CHAPTER 7

# FUTURE DIRECTIONS FOR LABOR ARBITRATION AND FOR THE ACADEMY

## I. ARBITRATION: PROCESS OR PROFESSION?

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One should always begin speeches about the future with disclaimers and qualifications. Mine are fairly straightforward: I haven't ever been totally immersed in arbitration; my active participation has recently dwindled nigh unto the vanishing point, and my perspective is inevitably that of a potentially extinct species—the Canadian. With these limited credentials, I freely concede, it is an act of presumption to attempt to predict the future of arbitration and of the National Academy. I am, in effect, a seer without a crystal ball, an oracle strayed from Delphi, Gallup minus his poll. Yet I have been instructed to do what Walter Reuther was once accused of doing, to reminisce about the future—and so I shall.

I come to this afternoon's discussion with a sense that both the arbitration process and the National Academy are in a time of trouble. Arbitration no longer commands the widespread respect, almost reverence, it once enjoyed amongst both its practitioners and its clients. Cost, delay, complexity, and rigidity are among its widely diagnosed ills. And the Academy confronts both an overt controversy about its dues structure and a less obvious, more difficult, identity crisis. I believe, and will try to demonstrate, that in some respects the difficulties of arbitration and of the Academy are linked together.

Before I analyze each separately, however, let me point out that both share at least several common afflictions. The first of these is midcentury malaise: hardly a single institution in our society does not experience similar afflictions. Secondly, and more explicitly, both arbitration and its practitioners are intimately involved in the

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world of collective bargaining. Some of the fundamental premises of that world are being reexamined in the light of changes in our social, economic, and political systems, and neither arbitration nor the Academy can expect to remain unaffected. And finally, there is the midlife crisis that so many people experience around the age of 35—by coincidence the age of arbitration in many important relationships and the next anniversary milestone that the Academy itself will pass. This midlife crisis is characterized by a deeply upsetting preoccupation about what the future holds.

If I had to define in a single phrase the issues confronting us, I would say that we have to decide whether to treat arbitration as a process or as a profession. To vastly oversimplify, I mean to suggest that if we are concerned with arbitration as a process, we will tend to focus on ways and means of resolving labor-management conflict. Our predictions about the future, our prescriptions for ourselves and the Academy, will be derived from our knowledge of general trends in labor-management relations and from new insights developed in other areas of adjudication and dispute settlement. If, however, we treat arbitration as a profession, we will tend to focus on improving our own credentials, performance, and image as arbitrators. Matters such as training and ethics, case management and billing practices, legal rules and arbitration doctrine, will be our concerns.

I realize full well that we generally pay homage to the ideals of both process and profession. Indeed, we believe that one serves and supports the other. But I hope to persuade you to let me set process against profession, at least as a dialectic exercise, in order to better understand what the future holds in store for the National Academy and the activity which unites us all in membership.

Labor arbitration began as an amorphous, highly informal process. In the earliest days, it was by no means clear whether disputes were to be resolved through adjudication or mediation or some blend of the two. There was, initially, no expectation that awards would be final, binding, or enforceable. There was no clear line drawn between interest disputes and rights disputes. The only matter which could be stated with assurance was that the process derived its legitimacy from the mandate given it by the parties. In this context, the role of the arbitrator was necessarily ambiguous and ill-defined. Undoubtedly, many early practitioners were wise, humane, and learned. Equally, it is probable that some were foolish, insensitive, and ill-informed.

Today, I suspect, arbitration is rather more homogeneous than it was 30 or 40 or 50 years ago. There is no longer any doubt about the process of decision-making: it is clearly adjudicative. While arguments persist about the arbitrator's mandate, it is now clear, in Canada at least, that it is rooted not in the larger imperatives of the relationship, but in the language of the contract itself; not in values peculiar to the industrial-relations community, but in the broader legal system whose common law and statutory doctrines are a ghostly presence at every arbitration hearing. And, thanks to the Academy and other groups in the field, arbitrators now aspire to high standards. Their technical competence has been enhanced, their ethical sensibilities heightened, and their socioeconomic status made more secure.

