

## **DECISION ON APPEAL (TOM WILSON)**

The National Hockey League Players' Association, on behalf of Tom Wilson, has appealed from an October 3, 2018 supplementary discipline decision suspending Mr. Wilson for twenty (20) games. This shall constitute my determination of Mr. Wilson's appeal. For the reasons described herein, I find that the decision suspending Mr. Wilson for twenty (20) games was supported by clear and convincing evidence and is, therefore, affirmed.

### **I.**

#### **SUMMARY OF FACTS**

At approximately 5:18 of the second period of the September 30, 2018 Preseason Game between the Washington Capitals and the St. Louis Blues at Capital One Arena in Washington, D.C., Tom Wilson (a right winger with Washington) delivered a forceful, open-ice check to St. Louis center Oskar Sundqvist. The on-ice officials assigned to the game immediately assessed Mr. Wilson with a match penalty for an illegal check to the head in violation of Official Playing Rules 48.1 and 48.5, and Mr. Wilson was ejected from the game.

I have closely reviewed the video footage of the incident, as captured from the multiple angles contained in the NHL Department of Player Safety ("DPS" or "the DPS") suspension video and the video offered by the NHLPA as Exhibit A at the appeal hearing. It is clear from looking at the video that:

Mr. Sundqvist had possession of the puck as he entered the offensive zone along the left sideboards. He then cut toward the middle of the ice attempting to find open space that would allow him to take a shot on goal. While backchecking, Mr. Wilson approached Mr. Sundqvist from behind and laterally through the middle of the ice in an attempt to deliver a check. Mr. Sundqvist appeared to see Mr. Wilson coming as he rushed a relatively weak shot toward the goal. Almost immediately upon Mr. Sundqvist releasing the puck, Mr. Wilson delivered a forceful check to Mr. Sundqvist that made significant contact with Mr. Sundqvist's head. Just prior to the hit, the momentum of Mr. Sundqvist's body shifted from right to left as a result of his attempted shot on goal. While it appears Mr. Sundqvist dipped his right shoulder to take the shot, the video footage reveals that his head and the core of his body remained on a steady plane. There was no meaningful movement of Mr. Sundqvist's head between the time Mr. Wilson had committed to the check and the time he delivered the check. The significant force of the check caused Mr. Sundqvist's head to snap and his entire body to spin around, before landing on his right shoulder.

The Official's Report of Match Penalty provided that Mr. Sundqvist "stayed down on the ice and was bleeding from the face." (NHL Ex. 5.)

Mr. Sundqvist was administered a SCAT 5 examination and was diagnosed with a concussion and superficial facial lacerations. (NHL Ex. 3.) Mr. Sundqvist also suffered a right shoulder A/C sprain, which the Injury Report concluded was the result of him landing on his right shoulder. (NHL Ex. 3 at NHL000457.) Mr. Sundqvist was placed on Injured Reserve (NHL Ex. 2), and as of the date of the appeal hearing (and this Decision), has not yet returned to

play (although it appears that his return to play is relatively imminent). Mr. Sundqvist has missed eight (8) Regular Season Games for his Club to this point (in addition to the remainder of the September 30 Preseason Game against Washington).

## II.

### **PROCEDURAL HISTORY**

On October 3, 2018, George Parros (Senior Vice President, DPS) held an in-person supplementary discipline hearing relating to this incident in New York. Following the hearing, Mr. Parros issued a decision suspending Mr. Wilson for twenty (20) games. The analysis and rationale underlying the suspension assessed to Mr. Wilson was fully explained in the DPS video produced and made publicly available in conjunction with the announcement of Mr. Parros' decision. (NHL Ex. 9.)

By letter to Deputy Commissioner Bill Daly, dated October 5, 2018, the NHLPA gave notice of an appeal on behalf of Mr. Wilson pursuant to Section 18.12 of the NHL/NHLPA Collective Bargaining Agreement ("CBA").

## III.

### **STANDARD OF REVIEW**

Section 18.12 of the CBA provides for the right to appeal to the Commissioner any decision regarding Supplementary Discipline for On-Ice Conduct. The CBA directs, in connection with any such appeal, that I determine whether the supplementary discipline "decision was supported by clear and convincing evidence."

#### IV.

#### **THE OCTOBER 18 HEARING**

As set forth in CBA Section 18.12, where (as here), the underlying decision results in a suspension of six (6) or more games, and such decision is appealed, I am required to hold an in-person hearing. I held such a hearing on October 18 at the offices of the League in New York. In attendance at the hearing were Mr. Wilson, his agents Pat Morris and Mark Guy, and John Gerba, Maria Dennis, Don Zavelo, David Sinclair, Joe Reekie and Mathieu Schneider on behalf of the NHLPA. In addition to Mr. Wilson, Washington Capitals General Manager Brian MacLellan appeared and was also called to testify. Joining me at the hearing were members of the League office staff, including Bill Daly, David Zimmerman, Julie Grand and Jamie Hacker. George Parros, from the DPS, was later called to testify during the hearing. Also in attendance were counsel from Proskauer Rose.

The hearing began at approximately 11:00 a.m. and concluded at approximately 6:15 p.m. All parties were given a full and fair opportunity to be heard. The record was closed at the conclusion of the in-person hearing, subject to the NHLPA's right to verify the information contained in NHL Exhibit 1. The final transcript of the hearing was received at the League office on October 19.

V.

