CHAPTER 1

PRESIDENTIAL ADDRESS: WHEREFORE?

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Je vous remercie, tous et toutes, d'être venus et je souhaite à nos visiteurs des Etats–Unis et d'ailleurs la bienvenue au Canada et à Toronto.

Vous constituez, comme groupe, un rassemblement pour dire le moins impressionnant des experts les plus attitrés du monde dans le domaine des relations du travail, et c'est un grand honneur pour moi d'avoir le droit de vous adresser la parole pour les quelques minutes qui vont suivre.

C'est peut-être une folie de ma part que de vouloir être compris par la majorité d'entre vous, mais à cette fin il est clair que j'ai à renoncer à essayer de m'exprimer dans la langue de Voltaire—but it was Voltaire who said, appropriately for me: "We use ideas merely to justify our evil, and speech merely to conceal our ideas." If I had any ideas to share with you (and I refuse to deal with the question of what evil they might seek to justify), I expect you may feel, when I'm through, that they were well concealed in this speech.

I last addressed this body—or at least a lot of the faces in it—six years ago, giving a speech with the rather pretentious title, "The Forms and Limits of Representation." A few days after that, in Victoria, British Columbia, I spoke to the annual meeting of the Canadian Industrial Relations Association, calling my remarks, "Pour En Finir Avec La Propagande," which, roughly translated, means "let's cut the b.s." Neither of those exciting harangues can be said to have had any observable effect on anything whatsoever, which is not surprising. One of the basic premises on which both sets of remarks were based is that there is and will be, as there always has been, a need for individual workers to come together to further their common interests—that collective bargaining is a good thing. The factual premise was that in North American society the

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organizations that had over several decades successfully given practical effect to this common need—trade unions—had seen a dramatic decline in their rate of representativity of working people. The conclusion in the first of my speeches was, I think, incontrovertible: society has a real problem here, and we all need to think about it. In the second speech I allowed myself to offer a practical suggestion: that the union movement might better prepare itself for the 21st century by abjuring the tired shibboleths of the 19th century. This suggestion was well meant, although it cannot be said to have been well received.

I thought about those things in preparing my present remarks. I expect that the second paper has disappeared completely (I rather hope so), but the first is immortalized in the Academy's 1990 *Proceedings* of the 43rd annual meeting.[1] During the Academy year that will conclude tomorrow evening, the year in which I have had the honour to be President of the Academy, it has been my agreeable lot to travel a great deal, particularly throughout the United States, to attend and to say a few words at regional meetings of the Academy. That has required me to reflect a bit, and those reflections have been helped along by a certain degree of research into what my predecessors have said.

Things gradually dawn, sometimes, on even the slowest and most distracted of us. What has dawned on me, in the course of my musings this year, has been the validity of a thesis expounded to the Academy at its annual meeting of 1976—the year of the American Bicentennial—20 years ago. It was expounded by the then future President, Dave Feller, under the title, "The Coming End of Arbitration's Golden Age."[2] I remember that paper; I was there when it was presented. I was not persuaded by it at the time, and I can say in my defense only that I must have been distracted by the fact that the meeting was held in San Francisco, and that the delights outside the meeting room must have prevailed over those within. It has since come home to me that the golden age of arbitration is indeed ending—arbitration is evolving into something else. At least, what we have known as "labour arbitration" is being used or adapted to rather new ends. And with that thought I was reminded—I must have been paying *some* attention—of David

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[1]Weatherill, *The Forms and Limits of Representation*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), 11.

[2]In Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97.

Feller's paper. I looked it up and actually read it—with pleasure and relief. Pleasure, because it is intellectually stimulating and written with the acuity and wit of a Dave Feller, and relief, because my musings were consistent with Dave's thoughts, no doubt since at least subconsciously my thoughts had been formed by his.

Feller correctly saw what I eventually recognized, when in my 1990 remarks I bemoaned the tendency of the dedicated union rep to become the doctrinaire political lobbyist, a tendency that has had, whatever its successes in terms of social legislation generally, what may be the longer-term effect of making or tending to make unions themselves relatively marginal social institutions. And a corollary of this, of course, is the marginalization of labour arbitration. As Feller put it:

> ... [T]he introduction of public law as a source of individual employee rights, and the existence of public adjudicative and remedial bodies to vindicate those rights, necessarily undermine the hegemony of the collective bargaining agreement and the unitary—or almost unitary—system of governance under the agreement of which the institution of arbitration and its special status are the products. Arbitration is not an independent force, but a dependent variable, and to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished.[3]

What probably stimulated the return of Dave Feller's "Golden Age" paper to my mind was the use of that phrase by Ray Marshall, in his address to the Academy at the Educational Conference last fall in San Antonio. He described the period beginning at the end of the 1940s and ending in the 1970s as a "golden age" in terms of the relatively equitable distribution of wealth in the American economy, and I think that can surely be extended to the North American economy as a whole. The collective organization, representation, and negotiation made possible by legislation based essentially on the Wagner Act were among the most important structural factors making that golden age possible. The relatively equitable distribution of wealth that was achieved in that period, but that no longer obtains was, as Ray Marshall told us, really unique in the history of the world. It was one of the bases, I think, for the expectations of life many of us came to have for ourselves and for our children, and the fact that it seems not to have held is surely one of the sources of the deep unease with which our populations contemplate the second millennium. It is not just for

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[3] *Id.* at 109.

arbitration—whatever the fortunes of arbitrators themselves—that the golden age has ended.

