

DECISION ON APPEAL (DAVID PERRON)

The National Hockey League Players' Association ("NHLPA"), on behalf of David Perron, has appealed from a December 11, 2023, supplementary discipline decision suspending Mr. Perron for six (6) games. This shall constitute my determination of Mr. Perron's appeal. For the reasons described herein, I find that the decision suspending Mr. Perron for six (6) games was supported by clear and convincing evidence and is, therefore, affirmed.

I.

SUMMARY OF FACTS

This appeal arises out of an incident involving Detroit Red Wings' forward David Perron in the first period of a game between Detroit and the Ottawa Senators at Little Caesars Arena on December 9, 2023. I have closely reviewed the video footage of the incident, as captured on the suspension video prepared by the NHL Department of Player Safety ("DPS").

Late in the first period, with Ottawa ahead by a score of 1-0, the on-ice officials whistled the play dead due to an injury sustained by Detroit forward Dylan Larkin. After the whistle stopping play, Mr. Perron turned around to see Ottawa defenseman Artem Zub standing over the fallen Mr. Larkin. In the video, Mr. Zub can be seen motioning towards the Player Bench after play is stopped, apparently in an effort to request medical assistance for Mr. Larkin.

Mr. Zub was not responsible for Mr. Larkin's injury. Nevertheless, Mr. Perron, believing otherwise, circled back toward Mr. Zub, taking several deliberate strides in the direction of the Ottawa Player, raised his stick with both hands, pulled it back, and thrust the shaft of his stick forward, while also launching his body toward Mr. Zub to deliver a forceful blow to the right side of the Ottawa Player's face and head, knocking him to the ice. It appears that Mr. Zub saw

Mr. Perron charging toward him at the last moment, and (unsuccessfully) attempted to protect himself from Mr. Perron with the hand he had already raised to notify the bench of the injury to Mr. Larkin.

The Official's Report of Match Penalty states:

After the whistle for the injured player (#71 Larkin), the Detroit player David Perron immediately skates towards the Ottawa player (#2 Zub) and violently crosschecks him in the head. Zub seemed to be injured as a result of the crosscheck to the head. Due to the intent and direct violent action by Perron, the original call was a match penalty for intent to injure. After huddling with the other officials, we decided to also review a major penalty for the Ottawa player #21 Joseph as well as the match penalty for Perron. After review the major on Joseph was reduced to a minor for roughing. The original call on Perron was confirmed and he was assessed a match penalty for intent to injure.

II.

PROCEDURAL HISTORY

On December 11, 2023, George Parros (Senior Vice President, DPS) held an in-person supplementary discipline hearing (via Zoom videoconference) relating to this incident.

Following the hearing, Mr. Parros issued a decision suspending Mr. Perron for six (6) games.

The analysis underlying the suspension assessed to Mr. Perron was explained in the DPS video produced and made publicly available in conjunction with the announcement of Mr. Parros' decision. As of the date of this decision, Mr. Perron has served the full six (6) game suspension.

By email to Deputy Commissioner Bill Daly, dated December 12, 2023, the NHLPA gave notice of an appeal on behalf of Mr. Perron pursuant to Section 18.12 of the NHL/NHLPA Collective Bargaining Agreement ("CBA").

III.
THE DECEMBER 19 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 December 19, 2023, at the League offices in New York. In attendance at the hearing in addition to and on behalf of Mr. Perron were his agent, Allan Walsh, and John Gerba, Don Zavelo, Maria Dennis, David Sinclair and Gideon Martin from the NHLPA. General Manager Steve Yzerman attended on behalf of the Detroit Red Wings. Bill Daly, David Zimmerman, Julie Grand, Daniel Ages and Jamie Hacker attended the hearing on behalf of the League. George Parros, from DPS, appeared at the hearing and he, as well as Mr. Perron and Mr. Yzerman, testified. Also in attendance on behalf of the League were counsel from Proskauer Rose LLP, Joseph Baumgarten and Thomas Fiascone.

The hearing began at approximately 4:00 p.m. and concluded at 5:36 p.m. All parties were given a full and fair opportunity to be heard and no objection to the proceeding was raised. The record was closed at the conclusion of the hearing. The transcript of the hearing was received by email on December 20, 2023.

IV.
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.

V.

THE NHLPA'S CONTENTIONS

The NHLPA acknowledged at the hearing that the Player's conduct constituted an illegal cross-check but claimed that the six (6) game suspension imposed by DPS was excessive. The NHLPA argued that:

1. The conduct did not involve an intentional cross-check to the head and that: (a) Mr. Perron was intending to strike Mr. Zub's arm; (b) the primary point of contact was, in fact, Mr. Zub's arm; and (c) Mr. Perron's stick rode up from the arm to make contact with Mr. Zub's head. (Tr. 13, 19, 28)

2. Mr. Perron has no significant history of supplementary discipline.

3. Mr. Zub did not suffer a serious injury.

4. The six (6) game suspension imposed by DPS was excessive in light of supplementary discipline imposed for similar infractions by other Players in the past.

