

4-15-2021

## The “Fundies” of ADR in the NHL

Niko Tsiouvaras

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



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

---

### Recommended Citation

Niko Tsiouvaras, *The “Fundies” of ADR in the NHL*, 21 Pepp. Disp. Resol. L.J. 75 (2021)  
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol21/iss1/3>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu), [linhgavin.do@pepperdine.edu](mailto:linhgavin.do@pepperdine.edu).

# The “Fundies” of ADR in the NHL

Niko Tsiouvaras

## I. INTRODUCTION

Whenever the expiration of a Collective Bargaining Agreement (CBA) draws near, sports fans and pundits alike fear the worst—a lockout.<sup>1</sup> The current CBA between the National Hockey League (NHL) and the National Hockey League Players’ Association (NHLPA) was extended during the summer of 2020 to run through the 2025–2026 season with a possible one-year extension, a process sped up by the coronavirus pandemic.<sup>2</sup> This guarantees “unthinkable labor peace,” at least for the time being, as the NHL and the NHLPA demonstrated a tremendous amount of cooperation in the face of adversity while labor relations in other major professional sports leagues faltered.<sup>3</sup>

Still, even though the extension resolved many issues around escrow and international participation that threatened the negotiations before the extension, others loom overhead that could prove tricky obstacles to overcome in the next round of negotiations, including the restricted free agent (RFA) market and health care coverage.<sup>4</sup> The NHL is

---

<sup>1</sup> Helene Elliott, *Gary Bettman Says NHL Won’t Reopen Current CBA, Reducing Chances for Lockout*, L.A. TIMES (Aug. 30, 2019, 2:57PM), <https://www.latimes.com/sports/hockey/story/2019-08-30/gary-bettman-nhl-wont-reopen-cba-reducing-chances-lockout>.

<sup>2</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION (2013) [hereinafter CBA]; see also James O’Brien, *Hockey Is Back: NHL, NHLPA Ratify CBA, Return to Play Agreement*, NBC SPORTS (July 10, 2020, 8:14 PM), <https://nhl.nbcsports.com/2020/07/10/hockey-is-back-back-nhl-nhlpa-ratify-cba-return-to-play-agreement/>.

<sup>3</sup> O’Brien, *supra* note 2.

<sup>4</sup> Associated Press, *NHLPA Will Not Opt Out of Collective Bargaining Agreement, Guaranteeing Labor Peace Until 2022*, CHI. SUN-TIMES (Sept. 16, 2020), <https://www.suntimes.com/story/sports/hockey/2020/09/16/nhlpa-will-not-opt-out-of-collective-bargaining-agreement-guaranteeing-labor-peace-until-2022/>.

the only major professional sports league ever to lose a season over a labor dispute.<sup>5</sup> The costs of a lockout are substantial.<sup>6</sup> During the lockout-shortened 2012–13 season, it is estimated that every day missed cost the league \$18 to \$20 million, eventually totaling \$2 billion in lost revenue for the owners, and that players lost around \$800 million in income.<sup>7</sup> This also does not even factor in the lost value for the television networks carrying NHL games, the lost activation opportunities for the teams and their sponsors and partners, and the lost goodwill of fans who cherish the sport.<sup>8</sup> The costs of not playing will easily be contrasted with the long-term goodwill and resulting profits from finding a way to play during the pandemic. Thus, there is a strong economic incentive, between the NHL and NHLPA, to extend their harmonious relationship years into the future to prevent losing games given the current financial environment.

Sports have utilized Alternative Dispute Resolution (ADR) strategies for decades.<sup>9</sup> Negotiation has been at the forefront of every labor or contract dispute, and salary arbitration was first brought into the sports world by the NHL in the 1970s as a way of settling compensation disputes between players and teams without going to the courts.<sup>10</sup>

---

2019, 2:21PM CDT) [hereinafter CHI. SUN-TIMES], <https://chicago.suntimes.com/2019/9/16/20869079/nhl-nhlpa-collective-bargaining-agreement>.

<sup>5</sup> Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for A Line Change*, 29 OHIO STATE J. ON DISP. RESOL. 485, 485 (2006).

<sup>6</sup> Anna Hiatt, *Dissecting the Massive Costs of the NHL Lockout*, THE WEEK (Nov. 28, 2012), <https://theweek.com/articles/470081/dissecting-massive-costs-nhl-lockout>.

<sup>7</sup> Hiatt, *supra* note 6; Paul D. Staudohar, U.S. Bureau of Lab. Stat., *The Hockey Lockout of 2012–2013*, MONTHLY LAB. REV., July 2013, at 1, 2–3, <https://doi.org/10.21916/mlr.2013.24>; Allen H. Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. STATE L.J. 1171, 1199–200 (2018).

<sup>8</sup> Hiatt, *supra* note 6.

<sup>9</sup> Yoost, *supra* note 5, at 499.

<sup>10</sup> Yoost, *supra* note 5, at 500.

Mediation, on the other hand, is seldomly used in professional sports, but it has been used by the NHL before.<sup>11</sup> Following a twelve-hour mediation and sixteen additional hours of negotiation between player and team representatives during the 2012–2013 NHL lockout, the parties were able to reach agreement and save the remainder of the season after missing 113 days.<sup>12</sup> Other than these instances, negotiation and arbitration have dominated the ADR landscape in professional sports.<sup>13</sup>

Part of the reason for this is because the CBA specifically calls for the use of negotiation and arbitration in certain situations.<sup>14</sup> One such situation is that of the RFA.<sup>15</sup> Under the current CBA, RFAs who meet certain eligibility requirements may elect to file for arbitration according to Article 12.2 or their club may elect for arbitration in accordance with Article 12.3.<sup>16</sup> Currently, it is typical for

---

<sup>11</sup> Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. OF SPORTS & ENT. L. 189, 191 (2014).

<sup>12</sup> Grabowski, *supra* note 11, at 191–92. The NHL also tried mediation three times during the 2004–05 lockout and once earlier in the 2012–13 lockout before this round of mediation worked. Ira Podell, *Mediators Fail to Help in NHL Labor Fight*, NBC BAY AREA (Nov. 30, 2012, 1:24 AM), <https://www.nbcbayarea.com/news/sports/NATL-Mediators-Fail-to-Help-in-NHL-Labor-Fight-181497901.html>; Lester Munson, *Mediation Between NHL Owners, NHLPA the Way to End the Lockout, for Now*, ESPN (Nov. 27, 2012), [https://www.espn.com/nhl/story/\\_/id/8683379/mediation-nhl-owners-nhlpa-way-end-lockout-now](https://www.espn.com/nhl/story/_/id/8683379/mediation-nhl-owners-nhlpa-way-end-lockout-now).

<sup>13</sup> Grabowski, *supra* note 11, at 193.

<sup>14</sup> Grabowski, *supra* note 11, at 193; Yoost, *supra* note 5, at 497–99 (discussing negotiation and salary arbitration within an NHL and NHLPA signed CBA).

<sup>15</sup> CBA, *supra* note 2, at 30. RFA status is determined by the number of years played professionally and the age at which the player signed his first Standard Professional Contract (SPC)—three years played professionally and signed his first SPC in between 18 and 21; two years played and signed his first SPC in between 22 and 23; or played one year professionally and signed his first SPC at 24 years of age or older. CBA, *supra*. Essentially, an RFA is any player who is not an Unrestricted Free Agent (UFA) or on an entry-level deal. CBA, *supra*.

<sup>16</sup> CBA, *supra* note 2, at 57–59. Arbitration eligibility for RFAs is also based on the number of years played professionally and the age at which the player signed his first SPC—four years played professionally and signed his first SPC in between 18 and 20; three years played professionally and signed his first SPC at 21 years old; two years played professionally and signed his contract in

about forty players to file for arbitration per year, but only about three or four actually “go all the way through the arbitration process,” with the rest agreeing to terms before the hearing date.<sup>17</sup>

The 2019 offseason highlighted why the RFA market is such an interesting case study.<sup>18</sup> Some of the top stars in the game coming off their entry-level deals were hitting restricted free agency and holding out throughout the summer, into training camp, and the preseason.<sup>19</sup> There was legitimate concern that the younger RFA class of 2019 would upset the NHL ecosystem by demanding to be paid like the older top players in the game, a concept once foreign but now realistic.<sup>20</sup> While it was posited that the discontent of RFAs with the current pay structure could lead to a desire to want to change the CBA,<sup>21</sup> the issue of the RFA market did not come up during the extension talks. Although this does not mean that the RFAs will not have a problem with the CBA when it does expire, it at least shows signs that it is not as big of an issue as originally feared but may be something to pay attention to in the coming years.<sup>22</sup>

---

between 22 and 23; or played one year professionally and signed his first SPC at 24 years of age or older. CBA, *supra*, at 57. Therefore, not every RFA is eligible for arbitration.

<sup>17</sup> Ryan Lake, *Inside NHL Salary Arbitration and the 40 Players Who Have Filed*, FORBES (July 24, 2019, 3:15 PM EDT), <https://www.forbes.com/sites/ryanlake/2019/07/24/inside-nhl-salary-arbitration-and-the-40-players-that-have-filed/#5571006860f3>.

<sup>18</sup> Matt Kalman, *CBA Peace, RFA Signings Keep NHL Owners on Winning Streak*, FORBES (Sept. 18, 2019, 8:31 AM EDT) [hereinafter *CBA Peace*], <https://www.forbes.com/sites/mattkalman/2019/09/18/cba-peace-rfa-signings-keep-nhl-owners-on-winning-streak/#5123b5f827c4>.

<sup>19</sup> *CBA Peace*, *supra* note 18.

<sup>20</sup> Matt Kalman, *Can't Blame Unsigned NHL RFAs for Looking for Same Satisfaction as McDavid*, FORBES (Aug. 27, 2019, 8:00 AM EDT) [hereinafter Kalman], <https://www.forbes.com/sites/mattkalman/2019/08/27/cant-blame-unsigned-nhl-rfas-for-looking-for-same-satisfaction-as-mcdavid/#1937191b7df1>.

<sup>21</sup> Kalman, *supra* note 20.

<sup>22</sup> CHI. SUN-TIMES, *supra* note 4.

