

CHAPTER 8

HOCK-EY! HOCK-EY! HOCK-EY!

- Moderators:** **Elizabeth Neumeier**, National Academy of Arbitrators, Gloucester, MA
Chris Sullivan, National Academy of Arbitrators, Vancouver, BC
- Panelists:** **Jeff Angus**, Laughton & Co., Vancouver, BC
Brian Burke, Former Toronto Maple Leaf, Vancouver Canuck, and Anaheim Duck General Manager
Michael Elliot, Heenan Blaikie, Vancouver, BC
Peter Gall, Heenan Blaikie, Vancouver, BC
Bruce Laughton, Laughton & Co., Vancouver, BC

Chris Sullivan: We are in Canada, and so, a hockey presentation. This session pertains to the salary arbitration for Cam Neely. Cam Neely was drafted by the Vancouver Canucks in the first round, and traded in June of 1986 to the Boston Bruins. But, we have assumed that trade never took place. This salary arbitration takes place between Neely and the Vancouver Canucks in 1989. The parties, however, will be drawing upon more recent salary-related data.

The relevant collective agreement language that governs the salary arbitration process involves each side having 90 minutes to split between their case and rebuttal. We are truncating that; the parties have 30 minutes. The collective agreement also provides for 10-minute surrebuttal to address new comparators or new issues raised by agreement of the parties. We are not going to have that extra 10 minutes. No new matters are going to be raised, as such.

I will introduce the panel and we will get right to it. To my left, representing the National Hockey League Players' Association (NHLPA) and Cam Neely, are Bruce Laughton, Q.C.; and Jeff Angus. On behalf of the Vancouver Canucks are Peter Gall, Q.C.; Brian Burke; and Michael Elliott. Let the games begin.

Bruce Laughton: This case is about money, and there are three ways this club makes money. First, it sells tickets and fills the seats. Second, it negotiates TV rights, preferably with networks and not just cable. And third, it gets into the playoffs and it stays in the playoffs so as to maximize number one and number two. Cam Neely is a player who makes all three of these things happen. He fills the Canucks' need for more size and grit, especially against teams like the Bruins or the Sharks. Without him, the Canucks are a smaller, skilled, puck-possession team that would be in danger, I predict, of being eliminated in the first round of the playoffs if Cam Neely were not there.

Our brief that I put forward sets out a number of matters and it starts with the analytical framework which flows from the collective agreement. The collective agreement sets out a number of matters the arbitrator has to consider: overall performance, injuries, illness, length of service, and vague things like the player's overall contribution to the team. At the same time, it says what you cannot put forward at arbitration. Critical ones are the size of salary and performance of a comparable player who signs a contract as an unrestricted free agent, the financial state of the team, and the salary cap. So those are out of the picture.

Now, by way of introduction, Cam Neely is an aggressive and imposing player. He is six-foot-one, right-handed, and weighs 218 pounds. What you will see is that he brings both skill and the critical factor of intimidation to the team. He is a power forward in every sense of the word. He was drafted early—at age 18—and he has now played six seasons with the Canucks. As a result of the factors that we will together be reviewing, we are asking for an award of \$7 million.

In terms of his overall performance, Cam Neely's success has come largely from his hard accurate shot, quick release, and his willingness to engage in what you might call the more physical aspects of the game. His height and weight make him a devastating figure on the ice. He is well known for his body checks, his fists, and his goal scoring. He has become the archetype of the ultimate power forward, earning him the nickname, "Bam Bam Cam." Remember The Flintstones?

If you look at the statistics, you will see that throughout Cam Neely's career from '83 up to '89, he has improved in terms of goals, he has improved in terms of points, and he has improved in terms of penalty minutes. His physicality and his aggressiveness can, in part, be seen through his penalty minutes statistics,

which have increased from 57 in his first season to 190 in his last. In the last two seasons, they average 2.5 penalty minutes a game. As one commentator noted, penalty minutes are not necessarily a good indicator of aggressiveness, although once you get to a certain number approaching or passing two minutes per game, it is hard to argue that the player is not an aggressive player. You are not going to get 150-plus penalty minutes without a bunch of them being for physical infractions. But that is not the end of the story. Cam Neely does not spend all of his time in the penalty box. He brings a complete game to the ice, where a forward's prowess is accompanied by an aggressive style. This can be seen from his regular season goals and his playoff goals and points. In his second-to-last season, he reached a career high number of goals in both the regular season and the playoffs, 42 and 9, respectively. I predict with some basis that you will see him hitting 50 goals a season in the near future.

The number of games played are used as an indicator of experience and to facilitate comparability with other players, because it is not based on age. You do not have to have a 22-year-old versus a 22-year-old. In the six seasons that Neely has been with the Canucks, he has played a total of 419 regular games and 44 play-off games. His durability is not being advanced on the basis of a single season, but over a six-year period. Games played per season are 56, 72, 73, 75, 69, and 74. That shows he has stayed healthy. He could not be considered an accident-prone player and that is important when we look into the future.

The relevance of games played was commented on by one arbitrator, who said, "A look at total games played, coupled with the player's consistency will factor into the mix." The career-path element emphasized by the club—to the extent it is relevant—reveals the difference between a player who is a National Hockey League (NHL) success rapidly following his draft, and one who took years to become a full-time player. That is what you will hear from my co-counsel, that being a forward takes time. Being a tough, performing forward takes time and it does not just occur in the first three years after you are drafted.

Regarding his overall contribution to the club, I think you can look at his shooting percentage, which has been in the mid-teens, and we acknowledge that Mr. Neely has played alongside some excellent players. But, in our submission, Mr. Neely was as important to the success of the other players as they were to his success. It is truly a team operation.

Now I will just touch on plus-minus as a statistic because we will see it in the Canucks' brief. Plus-minus measures the goal differential for a player while he is on the ice, excluding power play goals. If the player is on the ice and his team scores, he gets a plus. If the player is on the ice and the other team scores, he gets a minus. So, in the last three seasons, Neely's plus-minus have been plus 23, 30, and 14. We disagree that this can be used to compare one team to another because it is totally dependent on what your team is doing—how the goalie is performing. But what it can show is how you compare to other players on the same club. Look at Daniel Sedin's, 36, 30, and 14—very, very similar.