This brief and oversimplified history of labor arbitration, not surprisingly, bears a striking resemblance to the history of the very institution arbitration was meant to preempt—the courts themselves. Based initially on local communities, drawing upon tacit understandings and administered by lay personnel, unknowingly mixing legislative, executive, and judicial functions, the courts also evolved as clearly defined institutions. Procedures became fixed and formal. Substantive rules were announced, catalogued, applied, refined, repealed, and—above all—articulately and consciously used by judges. And the judges themselves were professionalized. Originally they were expected merely to read and write, at a later period to "think like lawyers," and today increasingly to behave ethically and with due regard to the compelling claims of law and social policy.

Unfortunately, too, arbitration shares with the courts a historical tendency to overestimate its capacity. I mean this in both a qualitative and a quantitative sense.

Qualitatively, we thought the courts could do it all: regulate the marketplace, resolve family conflicts, suppress antisocial behavior, redress racial and sexual injustice, tame the aggressions of local, state, and national governments. Only recently have we begun to realize that adjudication has its limits—that when it is divorced from other social processes, it becomes a treadmill which goes 'round and 'round and never arrives at a destination. Arbitration, similarly, has been assigned tasks it cannot handle—tasks which only the parties (and perhaps the community) can deal with effectively: discipline problems such as absenteeism, alcoholism and aggression which are rooted in alienation from work, or job security claims which are a compound of demographic, educational, environmental, technological, and economic problems.

Quantitatively, the parallels are also obvious. Partly as a result of overuse, partly as a result of population shifts and growth, partly as a result of poor planning, the courts are generally drowning under a tidal wave of litigation. Not only must one wait an unconscionable period of time to have a case heard in most courts, but the cost of litigation is inflated by market pressures to the point where no one can really afford to litigate. So too with arbitration. Many relationships number their pending arbitration cases in the scores or hundreds, and the resulting delays and costs create frustration and often injustice. And both institutions grope for ways of speeding up the process, cranking the sausage machine more quickly, consciously sacrificing quality for quantity, or diverting cases out of the adjudicative stream altogether.

In neither case can we attribute our present plight to sinister forces. Both processes, I am sure, responded as best they could to the demands placed upon them. Indeed, both were to a certain extent victims of a laudable desire for predictability, competence, and sophistication. But in each case we suffered a loss of original virtue. Somewhere along the way we traded process for professionalism.

To avoid any implication that I think this exchange was fraudulent, sinister, or even deliberate, let me be very explicit on one point. I believe that on the whole labor arbitrators have served well the needs of the industrial community, that members of this Academy in particular have demonstrated both integrity and intelligence in their work, and that they have earned for themselves an honorable mention in any social or legal history of twentieth-century North America. But I also believe that labor arbitrators have not merely served, but have commanded as well; that they are not just an effect, but a cause of fundamental changes in the arbitration process; and that it is these changes which bring us to our present soul-searching exercise.

We have all tried to improve the process by being better professionals. Yet, ironically, professionalism in arbitration—represented in its highest form in this Academy—may have acted as a catalyst in triggering fundamental, irreversible, and undesirable changes in the process. In saying this, I make no Hays-like accusations. I do not suggest that arbitrators are venal or cynical or lazy. I do not even suggest that the role of the professional neutral is intrinsically flawed or open to abuse. Nonetheless, we professional arbitrators must accept some responsibility for the process in which we are so deeply involved. We are quick to take credit when the process functions well. We must equally accept our share of the blame when it does not. And one source of our blame is professionalism.

Like any profession, arbitration may be said to possess five characteristics: theoretical knowledge, a monopoly, authority, a code of ethics, and a culture. To the extent that each of these characteristics has been more sharply defined as arbitration moved toward professionalism, the effectiveness of arbitration as an industrial-relations process may have diminished.

Let me first consider theoretical knowledge. Like law, medicine, the clergy, or engineering, arbitration has gradually developed a body of theory to legitimate and verify and make more effective the daily work of its practitioners. Examples of such theories are due process and the primacy of peacekeeping over other industrial values. Derived from these theories are such doctrines as the need for a "culminating incident" in discharge cases, or the affirmative duty imposed on unions to secure a return to work in wildcat-strike situations. Proof of the growing importance of theory and doctrine is the publication of the first major Canadian treatise on substantive arbitration law, a formidable work which encompasses virtually all reported arbitration awards, organized into chapters, and rationalized into rules or at least majority and deviant schools of thought.