This note seeks to provide to an overview of how the fundamentals (or “fundies” in hockey circles) of ADR can be applied to the NHL’s most pressing issues. It will analyze two areas specifically: the overall CBA negotiations in the big picture and the RFA system in a narrower view. In a negotiation, every variable can be bargained for in relation to the other variables; thus, the issues surrounding escrow or international participation cannot be viewed in a vacuum.<sup>23</sup> While recognizing that the escrow payment aspect of the CBA has been and probably will be the most contentious,<sup>24</sup> the RFA market is more complex and provides a better foundation for implementing ADR.<sup>25</sup> Therefore, this note will contribute more to the discussion on the RFA market.

Part II will provide context of the events leading up to the current NHL landscape. It will outline the history of NHL–NHLPA relations, describe the main issues influencing the upcoming CBA negotiations, and explain the workings of the RFA system. Part III will then present and discuss proposed solutions to improve the RFA market for both the clubs and the players. The analysis supports the conclusion that the NHL should integrate mediation into restricted free agency in both salary arbitration and contract holdout situations. In Part IV, this note will further advocate for the implementation of mediation in CBA negotiations. Finally, Part V will provide a brief conclusion.

## II. BACKGROUND

This section will provide background information on the history of CBA negotiations in the NHL, break down

---

<sup>23</sup> CHI. SUN-TIMES, *supra* note 4.

<sup>24</sup> Associated Press, *Escrow Tops NHL Players’ List of Concerns Ahead of CBA Talks*, NBCSPORTS (June 17, 2019, 9:45 AM EDT), <https://nhl.nbcports.com/2019/06/17/escrow-tops-nhl-players-list-of-concerns-ahead-of-cba-talks/>.

<sup>25</sup> Missy Zielinski, Tampa Bay Lightning, *What Exactly Is a Restricted Free Agent?*, NHL (June 5, 2014), <https://www.nhl.com/lightning/news/what-exactly-is-a-restricted-free-agent/c-721878> (discussing the complexity of RFAs and the need for negotiations when an offer is made to an RFA).

the major issues in the upcoming round of CBA negotiations, and also give a primer on the “stock market approach” and RFA negotiations. The “stock market approach” is a personal term coined to reflect the recent shift in thinking in the hockey community about allocating the team’s salary cap.

#### A. HISTORY OF THE CBA

The NHLPA began in 1957 after being founded by NHL greats like Ted Lindsey and Doug Harvey as a result of backlash over an inadequate pension plan and a television deal that only compensated team owners.<sup>26</sup> League owners initially opposed the creation of the players’ union, but the players finally established it in 1967 after leveraging an antitrust lawsuit against the NHL.<sup>27</sup> Aside from being mired by misguided leadership at the top (which is beyond the scope of this article), the NHLPA has been marked by making gradual changes from a landscape that substantially favored team owners to one that is more neutral.<sup>28</sup>

Historically, the NHL did not have a free agent system—NHL teams could hold on to a player for his entire career through the player option system and the use of reserve clauses.<sup>29</sup> While players could not leave the team they were bound to, they could challenge the team’s unilateral contract extension to the NHL president.<sup>30</sup> A report that criticized the anti-competitive nature of the reserve clauses in 1969 brought about the introduction of salary arbitration, making the NHL the first professional

---

<sup>26</sup> Jordan I. Kobritz & Jeffrey F. Levine, *Don Fehr Leads the NHLPA: Does the NHL Have Anything to Fear?*, 11 VA. SPORTS & ENT. L. J. 178, 180 (2011).

<sup>27</sup> Kobritz & Levine, *supra* note 26, at 181.

<sup>28</sup> Kobritz & Levine, *supra* note 26, at 182–208.

<sup>29</sup> Kobritz & Levine, *supra* note 26, at 184; *see also* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc. 351 F. Supp. 462, 481 (E.D. Pa. 1972) (holding the reserve clause in a SPC to be a “perpetual option on a players’ services without limitation.”).

<sup>30</sup> Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW J. 189, 193 (2003).

league to implement salary arbitration.<sup>31</sup> Arbitration was available to basically any player that was unsigned or could not agree to terms with his team.<sup>32</sup> Following more antitrust litigation over the reserve clause, the owners decided to discard the reserve clause and allow for free agency in 1972.<sup>33</sup>

The 1982 CBA added to the free agent system, but only just—a player could only have true mobility (under the modern system, this would be an Unrestricted Free Agent or “UFA”) when he reached thirty-three years of age.<sup>34</sup> Until then, a player could only exercise restricted mobility (a modern RFA), but the compensation the signing team was required to pay the former team was so steep that it made it a severe limitation (similar to the modern offer sheet).<sup>35</sup> At the time, NHL players were the “least free” athletes of the four major sports leagues.<sup>36</sup>

Under new leadership, the NHLPA went on a ten-day strike “on the eve of the 1992 Stanley Cup Playoffs” that put the entire postseason and millions of dollars in league revenues at stake.<sup>37</sup> The NHLPA secured concessions that brought to the players: the ability to choose an independent arbitrator, a lowered free agency age from thirty-one to thirty, and an increased postseason revenue share, but the owners maintained the right to opt out after two years—setting the stage for the 1994 lockout.<sup>38</sup>

---

<sup>31</sup> See Yoost, *supra* note 5, at 500; see also Aubut, *supra* note 29, at 193.

<sup>32</sup> Aubut, *supra* note 30, at 194. As explained above, the eligibility requirements for arbitration have changed over the years.

<sup>33</sup> Kobritz & Levine, *supra* note 26, at 184–85.

<sup>34</sup> Kobritz & Levine, *supra* note 26, at 186–87.

<sup>35</sup> Kobritz & Levine, *supra* note 26, at 187.

<sup>36</sup> Kobritz & Levine, *supra* note 26, at 187.

<sup>37</sup> Aubut, *supra* note 30, at 194; Kobritz & Levine, *supra* note 26, at 190.

<sup>38</sup> Kobritz & Levine, *supra* note 26, at 190–91. Apparently, the NHL used a federal mediator to help resolve this dispute. Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J. L. 167, 187 (2013).

The owners preemptively initiated a lockout prior to the start of the 1994–1995 season in an effort to contain the rapidly increasing salaries due to the free agent system and salary arbitration.<sup>39</sup> The increasing salaries created financial disparities that favored large-market teams over small-market teams and fostered instability in an era when the league was trying to grow.<sup>40</sup> The owners' solution for improving cost certainty was to institute a salary cap, but they ultimately conceded on this issue after missing half of the season's games.<sup>41</sup> The compromise featured a salary cap for rookies, "walk-away" rights for teams in arbitration proceedings, an age restriction of twenty-five on RFAs, and a one-year bump of the UFA age limitation to thirty-two.<sup>42</sup> There was general labor peace for the next ten years, although player salaries remained on the rise and the disparity between player salaries and league revenues continued to grow.<sup>43</sup> This, again, created pressure heading into the 2004 offseason.<sup>44</sup>

The CBA negotiations in 2004 presented many of the same bargaining issues, including: free agency rights, arbitration procedure, revenue sharing, the game schedule, player playoff bonuses, and fines for player misbehavior.<sup>45</sup> However, none took centerstage more than the issue of

---

<sup>39</sup> Kobritz & Levine, *supra* note 26, at 191; *see also* Yoost, *supra* note 5, at 503–07 (explaining how salary arbitration has increased salaries in Major League Baseball (MLB)). Even though MLB uses a slightly different arbitration method than the NHL's—making it not a 1:1 comparison for how arbitration affects the NHL—it provides insight into how the process is a win for players.

<sup>40</sup> Joshua Liebman, *Tip Your "Cap" to the Players: 2007-2008 Off-Season Reveals NHL's Salary Cap Benefits on Players*, 16 *SPORTS LAW J.* 81, 89 (2009).

<sup>41</sup> Liebman, *supra* note 40, at 90.

<sup>42</sup> Liebman, *supra* note 40, at 90; *see generally* CBA, *supra* note 2, at 69 (more detail on "walk-away" rights).

<sup>43</sup> Liebman, *supra* note 40, at 91.

<sup>44</sup> Liebman, *supra* note 40, at 91.

<sup>45</sup> Kobritz & Levine, *supra* note 26, at 194.

creating a salary cap.<sup>46</sup> Owners bound together to not make concessions until players agreed to implement a salary cap.<sup>47</sup> The players remained hard on the line opposing the cap, but once the owners announced the cancelation of the entire 2004–2005 season, the players’ solidarity faltered.<sup>48</sup> Eventually, the sides signed a deal that was viewed as “extremely pro-management.”<sup>49</sup> The team-friendly components included an immediate 24% cut in players’ salaries, a salary cap linked to league revenue, and an escrow account players would contribute to that would reimburse teams league-wide if they made up more than 54% of NHL revenues.<sup>50</sup> Teams could also now limitedly elect to submit a player to arbitration, a right previously only the players possessed.<sup>51</sup> Players won concessions in the form of a gradual reduction in the age of acquiring UFA status to twenty-seven years old over the course of three seasons and increases in the minimum salary requirement.<sup>52</sup> Additionally, the players received 57% of the Hockey Related Revenue, as opposed to the 47% players receive in the National Football League (NFL) and the 50% players receive in the National Basketball Association (NBA).<sup>53</sup>

Despite “robust revenue growth” over the course of the seven-year agreement, issues lingered going into the 2012 offseason, chief among them being the large-market–small-market revenue gap, the division of Hockey Related Revenue between players and teams, and free agency.<sup>54</sup> After a 113-day lockout that saw the Winter Classic and All

---

<sup>46</sup> Kobritz & Levine, *supra* note 26, at 194.

<sup>47</sup> Kobritz & Levine, *supra* note 26, at 194.

<sup>48</sup> Kobritz & Levine, *supra* note 26, at 195–96.

<sup>49</sup> Kobritz & Levine, *supra* note 26, at 197.

<sup>50</sup> Kobritz & Levine, *supra* note 26, at 197.

<sup>51</sup> Liebman, *supra* note 40, at 93.

<sup>52</sup> Liebman, *supra* note 40, at 93–94.

<sup>53</sup> Staudohar, *supra* note 7.

<sup>54</sup> Staudohar, *supra* note 7.