Regarding special qualities of leadership or public appeal, I'll say this: the fans love Cam Neely. He is a hometown boy, born in Comox over on Vancouver Island. His potent blend of offensive talent and punishing physical presence endear him to Canucks' fans. He has proven to be the answer to Vancouver's prayers, a power forward willing to bang, crash, and score. Off the ice, he has had his share of family troubles, with both his parents being diagnosed with cancer within six months of each other. As a result, he has participated extensively in support for cancer survivors and has set up the Cam Neely Foundation.

In terms of comparable players, it is important to remember that in achieving a salary in the NHL, you are not dependent on final-offer-selection as you are in other sports. You, as the arbitration panel, have the ability to pick a number that is different from the numbers that have been put forward. In terms of comparability, one arbitrator said in an Anaheim Ducks' arbitration, "The notion of finding a true comparable, i.e., an identical twin, tilts more towards hope than reality." As in any proceedings where comparables are used to set wages or economic benefits, there are just too many factors unique and different to these players that will always give the parties fertile ground for argument to support their respective positions. The most one can hope for when trying to define any sets of comparables, is to get a reasonable picture of the marketplace by using similar players with similar abilities and production. So, when you are looking at a forward, we say the important factors are games played, goals, goals-per-game, assists, points-per-game, and penalty minutes to select comparable players.

With that introduction, I will turn matters over to Jeff, who will deal with the comparable players.

Jeff Angus: In determining comparables for Cam Neely, we introduce five players in our brief and I am going to focus, particularly, on three of them. The first one we mention is Scott Hartnell. Mr. Hartnell signed a six-year contract worth over \$25 million. At that time he was 25 years old, or, one year older than Mr. Neely is right now. Mr. Hartnell also received a no-trade clause with his new contract and players often take less salary for this type of stability and guarantee from the team. Because Mr. Hartnell signed in his platform year, we feel that does not allow for any direct salary comparison because the dynamic and marketplace in hockey changes considerably. But we want to use him as an example of a player who was compensated significantly for more than just goals and assists, but also for his toughness, his grit, and his physicality. In his platform year, Mr. Hartnell only recorded 39 points, placing him 170th in the league, where Mr. Neely was in the top 50 in scoring in his platform year—a significant difference. Cam also produced significantly more penalty minutes and shots-on-goal, which are indicators of toughness and consistency, than Mr. Hartnell, being a consistent offensive threat.

The next comparable is David Backes who is a power forward for the St. Louis Blues. Back in 2010, Mr. Backes signed a five-year contract worth \$4.5 million per season. At that time, he was 26 years old, or two years older than Mr. Neely. Similar to Scott Hartnell, he also received a no-trade clause, which could have some impact on the overall salary amount, i.e., lessening it. His contract, again, was signed three years ago, so any direct salary comparison is probably difficult. But he is a great example of a player who plays with grit and who is rewarded for that. In his platform year, Mr. Backes failed to score 20 goals or 50 points. He was outside the top 100 scoring and, again, Mr. Neely was inside the top 50 in his platform year.

The final comparable we feel is the best direct comparable, Milan Lucic, who is a power forward for the Boston Bruins. Both he and Cam are rugged and intimidate with fighting, hitting, size, and strength. They are the same age. Mr. Lucic was 24 when he signed his contract and, typically, power forwards are classified as skilled players who can play with an edge. Both Mr. Lucic and Mr. Neely are incredibly aggressive and intimidating, and players around the league fear playing against them. We feel this is an attribute that is very rare in today's game. Mr. Lucic's contract was for three years, for \$18 million, or \$6 million per season. He also

received a no-trade clause, with some modifications. Mr. Lucic, like Mr. Neely, is regarded as one of the better fighters in the sport and this is obviously a very rare skill to have from a player who is also relied upon to produce offensively. Receiving \$6 million a year is not typical for a player known for his toughness and grit just as much as he is known for scoring and skill. In his platform year, Mr. Lucic was 53rd in points, ranking comparably to Mr. Neely. Mr. Neely, in his platform year, had 55 more penalty minutes, showing a more consistent physical edge. He had 11 more goals and did this while playing in seven fewer games. Mr. Neely also had a good post-season that year, scoring seven times in ten playoff games, compared to Mr. Lucic who had zero goals in his seven playoff games.

At the time of this arbitration, Mr. Neely has significantly more experience, he has significantly more career goals, and he has significantly more career penalty minutes—almost 300 more than Mr. Lucic. Most telling, is his decided edge on the shots-on-goal category, which is a great way to measure offensive consistency from a player. Mr. Neely has 986 shots-on-goal to date, while Mr. Lucic had less than 600 at the time of his contract extension. Ranking in terms of the rest of the league, Mr. Neely was 26th in shots-on-goal in his platform year and, in Mr. Lucic's platform year, he was well outside the top 150 in the league. This is a significant difference.

We feel that Mr. Lucic is the best comparator. Just because players play with a physical edge and intimidate, it is not really fair to compare them to skilled players because what they bring is so unique and so valued by hockey teams. You saw that by what the Boston Bruins gave Mr. Lucic with his contract extension. And because of their unique abilities and Mr. Neely's improvement in physical play and improvement in offensive consistency—highlighted by an increase in penalty minutes and increased shots-on-goal number per season—we feel that our salary request of \$7 million is reasonable.

Elizabeth Neumeier: You have 11 minutes remaining for your rebuttal.

Peter Gall: This case is about choosing the appropriate comparator. And, in order to do that, Madam Chair, you have to first understand the principles—the guidelines that have been developed to assist arbitrators in choosing the appropriate comparator. But, secondly, and very important in this case, is understanding the statistics. My co-counsel will explain the guidelines, and then

Mr. Burke will deal with the statistics and what they really tell us about the appropriate comparator. With the greatest of respect to my friends, they have glossed over—and in some cases ignored—the governing principles. They have also glossed over and ignored some fundamental differences statistically, when you compare different eras in which these statistics were achieved. They have glossed over that in presenting their analysis, so I will turn it over to my colleague, Mr. Elliott, who will deal with the appropriate comparator.