But if it could be achieved once, surely it is in our power to achieve it again. I think that for this to occur, the forms of representation, and thus the requirements of effective organizing (I could have expressed that the other way around; they are complementary notions), must evolve more dramatically than they have in recent years and must adapt more promptly to new forms of working life as they evolve, just as they previously developed as a natural response to the needs of the workplace in the industrial age—an age out of which we have now passed.

Collective agreements *have* been diminished as sources of employee rights, and arbitration, considered as a social institution, likewise has been diminished (save for a lucky few beneficiaries and practitioners—that's us).

There are, as we all are aware, many sources of employee rights these days, and it is reasonable to ask whether the plethora of rights so created and conferred forms anything like a consistent or coherent whole (I don't believe it does). There also are a number of public adjudicative and remedial bodies established to vindicate those rights. Those rights, it should be said, are not merely rights against employers; they also may be rights against other employees, against unions, against the state itself, all employment-related in one way or another. They do not necessarily relate directly to the employment relationship itself, to the "terms and conditions of employment," of which we used to speak, but may well involve many other aspects of the "workplace experience."

To the extent that arbitrators have been cloaked, whether by legislatures or by courts, with authority to adjudicate questions other than those arising somewhere within the four corners of a collective agreement (and we are increasingly so cloaked), then they—we—become, in a sense, public adjudicative and remedial bodies, and our jurisdiction now goes beyond that which the parties—the employers and the unions—had power to confer on us.

There are two aspects of this development that I would like to note. They are really complementary. The first is that the *adjudicator* now has more apparent power than the *arbitrator* had. He or she makes decisions over a broader range of questions, and exercises a wide discretion in many of them. What used to be the centre—the collective agreement, the parties' agreement, the parties' creation—has not held. However, although this new power of arbitrators is wide-ranging, it may prove to carry something less

than the authority we have been used to. The increased extent of this power, the expansion of possibilities for error, the inevitable growth in the number of instances where it is not well exercised, will make the guardians—the judges—uneasy and will, it can be predicted, lead to some new jurisprudence in the area of judicial review, rather different from that from which we have long benefited.

The second aspect of the expansion of arbitrators' work beyond the four corners of the collective agreement, an expansion caused by the legislative acceptance of a social agenda for which unions can take considerable credit, is the corresponding diminution in the authority and power of the parties themselves. I mean the parties, unions and employers, as collaborators in collective negotiation to achieve and administer collective agreements. Collective agreements now cover a terribly reduced segment of the workforce from that which had been covered a generation ago, and where they do exist they now reflect, or in their application reflect, a social agenda, however desirable, that is not all of the parties' making. The parties' responsibility has been diminished.

Now, even where, as is usually the case, there is no collective agreement governing the working relationship, public law applies and has created various employee rights. Some of these may be more or less efficiently vindicated by public remedial and adjudicative bodies, even if, as there would be under a collective agreement, there is no arbitrator to take on that role. But these bodies, plagued by backlog and cost problems, and sometimes by problems of competence, are scarcely a universal answer to the need for workplace justice, even with respect to those subjects on which legislation exists. Some employers, whatever their motivation might be, are now experimenting with what is known as "employer-promulgated arbitration," although I hope I'm not being too pedantic in pointing out that it isn't really arbitration. What I mean is that such systems do not involve two parties to a deal choosing their own judge to decide disputes between them arising with respect to *their* deal.

While arbitrators' jurisdiction may thus be seen to have expanded, their real authority is being reduced, and the parties' control over and responsibility for what happens at work is being diminished. Among the things that are shifting in our society are those things: authority, control, responsibility.

On what arbitration really is, this is a good time to recommend to you James Oldham's paper "On the Constancy and Pedigree of

the Arbitrator's Heritage,"[4] given at our meeting two years ago in Minneapolis. Jim pointed to a number of parallels between early and modern arbitration principles to show that the world of arbitration is a unified whole, and that plus ca change, plus c'est la même chose. There is no "bright line" between commercial and labour arbitration. Of course, he was talking about *arbitration*, not about "new frontiers in dispute resolution" and not about "the search for industrial justice."