Star Weekend canceled, the dispute finally ended.<sup>55</sup> The owners and players reached the settlement after a twelve-hour voluntary mediation session followed by sixteen additional hours of negotiation.<sup>56</sup> The key provisions regarding the bargaining issues were a 50–50 split in Hockey Related Revenue, a seven- or eight-year limit on the term of free agent contracts, and increased revenue sharing.<sup>57</sup> The rules on arbitration proceedings did not change, and the agreement did not address participation in the Winter Olympic Games.<sup>58</sup> The agreement was set to last for ten years, with a mutual option to reopen at the eight-year mark.<sup>59</sup> Both the players and the owners decided not to exercise this option before ultimately agreeing to an extension during the pandemic.<sup>60</sup> Even though the 2012–2013 deal is more owner-friendly than all of the other major North American sports leagues, the extension took steps to bring it closer to an even playing field for players.<sup>61</sup>

#### **B. CURRENT CLIMATE**

The four major issues that were most relevant to CBA negotiations before the extension, and which will likely still be relevant in the upcoming round were: the mandatory escrow payments taken from players' paychecks, the ramifications of recent RFA negotiations, participation in international competition, and the level of post-career health care.

##### **i. ESCROW, ESCROW, ESCROW**

---

<sup>55</sup> Staudohar, *supra* note 7.

<sup>56</sup> Grabowski, *supra* note 11, at 191–92. The mediator shuttled back-and-forth between the League headquarters in Manhattan and the nearby players' union hotel suite, eventually getting both sides to meet face-to-face in the hotel suite. Grabowski, *supra* note 11, at 191–92.

<sup>57</sup> Staudohar, *supra* note 7.

<sup>58</sup> Staudohar, *supra* note 7.

<sup>59</sup> Staudohar, *supra* note 7.

<sup>60</sup> CBA Peace, *supra* note 18.

<sup>61</sup> CBA Peace, *supra* note 18; *see also* O'Brien, *supra* note 2.

“A. escrow and B. escrow” was Chicago Blackhawks’ captain Jonathan Toews’s response when pressed about the two biggest issues in the CBA negotiations.<sup>62</sup> Toews is not alone in this opinion, as 25 out of 31 player representatives echoed that escrow is the biggest bargaining issue.<sup>63</sup> From a birds-eye view, Hockey Related Revenue is split evenly between the owners and the players.<sup>64</sup> Per the current CBA, players are required to pay into an escrow account quarterly.<sup>65</sup> The amount to be paid is calculated by multiplying the player’s base salary by an “Escrow Percentage,” which is the difference between what clubs actually paid during that quarter and the aggregated Adjusted Midpoint of the Team Payroll Range.<sup>66</sup> If the league outperforms its revenue projections, the escrow payments are returned to the players, but if the league does not meet expectations, then the money is withheld to ensure that the owners receive their 50% of the Hockey Related Revenue split.<sup>67</sup>

It is estimated that players have lost upwards of 10% of what they signed for due to escrow payments.<sup>68</sup> The assumption when drafting this provision was that a healthy number of teams would spend less than the midpoint of the salary cap, closer to the floor.<sup>69</sup> Recently, most teams are

---

<sup>62</sup> Associated Press, *supra* note 24.

<sup>63</sup> Associated Press, *supra* note 24.

<sup>64</sup> Associated Press, *supra* note 24. *See also* CBA, *supra* note 2, at 223–43 (outlining what constitutes Hockey Related Revenue or “HRR”).

<sup>65</sup> CBA, *supra* note 2, at 254–55.

<sup>66</sup> CBA, *supra* note 2, at 254–55 (see accompanying text for examples of the calculation).

<sup>67</sup> Jesse Campigotto, *Why NHL players hate the escrow*, CBC SPORTS (Sept. 12, 2019, 4:40 PM), <https://www.cbc.ca/sports/hockey/nhl/buzzer-nhl-escrow-1.5281498>.

<sup>68</sup> Associated Press, *supra* note 24.

<sup>69</sup> Campigotto, *supra* note 67; *see also* Brian Burke’s analysis of escrow and explanation of how less than half of all teams in 2019–20 could bring up one player from the minor leagues making the league minimum salary. Tim and Sid, *Jesper Kotkaniemi Resuscitating Career of Jonathan Drouin This Season*, 85

spending right up to the cap ceiling to remain competitive in a league with such parity.<sup>70</sup> Players had been counting on getting the money back, but the owners have been keeping a chunk of it the last couple summers.<sup>71</sup> Toews, who signed a deal with Chicago worth \$10.5 million annually, sees over \$1 million of that disappear into escrow every year.<sup>72</sup> The problems go beyond losing money—because the amount is to be calculated quarterly, players find it hard to know their worth and budget accordingly.<sup>73</sup>

Player representative Cory Schneider has voiced that he does not know if the escrow payments will be eliminated but that they need to be controlled in some way.<sup>74</sup> One way explored to accomplish this is to redefine how Hockey Related Revenues are calculated.<sup>75</sup> This, however, would likely result in the salary cap not increasing as much as it would otherwise, which would also limit player earnings.<sup>76</sup> While owners may enjoy this solution,<sup>77</sup> the NHLPA has expressed that the players are not interested in cutting salaries but are open to other ways to address the players' interests.<sup>78</sup> Another way to reduce the burden of escrow is to increase the amount of money available to player salaries through the Exception Player Rule suggested by player agent Kurt Overhardt.<sup>79</sup> Under this solution, the

---

YOUTUBE (Oct. 17, 2019), <https://www.youtube.com/watch?v=b15-WNGq17w>.

<sup>70</sup> Campigotto, *supra* note 67; Tim and Sid, *supra* note 68.

<sup>71</sup> Campigotto, *supra* note 67.

<sup>72</sup> Campigotto, *supra* note 67.

<sup>73</sup> Associated Press, *supra* note 24.

<sup>74</sup> Associated Press, *supra* note 24.

<sup>75</sup> CBA Peace, *supra* note 18.

<sup>76</sup> CBA Peace, *supra* note 18.

<sup>77</sup> CBA Peace, *supra* note 18.

<sup>78</sup> Associated Press, *supra* note 24.

<sup>79</sup> Kurt Overhardt & Brian Schoelzel, *KO Sports Inc. Opinion: An Opportunity to Increase the Competitive Landscape in the NHL*, KO SPORTS (Apr. 27, 2020, 10:00 AM), <https://kospportsinc.com/ko-sports-inc-opinion-an-opportunity-to-increase-the-competitive-landscape-in-the-nhl/>.

player with the highest salary will not count against the salary cap of his respective team.<sup>80</sup> It remains to be seen how this idea will be received if brought up in 2025 or 2026.

Per the CBA extension, the salary cap will remain flat for at least one year depending on revenues following the pandemic, and escrow will be capped at 20% for the 2020–2021 season before eventually falling to 6% from 2023 to 2026.<sup>81</sup> Part of the concession that led to this win on the escrow front for players was deferring part of their salary for the 2020–2021 season to be paid back later in order to alleviate the cash flow struggles stemming from the pandemic.<sup>82</sup>

## ii. THE RFA POWDER KEG

Part of the reason general managers (“GMs”) are spending to the cap is because the young crop of RFAs over the past couple seasons are demanding as much money on their second contracts as players were previously making on their third and fourth contracts.<sup>83</sup> The 2019 RFA class which included the likes of Mitch Marner, Brayden Point, Mikko Rantanen, Matthew Tkachuck, Kyle Connor, Patrik Laine, Brock Boeser, Zach Werenski, and Charlie MacAvoy would form a veritable All–Star team.<sup>84</sup> This crop was seeking the same treatment as previous classes—the only problem was that there was not enough money to go around because revenues did not grow at the expected rate.<sup>85</sup>

The RFA market has undergone a massive shift even in the past couple years.<sup>86</sup> Stars like Johnny Gaudreau,

---

<sup>80</sup> Overhardt & Schoelzel, *supra* note 79.

<sup>81</sup> O’Brien, *supra* note 2.

<sup>82</sup> O’Brien, *supra* note 2.

<sup>83</sup> Kalman, *supra* note 20.

<sup>84</sup> Kalman, *supra* note 20.

<sup>85</sup> Kalman, *supra* note 20.

<sup>86</sup> Elliotte Friedman, *31 Thoughts: Tense RFA Waiting Game Hits Final Stage*, SPORTSNET (Sept. 10, 2019, 2:28 PM), <https://www.sportsnet.ca/hockey/nhl/31-thoughts-tense-rfa-waiting-game-hits-final-stages/>.

Nathan MacKinnon, Sean Monahan, and Mark Scheifele signed in the \$6 million annual average value (AAV) range coming off their entry-level deals, but now RFAs classes only three or four years later are looking in the \$7 million, \$9 million, and even the \$11 million AAV range.<sup>87</sup> While some GMs are willing to pay to keep their top talent, they are also hesitant to have young players who have not fully proven themselves making up to \$4 million more per year than their more established top players.<sup>88</sup>

Because RFAs do not have much leverage, they tend to wait until one player signs a favorable contract and then base their negotiations off that benchmark.<sup>89</sup> In the case of 2019, the RFAs were waiting on Mitch Marner.<sup>90</sup> Marner's performance in the final year of his rookie deal, as well as the Maple Leafs' recent signings of William Nylander, Auston Matthews, and John Tavares gave Marner the most leverage out of the RFA field.<sup>91</sup> Still, the only real alternative RFAs have to signing what their team gives them is to sit out for the start of the regular season.<sup>92</sup> If the player waits past the December 1 deadline, as William Nylander almost did the prior year, the player would be forced to miss that entire season, a result that is bad not only for the player and team but also for a league trying to capitalize on the influx of young talent.<sup>93</sup> There is growing concern that this younger generation of players will be more likely than

---

<sup>87</sup> Friedman, *supra* note 86.

<sup>88</sup> Friedman, *supra* note 86.

<sup>89</sup> Chase Kell, *Report: NHL's RFAs Waiting for Mitch Marner to Set the Market*, YAHOO! SPORTS (July 29, 2019, 5:10 PM), <https://sports.yahoo.com/restricted-free-agents-waiting-for-mitch-marner-to-set-the-market-001054722.html>.

<sup>90</sup> Kell, *supra* note 89.

<sup>91</sup> Kell, *supra* note 89.

<sup>92</sup> Kell, *supra* note 89.