Michael Elliott: I will speak to the principles, we submit, that should be applied in assessing the contracts of those who have been raised as comparable players to Mr. Neely. Mr. Burke will then put forward the position on Mr. Neely as a player and the comparables.

As Mr. Gall has said, the principle means of determining the appropriate value of a player subject to arbitration is to identify the player who can be considered a comparable, and then to use that player's contract as a reference point to locate the value of the player at issue. However, in doing so, it must be remembered that the comparable contract will frequently differ in nature from the contract that the player at issue will be signing, most importantly, in the number of years and the player's status during those years. It is, therefore, necessary to refer to the governing principles when referring to the comparable contract.

We think that there are, broadly speaking, three principles that should be applied to the comparable contracts that have been raised here. As I go through each of these principles, it is important to remember that Mr. Neely will be signing for a single year. His contract will include no years as an unrestricted free agent, while all of the comparable contracts that have been raised are multi-year deals that include unrestricted free agent years.

The three principles are number one, multi-year contracts have a built-in premium relative to single-year contracts. Number two, the appropriate way to evaluate a comparable multi-year contract, having discounted for the premium, is to consider the first-year salary of that contract and not its average annual value. And number three, unrestricted free agent years, that is, years in which a player would be an unrestricted free agent if he were not under contract, must be accorded more value than restricted, free agent years.

So, the first principle is that multi-year contracts have a built-in premium relative to single-year contracts. Only contracts signed

by players under the age of 27 are admissible as comparative contracts in arbitration, which means (a) those players are young, and (b) they will be expected to improve. Clubs will pay a premium to lock-in young players to longer-term deals to benefit from that improvement and to guarantee the security of a stable, young core of players to build around. When referring to such contracts to determine the salary of a player who is signing for a single year—as is Mr. Neely—this premium must be discounted.

The second principle is that it is the first-year salary and not the average annual salary of a multi-year contract that must be taken as a bench mark. Perhaps I should repeat that. It is the first-year salary—not the annual salary—that must be taken as a bench mark. Comparables are comparables, or at least they should be, because their performance is substantially similar to the player at issue, up to and including their platform year, i.e., the year before they sign the comparable contract. Using the average annual salary undermines the basic principle of using comparables, which is that similar performers should be rewarded to the extent of their similarity.

The third and final principle is the one we particularly want to stress and that is, that unrestricted free agent years are more valuable than restricted free agent years. By definition, unrestricted free agent years are years in which players can sell their services on the open market to all 30 teams in the NHL. Restricted free agent years, by contrast, are years in which a player is effectively limited to selling those services to a single team. The greater value of unrestricted free agent years is supported not only by the economic importance of an open market for services, but also by the collective bargaining agreement (CBA) itself. Unrestricted free agent years were a major sticking point for the NHL Players Association in the previous collective bargaining rounds. So much so, that they succeeded in reducing the age of eligibility from 31 down to 27. The CBA recognizes the distorting effect of considering unrestricted free agent years for determining the value of a player who is a restricted free agent when signing a contract, by providing that contracts signed by unrestricted free agents are inadmissible for purposes of arbitration. However, the CBA can do little—or does do little—about the multi-year deals that, while signed in a restricted free agent year, continue through unrestricted free agent years. As all of the comparable contracts proposed by both sides in this arbitration include unrestricted free agent years, but Mr. Neely's will not—discounting for the premium involved is particularly important.

At the extreme end of the contracts put forward in Mr. Neely's brief are those of Alex Ovechkin, which includes nine unrestricted free agent years, and David Backes, whose contract includes only unrestricted free agent years. On this basis, we will be arguing that the contract of Backes—I believe it has been conceded—and Ovechkin should be given little or no weight. The substantial premium for unrestricted free agents must still, however, be accounted for in respect to the comparables that remain, including ours—David Krejci and James Neal. And, to speak more specifically to those comparables of Mr. Neely himself, I will now turn things over to Mr. Burke.

Brian Burke: Thank you. Good morning, Madam Chair, it is an honor to be here. I have been a senior executive in the NHL for 25 years. I am very honored to be asked to speak here today, so thank you.

Mr. Elliott has reviewed several of the basic principles that go into salary arbitration in this collective bargaining process between the NHL and the NHLPA. This process is designed to bridge gaps, hopefully, between reasonable positions and we are going to come back to that in just a few moments.

First off are two key points in this statistical analysis of Mr. Cam Neely, who is a very good hockey player. Understand, we do not come to bury Cam Neely, we come to pay him fairly, but not more than fairly. He is a good guy. He is a better person than he is a hockey player . . . and he is a friend.

We are working off statistics from a different era and it is very important that we address and acknowledge the fact that we are, statistically, talking apples and oranges here. We are not talking about current statistics, so I will point this out to you. In Mr. Neely's platform year, the average goals per game scored were 7.48. In this most recent season—the 2012–2013 season—that number is 5.44. It is a drop of more than two goals per game, a drop of close to 27 percent. It is critical that as we evaluate Mr. Neely's performance, we acknowledge that fact. In the 1985–1986 season, Wayne Gretzky won the Art Ross Trophy as the scoring champion in the NHL with 215 points. In the last full season, which is 2011 and 2012—this past season of course was abbreviated—the scoring champion in the NHL was Evgeni Malkin of the Pittsburgh Penguins who had 109 points. Mr. Gretzky's best year was worth two years in the current era.

There are several reasons why scoring is down. Goal tending is better, dramatically better. All teams employ at least one goal-

tending coach, most have two. The goal-tending position now attracts elite athletes and I personally blame Patrick Roy for this development. Defensive systems are far more elaborate and penalty-killing has become a science. But, whatever the reasons, scoring is down dramatically, which has led to radical rule changes in the NHL to increase scoring.

So, this is the case where it is not apples to apples. When looking at Mr. Neely's statistics, some indexing or some adjustment has to be considered. League rankings support this. We refer to where a player scores, and where he is in league ranking in those times. You say, "Oh, boy, you've got 36 goals that year, that's a lot today." Well, in his best goal-scoring year ever, Mr. Neely was 20th in the NHL. That is an important factor.