**THE NHLPA'S CONTENTIONS**

The NHLPA presented several videos, including footage of: (i) Mr. Wilson's check on Mr. Sundqvist (NHLPA Ex. A); (ii) another incident involving Mr. Wilson and Chicago Player Jonathan Toews from a game played on October 15, 2015 (NHLPA Ex. B); (iii) various examples of plays incorporated in educational videos created by DPS concerning its application of Rule 48 (NHLPA Exhs. C and D); and (iv) a compilation of plays from various NHL games in which offensive players took evasive actions to avoid oncoming checks (NHLPA Ex. E). The NHLPA also presented the testimony of Messrs. Wilson and MacLellan, as well as argument by Mr. Gerba and Ms. Dennis.

The NHLPA's primary argument on this appeal is that Mr. Parros' determination that Mr. Wilson violated Playing Rule 48 was not supported by clear and convincing evidence, and that because there was no violation of Rule 48, there should have been no supplementary discipline of any kind, nor suspension of any duration.

The NHLPA advances two principal theories in support of its position that Mr. Wilson did not violate Rule 48. First, the NHLPA asserts that there was no violation of Rule 48 because Mr. Sundqvist's head was not the "main point of contact" of the check delivered by Mr. Wilson. (Tr. 7.) The NHLPA cited to the DPS educational video (NHLPA Ex. C) as support for the proposition that the head should be deemed the "main point of contact" *only* when it snaps *independently* of the rest of the Player's body—which, the NHLPA argued, did not occur here. (Tr. 8-9, 74-81.) The NHLPA contends that Mr. Wilson's check was a "full body check," with

substantial contact also being made with other portions of Mr. Sundqvist's body (e.g., his shoulder, knees and torso) as well as his head. Because of these additional points of contact, the NHLPA argues that Mr. Sundqvist's head was not the "main point of contact" as Rule 48 requires. (Tr. 9, 79.)

Second, the NHLPA argues that any contact with Mr. Sundqvist's head was unavoidable within the parameters of Rule 48(i), (ii) and (iii). According to the NHLPA, Mr. Wilson attempted to check Mr. Sundqvist squarely through the body, and the head was not "picked" as a result of "poor timing, poor angle of approach, or unnecessary extension of the body upward or outward" (see Rule 48.1(i)). The NHLPA further asserts that Mr. Sundqvist "put himself in a vulnerable position by assuming a posture that made head contact on an otherwise full body check unavoidable" (see Rule 48.1(ii)). Finally, the NHLPA argues that Rule 48 was not violated because Mr. Sundqvist "materially changed the position of his body or head immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact" (see Rule 48.1(iii)). (Tr. 9-10, 89-104.)

The NHLPA's secondary argument, made in the alternative (if its argument that there was no violation of Rule 48 on the play in question is rejected), is that the twenty (20) game suspension assessed to Mr. Wilson was excessive and a suspension of that length is not supported by clear and convincing evidence. In particular, in regard to its argument that the length of the suspension was for too many games and should be reduced, the NHLPA asserts that:

1. Contrary to DPS' characterization in the suspension video (NHL Ex. 9), Mr. Wilson's suspension history was not "unprecedented" in terms of frequency as, according to the NHLPA, there have been Players with comparable records over similar time periods that did not receive an increase in discipline as substantial as Mr. Wilson's. (See Tr. 10-11, 110-119; NHLPA Ex. 1.)

2. The September 2017 suspension of Mr. Wilson should have been treated as equivalent to only a fine because it involved a suspension for Preseason Games exclusively. (Tr. 114-115.)

3. Mr. Parros improperly inflated the duration of Mr. Wilson's suspension by according more weight to the value of Playoff Games missed due to a prior suspension (Mr. Wilson received a suspension for three (3) of his team's Playoff Games in May 2018) than the value of Regular Season games missed due to a suspension. (Tr. 117-118; NHLPA Ex. 12 at pp. 14-15.)

4. Mr. Parros' treatment of Mr. Wilson as a "three-time repeat" offender was improper because each of Mr. Wilson's September 22, 2017 and May 1, 2018 suspensions were "highly debated" among DPS personnel before final decisions were reached by Mr. Parros. (Tr. 120, 128-129; NHLPA Ex. 8-11.)

5. The Rule violation here – to the extent I conclude there was one – was a function of missing what could otherwise have been a "legal check" by mere inches. In this regard, the

NHLPA argues that Mr. Wilson is generally considered a “clean” Player, not a “head hunter,” and points out that DPS acknowledged at the appeal hearing that Mr. Wilson likely did not harbor any intention to injure Mr. Sundqvist on the play in question. (Tr. 110-112, 229-231.)

When asked how long a suspension the incident warranted – assuming I were to conclude that Mr. Wilson’s check did, in fact, violate Rule 48 – the NHLPA suggested a suspension of eight (8) games. The NHLPA advanced the following rationale in support of its position that a suspension of only eight (8) games was warranted: (a) a “two times (2x)” multiplier reflected in the discipline assessed in 2013 to Buffalo Player Patrick Kaleta – where his most recent prior suspension had been doubled to ten (10) games – would be the most appropriate benchmark to choose for a multiplier; (b) since Mr. Wilson’s most recent suspension was for three (3) games (albeit three (3) games in the Second Round of the 2018 Stanley Cup Playoffs), the starting point for a suspension resulting from the check to Mr. Sundqvist’s head should have been six (6) games (*i.e.*, “two times (2x)” the length of Mr. Wilson’s most recent three (3) game suspension); and (c) in light of the injury Mr. Sundqvist suffered as a result of Mr. Wilson’s hit in this case, an additional two (2) game penalty (on top of the base amount) would normally be considered appropriate. As a result of the above assertions, the NHLPA concluded that Mr. Wilson’s check (if a violation of Rule 48) should only have warranted a suspension of no more than eight (8) games. (Tr. 133.)