<sup>93</sup> Kell, *supra* note 89.

players that have come before them to sit out if they do not get the terms they desire.<sup>94</sup>

At the very least, players are choosing to hold out until the start of the season to see what they can get by creating pressure on the team to sign them before the opening faceoff.<sup>95</sup> This logjam is not only affecting the RFA market but the future UFA market as well.<sup>96</sup> For example, because the vast majority of stars in the 2019 RFA market did not sign until right before the start of the season, the players who would become UFAs in the 2020 offseason (largely made up of more established players like Nicklas Backstrom, Alex Pietrangelo, Braden Holtby, Roman Josi, etc.) were not able to negotiate their extensions because GMs did not know how much money they would have left.<sup>97</sup> Additionally, in a hard salary cap league like the NHL, the more money RFAs receive, the less money there will be for the UFAs.<sup>98</sup> This is indicative of a possible divide between younger players and veterans.<sup>99</sup>

Fortunately, the RFA apocalypse fear destined to happen in 2019 never materialized.<sup>100</sup> All of the star RFAs signed before the start of the regular season without missing a game.<sup>101</sup> In fact, many of the deals started a market correction moving away from the inflated salaries the players originally sought.<sup>102</sup> Teams were generally thrilled about keeping the payroll down, and players preferred not to

---

<sup>94</sup> Friedman, *supra* note 86.

<sup>95</sup> Friedman, *supra* note 86.

<sup>96</sup> Kalman, *supra* note 20.

<sup>97</sup> Kalman, *supra* note 20.

<sup>98</sup> *Fantasy Football, Ovy-O's, Empty Net Goals, and How the NHLPA Works*, DROPPING THE GLOVES WITH JOHN SCOTT (Sept. 6, 2019) (downloaded using iTunes).

<sup>99</sup> DROPPING THE GLOVES WITH JOHN SCOTT, *supra* note 98.

<sup>100</sup> CBA Peace, *supra* note 18.

<sup>101</sup> CBA Peace, *supra* note 18.

<sup>102</sup> CBA Peace, *supra* note 18.

rock the boat in a time of calm waters.<sup>103</sup> Some players signed short-term bridge deals, hoping to cash-in in a few years when the television deal kicks in while others were able to secure a big payday with a longer-term commitment.<sup>104</sup> The 2020 RFA class showed signs of encouragement, as some players (Nico Hischier, Thomas Chabot, Clayton Keller, Alex DeBrincat, and Sam Girard) signed extensions almost a full year before entering restricted free agency.<sup>105</sup> This is not the entire 2020 RFA class—notably Mathew Barzal, Pierre Luc-Dubois, Mikhail Sergachev did not sign early—but there is no reason to hit the panic button yet.<sup>106</sup> While there is the still possibility that future generations will be less willing to sign without holding out or that the flat cap resulting from the pandemic extension could alter RFA negotiations,<sup>107</sup> it is encouraging that the potential RFA powder keg has not yet been ignited.

### iii. INTERNATIONAL COMPETITION

Players are also seeking guaranteed participation in the Winter Olympics.<sup>108</sup> The 2018 Pyeongchang Games marked the first time in decades that the NHL did not stop its season and allow its players to represent their countries in the world's most prestigious international competition.<sup>109</sup> Owners cited the disruption in the middle of the season, the risk of potential injury to star players, and the lack of growth

---

<sup>103</sup> CBA Peace, *supra* note 18.

<sup>104</sup> CBA Peace, *supra* note 18.

<sup>105</sup> Sean Leahy, *Devils, Hischier Agree to Seven-Year, \$50.75 Million Extension*, NBC SPORTS (Oct. 18, 2019, 3:57 PM), <https://nhl.nbcports.com/2019/10/18/devils-hischier-agree-to-seven-year-50-75-million-extension/>.

<sup>106</sup> Leahy, *supra* note 105.

<sup>107</sup> Friedman, *supra* note 86.

<sup>108</sup> Associated Press, *supra* note 24.

<sup>109</sup> Lyle Richardson, *Winter Olympics Participation a Potential Roadblock in NHL CBA Talks*, SPORTING NEWS (Oct. 8, 2019), <https://www.sportingnews.com/us/nhl/news/winter-olympics-a-potential-roadblock-in-nhl-cba-talks/rueebkqce4kv1di2o6y1bvtj8> [hereinafter SPORTING NEWS].

in popularity expected to come with Olympic participation as reasons for deciding not continue the tradition.<sup>110</sup> However, “[p]erhaps the biggest reason behind the owners’ unhappiness was because the International Olympic Committee (IOC) stopped covering travel, insurance, accommodations and other costs for NHL players taking part in Olympic action.”<sup>111</sup> In the preseason leading up the 2016–17 season, the NHL facilitated the World Cup of Hockey in an effort to still put forth some kind of best-on-best competition.<sup>112</sup> Players have indicated that they would be open to a similar setup, but not as a substitute for Olympic participation.<sup>113</sup> To the great surprise of many, the CBA extension included a tentative agreement, pending negotiations with the IOC, to allow player participation in the next two Winter Olympics.<sup>114</sup>

#### iv. POST-CAREER CARE

Player representatives Bo Horvat and Devan Dubnyk have spoken about the importance of post-career care both from a health perspective and a livelihood perspective.<sup>115</sup> Studies of concussions in athletes have been popularized since Bennet Omalu’s groundbreaking work in the early 2000s.<sup>116</sup> In July of 2018, the NHL offered a settlement to the 140 members of a class action suit against the league on the matter worth \$22,000 per player and \$75,000 in medical treatment.<sup>117</sup> In 2015, the NHL and the NHLPA also announced the rollout of a new program aimed

---

<sup>110</sup> SPORTING NEWS, *supra* note 109.

<sup>111</sup> SPORTING NEWS, *supra* note 109.

<sup>112</sup> SPORTING NEWS, *supra* note 109.

<sup>113</sup> SPORTING NEWS, *supra* note 109.

<sup>114</sup> O’Brien, *supra* note 2.

<sup>115</sup> Associated Press, *supra* note 24.

<sup>116</sup> Nicolas Pollock, *Hockey Brain Injuries: A Tragic Story of CTE in the NHL*, THE ATLANTIC (Apr. 25, 2019), <https://www.theatlantic.com/health/archive/2019/04/hockey-cte-todd-ewen-brain-injury/587818/>.

<sup>117</sup> Pollock, *supra* note 116.

at preparing athletes for issues they will face after they retire.<sup>118</sup> This includes helping players cope with mental health, balance their time, explore interests outside of hockey, and budget their finances; it also aims to help current players prepare for when they hang up the skates.<sup>119</sup> Dubnyk's comments do not make this issue out to be "anything major," but it is something that the players hope will be discussed.<sup>120</sup>

#### v. STATE OF THE UNION

Both the NHL and NHLPA had previously opted not to reopen the CBA in September 2019, and, after the extension, there is guaranteed labor peace until 2025 or 2026, generating optimism that the players' union and the owners are working well together.<sup>121</sup> Nearly 80% of players approved the extension, and it appears that there is greater unity among the players than in 2012.<sup>122</sup> Both NHL Commissioner Gary Bettman and Executive Director of the NHLPA Donald Fehr have expressed sentiments that negotiations were more cooperative than the previous rather combative rounds.<sup>123</sup> Indeed, all of this culminated in a CBA extension that seemed to come into existence with little-to-no drama while addressing some major issues on the horizon and determining a return-to-play plan in the midst of a

<sup>118</sup> Joe Pack, *Exiting the Game: How the NHL's New Retirement Program Aims to Help Players in Their Post-Hockey Life*, VICE (Sept. 8, 2015 10:35 AM), [https://www.vice.com/en\\_ca/article/qkq7j5/exiting-the-game-how-the-nhls-new-retirement-program-aims-to-help-players-in-their-post-hockey-life](https://www.vice.com/en_ca/article/qkq7j5/exiting-the-game-how-the-nhls-new-retirement-program-aims-to-help-players-in-their-post-hockey-life).

<sup>119</sup> Pack, *supra* note 118.

<sup>120</sup> Associated Press, *supra* note 24.

<sup>121</sup> O'Brien, *supra* note 2; Stephen Whyno, *NHL Players Stay With CBA, Labor Peace Set to at Least 2022*, US NEWS (Sept. 16, 2019 6:34 PM), <https://www.usnews.com/news/business/articles/2019-09-16/nhl-players-stay-with-cba-labor-peace-set-to-at-least-2022>.

<sup>122</sup> Harrison Brown, *Report: NHL, NHL Players' Association Have Voted To Accept CBA Extension, Return-to-play Protocols*, NOVA CAPS (July 10, 2020), <https://novacapfans.com/2020/07/10/report-nhl-players-association-have-voted-to-accept-cba-extension-return-to-play-protocols/>; Whyno, *supra* note 120.

<sup>123</sup> Whyno, *supra* note 121.

pandemic.<sup>124</sup> League revenues were healthy pre-pandemic, and there is much hype surrounding the television rights deal coming in 2021.<sup>125</sup> There is additional excitement surrounding the Seattle expansion team set to debut in 2021 and the legalization of gambling.<sup>126</sup> The league is in a good place, and neither the players nor the owners want to upset that.<sup>127</sup> The owners are happy—having gotten virtually everything they have wanted in the previous two negotiations—although they will likely push for a solution that closes the loophole that allows GMs to sign star players to bonus-heavy contracts.<sup>128</sup> Players, too, have benefitted from the current system, as salaries have risen with the tide of increasing revenues.<sup>129</sup> The CBA extension appears to give a little back to the players, creating a win-win situation and a more even balance in the CBA compared to other leagues.<sup>130</sup>

### C. A TALE OF TWO RFA NEGOTIATIONS

There are superstar RFAs, and there are regular RFAs. Much to the chagrin of Charles Dickens, the negotiations for these two types of RFAs look very different.<sup>131</sup> This is an oversimplification because there are many different types of RFAs,<sup>132</sup> but in the big picture, it provides a basic framework for how to view RFA negotiations. The negotiation hinges on how the player fits

---

<sup>124</sup> O'Brien, *supra* note 2.

<sup>125</sup> Whyno, *supra* note 121.

<sup>126</sup> Lyle Richardson, *What's Next in CBA Discussions Between the NHL and Its Players?*, SPECTORS HOCKEY (Sept. 24, 2019), <https://www.spectorshockey.net/2019/09/whats-next-in-cba-discussions-between-the-nhl-and-its-players/>.

<sup>127</sup> Whyno, *supra* note 121.

