

# NATIONAL POST

## Figuring out the future of the NHL lockout

Quoting Keith P. Burkhardt

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In this occasional feature, the National Post tells you everything you need to know about a complicated issue. With the National Hockey League and the National Hockey League Players' Association having broken off collective bargaining negotiations with duelling news conferences on Thursday, there are questions about the process, and where it might lead next. Sean Fitz-Gerald assesses the present and surveys experts to see how the future might look if it lands in a courtroom:

### **So where are we?**

It depends. Some have suggested the venom NHL commissioner Gary Bettman sprayed from his lectern Thursday night — he really did seem to spit “incomprehensible” as he described the optimism NHLPA counterpart Donald Fehr had offered — is just part of an elaborate negotiating dance. Others, such as Don Cherry, have accepted the display at face value, and as not a very promising sign for a season.

George Smith, a Queen's University professor who has negotiated labour deals for companies such as Air Canada and the CBC, was taken aback by the way both sides handled the breakdown in negotiations.

“The thing should have very quickly been, ‘We've been unable to make a deal, the talks have broken off and we're trying to find a way to get back together,’ ” Smith said. “Then get out of there, shut up and go back to the bargaining table.”

### **Where is the disconnect?**

What the NHL wants: A 10-year collective agreement (with an option after year No. 8), a five-year cap on player contracts (an exception of seven years made for teams to re-sign their own players), and no compliance buyouts of current contracts or caps on escrow clawbacks when league revenue falls short of expectations. On Thursday, Bill Daly, the NHL deputy commissioner, described the cap on contracts as “the hill we will die on.”

The NHLPA, as has been reported, proposed an eight-year cap on contracts. They offered an eight-year term on the new collective agreement (with an opt-out after six). Players had also accepted a reduction in their share of hockey-related revenue, and a package of US\$300-million offered by the owners to ease the transition for players already under contract, as that percentage drops.

After Thursday?

“Anything that we put on the table this week is off the table,” Bettman said.

### **Why do we keep hearing about decertification?**

It is one of the arrows left in the union's quiver, albeit an arrow drenched in kerosene and swathed in plutonium. Decertifying the union would require players to vote — filling out cards, or signing a petition to dissolve the union — and would leave players in a position to challenge the NHL with antitrust suits in the United States.

“I think it’s more just kind of a way to get leverage for the players,” said Nathaniel Grow, an assistant professor at the Terry College of Business at the University of Georgia who has a paper, Decertifying Players’ Unions: Lessons From the NFL and NBA Lockouts of 2011, that will be published early next year. “If they’re being locked out, they don’t have a lot of pressure points to apply to the owners.”

### **And what is a disclaimer of interest?**

That is the more likely scenario. In the U.S., a decertified union has to wait a year before it can recertify. A disclaimer of interest is a much more informal process — as simple as writing a letter saying the union no longer represents the players — and the union could be reassembled in relatively little time. Keith Burkhardt, a labour lawyer with Toronto-based Sherrard Kuzz LLP, said that, in Canada, the disclaimer would be known more as abandonment of bargaining rights. Either way, the union, as it now stands, would be out of the picture. And Fehr unlikely to be allowed to stand at the forefront.

### **What could players gain from that?**

Under U.S. law, Grow said, if you are found to be in violation of federal anti-competition law, you are liable for treble damages. So if players are suffering US\$10-million in losses a day during the lockout, that award total would shoot up to US\$30-million: “That totally changes the financial calculus for the owners,” Grow said.

The other benefit in the U.S., is that a court could declare the lockout is illegal.

NFL players filed for an injunction to end the NFL lockout last year, but ultimately lost on appeal: “But they lost it on jurisdiction,” said Mort Mitchnick, a labour lawyer with the Toronto-based firm Borden Ladner Gervais LLP. “So no one’s clear yet, as to what the real answer is, in terms of whether you can actually [end] the lockout.”

During the NBA lockout, NBA players opted against filing that injunction, and instead filed for the treble damages: “And two weeks later, they had a deal,” Mitchnick said. “Often times, it’s the threat and the uncertainty of what’s hanging over your head that causes things to change.”

### **The downside?**

There is an uncertainty in how the owners would react. Bettman said the board of governors had been briefed on the possibility of a disclaimer: “We don’t view it in the same way, in terms of its impact, as apparently the union may,” he said.

“It’s possible the owners, especially given how contentious this seems to be, will just dig in their heels and say, ‘Well, screw them, we’re not going to budge — if they want to fight it out in court, we’ll fight it out,’” Grow said.

### **How would it play out?**

Nobody can say for certain. In sports, the process has never gone the full distance down the legal route. Burkhardt said he spent a half-hour discussing the possible outcomes with an arbitrator on Thursday night.

“If all of this played out in law, we may not have hockey for the next three years — at the same time, we would have some really great legal analysis, legal decisions and legal precedents,” he said with a chuckle. “And aside from the two of us, no one else would care about it ... everyone would think this was terrible and awful. But man, that would be neat.”

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