## VI.

### ANALYSIS

#### A. Mr. Wilson Violated Rule 48

Rule 28 allows the Commissioner to assess fines and/or suspensions for any violation of the League's Playing Rules committed during the course of a game, whether or not such offense has been penalized by the Referee. Here, the suspension of Mr. Wilson was based on a determination – made both in real time by the on-ice officials and following video review of the incident by the DPS – that he had violated Playing Rule 48.

Rule 48 provides as follows:

**48.1 Illegal Check to the Head** – A hit resulting in contact with an opponent's head when the head was the main point of contact and such contact to the head was avoidable is not permitted.

In determining whether contact with an opponent's head was avoidable, the circumstances of the hit including the following shall be considered:

- (i) Whether the player attempted to hit squarely through the opponent's body and the head was not "picked" as a result of poor timing, poor angle of approach, or unnecessary extension of the body upward or outward.
- (ii) Whether the opponent put himself in a vulnerable position by assuming a posture that made head contact or an otherwise full body check unavoidable.
- (iii) Whether the opponent materially changed the position of his body or head immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact.

Following the incident in question, Mr. Wilson was immediately assessed a match penalty and was ejected for the remainder of the game for an illegal check to the head under Rule 48.5.

My conclusion that DPS' determination that Mr. Wilson violated Rule 48 is supported by clear and convincing evidence is based on the following:

1. ***Mr. Sundqvist's Head was the Main Point of Contact***

a. Simply watching the video footage of the incident, including a frame-by-frame review, clearly and convincingly establishes that Mr. Sundqvist's head was the main point of contact of Mr. Wilson's check on the play in question. (*See* NHLPA Ex. A, NHL Ex. 9.) The video shows that as Mr. Wilson delivered the check on Mr. Sundqvist, Mr. Wilson's left shoulder made primary, direct and substantial contact with Mr. Sundqvist's head, and that his head – as opposed to any other portion of his body – received the majority of the force from Mr. Wilson's check. Any other contact that Mr. Wilson may have also delivered to Mr. Sundqvist's body as a result of the check was secondary and incidental.

b. A review of the video footage also leads to the conclusion that, contrary to the NHLPA's assertion otherwise, Mr. Sundqvist's head did, in fact, snap in an independent manner just prior to the rest of Mr. Sundqvist's body. (Tr. 76.) While the independent head movement may not have been as pronounced as in some of the examples shown in the DPS educational video (NHLPA Ex. C), I reject the assertion that such fact alone is dispositive or necessarily supports a conclusion that Mr. Sundqvist's head was not the main point of contact on this play.

c. I also reject the NHLPA's argument that an independent "snapping" of the head is a necessary and essential element of an illegal check to the head. The NHLPA's argument relies on a video distributed by DPS this past year (NHLPA Ex. C), which featured several plays and concluded that a head snap independent from the body "is *an* excellent indicator that the head was the main point of contact." Clearly, the examples in the video were merely illustrative, and not exhaustive, of circumstances in which the head is the main point of contact. An independent head snap is certainly not required in every instance – particularly where, as here, the momentum of Mr. Sundqvist's body was moving in the same direction as his head at the time contact was made. I also credit Mr. Parros' testimony in this regard, as his department created and issued the educational video in question and he is tasked with making these determinations on a regular basis. Mr. Parros stated that an independent head snap is "an excellent indicator" that the head was the main point of contact, but "[i]t doesn't mean it's the only indicator." (Tr. 168.)

d. I also find compelling that, in addition to Mr. Parros, who testified that it was "very clear" from the video that the head was the main point of contact (Tr. 169), the DPS personnel who reviewed the incident were unanimous in concluding that the head was the main point of contact – not the shoulder or any other portion of Mr. Sundqvist's body. (NHL Ex. 10.)

e. I reject the NHLPA's contention that "there's a significant shoulder injury to Sundqvist which would indicate that a major part of the force was delivered to the shoulder" (Tr. 81), rather than to the head. Mr. Sundqvist's head and body were spun violently as a result of Mr. Wilson's check, causing Mr. Sundqvist to land hard on his right shoulder. Indeed, the injury report prepared in conjunction with the injury concluded that Mr. Sundqvist's right shoulder

injury was caused by him falling on his shoulder. (NHL Ex. 3 at NHL000457.) Further, the fact that Mr. Sundqvist was diagnosed with and continued to suffer from the symptoms of a concussion for approximately two (2) weeks after the check provides further support that the head – not the shoulder or any other part of Mr. Sundqvist’s body – took the brunt of the blow from Mr. Wilson’s check, therefore, suggesting that it was the main point of contact. (*Id.*; *see also* NHL Ex. 2.)

f. Finally, even Mr. Wilson admitted that, in delivering the check on Mr. Sundqvist, he made contact with Mr. Sundqvist’s head. While he also maintained that he made significant contact with Mr. Sundqvist’s body (Tr. 38, 50.), when pressed, Mr. Wilson acknowledged that he could not conclude one way or the other whether Mr. Sundqvist’s head was the main point of contact on the play. (Tr. 50.) I conclude that the video and other evidence described above provide clear and convincing evidence that it was.

## 2. *The Head Contact Was Avoidable*

I also find that there is clear and convincing evidence that the contact to Mr. Sundqvist’s head was avoidable by Mr. Wilson. During the hearing, the NHLPA argued that Mr. Sundqvist left himself vulnerable to the check and subsequent injury by skating to the middle of the offensive zone and failing to take any evasive actions to avoid the oncoming Player or otherwise to protect himself from the imminent contact. (Tr. 33, 64.) I reject this argument out of hand. There is no dispute that Mr. Sundqvist was eligible to be checked on this play as he remained in possession of the puck; the DPS suspension video expressly acknowledges that. (NHL Ex. 9.) “Eligibility to be checked,” however, is not the same as “eligibility to be checked in the head.”