The NHLPA contended at the hearing that the maximum suspension that could be justifiably imposed would be four (4) games.

VI.

ANALYSIS

Because the NHLPA and Mr. Perron do not contest that the conduct in question violated the League Playing Rules, my analysis is limited to whether the six (6) game suspension imposed by DPS is appropriate, *i.e.*, supported by clear and convincing evidence. For the reasons that follow, I find that it is.

As I have noted in prior supplementary discipline 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.

The Type of Conduct Involved (Section 18.2(a))

There is no question (and no dispute) that Mr. Perron's conduct involved a serious cross-checking infraction in violation of League Playing Rules. Based on my review of the video, I find that Mr. Perron's actions were not merely careless or reckless, they were intentional. Mr. Perron skated deliberately and aggressively toward Mr. Zub after play was stopped. Seeing Mr. Larkin lying prone on the ice, Mr. Perron specifically targeted Mr. Zub for retaliation. With ample time to consider his actions, he took several deliberate strides towards his target and then launched himself up and into Mr. Zub, extending his arms as he did so, to deliver a cross-check directly to Mr. Zub's head.

Although Mr. Zub did not suffer a serious injury, I note that the on-ice officials assessed a match penalty against Mr. Perron for a deliberate attempt to injure under Playing Rule 21.1, a penalty which they confirmed after reviewing a video replay of the infraction. (NHL Ex. 1.) At the hearing, Mr. Perron denied any intent to injure Mr. Zub. I believe it is a close call as to whether there was intent to injure. However, given Mr. Perron's scant disciplinary history over a lengthy career, as well as Mr. Perron's testimony regarding his own prior head injuries, I accept and credit Mr. Perron's testimony that he had no specific intent to inflict serious injury on Mr. Zub. However, the circumstances do suggest that Mr. Perron intended to physically punish Mr. Zub for what he considered (erroneously) to be the latter's infliction of an injury on his teammate, and that he did so in reckless disregard for the possibility of serious injury.

Injury to The Opposing Player (Section 18.2(b))

Mr. Zub was not seriously injured as a result of Mr. Perron's actions.

The Status of The Offender (Section 18.2(c))

Mr. Perron has been fined for cross-checking on one prior occasion in his NHL career.¹

The Situation of The Game (Section 18.2(d))

Mr. Perron's conduct occurred well after the whistle had blown and play had been stopped due to Mr. Larkin's injury. This is not a case where Mr. Perron was chasing the puck or attempting to deliver a legal check; nor was he involved in or attempting to disengage from a scrum. Mr. Perron's singular motive was to exact retribution against (what turned out to be) an innocent and unsuspecting Player.

Other Factors As May Be Appropriate (Section 18.2(e))

As discussed above, there was no provocation by Mr. Zub, who had committed no infraction and who had no reason to expect (or opportunity to effectively prepare for) a violent cross-check to his head.

* * *

Weighing the factors described above, I find that a six (6) game suspension is appropriate. Like Mr. Parros, I reach this conclusion based on the particularly egregious nature of the conduct. In particular:

1. I find based on my review of the video that the cross-check was delivered directly to Mr. Zub's head. I do not credit Mr. Perron's testimony that his initial contact was with Mr. Zub's arm (approximate to his elbow) or that his stick "rode up" to Mr. Zub's head. The video

¹ Mr. Parros testified at the hearing that he did not consider Mr. Perron's disciplinary history to be a factor weighing in favor of greater discipline beyond that warranted by the cross-check itself. (Tr. 66-67.) I agree with that conclusion.

footage clearly establishes that the cross-check was delivered directly to Mr. Zub's head. Mr. Zub did not suddenly change his position in a way that caused the cross-check to hit his head. Rather, Mr. Perron deliberately aimed his cross-check directly at Mr. Zub's head and launched his body to deliver it forcefully.

2. The cross-check was intended as retribution – and Mr. Perron acknowledged as much. Mr. Perron was clearly motivated by what he (erroneously) concluded was an injury to Mr. Larkin inflicted by Mr. Zub. With ample time to consider his options, he targeted an unsuspecting victim and delivered a powerful blow to the victim's head using his stick (held firmly with two hands) and all the physical force he could muster.