As a scholar as well as an arbitrator, I cannot avoid a feeling of admiration for the effort and skill that produced this book. Yet I wonder what it will do to the process. I am very much afraid that the appearance of such a treatise introduces a new dynamic in arbitration, or at least makes irreversible an existing trend to professionalism and away from process.

With this marvelous tool at our disposal, will anyone be surprised if arbitration arguments become increasingly directed toward rules and precedents and less toward justice or practicality or even established practice? Should we not expect that the test of legitimacy of an award will no longer be its congruence with the shared intentions of the parties, whether stated or implied? Instead, it will be tested against the body of arbitration jurisprudence and measured for doctrinal rectitude. And what do such predictions suggest about who will be able to present and decide cases in the future? And about what enhanced professionalism will mean in terms of even greater costs and delays? It seems to me that process values—industrial-relations values—are being increasingly displaced by professional values—the values of a system of industrial law.

The two, to be sure, are not wholly different or inconsistent. But relations are idiosyncratic, dynamic, and ambiguous, while law tends to be more universal, static, and predictable. Moreover, industrial-relations values tend to be rooted within the system, while

legal values draw upon norms from outside—equitable maxims, canons of construction, statutory policies.

The result is that the industrial community is less and less the producer of its own rules, more and more the consumer of those devised and dispensed by arbitrators. And arbitrators are less and less the servants of the parties and more and more the oracles of a brooding legal omnipresence.

This shift in roles is reinforced by the emergence of a de facto arbitration monopoly. In several Canadian jurisdictions, this monopoly is effectively conferred upon those who are accredited by a government body, in the United States upon those who are named to AAA panels as well as those nominated by state and federal agencies. And in both countries, membership in the National Academy represents a further guarantee of status—an elite within a monopoly. In another session of this meeting, we discuss whether arbitrators should be certified. As with any profession, certification of arbitrators is intended to better protect the public. Those who are certified are, presumptively, more neutral, more acceptable, than those who are not. One patronizes uncertified practitioners at one's peril.

But, as in other professions, there is a real risk that the benign purpose of the monopoly will become unintentionally antisocial. People cannot transfer their own property or secure their own divorces in most jurisdictions; they cannot have broken bones set or simple wounds stitched without the intervention of a doctor. And with what result? Things that should be done cheaply and speedily are made slow and expensive because a small professional cadre, largely overqualified for such tasks, is alone entitled to perform them, and must do so at rates of remuneration fixed not by the intrinsic importance of the tasks, but by the sacrifice of other earning opportunities. Need I reach very far for analogies to law and medicine in the profession of arbitration?

A third characteristic of any profession is the authority that the professional exercises over his lay client. This authority has two bases. On the one hand, the client is dependent on the professional's technical and theoretical knowledge and often in no position to pass critical judgment on his work. This enables the professional to tell the client how to behave in a given situation. On the other hand, the professional's superior position often gives him an opportunity to exploit the client. His forbearance from doing so also gives him a moral claim to authority over the client.

At first blush, arbitration does not appear to conform to this classical professional model. Far from the professional dominating the client, it is often said, the arbitration professional is excessively subservient. Part of the folklore of arbitration, for example, is that some arbitrators will give a victory to one side after deciding a series of cases in favor of the other, just to avoid giving offense and risking future unemployment. But note: It is the bad arbitrator, the unprofessional arbitrator, who behaves this way, not the arbitrator who acts in accordance with high ethical standards. In other words, for "good" arbitrators, a commitment to the professional value of responsible adjudication takes priority over the less worthy value of self-interest.

But the matter is not quite so simple if we consider arbitration as a process. Suppose that a company has won three or four discipline cases in a row. The arbitrator is now confronted with a case that the union ought to win on the merits, but should lose if the employer is allowed to prevail on a well-argued technical objection. The arbitrator in such a case is not simply confronted with the discrete problem of giving weight to a technical objection, apart from any consideration of its setting and antecedents. If he gives effect to the employer's technical argument, he courts unemployment, of course, and this is in the best traditions of professionalism. But more importantly, he may undermine the union's faith in the efficacy of arbitration. The union's reaction to dismissal of a meritorious grievance on technical grounds may well be that it no longer accepts the justness of the three or four earlier decisions and no longer expects justice from arbitration in the future. However, if the arbitrator strives to sustain the grievance, and thus salvages the process in industrial-relations terms—and, incidentally, himself in the union's eyes—he is sure to be accused by the company of unprofessional conduct.