Our Playing Rules clearly prohibit the latter. While it is completely understandable that a Player may choose to “bail” on a play in order to avoid being checked, no Player should be required to do so to avoid being checked in the head. The onus is on the Player making the check to avoid making the head the main point of contact as long as such contact is avoidable. Here, Mr. Wilson’s check violated Rule 48 because – in addition to the head being the main point of contact – the head contact was, in fact, avoidable.

My conclusion that head contact on this play was avoidable is supported by the following:

a. Mr. Wilson did not check Mr. Sundqvist squarely through the body, which renders Rule 48.1(i) inapplicable. The NHLPA argued that at one point just before Mr. Sundqvist attempted to execute the shot on goal, both Players (Messrs. Wilson and Sundqvist) were squared up with each other and Mr. Wilson was preparing to deliver a clean check. (Tr. 29, 31, 91.) The NHLPA further asserted that at the point Mr. Wilson was “already engaged in the hit, [and] is going to hit Sundqvist squarely through the chest,” Mr. Wilson’s angle of approach was appropriate. (Tr. 92.) However, based on my review of the video footage, I concur with the conclusion reached by DPS that Mr. Wilson’s angle of approach was poor and resulted in Mr. Wilson trying unsuccessfully to cut in front of Mr. Sundqvist in order to check through Mr. Sundqvist’s chest. Instead, Mr. Wilson’s inability to position himself squarely in front of Mr. Sundqvist and check through the core of his body is likely what resulted in a high check that “picked” Mr. Sundqvist’s head. (NHL Ex. 8.) Mr. Wilson could have taken a different angle of approach that could have provided him more body with which to deliver a

clean check. He also could have crouched lower in his approach to ensure there was no contact with Mr. Sundqvist's head. Or, he could have attempted to avoid the check altogether. He chose to do none of those things.

b. In this regard, I was not persuaded by the video example relied on by the NHLPA in support of its position that Rule 48.1(i) should apply here. (NHLPA Ex. D.) The video showed a check delivered by Colorado Player Nikita Zadorov on Nashville Player Kevin Fiala, in which it was determined that contact with Mr. Fiala's head was unavoidable because Mr. Zadorov was delivering a full body check and did not take a poor angle of approach (as Mr. Wilson did here). The video also highlighted the significance of the six inch height difference between the Players. Here, Mr. Wilson is only one inch taller than Mr. Sundqvist. While the NHLPA argued that Mr. Sundqvist "put[] himself in a shorter position by shooting the puck" (Tr. 90), the video itself belies that conclusion as it shows that both Players' heads (Messrs. Wilson and Sundqvist) were at nearly identical heights immediately prior to, during and immediately after the attempted shot on goal was taken, and through to the point of Mr. Wilson's contact with Mr. Sundqvist.

c. I also reject the argument that Mr. Wilson's angle of approach and resulting check on Mr. Sundqvist was somehow justified because he was merely backchecking in accordance with Washington's defensive "system," and how he is "coached to play." (Tr. 26, 63-64, 67-68, 91.) This is the same argument I have previously considered and rejected in the *Kaleta* matter. (See NHLPA Ex. 13 at pp. 7-8.)

d. Likewise, I find that Rule 48.1(ii) does not apply to the circumstances of the check in question. A review of the video footage belies the NHLPA's assertion that Mr. Sundqvist put himself in a vulnerable position – making head contact unavoidable – because he was bent low, his shoulder was low and his head was exposed. The video example that the NHLPA used as a comparator for this purpose is readily distinguishable. (NHLPA Ex. D) In the video the NHLPA relies on, Pittsburgh Player Patrick Hornqvist delivered a check to Boston Player Charlie McAvoy. At the time the check is delivered, Mr. McAvoy was crouched forward, with his head bent down in front of his body while handling the puck – making it impossible for Mr. Hornqvist to deliver a check to Mr. McAvoy without Mr. McAvoy's head being the main point of contact. I reject the NHLPA's claim that "[t]his is almost the exact same position that Sundqvist is in" as inaccurate and inconsistent with even a cursory review of the two videos. (Tr. 94.) Mr. Hornqvist was delivering a straight-on check and thus had no options to deliver a clean check; Mr. Wilson, by contrast, was approaching Mr. Sundqvist from a side angle and could have taken a different angle of approach that could have resulted in a clean check that did not "pick" Mr. Sundqvist's head. In short, the two plays are distinct, and have materially significant and controlling differences.

e. The NHLPA also showed video footage of a play from three (3) years ago in which Chicago Player Jonathan Toews successfully avoided a potential check by Mr. Wilson on a similar backchecking play,<sup>1</sup> as well as various other video clips showing examples of offensive

---

<sup>1</sup> I found the NHLPA's reliance on the Wilson/Toews play to be particularly curious here because while it is clear that Mr. Toews saw Mr. Wilson approaching and chose to make efforts to avoid the oncoming check, it was equally clear that Mr. Wilson also "pulled up" on the play, and reduced his speed to minimize the impact of any potential collision with Mr. Toews. Mr. Wilson had the same option to "minimize" or avoid contact here and he chose not to do so.