3. At the hearing, Mr. Perron repeatedly attempted to justify his actions as warranted intervention on behalf of a teammate and that he only intended to start a scrum. I reject that justification. NHL hockey is a physical game that sometimes results in physical confrontations. However, it is disingenuous to suggest that the cross-check here was merely intended to start a scrum. Mr. Perron could have verbally challenged Mr. Zub, but he did not.² He could have pushed or jabbed him or even dropped his gloves to fight, but he did not. Had he chosen other options to support his teammate he might still have been penalized, but the episode may have ended without supplementary discipline.³ While “standing up” for a teammate may have a place in the game within limits, a Player does not have *carte blanche* to determine the manner of retaliation, particularly where, as here, the manner chosen is potentially dangerous.

² Had he hesitated even momentarily before reacting to what he admittedly had not seen, he might have learned that Mr. Zub had not been responsible for Mr. Larkin's injury.

³ Mr. Perron testified that he had previously started a scrum to create a spark for his team in a playoff series. (Tr. 10-11.) Mr. Perron, a seasoned veteran Player, clearly knows how to start a scrum without his actions rising to the level of a suspension-worthy offense.

I acknowledge that Mr. Perron does not have a meaningful history of supplementary discipline and that Mr. Zub did not suffer a serious injury. These facts were taken into consideration when determining that a six (6) game suspension was appropriate. Given the nature of the conduct (as discussed above), the suspension almost certainly would have been considerably longer if Mr. Perron did not have a clean record or if there had been an injury.

Understandably, the NHLPA emphasized Mr. Perron's prior record, which includes only one prior instance of supplementary discipline in the form of a fine, and one warning. However, Mr. Perron is not the first NHL Player to receive a lengthy suspension despite the lack of prior suspensions. Two other instances are illustrative and support the imposition of a significant suspension here.

In 2013, I upheld a fifteen (15) game suspension of Boston Bruins' Player Shawn Thornton for slew footing and punching an opposing Player, who suffered an injury as a result. In doing so, I noted that Mr. Thornton had an excellent record for clean play, with no supplementary discipline over his eleven (11) season NHL career. Yet, the severity of his conduct (combined with the injury to the opposing Player) resulted in a fifteen (15) game suspension.⁴

Mr. Perron's offense was less egregious than Mr. Thornton's and did not result in an injury to the opposing Player – and his six (6) game suspension is considerably shorter. But the point remains clear: A first time offender may be subject to a lengthy suspension.

A more recent – and considerably less egregious – case involving a first-time offender was the suspension of Jason Spezza in 2021 for a kneeing infraction. In my decision reducing

⁴ Of course, in the ten years since Mr. Thornton's suspension, the League's focus on head safety has only increased. The same conduct today would no doubt yield an even lengthier suspension.

Mr. Spezza's suspension from six (6) games to four (4) games, I noted that Mr. Spezza had played in excess of 1,300 NHL games over nineteen (19) seasons without ever having been fined or suspended for on-ice conduct. Nevertheless, he received a four (4) game suspension (the same quantum of discipline suggested here by the NHLPA). Significantly, unlike Mr. Perron's conduct here, Mr. Spezza's offense occurred during a "hockey play" (*i.e.*, while Mr. Spezza was attempting to check his opponent), and his conduct was reckless but not intentional.

I find that the Thornton and Spezza cases (involving first time offenders who committed head-related offenses) are consistent with, and provide ample support for, the imposition of a six (6) game suspension here. Mr. Perron's conduct was more egregious than that in the Spezza case, but considerably less egregious than that in Thornton case.

Moreover, I do not accept the NHLPA's contention that the "comparator" evidence it presented at the hearing compels a suspension of no more than four (4) games.

The most recent instance of supplementary discipline presented by the NHLPA involved a two (2) game suspension of Jamie Benn in May 2023. That suspension resulted in Mr. Benn missing two (2) playoff games. The cross-check there occurred while Mr. Benn was vying with an opposing Player for control of the puck. By contrast, as discussed above, the cross-check here occurred well after the whistle had blown. Even more importantly, the cross-check here was delivered with considerably more force than Benn's cross-check and to a Player who had no meaningful opportunity to anticipate contact of any kind, much less a blow to the head. Keeping in mind that discipline is not formulaic, the six (6) regular season game suspension of Mr. Perron for his conduct is reasonable in light of the two (2) playoff game suspension of Mr. Benn, given that I find Mr. Perron's conduct to be more egregious than Mr. Benn's.