We will concede Cam is a big man. But, last I looked, we do not pay for big; we pay for production. We will concede he is a fan favorite. We will concede he is local. We will concede he is a good hockey player and we want to pay him as a good hockey player.

Mr. Neely was drafted ninth overall, so this is not a player who came out of the woodwork; he was scouted by the Vancouver Canucks and drafted very high. He should be a good hockey player if we are good at our jobs. For the first three years, all the promise we saw went unfulfilled. It was a mixed bag, he was a minus player. Counsel for the other side can discount plus-minus, a statistic that is always used by the NHLPA when it is in their favor and never used—or dismissed—when it is not. This is a player who had a real hard time on the defensive side of the game in his first three years. In his fourth year, he had a breakthrough year: 36 goals and 36 assists for 72 points. The next year, he improved again in goal scoring, but his point production dropped. He was 20th in the league in goal scoring for that year. Now we get to his sixth year, which is his platform year. He has 37 goals and 38 assists for 75 points. If you reduce his points by that 27 percent I mentioned, in today's stats that is 28 goals and 29 assists for 57 points.

This is not a player who has shown consistent improvement as a player in the NHL. Counsel says it takes time for forwards to develop. Well, there are a lot of forwards who come in to the NHL and who are instantly successful, such as Steven Stamkos and Sidney Crosby.

In our situation, Cam Neely is not a premier forward in the NHL. He is a good hockey player. We are prepared to pay him as a good hockey player. He is not a premier power forward. He has never been higher than 27th in the NHL in points scored. These

are the key rankings, not statistics compared to today. In his era, he was never higher than the 27th in the NHL, 46th in points-per-game, and never higher than 20th in goals, never a first team all-star. Never.

Now, let us look at our two comparables. Sorry, I have to mention two other things. Much of Mr. Neely's success was registered against sub-500 teams. This happens to a lot of players, but we are interested in when players score; if they are playing weak opponents and they register big totals, that is not as useful to us as winning games. Those points are more useful when we are playing productive teams. He is not a top, two-way forward. He is what they describe as big, as punishing, but he is not a two-way player. So, let us look at our two comparables.

You have to be careful with arbitration and statistics. It is statistically based, but statistics can be deceptive. Statistics are often like a lamp post to a drunk, useful for support, but not for illumination. Now, Mr. Krejci is a center, not a winger, and center is the highest paid and the highest-skilled position on a hockey team besides the goal tender. The forward group requires more skill, usually a higher hockey IQ, and more defensive responsibility. The center is a 200-foot, 60-minute player, a player who plays in all parts of the ice and in all situations during the game. It does not matter what the time is on the clock. As a premier faceoff guy, Mr. Krejci kills penalties. He led the NHL in plus-minus and he has the Stanley Cup ring, which Mr. Neely has yet to produce. He is one of our comparables. He is a player for whom we can make a case for who is a much better player, but we are prepared to say that David Krejci is a comparable.

The second comparable is interesting. It is interesting to us that opposing counsel could run the statistics on comparable players and not come up with Mr. James Neal. He is a stallion, a proven power forward who, with the exception of the year in which he was traded, has improved virtually every year. The Neal contract is instructive, in my mind, because in their platform years, Mr. Neely and Mr. Neal are twins. Opposing counsel quoted the arbitrator in the Venesky case, who said, "You never truly find twins." But, I think arbitrators lay awake at night and dream of twins, and beg for twins, and plead for twins, and go to church and pray for twins, because that fixes the analysis. Well, Neely and Neal are twins in their platform years. Most importantly, Mr. Neal's contract purchased three years of unrestricted free agent. We are not getting any unrestricted free agency years from Mr. Neely with this one-

year award. As Mr. Elliott mentioned, we pay a premium in these long-term contracts to keep a player off the market to make certain he cannot be bid on by these big U.S. teams, these powerful teams south of the border. Mr. Neal's contract purchased three years of unrestricted free agency. I am amazed that this contract, this comparable, did not come up in our opponent's brief. We have made an offer that we think is fair, of \$5 million. That is the Neal contract—it is \$5 million. Our offer approaches that when you discount it for unrestricted free agency and we think our offer is more than fair.

Elizabeth Neumeier: You have eight minutes reserved for your rebuttal. And who is going to speak for the player on the rebuttal?

Jeff Angus: I am going to be speaking to the comparables the Canucks brought forth. The first player was David Krejci, and we acknowledge that Mr. Krejci is a very good player at center on a very good team, as evidenced by his plus-minus statistic, which is largely, again, a team-based statistic. He is not his team's primary checking center—that is Patrice Bergeron, who typically receives the prime scoring opportunities. We also acknowledge that Mr. Krejci is a very good face-off man, but we do not feel that is a relevant stat to compare to Mr. Neely, who is a right winger. Right wingers predominantly do not take face offs; that is not part of their role. The reason why I introduce Mr. Hartnell as a comparable is because we wanted to show his value to his team's toughness, intimidation, and grit. While you can look purely at the statistics, Mr. Krejci is a worthwhile comparable, but he is not even close to Cam Neely in terms of grit, physicality, or intimidation. In his platform year, Mr. Krejci had 36 penalty minutes and, in Mr. Neely's platform year, he had 190, which is obviously a significant difference.

The second comparable brought forth is James Neal. James Neal is a better comparable for Cam Neely in terms of playing style. They are both big wingers who score goals and who hit. But, there is no mention of Mr. Neal's rapid progression in his platform year due to the fact that he was playing with Evgeni Malkin, who was the NHL scoring leader that season. In the past, players have benefited tremendously from playing with really good line mates. We saw this in Vancouver many years ago with Brendan Morrison playing with Marcus Näslund, and in Philadelphia with Mikael Renberg playing on the same line as Eric Lindros. Neal played over 80 percent of his shifts at even strength that season with Evgeni Malkin. So, while he may have taken steps forward as

a player, a lot of that was due to playing with a superstar—one of the best players in the world.