<sup>128</sup> Richardson, *supra* note 126.

<sup>129</sup> Richardson, *supra* note 126.

<sup>130</sup> Whyno, *supra* note 121.

<sup>131</sup> See generally Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL...An Agent's View*, 4 MARQ. SPORTS L. J. 1 (1993).

<sup>132</sup> Bartlett, *supra* note 131.

into the talent pool.<sup>133</sup> In arbitration, GMs and agents alike rely on comparable players analyses (“comparables”), and the practice is much the same in plain old negotiation.<sup>134</sup> A critical component of the negotiation is who has more leverage and how it is used.<sup>135</sup> Players gain leverage by possessing strong statistics and accolades, having “arb rights,” or finding other alternatives to signing with the team.<sup>136</sup> Teams gain leverage when a player only has marginal statistical contributions, is coming off an injury, or lacks other alternatives.<sup>137</sup>

Strictly from a system standpoint, the common RFA is better situated to maximize his leverage while in restricted free agency. For starters, it is more likely for a common RFA to have arbitration rights than a superstar RFA.<sup>138</sup> As described above, the requirements for a player that qualifies as an RFA and one that has arbitration rights are very similar, but the most important distinction is that players who sign their first SPC between the ages of 18 and 20 acquire arbitration rights after playing professionally for four seasons, yet they become an RFA after three playing seasons.<sup>139</sup> This is significant because many of the superstar players and their respective teams wish to sign longer term deals after their initial three-year entry-level contract expires.<sup>140</sup> If indeed that is the case, the players will likely never be eligible for arbitration unless they bet on

---

<sup>133</sup> Bartlett, *supra* note 131, at 6.

<sup>134</sup> Bartlett, *supra* note 131, at 6, 12–13; *Spittin’ Chiclets Episode 232: Featuring Brian Burke + Rone*, BARSTOOL SPORTS (Jan. 2, 2019) (downloaded using iTunes).

<sup>135</sup> Bartlett, *supra* note 131, at 8.

<sup>136</sup> Bartlett, *supra* note 131, at 8; Greg Wyshynski, *How to Improve the Restricted Free Agency*, ESPN (Aug. 8, 2018), [https://www.espn.com/nhl/story/\\_/id/24318623/nhl-how-restricted-free-agency-system-changed](https://www.espn.com/nhl/story/_/id/24318623/nhl-how-restricted-free-agency-system-changed).

<sup>137</sup> Bartlett, *supra* note 131, at 8; Wyshynski, *supra* note 136.

<sup>138</sup> See Wyshynski, *supra* note 136.

<sup>139</sup> Wyshynski, *supra* note 136.

<sup>140</sup> Wyshynski, *supra* note 136.

themselves in the short run and thus they become bound to the team holding their rights until they reach UFA status.<sup>141</sup> Common RFAs, on the other hand, tend to sign shorter “bridge” deals and therefore will likely have arbitration rights during their second round of negotiations with the club.<sup>142</sup> Without arbitration rights, a player has little-to-no leverage.<sup>143</sup>

Some players have tried to create leverage through other means. One such option would be to sign an offer sheet.<sup>144</sup> In theory, an offer sheet would be more likely to occur with a common RFA than a superstar RFA because the compensation for acquiring a superstar RFA would be much more costly than that of a common RFA, and signing teams are less willing to part with valuable draft picks.<sup>145</sup> Aside from allowing a player to receive a higher AAV than his original team may not want to dole out, offer sheets give a player more control over his destination than a standard RFA contract, allow a player to achieve the financial structure he desires, and provides peace of mind by expediting the negotiation process.<sup>146</sup> In practice, offer sheets are very rarely seen and even less likely to be signed,<sup>147</sup> so this option rarely works for any RFA, regardless of star power.

---

<sup>141</sup> See Wyshynski, *supra* note 136.

<sup>142</sup> See Wyshynski, *supra* note 136.

<sup>143</sup> Wyshynski, *supra* note 136.

<sup>144</sup> Wyshynski, *supra* note 136. Teams may sign another team’s RFA through an offer sheet, and if the other team does not match the offer, the team receives the RFA and must pay the original team compensation in the form of draft picks in varying amounts depending on the value of the contract. Wyshynski, *supra* note 136.

<sup>145</sup> See Wyshynski, *supra* note 136.

<sup>146</sup> Carol Schram, *Mitch Marner Considers Training in Switzerland As the NHL’s RFA Impasse Continues*, FORBES.COM (Aug. 21, 2019, 11:04 AM), <https://www.forbes.com/sites/carolschram/2019/08/21/mitch-marner-considers-training-in-switzerland-as-the-nhls-rfa-impasse-continues/#4cf4e5252991>.

<sup>147</sup> Wyshynski, *supra* note 136.

Another way players try to gain leverage is by finding other alternatives. For example, Mitch Marner considered training in Switzerland during the NHL season if he could not reach agreeable terms with the Maple Leafs before the season started.<sup>148</sup> This is a better option for star players because they are less replaceable.<sup>149</sup> However, this is not a popular trend, as none of the other RFAs waiting on Marner to set the market decided to train overseas.<sup>150</sup> Additionally, players may be less willing to attempt missing part of the NHL season after watching William Nylander struggle after his return from his holdout.<sup>151</sup> This option might be easier to accomplish than signing an offer sheet, but it provides less leverage and carries more risk.

On the whole, RFAs have little leverage without arbitration rights.<sup>152</sup> While in theory common RFAs are better able to manipulate the system to maximize their incomes, superstar RFAs still receive better outcomes naturally due to their higher statistical contributions and the difficulty of replacement.<sup>153</sup> In the example from the previously cited article, per CapFriendly, the common RFA with arbitration rights (Josh Leivo) signed a two-year deal with a \$612,500 AAV after posting eight points in twenty-eight games at the NHL level; the superstar RFA without arbitration rights (William Nylander) eventually signed a six-year contract with an AAV of \$6,962,366 after accumulating 135 points and 185 games of NHL experience.<sup>154</sup> Despite not having arbitration rights, players

---

<sup>148</sup> Schram, *supra* note 146.

<sup>149</sup> See Wyshynski, *supra* note 136.

<sup>150</sup> Schram, *supra* note 146.

<sup>151</sup> Schram, *supra* note 146; Nylander opens up for the first time regarding his holdout, Bardown, <https://www.bardown.com/nylander-opens-up-for-the-first-time-regarding-his-holdout-1.1219522> (last visited Sept. 20, 2020).

<sup>152</sup> See Wyshynski, *supra* note 136.

<sup>153</sup> See Wyshynski, *supra* note 136.

<sup>154</sup> Wyshynski, *supra* note 136; See generally CAPFRIENDLY, <https://www.capfriendly.com> (last visited Jan. 11, 2019).

would rather have Nylander's contract than Leivo's; this division shows how different players use the system to their advantage in contract negotiations.

#### D. THE STOCK MARKET APPROACH

Many of the proposals that follow involve making some alteration to the CBA, but this section discusses an approach that is more of a shift in mindset. This shift is a trend in the NHL where players are being paid based on future expectations rather than past performance.<sup>155</sup> Traditionally, hockey players have been paid based on a similar model to most business industries: wages are a function of marginal product factors and marginal revenue factors.<sup>156</sup> Marginal product factors in this context are largely prior statistics, whether traditional hockey stats or more modernly advanced analytics, and marginal revenue factors are valuations based on the increased expected money a team will bring in from signing a player.<sup>157</sup> Previously, star players would sign a mid-length "bridge deal" before signing a big ticket at or around the time of hitting unrestricted free agency.<sup>158</sup> Now, some GMs are changing their mindset to focus on signing a younger player

---

<sup>155</sup> KEVIN PECK, SALARY DETERMINATION IN THE NATIONAL HOCKEY LEAGUE: RESTRICTED, UNRESTRICTED, FORWARDS, AND DEFENSEMEN, 8 (Western Mich. U. Dec. 7, 2012), [https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3334&context=honors\\_theses](https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3334&context=honors_theses).

<sup>156</sup> PECK, *supra* note 155, at 8, 10. Although the data in this article is from the 2011–2012 season and thus predates the current CBA, the changes to the CBA did not substantially change the relationships studied in the data. Rather, as discussed above, the fight over the most recent CBA centered on the revenue split between owners and players, the length of free agent contracts, and revenue sharing amongst the teams.

<sup>157</sup> PECK, *supra* note 156, at 8, 10.

<sup>158</sup> Associated Press, *Connor McDavid Deal Ushers in Era of NHL's Millennial Millionaires*, SPORTS ILLUSTRATED (Sept. 30, 2017), <https://www.si.com/nhl/2017/09/30/nhl-salary-trends-youth-connor-mcdavid-contract> [hereinafter SPORTS ILLUSTRATED].

coming off his entry-level deal to a longer term contract rather than signing a more veteran player.<sup>159</sup>

The benefit to this approach is that it helps retain young talent in the organization.<sup>160</sup> The importance of this can be seen not only in contracts given to younger players and the fact that fewer notable players have contract years during their first year of UFA eligibility, but also by how teams are investing in their staff.<sup>161</sup> This focus on younger players puts pressure on the labor market in a hard salary cap system,<sup>162</sup> which leads to better competition. Furthermore, if a player produces at the same level and generates more revenue for the team through jersey sales or tickets sold, that player should be paid more regardless of his age.<sup>163</sup>

However, betting on younger talent does make for risky business for GMs. It is harder to guess right when basing a decision off of three years' worth of information compared to six or seven years of information.<sup>164</sup> This is supported by the fact that counting stats are a statistically significant indicator of salaries for UFAs but not for RFAs.<sup>165</sup> This could be because it is harder to predict future value based on limited information and thus, there is more variance, but it could also just be a sign that teams are incorporating this stock-market-like philosophy.<sup>166</sup> Some would also argue that the players have not earned a big ticket after playing for three years while others would argue that

---

<sup>159</sup> SPORTS ILLUSTRATED, *supra* note 158.

<sup>160</sup> See SPORTS ILLUSTRATED, *supra* note 158.

<sup>161</sup> SPORTS ILLUSTRATED, *supra* note 158.

<sup>162</sup> See Kalman, *supra* note 20.

<sup>163</sup> See Kalman, *supra* note 20.

<sup>164</sup> See generally SPORTS ILLUSTRATED, *supra* note 158.

