

2023

## "Eighteen Million Over": The National Hockey League's Long Term Injured Reserve Parity Challenge

Bernard Horowitz

Robert Luther III

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Repository Citation

Bernard Horowitz and Robert Luther III, *"Eighteen Million Over": The National Hockey League's Long Term Injured Reserve Parity Challenge*, 33 Marq. Sports L. Rev. 695 (2023)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol33/iss2/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# ARTICLES

## “EIGHTEEN MILLION OVER”: THE NATIONAL HOCKEY LEAGUE’S LONG TERM INJURED RESERVE PARITY CHALLENGE

BERNARD HOROWITZ\* & ROBERT LUTHER III\*\*±

### INTRODUCTION

#### *A. Overview*

In 2005, the National Hockey League (NHL) moved past the “Dead Puck Era” (1994-95—2003-04) with a landmark Collective Bargaining Agreement (CBA), installing a new parity system including revenue-sharing and a salary cap. The 2005 CBA framework aspired to establish financial parity between teams of different market sizes so that—according to Commissioner Gary Bettman—“a team’s ability to compete [would be] based on its hockey, front office and team building skills, not on the team’s ability to pay.”<sup>1</sup>

With Bettman’s successful financial infrastructure working as planned, NHL General Managers (GM’s) facing salary cap constraints explored the boundaries of the 2005 CBA’s team management and cap accounting rules,

---

\* Bernard Horowitz is a Law Clerk for Senior Judge Mary Ellen Coster Williams of the United States Court of Federal Claims and was formerly a backup goaltender for the Colorado College Tigers. This article does not reflect the views of the Court of Federal Claims or Judge Williams, and was co-written solely in the author’s personal capacity and not as part of his court-related duties.

\*\* Robert Luther III is Of Counsel at Jones Day in Washington, D.C., and is an Adjunct Professor of Law at the Antonin Scalia Law School at George Mason University. He advises teams, executives, and players around the game of hockey on sensitive issues.

± The authors extend their special thanks to Michael Beck, Brian H. Boyle, Michael Hull and Bill Sweatt for their comments on earlier drafts of this article.

1. See, e.g., C-SPAN 2, *Gary Bettman NHL Interview – Post Lockout 2005*, YOUTUBE, at 23:16 (Feb. 14, 2021), <https://www.youtube.com/watch?v=LYrFEILMBt8>.

exposing a few loopholes. These loopholes mainly concerned the effective permissibility of putative “retirement contracts,” whereby GM’s lengthened player contracts far beyond the reasonable duration of a professional hockey career to lower that player’s Average Annual Value (AAV) and thereby increase his team’s annual cap space.

The 2005 CBA expired in 2012 and, reportedly, GM’s widely favored rule adjustments closing the loopholes. And yet, while the successor 2013 CBA retained the bedrock architecture of the 2005 CBA and constrained “retirement contract” structuring practices, it did not resolve one key problem which remains widely recognized across the NHL today: apparent or actual strategic exploitation of Long-Term Injured Reserve (LTIR) for salary cap purposes. In short, LTIR rules leave open the appearance that some teams may be signing players to long-term contracts in anticipation that once such a player reaches his mid or late thirties, the player may be cooperatively construed as “injured” (and still fully paid) while allowing the designating team to effectively recover all corresponding salary cap space.

With LTIR, the NHL faces a policy challenge: team front offices and fans widely believe that strategic exploitation of LTIR rules for cap purposes has transpired. Leaving aside whether this has occurred in fact, the mere appearance of such exploitations represents a significant PR liability for the NHL. Facing such liabilities, rather than putting itself in the lose-lose position of reviewing LTIR abuse allegations through tricky injury-legitimacy investigations, the NHL may seek to adjust the rules. A possible solution would be to reduce LTIR cap benefits for teams which designate players in their mid-thirties or older.

### *B. Background*

After the Tampa Bay Lightning eliminated the Carolina Hurricanes from the 2020-21 playoffs, star Carolina defenseman Dougie Hamilton cited Tampa Bay’s exploitation of LTIR rules as a key factor in the outcome of the series. Hamilton specifically alleged that his team had been defeated by an opponent “\$18 million over the cap or whatever they are . . . . You realize how many weapons they have and if you think about how many more players you could add with that money . . . .”<sup>2</sup>

What Dougie Hamilton said was unusual for at least two reasons. First, discussing in-game events with reference to obscure NHL salary cap rules

---

2. See, e.g., *Hurricanes’ Dougie Hamilton on Lightning: ‘We Lost to a Team \$18M Over the Cap’*, ATHLETIC (June 10, 2021), <https://theathletic.com/news/hurricanes-dougie-hamilton-on-lightning-we-lost-to-a-team-18m-over-the-cap/z0dG0hBqAH8n/>.

breaks with player culture. But what he said was unquestionably true: the Lightning had, in fact, relied on LTIR rules permitting teams to exceed the cap in the playoffs. They placed star winger Nikita Kucherov on LTIR for the entire regular season and then activated him when the playoffs began. Because the Lightning spent to the upper limit of the cap, activating Kucherov during the season would have broken the threshold; but by waiting until the playoffs to activate him, the Lightning cleverly exploited a salary cap loophole—and Hamilton called them out for it. Second, and perhaps most interestingly, Hamilton's statement also directly—and publicly—questioned the NHL's parity regime—a key underlying principle for driving revenue in the League today. In February 2022, the “Kucherov” maneuver appeared primed to resurface: to avoid exceeding the cap with the activation of Jack Eichel, the Vegas Golden Knights placed captain Mark Stone on LTIR, with the apparent plan of reactivating Stone for the playoffs, when the salary cap would no longer apply.<sup>3</sup> However, the team missed the playoffs.

Sixteen years earlier, the NHL had resolved the 2004-05 lockout and lost season in the 2005 Collective Bargaining Agreement (CBA) by establishing financial parity mechanisms, specifically a salary cap and revenue sharing, so that teams from different-sized markets would have access to comparable resources to sign and retain players. This framework quickly became (and remains) a defining characteristic of the modern NHL. But Hamilton's statement in 2021 suggested that the regime was being undermined by the construction of the NHL's salary cap rules, and specifically LTIR rules.

LTIR and contractual structuring rules indeed represent the last major policy challenge remaining from the NHL's original 2005 adoption of the financial parity and salary cap framework. Because the 2005 revenue sharing and the salary cap rules essentially meant that GM's could only gain a financial edge over competitors by exploiting salary cap rules,<sup>4</sup> post-2005 GMs vigorously exploited any loopholes they could find.

According to longtime NHL executive Brian Burke, in the 2012-13 CBA negotiations the loopholes enabling cap circumvention were “the stuff that the GM's thought was important.”<sup>5</sup> However, purportedly, the 2013 CBA as agreed reflected that NHL owners overwhelmingly prioritized reinforcing the

---

3. See, e.g., Ant Barberio, *Should We Question How the Golden Knights Put Mark Stone on IR?*, FANSIDED (Feb. 17, 2021), <https://puckprose.com/2022/02/17/should-we-question-how-the-vegas-golden-knights-put-mark-stone-on-injured-reserve/>.

4. See, e.g., C-SPAN 2, *supra* note 1, at 23:08 (“We have reduced the disparities between team payrolls to a level that should not make a competitive difference. Now a team's ability to compete is based on its hockey, front office and team building skills, not on the team's ability to pay.”).

5. BRIAN BURKE & STEPHEN BRUNT, *BURKE'S LAW: A LIFE IN HOCKEY* 263 (2021).

fifty-fifty revenue split with the players, and in the process declined to address the loopholes.<sup>6</sup> Thus, the 2013 CBA (modeled on the 2005 CBA) responded by tightening the rules, but apparent weaknesses remained.

The 2021 offseason following Hamilton's statement highlighted these LTIR rule flaws more prominently than at any previous point. The past few years are replete with cases where NHL teams managing onerous contracts used LTIR to reclaim all cap space which those players would have otherwise occupied. In other words, teams have construed certain veteran players – signed to contracts with relatively high salaries – as injured, creating an equivalent amount of extra cap space. This enables the LTIR-designating team to narrowly avoid exceeding the cap, or to hurriedly acquire additional players with the extra space. Prominent examples include recent Hall of Fame inductee Marian Hossa (LTIR-designated with four years remaining on his contract), Stephane Robidas and Joffrey Lupul (LTIR-designated in awkward circumstances), and Shea Weber (LTIR-designated with five years remaining on his contract despite playing in almost all regular season and playoff games the previous season). At the same time that Weber was permanently placed on LTIR, Minnesota Wild GM Bill Guerin faced the identical contracts of Zach Parise and Ryan Suter. Both players were thirty-six years old and registered a \$7.5 million cap hit for four more years. Rather than seek full cap space reimbursement through LTIR, Guerin bought out both contracts. As a result, the Minnesota Wild incurred significant buyout cap penalties: \$12.7 million in 2022-23, and \$14.7 million in 2023-24 and 2024-25 (reflecting 15.6%, 18% and 18% of the entire Wild salary cap in each of these seasons).<sup>7</sup> Hossa, Weber, Lupul, Robidas and other such LTIR designations appeared circumstantially similar to those of Parise and Suter, yet the Wild were forced to suffer severe penalties that other similarly-situated teams did not.

These apparent divergences between teams' cap outcomes represent a liability for the NHL not only because they undermine the league's parity regime (certainly in appearance and perhaps in fact), but also because they may trigger a range of sensitive questions about the legitimacy of player injury classifications, including injury insurance filings. An ideal remedy would be to adjust the CBA rules so that awkwardly aligned LTIR cap management outcomes (i.e., Suter and Parise versus Lupul, Robidas, Hossa or Weber) are systemically avoided.

---

6. *Id.* at 262.

7. Emily Kaplan, *Minnesota Wild Buying Out Longtime Stars Zach Parise, Ryan Suter*, ESPN (July 13, 2021), [https://www.espn.com/nhl/story/\\_/id/31812188/minnesota-wild-buying-long-stars-zach-parise-ryan-suter](https://www.espn.com/nhl/story/_/id/31812188/minnesota-wild-buying-long-stars-zach-parise-ryan-suter).

Part I of this article will review the backstory of the NHL's current parity regime: the Dead Puck Era (1994-95-2003-04) and the 2004-05 lockout, which gave rise to the landmark 2005 CBA.

Part II will examine the evolution of the rules governing team salary cap management from 2005 through the present. First, under the 2005 CBA, from 2005-2012, GM's worked tirelessly to exploit certain grey areas, namely a contractual structuring practice known as the "retirement contract" which teetered on the edge of violating salary cap "circumvention" rules. Second, the 2013 CBA—modeled on the 2005 CBA—aimed to close the loopholes enabling putative retirement contracts by restricting contractual length and frontloading, and by establishing the "Cap Recapture Penalty." While the 2013 CBA succeeded in closing some loopholes, it did not address the potential strategic exploitation of LTIR. On July 10, 2020, facing COVID-19, NHL players and owners agreed to a Memorandum of Understanding (MOU) extending the 2013 CBA through September 15, 2026. Thus, the 2013 CBA remains the central NHL team management rule framework as of this writing.

Part III presents two possible remedies for the LTIR issues remaining in the wake of the 2013 CBA, which continue to put the NHL in an uncomfortable position, for example, facing PR liabilities, injury legitimacy investigations, and apparently unequal outcomes whereby some teams are able to escape backfiring contracts using LTIR while others are not so able.

## I. THE BACKSTORY OF THE NHL'S CURRENT PARITY REGIME

### A. *The Dead Puck Era Exposed the Necessity of Financial Parity*

As noted above, discussion of internal financial mechanisms of the NHL with reference to an on-ice outcome breaks with player culture. Since hockey's inception, coaches have always preached that players (of all ages) should avoid external "distractions" beyond their immediate task—defeating the opposing team they face on the ice—and that if players "put their heads down" and work hard, they will control their own destiny.

However, this uncharacteristic rise in player interest in salary cap rules has a precedent—another period during which financial issues spilled into wider hockey discourse and onto the ice: the "Dead Puck Era" from 1994-95 to 2003-04.

By 1994-95 the economics of the NHL began to create an increasingly wide resource gap between big and small market teams. For example, all three of the dynastic teams from the 80s and early 90s—the Islanders, Oilers, and

Penguins—endured severe financial struggles during this period.<sup>8</sup> After the New Jersey Devils deployed the neutral zone trap to great effect, for example, winning the 1994-95 Stanley Cup, small-market teams fighting asymmetrical battles against more talented big market teams with greater financial resources followed suit.<sup>9</sup> This translated into problematic on-ice gameplay—for example, in Game six of the 1999-2000 Eastern Conference Finals, the Devils eliminated the Toronto Maple Leafs, limiting the Leafs to a total of six shots on goal in the entire game.<sup>10</sup>

In 1998-99, 2001-02, 2002-03 and 2003-04, trapping teams featuring one solitary star player surrounded mostly by journeymen and grinders reached the finals, including the Buffalo Sabres (1998-99 with Dominik Hasek),<sup>11</sup> Carolina Hurricanes (2001-02 with Ron Francis),<sup>12</sup> Anaheim Ducks (2002-03 with Paul Kariya)<sup>13</sup> and Calgary Flames (2003-04 with Jarome Iginla).<sup>14</sup> A final illustration of these dynamics was the 2003-04 finals, which was so defensively tight and limited that in the entire seven game series, there was not a single lead change.<sup>15</sup> The reduction in game flow and drop in scoring

---

8. See Richard Sandomir, *Pickett Regains Ownership of Islanders*, N.Y. TIMES (July 12, 1997), <https://www.nytimes.com/1997/07/12/sports/pickett-regains-ownership-of-islanders.html>; *Sale of Oilers is Stymied by Edmonton Deal*, L.A. TIMES (Nov. 5, 1997), <https://www.latimes.com/archives/la-xpm-1997-nov-05-sp-50386-story.html>; Thomas Heath, *On Thin Ice, Penguins Saved*, WASH. POST (Oct. 7, 1999), <https://www.washingtonpost.com/wp-srv/sports/nhl/daily/oct99/07/mario7.htm>.

9. See *infra* notes 10-15.

10. *Maple Leafs Can Manage Only Six Shots in a Humbling Defeat*, L.A. TIMES (May 9, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-may-09-sp-28089-story.html>.

11. *1998-99 Buffalo Sabres Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/BUF/1999.html> (last visited May 2, 2023).

12. *2001-02 Carolina Hurricanes Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/CAR/2002.html> (last visited May 2, 2023).

13. *2002-03 Mighty Ducks of Anaheim Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/MDA/2003.html> (last visited May 2, 2023).

14. *2003-04 Calgary Flames Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/CGY/2004.html> (last visited May 2, 2023).

15. *2003-04 Stanley Cup Final Game 1, Calgary Flames vs. Tampa Bay Lightning Box Score: May 25, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200405250TBL.html> (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 2, Calgary Flames vs. Tampa Bay Lightning Box Score: May 27, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200405270TBL.html> (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 3, Calgary Flames vs. Tampa Bay Lightning Box Score: May 29, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200405290CGY.html> (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 4, Calgary Flames vs. Tampa Bay Lightning Box Score: May 31, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200405310CGY.html> (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 5, Calgary Flames vs. Tampa Bay Lightning Box Score: June 3, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200406030TBL.html> (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 6, Calgary Flames vs. Tampa Bay Lightning Box Score: June 5, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200406050TBL.html> (last visited May 2, 2023).

chances was likewise quantitatively reflected in statistics tracking gross goals scored per game year-to-year, where 2003-04 represented the NHL's lowest scoring season since 1955-56.<sup>16</sup>

The financial health of the NHL during this period was also disputed. NHL owners maintained that they were operating at a severe loss, while the NHLPA responded that such claims amounted to “creative accounting” excluding team profits which should have been included in a fair assessment of team and league finances.<sup>17</sup> Eventually, after the NHL entered a lockout, Arthur Levitt, former Chairman of the SEC, conducted a formal investigation of league finances; the *Levitt Report* supported the NHL's contention that the league was financially unhealthy.<sup>18</sup> In 2003-04, the NHL accrued almost \$2 billion in revenue, but suffered a combined \$273 million operating loss.<sup>19</sup> Also, there were drastic differences team-to-team: four teams had lost more than \$30 million each, and eight teams lost more than \$10 million.<sup>20</sup> Only eleven teams made a profit, and only two of those teams accrued profits of more than \$10 million.<sup>21</sup> Also, critically to the relationship between the NHL and the NHLPA, total player compensation was \$1.5 billion—seventy-five percent of total league revenue.<sup>22</sup>

After the lockout ensued and was finally resolved with a major league overhaul, Commissioner Gary Bettman tried to reach a broadcast agreement with ESPN, long viewed as instrumental to the NHL's growth in the early 1990s. Apparently left no reasonable choice, Bettman walked away and instead agreed to terms with the Outdoor Living Network (OLN), emphasizing that OLN would make the NHL a priority. ESPN's heavily trafficked website then demoted the NHL from a menu on its homepage (alongside the MLB, NBA and NFL) to a backup location alongside rugby and cricket.