I am also not persuaded that the next most recent suspension – Jeff Skinner’s three game suspension in December 2022 – supports a reduction of Mr. Perron’s suspension. Again, Mr. Skinner’s cross-check, though worthy of meaningful supplementary discipline, was not delivered with anything close to the same force that Mr. Perron delivered.⁵ Further, in Mr. Skinner’s case, he and his victim engaged in tussling and slashing prior to the suspension-worthy conduct, whereas Mr. Perron targeted an unsuspecting Player. The same is true of the other suspensions for cross-checks to the head cited by the NHLPA (*i.e.*, the suspensions issued to Johan Larsson, Mike Hoffman, Alex Chiasson, Evander Kane and Warren Peters), which were even less egregious than Mr. Skinner’s offense. The 2019 suspension of Robert Bortuzzo did not involve head contact at all.

At the hearing, both the NHLPA and Mr. Parros observed that the most analogous prior offense was Nazem Kadri’s cross-check of Luke Glendening, which resulted in a four (4) game suspension in April 2016. (Tr. 40, 55.) I agree that Mr. Kadri’s cross-check bore some of the same characteristics as Mr. Perron’s cross-check; Mr. Kadri pursued an opposing Player and delivered an illegal cross-check to the head that warranted significant supplementary discipline. While I believe that there are distinctions that make Mr. Perron’s infraction more egregious,⁶ I also believe that Mr. Kadri’s suspension does not in any event provide a useful “comparator” benchmark. I explain my reasons below.

⁵ As indicated on the NHLPA’s summary (NHLPA Ex. 1), Mr. Skinner had one suspension in 880 prior games. That suspension was in March 2012, more than ten (10) years earlier.

⁶ Mr. Kadri’s cross-check to Mr. Glendening was delivered as Mr. Kadri was chasing the puck in front of the net. Mr. Perron’s cross-check was delivered well after the whistle had blown and with much greater force.

The consideration of “comparator” evidence in this (and other) cases must find its source in Article 18.2 of the CBA. Subsections (a)-(d) of Article 18.2 set out specific factors to be considered in determining the quantum of supplementary discipline.⁷ Those subsections, however, do not refer -- directly or indirectly -- to comparator evidence as a consideration. The relevant language appears instead in the opening paragraph of Article 18.2, which states:

It is the parties’ intention to impose Supplementary Discipline for On-Ice Conduct in a swift, effective and consistent manner with respect to conduct proscribed by League Playing Rules, including the use of excessive and unnecessary force and reckless acts resulting in injury. In doing so, however, the parties do not intend to alter the basic fabric of our game.

The foregoing language articulates the parties’ agreement that supplementary disciplinary is intended to be “swift, effective and consistent.” Moreover, discipline must take into consideration “the basic fabric of our game.”

Consistent with this language, I noted in my decision in the Spezza case that a suspension that had occurred eight years earlier was of little relevance to Mr. Spezza’s case because:

[a]lthough head safety had already long been a focus for the League by that time, expectations regarding Player conduct have further evolved in the intervening years. I note here that while the League strives to apply discipline in a consistent manner, slavish adherence to “precedent” that is no longer appropriate in light of intervening changes in the game is not – and has never been – required. (Spezza, p. 8 n.3)

In other words, although discipline assessed in prior years may be worthy of consideration, “consistency” is not the only criterion. Discipline is also intended to be “effective” and consistent with the basic fabric of the game. It is precisely for these reasons that

⁷ Subsection (e) allows for the consideration of “[s]uch other factors as may be appropriate in the circumstances.”

the four (4) game suspension of Mr. Kadri in 2016 is not in any event an appropriate guide in determining the quantum of discipline here.

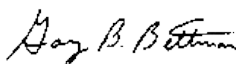
First, the four (4) game suspension of Mr. Kadri can hardly be considered to have been “effective” within the meaning of Article 18.2. A primary purpose of discipline is to change behavior. Mr. Kadri, however, was suspended three more times following his four (4) game suspension in 2016. As Mr. Parros noted in his testimony, the 2016 suspension was clearly not “effective.” (Tr. 60.) It hardly provides a meaningful guide to an appropriate penalty in 2023.

Second, it should hardly require repeating, but the expectations (of the League, the NHLPA and Players) regarding Player conduct and head safety has continued to evolve since 2016, and appropriately so. Perhaps the best evidence of this is the rarity of instances in which the kind of extreme conduct at issue here is seen in today’s game – which is precisely why the NHLPA had to go back to the 2015-2016 season to find an arguably close comparator. The “basic fabric of our game” as of 2023 contemplates zero tolerance for Mr. Perron’s uncharacteristic conduct and justifies the suspension that was assessed as a result. Mr. Perron’s case is precisely the type of case where “slavish adherence to ‘precedent’” must yield to the evolution of the game and the strides the League and the NHLPA have collectively made in the area of Player safety, particularly with regard to head injuries.

VII.

CONCLUSION

For the foregoing reasons, the decision of the Department of Player Safety suspending David Perron for six (6) games is hereby affirmed.



Gary B. Bettman

Dated: December 22, 2023