Here we see a clash between the adjudicative values implicit in the arbitrator's professional status and the relational values with which the parties should be primarily concerned. Given his ability to decide the matter before him, the arbitrator is not only in a position to insist upon the preeminence of adjudicative values, but he feels duty-bound to do so. The alternative course of action is perceived as unethical, although it may make the best sense in terms of the parties' relationship, including their future recourse to arbitration.

Like other professions, arbitration has produced a Code of Ethics. In common with most other professional codes, it is not actu-

ally enforced on a daily basis—nor could much of it be enforced at all. It rather performs a dual educative function. On the one hand, it helps to guide arbitrators faced with ambiguous situations into courses of conduct that are deemed to be professionally ethical. On the other, it reassures our clients that we will not take advantage of the position of trust in which we find ourselves. We will not decide cases for illicit motives, or in pursuance of improper procedures. Of course, a minor theme in our professional code is that of regulating arbitrators' commercial practices. I am sure that this matter is not considered by anyone to be of primary significance, and it is just happenstance that the two ethical opinions published in the Academy's Proceedings in the last ten years both related to solicitation for business.

What our code does not really deal with, however, is the impact of the arbitration process—the cumulative effect of three or four decades of decisions—upon labor-management relations. I understand why, of course, this is not a theme to which individual arbitrators can respond. Indeed, the arbitration profession as a whole can hardly make any concerted response, at least in comparison with the power of labor and management to shape their own destinies. Yet I remain troubled that we are, essentially, looking inward when we come to define our professional responsibilities. What would we say of other professions who did likewise?

Finally, an important component of any profession is its culture—the basic values it embraces, the behavioral norms derived from those values, and the symbols designed to remind us of the need to observe them.

As with any profession, perhaps the overriding value embraced by arbitrators is that the service they render is indispensable not only to their clients, but to the future well-being of mankind. As Paul Weiler's paper indicates, Canadians do not all view arbitration as indispensable. They are prepared to vest contract interpretation in other expert tribunals such as the Labour Relations Board, and, indeed, to substitute for adjudication, processes of mediation and compromise which may lead to the disposition of grievances more speedily and cheaply, and also in a way which promotes harmony in the labor-management relationship. Nonetheless, we arbitrators obviously do believe that we are performing a very important public service. We know it is important, in part, because people are willing to pay a lot for it. The Canadian Supreme Court did not press the laurel wreath of the *Steelworkers'* trilogy upon our collective brows; rather the contrary. But no matter. Absent external acknowl-

edgment of our brilliance and indispensability, we turn to self-laudation. Our conviction remains unshaken; we are doing wonderful things for society.

This basic belief is supported by a number of behavioral norms. We charge a lot for our service not simply because people can afford to pay it, but because it proves it is an important service. We take on a lot of cases not simply because we want the money, but because we want to demonstrate how busy we are. We write discursive and learned opinions not because we will necessarily justify high fees, enlighten our clients, or enhance our reputation, but because it affords us an opportunity to exercise our professional skills.

While arbitration styles are highly idiosyncratic, they do serve to accomplish certain purposes. Whether formal or friendly, we must be equally so with both sides to reassure them of our impartiality. Whether active or passive in the conduct of a hearing, we cannot afford any public indication that we regard the matter as trivial or the position of the parties as mean or laughable.

And if we are searching for symbolic behavior, what after all could be more symbolic than the care with which we first established and then purged the Academy's permanent guest list, and today retire to consider our fate behind closed doors and safe from the prying eyes of those with whom it is intimately connected.

I have tried to demonstrate that arbitration is, indeed, a profession. In so doing, I have from time to time and with perhaps excessive emphasis tried to show how professionalism sometimes works against, or does not enhance, the arbitration process itself. I want to reassure you, however, that I am a disciple of neither Jean Jacques Rousseau nor Ned Ludd. I do not really believe that we have regressed from an earlier golden age of noble primitivism, nor do I advocate that we smash our professional machinery and start again as a cottage industry of dispute resolution. I merely wanted to underline the fact that we consider ourselves to be a profession.

