The Atlanta Thrashers' payroll was \$34.262 million when the lower limit was \$40.7 million. 2008–09 NHL Salaries, USA TODAY, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2008> [hereinafter 2008–09 NHL Salaries] (last visited Aug. 24, 2011).

¹⁵⁸ The New York Islanders' payroll was \$31.615 million when the lower limit was \$40.8 million. 2009–10 NHL Salaries, USA TODAY, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2009> [hereinafter 2009–10 NHL Salaries] (last visited Aug. 24, 2011).

may want to take on players with large salaries, but smaller cap hits, in an effort to make a playoff run.¹⁵⁹ Forcing clubs to fit within the narrow window between the lower limit and upper limit eliminates this option. Allowing trade deadline deals actually benefits the League, as clubs that are no longer contending may trade veterans for promising young players that will help the club be competitive in future seasons, creating greater parity in the League.

The League's current salary cap structure also helps clubs sign promising young players to contracts that pay the players less in the early years of the contracts, and as the players mature and improve, thereby helping draw more revenue, the clubs can afford to spend more money on them. Young stars like Milan Michalek,¹⁶⁰ Travis Zajac,¹⁶¹ and Bobby Ryan¹⁶² all signed contracts when they were twenty-four years old or younger that paid lower annual salaries in the earlier years of the contracts and pay higher annual salaries in the later years of the contracts when these players are in their prime years. If the cap hit for these players is their annual salary, it is more difficult for their respective clubs to be cap-compliant.¹⁶³

The last benefit provided by the current structure of the salary cap is that it creates parity within the league. Certain clubs, especially in small geographic markets or clubs located in the Sun Belt¹⁶⁴ will never be able to draw the kind of revenue that clubs in large geographic markets can. Hockey is more popular in Montreal and Toronto than in Phoenix or Tampa Bay.¹⁶⁵ Allowing these smaller market clubs to

¹⁵⁹ This situation often arises at the trade deadline, when clubs that have fallen out of playoff contention become "sellers," looking to shed players with large salaries because they no longer have playoff gate receipts to look forward to. Clubs still in contention, or "buyers," will often trade for these players, willing to take on the additional salary in an effort to improve their chances of winning the Stanley Cup, which will generate a significant amount of revenue for the club.

¹⁶⁰ See Milan Michalek Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=128> (last visited Aug. 24, 2011).

¹⁶¹ See Travis Zajac Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=776> (last visited Aug. 24, 2011).

¹⁶² See Bobby Ryan Contract Details, CAPGEEK, <http://capgeek.com/players/display.php?id=314> (last visited Aug. 24, 2011).

¹⁶³ As their salaries rise in the later years of the contracts, there is less cap space available for the remaining players, and therefore it is more difficult for the clubs to be cap-compliant.

¹⁶⁴ The Sun Belt is a region in the United States extending from Florida in the east to southern California in the west. *Sun Belt Definition*, ENCYCLOPEDIA BRITANNICA ONLINE ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/573594/Sun-Belt> (last visited Aug. 24, 2011). The Sun Belt clubs are the Tampa Bay Lightning, Florida Panthers, Dallas Stars, Phoenix Coyotes, Anaheim Ducks, and Los Angeles Kings. The Carolina Hurricanes, which play in Raleigh, North Carolina and the Nashville Predators may be included in this group as well. See *supra* note 40. Up until its sale and relocation in May 2011, this group included the Atlanta Thrashers as well. See *infra* note 201 (discussing the sale and relocation of the Atlanta Thrashers to Winnipeg, Manitoba, Canada).

¹⁶⁵ Hockey tends to thrive in the cold weather climates of the north where the availability of ice rinks is greater. As Nelson Riis, former member of Canadian Parliament remarked during a debate to make hockey Canada's official sport:

[I]t is safe to say that hockey matters to all of us, in Quebec and the rest of Canada. It is part of our culture. It is key to the understanding of Canada. It is the perfect game on the perfect Canadian medium in the perfect Canadian season. We are a northern

conserve capital that would otherwise be allocated to spending to the lower limit gives clubs the opportunity to invest in better scouting, training, and coaching. This system provides an opportunity for clubs to develop their young players and be competitive in the future.