In summary, the deterioration of the NHL during the Dead Puck Era stemmed from on-ice misalignments and tactical changes which reflected

---

hockey-reference.com/boxscores/200406050CGY.html (last visited May 2, 2023); *2003-04 Stanley Cup Final Game 7, Calgary Flames vs. Tampa Bay Lightning Box Score: June 7, 2004*, HOCKEY REFERENCE, <https://www.hockey-reference.com/boxscores/200406070TBL.html> (last visited May 2, 2023).

16. See *NHL League Averages*, HOCKEY REFERENCE, <https://www.hockey-reference.com/leagues/stats.html> (last visited May 2, 2023) (2003-04 NHL teams totaled 2.57 goals per game).

17. See JONATHON GATEHOUSE, *THE INSTIGATOR: HOW GARY BETTMAN REMADE THE NHL AND CHANGED THE GAME FOREVER* 99 (2012).

18. *Id.* at 100.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*



growing financial inequities between large and small market teams (as well as the weakness of the Canadian dollar relative to the US dollar). In response, small market franchises adopted the neutral zone trap and skill mitigation tactics to have a chance to defeat more skilled, big market teams. The big market teams recognized that their best response to the trap was to implement similar defensive systems. The result of these dynamics, embodied by the 2003-04 finals, was the deterioration of the NHL's on-ice product as a response to the financial conditions of teams across the league.

While such problems appeared daunting on the surface, it was still apparent (at least to Commissioner Bettman) that establishing financial parity between NHL teams would strengthen then NHL and alleviate one of the factors centrally driving the metastasis of the trap.

*B. Bettman's Powerplay: The 2005 CBA Ends the Dead Puck Era*

Gary Bettman assumed office as NHL Commissioner in 1993.<sup>23</sup> Previously, Bettman had served as General Counsel and Senior Vice President of the NBA, and was widely recognized as a key disciple and associate of heralded longtime NBA Commissioner David Stern.<sup>24</sup> Also relevant to Bettman's migration to the NHL was his role in developing the NBA's salary cap, which led to the accurate perception that Bettman aimed to bring a salary cap to the NHL so that player salaries would be tied to league revenue.<sup>25</sup>

The NHL's first labor stoppage under Bettman's tenure—delaying the 1994-95 season—arose at a critical point just before the Dead Puck Era. NHL revenues in the early 1990s were generally rising so that NHL ownership could not so easily raise objections about player salaries relative to league revenues.<sup>26</sup> Had Bettman's attempt to establish a cap framework before the 1994-95 season succeeded, it seems possible that at least some of the forces contributing to the Dead Puck Era would have been pre-empted. Looking back on the resolution of the 1994-95 stoppage years later, Bettman observed that the attempt to install a cap system fell to a paucity of owner solidarity.<sup>27</sup> However, as the NHL declined and the effects of the Dead Puck Era grew in magnitude, NHL ownership increasingly unified behind Bettman. In June

---

23. *Id.* at 2.

24. See Emily Sadler, *Gary Bettman on How David Stern Transformed Sports Landscape*, SPORTSNET (Jan. 3, 2020, 12:13 PM), <https://www.sportsnet.ca/hockey/nhl/gary-bettman-david-stern-transformed-sports-landscape/>.

25. GATEHOUSE, *supra* note 17, at 76.

26. *See id.* at 80.

27. *Id.* at 92-93.

2000, the NHL Board of Governors unanimously voted to empower Bettman not only to negotiate the next NHL-NHLPA Collective Bargaining Agreement, but further enabled Bettman to accept terms with a simple majority of owners, rather than two thirds.<sup>28</sup> In 2002, the Board awarded Bettman a new contract running through 2008, setting the stage for Bettman's support from NHL ownership upon the 2004 expiration of the existing CBA.<sup>29</sup>

For obvious reasons, the NHLPA opposed an NHL salary cap because this would restrict player compensation. However, the Levitt Report verified the league's general financial losses, the financial losses of individual teams, the glaring inequities between teams of different market sizes, and the relative proportion of NHL revenues pocketed by players (seventy-five percent) versus ownership (twenty-five percent).<sup>30</sup> Also, as noted above, even without knowledge of the league's financial struggles, hockey fans and players could not help but notice the deterioration of the on-ice game itself, generally signaling that reform was needed. The combination of most NHL owners losing money, their unification behind Bettman, and the perception that the NHL required a significant overhaul placed Bettman in a relatively strong negotiating position. Years later, Bettman reflected, "Our research showed that [fans] were supportive of what we were doing because they wanted the problems fixed. They didn't want a Band-Aid. They wanted better competitive balance and better economics in terms of franchise health and stability."<sup>31</sup>

The NHLPA, headed by Bob Goodenow, reportedly resisted Bettman's parity and revenue-sharing related proposals, leading to the cancellation of the entire 2004-05 season.<sup>32</sup> However, the reality that owners were losing money on hockey and the relatively short careers of most NHL players aligned the incentives towards players ultimately accepting Bettman's remedies, which is what transpired in the form of the landmark 2005 CBA between the owners and the players.

---

28. *Id.* at 95-96.

29. *Id.* at 96.

30. *Id.* at 100.

31. *Id.* at 110.

32. *See id.* at 105.

*C. The 2005 CBA Established a New and Highly Successful Financial Parity System for the NHL*

Today, the core conditions of the 2005 CBA between NHL owners and the NHLPA remains the bedrock legal scheme governing the NHL and NHL team management.

First, remedying years of allegations from both sides about “creative accounting” tinting reporting of the relative profits of the players or owners one way or the other, the 2005 CBA aimed to comprehensively collate and pool all “hockey related revenue” and systematically split this, fifty-fifty, between players and owners.<sup>33</sup>

Second, the fifty-fifty revenue split is reflected in a hard minimum and maximum salary cap for each team.<sup>34</sup> If total NHL revenue rises, then the cap for each team rises, and vice versa. In other words, with the 2005 CBA, league-wide (total) player salary became fixed as a percentage of league revenue. This fifty-fifty split represents a dramatic reversal from conditions in 2004, where player salaries reflected seventy-five percent of league revenue.<sup>35</sup> Notably, to achieve these arrangements and lower the proportion of league revenues earned by players, the 2005 CBA included a twenty-four percent rollback of all active NHL player contracts.<sup>36</sup>

Third, to ensure financial parity between NHL clubs and prevent under-the-table compensation to players outside the cap system, the 2005 CBA standardized NHL player contracts (SPCs).<sup>37</sup> The CBA imposed merger clauses on each SPC, so that, in theory, each team-player contract legally represents the totality of the agreements between the parties.<sup>38</sup> Recognizing that players should be recognized for exceptional performance and also milestone achievements, the 2005 CBA also established a framework for player performance bonuses, which are likewise standardized.<sup>39</sup>

---

33. See *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, NHL, § 50.1(a), at 160, § 50.4(b), at 193 (July 22, 2005), <http://www.letsgoopens.com/NHL-2005-CBA.pdf> [hereinafter *2005 NHL CBA*].

34. *Id.* § 50.5(b), at 198.

35. GATEHOUSE, *supra* note 17, at 100.

36. *Key Terms of NHL Agreement*, ESPN (July 13, 2005, 4:15 PM), <https://www.espn.com/nhl/columns/story?id=2107128>.

37. *2005 NHL CBA*, *supra* note 33, §11.1, at 40.

38. *Id.* § 11.9(b), at 48; see also *id.* Ex. 1, ¶ 19, at 253.

39. *Id.* § 11.7, at 48, § 50.2(b), at 1870-89; *id.* Ex. 5, at 260-62; see also *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, NHL, Ex. 38, at 479-80 (Feb. 15, 2013), <http://www.letsopens.com/NHL-2013-CBA.pdf> [hereinafter *2013 NHL CBA*].

Fourth, and critically, the 2005 CBA established a system of revenue sharing to ensure parity for teams irrespective of market size. Between this revenue sharing and the cap system, the small market teams would be equipped comparably to big market teams to acquire and/or retain elite players with high salaries.<sup>40</sup>

The architecture and terms of the 2005 CBA outwardly appeared to be a resounding victory for the owners over the players because of, for example, the twenty-four percent rollback in salaries and the general change from players pocketing seventy-five percent of league revenue down to fifty percent.<sup>41</sup> And, despite this, the players voted to ratify the new CBA—with eighty-seven percent in favor.<sup>42</sup> Given how these optics had the potential to further complicate (enflame) player-owner labor relations moving forward, Gary Bettman energetically presented his victory over the NHLPA and Goodenow as a win for both sides: Bettman maintained that the CBA would be mutually beneficial for both the players and the owners—the new 50/50 split (and full tracking of hockey revenues) would lead to a healthier relationship—partnership<sup>43</sup>—between the NHL and NHLPA. Just as emphatically, Bettman predicted that establishing financial parity between teams would translate into a healthier on-ice product and support NHL growth in new markets, benefitting all parties.<sup>44</sup>

While Bettman's stump speeches promoting the 2005 CBA agreement and highlighting the positive effects of establishing financial parity between teams might once have been regarded as far-fetched or made for effect, even the Commissioner's critics must concede today, in 2023, that his vision for parity has been successful. For example, the on-ice results were immediate: the 2005-06 Stanley Cup finals were by far the most offense-friendly and exciting championship series since the beginning of the Dead Puck Era, and also featured two small-market teams—Carolina and Edmonton.<sup>45</sup> In 2006-07, the

---

40. See *2005 NHL CBA*, *supra* note 33, art. 49, at 140.

41. Jed Hughes, *NHL Lockout; NHL is Skating on Thin Ice With Long Stoppage*, BLEACHER REP. (Oct. 11, 2012), <https://bleacherreport.com/articles/1367063-nhl-skates-on-thin-ice-impact-of-latest-lockout-in-nhl>; *Key Terms of NHL Agreement*, *supra* note 36.

42. GATEHOUSE, *supra* note 17, at 108.

43. See, e.g., RBK HOCKEY, *NHL CBA Press Conference (7-13-05)*, YOUTUBE, at 3:05-3:30; 23:25-23:45 (Oct. 18, 2012), <https://www.youtube.com/watch?v=BPsjrJnt7fQ>.

44. See, e.g., C-SPAN 2, *supra* note 1, at 15:00-15:25.

45. The 2005-06 championship Carolina team included five players who scored over 1000 career points—unrecognizably more skill-oriented than the Carolina team that trapped its way into the finals in 2002. See *2005-06 Carolina Hurricanes Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/CAR/2006.html> (last visited May 2, 2023); *Rod Brind'Amour*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/b/brindro01.html> (last visited May 2, 2023); *Ray Whitney*,

second season under the new CBA, an Anaheim Ducks team led by 3 (perhaps 4) Hall of Fame players won the Stanley Cup, likewise incomparably more talent-oriented than the Ducks team which grinded its way into the 2003 finals.<sup>46</sup> The Buffalo Sabres team which emerged from the lockout was possibly the most exciting and offense-minded team in the league and won multiple division championships—a diametric reversal from the Hasek-plus-grinders team that reached the 1999 Stanley Cup Finals.<sup>47</sup>

The reality that Bettman’s vision of an NHL invigorated by parity has actually transpired may have taken a few years to sink in, but it has in fact become a distinguishing characteristic of the NHL. In the 2016-17 NHL playoffs, Charles Barkley, the retired NBA star-turned formidable TNT basketball (and current events) commentator, criticized the NBA for its lack of competitive parity relative to the NHL—the NBA playoffs were perennially dominated by “super-teams,” leading to an extraordinarily high number of NBA playoff sweeps.<sup>48</sup> Barkley declared, “I’m just glad to be here because the NBA Playoffs have not been great, but the Stanley Cup Playoffs have been amazing.”<sup>49</sup> Asked what, specifically, he enjoyed about the NHL playoffs, Barkley compared the NHL to the exclusion of the NBA: “[n]umber one, you have no idea who is going to win—there’s not a single person who thought the Nashville Predators were going to be playing for the Stanley Cup

---

HOCKEY REFERENCE, <https://www.hockey-reference.com/players/w/whitnra01.html> (last visited May 2, 2023); *Mark Recchi*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/r/recchma01.html> (last visited May 2, 2023); *Eric Staal*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/s/staaler01.html> (last visited May 2, 2023); *Doug Weight*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/w/weightdo01.html> (last visited May 2, 2023).

46. *2006-07 Anaheim Ducks Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/ANA/2007.html> (last visited May 2, 2023).

47. *2006-07 Buffalo Sabres Roster and Statistics*, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/BUF/2007.html> (last visited May 2, 2023).

48. In the 2016-17 NBA playoffs, the favorite Golden State Warriors swept their first, second, and third round matchups and defeated Cleveland 4-1 in the finals. Cleveland had swept its first and second rounds and won in the Conference Finals 4-1. In other words, the two NBA finalists collectively lost one game in the first three rounds of the playoffs. Then, in the 2017-18 finals, the 2016-17 result repeated (Golden State defeating Cleveland) in yet another sweep. See *NBA 2017 Playoffs Information: Playoff Brackets*, LAND OF BASKETBALL.COM, [https://www.landofbasketball.com/yearbyyear/2016\\_2017\\_playoffs\\_brackets.htm](https://www.landofbasketball.com/yearbyyear/2016_2017_playoffs_brackets.htm) (last visited May 2, 2023); see also *NBA 2018 Playoffs Information: Playoff Brackets*, LAND OF BASKETBALL.COM, [https://www.landofbasketball.com/yearbyyear/2017\\_2018\\_playoffs\\_brackets.htm](https://www.landofbasketball.com/yearbyyear/2017_2018_playoffs_brackets.htm) (last visited May 2, 2023).

49. RED HIGHLIGHTS, *Charles Barkley Says the Cup Final is Better Than the NBA Finals*, YOUTUBE, at 1:15-1:20 (June 6, 2017), <https://www.youtube.com/watch?v=jWOpGhc24HA>.

Championship. I love that ability—like when the regular season ends, anybody has a chance.”<sup>50</sup>

Bettman’s vision of NHL growth through parity supported by revenue sharing and a hard cap might have sounded far-fetched in 2004—but in 2023, not only has this vision been achieved, but it has become a selling point and a boon for the modern NHL, increasing the marketability and general financial health of the league. Fifteen years after turning down an ESPN broadcast deal which rendered the NHL a secondary attraction and signing the NHL with the Outdoor Living Network, Bettman capped his success by signing dual new broadcast agreements between the NHL and both TNT and ESPN.<sup>51</sup>

The success of the 2005 financial parity architecture ultimately meant that the NHL community widely embraces parity as an aspirational principle. However, this also pivoted the “parity” issue from small market versus big market to what one might call “transactional parity,” i.e., a focus on equal and fair application of salary cap restriction rules as General Managers fight tooth and nail to create cap space.

## II. THE NHL SALARY CAP FRAMEWORK

The original 2005 CBA passed to end the 2004-05 lockout was succeeded by a new 2013 CBA (retaining the core revenue sharing and hard cap architecture from 2005) adopted by the NHL on February 15, 2013, and set to expire on September 15, 2022.<sup>52</sup> On July 10, 2020, facing the COVID-19 pandemic, the players and owners agreed to a provisional Memorandum of Understanding (MOU); the MOU extended the 2013 CBA through September 15, 2026.<sup>53</sup> Thus, today, the current NHL player transaction rules framework remains the 2013 CBA as slightly modified by the MOU. This chronology also traces the evolution of the NHL’s cap rules: the 2005 CBA fundamentally established financial parity – the cap system and revenue sharing. Then, from 2005-2012, NHL General Managers operating at the margins of the 2005 CBA exposed loopholes, namely relating to the use of “retirement contracts.” The 2013 CBA addressed the loopholes, but the controversial use of LTIR to

---

50. SPORTSNET, *Charles Barkley Loves the Parity of the NHL Playoffs*, YOUTUBE, at 0:50–1:06 (June 5, 2017), <https://www.youtube.com/watch?v=c4fFOu8nyeM>.

51. Brandon Costa, *NHL Commissioner Gary Bettman Excited For Growth Potential With Two National Rightsholders*, SVG NEWS (Oct. 21, 2021, 2:16 PM), <https://www.sportsvideo.org/2021/10/21/nhl-commissioner-gary-bettman-excited-for-growth-potential-with-two-national-rightsholders/>.

52. *2013 NHL CBA*, *supra* note 39, § 3.1, at 11.

53. *National Hockey League/National Hockey League Players’ Association Memorandum of Understanding*, NHLPA 1 (July 10, 2020), <https://www.nhlpa.com/the-pa/cba>.

relieve teams of the cap hits of aging players survived the 2013 CBA and remains a challenge for the NHL.

To fundamentally bind teams and players to the hard cap, the 2005 CBA channeled all financial dealings between teams and players into a one-size-fits-all contractual framework: the *Standard Player Contract* (SPC).<sup>54</sup> Each SPC includes merger and integration conditions, engendering parity between teams from different market sizes by forbidding any external agreements so that the terms of each SPC are supposed to comprise the totality of the financial relationship between the team and the player.<sup>55</sup>

Revenue sharing, the adoption of the hard cap and the SPC framework, and the exceptionless bar on external financial agreements and inducements between teams and players fundamentally established financial parity between NHL teams. As noted above, this instigated a shift: parity has become a question not of resources, but of fair application of the transactional rules governing contracts, trades, buyouts, injuries, retirements and other managerial transactions.<sup>56</sup> Teams are reportedly quick to file grievances (triggering NHL central office supervision) if they sense that any other team is bending rules to gaining an unfair competitive advantage.<sup>57</sup> All such questions lead back to the CBA rules governing transactions and putative loopholes.