Players with the puck who took evasive actions to avoid being checked. (Tr. 99, NHLPA Exhs. B, E.) Mr. Wilson testified that he believed the onus was at least in part on the offensive Player to prepare for and to receive contact, and that he had expected Mr. Sundqvist to protect himself in some manner, which he failed to do. (Tr. 32-33, 36.) As the DPS suspension video makes clear, however, and as noted above, while Mr. Sundqvist was eligible to be checked on the play under the circumstances, Rule 48 in this case placed the onus squarely on *Mr. Wilson* to avoid making his opponent's head the main point of contact where such contact was otherwise avoidable. Here, because head contact *was* otherwise avoidable for Mr. Wilson, the Playing Rules did not require Mr. Sundqvist to take affirmative actions to avoid being checked in the head on this play.

f. Rule 48.1(iii) also does not excuse Mr. Wilson's check on this play because Mr. Sundqvist did not materially change the position of his head or body prior to or simultaneously with contact *in a way that significantly contributed to the head being the main point of contact*. Although Mr. Sundqvist adjusted his arms while taking a shot at the net, and his right shoulder dipped down to take the shot, it is dispositive that Mr. Sundqvist's head and the core of his body continued on a consistent path from the moment Mr. Wilson committed to the check through the time he delivered it. The video footage corroborates Mr. Parros' conclusion that Mr. Sundqvist's head and body "stayed along that same path" and "[did] not move in a significant manner." (Tr. 167.) Despite the NHLPA's contention that the dip of his shoulder placed Mr. Sundqvist's head on a "silver platter" for Mr. Wilson (Tr. 102-103), the video footage does not support this interpretation; Mr. Sundqvist's head and the core of his body remained constant and on the same plane the entire time. Indeed, as Mr. Parros testified,



notwithstanding the fact that Mr. Sundqvist's right shoulder slightly dipped down to take the shot, his body remained "siloed," and "[h]is head didn't move, his body didn't move." (Tr. 167.) Mr. Parros' finding in this regard is confirmed by the video evidence of the play in question, which clearly and convincingly establishes that Mr. Sundqvist's head did not "materially change" position in a way that "significantly contributed" to the head being the main point of contact.

g. This incident is clearly distinguishable from the circumstances that were intended to be covered by the exception set forth in Rule 48.1(iii). For instance, based on the examples shown on the DPS video that the NHLPA used during the appeal hearing (NHLPA Ex. D), the Players who sustained head contact in those plays had either abruptly turned (*i.e.*, New Jersey Player Blake Coleman), or had stopped and suddenly turned (*i.e.*, Pittsburgh Player Brian Dumoulin), which, in both cases, directly resulted in the head contact that followed. (NHLPA Ex. D, Tr. 173-173.) Here, by contrast, Mr. Sundqvist was in a completely predictable and fully observable posture and position from Mr. Wilson's vantage point; Mr. Sundqvist did not abruptly stop or assume any material changes in body positioning. Indeed, Mr. Wilson admitted that he was fully expecting Mr. Sundqvist to attempt a shot or to pass the puck as he was approaching – just as he ultimately did. (Tr. 54-55.) The fact that Mr. Sundqvist attempted a shot on goal quickly just prior to the check being delivered did not result in a material change in his body positioning that "significantly contributed to the head contact."

h. I also find that Mr. Wilson's testimony that he could not have done anything differently to avoid checking Mr. Sundqvist's head (Tr. 52) to be entirely inconsistent with, and

undermined by, the testimony of Brian MacLellan, his own team's General Manager, who flatly acknowledged that Mr. Wilson "had options" to avoid checking Mr. Sundqvist's head. (Tr. 73.)

i. The NHLPA stressed at several junctures during the appeal hearing its view that the evidence is clear that Mr. Wilson did not "intend to injure" Mr. Sundqvist, or to "target his head." (Tr. 24, 57, 72, 108, 230.) However, as the NHLPA well knows, Rule 48 no longer requires "intent" to support a finding that the Rule has been violated; indeed, the Rule was amended five (5) years ago to specifically delete language referring to the "targeting" of the head. Hockey is, indeed, a game of inches and as Mr. Parros said, "you can be off by three inches and end up unintentionally hitting someone's head." (Tr. 174.) Players are constantly cautioned not to put themselves in the position of "missing" on "close hits" where the result could be (and very often is) an illegal check to the head. Mr. Wilson has seemingly and consistently refused to heed this warning.

j. Finally, I deem it important to note that the DPS deals with and interprets Rule 48 on an everyday basis – reviewing literally hundreds of checks a year. The people working in that Department are eminently qualified and experienced in understanding the intricacies of the Rule and making fine distinctions in reaching their conclusions. With all due respect to the people making arguments for the NHLPA, suggesting that Mr. Parros' decision was incorrect, they are not similarly qualified or experienced. They do not watch every game every night; they do not review every play; they do not understand the intricacies of Rule 48; and they are not practiced in the art of making fine distinctions on plays such as this one. While ultimately it is up to me to render a decision on this appeal, and while that decision must be based on my own review of the

record to satisfy myself that the DPS decision in this instance is supported by clear and convincing evidence, it is certainly worth noting that those who are tasked with applying and enforcing Rule 48 on an everyday basis had little difficulty in concluding that the check in question constituted a clear violation of Rule 48.

The evidence thus clearly and convincingly establishes that Mr. Wilson violated Rule 48 by delivering a high, hard, forceful and dangerous illegal check to the head of Mr. Sundqvist.

**B. The 20 Game Suspension Was Appropriate**

As I have noted in prior opinions, the CBA does not prescribe a formulaic basis for the determination of appropriate Supplementary Discipline. To the contrary, Article 18 embodies a recognition that each case is unique and must be decided on the basis of its own particular facts and circumstances.

The framework for my inquiry as to the appropriate level of discipline for on-ice conduct in violation of the Playing Rules involves a review of the following factors set forth in Section 18.2 of the CBA:

- (a) The type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.
  
- (b) Injury to the opposing Player(s) involved in the incident.

- (c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation. (Emphasis in original.)
- (d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.
- (e) Such other factors as may be appropriate in the circumstances.