The Washington Capitals embraced this model. In the 2005–06 season, the Capitals spent \$19.833 million on player salaries, which was the lowest amount in the League.¹⁶⁶ Not surprisingly, the Capitals finished with the second worst record in the Eastern Conference.¹⁶⁷ However, through successful scouting, drafting, and management, the Capitals began to improve, and in 2009–10 they finished with the best record in the League during the regular season and were therefore awarded the Presidents' Trophy.¹⁶⁸ That season the Capitals spent \$56.138 million,¹⁶⁹ just under the upper limit of \$56.8 million. The Capitals also had perfect home attendance that year, selling out all forty-one regular season games played at its home arena, the Verizon Center.¹⁷⁰ While it is difficult to state that this salary structure is the reason the Capitals were so successful in 2009–10, the Capitals' top four scorers that season were drafted in the period between 2002 and 2006,¹⁷¹ a rebuilding period in which the Capitals only made one playoff appearance.¹⁷²

All of these reasons suggest that making the switch to the National

people and hockey is a northern sport. It is certainly fair to say it is much more than a game in our country.

Canada: House of Commons, *Private Members' Business Bill C-212 Motion for Second Reading of National Sports Act* (Apr. 1994) (statement of Parliament member Nelson Riis), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332313&Language=E&Mode=1&Parl=35&Ses=1#NATIONALSPORTACT>. In 2011, Canada rescheduled a French federal election debate, which would have conflicted with the Montreal Canadiens' first round playoff game. See Emma Carmichael, *Canada Acknowledges that Its Hockey Is More Important Than Its Politics*, DEADSPIN (Apr. 11, 2011, 11:20 AM), <http://deadspin.com/#!5790785>.

¹⁶⁶ The Minnesota Wild had the second lowest payroll that season, \$25.158 million, and the League median salary that season was \$35,948,920. 2005–06 NHL Salaries, USA TODAY, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2005> [hereinafter 2005–06 NHL Salaries] (last visited Aug. 24, 2011). The lower limit in 2005–06 was \$21.5 million. See *supra* note 42.

¹⁶⁷ 2005–06 NHL Standings, NHL NETWORK, <http://www.nhl.com/ice/standings.htm?season=20052006&type=CON> (last visited Aug. 24, 2011).

¹⁶⁸ 2009–10 NHL Standings, NHL NETWORK, <http://www.nhl.com/ice/standings.htm?season=20092010&type=LEA> (last visited Aug. 24, 2011). See also Ted Starkey, *Caps Clinch Presidents' Trophy*, WASH. TIMES (Apr. 4, 2010), <http://www.washingtontimes.com/news/2010/apr/04/caps-clinch-presidents-trophy/?page=1>.

¹⁶⁹ 2009–10 NHL Salaries, *supra* note 158.

¹⁷⁰ *NHL Attendance Report 2009–10*, ESPN, http://espn.go.com/nhl/attendance/_/year/2010 (last visited Aug. 24, 2011).

¹⁷¹ *2009–10 Washington Capitals Roster and Statistics*, HOCKEY-REFERENCE.COM, <http://www.hockey-reference.com/teams/WSH/2010.html> (last visited Aug. 24, 2011). Alexander Semin was drafted in 2002, Alexander Ovechkin and Mike Green were drafted in 2004, and Nicklas Backstrom was drafted in 2006. Draft Choices of the Washington Capitals, NHL.COM NETWORK,

<http://capitals.nhl.com/club/draftstats.htm?year=All&round=All&team=WSH&navid=DL|WSH|home&navid=DL|WSH|home> (last visited Aug. 24, 2011).

¹⁷² *Washington Capitals Playoff History*, YAHOO! SPORTS, (May 13, 2009), <http://sports.yahoo.com/nhl/news?slug=washingtonpost>.