#### A. NHL Contractual Structuring and Management Under the 2005 CBA

On the surface, the baseline 2005 CBA team management rules (which remain in practice today under the 2013 CBA) are elegantly simple. While actual player salaries may fluctuate year-to-year, the total amount paid to a player over the term of an SPC is averaged out over the course of the contract, producing an Average Annual Value (AAV)—the player's cap hit.<sup>58</sup> The AAV

---

54. 2005 NHL CBA, *supra* note 33, § 11.1, at 40.

55. *Id.* § 11.9(b), at 48; *see also id.* Ex. 1, ¶ 19, at 253.

56. *See* C-SPAN 2, *supra* note 1, at 23:00-23:26.

57. *See, e.g.,* 32 *Thoughts: The Podcast*, SPORTSNET, at 26:25 (July 16, 2021) (downloaded via Apple Podcasts); *see also id.* at 27:20 (Marek and Friedman reporting that “there are other teams who are saying that [Montreal’s LTIR designation of Shea Weber] is total BS.”).

58. *See* 2013 NHL CBA, *supra* note 39, § 50.5(d)(i), at 261. The only exception allowing NHL player salaries to fluctuate (after signature) is through performance bonuses, which are only available in three rare instances: (1) entry-level contracts, (2) one-year contracts for players over thirty-five (35+) and (3) one-year contracts for established players who miss significant time due to injury during their previous (contract) year before free agency. *See id.* at § 50.2(b)(i)(C)(2), 249. The value and performance thresholds for performance bonuses are strictly circumscribed and enumerated in the CBA itself. *See id.* § 11.7, at 48, § 11.9, at 48, § 50.2(b), at 247. Teams are allowed an extra 7.5% cap space “bonus cushion” (above the ceiling of the salary cap) for players who achieve bonuses, however, the amount by which teams surpass the

framework is rigid so that once a contract is signed, the cap hit is essentially “locked”: SPC’s may not be modified “in any manner whatsoever,” nor renegotiated, nor may they contain option clauses for voidable years.<sup>59</sup> While the CBA enables buyouts, the buyout may not deviate from the default cap penalty structure required under the CBA.<sup>60</sup>

The inevitable result of the rigidity of the NHL’s cap framework—which is necessary for the cap system to be successful—is that General Managers confronted with backfiring or burdensome long-term SPC’s must work extraordinarily hard and try everything possible to escape the contracts and create cap space. Thus, cap rule brinkmanship since 2005 has involved innovative schemes to alleviate problematic contracts, or to structure contracts in such a way that they are easier to manage in case of player under-performance.

One of the main reasons that these dynamics surfaced so prominently between 2005 and 2012 is that the 2005 NHL CBA generally and vaguely prohibited “cap circumvention,” but included virtually no further guidance on what types of contractual management or structuring practice constituted “cap circumvention.”<sup>61</sup>

Under this general, vague prohibition the 2005 CBA presented teams with a series of explicit and implicit tools for negotiating and managing long-term contracts, including (1) trades, (2) buyouts, (3) retirement, (4) LTIR, and (5) contractual “frontloading.” The outcomes of these dynamics from 2005-2012 were more pre-determined than it might appear because only retirement and LTIR enabled full cap relief without adverse consequences (whereas trades and buyouts of unwieldy contracts impose substantial costs).

---

salary cap ceiling is deducted from the team’s salary cap ceiling for the NHL season. *Id.* at § 50.5(h)(ii), 281.

59. *Id.* § 11.10, at 49 (no renegotiations), § 11.1(a), at 40 (no modifications), § 11.13, at 50 (no option clauses).

60. *Id.* § 50.9(i)(iii), at 289.

61. 2005 NHL CBA, *supra* note 33, § 26.3, at 115.

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 SPC, 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 intention 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.

*Id.* (emphasis added).



Trading a backfiring long-term contract was (and remains) an unattractive option because other teams likewise trying to maximize cap space are either unwilling to accept such contracts or demand a high price from the team in exchange for absorbing such a contract.<sup>62</sup>

The NHL buyout framework was (and remains) likewise a fallback option for a General Manager facing an unwieldy long-term contract. Under the CBA's mandatory buyout cap penalty schedule, players twenty-six years old and over are paid two-thirds of the value over the contract for double its duration.<sup>63</sup> Notably, this applies only to a player's base salary, and not annual signing bonuses—signing bonus compensation is immune from buyouts.<sup>64</sup> In other words, if a player had, for example, four years remaining on his contract at \$6 million per season (\$24 million total), a buyout of his contract would impose a penalty of \$16 million (two-thirds of the value) over eight years (double the term)—\$2 million annually for eight seasons. Adding the additional detail that signing bonuses must be paid to players (and count against the cap) immune from buyouts, the \$2 million annual penalty would increase commensurately with any signing bonuses.

In contrast to trades and buyouts, player retirement and Long-Term Injury Reserve (LTIR) have offered teams *full* relief from long-term contracts.<sup>65</sup> Under the 2005 CBA, the cap hits of retiring players disappeared upon retirement.<sup>66</sup> In addition, placing a player on LTIR in effect creates the equivalent amount of cap space (above the ceiling of the salary cap) occupied by the player. In other words, permanent placement of a player on LTIR – for the remaining duration for a long-term SPC – afforded the same relief as retirement under the 2005 CBA.<sup>67</sup> Also, the NHL has reportedly long retained an internal policy requiring insurance of long-term contracts so that ownership enjoys financial reimbursement of the salaries paid to players on LTIR.<sup>68</sup>

Thus, because neither retirement nor LTIR classification under the 2005 CBA imposed any of the negative repercussions of trading or buying out

---

62. See, e.g., Zach Leach, *Arizona Coyotes Acquire Andrew Ladd, Multiple Draft Picks*, PROHOCKEYRUMORS (July 17, 2021, 3:37 PM), <https://www.prohockeyrumors.com/2021/07/arizona-coyotes-acquire-andrew-ladd-multiple-draft-picks.html>.

63. See *2013 NHL CBA*, *supra* note 39, § 50.5(d)(iii), at 268-69, § 50.9(i)(i), at 288.

64. *Id.*

65. See *id.* § 50.10(d), at 290, § 50.5(b)(ii), at 258-59.

66. See generally *2005 NHL CBA*, *supra* note 33, § 11, at 40, § 26, at 115, §50, at 160.

67. See *2013 NHL CBA*, *supra* note 39, § 50.10(d), at 290, § 50.5(b)(ii), at 258-59.

68. Rick Westhead, *Concussions Could Ruin NHL Teams if Insurers Pull Coverage*, TORONTO STAR (Jan. 30, 2012), [https://www.thestar.com/sports/hockey/2012/01/30/concussions\\_could\\_ruin\\_nhl\\_teams\\_if\\_insurers\\_pull\\_coverage.html](https://www.thestar.com/sports/hockey/2012/01/30/concussions_could_ruin_nhl_teams_if_insurers_pull_coverage.html).

onerous long-term contracts, teams operating in the wake of the 2005 CBA could strategically aim for what became known as “*retirement contracts*,” i.e., strategically aiming for player retirement or permanent LTIR designation after their durability and effectiveness diminishes with age.

Retirement contracts have been enabled and amplified through a contractual structuring practice called “frontloading.” By negotiating SPC’s of longer duration (past the customary prime age period of a player), teams could lower a player’s AAV, and then simply clear the contract (before it expired) with the player’s retirement. From the player’s perspective, if the contract was “frontloaded,” for example, most of the value of the contract was paid early in its duration, the player could retire before the end of the contract without leaving much money on the table.

Unrestricted frontloading (unregulated under the 2005 CBA) also increased the possibility of relief via trade towards the end of such a contract, even when player performance had dropped in the extreme. Because the AAV framework leaves a player’s cap hit constant, frontloading actual salary towards the earlier seasons of a contract created a period later in the contract where player salary was far below his cap hit. Rebuilding teams seeking to reach the salary cap floor have strong incentives to trade for such contracts irrespective of player ability because a General Manager could pay a player \$1 million for a \$5 million cap hit, moving towards the cap floor without actually paying the amount of cap space absorbed. These dynamics produced many instances where rebuilding teams have traded for players with little or zero on-ice value because of their contractual status.

Thus, because frontloading was unregulated under the 2005 CBA, NHL General Managers were free to structure long-term contracts with the apparent ulterior motive of escaping those contracts through retirement or LTIR or trade once the value and performance of the player dropped. Accordingly, under the 2005 CBA and between 2005-06 and 2011-12, the vague and undefined “circumvention” rule on the one hand and the lack of restrictions on frontloading in tandem with the retirement and LTIR permissibility on the other spurred contracts which strained the limits of the framework.

For example: the Philadelphia Flyers signed Chris Pronger to a seven-year, \$34.55 million contract with AAV of \$4.94 million beginning at age thirty-six:

Year	C. Pronger Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2010-11	36	\$3m	\$4.6m	\$7.6m	\$4.94m
2011-12	37	\$1m	\$6.6m	\$7.6m	\$4.94m

2012-13	38	\$1m	\$6.2m	\$7.2m	\$4.94m
2013-14	39	\$1m	\$6m	\$7m	\$4.94m
2014-15	40	\$0	\$4m	\$4m	\$4.94m
2015-16	41	\$0	\$575K	\$575K	\$4.94m
2016-17	42	\$0	\$575K	\$575K	\$4.94m

69

Under the terms of this contract when signed, Pronger could plan to retire at age forty or forty-one having already pocketed most of the total salary of the contract. By adding the final two or three years, the Flyers were able to drive down Pronger's cap hit by stretching the total value of the contract over a longer period. For example, excluding the final three years, this contract pays \$29.4 million over four years, with an AAV/cap hit of \$7.35 million. By extending the contract to seven years, the cap hit is far lower. Under the 2005 CBA, if Pronger retired before the end of the contract, the Flyers would incur no penalty—the cap hit would simply disappear.<sup>70</sup> Also, if Pronger became too injured to play as he entered his forties, LTIR would relieve the Flyers of the cap hit and insurance would provide actual financial relief.

Likewise, the Boston Bruins signed Marc Savard to a similar seven-year, \$28.15 million contract with an AAV of \$4.02 million:

Year	M. Savard Age	Signing Bonus	Base Salary	Salary	Cap Hit
2010-11	33	0	\$7m	\$7m	\$4.02m
2011-12	34	0	\$7m	\$7m	\$4.02m
2012-13	35	0	\$6.5m	\$6.5m	\$4.02m
2013-14	36	0	\$5m	\$5m	\$4.02m
2014-15	37	0	\$1.5m	\$1.5m	\$4.02m
2015-16	38	0	\$575K	\$575K	\$4.02m
2016-17	39	0	\$575K	\$575K	\$4.02m

71

---

69. *Chris Pronger*, CAPFRIENDLY, <https://www.capfriendly.com/players/chris-pronger> (last visited May 2, 2023).

70. *Id.*

71. *Marc Savard*, CAPFRIENDLY, <https://www.capfriendly.com/players/marc-savard> (last visited May 2, 2023).

Pronger and Savard both sustained career ending concussions and stopped playing long before their contracts ended—both were placed on LTIR, effectively relieving the Flyers and Bruins of the respective cap hits.<sup>72</sup> Later, in the 2013 CBA, the Pronger contract was used as an example (with Pronger's name redacted) of a banned contractual practice constituting cap “circumvention.”<sup>73</sup>

There are also instances of similar contracts signed by players earlier in their careers than Pronger and Savard. Marian Hossa signed a twelve-year, \$63.3 million contract with the Chicago Blackhawks, and Roberto Luongo signed a twelve-year, \$64 million contract with the Vancouver Canucks, as follows:

Year	M. Hossa Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2009-10	30-31	0	\$7.9m	\$7.9m	\$5.275m
2010-11	31-32	0	\$7.9m	\$7.9m	\$5.275m
2011-12	32-33	0	\$7.9m	\$7.9m	\$5.275m
2012-13	33-34	0	\$7.9m	\$7.9m	\$5.275m
2013-14	34-35	0	\$7.9m	\$7.9m	\$5.275m
2014-15	35-36	0	\$7.9m	\$7.9m	\$5.275m
2015-16	36-37	0	\$7.9m	\$7.9m	\$5.275m
2016-17	37-38	0	\$4m	\$4m	\$5.275m
2017-18	38-39	0	\$1m	\$1m	\$5.275m
2018-19	39-40	0	\$1m	\$1m	\$5.275m
2019-20	40-41	0	\$1m	\$1m	\$5.275m
2020-21	41-42	0	\$1m	\$1m	\$5.275m

74

If Hossa's contract only included the first seven seasons (ages thirty–thirty-seven), his cap hit would have been \$7.9 million. Under the 2005 CBA, Hossa could simply retire in 2016 or 2017 having already pocketed most of the value of the contract and vacating his cap hit after the Blackhawks already

---

72. *NHL Careers Ended by Concussions*, SPORTS ILLUSTRATED (Apr. 17, 2013), <https://www.si.com/nhl/2013/04/17/17nhl-careers-ended-by-concussions#gid=ci0255c75e50082781&pid=chris-prongerjpg>.

73. See 2013 NHL CBA, *supra* note 39, § 50.5(d)(ii)(B)(1), at 267 (Illustration #3).

74. *Marián Hossa*, CAPFRIENDLY, <https://www.capfriendly.com/players/marian-hossa> (last visited May 2, 2023).

enjoyed the benefits of Hossa's prime years. The same principles applied to Luongo:

Year	R. Luongo Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2010-11	31-32	0	\$10m	\$10m	\$5.33m
2011-12	32-33	0	\$6.7m	\$6.7m	\$5.33m
2012-13	33-34	0	\$6.7m	\$6.7m	\$5.33m
2013-14	34-35	0	\$6.7m	\$6.7m	\$5.33m
2014-15	35-37	0	\$6.7m	\$6.7m	\$5.33m
2015-16	36-37	0	\$6.7m	\$6.7m	\$5.33m
2016-17	37-38	0	\$6.7m	\$6.7m	\$5.33m
2017-18	38-39	0	\$6.7m	\$6.7m	\$5.33m
2018-19	39-40	0	\$3.4m	\$3.4m	\$5.33m
2019-20	40-41	0	\$1.6m	\$1.6m	\$5.33m
2020-21	41-42	0	\$1m	\$1m	\$5.33m
2021-22	42-43	0	\$1m	\$1m	\$5.33m

75

The Blackhawks and Canucks recognized, obviously, that extending the duration of the Hossa and Luongo contracts would lower each player's AAV, enabling the signing of an elite player at a relatively reduced cap hit. And again, under the 2005 CBA, the Blackhawks and Canucks anticipated full cap relief if either player retired or suffered a career-ending injury.

All SPC's must be filed with and approved by the NHL league office.<sup>76</sup> If the NHL rejects rather than approves an SPC, this triggers an arbitration hearing between the NHL and the NHLPA.<sup>77</sup> Why did the NHL approve these contracts, which are designed to evade the cap framework? At what point would such a contract constitute "Circumvention"? If such a matter went to arbitration, the NHLPA was positioned to hammer the NHL on the vagueness of the 2005 CBA's "circumvention" rule—how could such a vague rule be construed as adequate notice to teams? How could lines be drawn inculcating some practices (SPC's) and not others? The NHL held its fire on Pronger, Savard, Luongo and Hossa—perhaps waiting for an even more extreme SPC.

---

75. *Roberto Luongo*, CAPFRIENDLY, <https://www.capfriendly.com/players/roberto-luongo> (last visited May 2, 2023).

76. See 2013 NHL CBA, *supra* note 39, § 11.3, at 41.

77. See *id.* § 11.2, at 40, § 11.6, at 42-45.

It was the New Jersey Devils who broke the stalemate by escalating retirement contract structuring practices underlying the Hossa and Luongo contracts to an extreme. Seemingly gambling that the vague “circumvention” framework could not be used to penalize such structuring practices, the Devils signed star forward Ilya Kovalchuk to a seventeen-year \$102 million contract on July 19, 2010.<sup>78</sup> The final six years of the contract each paid Kovalchuk under \$1 million, and spanned ages thirty-eight to forty-three.<sup>79</sup>

Year	Kovalchuk Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2010-11	27	N/A	N/A	\$6m	\$6m
2011-12	28	N/A	N/A	\$6m	\$6m
2012-13	29	N/A	N/A	\$11.5m	\$6m
2013-14	30	N/A	N/A	\$11.5m	\$6m
2014-15	31	N/A	N/A	\$11.5m	\$6m
2015-16	32	N/A	N/A	\$11.5m	\$6m
2016-17	33	N/A	N/A	\$11.5m	\$6m
2017-18	34	N/A	N/A	\$10.5m	\$6m
2018-19	35	N/A	N/A	\$8.5m	\$6m
2019-20	36	N/A	N/A	\$6.5m	\$6m
2020-21	37	N/A	N/A	\$3.5m	\$6m
2021-22	38	N/A	N/A	\$750K	\$6m
2022-23	39	N/A	N/A	\$550K	\$6m
2023-24	40	N/A	N/A	\$550K	\$6m
2024-25	41	N/A	N/A	\$550K	\$6m
2025-26	42	N/A	N/A	\$550K	\$6m
2026-27	43	N/A	N/A	\$550K	\$6m

80

Apparently deciding that the Kovalchuk contract was materially more extreme than Hossa and Luongo, the NHL acted, rejecting the Kovalchuk contract as a Section 26.3 “Circumvention” and triggering an arbitration confrontation with the NHLPA.<sup>81</sup> The NHL’s formal rejection letter contended that the Kovalchuk SPC amounted to a “retirement-contract.”<sup>82</sup>

---

78. Nat’l Hockey League v. Nat’l Hockey League Players Ass’n (*In re Kovalchuk Contract Arbitration*) (2010) (Bloch, Arb.) [hereinafter *In re Kovalchuk Contract Arbitration*].