<sup>165</sup> See PECK, *supra* note 156, at 15.

<sup>166</sup> See generally PECK, *supra* note 156.

players can begin earning more money earlier in their careers.<sup>167</sup>

The flip side of the speculative argument—the “pros” of speculation—is that it provides cost certainty for GMs and financial security for players.<sup>168</sup> GMs benefit from having a clearer picture of what the team and its cost structure will look like.<sup>169</sup> The younger players signing the longer term deals benefit from knowing where they will be playing and how much they will be making for a longer period of time.<sup>170</sup> However, if this trend catches on, in the long term these players may ironically find themselves taking discounts once their initial deals end. Because the CBA limits contracts to seven or eight years,<sup>171</sup> these superstar RFAs will become free agents at around age thirty, the age of players who will lose out the most under this approach; thus, players may not end up in a better position than they would have under the traditional approach.

Ultimately, since this approach to building rosters is more of a trend that is up to the discretion of GMs, there will not likely be a rule change directly affecting it in the next CBA, but it is something to watch for on the RFA landscape to see if it becomes the new normal and how it will impact other solutions.

### III. PROPOSED SOLUTIONS

The following is an analysis of the ideas proposed to remedy the RFA situation. The next section advances several tweaks to the current CBA’s cap structure, including allowing arbitration for all RFAs, instituting a soft cap like the NBA or a franchise tag feature like the NFL, getting rid of restricted free agency altogether, and adjusting the

---

<sup>167</sup> Compare Wyshynski, *supra* note 136, with SPORTS ILLUSTRATED, *supra* note 158.

<sup>168</sup> See SPORTS ILLUSTRATED, *supra* note 158.

<sup>169</sup> See SPORTS ILLUSTRATED, *supra* note 158.

<sup>170</sup> SPORTS ILLUSTRATED, *supra* note 158.

<sup>171</sup> See Staudohar, *supra* note 7.

mechanics of the offer sheet. One additional solution considered is implementing mandatory mediation. Section C argues that the best feasible solution is combining mandatory mediation in arbitration and hold-out situations with some bargained-for contract options not otherwise available to RFAs.

**A. PROPOSED RULE CHANGES TO THE CURRENT SYSTEM**

**i. ARBITRATION FOR EVERYBODY**

One potential CBA alteration that could reduce RFA holdouts would be to open up arbitration to all RFAs.<sup>172</sup> The benefits of using arbitration in sport include a final and binding award on the parties, a quick resolution to the process, and economic efficiency for the parties.<sup>173</sup> The players benefit from having an award based on the marketplace, not team salary structures.<sup>174</sup> The setup also completely disregards the “stock-market approach” model described above in favor of using past performance as a baseline, resulting in greater certainty of what the award will look like.<sup>175</sup> It also provides players with additional leverage in negotiations.<sup>176</sup> From a public policy perspective, it appears to have the benefit of putting an end to the proposition that young stars face of taking a below-market deal or holding out.<sup>177</sup>

---

<sup>172</sup> See Wyshynski, *supra* note 136. Player agent Michael Deutsch advocated for younger players to become arbitration eligible after the expiration of the entry-level contracts. Wyshynski, *supra* note 135.

<sup>173</sup> American Arbitration Association, *Using ADR to Resolve Collegiate, Professional, and Sports-Business Disputes*, ADR.ORG, [https://www.adr.org/sites/default/files/document\\_repository/Using%20ADR%20to%20Resolve%20Collegiate%20Professional%20and%20Sport%20Business%20Disputes.pdf](https://www.adr.org/sites/default/files/document_repository/Using%20ADR%20to%20Resolve%20Collegiate%20Professional%20and%20Sport%20Business%20Disputes.pdf).

<sup>174</sup> Wyshynski, *supra* note 136.

<sup>175</sup> Wyshynski, *supra* note 136.

<sup>176</sup> Wyshynski, *supra* note 136.

<sup>177</sup> Wyshynski, *supra* note 136. This is echoed by player agent Allan Walsh. Wyshynski, *supra* note 135.

However, arbitration can be a bitter, hard-fought battle, and as a result, both teams and players seek to avoid it if possible.<sup>178</sup> The stories that come to mind include that of Tommy Salo leaving his arbitration against New York Islanders GM Mike Milbury in tears and the infamous story of the arbitration between Brendan Morrison and Brian Burke, in which Morrison was humorously compared to a mouse while his teammates were analogized to an elephant.<sup>179</sup> Ending a contract dispute in arbitration also takes the decision-making out of the hands of the players and GMs when it might be in their best interest to negotiate a different settlement than an arbitrator can award.<sup>180</sup> Furthermore, studies have found a negative correlation between arbitration and the player's performance in the following season and the likelihood that the player stays with the team, results that teams and players alike certainly do not want.<sup>181</sup> Plus, after fighting to resist the usage of salary arbitration during CBA negotiations,<sup>182</sup> owners are not likely to agree to expand the practice. Indeed, arbitration cases may even decrease from their already feeble numbers. Some GMs would rather not issue qualifying offers to RFAs than be bound to an arbitration award that is too high amid the

---

<sup>178</sup> Trevor Levine, *Two Worlds Collide: Salary Arbitration for NHL Players in the Salary Cap Era*, 26 OHIO ST. J. ON DISP. RESOL. 729, 729 (2011).

<sup>179</sup> See Levine *supra* note 178, at 729; *Brendan Morrison*, 31 THOUGHTS (August 17, 2020) (downloaded using iTunes). See also Jared Bishop, *Implementing Mediation into NHL Salary Negotiations for Restricted Free Agents Prior to Salary Arbitration*, 23 SPORTS L. J. 137, 142–43 (2016) (recounting Jeff O'Neil's tweet about his arbitration experience before the P.K. Subban's potential arbitration hearing highlight this sentiment).

<sup>180</sup> Wyshynski, *supra* note 136.

<sup>181</sup> John W. Budd, *Are Voluntary Agreements Better? Evidence from Baseball Arbitration*, UNIV. OF MINN., 28–29 (Mar. 18, 2016), <http://jbudd.csom.umn.edu/RESEARCH/Baseball-arbitration-paper.pdf>.

(Recognizing that this study analyzes baseball arbitration, which utilizes a different arbitration method than the NHL, the study's results are likely still relevant to the NHL, although maybe not as dramatic of results would be likely in the NHL, as both systems possess adversarial functions).

<sup>182</sup> Kobritz & Levine, *supra* note 26, at 191.

pressure of being strapped under a flat cap while preparing for the Seattle expansion draft.<sup>183</sup> Therefore, while allowing all RFAs to be arbitration eligible would solve one RFA problem, it is not a likely solution and may even lead to more problems.

#### i. A SOFT CAP

Some have also suggested instituting a soft salary cap.<sup>184</sup> Major League Baseball and the NBA feature a soft cap, but the NBA's Larry Bird Exception provides a better model for the NHL's purposes.<sup>185</sup> The typical Larry Bird Exception allows teams to sign a player for a longer term with higher annual raises at a reduced cap hit, but this option is only available for players that have played for the same team for three consecutive years.<sup>186</sup> The NHL could offer a version of this salary cap exception to RFAs. Perhaps the rule would allow for players who have played for the same team for five years to sign up to a ten-year deal with a cap hit of 80% of its traditionally calculated AAV.<sup>187</sup> This compromise would afford GMs the opportunity to gather more evidence on which players they would like to reward with big contracts while also giving players the security they desire with contracts longer than the custom.<sup>188</sup> It also satisfies the criticism that players should have to earn their big contracts by paying their dues first.<sup>189</sup> And, most

---

<sup>183</sup> *Where Do the Maple Leafs Go from Here?* 31 THOUGHTS (Aug. 12, 2020) (downloaded using iTunes) [hereinafter 31 Thoughts].

<sup>184</sup> Drew Meyer, *How the NHL Could Fix the Salary Cap and Pay the Players*, SB NATION (Jul. 24, 2019, 12:41 PM EDT), <https://www.broadstreethockey.com/2019/7/24/20706791/how-the-nhl-could-fix-the-salary-cap-cba>.

<sup>185</sup> See generally Steven Loung, *NBA off-season FAQ: Moratorium, max Contracts, Bird Rights, and more*, SPORTSNET (June 26, 2019 12:07 PM), <https://www.sportsnet.ca/basketball/nba/nba-off-season-faq-moratorium-max-contracts-bird-rights/>.

<sup>186</sup> Loung, *supra* note 185.

<sup>187</sup> See generally Loung, *supra* note 185.

<sup>188</sup> See SPORTS ILLUSTRATED, *supra* note 158.

<sup>189</sup> Wyshynski, *supra* note 136.

importantly from the league's perspective, it allows teams to retain their homegrown talent, an objective critical to maintaining competitive parity across the league with large and small-market teams.<sup>190</sup>

One commentator has even suggested a new salary cap structure that has different salary caps for players drafted by a team and players otherwise acquired.<sup>191</sup> This similarly accomplishes the goal of helping teams retain homegrown talent.<sup>192</sup> It also helps teams avoid the situation the Toronto Maple Leafs found themselves in.<sup>193</sup> The team drafted so many star players in a short span, that it became difficult to pay all of them when the players came off their entry-level deals.<sup>194</sup> However, this proposal could have vast unintended consequences, as teams vary in the construction of the roster in terms of drafted and otherwise acquired players. The only fair way to accomplish this would be to make the cap ceiling a multiple of the percentage of players drafted by the team, and that would make the system too complicated and reduce market efficiency. Additionally, this proposal would adversely affect certain veteran free agents,<sup>195</sup> so the NHLPA might be hesitant to endorse a scheme that favors one group of its members over another.

A solution that accomplishes similar goals with fewer drawbacks is also the idea of "cap cash," whereby teams could trade excess cap room to other teams as if it were a prospect or draft pick.<sup>196</sup> A relatively recent proposal, the details have yet to be fully flushed out and the waters have yet to be tested, but it shows promise in that it does not require a dramatic alteration to the cap system and it does

---

<sup>190</sup> Staudohar, *supra* note 7.

<sup>191</sup> Meyer, *supra* note 184.

<sup>192</sup> Meyer, *supra* note 184.

<sup>193</sup> See Kalman, *supra* note 20.

<sup>194</sup> See Kalman, *supra* note 20.