Basketball Association or National Football League style salary cap¹⁷³ would do more harm than good. Without the flexibility provided by the current salary cap structure, these benefits would effectively be eliminated.¹⁷⁴ However, this Note argues that by switching to a salary cap system that measures salaries paid, and expanding the window between the lower and upper limits, the League and the Players' Association can retain all the benefits from the current salary cap system while creating a bright-line rule going forward to determine which contracts, similar to the rejected Kovalchuk contract, violate the CBA. Further, any creative means employed by clubs and players to circumvent the CBA would still fall under the broad scope of section 26.3.

C. Salary Cap Solution

In 2005–06, the first season following the lockout, the lower limit was set at \$21.5 million and the upper limit was set at \$39 million.¹⁷⁵ That year there was only one club, the Washington Capitals, that paid player salaries (not the averaged club salary, which must fall between the lower and upper limits) less than the lower limit.¹⁷⁶ On the other end of the spectrum, there were eight clubs that spent above the upper limit on salaries, of which the New Jersey Devils and Vancouver Canucks spent the most.¹⁷⁷

In 2006–07, the lower and upper limits were calculated to be \$28 million and \$44 million, respectively.¹⁷⁸ The only club to pay salaries below the lower limit was the Pittsburgh Penguins.¹⁷⁹ As well, there were only three clubs that spent above the upper limit, with the New Jersey Devils leading the League for the second year in a row.¹⁸⁰

In 2007–08, both limits rose dramatically,¹⁸¹ with the lower and

¹⁷³ See *supra* note 43 and accompanying text.

¹⁷⁴ The aforementioned benefits only exist because the National Hockey League's salary structure does not measure actual salaries paid, but rather the sum of the players' cap hits. This means that clubs have more maneuverability within the confines of the salary cap than is suggested by the narrow \$16 million window between the lower and upper limits. See *supra* note 44.

¹⁷⁵ 2005 NHL CBA, *supra* note 4, § 50.5(b)(ii). This was the only season in which the CBA predetermined the lower and upper limits. For all other seasons under the current CBA, the lower and upper limits were calculated using a formula, providing a payroll range of \$16 million. See *supra* notes 36–42 and accompanying text.

¹⁷⁶ The Capitals spent \$19,833,430 on player salaries, 8.4% below the lower limit. 2005–06 NHL Salaries, *supra* note 166. All calculations are the author's own, using salary information obtained from the *USA Today* salary database. See *supra* notes 156–158, 166; see also *infra* note 179.

¹⁷⁷ The Devils spent \$47,095,949 on salaries, which was 20.76% above the upper limit. The Canucks spent \$43,711,344, which was 12.08% above the upper limit. 2005–06 NHL Salaries, *supra* note 166.

¹⁷⁸ Fitzpatrick, *supra* note 42.

¹⁷⁹ The Penguins spent \$26,293,273, 6.5% below the lower limit. 2006–07 NHL Salaries, *USA Today*, <http://content.usatoday.com/sports/hockey/nhl/salaries/totalpayroll.aspx?year=2006-07> [hereinafter 2006–07 NHL Salaries] (last visited Aug. 23, 2011).

¹⁸⁰ The Devils spent \$49,608,766, 12.75% above the upper limit. *Id.*

¹⁸¹ This was due to a large increase in hockey related revenues. See *supra* notes 36–42 and accompanying text.

upper limit calculated to be \$34.3 million and \$50.3 million, respectively.¹⁸² That season there were only two clubs to pay salaries below the lower limit: the Nashville Predators and the Columbus Blue Jackets.¹⁸³ There were five clubs that spent above the upper limit with the Colorado Avalanche and Philadelphia Flyers having spent the most.¹⁸⁴

In 2008–09, the limits rose dramatically again.¹⁸⁵ The lower limit was calculated to be \$40.7 million and the upper limit calculated to be \$56.7 million.¹⁸⁶ There were four clubs that spent below the lower limit, of which the New York Islanders spent the least.¹⁸⁷ There were six clubs that spent above the upper limit, with the New York Rangers leading the League.¹⁸⁸