Let's go back to the comparable playing style. While they are both big forwards, Mr. Neal is not necessarily an intimidating power forward. He uses his size more for creating separation and open ice for his linemates. In his platform year, Mr. Neal had 108 hits, which placed him seventh on the Penguins and 157th in the league. Hits were not recorded back in the late 1980s when Mr. Neely played, but we assume he would have been placed significantly higher in this category, as he was known as a consistent hitter and as a physical presence. That is our rebuttal to the player comparables.

Bruce Laughton: In terms, overall, of the points that have been raised, I like to go back to the collective agreement because the collective agreement uses overall performance—including statistics in all previous seasons—as one factor. But, the collective agreement goes on to say, let us look at injuries, illnesses, and games played. Let us look at his length of service with the team. Let us look at his overall contribution to the team's success or failure, and his special qualities of leadership for public appeal. The collective agreement does not give weight to these factors. The collective agreement does not say that the statistical analysis that my friends put forward—in terms of their approach to comparators—is the guiding light and is the only factor. It does not say what standard of proof is necessary and it does not say how you should discount the other factors. In my submission, what we put forward in terms of comparables, particularly in Mr. Angus's critique of opposing side's comparables, shows that their salary proposal of \$4.5 million is not fair. It is not a just reward for what Mr. Neely brings to the game, to the club, and to the organization as a whole. So, in our submission, we are staying with our \$7 million demand.

Elizabeth Neumeier: Okay, thank you. You have eight minutes.

Brian Burke: Thank you Madam Chair. Interestingly, I was part of the Brendan Morrison arbitration. It is interesting when you want to distinguish a player and say, yes, he plays with great players, but with the NHLPA arbitration of Brendan Morrison, who played between two first-team all-stars, not once did the NHLPA bring that up. It is amazing to me.

Salary arbitration is a body of law; there is case law, there are precedents. The learned counsel cited a case with Anaheim where the arbitrator said, "The key to the process is choosing rational

comparables.” Rational comparables. Let us look at the NHLPA’s comparables. Alexander Ovechkin, are you kidding me? This guy scored 219 goals in four years. Mr. Neely has 166 in six years. I do not understand that one. Scott Hartnell. The Flyers did, in fact, pay this player \$4.2 million several years ago, and they purchased several years of unrestricted free agency. Again, the premium teams pay. They would all do a one-year deal with players. We would love to do one-year deals with players. But, we pay the premium, so that a player never hits the market. David Backes signed his contract days before he became an unrestricted free agent. In fact, his no-move, no-trade clause—in the way it was drafted in his contract—was not eligible for him as a restricted free agent. They just fast-forwarded until July 1st and they drafted it as if he were unrestricted. So, the St. Louis Blues, with this comparable that you are being asked to consider, purchased five years of unrestricted free agency. Milan Lucic. In his and Cam’s platform year, they are not comparable in terms of any of the stats that make any sense to us, and Lucic’s is at \$5.5 million in the first year. And, Lucic has a Stanley Cup Ring. Corey Perry is a player with an ancient contract and arbitration law is clear, that older contracts should not be considered as weighty, but the fact is he is a player who has won a Most Valuable Player award and a Stanley Cup ring, and that is a comparable.

Much of these players’ success, in opposing counsel’s brief, has come after they signed their contracts. If you go back to the two key statistics, again learned counsel says the CBA says this, but in the arbitration law case law, the two key factors the arbitrators have said are significant, are platform year and career to platform. If you look at that, James Neal is the best comparable that anyone has put on the table here, and there is case law that supports that.

I think the NHLPA has put forth faulty comparables. I do not think they line up with Cam Neely at all. I am amazed that they were able to escape James Neal. The arbitration system permits the arbitrator to select any award, but there cannot be an incentive in the system which is designed to reduce and solve reasonable gaps between the parties. There cannot be an incentive for our team to come in with a lowball offer and for the other side to come in with an unrealistic offer to end up with a split-the-baby-award. Nor should there be an incentive for a player to request an absurdly high amount where we come in with a reasonable offer and, again, pray for a split-the-baby-result. Our offer is fair, it is supported by the evidence without indexing. James Neal is a twin

without indexing. This is a player who is a twin, it does not matter which era. They are twins—it is dead on. That player makes \$5 million and gave up three years of unrestricted free agency. We have the right number on the table, \$4.5 million. We submit that it is fair and we ask, Madam Chair, that you award this amount to Cam Neely.

Elizabeth Neumeier: Thank you very much, Mr. Burke. We did not know when we decided to do this hearing this way that this case would actually surface a whole range of issues that regularly come up in hockey salary arbitration cases. The evaluation of multi-year contracts, how you handle unrestricted free agent years, whether there is a premium built into the long-term contract as the clubs argue, or whether players are taking less for the security of the long-term contract. Also arising are the notions of locking in younger players, so that the signing club gains the benefit of their improvement, the impact of a career path, whether someone has a great platform year and they are building year after year on their performance, or maybe they started out really well and did not have the greatest platform year.

One of the things that did not happen this time, is there are no comparables that both sides agreed were comparables. Frequently that is the case—that both sides are focusing on the same comparable players—but we do not have that here.

In real arbitration time, you have 48 hours to issue a decision and to write an award explaining how you got to the number and what comparables you found to be persuasive. I am going to ask for a show of hands, on a series of quick questions, to see if we can get consensus from this audience as to where this case should end up.

Let me start at the extremes. Was anybody persuaded that the player's demand for \$7 million is the right number that would be awarded on this record? Okay. Was anyone persuaded that the club's offer of 4.5 should be awarded? Okay, you have several people there. Looking at the comparables that the player was relying upon—I am just going to take the average annual salary because that is the simplest way to do it—I do not think the record shows how much each player was getting in the first year of their contracts. So, the lowest would be, actually, Scott Hartnell is lower than the club's offer, so we will skip that. David Backes meets the club's offer. Milan Lucic—his salary is \$6.0 million. Was anyone persuaded that number or something close to it should be the award? Okay. Then James Neal, the so-called twin—called twin

by the club anyway—at \$5.0 million. How many people were persuaded that that might be the right number? Okay. Let me jump to 5.5 million to see if there are those who would award that amount. Okay. I already asked about six and there were not any takers, so it is looking like the group is coming out between five and six million dollars. The midpoint, which is not critical in hockey, but it is in baseball, is \$5.75 million in this case. It seems like the group would come out near the midpoint.