I review these factors below. However, it bears repeating at the outset of this portion of my Opinion that head checks are a matter of great concern to the League, our Clubs and our Players, and that violations of Rule 48 are among the most serious Playing Rule infractions in the game. As I wrote in my July 2, 2012 opinion concerning the suspension of Raffi Torres (*see* NHLPA Ex. 12 at p. 9):

Notably, Rule 48 was initially adopted by the NHL Board of Governors during the 2009/10 season with support of the NHL General Managers and the NHL/NHLPA Competition Committee in response to a growing concern regarding head hits and head injuries generally, and with respect to blindside head hits in particular (which the Rule was originally written to prohibit). Little more than a full season later, the NHL decided to broaden the scope of Rule 48 to prohibit hits from any direction in which a Player's head is targeted and is the principal point of contact. These changes were implemented for the 2011/12 season, and again were supported by NHL General Managers, the NHL/NHLPA Competition Committee, and the NHL Board of Governors.

It is fair to say that the focus on head hits and concussions has been a top priority of the NHL (and the NHLPA) for some time, and the adoption of Rule 48 – together with the many steps that have been taken to educate Players regarding the Rule – sent a clear message regarding the seriousness with which the League views targeted hits to the head.

I reiterated these same concerns and sentiments in my decision affirming a ten (10) game suspension for Buffalo Player Patrick Kaleta in October 2013. (NHLPA Ex. 13 at p. 9.) I noted

there that Rule 48 had been amended again prior to the start of the 2013/14 season (with the input and approval of the NHLPA) to make clear “that the ‘intentionality’ of the head hit is [no longer] a stated element of the Rule” and that “a Player’s reckless disregard for an opponent’s head in delivering a body check will itself be sufficient to constitute a violation of Playing Rule 48.” (*Id.* at p. 10.)

In the years since, the League has continued in a variety of ways to emphasize its concern and commitment to the Rules designed to prevent and minimize the number of head injuries, including by taking new and additional steps to educate Players regarding Rule 48. Indeed, the educational videos produced and made available by the DPS over the past year and introduced by the NHLPA at the appeal hearing (NHLPA Exhs. C and D) are prime examples of these efforts. In addition, Mr. Parros and the other members of DPS have spent countless hours speaking to Players (including Mr. Wilson) and other team personnel on Playing Rule enforcement and safety issues, particularly as they relate to dangerous plays that can lead to head injuries.

As for the factors referred to in Article 18.2, I find as follows:

#### The Type Of Conduct Involved

Mr. Wilson’s conduct was in violation of Rule 48. Even if I accept that Mr. Wilson did not intend to make head contact with Mr. Sundqvist or attempt to injure him, the fact of the matter was that the check was intentional – it was not accidental. For the reasons previously

discussed, Mr. Wilson's check at a minimum must be considered reckless. Moreover, the force used was excessive, unnecessary and posed a serious risk of injury to his opponent.

#### Injury To The Opposing Player

Mr. Sundqvist suffered a serious injury on the play. As indicated above, he has missed eight (8) games as of the date of this Decision with a diagnosed concussion and a shoulder A/C sprain.

#### The Status Of The Offender

The CBA's underlined language highlights the significance of this factor: "Players who repeatedly violate League Playing Rules will be more severely punished for each new violation." This emphasis is appropriate. The goal of supplementary discipline is to not only punish conduct that is in violation of League Rules, but also to pose an effective deterrent to future misconduct by the same Player.

This is Mr. Wilson's *fourth suspension in barely more than a year*:

- In September 2017, he was suspended two (2) Preseason Games for a dangerously late and forceful check (interference) against St. Louis Player Robert Thomas during a Preseason Game.

- Just two games after his return to play from the suspension for his illegal check on Mr. Thomas, Mr. Wilson was suspended again (in October 2017) – this time for four (4) Regular Season Games – for a boarding infraction (described in the suspension video as “forceful” and “dangerous”) during a Preseason Game against St. Louis Player Samuel Blais.
  
- In May 2018, Mr. Wilson was suspended again – this time for three (3) Playoff Games for a forceful, dangerous, open-ice illegal check to the head of Pittsburgh Player Zach Aston-Reese. Mr. Aston-Reese’s jaw was broken on the play and his Playoff season was ended.

#### The Situation Of The Game

In the incident, there were no noteworthy circumstances of the kind mentioned in Article 18.2(d) (“for example: late in the game, lopsided score, prior events in the game”). However, the game itself was the last Preseason Game for both teams – a game in which the outcome would not count towards or have any effect on either Club’s standings heading into the Regular Season. Although the illegal check occurred on what could otherwise be considered a “hockey play,” the reckless nature of the check and the level of force applied in the context of the last Preseason Game before the start of the Regular Season further reflects what I conclude to be particularly poor judgment by Mr. Wilson.

### Other Factors As May Be Appropriate

As noted in the DPS suspension video, and at the hearing, Mr. Wilson's four (4) recent suspensions for on-ice misconduct have been in rapid succession, whether considered in terms of games between incidents or in terms of calendar days. During this period, DPS has worked diligently to provide specific instruction to Mr. Wilson to assist him in understanding the appropriate confines of the Playing Rules. Mr. Parros met with Mr. Wilson in Calgary in 2017 after the second (2<sup>nd</sup>) of his three (3) total suspensions last season. (Tr. 43-44.) Mr. Parros also traveled to Toronto in August 2018 to meet one-on-one with Mr. Wilson again to provide feedback on his style of play, and to advise him on how to make the necessary adjustments to his game that might help to avoid or minimize the likelihood of him executing illegal and dangerous checks. (Tr. 21-22, 48-49, 157, 161.) This meeting followed not only the illegal check to Mr. Aston-Reese (breaking his jaw) and subsequent suspension assessed to Mr. Wilson during the Second Round of the 2018 Stanley Cup Playoffs, but also questionable and/or illegal checks to Columbus Player Alexander Wennberg in the First Round of the 2018 Stanley Cup Playoffs; to Pittsburgh Player Brian Dumoulin in the Second Round of the 2018 Stanley Cup Playoffs; and to Vegas Player Jonathan Marchessault during the 2018 Stanley Cup Final. (Two (2) of these three (3) plays resulted in penalties on the ice being assessed against Mr. Wilson.) The Marchessault check in particular led to a call from Mr. Parros to Mr. Wilson during the Stanley Cup Final, and a warning to Mr. Wilson to make better decisions in the timing and selection of his checks. (Tr. 18-19, 45-46.) Both in-person meetings with Mr. Wilson – first in Calgary and then again in Toronto – involved a comprehensive review of video featuring Mr. Wilson's play and some of his checks that had caused DPS concern. (Tr. 21-22, 43-44, 48-49.) Mr. Wilson's