In 2009–10, the lower and upper limits increased by \$100 thousand each, to \$40.8 million and \$56.8 million, respectively.¹⁸⁹ There was only one club that spent below the lower limit: the New York Islanders.¹⁹⁰ There were eight clubs that spent above the ceiling with the New York Rangers outspending the rest of the League for the second consecutive season.¹⁹¹

The data from the years 2005–06 through 2009–10 shows that the vast majority of clubs (73.33%) paid salaries within the limits.¹⁹² By expanding the range between the limits by ten percent on each end and forcing all clubs to pay salaries within this window, the loophole Kovalchuk and the Devils tried to exploit will be closed, and a bright-line rule for determining which contracts violate the CBA will be created, without eliminating any of the benefits provided by the current salary cap structure.¹⁹³

Between 2005 and 2010, using these new parameters for the lower and upper limits, there have been only sixteen clubs to spend below the lower limit or above the upper limit, representing less than eleven

¹⁸² Fitzpatrick, *supra* note 42.

¹⁸³ The Predators spent \$30,273,340, 13.3% below the floor and the Blue Jackets spent \$28,010,000, 22.46% below the floor. 2007–08 NHL Salaries, *supra* note 156.

¹⁸⁴ The Avalanche spent \$61,290,750, 21.85% above the floor and the Flyers spent \$57,518,200, 14.35% above the upper limit. *Id.*

¹⁸⁵ *See supra* note 181.

¹⁸⁶ Fitzpatrick, *supra* note 42.

¹⁸⁷ The Islanders spent \$33,267,500, 22.34% below the lower limit. 2008–09 NHL Salaries, *supra* note 157.

¹⁸⁸ The Rangers spent \$66,064,200, 16.52% above the upper limit. *Id.*

¹⁸⁹ Fitzpatrick, *supra* note 42.

¹⁹⁰ The Islanders spent \$31,615,000, 29.05% below the floor. 2009–10 NHL Salaries, *supra* note 158.

¹⁹¹ The Rangers spent \$63.88 million, 12.46% above the ceiling. *Id.*

¹⁹² Over the five seasons, there were forty clubs that paid salaries below the lower limit or above the upper limit. There are thirty clubs in the League, so over the five seasons, there are 150 club seasons, with 110 of them paying salaries within the range.

¹⁹³ The loophole exists because clubs can add illusory years onto a contract to lower the annual cap hit. However, by switching the system so that the cap hit equals the salary paid during the year, adding additional years will not help.

percent of all individual club seasons over that period.¹⁹⁴ This small number suggests that making the switch to a salary cap whose floor and ceiling are each extended by ten percent is feasible. Further, this approach should not financially overburden any of these clubs. At one extreme, the 2009–10 New York Islanders would have been required to spend an additional \$5.105 million on player salaries.¹⁹⁵ However, the 2009–10 New York Islanders appear to be an extreme outlier; the second most extreme case was the 2008–09 New York Islanders, which would have been required to spend an additional \$3.362 million on player salaries.¹⁹⁶ At the other extreme, the 2007–08 Colorado Avalanche would have been required to cut salaries by \$5.96 million.¹⁹⁷ This is not to trivialize the financial steps that would be required of these few clubs, which fall outside the extended parameters. However, requiring a few clubs to take certain steps to be cap-compliant in the interest of closing the Kovalchuk loophole and creating a bright-line rule is a small price to pay.

Switching to this system also preserves the benefits provided by the current CBA. The bigger window provided by this format will allow small market clubs to spend a lower amount and still be cap-compliant. On the other end of the cap, expanding the window allows clubs that are looking to take on salary at the trade deadline to do so in a manner that still falls within the cap. The benefit of being able to tie up young players is still available with the expanded window as well. Lastly, if one of the goals of a salary cap is to promote parity within the League by requiring that all clubs spend within a specific range,¹⁹⁸ the lower and upper limits should measure actual salaries paid, which is not the case under the current system.¹⁹⁹