Now we have time for some discussion and questions, and I think there are some things that the panelists want to talk about. Do the panelists want to comment on some of the changes? I think the new contract has made some significant changes that are going to impact both arbitration and the salary scales going forward.

Jeff Angus: The thing with this arbitration that is really unique is, obviously, the fact that the year we are using, as Brian brought up, was in the late 1980s and it is not really possible to even compare statistics because it was basically a different sport back then. Then, the goalies were a lot smaller, the game was a lot faster, and there were different penalties. It is really difficult to find a comparison in today's game. The point we were trying to bring up in our argument was that for Mr. Neely, so much of his value is unquantifiable—his toughness, his physicality, his grit. You could find 50 players with more goals and with more assists than he had, but you could also find 30 general managers (GMs) that would pick Cam Neely over all of them just for what he brings to the table. It is interesting to see how that dynamic plays out when you are trying to quantify the unquantifiable in a situation like this.

Brian Burke: When we do salary arbitrations, we assume the arbitrator wants some integrity in the process and wants some honesty in the process. So, we try not to run down the player any more than we have to. To make our point, yes, you can see that he is big and he is tough. Cam Neely was a tough player when he played. I always feel that, in front of the arbitrator, you are better off conceding the things that he or she is going to discern anyway. It is foolish to argue stuff that they are going to pick out of the brief. The way NHLPA counsel described him as a player is accurate. What they asked for is just unreasonable.

Chris Sullivan: Just on that point, there is a famous comment—at least famous locally—and it was the case, I think, Peter Gall was involved in with Brendan Morrison—because it got played over and over and over in local media—about a comment Brian Burke

made during the course of the arbitration about Brendon Morrison being a mouse on the back of the elephant called Näslund.

Brian Burke: May I tell a story quickly? One of our lawyers was Daniel Dumais from Quebec. He is a French Canadian and a very bright guy. My teams do not have many salary arbitrations because we have a rule; if you file with my team, we say, there is no settlement. Last year, there were two arbitration decisions, all the rest we settled before going to arbitration. Several of the settlements were on the court house steps. If you file, we go. We hire a lawyer and say, see you at arbitration. I had only one arbitration in all these years. Brendan Morrison took us to arbitration. He was a first-line center on our team because we did not have a legitimate first-line center. He played between Markus Näslund, who is a first-team all-star, and Todd Bertuzzi, who was a first-team all-star that year. Daniel Dumais tells a story at the start of the arbitration. He says, "A mouse is walking through the jungle and he comes to a bridge, the bridge she is rickety, she is missing planks, swaying in the wind and the mouse, he is scared to go across the bridge and so the mouse sits there. Along comes an elephant and he picks up the mouse, he puts him on his head and says 'I bring you across the bridge, we get there safe and sound.' They go across the bridge, it rocks, it shakes, it quakes. The mouse, he's scared. They make it across, the elephant puts the mouse down on the ground. The mouse turns to the elephant and says, 'Boy did we make that bridge shake.' Mr. Arbitrator, Brendan Morrison is the mouse."

Amedeo Greco: I have a question and it is about something that management did not say, which to me is just as important as what it said. When we talk about a player being a fighter and getting 325 minutes in penalties, or whatever, should he be rewarded for that? If management does not counter that argument, does not that mean that management places a premium on that, should he be rewarded for that, which is like, to me, rewarding a dirty player. So my question is, why is that even a criterion? Why should a player be rewarded for spending time in the penalty box?

Brian Burke: Well, I have found very little success in explaining the fighting issue to people who come in with a predisposition against it. There is nothing dirty about a fight. It is part of our game. It is a valuable commodity. Now, it is the lowest skill we reward. In other words, I am not sure that I want Cam to fight if he is on my team. But fighting is part of our game. It is heavily penalized, but it is valuable to us. It is not dirty at all; it is an important

part of the way my teams play. My teams fight—it is that simple. We fight in the regular season, we fight in the pre-season, we fight in the playoffs. It is part of what we do, it is part of how we win.

Bruce Laughton: But is it not also—tell me if this is correct—that penalty minutes do not necessarily reflect fighting, but can simply result from physical aggressiveness?

Brian Burke: Yes, but generally, if you are getting up into the 200-penalty-minute range, there is a bunch of nickels in there, that is, five-minute penalties for fighting. You cannot get that many minor, two-minute penalties to get up to those numbers. For Cam Neely, counsel has not overstated the case one bit. Cam Neely was—and I probably say this because I am going to see him soon and I do not want him to get mad—a feared player when he played. There is an intimidation side to our game that is still primitive and still part of what we do. Fighting is still a part of that culture. Someday over a beer, I can give you a much better explanation of that, but it would take too long here and it is like hunting. When I tell someone I hunt, someone invariably says, “Well how can you kill those poor creatures?” I am not going to win that debate. It is like arguing with your wife; when you do win, you might as well have lost.

Glenn Dosely: You talk about comparable players, but do you ever look at the line? I’m thinking Lindros and Mikael Renberg as a power line. Do you compare the lines to the player as well?

Jeff Angus: I brought that up talking about James Neal, how he played his good year with Malkin. I think, again, the reason why it probably was not brought up with Neely is because, in real life, Cam Neely put up those numbers while on Boston. He was playing with really good players, but on Vancouver they did not have that calibre of player.

Brian Burke: We were kind of handicapped on that issue, because he was not really with that team.

Jeff Angus: The Canucks in the late 1980s did not have the calibre of players that Boston had, so an argument in real life could have been made that Cam Neely benefited from playing with good centers. That would be something that definitely would have been brought up.

Glenn Dosely: Those players are really good because of the line they play on. When Lindros got away from that power line, he was never the Lindros he was on that power line, so does that make a difference?