79. *Id.*

80. *Id.* at 2.

81. Pertinent rules from the 2005 CBA: All SPC’s must be approved by the NHL. *See 2005 NHL CBA*, *supra* note 33, § 11.3, at 40. Any SPC contracts rejected by the NHL triggers a grievance and an arbitration

We believe the structure of the SPC on its face constitutes an impermissible “retirement-contract,” pursuant to which the parties can have no reasonable expectation of complete performance in accordance with its terms. By adding illusory years to the SC, the contract is structured so as to artificially decrease the Averaged Amount attributable to each year of the SPC, and therefore, to decrease the Club’s Averaged Club Salary in every year of the contract.<sup>83</sup>

As one might have predicted, the NHLPA responded citing the vagueness of “circumvention” under the 2005 CBA: since the alleged “Circumvention” of the Kovalchuk SPC was not directly identified as forbidden, then how could the structure of this SPC constitute “Circumvention”? The NHL maintained that its broad authority under Section 26.3 was enough to block SPC’s running afoul of “Circumvention,” generally, even if the 2005 CBA did not provide detailed guidance on “Circumvention.” Arbitrator Bloch sided with the NHL against the NHLPA, holding:

The overall structure of this SPC reflects not so much the hope that Mr. Kovalchuk will be playing in those advanced years, but rather the expectation that he will not. This is a long contract—17 years—the longest in NHL history . . . But Kovalchuk is 27 years old, and the agreement contemplates his playing until just short of his 44<sup>th</sup> birthday. That is not impossible, but it is, at the least, markedly rare. Currently, 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.<sup>84</sup>

The elements of this Agreement are unique. They include the age of the Player, the dramatic diveback after 11 years, the notable frontloading of the compensation, the relatively minimal payment during the 6-year tail of the contract and the clear incentives and ability of the team to move the Player out

---

proceeding to issue a binding resolution the dispute. *Id.* § 11.1, at 40, § 48, at 137. NHL SPC rejections are allowed based on alleged cap circumvention. *Id.* § 11.6, at 40, § 26.3, at 115.

82. *In re Kovalchuk Contract Arbitration*, *supra* note 78, at 3.

83. *Id.*

84. *Id.* at 17.

and likely rid itself of the continuing salary cap burden during the out years of the contract. All this supports the League's conclusion that it is reasonably unlikely the last years of this contract will be performed. The record reflects that the result of this SPC, considered in its entirety, is to artificially extend the term of that 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.<sup>85</sup>

The resolution to the NHL's victory over the NHLPA in the *Kovalchuk* arbitration proceeding included settlement ramifications for both the New Jersey Devils and for the NHLPA. The Devils were penalized with the confiscation of several draft picks, and the NHL agreed to approve a new Kovalchuk contract for fifteen years at \$100 million, as opposed to seventeen years at \$102 million.<sup>86</sup>

Perhaps obviously, the proceeding raised the issue of SPC structuring generally across the NHL, as well as the Pronger, Savard, Luongo and Hossa contracts, which were still on the books at the time. As part of the resolution to the Kovalchuk dispute, the NHL and NHLPA amended the 2005 CBA to include modest interim rules limiting contractual frontloading, namely raising the minimum annual salary for an SPC to \$1 million.<sup>87</sup> The NHL also agreed not to retroactively review the Pronger, Savard, Luongo and Hossa contracts under its rejection authority, applying these new interim rules only to SPC's signed after September 4, 2010.<sup>88</sup>

With the 2005 CBA set to expire after the 2011-12 season, in 2010, the NHL and NHLPA reached an interim agreement resolving the Kovalchuk case pending the next CBA: they raised the minimum SPC annual salary to \$1 million.<sup>89</sup> In other words, for a small window—2010-12—teams could seemingly offer SPC's structured very similarly to the Savard, Pronger, Hossa and Luongo contracts so long as the contracts had an annual salary floor of \$1 million. In effect, teams were confronted with the question of whether the

---

85. *Id.* at 19.

86. *Ilya Kovalchuk*, CAPFRIENDLY, <https://www.capfriendly.com/players/ilya-kovalchuk> (last visited May 2, 2023).

87. *NHL, NHLPA Reach Agreement Governing Long-Term Contracts*, NHL (Sept. 4, 2010), <https://www.nhl.com/news/nhl-nhlpa-reach-agreement-governing-long-term-contracts/c-536880>.

88. *Id.*

89. *Id.*



NHL would reject contracts structured more moderately than Hossa and Luongo and thereby trigger another arbitration hearing with the 2012 CBA negotiations approaching. They apparently concluded that this was unlikely.

Accordingly, following the *Kovalchuk* settlement, teams apparently recognized that they had a two-season window during which the only additional restriction was the \$1 million floor interim agreement between the NHL and NHLPA. Accordingly, many more heavily frontloaded contracts were signed between Sept. 4, 2010, and the expiration of the CBA in 2012, notably including Shea Weber (fourteen years, \$110 million) and Zach Parise/Ryan Suter (thirteen years, \$98 million apiece).<sup>90</sup>

Year	Weber Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2012-13	27	\$13m	\$1m	\$14m	\$7.86m
2013-14	28	\$13m	\$1m	\$14m	\$7.86m
2014-15	29	\$13m	\$1m	\$14m	\$7.86m
2015-16	30	\$13m	\$1m	\$14m	\$7.86m
2016-17	31	\$8m	\$4m	\$12m	\$7.86m
2017-18	32	\$8m	\$4m	\$12m	\$7.86m
2018-19	33	\$0	\$6m	\$6m	\$7.86m
2019-20	34	\$0	\$6m	\$6m	\$7.86m
2020-21	35	\$0	\$6m	\$6m	\$7.86m
2021-22	36	\$0	\$6m	\$6m	\$7.86m
2022-23	37	\$0	\$3m	\$3m	\$7.86m
2023-24	38	\$0	\$1m	\$1m	\$7.86m
2024-25	39	\$0	\$1m	\$1m	\$7.86m
2025-26	40	\$0	\$1m	\$1m	\$7.86m

<sup>91</sup>

Year	Suter/Parise Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2012-13	27-28/28	\$10m	\$2m	\$12m	\$7.54m
2013-14	28-29/29	\$10m	\$2m	\$12m	\$7.54m
2014-15	29-30/30	\$5m	\$6m	\$11m	\$7.54m
2015-16	30-31/31	\$0	\$9m	\$9m	\$7.54m

90. *Shea Weber*, CAPFRIENDLY, <https://www.capfriendly.com/players/shea-weber> (last visited May 2, 2023); *Zach Parise*, CAPFRIENDLY, <https://www.capfriendly.com/players/zach-parise> (last visited May 2, 2023); *Ryan Suter*, CAPFRIENDLY, <https://www.capfriendly.com/players/ryan-suter> (last visited May 2, 2023).

91. *Shea Weber*, *supra* note 90.

2016-17	31-32/32	\$0	\$9m	\$9m	\$7.54m
2017-18	32-33/33	\$0	\$9m	\$9m	\$7.54m
2018-19	33-34/34	\$0	\$9m	\$9m	\$7.54m
2019-20	34-35/35	\$0	\$9m	\$9m	\$7.54m
2020-21	35-36/36	\$0	\$8m	\$8m	\$7.54m
2021-22	36-37/37	\$0	\$6m	\$6m	\$7.54m
2022-23	37-38/38	\$0	\$2m	\$2m	\$7.54m
2023-24	38-39/39	\$0	\$1m	\$1m	\$7.54m
2024-25	39-40/40	\$0	\$1m	\$1m	\$7.54m

92

The Weber, Parise and Suter contacts (as well as many others signed during the aforementioned 2010-12 window) illustrate how the *Kovalchuk* settlement's imposition of a \$1 million floor registered almost no effect on the "retirement contracts" phenomenon in dispute between the NHL and NHLPA. A flurry of additional frontloaded SPC's signed before the post-*Kovalchuk* window closed set the stage for the CBA negotiations of 2012-13.

#### B. The 2013 CBA

According to the memoirs of Brian Burke, the fifty-fifty revenue split between owners and players—which had been the aim of the 2005 CBA—slipped between 2005 and 2012 to fifty-seven–forty-three in favor of players.<sup>93</sup> Therefore, per Burke, Commissioner Bettman's overwhelming priority in the 2012-13 CBA negotiations (on behalf of owners) was to negotiate adjustments restoring the fifty-fifty split, so as to end the work stoppage as quickly as possible.<sup>94</sup> However, Burke contends that the priority of NHL *General Managers* had been to close cap circumvention loopholes, preventing teams from securing an unfair advantage over others with contractual structuring brinkmanship.<sup>95</sup> Burke thereby couches the 2013 CBA as a reflection of NHL owner interests—ending the work stoppage—at the cost of punting on salary cap rule reform.<sup>96</sup>

---

92. Ryan Suter, *supra* note 90; Zach Parise, *supra* note 90.

93. BURKE & BRUNT, *supra* note 5, at 263.

94. *Id.* at 263.

95. *Id.* at 261-62.

96. *Id.* at 262.

The 2013 CBA carried over the 2005 CBA's broad general authority forbidding "Circumvention," verbatim.<sup>97</sup> Beyond this, the 2013 CBA further established a series of more concrete rules to pre-empt frontloaded or retirement-ilk contracts such as those of Pronger, Savard, Hossa, Luongo, the second (accepted) Kovalchuk contract, Weber, Parise and Suter and others. These adjustments included (1) the "Cap Recapture Penalty" (imposing a cap penalty when players on frontloaded SPC's retire before the end of the contract), (2) a seven-to-eight-year maximum limit on the length of SPC's, (3) restrictions on the degree of permissible frontloading, and (4) a two-year "compliance buyout" option enabling teams holding pre-existing frontloaded SPC's (now retroactively subject to the 2013 CBA framework) to buy out those contracts without suffering cap damage.

The Cap Recapture penalty is imposed on teams using a mathematical formula calculating the amount of cap money saved by a team when a player signed to a frontloaded long-term SPC retires (officially) before the end of the SPC.<sup>98</sup> In other words, it penalizes the degree to which the contract has been stretched out into a player's probable retirement years to lower that player's cap hit. The 2013 CBA used the Pronger contract (also presented above) as an example:

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6*	Year 7*
Pronger Age	36	37	38	39	40	41	42
Salary	\$7.6M	\$7.6M	\$7.2M	\$7.0M	\$4.0M	\$1.0M	\$600K

---

97. See 2005 NHL CBA, *supra* note 33, § 26.3, at 115; 2013 NHL CBA, *supra* note 39, § 26.3, at 159 (Section 26.3 is identical in both the 2005 and 2013 NHL CBA).

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 SPC, 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 intention 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.

*Id.*

98. See 2013 NHL CBA, *supra* note 39, § 50.5(d)(ii)(B)(1), at 266.

AAV	\$5.0M	\$5.0M	\$5.0M	\$5.0M	\$5.0M	\$5.0M	\$5.0M
\$\$ saved	\$2.6M	\$2.6M	\$2.2M	\$2M	\$-1M	-	-
Penalty	-	-	-	-	-	\$4.2M	\$4.2M

99

If Pronger retired after year five at age forty, the Flyers would have saved a total of \$8.4 million through structuring between years one and five. With the Cap Recapture Penalty applied, this sum is then imposed as a penalty over the final two (non-performed) seasons of the contract following Pronger's retirement.

The 2013 CBA established contractual duration limits: the maximum permissible length for *re-signings* is eight years while the maximum length for *free agent* signings (of players from other teams) is seven years.<sup>100</sup> However, this adjustment instituted a spike in maximum duration (i.e. eight-year) contracts: elite players nearing unrestricted free agency now routinely face scenarios where their previous team points out that the player's likely best gross financial option is re-signing with an eight-year contract because another team would struggle to match the same value with a seven-year contract. Therefore, despite lowering the ceiling for contractual duration generally, these durational limits ironically guarantee a steady stream of expensive contracts carrying far past the recognized prime years of a professional athlete.

The 2013 CBA also constrained frontloading with salary "variability rules."<sup>101</sup> These rules hold that a player's total salary per year (base salary + signing bonus for that season) may not deviate by more than thirty-five percent from that player's salary in the first year of their SPC.<sup>102</sup> Also, a player's salary per year (base salary + signing bonus for that season) may never be less than half (fifty percent) of the highest yearly salary included in the contract. In other words, we will no longer see new contacts with most of the compensation paid in the earliest seasons and ending with only \$1 million per year paid in the final seasons (compare Hossa, Weber, Parise, Suter, etc.).

While all of these adjustments clamped down on "retirement contract" structures, they failed to address one key loophole: instead of having players signed to retirement contracts retire (triggering the cap recapture), teams could

---

99. *Id.* § 50.5(d)(ii)(B)(1), at 267.

100. *Id.* § 50.8(b)(iv), at 285.

101. *Id.* § 50.7(a)-(b), at 282-84.

102. *Id.* § 50.7(a), at 282.

permanently place such a player on LTIR; nothing in the 2013 CBA prevents a team from signing a player through their late thirties or early forties, and then effectively relieving the entire cap hit after the player's health and durability diminishes with age.

### *C. The Implementation and Aftermath of the 2013 CBA*

The 2013 CBA was adopted by the NHL on February 15, 2013, ending a half-season lockout so that the 2012-13 season was shortened to only forty-eight games.<sup>103</sup> The impact of the 2013 CBA rule adjustments is most easily understood in terms of its effects on (A) pre-existing contracts, especially those transgressing the new limitations, and (B) new contracts.

As reviewed above, after the 2005 CBA, many teams signed players to what the NHL termed "frontloaded" or "retirement" contracts which remained active as of the 2013 CBA. After the *Kovalchuk* case inculcated such practices but left the loophole in place, teams hurried to sign elite players to retirement (ilk) contracts: if the NHL declined to repudiate the Hossa and Luongo contracts, they could not reasonably penalize teams for signing other players to similar contracts, more moderate than the rejected Kovalchuk contract. These dynamics produced Weber, Parise and Suter, and other similar contracts signed in the two seasons before the 2013 CBA.

Under the 2013 CBA, the Cap Recapture Penalty was retroactive—i.e., binding on pre-2013 contracts. Therefore, teams which had signed expensive frontloaded contracts faced extreme penalties if a such a player officially retired before its end: would Marian Hossa play until age forty-two, earning only \$1 million per season from ages thirty-nine to forty-two? Would Shea Weber, a rugged defenseman, play until age forty? Would Roberto Luongo, a goaltender, be able to play until age forty-three? Would Ryan Suter and Zach Parise together make it to age forty? There were yet more examples, such as Brad Richards of the Rangers<sup>104</sup> and Vincent Lecavalier of the Lightning,<sup>105</sup> who appeared to be wearing down with many years left on their contracts. As of the 2013 CBA, teams holding such contracts faced the serious threat of future Cap Recapture Penalty damage.

---

103. Kevin Allen, *NHL Schedule Released, Features 48 Games in 99 Days*, USA TODAY (Jan. 13, 2013, 2:26 AM), <https://www.usatoday.com/story/sports/nhl/2013/01/12/nhl-schedule-48-games/1829661/>.

104. *Brad Richards*, CAPFRIENDLY, <https://www.capfriendly.com/players/brad-richards> (last visited May 2, 2023).

105. *Vincent Lecavalier*, CAPFRIENDLY, <https://www.capfriendly.com/players/vincent-lecavalier> (last visited May 2, 2023).

While the 2013 CBA anticipated these dynamics, its remedy, “compliance buyouts,” arguably failed. The 2013 CBA compliance buyout framework allowed each NHL team two special buyouts—*without* any cap penalty—to be executed following either the 2012-13 or 2013-14 season.<sup>106</sup> In essence, the compliance buyout framework encouraged teams to review pre-existing frontloaded SPC’s which might trigger serious liabilities in future years, including in cases where players were performing well in 2013 but whose contracts might nonetheless inflict cap recapture penalty damage many years later.