<sup>195</sup> Meyer, *supra* note 184.

<sup>196</sup> See 31 THOUGHTS, *supra* note 183.

not add any extra money into the system nor take any out of owners' pockets.<sup>197</sup>

Thus, if the NHL were to amend its cap system in this vein, a soft cap structure with either modified Larry Bird rights or an implementation of "cap cash" would be the best solution to benefit RFAs and veteran players. However, this is a seemingly unlikely notion (disregarding the sunk cost principle given that instituting the salary cap came at the expense of the entire 2004–2005 season).<sup>198</sup>

## ii. THE FRANCHISE TAG

In the NFL, teams have the option of designating a player with a franchise tag.<sup>199</sup> Thereafter, no other team can make an offer to that player, and he will receive the average salary of the five highest paid players at his position.<sup>200</sup> The NHL could implement a franchise tag option that teams can use on RFAs that threaten to hold out. This creates financial and emotional security for the players, and cost certainty for GMs, while also allowing negotiators to resolve disputes earlier and teams to retain their top talent.<sup>201</sup> Some GMs may not like the franchise tag because it skews the market based on other GMs' valuations.<sup>202</sup> Also, some players who feel they are in the top two at their position (or at least that they should be paid like it) will not like being tagged because their salary will automatically be brought down to below their expectations.<sup>203</sup> And while the tag may stop the occasional holdout, it puts another arrow in general managers' quivers that increases their leverage in RFA negotiations; if players face additional pressure from their

---

<sup>197</sup> See 31 THOUGHTS, *supra* note 183.

<sup>198</sup> Kobritz & Levine, *supra* note 26, at 197.

<sup>199</sup> Steve Silverman, *The Pros and Cons of Adding the Franchise Tag to the NHL CBA*, BLEACHER REPORT (Mar. 13, 2013), <https://bleacherreport.com/articles/1565782#slide0>.

<sup>200</sup> Silverman, *supra* note 199.

<sup>201</sup> Silverman, *supra* note 199.

<sup>202</sup> Silverman, *supra* note 199.

<sup>203</sup> Silverman, *supra* note 199.

team, it could result in further resentment or even an increase in holdouts as players who do not feel that GMs will exercise the tag double down on what leverage they do have.<sup>204</sup> All in all, the franchise tag is not the best option for the NHL's needs.

### iii. GET RID OF RESTRICTED FREE AGENCY ALTOGETHER

At least one player agent has suggested that everybody (except the teams) would be happy with a total free-market system sans restricted free agency.<sup>205</sup> In such a system—one that would make every economist proud—the market would dictate all contracts, as all players would become UFAs.<sup>206</sup> This would dispense with the gripe that RFAs are not truly “free agents.”<sup>207</sup> It would also give younger players significantly more leverage.<sup>208</sup> However, the problem is that it would do so at the expense of veteran players, as the free agent market would become more congested and lower the equilibrium that veterans currently enjoy.<sup>209</sup> While this would be better for the league overall, assuming it pays players based on their on-ice production and effect on revenue,<sup>210</sup> the NHLPA would again run into the problem of divergent constituent interests. Moreover, this proposal would mess with the league's parity, as it favors large-market teams and does not address the concern that players should pay their dues before hitting unrestricted free agency. Given that the minimum age to acquire UFA rights was as high as thirty-three, a number the league was reluctant to reduce, it appears unlikely that such a solution would be well received by owners.<sup>211</sup>

---

<sup>204</sup> Silverman, *supra* note 199.

<sup>205</sup> Wyshynski, *supra* note 136.

<sup>206</sup> Wyshynski, *supra* note 136.

<sup>207</sup> Wyshynski, *supra* note 136.

<sup>208</sup> Wyshynski, *supra* note 136.

<sup>209</sup> Wyshynski, *supra* note 136.

<sup>210</sup> PECK, *supra* note 155, at 8, 10.

<sup>211</sup> Kobritz & Levine, *supra* note 26, at 186–87; Wyshynski, *supra* note 136.

#### iv. ADJUSTING OFFER SHEETS<sup>212</sup>

Adjusting the offer sheet compensation structure can provide another avenue for RFAs to gain more leverage.<sup>213</sup> Doing so would make holding out less likely, as demonstrated by the Sebastian Aho offer sheet in the 2019 offseason,<sup>214</sup> since offer sheets are available from the start of the free agency period and provide a guaranteed resolution within seven days. It also gives an RFA the option to negotiate for a type of contract structure that his team is not open to with another club that is.<sup>215</sup> The trouble with offer sheets is that the compensation is both too much and not enough—signing teams have to give up too many draft picks to make it worth their while, and receiving teams do not receive enough to justify giving up their homegrown talent.<sup>216</sup> Also, there is the ever-present theory that GMs approach offer sheets “collegially” under the modern salary cap system, making their usage a rarity.<sup>217</sup> Ultimately, because it is hard to envision a way of making offer sheets’ economic incentives work out mathematically,<sup>218</sup> adjusting the offer sheet mechanism is not a viable solution—even though it may help RFAs gain leverage and increase offseason drama.<sup>219</sup>

#### B. MANDATORY MEDIATION

One final proposal to consider is adding a provision to the CBA requiring mediation before arbitration.<sup>220</sup> This effectively accomplishes the objectives of keeping the

<sup>212</sup> See *supra* note 144 for the definition of an offer sheet.

<sup>213</sup> Larry Lage, *Some of NHL's best still available as restricted free agents but it would be a big surprise if signed by another team*, THE GLOBE AND MAIL (July 3, 2019), <https://www.theglobeandmail.com/sports/hockey/article-some-of-nhls-best-still-available-as-restricted-free-agents-but-it/>.

<sup>214</sup> Schram, *supra* note 146.

<sup>215</sup> Lage, *supra* note 213.

<sup>216</sup> Lage, *supra* note 213; Wyshynski, *supra* note 136.

<sup>217</sup> Wyshynski, *supra* note 136.

<sup>218</sup> Lage, *supra* note 213; Wyshynski, *supra* note 136.

<sup>219</sup> Levine *supra* note 178, at 748.

<sup>220</sup> Grabowski, *supra* note 11, at 213.

control over the outcome in the negotiators' hands and providing a speedy resolution to a conflict.<sup>221</sup> It also protects the interest of maintaining a healthy working relationship between the players and their teams without limiting or undermining the arbitration process.<sup>222</sup> For salary disputes specifically, mediation provides the additional benefit of keeping negotiations going when they stall.<sup>223</sup> As was the case with Marner, RFA negotiations can hit an impasse,<sup>224</sup> and nothing happens until either the start of the season or the artificial December 1 deadline.<sup>225</sup> Mediation can keep both sides talking, increasing the probability that they will reach an agreement before it is too late.<sup>226</sup> Mediation also fosters innovation, which could help clubs and players find ways to come up with creative deal structures they are unlikely to reach in arbitration (or even potentially negotiation) if the sides dig into their respective positions too deeply.<sup>227</sup> This proposal benefits GMs too, as it provides them an opportunity to “express their salary cap concerns and realistic capabilities,” evidence not allowed in arbitration hearings.<sup>228</sup>

A criticism of these last two benefits is that both are available in negotiation as well— other than the use of positional bargaining, there is nothing stopping the sides from discussing creative solutions within the constraints of the CBA and the realm of realistic possibilities while negotiating.<sup>229</sup> In response, Bishop argues that in order for mediation to work in salary disputes, we must make adjustments to the SPC, namely relating to performance

---

<sup>221</sup> Grabowski, *supra* note 11, at 213.

<sup>222</sup> Grabowski, *supra* note 11, at 213, 214.

<sup>223</sup> Grabowski, *supra* note 11, at 208.

<sup>224</sup> Schram, *supra* note 146.

<sup>225</sup> Kell, *supra* note 89.

<sup>226</sup> Grabowski, *supra* note 11, at 208–09.

<sup>227</sup> Bishop, *supra* note 179, at 152.

<sup>228</sup> Bishop, *supra* note 179, at 155.

<sup>229</sup> See Grabowski, *supra* note 179, at 212–13.

bonuses and no-trade or no-movement clauses.<sup>230</sup> His proposals, while on the right track, fall short for several reasons. First, the change regarding performance bonuses places teams under the same salary cap limitations;<sup>231</sup> this does no good because it does not expand the salary cap pie but rather creates more competition for the same amount of slices, thereby exacerbating troubles with cap management, holdouts, and the divide between RFAs and veterans.<sup>232</sup> Secondly, the addition of these changes to the CBA is not directly tied to mediation, and players would only become eligible for these new benefits once they acquire arbitration eligibility.<sup>233</sup> This creates no momentum for mediation that would not be present in negotiation, aside from the owners feeling like they would be giving something for nothing.<sup>234</sup> One way to remedy this could be to make these additional benefits contingent upon entering mediation before a specific deadline.

One final consideration for the “mediation before arbitration” approach is to alter the context of salary arbitration. As mentioned above, typically about forty players file for arbitration in the offseason, and only about three or four contracts per year are determined by an arbitration award.<sup>235</sup> Furthermore, few if any of the players who file for arbitration are star players.<sup>236</sup> Therefore, this proposal is underinclusive if intended to solve the RFA problem. To have a greater impact on the RFA landscape, it would be better to expand mediation to all RFAs rather than just those eligible for arbitration.

---

<sup>230</sup> Bishop, *supra* note 179, at 152–53.

<sup>231</sup> Bishop, *supra* note 179, at 153.

<sup>232</sup> See generally Wyshynski, *supra* note 136.

<sup>233</sup> Bishop, *supra* note 179, at 152–54.

<sup>234</sup> See generally Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. OF SPORTS & ENT. LAW 189, 212-13 (2014).

<sup>235</sup> Lake, *supra* note 17.

<sup>236</sup> See generally Lake, *supra* note 17.