Brian Burke: There are a lot of situational ethics here. If you can argue that the guy did it without linemates, that is what you do, and if you play with good linemates, you discount them. That is the union's position on plus-minus. I am not saying this critically or sarcastically—it is amazing how it never came up in the Morrison case until we brought it up and, yet, if it is to their advantage, it comes up right away. Same with plus-minus, what counsel said is exactly right. If you are on a terrible team, you are going to be a minus player. You could be the best defensive player in the league, but on a terrible team, you are going to be a minus player. It does have some value, though. There are aberrations in that system where you can find a really useful statistic.

Fred Dichter: I was wondering about when you are talking about goalies—besides goals against and saves percentage—what kind of stats do you look at to use as comparables?

Brian Burke: Success, that is, wins. Goals against average and save percentage are really the two that determine a goalie's salary. You can have a poor goals against average if you are on a poor team, but your saves percentage has to be high. It is funny. If you go back and look at the statistics we put in for goalies back in 1994, when we did the last CBA or two CBA's ago, all the goalies blow right through them now because goal scoring is down so dramatically. You used to get an award or a bonus for having a save percentage over 850 back then, but now, they are all at 900 plus. They stop nine shots out of ten. Those are the two keys—goals against average and save percentage. Save percentage is the stat that saves you if you are on a horseshit team.

Gil Vernon: Just a comment about fighting and it has to do with the arbitration process in general in terms of whether it is a hockey case, or baseball, or for brewery workers in Wild Rose, Wisconsin. You try not to make value judgments. The first NHL case I had was for Darren Van Impe, and I always mispronounce his name—a 24-year-old for Boston. The first thing out of his agent's mouth was, "My guy deserves the money he's asking for because he led the NHL last year in major five-minute fighting penalties." You look over at the kid—his nose starts above his right eye, and travels somewhere down left of his mouth, and you try not to make those value judgments. What you do, is look how the parties value that skill and Brian hit the nail on the head. There are different skills in hockey and fighting is considered a skill. You do not make a value judgment about fighting, but you try to

analyze the data as to how the parties—not only these parties, but parties in general—value that particular skill. Just like speed, scoring, whether someone is good on the penalty kill or not, and so on, and so forth. Do not make a value judgment, but see how the parties value it and attach that value to it, and factor it in with all the other factors.

Brian Burke: It is very hard to explain why fighting is part of our game to people who do not follow the game. You cannot fight in any other sport. You can fight, but you get thrown out. Other than boxing or ring sports, you cannot fight in a football game or basketball game, you get kicked out. Baseball, you get kicked out. This is the only sport where it is penalized, but it is acceptable.

Gil Vernon: By the way, I gave Darren a little bit more money to get better bridge work.

Peter Gall: I wonder if I can ask a question of Jeff Angus, Brian Burke, and the arbitrators in the audience who have done cases in major league baseball. Does salary arbitration make any sense in the salary cap system? It started in hockey without a salary cap. In baseball, there is no salary cap, but it is not in basketball and it is not in football. Does it still make sense in hockey?

Brian Burke: I do not think it does. I think it is inconsistent with our cap system. You are, realistically, taking money from a teammate. It is that simple for me. When I was in Toronto and was the GM, we were a full-cap team. We had the highest revenues in the league. We spent the cap. So, we are going to spend \$62 million cap this next year. If you get an extra million from me, that money is coming out of a teammate's pocket. I do not think it is consistent—conceptually or practically—in our cap system at all. I was confident that it would go away this time.

Andrea Knapp: What I was interested to hear from the two different advocates is from the player side. I heard there are four, five, six different factors to consider. But then, from the team's side, basically, as I understood, you said there are essentially only two factors. You did not address things like fan appeal, all of those others, and you referenced several arbitrations in which the arbitrators said there really are just two factors. So, my question is, does the collective bargaining agreement give any weight to the different factors, is it simply how decisions have evolved? Could you explain how the different factors are weighed or if there really are only two.

Bruce Laughton: The collective agreement has been commented on by a number of arbitrators. The collective agreement

simply sets out the factors that are admissible and the factors that are inadmissible. But, it does not go further to discuss standard of proof; it does not say you have to use every one of the criteria, and it does not say what weight should be accorded to one or the other. It is very open-ended. One arbitrator will focus, potentially, on one or the other, but another arbitrator will focus on a different matter. There was a quote in my brief where they said, “Well, look, what am I supposed to do with all these awards that have had these interpretations?” And, I said, “Well, arbitrators, how useful can these be in as much as each player is unique. So his salary arbitration is special to its facts.” Most of the cited awards are frequently inconsistent in terms of how they utilize and weight any given factor. They deserve some persuasive value as opposed to some precedential value. But, that just means that each case is going to, ultimately, be determined on its facts. So, it is quite different from the kind of interest arbitration that you would see with firefighters and police, for example.

Brian Burke: I agree with all of that. I would just add that there is a body of case law. The number of cases drops every year. Last year, there were only two. It is a dying art because we have offer sheets for restricted free agents in our CBA, and ever since a couple of those have gone around, teams are now just over-paying and locking guys up when they are young. It used to be there were three contracts before you really got paid. You had entry level, then you had your second restricted free agent contract, and then you were approached with unrestricted free agency. Now the team steps up and pays. That second contract—by and large—has disappeared because of those offer sheets. For the Corey Perry contract, I was the GM at Anaheim at the time. I signed Perry into his contract in direct response to an offer sheet for another one of our players. They would offer sheet a lesser player, and then we are dead on this kid, and this kid is a good player. Someone is going to offer sheet him. We did not have a lot of money in Anaheim, it is not a profitable team, so we overpay to lock the players up. Your choice is to match it and overpay when a big market team offer sheets a guy. So, do you look like you got bullied into it, or just bend over and pay the money early?

Bruce Laughton: Is that what you usually do?

Brian Burke: For anyone here from California, there are two really good young players in Anaheim. Well, they are not young anymore, but they were when I got there. I did not draft them. I cannot take any credit for them: Ryan Getzlaf and Corey Perry.

They are both studs, but after Dustin Penner, our third-best young player, got offer sheeted, we felt we just had no choice. Lock these two kids up, overpay them, or else for sure we were going to lose them.

Walter De Treux: A few minutes ago, Mr. Burke gave his opinion on the salary arbitration system—that it does not really make sense with a hard cap. The player’s representative did not get a chance to respond to that. Do you have a point of view on that?