In cases where players signed to such contracts seemed to be slowing down (Richards and Lecavalier), the Rangers and Lightning pulled the trigger. This was particularly painful for the Lightning because Lecavalier was the franchise’s original first draft pick, the captain, and had led the team to a Championship in 2004—but the Lightning anticipated that Lecavalier’s contract would eventually become burdensome.

However, most of the players signed to pre-2013 CBA frontloaded or retirement-ilk contracts—the players for whom the “compliance buyout” was ostensibly designed—were in their prime and showed no signs of slowing down. The Blackhawks, holding the twelve-year contract of Hossa and the thirteen-year contract of Duncan Keith,<sup>107</sup> were about to win their second of three championships (2010, 2013, and 2015), centrally relying on both players. Shea Weber, Luongo, Zach Parise and Ryan Suter—elite players—were all in their primes. While these contracts were the most extreme pre-2013 CBA contracts (in terms of length and structuring), they represent a mere fraction of the frontloaded contracts across the NHL signed before 2013. Compliance buyouts were applied vigorously—but overwhelmingly to players who were underperforming their immediate cap hit. Thus, many of the key pre-2013 “retirement”, or “frontloaded”, contracts survived the cap recapture penalty—teams kept their elite players with problematic contracts, kicking the can down the road to address such liabilities at a later date, and not with a compliance buyout. This decision pointed directly at the possibility of permanent LTIR designation.

Separately from the question of pre-2013 frontloaded contracts continuing past 2013 and surviving the compliance buyout window, the 2013 CBA guarantees continued future scenarios where general managers face prohibitive

---

106. See 2013 NHL CBA, *supra* note 39, § 50.9(h)(i)(ii), at 288 (by rule, players subject to a compliance buyout were not allowed to re-sign with that same team).

107. *Duncan Keith*, CAPFRIENDLY, <https://www.capfriendly.com/players/duncan-keith> (last visited May 2, 2023); *Marián Hossa*, *supra* note 74.

long-term SPC's stretching into players' late thirties: this is because of (A) the seven-versus-eight-year contract duration rule and (B) the emergence of the *buyout-immune contract*.

As noted above, the 2013 CBA established a maximum contractual limit of seven years for free agent signings of players from other teams, and a contractual limit of eight years for re-signings.<sup>108</sup> This leads to a pattern: elite players reach their contract year, and their team wants to prevent the player from reaching free agency and signing elsewhere. The team offers the player an eight-year contract through the player's mid or late thirties, pointing out that in free agency, to match value of the eight-year contract offer, another team would have to squeeze the same amount into a seven-year offer (unlikely). From the player's perspective, because either a seven or eight-year contract will expire in the player's mid or late thirties, an additional contract with a high AAV is unlikely. Therefore, purely in economic terms, the player's likely best option is to accept the eight-year deal rather than test unrestricted free agency. Thus, as one might expect, the aftermath of the 2013 CBA (through the present) witnessed a spike in eight-year extensions. Therefore, despite of the 2013 CBA's reforms limiting SPC duration, NHL general managers will continue to regularly navigate long-term SPC's of players in their mid or late thirties. Two case-in-point examples of this post-2013 eight-year extension contract pattern are Brent Burns and Carey Price.

In 2015-16, Burns had a brilliant season, and was in the process of topping it in his contract year of 2016-17, after which time he would be an unrestricted free agent. On November 22, 2016, Burns signed an eight-year contract extension with San Jose, to begin in 2017-18, when Burns was already thirty-one years old.

Year	Burns Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2017-18	32-33	\$7m	\$3m	\$10m	\$8m
2018-19	33-34	\$6m	\$4m	\$10m	\$8m
2019-20	34-35	\$5m	\$5m	\$10m	\$8m
2020-21	35-36	\$8m	\$2m	\$10m	\$8m
2021-22	36-37	\$3.5m	\$4m	\$7.5m	\$8m
2022-23	37-38	\$3.5m	\$3m	\$6.5m	\$8m
2023-24	38-39	\$2m	\$3m	\$5m	\$8m

---

108. 2013 NHL CBA, *supra* note 39, § 50.8(b)(iv), at 285.

2024-25	39-40	\$2m	\$3m	\$5m	\$8m
---------	-------	------	------	------	------

109

The distinction between the Burns contract (post-2013 CBA) and those of Hossa, Weber, Parise, Suter (pre-2013) is self-evident. Because of the 2013 CBA limitations on frontloading, the final three years of Burns' contract still carry a significant annual salary, presenting a potential challenge if Burns declines as he approaches age forty. Ultimately, because of Burns' elite performance as he approached unrestricted free agency, the Sharks apparently made the decision to lock up Burns for his remaining elite seasons and try to find a solution for the later years of the contract down the line. That solution materialized after 2021-22, when the Sharks—rebuilding—traded Burns (age thirty-seven) to Carolina while retaining \$2.7 million in cap space per season.<sup>110</sup>

The exact same analysis applied to Carey Price. Price was eligible to become an unrestricted free agent on July 1, 2018. Under the 2013 CBA, extensions may be signed up to one year before free agency.<sup>111</sup> The Canadiens wasted no time. On July 2, 2017, they signed Price to an eight-year \$84 million extension on the second day he was eligible to sign such an agreement—one full year before he was set to reach free agency.<sup>112</sup> In other words, Price's new agreement did not begin until 2018-19—at age thirty-one.

Year	Price Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2018-19	31	\$13m	\$2m	\$15m	\$10.5m
2019-20	32	\$13m	\$2m	\$15m	\$10.5m
2020-21	33	\$8.75m	\$1m	\$9.75m	\$10.5m
2021-22	34	\$11m	\$2m	\$13m	\$10.5m
2022-23	35	\$6.75m	\$1m	\$7.75m	\$10.5m
2023-24	36	\$6.5m	\$2m	\$8.5m	\$10.5m
2024-25	37	\$5.5m	\$2m	\$7.5m	\$10.5m
2025-26	38	\$5.5m	\$2m	\$7.5m	\$10.5m

113

---

109. *Brent Burns*, CAPFRIENDLY, <https://www.capfriendly.com/players/brent-burns> (last visited May 2, 2023).

110. *Id.*

111. *2013 NHL CBA*, *supra* note 39, § 50.5(f)(ii), at 278-79.

112. *Carey Price*, CAPFRIENDLY, <https://www.capfriendly.com/players/carey-price> (last visited May 2, 2023).

113. *Id.*



Just as the Sharks had done with Burns, the Canadiens calculated that the benefit of signing Price for his remaining prime outweighed any problems which might arise later in the contract due to age and performance.<sup>114</sup>

The Price contract highlights the other main reason that the 2013 CBA framework points towards continued awkward scenarios where GM's navigate long-term SPC's active in players' late thirties: the "buyout immune" contract. As noted above, under the CBA, buying out a contract means that the player is still paid two-thirds of the value of the contract over twice its remaining length (which is expressed as a cap penalty).<sup>115</sup> However, as also noted above, this *only* applies to a player's base salary—not to annual signing bonuses.<sup>116</sup> If the Canadiens applied a buyout to Carey Price, they would receive almost zero cap relief: the buyout would apply to \$1-2 million per season, and all the full signing bonuses would still be due to Price.

In the past couple of seasons, buyout immune contracts have suddenly spiked in frequency—many of the eight-year extensions and re-signings signed to pre-empt unrestricted free agency are structured to be buyout-immune. For example, in August 2021, a year before UFA eligibility, Sean Couturier signed eight-year \$62 million extension with the Flyers, which is effectively buyout-immune, and runs until age thirty-seven.<sup>117</sup>

Year	Couturier Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2022-23	29-30	\$6m	\$1.75m	\$7.75m	\$7.75m
2023-24	30-31	\$5m	\$4m	\$9m	\$7.75m
2024-25	31-32	\$5m	\$4m	\$9m	\$7.75m
2025-26	32-33	\$5m	\$4m	\$9m	\$7.75m
2026-27	33-34	\$6m	\$1.75m	\$7.75m	\$7.75m
2027-28	34-35	\$5m	\$1.5m	\$6.5m	\$7.75m
2028-29	35-36	\$5m	\$1.5m	\$6.5m	\$7.75m

114. See Conor McKenna, *Dreger: What Does the Future Hold For Carey Price?*, TSN, at 3:38-4:30 (May 2, 2022), <https://www.tsn.ca/radio/montreal-690/dreger-what-does-the-future-hold-for-carey-price-1.1793974>; see also *infra* note 187 and accompanying text.

115. See *2013 NHL CBA*, *supra* note 39, § 50.5(d)(iii), at 268-69, § 50.9(i)(i), at 288.

116. See *id.*

117. On December 18, 2021, Couturier suffered a back injury; then, on February 11, 2022, the Flyers announced that Couturier was undergoing back surgery and would be out for the season. Olivia Reiner, *Flyers Center Sean Couturier Out For the Season After Undergoing Successful Back Surgery*, PHILA. INQUIRER (Feb. 11, 2022), <https://www.inquirer.com/flyers/flyers-couturier-surgery-fletcher-ellis-season-20220211.html>.

2029-30	36-37	\$5m	\$1.5m	\$6.5m	\$7.75m
---------	-------	------	--------	--------	---------

118

Likewise, also in August 2021, Darnell Nurse signed an eight-year \$74 million buyout-immune extension with the Oilers:

Year	Nurse Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2022-23	27-28	0	\$12m	\$12m	\$9.25m
2023-24	28-29	0	\$10.4m	\$10.4m	\$9.25m
2024-25	29-30	0	\$12m	\$12m	\$9.25m
2025-26	30-31	0	\$10m	\$10m	\$9.25m
2026-27	31-32	\$6m	\$2m	\$8m	\$9.25m
2027-28	32-33	\$6m	\$1.2m	\$7.2m	\$9.25m
2028-29	33-34	\$6m	\$1.2m	\$7.2m	\$9.25m
2029-30	34-35	\$6m	\$1.2m	\$7.2m	\$9.25m

119

By signing players to eight-year buyout immune extension contracts, teams across the NHL are wagering that the value they will receive from these players' remaining prime seasons—into their mid and late thirties—will outweigh difficulties they may face on the back end, *even if* they forego buyouts as a remedy. Why? Because part of the strategic calculus is the availability of LTIR.

#### *D. The Elephant in the Room following the 2013 CBA: Permanent LTIR Designations*

As noted throughout this article, since the 2005 CBA, teams have had the capacity to use Long-Term Injury Reserve (LTIR) to effectively alleviate the full cap hit of injured players. Under the 2013 CBA, if LTIR is invoked, the player must be unable to play for a minimum of twenty-four calendar days and ten regular season games.<sup>120</sup> The backdrop to Dougie Hamilton's comments about Tampa Bay and Nikita Kucherov in the 2021 playoffs stems from the LTIR rule that teams may exceed the cap in the playoffs; in effect, teams have the option of keeping players on LTIR during the regular season and then

118. *Sean Couturier*, CAPFRIENDLY, <https://www.capfriendly.com/players/sean-couturier> (last visited May 2, 2023).

119. *Darnell Nurse*, CAPFRIENDLY, <https://www.capfriendly.com/players/darnell-nurse> (last visited May 2, 2023).

120. *2013 NHL CBA*, *supra* note 39, § 50.10(d), at 290. *See also id.* Ex. 1, ¶¶ 5(g)-(i), at 313-14.

activating those players for the playoffs, when this would have put the team over the cap during the regular season.<sup>121</sup>

The 2013 CBA framework provides for the reality that LTIR designations might be controversial, and may trigger investigations or grievances, requiring an assessment by a neutral physical exam where the physician is jointly selected by the NHLPA and the league.<sup>122</sup> Because certain LTIR designations were increasingly questioned between 2013 and 2020, the July 10, 2020 MOU, which extended the 2013 CBA in lieu of COVID, further hashed out the framework for securing independent medical opinions in case of contested LTIR designations.<sup>123</sup>

Casting a shadow over the LTIR framework is the NHL's SPC merger and integration conditions. As noted above, the 2005 and 2013 CBAs strictly instruct that SPC's reflect the totality of the agreements between a player and a team—no "outside" agreements are permitted because this would undermine the league's parity protections.<sup>124</sup> The bar against outside agreements is also reaffirmed in the terms and conditions of SPC directly.<sup>125</sup>

However, at the same time, it is a matter of fact that such outside agreements transpire. For example, in 2015-16, the Flyers and Kings agreed to a trade which would send Vincent Lecavalier to Los Angeles when Lecavalier had one additional year remaining on his contract. Before executing the trade, the Kings reportedly informed Lecavalier that they could proceed only if Lecavalier agreed to retire after the season, leaving the remaining year of his contract on the table.<sup>126</sup> Lecavalier apparently agreed, despite the CBA rule forbidding agreements outside of SPC's.<sup>127</sup> After the trade was processed, Lecavalier played well for the remainder of the season, and reportedly raised questions about whether he might come back for the final season of his

---

121. *See id.* § 50.10(d), at 290, § 50.5(b)(ii), at 258 (as noted above, the Vegas Golden Knights appeared on track to do this in 2021-22 with Jack Eichel and Mark Stone—activating Eichel and LTIR'ing Stone—but the team missed the playoffs).

122. *Id.* § 50.10(d), at 290.

123. *See National Hockey League/National Hockey League Players' Association Memorandum of Understanding*, *supra* note 53, at ¶¶ 32-37 & MOU Attachments B-F.

124. *2013 NHL CBA*, *supra* note 39, § 11.9(b), at 48; *see also* Ex. 1, ¶ 19, at 313-14.

125. *Id.* § 11.9(b), at 48.

126. *Vinny Lecavalier Traded From Flyers to Kings, Will Retire at Season's End*, TAMPA BAY TIMES (Jan. 6, 2016), <https://www.tampabay.com/sports/hockey/lightning/vinny-lecavalier-traded-from-flyers-to-kings-will-be-retire-at-seasons-end/2260285/>.

127. *See id.*

contract.<sup>128</sup> The Kings pointed to Lecavalier's agreement to retire, but also conceded that the agreement was unenforceable under the terms of the CBA.<sup>129</sup> Lecavalier then relented and retired. Thus, it is a matter of record that agreements outside SPC's take place between teams and players—the question is not “if,” but “how often.”

Consider applying the Lecavalier scenario in the LTIR context: a team signing or acquiring a player with a long-term SPC stretching into the late period of a player's career may calculate that at some point, if the player's health (and/or performance) deteriorates with age, that player can eventually be coaxed into cooperatively accepting a permanent LTIR designation, relieving the team of the cap hit, perhaps with benefits in return (e.g., a front office job). When the Canadiens traded for Shea Weber in 2016, he was thirty-one years old, signed through age forty with an AAV of \$7.86 million per season. The Compliance Buyout was no longer available to be applied to Weber—so, what did Montreal management anticipate would happen with Weber—a defenseman known for his physicality—as he reached his mid-thirties? Stephane Robidas emerged from extended LTIR isolation, away from the media<sup>130</sup> to become Director of Player Development for the Maple Leafs. During the 2021-22 season, rumors emerged that the Canadiens would hire Shea Weber to fill a similar role.<sup>131</sup> However, after the season, the possibility emerged that the Canadiens might permanently place Carey Price on LTIR as well,<sup>132</sup> and they traded Weber's contract to the Vegas Golden Knights.

Originally, the use of LTIR to effectively negate many years of a long-term contract was not controversial. Both Chris Pronger and Marc Savard signed contracts forecasting that they would play until they pocketed most of their salaries and would then retire as their annual salaries dropped. However, as noted above, both Pronger and Savard suffered career-ending concussion problems.

---

128. Jared Clinton, *Vincent Lecavalier's Plans Haven't Changed, Says He's Still Retiring*, HOCKEY NEWS (Apr. 24, 2016), <https://thehockeynews.com/news/vincent-lecavaliers-plans-havent-changed-says-hes-still-retiring>.

129. Travis Hughes, *Vincent Lecavalier Will Indeed Retire, Leaving Flyers Clear of His Contract*, BROAD ST. HOCKEY (June 21, 2016, 12:12 PM), <https://www.broadstreethockey.com/2016/6/21/11990158/vincent-lecavalier-retirement-flyers-contract>.

130. See *infra* pp. 731-32.

131. Josh Erickson, *East Notes: Canadiens, DeBrusk, Stamkos*, PROHOCKEYRUMORS (Nov. 30, 2021, 8:22 PM), <https://www.prohockeyrumors.com/2021/11/east-notes-canadiens-debrusk-stamkos.html>; Josh Erickson, *Canadiens Interested in Retaining Shea Weber For Front-Office Role?*, YARDBARKER (Nov. 30, 2021), [https://www.yardbarker.com/nhl/articles/canadiens\\_interested\\_in\\_retaining\\_shea\\_weber\\_for\\_front\\_office\\_role/s1\\_14825\\_36593126](https://www.yardbarker.com/nhl/articles/canadiens_interested_in_retaining_shea_weber_for_front_office_role/s1_14825_36593126).