While this is generally desirable, I have also indicated that there is at least a risk that from good professional intentions, serious unintended harm to the process may result. There is also some risk that professionalism will expose us to the justified criticism now being mounted against other professions.

Professions, for example, stand for economic privilege. Few would deny that arbitrators dwell in the upper reaches of the economic life of North America. We are well paid, accustomed to expense-account living, and used to the psychic rewards associated with power and position. We do not mingle much with the working

class and probably feel a little more at home with senior than with middle management.

Professions often act as radical, knowledge-based monopolies—reaching out to control more work, resisting encroachments from rival groups or lay people. Examination of recent volumes of the Academy Proceedings will reveal the extent to which we have been seeking to expand our monopoly from labor-management relations into other areas of social controversy. Now, in Canada, we are beginning to confront the problem of encroachment by labor boards and their field staffs, and I do not doubt that Canadian arbitrators will seek to resist these encroachments in order to protect their monopoly. Indeed, the very development of an arbitration jurisprudence and our emphasis on proven neutrality and acceptability can be seen as protective measures. They reinforce the exclusivity of the profession, and thus strengthen our market position.

Neither of these characteristics enhances public respect for our profession or appreciation of its contribution. But both of them are intimately connected with our emergence as a profession and, I would suggest, with the present problems of the National Academy.

The Academy stands for professionalization. Our deliberations, our publications, our fees and other institutional arrangements, our social style—all of these things lead to the portrayal of the arbitrator as a professional. Inevitably, therefore, one must conclude that the fate of the Academy is tied up with the fate of professionalism. If the trend in labor arbitration is to more professionalism, more technicality, more sophistication, a greater emphasis on adjudicative values, then the Academy will flourish. If the trend is in the other direction, in the direction of informal dispute-resolution, with more direct participation by those affected, the Academy will have to rethink its commitment to professionalism or face difficult times.

My prediction is that labor relations has gone as far as it can down the road toward professionalism. Whoever is to blame, it can hardly be denied that the costs and delays and legalism of arbitration today are dysfunctional. They interfere with the attainment of important social objectives, including the use of the grievance procedure for catharsis, the securing of justice for individual employees, and the provision of a margin for organic growth in the written terms of a relationship. The system is not working well. It follows that the Academy may wish to reconsider its commitment to professionalism.

What do I mean, more specifically, by professionalism in this context? In part I refer to the Academy's agenda. The formal presentations at this annual meeting, for example, include sessions on the impact of legal doctrine on arbitration at the levels of grievance handling and judicial review, and the certification of arbitrators, while this session is also in the nature of navel-gazing. Only the session on "Avoiding the Arbitrator" promises a different perspective, and I will be interested to see whether fear and loathing or a genuine concern for good industrial relations is the leitmotif of that discussion.

In part, however, I refer to the informal agenda of the Academy—where it spends its money between annual meetings, what people talk about in the corridors, what unstated assumptions permeate after-dinner speeches, what social style it affects. The informal and formal agendas interact. They can reinforce each other, or exist in a state of creative tension. I suspect it will be easier to turn the formal agenda in another direction than to alter the shoptalk of men and women for whom arbitration is a way of life.

And this, perhaps, brings me to the root of the Academy's problem. For some members, arbitration is a way of life; for others it is not. And these two groups, and the shades between, most emphatically do not correspond to those who make their living teaching and those who are full-time arbitrators, or even to those who make a little money arbitrating and those who make a lot. I know academics for whom arbitration is their claim to immortality, and full-time arbitrators who have a very modest view of their own role in the great scheme of industrial relations. And vice versa. There are those who are so deeply immersed in arbitration that any dilution of professionalism will diminish their loyalty to the Academy. And there are those for whom arbitration is but one interest among many, who would welcome a broader and less professionally focused Academy, and who are likely to turn away more in sorrow than in anger if they do not sense a change in mood.

I began with an apology. In the interests of perfect symmetry, not to say honesty, I propose to end on the same note. I have said some critical things about people whom I respect and like, and foretold a problematic future for an organization I have been proud to belong to for the past ten years. This was a difficult speech to make. I would not have made it if I did not believe that one can speak, and must speak, frankly to friends and colleagues. Anything less would be a mark of disrespect.