involvement in yet another illegal and dangerous head check so soon after his August meeting with Mr. Parros strongly suggests to me that Mr. Wilson is “not getting the message,” and it reinforces my firm conviction that the lengthy suspension issued by DPS in this case was necessary and appropriate and supported by clear and convincing evidence.

Taking into account all of the above factors – and the consistently dangerous style of Mr. Wilson’s play during the relevant period – I agree with Mr. Parros’ conclusion that an extended suspension is necessary. In this regard, I reject the NHLPA’s suggestion that an eight (8) game suspension is sufficient under these circumstances. I address below each of the NHLPA’s arguments with respect thereto.

First, I decline to accept the NHLPA’s argument that Mr. Wilson’s September 2017 suspension should be treated as the equivalent of a fine (for purposes of determining the appropriate quantum of discipline here) because it involved only Preseason Games. (Tr. 114-115.) Nothing in Article 18 or in the League’s voluminous past practice involving supplementary discipline would support that assertion. Mr. Wilson’s suspension relating to the incident with St. Louis Player Robert Thomas (Mr. Wilson’s first of four (4) suspensions in the last year) was limited to Preseason Games not because his conduct had been deemed “minor”; rather, his suspension was for Preseason Games (and did not extend into the Regular Season) based solely on the timing of his offense, which occurred during the Preseason. Article 18.10 provides that “[w]henver possible, suspensions . . . will take effect beginning with the game

immediately following the game in which the incident giving rise to the suspension occurred.”<sup>2</sup> Moreover, the DPS video announcing the suspension for the late and illegal check against Mr. Thomas (which emphasized the “predatory nature” of the play) was explicit in making clear that Mr. Wilson was being suspended for serious and dangerous misconduct on the ice. (NHL Ex. 8.)

Second, I do not find the NHLPA’s reference to the disciplinary records of other Players over supposedly comparable periods of time (Messrs. Tkachuk, Scott, Garbutt, Kaleta and Rinaldo) to be on point or in any way persuasive. For a variety of reasons, none are appropriate comparators:

- Messrs. Tkachuk, Scott, Garbutt and Kaleta were suspended three (3) times within the respective periods covered by the NHLPA exhibit (NHLPA Ex. 15) for infractions of varying degrees of seriousness. As noted, Mr. Wilson has been suspended *four (4) times in approximately one year’s time*. Moreover, all four (4) of the infractions for which Mr. Wilson was suspended involved violent and dangerous physical conduct, all of which could have caused (and some did cause) serious injury to his opponent, which was not true of the NHLPA’s purported comparators.

---

<sup>2</sup> The NHLPA’s suggestion that there is essentially no consequence to a suspension for Preseason Games only also misses the mark. (Tr. 114-115.) Although a suspension in the Preseason does not result in the loss of salary (notably, nor does a suspension in the Stanley Cup Playoffs), such a suspension (unlike a fine) places the Player at risk of being treated as a “repeat offender” for purposes of the salary forfeiture provisions of Article 18.15 in the event he must miss games due to another suspension being assessed in the next eighteen (18) months. In point of fact, Mr. Wilson was treated as a repeat offender (resulting in a significantly increased loss of salary) for his second suspension last year involving a dangerous boarding infraction against St. Louis Player Samuel Blais.

- As for Mr. Rinaldo, he was suspended four (4) times, but those suspensions were for conduct that occurred over a period in excess of three and one half (3½) years. And, Mr. Rinaldo's most recent two (2) suspensions were nearly two (2) years apart (and did not result in injuries to the opposing player). To be sure, Mr. Rinaldo's record is hardly a model for gentlemanly play – far from it – but for purposes of measuring the appropriate quantum of discipline in this case, I find the Rinaldo comparison to be of limited persuasive value.
  
- Mr. Wilson is the only Player in the NHLPA's comparator group to have committed two (2) illegal checks to the head – both of which caused serious head injuries (to Messrs. Aston-Reese and Sundqvist, respectively) – in such rapid succession. And, as noted above, Mr. Wilson committed these on-ice infractions in the wake of repeated warnings and a number of efforts made by the League and DPS to provide guidance to Mr. Wilson and to raise his awareness.

Third, I have considered in reaching my decision here the NHLPA's argument that Mr. Wilson's record in conjunction with the nature and degree of his most recent offense falls short of the seriousness of factors that led me to impose a twenty-one (21) game suspension on Arizona Player Raffi Torres in 2012. However, I do not find the NHLPA's argument to be persuasive for the following several reasons:

- As noted in my 2013 decision in the *Kaleta* matter, the League's expectations concerning the importance of promoting head safety in the NHL have been heightened since 2012 and the efforts of the NHL and NHLPA to educate Players on the importance of safe play have increased year after year. Players are justifiably held to even higher standards and expectations for promoting Player Safety in 2018 than they were in 2012, when the Raffi Torres incident occurred.
  