132. See *supra* notes 66-67.

Year	M. Savard Age	Signing Bonus	Base Salary	Salary	Cap Hit
2010-11	33	0	\$7m	\$7m	\$4m
2011-12	34	0	\$7m	\$7m	\$4m
2012-13	35	0	\$6.5m	\$6.5m	\$4m
2013-14	36	0	\$5m	\$5m	\$4m
2014-15	37	0	\$1.5m	\$1.5m	\$4m
2015-16	38	0	\$575K	\$575K	\$4m
2016-17	39	0	\$575K	\$575K	\$4m

133

Savard sustained what turned out to be a career-ending injury during the 2010-11 season and was placed on LTIR, holding off on official retirement (and collecting his salary) until the contract ended.

Year	C. Pronger Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2010-11	36	\$3m	\$4.6m	\$7.6m	\$4.94m
2011-12	37	\$1m	\$6.6m	\$7.6m	\$4.94m
2012-13	38	\$1m	\$6.2m	\$7.2m	\$4.94m
2013-14	39	\$1m	\$6m	\$7m	\$4.94m
2014-15	40	\$0	\$4m	\$4m	\$4.94m
2015-16	41	\$0	\$575K	\$575K	\$4.94m
2016-17	42	\$0	\$575K	\$575K	\$4.94m

134

Likewise, Pronger sustained what turned out to be a career-ending injury during the 2011-12 season and was placed on LTIR, holding off on official retirement (and collecting his salary) until the contract ended.

While the press did observe that Pronger was delaying official retirement for salary cap reasons, there was no controversy over the LTIR designations of Savard and Pronger because of the evident severity of their injuries.

However, LTIR designations began drawing significantly more interest after two controversial LTIR designations by the Toronto Maple Leafs—the designations of Stephane Robidas and Joffrey Lupul. After playing fifty-two games for the Leafs in 2014-15, Robidas notoriously disappeared from Leafs training camp directly after discussing his anticipated role as the team's

---

133. *Marc Savard*, *supra* note 71 (emphasis added).

134. *Chris Pronger*, *supra* note 69 (emphasis added).

seventh defenseman during the upcoming season.<sup>135</sup> The Leafs then placed Robidas on LTIR, relieving themselves of his cap hit. Robidas was so difficult to find that the Toronto media coined the term “Robidas Island,” connoting players placed on LTIR for long periods of time pointing towards cap considerations.<sup>136</sup> As noted above, Robidas subsequently joined the Toronto organization and became the position of Director of Player Personnel.<sup>137</sup> Any agreement between the Leafs and Robidas outside of his SPC might be regarded as running against the CBA—and as illustrated by the Lecavalier retirement-trade agreement, outside agreements are not outside the realm of possibility.

The season following Robidas’s disappearance, Joffrey Lupul joined Robidas on LTIR. Lupul—thirty-one years old at the time—had struggled with injuries. At training camp, teammate Nazem Kadri told the media, “[m]an, Lupul looks great, he’s flying out there!”<sup>138</sup> However, that afternoon, Lupul allegedly failed his physical and could not play.<sup>139</sup> Unlike Robidas, who remained deadly silent after his LTIR designation and evidently retained excellent relations with the Leafs, Lupul took to social media to dispute his injury status, resisting the LTIR designation, and triggering a confrontation with Leafs management.<sup>140</sup> Lupul finally deleted his Tweet and never posted on Twitter again.<sup>141</sup> He also never again played in an NHL game.<sup>142</sup> Finally, in 2019, Lupul clarified on the Spittin’ Chiclets podcast that he had not sustained

---

135. Jeff Veillette, *NHL Penalizes Maple Leafs For Abuse of Long Term Injured Reserve*, LEAFS NATION (Apr. 1, 2016), <https://theleafsnation.com/news/nhl-penalizes-maple-leafs-for-abuse-of-long-term-injured-reserve/>; *Stephane Robidas*, CAPFRIENDLY, <https://www.capfriendly.com/players/stephane-robidas> (last visited May 2, 2023).

136. Kevin McGran, *Lou Lamoriello’s Legacy Tied to Robidas, Lupul, Cowen*, TORONTO STAR (May 1, 2018), [https://www.thestar.com/sports/breakaway\\_blog/2018/05/01/lou-lamoriello-s-legacy-tied-to-robidas-island.html](https://www.thestar.com/sports/breakaway_blog/2018/05/01/lou-lamoriello-s-legacy-tied-to-robidas-island.html).

137. See Lance Hornby, *Stephane Robidas Opens Up About End of His Maple Leafs Playing Days*, TORONTO SUN (Sept. 8, 2017), <https://torontosun.com/2017/09/08/stephane-robidas-opens-up-about-maple-leafs-departure>.

138. SPORTSNET, *This Lupul Story Goes Much Deeper Than “Just a Physical,”* YOUTUBE, at 0:47:05 (Sept. 18, 2017), <https://www.youtube.com/watch?v=2DJ-cDgGkwI>.

139. *Id.* at 0:50:0:54.

140. Mary Clarke, *Joffrey Lupul Accuses Maple Leafs of Cheating on Preseason Physicals*, SB NATION (Sept. 18, 2017, 2:07 PM), <https://www.sbnation.com/nhl/2017/9/18/16328220/joffrey-lupul-instagram-toronto-maple-leafs-cheating>.

141. David Morassutti, *Toronto Maple Leafs: Joffrey Lupul Reflects on Ending With Team on Spittin Chiclets*, FANSIDED (July 10, 2019), <https://tipofthetower.com/2019/07/10/toronto-maple-leafs-joffrey-lupul-reflects-ending-team-spittin-chiclets/>.

142. *Id.*; SPORTSNET, *supra* note 138; Clarke, *supra* note 140.

a career-ending injury, but was injury prone and had lost confidence in his ability to stay healthy for a full season.<sup>143</sup>

The outcome of the Robidas and Lupul episodes were widely questioned, and immediately preceded the declining years of the more extreme frontloaded contracts predating the 2013 CBA.

Marian Hossa was LTIR designated a year after the Lupul controversy. To end the 2016-17 season, the Blackhawks were eliminated from the playoffs by the Nashville Predators on April 20, 2017.<sup>144</sup> Hossa's 2017-18 annual salary was scheduled to drop to only \$1 million per season over the course of Hossa's age thirty-nine to forty-two (four) seasons.<sup>145</sup> On April 23, 2017, the *Chicago Tribune* reported that Hossa "said he is returning to the Hawks next season."<sup>146</sup> Separately on April 23, the *Tribune* quoted Blackhawks general manager Stan Bowman stating that he was "frustrated and angry" that the team had been eliminated in the first round and that he would be aggressive in adjusting the team's roster.<sup>147</sup> Bowman explained:

[t]here will be change. Change comes in many different ways. So the specifics of how we're going to change things into next year are not really meant for this forum . . . . We have to find a way. We need to get better . . . . Our expectation is to win, and we didn't win. I don't buy into that. We have to find a way.<sup>148</sup>

The *Tribune* observed that "it sounded as if everything [was] on the table. If Bowman want[ed] to make big roster changes, he'[d] have to get creative, considering the Hawks ha[d] a significant amount of salary-cap space tied up in some big-money, long-term contracts – with most of those containing no movement clauses."<sup>149</sup>

---

143. See Morassutti, *supra* note 141.

144. *2017 NHL Western First Round: Nashville Predators Defeat Chicago Blackhawks 4-0*, HOCKEY REFERENCE, <https://www.hockey-reference.com/playoffs/2017-chicago-blackhawks-vs-nashville-predators-western-first-round.html> (last visited May 2, 2023).

145. *Marián Hossa*, *supra* note 74.

146. Chris Kuc & Chris Hine, *Blackhawks Notes: We'll See a New Toews*, CHI. TRIB., Apr. 23, 2017, at 4.

147. Chris Hines, *Bowman Vows Shake-Up*, CHI. TRIB., Apr. 23, 2017, at 3.

148. *Id.*

149. *Id.*

Between April 22 and mid-June, 2017, the *Chicago Tribune's* coverage consistently reported that the Blackhawks faced a cap crunch because of expensive veteran contracts such as Hossa's.<sup>150</sup> Then, on June 22, 2017, it was announced that Hossa would be LTIR designated with a rare skin condition.<sup>151</sup> The *Tribune* ran three articles addressing the topic simultaneously, two of which advertised similar skin condition cases of players who retired thirty-four and thirty-nine years earlier: One article profiled former NHLer Tom Reid, who had retired from the NHL in 1978.<sup>152</sup> Another article cited the case of goaltender Gilles Gilbert, who retired from the NHL in 1983.<sup>153</sup> Finally, cutting to the heart of the matter, the *Tribune's* third June 22 article was titled, *Absence May Bring Cap Relief*.<sup>154</sup> The article (1) noted that if Hossa officially retired, the Blackhawks would suffer significant cap damage under the cap recapture penalty (\$4.25 million annually for four seasons<sup>155</sup>), (2) quoted NHL Deputy Commissioner Bill Daly as telling the *Tribune* that "the league is expected to rule on Hossa's status in the coming days," and (3) finally addressed the real issue at hand, stating, "[c]ynics are likely to say this is another questionable way in which the Hawks are circumventing the cap. Other teams have employed this tactic, such as the Flyers with Chris Pronger . . ."<sup>156</sup> The analogy to Pronger, however, is unwarranted on its face: Hossa had played eight out of his twelve seasons, his final four remaining seasons spanned ages thirty-nine to forty-two, and he had already received 93.5% of the payment due under the contract. In contrast, Pronger's LTIR designation

---

150. The *Tribune's* reporting continued to reflect the reality that despite Bowman's intention to overhaul the team, the Blackhawks' cap situation restricted this. For example, on May 19, 2017, the *Chicago Tribune* ran a story titled *Potential Deals Await Partners: Making Offseason Moves Complicated by Cap Hits, Clauses*. See Chris Hine, *Potential Deals Await Partners: Making Offseason Moves Complicated by Cap Hits, Clauses*, CHI. TRIB. (May 19, 2017), [https://digitaledition.chicagotribune.com/tribune/article\\_popover.aspx?guid=c238ee7b-c97f-4321-b893-2ae8400eaa9a](https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=c238ee7b-c97f-4321-b893-2ae8400eaa9a).

151. See Shannon Ryan, *Best Medicine? Some Time Off*, CHI. TRIB. (June 22, 2017), [https://digital.edition.chicagotribune.com/tribune/article\\_popover.aspx?guid=f6981d4f-c335-44cb-9ec0-f34b4ca86f11](https://digital.edition.chicagotribune.com/tribune/article_popover.aspx?guid=f6981d4f-c335-44cb-9ec0-f34b4ca86f11).

152. Chris Hine, *'It Got Worse and Spread:' Skin Condition Forced Ex-Hawk Tom Reid to Retire*, CHI. TRIB. (June 22, 2017, 7:35 PM), <https://www.chicagotribune.com/sports/blackhawks/ct-blackhawks-marian-hossa-tom-reid-20170621-story.html>

153. See Ryan, *supra* note 151, at 6.

154. Chris Hine, *Absence May Bring Salary-Cap Relief*, CHI. TRIB., June 22, 2017, at 6.

155. See *id.*

$$\$7.9 \times 7 = 49 + 6.3 = 55.3 + 4 = 59.3$$

$$5.275 \times 8 = \$42.2$$

$$\$17.1\text{m}$$

$$\$4.25\text{m penalty for the last 4 years of the contract.}$$

156. *Id.*



came early in the second season of a seven-year contract, and he had received about twenty-nine percent of the payment due under his contract.

LTIR-designating Hossa relieved the Blackhawks of his \$5.275 million cap hit for the final four seasons of his contract, ages thirty-nine to forty-two.<sup>157</sup>

Year	M. Hossa Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2009-10	30-31	0	\$7.9m	\$7.9m	\$5.275m
2010-11	31-32	0	\$7.9m	\$7.9m	\$5.275m
2011-12	32-33	0	\$7.9m	\$7.9m	\$5.275m
2012-13	33-34	0	\$7.9m	\$7.9m	\$5.275m
2013-14	34-35	0	\$7.9m	\$7.9m	\$5.275m
2014-15	35-36	0	\$7.9m	\$7.9m	\$5.275m
2015-16	36-37	0	\$7.9m	\$7.9m	\$5.275m
2016-17	37-38	0	\$4m	\$4m	\$5.275m
2017-18	38-39	0	\$1m	\$1m	\$5.275m
2018-19	39-40	0	\$1m	\$1m	\$5.275m
2019-20	40-41	0	\$1m	\$1m	\$5.275m
2020-21	41-42	0	\$1m	\$1m	\$5.275m

<sup>158</sup>

The NHL opened investigations into the LTIR designations of both Lupul and Hossa, but took no action.<sup>159</sup> Capturing the outward appearance and public perception of these LTIR designations (even *before* the Hossa LTIR designation), readers of *LeafsNation* apparently fell for a well-conceived 2016 April Fool's hoax article announcing that the NHL was sanctioning the Leafs for "Abuse of Long Term Injured Reserve."<sup>160</sup> The *LeafsNation* April Fool's LTIR hoax article also projects the difficult position of the NHL: some teams seemingly raised concerns about the LTIR designations, binding the NHL to

---

157. Satchel Price, *Marian Hossa Will Miss 2017-18 Season Due to Skin Disorder*, SBINATION (June 21, 2017, 7:44 AM), <https://www.seconcityhockey.com/2017/6/21/15845342/marian-hossa-out-season-retirement-skin-condition-allergy-equipment-blackhawks-2017>.

158. *Marián Hossa*, *supra* note 74 (emphasis added).

159. Jared Clinton, *What Happens if the NHL Decides Lupul, Hossa Can't be Placed on LTIR?*, HOCKEY NEWS (Sept. 22, 2017), <https://thehockeynews.com/news/what-happens-if-the-nhl-decides-lupul-hossa-can-t-be-placed-on-ltir>; *Blackhawks Can Put Marian Hossa on LTIR*, SPORTSNET (Oct. 3, 2017, 11:38 AM), <https://www.sportsnet.ca/hockey/nhl/report-blackhawks-can-put-marian-hossa-ltir/>.

160. *See* Veillette, *supra* note 135.

investigate. At the same time, NHL sanctions responding to representations about player injuries would have been a PR and legal black hole for the NHL—this highlights the necessity of rules adjustments to avert any such scenarios so that the NHL is not placed in this position in the future.<sup>161</sup>

In 2019 (after the 2018-19 season), two years after the Hossa LTIR designation, Florida Panthers goaltender Roberto Luongo officially retired at age forty, with three seasons remaining on his contract. This triggered the Cap Recapture Penalty, which was imposed on both Vancouver (which had signed Luongo to the contract) as well as Florida.

Year	R. Luongo Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2010-11	31-32	0	\$10m	\$10m	\$5.33m
2011-12	32-33	0	\$6.7m	\$6.7m	\$5.33m
2012-13	33-34	0	\$6.7m	\$6.7m	\$5.33m
2013-14	34-35	0	\$6.7m	\$6.7m	\$5.33m
2014-15	35-37	0	\$6.7m	\$6.7m	\$5.33m
2015-16	36-37	0	\$6.7m	\$6.7m	\$5.33m
2016-17	37-38	0	\$6.7m	\$6.7m	\$5.33m
2017-18	38-39	0	\$6.7m	\$6.7m	\$5.33m
2018-19	39-40	0	\$3.4m	\$3.4m	\$5.33m
2019-20	40-41	0	\$1.6m	\$1.6m	\$5.33m
2020-21	41-42	0	\$1m	\$1m	\$5.33m
2021-22	42-43	0	\$1m	\$1m	\$5.33m

<sup>162</sup>

As the 2016 *LeafsNation* April Fool's joke intimated, at this time strategic (i.e. allegedly illegitimate) LTIR designations of aging players for cap purposes was so widely accepted that even though Luongo was essentially healthy, the question was why he *had not* been placed on LTIR.<sup>163</sup> Some suggested that LTIR designations (instead of retirement) were so routine that Luongo's decision to officially retire represented his revenge on the

---

161. See *infra* Part III.

162. Roberto Luongo, *supra* note 75 (emphasis added).

163. Patrick Johnston, *Luongo's Official Retirement From NHL Benefits Panthers, Burns Canucks*, PROVINCE (June 29, 2019), <https://theprovince.com/sports/hockey/nhl/patrick-johnston-luongos-official-retirement-from-nhl-benefits-panthers-burns-canucks>.

Vancouver organization and fans after friction during his period as a member of the Canucks.<sup>164</sup>

Similar dynamics likewise appeared after Montreal's Shea Weber LTIR designation in 2021, which could be reasonably considered foreseeable because of the backstory of Montreal's acquisition of the Weber contract from Nashville. In 2016, Montreal had become desperate to trade P.K. Subban, directly after signing him to a new eight-year, \$72 million contract.<sup>165</sup> Facing a deadline (after which time Subban would be untradeable because of an impending No-Movement Clause), Montreal agreed to trade Subban for Weber, by then a thirty-year-old rugged defenseman with ten years remaining on his contract. Nashville, having pocketed the four most valuable seasons of Weber's fourteen-year contract and anticipating Weber's decline (ages thirty to forty), accepted the deal. Aside from "Mon Dieu, nous devons larguer Subban toute suite," one wonders about Montreal's 2016 internal conversations analyzing the future implications of acquiring Weber's contract.<sup>166</sup> In 2020-21, the Canadiens reached the Stanley Cup finals. Weber played forty-eight of fifty-six regular season games and all twenty-two playoff games, yet he reportedly conveyed to his teammates during the finals that the end of his career was certain. After the Weber LTIR designation was announced, Montreal was apparently so confident that Weber's injuries were career-ending that General Manager Marc Bergevin spent all of the extra cap space in free agency, apparently anticipating that there was no way that Weber would recover.