¹⁹⁴ There were sixteen club seasons out of 150 that would fall outside the new parameters, representing 10.67%. See *supra* note 192. The 2007–08 Columbus Blue Jackets (22.46%) and Nashville Predators (13.3%), the 2008–09 New York Islanders (22.34%), Atlanta Thrashers (18.79%), and Los Angeles Kings (12.7%), and the 2009–10 New York Islanders (29.05%) were the only clubs since the 2004–05 lockout to spend more than ten percent below the lower limit. The 2005–06 New Jersey Devils (20.76%) and Vancouver Canucks (12.08%), the 2006–07 New Jersey Devils (12.75%), the 2007–08 Colorado Avalanche (21.85%), Philadelphia Flyers (14.35%), and New York Rangers (12.73%), the 2008–09 New York Rangers (16.52%) and Calgary Flames (11.29%) and the 2009–10 New York Rangers (12.46%) and Ottawa Senators (10.92%) were the only clubs since the 2004–05 lockout to spend more than ten percent above the upper limit.

¹⁹⁵ This represents a 16.15% increase in salary.

¹⁹⁶ This represents a 10.11% increase in salary.

¹⁹⁷ This represents a 9.73% decrease in salary.

¹⁹⁸ See *supra* note 25.

¹⁹⁹ The 2010–11 New York Islanders proved, on a nightly basis, that the current salary cap system is not ideal for promoting competition in the League. On November 15, 2010, Scott Gordon, the coach of the New York Islanders, was fired. The Islanders, the worst club in the League, had lost ten games in a row, while still being cap-compliant. Peter Botte, *Islanders Coach Scott Gordon Fired After 10-Game Losing Streak; Jack Capuano Named as Interim*, N.Y. DAILY NEWS (Nov. 15, 2010, 12:16 PM), http://articles.nydailynews.com/2010-11-15/sports/27081247_1_interim-tag-permanent-position-excellent-coach

What chance did Gordon have, though? In Gordon's swan song, the twenty players the Islanders dressed had a combined salary cap hit of \$32.3 million, more than 25% less than the League's salary floor of \$43.4 million.

Critics of this system may argue that expanding the window between the lower and upper limit will create a two-tiered League, with certain clubs regularly spending the bare minimum (e.g. Florida Panthers, Phoenix Coyotes), while other clubs will regularly spend to the upper limit (e.g. New York Rangers, Toronto Maple Leafs). While this may be accurate, it is no different than the current situation. Small market clubs will generally spend less than their large market counterparts. Under the current system, even though the averaged club salary window is \$16 million, the spread is often much greater.²⁰⁰

Since 2006–07, the Atlanta Thrashers²⁰¹ have annually been in the bottom quarter of the League in salaries paid.²⁰² Over that same period, the New York Rangers have annually been in the top fifteen percent of the League in salaries paid, and were the highest-spending club in both 2008–09 and 2009–10.²⁰³ The League cannot force people in nontraditional hockey markets to go to hockey games; it can encourage growth, but for the foreseeable future, the Thrashers will not have the Rangers' revenue. However, implementing this system will slightly narrow the window between the top- and bottom-spending clubs, and create a bright-line rule to determine which contracts violate the CBA.

Another criticism of this system is that as hockey related revenues rise, the disparity between the lower and upper limits will become even more pronounced.²⁰⁴ As the window between the limits increases, parity will disappear. However, this critique is shortsighted. Revenues tend to rise because the quality of the product increases; as hockey games become more enjoyable to watch, more people will want to attend causing arena prices to rise (e.g. tickets, parking, concessions). In addition, a larger fan base will likely lead to larger television and

How do the Islanders get away with it? They have more than \$6 million on their cap for the bought-out Brendan Witt and Alexi Yashin, while Mark Streit, who had preseason shoulder surgery and won't be able to play until around the time the [Islanders] are mathematically eliminated, takes up \$4.1 million of cap space. Throw in the scratched Trevor Gillies and Jack Hillen, and the Islanders just barely qualified to be an NHL [club]. Of course, their highest-paid player, goaltender Rick DiPietro, with a \$4.5 million cap hit, did not get off the bench.