- Of the twenty-one (21) total games for which Mr. Torres was suspended, thirteen (13) were Playoff Games. Although there is no hard and fast rule regarding the "value" of Playoff Games versus the "value" of Regular Season Games,<sup>3</sup> there can be no dispute that Playoff Games are considerably more "valuable." Therefore, I consider the twenty-one (21) game Torres suspension to have been markedly more severe in consequence to the offending Player and his team than the twenty (20) Regular Season Game suspension assessed to Mr. Wilson.

---

<sup>3</sup> The NHLPA asserted during the hearing that my decision in the *Torres* matter forecloses a determination that Playoff Games are "more valuable" than Regular Season Games for supplementary discipline purposes. (Tr. 117.) That argument clearly mischaracterizes my decision, which declined to reduce the suspension to Mr. Torres on the basis that his "time served" had included thirteen (13) Playoff Games. The decision merely observed that Mr. Hossa's injury rendered him disabled for the balance of the Playoffs and expressed my view that the Playoff Games missed were "no less valuable to the injured Player than they are to the Player being disciplined." (NHLPA Ex. 12 at pp. 14-15) My decision in *Torres* by no means forecloses a determination that the length of a supplementary discipline suspension may take into account whether the games missed will include Playoff Games, and the corresponding "value" of those Playoff Games. It is worth noting that if this were not the case, then Mr. Wilson would surely have been penalized more than three (3) Playoff Games last May for his illegal check to the head of Mr. Aston-Reese, which followed a four (4) Regular Season Game suspension for Mr. Wilson's boarding infraction against Mr. Blais.

- The twenty one (21) game suspension assessed to Mr. Torres was also more than “ten times (10x)” the length of Mr. Torres’ most recent prior suspension – a much greater multiplier than Mr. Parros considered here.

Fourth and finally, I reject the NHLPA’s argument that the length of Mr. Wilson’s suspension should be adjusted downward based on the fact that certain members of the DPS disagreed (at least initially) with Mr. Parros’ decisions to suspend Mr. Wilson for the plays involving Messrs. Blais and Aston-Reese last season. (Tr. 125.) In rejecting this argument, I note that the NHLPA would not have me impose a more substantial penalty to Mr. Wilson based on the fact that those same DPS members were *unanimous* in determining that Mr. Wilson’s check delivered to Mr. Sundqvist was illegal and a clear violation of Rule 48. (Tr. 123-124.) Nor, presumably, would the NHLPA have me place weight on the fact that the checks delivered by Mr. Wilson to each of Messrs. Wennberg, Dumoulin and Marchessault during the 2018 Stanley Cup Playoffs (for which no supplementary discipline was ultimately imposed on any) were all “close calls,” as to which some members of the DPS thought supplementary discipline should have been assessed to Mr. Wilson. (Tr. 154-155, 172-173.)

## VII.

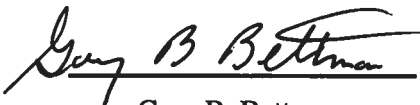
### CONCLUSION

Mr. Parros testified that in considering the appropriate quantum of discipline he examined the range of “multipliers” that had previously been applied to Players who had been suspended for a third time within eighteen (18) months (because he could identify no Player who had been suspended four (4) times in the relevant 18-month period). (Tr. 177-182.) At the high end (Mr. Torres), that multiplier was “ten times (10x)” the length of the Player’s most recent

prior suspension (without regard to any difference in “value” between Regular Season and Playoff Games). Mr. Parros determined that application of the Torres multiplier here (which could have resulted in a suspension of thirty (30) games here, if not longer, again, depending on the “value” accorded to Playoff Game suspensions) might have been too punitive in this particular case. Instead, the evidence in the record suggests that Mr. Parros applied a “three times (3x)” multiplier to Mr. Wilson’s most recent suspension which he valued at six (6) Regular Season Games (“two times (2x)” three (3) Playoff Games) to arrive at an eighteen (18) game base suspension – to which he then added two (2) additional games on account of Mr. Sundqvist’s injury – for a total of twenty (20). (*Id.*) I find his methodology eminently reasonable and appropriate. In my judgment, a twenty (20) Regular Season Game suspension assessed to Mr. Wilson reflects and accounts for appropriately the unique combination of factors involved in this case, including the gravity of the offense, Mr. Wilson’s prior disciplinary record (particularly within the relatively short period of time in which it was amassed), the multiple warnings and guidance he has received from the DPS, and the seriousness of Mr. Sundqvist’s injury. (*Id.*)

In conclusion, and keeping in mind that Article 18 is not formulaic, I find that the twenty (20) game suspension assessed to Mr. Wilson on account of his illegal check to the head of Mr. Sundqvist is supported by clear and convincing evidence. Every factor referenced in Article 18.2 calls for a significant suspension in this case. Mr. Wilson’s recent play has threatened the safety and well-being of opposing Players on too many occasions, despite prior discipline being assessed and despite the considerable efforts of DPS to counsel Mr. Wilson on how to play within the Rules.

One true and fundamental test of effective discipline is whether the discipline is of sufficient strength and impact that it has the effect of deterring the Player being disciplined from repeating the same or similar conduct in the future. By this standard, the supplementary discipline previously assessed to Mr. Wilson prior to this incident has clearly been ineffective in deterring his dangerously reckless play. Accordingly, I find that Mr. Parros' decision to impose a significant suspension of longer duration than in prior incidents in this case was readily supported by the evidence and might, in fact, be the only effective way to deter Mr. Wilson's future "bad conduct." I hope that this decision will serve as an appropriate "wake-up call" to Mr. Wilson, causing him to reevaluate and make positive changes to his game. The decision of the Department of Player Safety is hereby affirmed.

  
Gary B. Bettman

Dated: 10/25/18