Year	Weber Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2012-13	27	\$13m	\$1m	\$14m	\$7.86m
2013-14	28	\$13m	\$1m	\$14m	\$7.86m
2014-15	29	\$13m	\$1m	\$14m	\$7.86m
2015-16	30	\$13m	\$1m	\$14m	\$7.86m
2016-17	31	\$8m	\$4m	\$12m	\$7.86m

164. Frank Seravalli, *Luongo Retires, Hitting Canucks With \$3M Cap Recapture Penalty*, TSN (June 26, 2019), <https://www.tsn.ca/luongo-retires-hitting-canucks-with-3-million-cap-recapture-penalty-1.1328964>.

165. *PK Subban*, CAPFRIENDLY, <https://www.capfriendly.com/players/pk-subban> (last visited May 2, 2023).

166. Nashville's internal discussions also doubtless contemplated the Cap Recapture Penalty liabilities if Weber retired early, following his trade to Montreal. See Arpon Basu, *Analysis: Subban Trade Shouldn't be Surprising*, NHL (June 30, 2016), <https://www.nhl.com/news/canadiens-trade-of-pk-subban-is-no-surprise/c-281093904>.

2017-18	32	\$8m	\$4m	\$12m	\$7.86m
2018-19	33	\$0	\$6m	\$6m	\$7.86m
2019-20	34	\$0	\$6m	\$6m	\$7.86m
2020-21	35	\$0	\$6m	\$6m	\$7.86m
2021-22	36	\$0	\$6m	\$6m	\$7.86m
2022-23	37	\$0	\$3m	\$3m	\$7.86m
2023-24	38	\$0	\$1m	\$1m	\$7.86m
2024-25	39	\$0	\$1m	\$1m	\$7.86m
2025-26	40	\$0	\$1m	\$1m	\$7.86m

167

There is no question that the circumstances of Weber's permanent LTIR designation with five full seasons remaining on his contract raised eyebrows. In July 2021, at the end of the 2020-21 finals, coverage of Weber's injury status suggested certainty that his career was finished.<sup>168</sup> Then, in mid-October 2021, characterizations of the duration of Weber LTIR designation appeared to soften slightly – the designation was certain only for the 2021-22 season.<sup>169</sup> On November 29, 2021, Canadiens GM Marc Bergevin was fired, along with Assistant General Manager Trevor Timmins, and also Paul Wilson, the team's top public relations and communications executive.<sup>170</sup> At almost the exact same time, on November 30, it was reported that Weber had undergone an additional physical,<sup>171</sup> indicating that the NHL and/or another team had questioned whether a permanent LTIR designation (for five additional

---

167. *Shea Weber*, *supra* note 90 (emphasis added).

168. *Montreal Canadiens General Manager: Shea Weber's Career Likely Over*, SPORTSNAUT (July 22, 2021), <https://sportsnaut.com/montreal-canadiens-general-manager-shea-webers-career-likely-over/>.

169. Brian La Rose, *Atlantic Notes: Weber, Murray, Tkachuk, Mrazek*, PROHOCKEYRUMORS (Oct. 15, 2021, 9:00 PM), <https://www.prohockeyrumors.com/2021/10/atlantic-notes-weber-murray-tkachuk-mrazek.html>.

170. Stu Cowan, *Canadiens Fire GM Marc Bergevin, Trevor Timmins and VP Paul Wilson*, MONTREAL GAZETTE (Nov. 29, 2021), <https://montrealgazette.com/sports/hockey/nhl/hockey-inside-out/canadiens-remove-gm-marc-bergevin-two-others-in-front-office>; *see also Paul Wilson Named SVP, Public Affairs and Communications For Groupe CH*, NHL (May 22, 2018), <https://www.nhl.com/canadiens/news/paul-wilson-appointed-senior-vice-president-public-affairs-and-communications-for-groupe-ch/c-298736170>.

171. *See 2013 NHL CBA*, *supra* note 39, § 50.10(d), at 290 (“If . . . the League wishes to challenge the determination of a Club physician that a Player is unfit to play for purposes of the Bona-Fide Long-Term Injury/Illness Exception, the League and the NHLPA shall promptly confer and jointly select a neutral physician, who shall review the Club physician's determination regarding the Player's fitness to play.”); *see also National Hockey League/National Hockey League Players' Association Memorandum of Understanding*, *supra* note 53, at ¶¶ 32-37 & Attachments B-F. *See also* Scott Matla (@scottmatla), TWITTER (Nov. 30, 2021, 10:30 PM), <https://twitter.com/scottmatla/status/1465901114302341121>.

seasons) was merited.<sup>172</sup> Ultimately, while the NHL scrutinized the designation, it acquiesced.<sup>173</sup>

Also during the 2021 offseason, at the exact same time as Montreal's LTIR designation of Weber (and immediate use of all the cap space this created to sign unrestricted free agents), the Minnesota Wild faced an emergency cap crunch to re-sign young high end players, especially Kirill Kaprizov.<sup>174</sup> Previously, in 2012, anticipating the SPC restrictions to come in the 2013 CBA, the Wild signed Ryan Suter and Zach Parise to dual thirteen-year \$98 million contracts, assigning each player a cap hit of \$7.54 million per season. During the offseason between 2020-21 and 2021-22, Suter and Parise were thirty-six years old, with four full seasons remaining on their contracts. After evaluating his options, Wild GM Bill Guerin bought out both Parise and Suter.

Year	Suter/Parise Age	Signing Bonus	Base Salary	Total Salary	Cap Hit
2012-13	27-28/28	\$10m	\$2m	\$12m	\$7.54m
2013-14	28-29/29	\$10m	\$2m	\$12m	\$7.54m
2014-15	29-30/30	\$5m	\$6m	\$11m	\$7.54m
2015-16	30-31/31	\$0	\$9m	\$9m	\$7.54m
2016-17	31-32/32	\$0	\$9m	\$9m	\$7.54m
2017-18	32-33/33	\$0	\$9m	\$9m	\$7.54m
2018-19	33-34/34	\$0	\$9m	\$9m	\$7.54m
2019-20	34-35/35	\$0	\$9m	\$9m	\$7.54m
2020-21	35-36/36	\$0	\$8m	\$8m	\$7.54m
2021-22	36-37/37	\$0	\$6m	\$6m	\$7.54m
2022-23	37-38/38	\$0	\$2m	\$2m	\$7.54m
2023-24	38-39/39	\$0	\$1m	\$1m	\$7.54m
2024-25	39-40/40	\$0	\$1m	\$1m	\$7.54m

175

As a result of buying out Suter and Parise, the Wild created enough space to sign Kaprizov, but incurred the most severe buyout cap penalties in NHL history: \$12.75 million in 2022-23, and \$14.75 million in 2023-24 and 2024-

---

172. TJ Tucker, *Shea Weber Drawing Extra Scrutiny From the NHL Over Injury and People Are Wondering Why*, MARKERZONE (Dec. 2, 2021), <https://www.markerzone.com/news/index.php?no=67606>.

173. La Rose, *supra* note 169; *Insider Trading: How Did the Tkachuk Contract Come Together?*, TSN (Oct. 14, 2021), <https://www.tsn.ca/insider-trading-how-did-the-tkachuk-contract-come-together-1.1706673>.

174. Kaplan, *supra* note 7.

175. *Ryan Suter*, *supra* note 90 (emphasis added); *Zach Parise*, *supra* note 90 (emphasis added).

25 (reflecting 16.6%, 16.6% and 18.1% of the entire team salary cap in each of these seasons).<sup>176</sup> The gamble paid off; while the Wild competed to win their division's title, the Blackhawks and Canadiens toiled in their respective division basements even after having been relieved of the final four seasons of Hossa's contract (Blackhawks) and the final five seasons of Weber's contract (Canadiens).

What to make of these disparities? On their face, these disparate outcomes run afoul of the NHL's emphasis on parity. Also, importantly, such situations will continue to surface irrespective of the reforms of the 2013 CBA (e.g., an eight-year limit for contract extensions) for the reasons reviewed above. In the 2021 offseason, Montreal exposed Carey Price to Seattle in the Expansion Draft in order to protect veteran journeyman backup Jake Allen; Seattle then passed on Price, recognizing that his contract with Montreal incurs a \$10.5 million cap hit through Price's age thirty-eight season.<sup>177</sup> The Flyers are incurring a \$7.75 cap hit through Sean Couturier's age thirty-seven season in 2029-30.<sup>178</sup> Couturier underwent season-ending back surgery at age twenty-nine in February 2022, before the term of the extension had commenced, and then another back surgery in October 2022.<sup>179</sup>

Furthermore, in addition to possible LTIR gamesmanship undermining parity (or at minimum the appearance of parity), such issues represent a PR liability to the NHL. The NHL certainly does not want to be in the position of questioning the legitimacy of player injuries—however, even if it declined to investigate LTIR designations independently, nothing prevents teams wary of any extra advantage gained by rivals from filing grievances and triggering investigations.

### *E. LTIR and Insurance*

A further complication inherent in controversial LTIR designations relates to insurance. At least two categories of insurance policies inhabit the NHL's financial infrastructure. First, the CBA establishes conditions for disability and

---

176. Tony Abbott, *The Parise and Suter Buyouts Threaten to Hamstring the Wild's Youth Movement*, ZONECOVERAGE (July 13, 2021), <https://zonecoverage.com/2021/wild/the-parise-and-suter-buyouts-threat-en-to-hamstring-the-wilds-youth-movement/>.

177. Ian Oland, *Report: Seattle Kraken Pass on Picking Carey Price in Expansion Draft*, RUSSIAN MACH. NEVER BREAKS (July 21, 2021, 11:32 AM), <https://russianmachineneverbreaks.com/2021/07/21/report-seattle-kraken-pass-on-picking-carey-price-in-expansion-draft/>.

178. *Sean Couturier*, *supra* note 118.

179. Sam Carchidi, *Flyers' Sean Couturier Undergoes Another Surgery; Career in Jeopardy?*, PHILA. HOCKEY NOW (Oct. 29, 2022), <https://phillyhockeynow.com/2022/10/29/philadelphia-flyers-sean-couturier-undergoes-another-surgery-career-in-jeopardy-chuck-fletcher-back/>.

life insurance for players.<sup>180</sup> However, second and separately, unpublished internal NHL policies (or bylaws) reportedly mandate that teams must insure their top five SPC's at an eighty percent rate—this falls outside the CBA. Under the NHL Constitution, the Commissioner retains significant (apparently overwhelming) authority “for the general supervision and direction of all business and affairs of the League and shall have all such other powers as may be necessary or appropriate to fulfill his responsibilities.”<sup>181</sup> At some point, Commissioner Bettman and the NHL reportedly contracted with BWD, a New York Insurance Company, to implement the terms of the NHL's top-five SPC insurance rule so that all top-five SPC's on each team have eighty percent insurance through BWD.<sup>182</sup>

While the insurance aspect of LTIR designations does not appear to have been widely reported, analyzing this issue appears possible without resorting to speculation. As of 2012, with the NHL-BWD agreement reportedly already in place, the rise of concussion awareness and claims was inflicting significant losses on the insurance companies, leading insurance premium rates to rise from two percent in 2004 to more than five percent of a contract's value.<sup>183</sup> Insurance companies have widely resisted paying player injury claims, which appears reflected in an ongoing lawsuit with the NHL.<sup>184</sup> Also, among the players themselves, anecdotes freely circulate about players who retired early or missed long periods of time due to injury (especially concussions) where insurance companies allegedly demanded extraordinary amounts of documentation and medical testing. There is no reason to imagine this reported propensity for contesting player injury claims would be any more moderate for the policies underwriting high value SPC's rather than for player disability claims.

Permanent LTIR designations—as distinguished from in-season injuries when a player recovers and returns to the ice—are obviously costly for insurance companies. For example, as noted above, Chris Pronger and Marc Savard both suffered career-ending concussion problems early in their long-term SPC's—however, instead of officially retiring, both were permanently placed on LTIR. Pronger suffered his injury in just the second year of his

---

180. See 2013 NHL CBA, *supra* note 39, § 23, at 148.

181. NHL Constitution, LAKE L. GRP. § 6.3(a), at 15, <https://www.lakelawgroup.com/wp-content/uploads/2017/02/constitution-NHL-.pdf> (last visited May 2, 2023).

182. Westhead, *supra* note 68.

183. *Id.*

184. NHL, *Insurance Companies Warring Over Concussion Lawsuit*, SPORTS BUS. J. (Nov. 24, 2020), <https://www.sportsbusinessjournal.com/Daily/Issues/2020/11/24/Leagues-and-Governing-Bodies/NHL-Insurance-Fight.aspx>.

seven-year contract so that its remaining value was approximately \$25 million.<sup>185</sup> Savard suffered his injury in the first year of his seven-year contract so that its remaining value was approximately \$26 million.<sup>186</sup> Therefore, under the NHL's top-five contract, eighty percent coverage requirement, the Pronger and Savard career-ending concussions seemingly each yielded around \$20 million, not including counting Pronger and Savard's separate disability insurance coverage, if any. Further, obviously it would not have escaped insurance companies' attention that while the Pronger and Savard injuries appeared career ending, they both declined to officially retire so that their salaries would continue through the very end of their contracts.

Ironically, controversial LTIR designations of players signed to pre-2013 CBA frontloaded contracts were less costly for insurance companies (as distinguished from NHL cap considerations). Because the Hossa and Weber contracts were signed before the 2013 CBA and heavily frontloaded, their late-career salaries were far lower than their cap hits. At the time of Hossa's designation with four seasons remaining, only \$4 million remained on his contract—\$1 million per season.<sup>187</sup> Likewise, at the time of Weber's designation in 2021, with five years remaining on his fourteen-year contract, Weber's total remaining salary was only \$12 million.<sup>188</sup> Thus, relative to cases such as Savard or Pronger, claims such as those of Hossa and Weber would not inflict significant financial liabilities on insurance companies.

However, as reviewed above, the 2013 CBA heavily restricted frontloading and pre-empted the practice of tacking on cheap years at the end of a long-term SPC to lower an AAV. In other words, the terms of the 2013 CBA in effect necessitate that any post-2013 SPC which is one of the top five on a team will have significant money at stake throughout, unlike, e.g., the last years of the Hossa and Weber contracts.

To extrapolate this pre-vs-post 2013 CBA issue to the insurance context, consider, for example, Sean Couturier and Carey Price. As noted above, Couturier signed an eight-year extension at age twenty-nine in August 2021,

---

185. The salary of Pronger's contract after 2011-12 (his last season) was approximately \$19.3 million. Pronger played only thirteen games in 2011-12 (sixteen percent of the season), during which his salary was \$7.6 million. Therefore, the remaining salary on Pronger's contract as of his LTIR designation was apparently between \$25-\$26 million. *Chris Pronger*, *supra* note 69.

186. The salary of Savard's contract after 2010-11 (his last season—the first season of his SPC) was \$21.15 million. Savard played only twenty-five games in 2010-11 (thirty percent of the season), during which his salary was \$7 million. Therefore, the remaining salary on Savard's contract as of his LTIR designation was apparently around \$26 million. *Marc Savard*, *supra* note 71.

187. *Marián Hossa*, *supra* note 74.

188. *Shea Weber*, *supra* note 90.



with the new term to begin in 2022-23 at age thirty; Couturier played only seventeen games in the 21-22 season before undergoing season-ending back surgery, even before the extension had begun.<sup>189</sup> Under the post-2013 SPC structuring rules (preventing frontloading), Couturier's annual salary never drops lower than \$6.5 million.<sup>190</sup> Hypothetically, if the Flyers permanently LTIR designated Couturier for his final three seasons (ages thirty-five to thirty-seven), \$19.5 million in salary would remain,<sup>191</sup> with an insurance company on the hook for eighty percent of this sum (\$15.6 million). In other words, by rule, such a Couturier LTIR designation would be almost four times as expensive than Hossa's designation in insurance terms.