Jesse Spector, *Blogger Shoots and Scores in Unraveling Email Furor Surrounding NHL Discipline Czar Colin Campbell*, N.Y. DAILY NEWS (Nov. 20, 2010), http://articles.nydailynews.com/2010-11-20/sports/27081836_1_gregory-campbell-referee-penalty/3.

²⁰⁰ In 2009–10, the New York Rangers spent \$32,265,000 more than the New York Islanders, more than double the spread between the lower and upper limits. 2009–10 NHL Salaries, *supra* note 158.

²⁰¹ In fact, the Thrashers' financial woes ran so deep that the club was sold in May 2011 to True North Sports and Entertainment, which relocated the club to Winnipeg, Manitoba, Canada. *Thrashers Headed to Winnipeg*, ESPN (June 1, 2011, 11:16 AM), <http://sports.espn.go.com/nhl/news/story?id=6610414>.

²⁰² See *supra* notes 156–158 and 179.

²⁰³ *Id.*

²⁰⁴ As discussed earlier, the calculation of the adjusted midpoint, and by extension the lower and upper limits, is tied directly to hockey related revenues. 2005 NHL CBA, *supra* note 4, § 50.5(b)(i).

radio broadcast deals.²⁰⁵ Since the players are the product drawing in the revenue, they will demand greater incentives such as increased preliminary benefits, and will be entitled to greater salaries.²⁰⁶ In order to stay competitive, thereby drawing in greater revenue, owners will be forced to spend more on salaries to attract talented players to their clubs. Owners that elect not to spend more on salaries will likely not draw greater revenue.²⁰⁷ This model will force even small market clubs to spend more on salaries, avoiding a two-tiered League.

CONCLUSION

This Note proposes a model that will create a bright-line rule for determining when National Hockey League player contracts violate the CBA, while retaining the benefits provided by the current salary cap structure. By switching the structure of the salary cap system, the League does not need to provide further guidance as to the validity of these “retirement contracts,” as clubs could no longer reap the benefits of structuring deals like the rejected Kovalchuk contract. Even with the recent amendments to the CBA, failure to implement this Note’s proposed system will leave the standard unclear, potentially subjecting clubs to abuse by the League selectively enforcing which contracts to target as circumventions of the CBA. As there are contracts that comply with the stated terms of the CBA and its recent amendments that may still be rejected, something must be done. For this reason, a bright line must be drawn to provide clarity for clubs and players and to remove the potential for abuse by the League.

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²⁰⁵ *Id.* § 50.1(a) (providing a non-exhaustive list of hockey related revenues, including arena related costs and television contracts).

²⁰⁶ As hockey related revenues increase, the players’ percentage rises as well, giving the players a larger share of the league revenue. *Id.* § 50.4(b)(i)(A)–(E).

²⁰⁷ This works on the theory that the more money a club spends, the better the club will perform during the season, which will create demand among fans to attend the games. While not perfectly correlated, the Chicago Blackhawks and Philadelphia Flyers, the two clubs that competed for the Stanley Cup in 2009–10, were the fourth and seventh highest spending clubs that season. *See, e.g.,* 2009–10 NHL Salaries, *supra* note 158; *see also* Dan Gelston, *Blackhawks Win Stanley Cup*, YAHOO! SPORTS (June 10, 2010), <http://sports.yahoo.com/nhl/recap?gid=2010060915>. This was even more pronounced in 2010–11, when the Vancouver Canucks and Boston Bruins competed for the Stanley Cup, the top spending and fifth highest spending clubs in the League, respectively. *See, e.g.,* 2010–11 NHL Salaries, USA TODAY, <http://content.usatoday.com/sportsdata/hockey/nhl/salaries/team/2010> (last visited Aug. 24, 2011); *see also Boston Fans Celebrate Bruins’ Win*, ESPN (June 16, 2011, 10:50 AM), <http://sports.espn.go.com/boston/nhl/news/story?id=6663487>.

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