On new roles for us labour arbitrators, and of course this implies new roles for those who have the honour to appear before us, I would refer you to Walter Gershenfeld's paper "Will Arbitrators' Work Really Be Different?"[5] also given at the 1994 meeting. Walt saw a strong probability of growth in nonunion mediation and arbitration activity involving employment disputes. I raise once again what you may think of as the quibble that not all of what Walt refers to as "arbitration" really is arbitration, but of course I agree with him about what is likely to happen. Indeed it is already happening, and there are some Academy members whose work now takes them more frequently into the new areas of employment dispute resolution than into traditional arbitration. I draw your particular attention to his suggestion that there may be a role for union representation in these nonunion cases. There we have a concrete example of a new form that worker representation might take, and its long-term possibilities are indeed intriguing.

In such a form of representation might lie an answer to what Reg Alleyne, in a recent article in the *Chronicle*[6] posed as two "possibly irremediable" problems inherent in the institutional-individual process (he was referring to employer-promulgated "arbitration"). The problems Reg quite rightly sees in that process are, first, that it gives employers "a vastly superior ability to determine who serves as arbitrator"; and second, that it raises the problem of arbitrator compensation. If the employer pays the fees, the arbitration is all the more beholden to the employer. If the individual bears a portion of the fees, the process may be beyond what a lot of workers can afford. It is with respect to those problems that Walter Gershenfeld's suggestion of union representation should be considered.

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[4] In Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 138.

[5] *Id.* at 275.

[6] *"What Does Gilmer Mean?"* The Chronicle, Apr. 1996, at 5.

Whether labour arbitrators are to continue to practice *real* arbitration (as the judge chosen by two parties to decide a dispute arising under their agreement, and to be paid by them) in a "labour" (i.e., trade union) context exclusively, or whether they are willing to follow a more or less uncharted course as an adjudicator, mediator, dispute resolver, or general problem solver in the field of employment relations at large (without giving up being real arbitrators whenever they are asked), is a question that has caused and continues to cause great angst within the Academy.

In his presidential address at the Academy's 1992 annual meeting, Tony Sinicropi stated his belief that, "while we as an Academy must forever remain loyal to the roots of our profession in the traditional labor–management dispute-resolution field, we nevertheless must broaden our reach to embrace all forms of employment-related arbitration," adding that he did not believe we could "allow the angst we feel regarding the problems of organized labour to immobilize us at this critical moment in the Academy's history."[7] (With great respect, as they say, and in this case I mean it, President Sinicropi put the matter backward, although I am sure he was very well understood just the same. Precision, without being overly pedantic, I hope, is important, and I have sought to be precise about what "arbitration" really is. I believe Tony really meant to say—and if he didn't he should have!—that we should remain loyal to our roots in traditional labour-management *arbitration*, but nevertheless must reach out to embrace all forms of employment-related *dispute settlement*).

I am sure a lot of us feel, as I do, that this "critical moment in the Academy's history" will take many years to play out. President Sinicropi gave his own endorsement of the report of our ALDR committee—the Beck Committee—as do I; I suppose I have to, having been on the committee and having joined in its report. That report calls, in very mild terms, for contemplation, and presumably action in consequence thereof, of the fact that many of our members do engage in forms of employment dispute resolution other than arbitration. Indeed, as the years go by and this critical moment slowly plays out, it is clear that more and more members are doing so.

We have a responsibility to face the facts of our time, without discarding the values that enlightened our past. To apply constant

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[7] *The Future of Labor Arbitration: Problems, Prospects and Opportunities*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 1, 18.

values in changing times can be tried, unsuccessfully, after the fashion of Don Quixote, or, if we hope for success (which means taking our basic values really seriously), by developing new techniques, appropriate to new times, and by recognizing that this involves an evolutionary process that will never end. If our real concern is justice in workplace relationships, then we must test the techniques we have been using against the needs of the working population. In North America, there are more than 100 million working people for whom what we do means nothing. Which is to say we are paddling in a backwater, even though we are doing so in a very well-crafted canoe. And if we could lift our sights from our own continent for a moment, we would see that ours is a backwater in a tributary stream.

The globalization of the economy involves the globalization of the need for justice in the workplace. That need exists for billions of working people—for whom what we do means nothing. If we contemplate for a moment that immense need for workplace justice, it might help us to put some of our own preoccupations in perspective, and it might persuade more of us that arbitration as I have rather rigorously defined it cannot be more than one of a number of forms of dispute resolution. Arbitration is resource-intensive and often inefficient; it is a luxury, really, although being a luxury is not in and of itself a bad thing—when we can afford it. The contemplation of that immense need for workplace justice might also persuade us that we must welcome and support the efforts now being made, the evolution now taking place, to define and give life to new forms of representation, new methods of organizing workers, new methods of conflict resolution, and even of harmonization of working life. The Academy's endorsement of the Due Process Protocol is a sign that we do welcome those efforts, and I believe that our Law of the Workplace project is a sign of support for them. We must promote collective bargaining and social dialogue as they evolve in our changing world—but now I've given you the title of tomorrow's luncheon address—a very special one, which I eagerly await!