The same principles apply to Carey Price. The Montreal Canadiens—having already just LTIR-designated Shea Weber—exposed Carey Price in the Seattle Kraken Expansion Draft so as to protect veteran journeyman Jake Allen, even though Price was the only star player remaining on Montreal. At this point, Price, at age thirty-four, had \$44.25 million remaining on his post-2013 CBA contract (over five more seasons). Seattle then declined to select Price in spite of his status as an elite goaltender, suggesting an assessment that Price's contract (and cap hit), age and health presented such strong liabilities that they superseded his considerable abilities. Also, after the Canadiens faced a backlash from fans for exposing Price in favor of Allen, previously unreported information about Price's health (knee and hip) suddenly leaked, seemingly rationalizing and justifying why Montreal might have exposed its best player to be taken by Seattle, and why Seattle might have declined. An insurance company observing these developments, if asked to insure eighty percent of Price's contract moving forward and recognizing that \$44.25 million remained in total on the contract, would have strong reasons to anticipate that at some point, Price will be permanently placed on LTIR. And Price's contract has no "dead" years at the end. Therefore, if pushed to charge premiums for an eighty percent insurance policy for Price's contract, an insurance company would be incentivized to either (A) demand astronomical premiums for insuring Price's contract or (B) decline to insure Price outright. In early May 2022, leading TSN hockey insider Darren Dreger directly stated that especially given Price's recent stated concern about becoming a "burden" to the Montreal organization, Price's permanent LTIR designation would be Montreal's best strategic choice because then the team would have "that cap

---

189. Reiner, *supra* note 117.

190. Sean Couturier, *supra* note 118.

191. *Id.*

space to reinvest and do whatever you need to do . . . [to] expedite [a rebuild].”<sup>192</sup>

There are currently many contractual scenarios resembling those of Couturier and Price across the NHL—for more examples, one need look no further than the top five contracts of the San Jose Sharks as of 2021-22.<sup>193</sup>

Overlapping the reality that post-2013 CBA SPC structuring rules make LTIR designations more costly for insurance companies is the insurance component of controversial LTIR designations. Any insurer willing to

---

192. McKenna, *supra* note 114. Carey Price: “I want to be able to finish playing . . . at an acceptable level. I don’t know how long that is, but at the end of the day I want to be able to say that I left the game well and not being a burden.” *Id.* at 2:55-3:14.

Conor McKenna: I guess, something else that occurred to me . . . thinking about that quote right there—and I know that he’s talking about the level of play, when he’s talking about not being a “burden”—but, another thing that would be a burden is that contract on a goalie who can’t play 50-55 games. Even then, [\$10.5 million per year] is a lot of money on a guy like that. I wonder if that could be part of what [Price] meant with that answer too.

*Id.* at 3:24-3:55.

Darren Dreger: Yeah, I would agree with that—and again, that’s why it’s so difficult to deal with the uncertainty. And the Montreal Canadiens management/ownership doesn’t have a clear understanding or direction. So what you do, I think . . . is you try and boil it down into as simplistic a form as you can get it to. One scenario: Carey Price is done, can’t play anymore. Alright, then, you get the relief that comes along with players who can’t play. And it does get a little bit more complicated as Kent Hughes alluded to in reference to Shea Weber because there are insurance attachments, which, by the way, is really the reason why Shea Weber’s contract didn’t get moved to the Arizona Coyotes. It was because there was some more paperwork that needed to get done and there was some money that needed to be paid. Second scenario is [Price] goes through whatever he needs to go through, if there’s additional surgical procedures, ok, what’s the recovery length to that, what’s the likelihood that he’s going to play at a high level. And then the third scenario: are you okay with . . . Price at 50 games or less . . . ? But the one that is not most likely, but is the most intriguing is the one I mentioned right out of the gate—is, could he be done? And if he is done, well, you look back at the career of Carey Price, the fact that he was the best in his craft for a long, long time, will always be fondly remembered in Montreal, but now you’ve got that money. You’ve got that cap space to reinvest and do whatever you need to do to . . . expedite the turnaround.

*Id.* at 3:55-6:25.

193. As of 21-22, the Sharks had signed (1) Erik Karlsson for ages thirty-one to thirty-six—five more seasons at \$11.5 million AAV, \$51 million left in total after the 21-22 season; (2) Logan Couture for ages thirty-two to thirty-seven—five more seasons at \$8 million AAV, \$36 million left in total; (3) Marc-Edouard Vlasic for ages thirty-four to thirty-eight—four more seasons at \$7 million AAV, \$27 million left in total; (4) Evander Kane for ages thirty to thirty-four—three more seasons at \$7 million AAV, \$19 million left in total; (5) Brent Burns for ages thirty-six to forty—three 3 more seasons at \$8 million AAV, \$16.5 million left in total. See *San Jose Sharks*, CAPFRIENDLY, <https://www.capfriendly.com/teams/sharks> (last visited May 2, 2023); *Evander Kane*, CAPFRIENDLY, <https://www.capfriendly.com/players/evander-kane> (last visited May 2, 2023); *Brent Burns*, *supra* note 109.

underwrite an eight-figure contract will demand strong proof in the event of a claim, which raises the prospect of awkward and tense interactions between an insurance company and a team which has LTIR-designated a high value contract. The fact that insurance companies have relatively narrow “occurrence” targets for triggering a policy<sup>194</sup> projects ugly and potentially costly disputes if doubts are raised about the LTIR designation of a significant player. Consider the 2016 Joffrey Lupul case from the perspective of an insurance company: the Leafs, facing a cap crunch, place Lupul on LTIR, alleviating the cap problem, the day after Nazem Kadri says that Lupul “is flying out there” at training camp. Then, Lupul posts on Twitter that he is not actually injured, then deletes the Tweet and goes silent. The Lupul LTIR designation is not merely an internal business decision—fans comprehend the Leafs cap crunch and statements such as Kadri’s, and are therefore unsurprised by the suggestion that the Leafs may be “abusing LTIR” for cap purposes. Lupul has a top-five contract on the Leafs—two seasons remaining with a total value of \$9 million. What happens when the Leafs then file an insurance claim with BWD for Lupul’s contract—\$7.2 million (eighty percent of \$9 million)? Exercising reasonable business judgment, the insurance company is unlikely to pay the \$7.2 million without objection. Rather, an insurance company acting reasonably will presumably open an investigation and eventually settle the claim after a period of time (or reject it outright). Meanwhile, another NHL team skeptical of the Lupul LTIR designation might file a grievance. On the one hand, if the Leafs decline to file a claim for the Lupul injury, effectively swallowing his remaining \$9 million in salary, this might infer that Lupul may not actually be seriously injured (and also may raise questions about financial parity, since a small market team may not be able to afford such a maneuver). On the other hand, if the Leafs follow through and file the claim, the grievance could ask about the terms of the outcome of the claim: if the insurance company paid only twenty percent of Lupul’s contract, is this per se evidence that the Leafs’ LTIR designation was cap circumvention?

Thus, at least in theory, it seems reasonable to infer that the insurance ramifications of controversial LTIR designations may further contribute to the NHL’s LTIR policy dilemma. And while the NHL might be able to contract with BWD to pre-empt some such contingencies, there is no dodging the reality that an insurance company will have a vested financial interest in resisting a team’s LTIR representation that a player is permanently injured, and that this disinclination to pay the claim aligns with a grievance a rival

---

194. This source is Brian Boyle, a fellow Colorado College alumnus who now works as an insurance lawyer in Chicago. Brian provided feedback on the insurance section of this Article.

NHL team may file. Also, the challenge is likely broader than the reported BWD agreement because a non-Top five SPC may amount to \$6 million annually or higher—more than enough to make or break a team's cap outlook – and would be insured outside the NHL's arrangements with BWD.

### III. TWO RECOMMENDATIONS FOR ADDRESSING THE LTIR PROBLEM

Clearly, reinforcing parity (in fact and in appearance) as well as PR presents a strong basis for adjusting the NHL rules framework to bypass or avert awkward and questionable LTIR scenarios.

As reviewed above, the Cap Recapture Penalty was a 2013 response to alleged “retirement contracts”<sup>195</sup> where a team would lengthen the duration of an SPC and frontload the contract—this way, the player would pocket the majority of their salary during the early years of the contract, which were also the years during which the player would be in their prime. Then, the player could retire before the end of the contract, benefitting the team by vacating his cap hit of the remaining years. The Cap Recapture Penalty was conceived to apply in cases where players officially retired. However, if the player is instead construed as injured and permanently placed on LTIR, the Cap Recapture Penalty framework is inapplicable. Thus, while the 2013 CBA responded to the retirement contracts issue, the decade following the 2013 CBA has repeatedly exposed alleged cap-based exploitation of LTIR (or the appearance of such) as a vulnerability for the NHL.

Two reforms which might avert such LTIR tensions are (1) partially withholding cap relief for LTIR players thirty-five years old and over and (2) changing the cap rules to guarantee the full availability of buyouts as a remedy.

Under the CBA, an LTIR-designated player's AAV counts against the cap irrespective of the LTIR designation.<sup>196</sup> In other words, LTIR cap relief means that the team holding the LTIR player receives extra cap space as compensation for losing the player to LTIR. Revision of this full cap space reimbursement would be in harmony with some existing cap rules: for example, the demotion of a high-value player to the minors secures that

---

195. See *Ilya Kovalchuk*, *supra* note 86.

196. This is why permanently LTIR'd players such as Hossa, Marian Gaborik, David Clarkson, Nathan Horton, etc., have been a hot commodity for rebuilding teams: rebuilding teams acquire permanently LTIR'd players to reach the salary cap floor with reduced costs either (A) because the player's annual salary is low relative to their cap hit for the remaining years of their contract and/or (B), the insurance company is at least partially reimbursing the remaining cost of the contract.

player's team just over \$1 million in relief.<sup>197</sup> Why should teams receive 100% relief when a player in their mid or late thirties suffers an injury, when aging players are foreseeably more injury prone than younger players?

Thus, a solution to the LTIR designation conundrum might be to decline awarding full cap space reimbursement to the designating team. For example, a possible rule could entail withholding new cap space from the designation of a player thirty-five years or older<sup>198</sup> in the form of (A) half the player's AAV or (B) half the total of the player's annual signing bonus—whichever is higher.

Fundamental to the ostensible "retirement contract" is the idea that a team might be strategically anticipating that a player's body will break down as they reach the later years of the SPC. Signing a player to a high AAV contract running into their late thirties implicates this reality. However, even beyond this, a team that signs a player to such a contract *and* makes the contract buyout proof (i.e., paying the player's salary through signing bonuses) effectively represents that "we believe so much in this player that we will forego the need for a buyout for the full duration of the contract." Thus, one might argue that withholding compensatory LTIR cap relief in the amount of such a player's signing bonuses (beginning at age thirty-five) holds teams reasonably accountable for their own commitment: if the team did not really believe a player should be worth an \$8 million cap hit at age thirty-eight, then they should not have agreed to the buyout-proof contract.

Another point in support of such a reform is that it would only minimally affect teams that make mid-season LTIR designations: if a team only receives, say, fifty percent cap relief for the lost player, this would still be more than enough to recall a replacement from the minors (as with the demotion of a high AAV player). Withholding such LTIR cap space would only impose significant cap penalties for teams that designated 35+ age players for years at a time.

Withholding full reimbursement for LTIR designations would also run into at least two problems. First, there are clear instances in which a player suffers a career-ending injury so that there is no possible reasonable inference

---

197. The maximum cap relief for a non-ELC contract player demoted to the minors is \$1.125 million for the 21-22 season, to slightly increase in future seasons. *See 2013 NHL CBA, supra* note 39, § 11.12(a), at 49-50; *Minimum NHL Salary & Buried Cap Hit*, PUCKPEDIA, <https://puckpedia.com/minimum-nhl-salary-buried-cap-hit> (last visited May 2, 2023).

198. Note: this is completely distinct from the NHL's existing "35+" framework, which applies *only* to contracts signed *after* a player reaches age thirty-five, and not to contracts signed before age thirty-five which stretch past that age. *See 2013 NHL CBA, supra* note 39, § 50.5(d)(i)(B)(5), at 263-64, amended and superseded by *National Hockey League/National Hockey League Players' Association Memorandum of Understanding, supra* note 53, at ¶ 64.

of LTIR gamesmanship. However, if the proposed LTIR relief limitation is applied only to players age thirty-five and above, the player's team has already taken a chance by signing the player through an age when most are physically declining and more injury prone.<sup>199</sup>

A second objection would imaginably arise from the NHLPA: the capacity of teams to place players on LTIR raises the total aggregate salary paid to NHL players per year. As soon as the Canadiens placed Shea Weber on LTIR after the 2020-21 season, they went on a spending spree and used practically every penny of the \$7.8 million made available by Weber's designation.

\*\*\*

Separately, another idea which might help in part to reduce the number of contested LTIR designations would be to guarantee the availability of buyouts as a remedy for reasons suggested by Bill Sweatt, Associate Director at S&P Global Ratings, and a former teammate of one of the co-authors of this article who reached the NHL.

The NHL CBA flatly forbids option contracts.<sup>200</sup> However, at the same time, one might regard the buyout framework as an option framework in effect: because the cap cost of buyout penalties diminishes towards the end of a contract (depending on the amount of money remaining on the given contract), the buyout as designed could be regarded as an option: a team that seeks to "decline" the last year or years of a player contract exercises a buyout. However, as noted above, the last few seasons have witnessed a dramatic rise in SPC's structured so that buyouts afford almost zero cap relief – buyout-immune SPC's.

The rise in buyout-immune SPC's can be seen as undermining a kind of equilibrium between teams and players insofar as the degree to which the later years of SPC's were guaranteed: Before the rise of buyout-immune SPC structuring, teams could achieve some relief from buyouts while incurring a cap penalty, while the player received two-thirds of their salary over twice the duration of the contract. With buyout immunity, a team's options for cap relief are far more limited, and players enjoy essentially full protection. Such contracts may run directly into problematic LTIR scenarios because under the circumstances, LTIR designations may be the only way a team can clear cap

---

199. This is distinct from the NHL's current "35+" framework, which applies only to contracts signed *after* age thirty-five. Rather, the main concern with LTIR gamesmanship is the end of long-term contracts signed mid-career but ending after age thirty-five (to which the 35+ framework does not apply).

200. 2013 NHL CBA, *supra* note 39, § 11.13, at 50.

space—full relief from an expensive, backfiring contract presents a powerful incentive to maximally exploit LTIR.

Thus, enabling options or otherwise pre-empting buy-out proof contracts would seemingly help to restore the balance of the original buyout framework pre-dating the rise of buyout-immune contracts: with options or buyouts on the table, teams would have another tool to reasonably plan for the possibility that a long-term SPC eventually becomes problematic. Bargaining questions about whether a player would continue to contribute on the ice into their late thirties could be more directly incorporated into the negotiating process.

### CONCLUSION

With the wide embrace of the post-2005 lockout financial parity scheme, the NHL has pivoted its “parity” focus to ensuring transactional (salary cap rule) parity between different teams. Soon after resuming operations under the 2005 CBA in 2005-06, the NHL faced attempts to maximize cap space through putative “retirement contracts”: teams offered long-term, frontloaded SPC’s far in excess of the reasonable duration of player careers to drive down players’ annual cap hits. The 2013 CBA established the Cap Recapture Penalty framework, restricted frontloading, and limited the permissible duration of contracts to prevent teams from (A) structuring and lengthening contracts to drive down AAV’s or (B) planning for players to end their careers before the end of their contract so as to relieve the team’s cap obligations.

However, critically, the 2013 CBA did not address the possibility of teams signing players to long-term SPC’s strategically anticipating that a player in their mid or late thirties could be construed as “injured,” achieving full LTIR cap relief for the remainder of the contract. This possibility continues to represent a dangerous magnet because teams are presented with a choice between (A) full, unconditional cap relief through LTIR or (B) relatively severe cap penalties or liabilities. Teams which LTIR-designate aging, high AAV players at minimum trigger appearances of impropriety or unfairness relative to teams which do not use LTIR in such scenarios. This was particularly evident in the 2021 offseason with the contrast between (A) the Montreal Canadiens’ LTIR designation of Shea Weber, and (B) the Minnesota Wild suffering historically high cap penalties from their buyouts (instead of LTIR designations) of Ryan Suter and Zach Parise.

For the NHL, divergences such as that of Weber versus Suter/Parise (A) undermine parity—or at minimum the appearance of parity—and also (B) raise PR dangers about injury veracity: the Canadiens represented that Weber was able to play every playoff game in 2020-21, all the way through the Stanley Cup Finals, but purportedly was so badly injured that his career was

over at age thirty-five, with no chance of recovery over the course of the five years remaining on his contract.

The recent rise of eight-year SPC's immune from buyouts (arranged by paying players through annual signing bonuses rather than through base salary) means that the NHL will face buyout-immune SPC's stretching into players' mid- and late-thirties on a regular basis. Moving forward, this points towards a regular stream (or even an uptick) in problematic LTIR scenarios. The NHL's internal rule requiring eighty percent insurance coverage of the five highest SPC's on each team, however prudent for reasons independent of LTIR, may amplify such scenarios.

Rather than reviewing LTIR designations through tricky and sensitive injury legitimacy investigations, the NHL may be better disposed to construe buyout-immune contracts stretching past age thirty-four as team representations that the player will remain valuable, where the player's anticipated health and capacity to play is part of that value. In other words, a team's commitment to a contract running through a player's mid- or late thirties would justify only a partial salary cap reimbursement should that player suffer serious injury. This could institute a compromise bypassing LTIR designation injury-legitimacy grievances and investigations and bake LTIR relief considerations into the contractual negotiation process. Such a solution might be further supported by enabling options or pre-empting buyout proof contracts, giving teams more flexibility — outside of LTIR designations — if a long-term SPC becomes problematic.