Jeff Angus: I have obviously taken part in less of these than Brian, but I think it is inconsistent with a hard cap because the point of arbitration from the player’s perspective is to maximize his value. Under a hard cap, you are essentially minimizing the value of some of your teammates. Look at all the good teams in hockey or in other leagues with hard caps—not all of them—but the players that stick around take less money. You see it with the Canucks with Ryan Kessler; he did not maximize his value to stay with Vancouver. They took less money. I think going to arbitration to maximize your pay is inconsistent with the principles of wanting to win in a hard-cap era.

Brian Burke: When the union agreed to a salary cap, they also mandated a floor for all teams. It is not like baseball, where you have some teams taking the revenue-sharing money, but not spending it on players. All of our teams are obligated to pay to a certain level, whether their market supports that revenue or not. We have revenue sharing that tops those teams up. Maybe your revenues will only support a \$35 million payroll, but you have got to be at \$45 million—or wherever the floor is that year—and some of that money is augmented by revenue sharing. To me, it is not like we say to the players, “Hey, you’re capped.” There is going to be a minimum paid to these players, regardless of market size. Once we are in that range—whether my budget is \$50 million, I am full capped, or I am floor—whatever money you get from me in this process is coming out of some teammate’s pocket because my budget is not changing. I cannot go over the cap and I do not get more revenue sharing, so it has to come from somewhere. It is coming from a teammate or more than one teammate.

Barry Winograd: Whatever the vagaries of the collective versus the individual balancing, you know the union’s interest. I have a question about the history of arbitration because all panelists remarked about the dramatic changes in the sport over the last few decades. Nevertheless, it is my understanding, and I may be wrong, that the statistical outcome in terms of risk-analysis

has been pretty consistent. These cases settle, whether it is your approach, Mr. Burke—which is if we do not settle, we are going to arbitration—or some other approach. There is a very high level of settlement which is the function of this kind of arbitration, namely, to promote settlement. Have there been glitches in that as the game has changed, or has change been kind of steady, such that the settlement process has not been disrupted? Comment on that.

Brian Burke: We have taken a whole class of players out of the pool where they might file for arbitration because we are now signing them out of that first contract. Again, when you come into the NHL, you have to sign a three-year entry-level contract that is not optional. It can be less if you are of a certain age—if you are older—but, if you are an 18-year-old kid and we just drafted you, like Emerson Etem, a California kid playing for the Ducks, he must sign a two-year contract. It is a mandatory two-way contract with a minor-league clause. So, if he gets sent down to the minors, while he might make \$700,000 in the NHL, he might make \$75,000 there. Teams can avoid really expensive mistakes on high picks because of the mandatory two-year contract. It used to be that he negotiated a second bridge contract for three years, and then he got the big dough. Now, that second contract has disappeared. When he has arbitration rights, we are just paying those kinds of players now. They do not have to file for arbitration because we are giving them four- and five-year deals with big dough. I think that is why the numbers have fallen off more than anything else.

There is also a walk-away right. I was fired the day this collective agreement was ratified, so I am a little fuzzy on some of the details. There was a walk-away right in the old system where, if a team did not like an arbitration award, they said, we are walking away from it, and they did. This time around, the union said, you cannot just walk away from all of these awards, so they set a threshold of \$3.5 million. If I have a player who is grossly overpaid and I do not want to pay him, I can walk away and he becomes an unrestricted free agent; he can sign with any team, but if the award is under 3.5, I have to honor it.

Barry Winograd: The reality has been that even with these carve outs and exclusions you are describing, the reality is very, very few cases ever get to arbitration.

Brian Burke: Right.

Barry Winograd: And that is good, right?

Brian Burke: Yes. I loathe arbitration, with no offence to this group. I have friends in this group.

Barry Winograd: I do not think it is an offence because I think everybody here, or almost everybody, would agree that the system you have is designed to avoid arbitration.

Brian Burke: Correct.

Barry Winograd: It is better for you to settle than for us to settle it for you.

Brian Burke: Correct. That has value for me. Several friends in this room, who I have testified in front of on the club's behalf, have seen me operate. I have great respect for the process. I hate arbitration of salaries in a hard cap system; it drives me crazy. I think it is grossly unfair and we do not have final-offer arbitration, so there is no incentive to be reasonable in what you offer. You guys just split the baby, so you are going to get a split-the-baby-offer. We should have come in at three million for Cam.

Bruce Laughton: Well, we did come in at six.

Brian Burke: There's no incentive for either side. I am not throwing rocks at the union, but there is no incentive for anyone to be reasonable. I think we should abolish it, but if we are going to have arbitration, I think it should be final-offer arbitration. I would rather you guys pick one envelope or the other. I really would. Then we have to be fair, and I am going to get really killed if I am not reasonable. Now, there is no penalty. I could have come in at two million and they give him six. That is what you guys gave him, anyway. Okay, next time I will come in at one.

Bruce Laughton: In terms of arbitration, the numbers go back to 2001. There were 17 arbitrations. It was not a huge number, and it has dropped down in 2009 and 2010 to four each year. The other change, and correct me if I am wrong because I do not know much about hockey, is that the unrestricted free agent age is now 27 and, so, you are dealing with a much smaller pool of people—those eligible between about age 22, which would be rare—and 26. So, that pool of people eligible to go to arbitration has shrunk and that is, in part, why you see these lower numbers.

Brian Burke: That is exactly right. It used to be 31 years of age. There is a whole class of people who never get to avail themselves of the process.

Elizabeth Neumeier: Are there any other questions in the audience? Would any of the panelists like to make any final remarks?

Bruce Laughton: I have never been to a hockey game, so this is a new experience for me.

Chris Sullivan: There is a story that Peter Gall tells about Bruce showing up to represent the Players Association and having all these NHL stars in his office. The labor board and staff are coming in to watch the proceedings, and everyone knows everyone. Bruce has to have the individuals identify themselves because he does not know any of the players—not one name.

Brian Burke: We are lucky in the NHL. The NHL player is a special animal—they really are great kids. They are hardnosed, polite, hardworking kids. They are great with the fans and they are great with the media. They are special kids.