### C. A MODEST PROPOSAL:<sup>237</sup> THE NHL SHOULD IMPLEMENT MEDIATION

Many of the above proposals address ancillary issues but not the main problem with RFA negotiations; they serve as a shortsighted fix to a narrow problem rather than projecting a well-rounded solution with a bigger picture in mind. The big picture is simply this: 1) over the course of the NHL's history, owners have enjoyed friendlier CBAs than players; 2) players are seeking to gain more leverage; 3) the league is in an unprecedented flux in terms of roster makeup and on-ice production, caused by the infusion of youth cornerstone players; and 4) the NHLPA, teams, players, and player agents are all trying to balance the competing interests of different players.<sup>238</sup>

In terms of public policy, the league should pay the best players the most.<sup>239</sup> A cornerstone player of the franchise who provides more value on the ice should make more than a veteran free agent who might be bought out in a few years.<sup>240</sup> This is particularly true when the market dictates such a result.<sup>241</sup> However, too radical of a change can produce injustice for veteran players who had been taking discounts their whole career under the pretense that they would get rewarded in the future.<sup>242</sup> Therefore, it is necessary that any change to the current system gives younger players more leverage without yanking the carpet out from veteran players. Accomplishing this while also providing a benefit for teams is the ultimate win-win.

The stock market approach to building a team is a trend that ought to be kept in mind when debating potential rule changes because it serves as a predictor of future

---

<sup>237</sup> Don't worry, this passage does not advocate for cannibalism of babies.

<sup>238</sup> See generally Kalman, *supra* note 20; Wyshynski, *supra* note 136.

<sup>239</sup> See Kalman, *supra* note 20.

<sup>240</sup> See Kalman, *supra* note 20.

<sup>241</sup> PECK, *supra* note 155, at 8, 10.

<sup>242</sup> See Kalman, *supra* note 20.

behavior within the system and how it will impact both teams and players. Of the proposed changes to the free agent system, the best solution is the move to a soft cap system with the introduction of modified Bird rights. It presents the fairest compromise in which players secure more leverage and a larger payday, teams procure cost certainty and a larger window to evaluate talent, and the system more accurately reflects the value of players relative to the rest of the labor market. For the reasons outlined above, this proposal is unlikely to be adopted. Alternatively, the untested soft cap theory of “cap cash” shows promise, but the league’s appetite for such a solution remains to be seen. Therefore, it is best to shift attention towards a more attainable solution: mediation.

The NHL should integrate mediation into its free agency structure. While it should always be available (and indeed, there is no mention of a rule against it anywhere in the CBA), an RFA should be required to mediate in two scenarios: 1) before he holds out and 2) before he enters arbitration. The biggest effect this would have is strengthening the relationship between the player and team.<sup>243</sup> It will also increase the probability that an outcome will be determined quicker and the outcome will be one determined by the parties.<sup>244</sup> In the first scenario, a quick resolution is important to avoid a player missing games.<sup>245</sup> In the second scenario, mediation provides a peaceable resolution process that avoids the horror stories of previous NHL arbitrations.<sup>246</sup> It also provides teams with a process where they can fight the inflationary effects on wages that have resulted from arbitration.<sup>247</sup> Although the relative

---

<sup>243</sup> See American Arbitration Association, *supra* note 173.

<sup>244</sup> See American Arbitration Association, *supra* note 173.

<sup>245</sup> See Schram, *supra* note 146.

<sup>246</sup> Bishop, *supra* note 179, at 142–43.

<sup>247</sup> See Liebman, *supra* note 40, at 89.

effectiveness of mandatory mediation can be debated,<sup>248</sup> it provides tremendous potential upside and incurs little cost that would not be incurred anyway through the current system of negotiation and arbitration. Additionally, to overcome this debate, the CBA could sweeten the pot and incentivize voluntary mediation. In each scenario, there could be a provision stating that parties that enter mediation before a date relevant to each scenario (say July 1 for arbitration and the start of training camp for holdouts), RFAs may bargain for extra performance bonuses, limited no-trade or no-movement clauses, or some other agreed-upon advantage,<sup>249</sup> and teams may discount the performance bonuses from their salary cap similar to the proposals discussed under the soft cap discussion.<sup>250</sup> This would maximize the incentive for teams and players to come to a mutually beneficial agreement, and it does so in a way that maintains the balance of the NHLPA's interests, encourages RFAs not to hold out, and allows teams more flexibility in retaining their top talent without ceding too much leverage.

#### IV. MEDIATION SHOULD ALSO BE IMPLEMENTED IN CBA NEGOTIATIONS

If mediation works in the big picture of RFA salary disputes, can it also work in the big picture of the NHL, namely CBA negotiations? Mediation has been lauded for saving the last half of the NHL season during the 2012–2013 CBA dispute.<sup>251</sup> However, mediation has not always been successful, as the NHL and NHLPA's three attempted mediations before the cancelation of the 2004–2005 season as well as an attempt earlier in the 2012–2013 labor dispute failed to produce an agreement.<sup>252</sup> Nevertheless, under the

---

<sup>248</sup> STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 404 (5th ed.).

<sup>249</sup> See Bishop, *supra* note 179, at 152–54.

<sup>250</sup> See Meyer, *supra* note 184.

<sup>251</sup> Grabowski, *supra* note 11, at 191–92.

<sup>252</sup> Podell, *supra* note 12; Munson, *supra* note 12.

proper circumstances, mediation can be helpful in resolving collective bargaining differences.<sup>253</sup>

Grabowski makes several arguments in favor of including a mediation provision.<sup>254</sup> Albeit that his conclusion is directed at contractual disputes, much of the analysis is focused on how mediation has worked in the CBA context of the NHL's history.<sup>255</sup> One of the most interesting benefits of mediation brought up is that it familiarizes the parties with "the obstacles to resolution, so they know what to avoid in the future."<sup>256</sup> This is an important, yet understated, benefit of mediation in the collective bargaining context because the issues that plagued the negotiations in 2012–2013 are not the same as the issues that the parties disagree about currently.<sup>257</sup> This is somewhat unprecedented as NHL history shows that certain issues such as arbitration rights and free agency have come up recurrently in multiple CBA negotiations.<sup>258</sup> Yet, the latest round of CBA negotiations after a successful mediation did not involve the same issues as 2012–2013, nor does it appear to be likely to be case in the upcoming round after the extension expires.<sup>259</sup> It is indicative of the fact that the parties do in fact learn more about the issues, come up with more creative solutions, and ultimately "keep the peace" better with mediation.<sup>260</sup>

---

<sup>253</sup> Grabowski, *supra* note 11, at 214.

<sup>254</sup> Grabowski, *supra* note 11, at 195–210.

<sup>255</sup> Grabowski, *supra* note 11, at 198–210.

<sup>256</sup> Grabowski, *supra* note 11, at 196.

<sup>257</sup> Compare Kobritz & Levine, *supra* note 26, at 194; Associated Press, *supra* note 24 with Kevin Allen, *NHL, union reach tentative agreement to end lockout*, USA TODAY SPORTS (Jan. 6, 2013 5:57 AM), <https://www.usatoday.com/story/sports/nhl/2013/01/06/nhl-union-agreement-lockout/1811799/>.

<sup>258</sup> See generally Aubut, *supra* note 30.

<sup>259</sup> Compare Kobritz & Levine, *supra* note 26, at 194 with O'Brien, *supra* note 2.

<sup>260</sup> Allen, *supra* note 257.

Part of the reason mediations have not been successful in the past is that neither party sought mediation, but rather federal mediators offered their help.<sup>261</sup> This happened in both the failed and successful mediation attempts in the 2012–2013 round of CBA negotiations.<sup>262</sup> This is troublesome because it may be too late by the time the mediator steps in.<sup>263</sup> Rather, as was suggested with RFA mediation proposal, the parties should agree to mediate by a certain date prior to the September 15 expiration of the CBA if an extension is not already reached. In addition, the next CBA should include a provision stating the same thing in the event that an extension is not agreed upon by a certain date before the expiration of the future CBA.

There are too many possible creative solutions given the combination of variables and issues arising in the upcoming round of CBA negotiations to put forth a coherent, definitive solution that the NHL and NHLPA should adopt.<sup>264</sup> It is precisely in this setting that mediation offers the best advantage because of its flexibility and creativity.<sup>265</sup> This process will allow the owners and the union to make the tradeoffs each respective side deems in its best interest and facilitate an outcome that both sides can be proud of.<sup>266</sup> Mediation will benefit players and owners both financially and emotionally in a potentially highly contentious process.<sup>267</sup>

## V. CONCLUSION

The NHL has been a bona fide testing ground for ADR concepts in the sports industry. It was the first professional sports league to use arbitration in contract

---

<sup>261</sup> Grabowski, *supra* note 11, at 212.

<sup>262</sup> Podell, *supra* note 12.

<sup>263</sup> Grabowski, *supra* note 11, at 212.

<sup>264</sup> See generally Associated Press, *supra* note 24.

<sup>265</sup> American Arbitration Association, *supra* note 173.

<sup>266</sup> American Arbitration Association, *supra* note 173.

<sup>267</sup> See Grabowski, *supra* note 11, at 214.

disputes,<sup>268</sup> and it was the first North American sports league to successfully use mediation to resolve a collective bargaining dispute.<sup>269</sup> The NHL also has the not so distinguished honor of being the only league to lose a full season to a lockout.<sup>270</sup> It has lost regular season games in each of the previous three labor disputes.<sup>271</sup> In order to avoid doing so for the fourth straight time, costing players, owners, networks, sponsors, and fans both financially and emotionally, the NHL should implement more ADR processes into the CBA. In response to one potential issue in the upcoming CBA negotiations, the NHL should integrate mediation into restricted free agency, specifically before salary arbitration and before an RFA holds out coming off of an entry-level contract. Mediation should also be implemented in CBA negotiations in order to help balance the remaining issues in a way that results in a satisfactory, fair, and timely resolution to the CBA negotiations before the September 15 deadline. Additionally, including a provision for mediation before the expiration of the next CBA will further reduce the likelihood of shortening the regular season. ADR has been a major component of NHL history, and it can continue to make a positive impact in the contexts of RFA negotiations and collective bargaining through the implementation of the mediation process. And that is how the NHL can use the “fundies” of ADR when it gets in a pinch tighter than Niklas Kronwall crashing down the side boards.

---

<sup>268</sup> Yoost, *supra* note 5, at 500.

<sup>269</sup> Grabowski, *supra* note 11, at 191.

<sup>270</sup> Kobritz & Levine, *supra* note 26, at 195–96.

<sup>271</sup> Ira Podell, NHL lockout 2012: Mediator gets league, union back together, *Washington Times* (Jan. 5, 2013), <https://www.washingtontimes.com/news/2013/jan/5/nhl-lockout-2012-mediator-gets-league-union-back-t/>.