CHAPTER 13

REMINISCENCES

I. INTRODUCTION

FRANCES BAIRSTOW*

Those of you who know that I have been a friend of Alan Gold's for 36 years will realize how difficult it is for me to introduce him. He has been not only a friend but a mentor and an active supporter of both my directorship of the Industrial Relations Centre at McGill and my career as an arbitrator. However, this support was often at the risk of my ego and confidence when he read my awards, shook his head, and commented on the length of time I took to state the obvious.

Alan grew up in Montreal, did his undergraduate work at Queen's University, and earned his law degree in French at the University of Montreal. It is impossible to list all of his professional achievements; time permits only a few: chair of the Quebec Labour Relations Board; chief justice of the Provincial Court of Quebec; then chief justice of the Superior Court of Quebec, a post from which he has recently retired to practice law; chancellor of McGill University; chancellor of Concordia University; arbitrator; mediator; professor of law; and holder of more honorary degrees than I can count.

In his career he has somehow found time to lecture to and advise university undergraduate students, law students, and faculty. He has served on countless committees and boards, including that of Montreal's cultural center, Place des Artes. He has been available to his sons, his daughter, his grandchildren, his nephews, and his in-laws. What makes him a true "renaissance man" is that he is interested and informed about matters other than labour relations—music, drama, films, literature, fishing, golf, and his family and friends.

---

*Member, National Academy of Arbitrators, Clearwater, Florida.

However, he does have his failings, if not shortcomings. For such an erudite and learned man, it is a wonder that he is constitutionally incapable of uttering the shortest of words in the English language—"no." Besides that, along with his wife Lynn, he can't allow a concert to go unheard, a play not to be attended, or a good film not to be seen. Furthermore, I have yet to hear him say a kind word about any composer born after 1800.

For our purposes of the fireside chat today, I hope he will clear up the mystery of why a man who had reached the status of chief justice of the Superior Court of Quebec would regularly depart from that office to immerse himself in the most intractable labour relations battles of our time such as the Montreal docks, the post office, and other disputes such as Canadian Indians, and most recently electoral reform in Quebec.

Ladies and gentlemen, Alan Gold.

II. FIRESIDE CHAT: "EVER PADDLING MADLY UNDERNEATH"

ALAN B. GOLD*

I begin with a disclaimer and an observation by George Orwell that sets the tone for our journey together. First, the disclaimer. What I tell you today is pure fiction and the product of imagination and invention. Any resemblance to governments, bodies politic or corporate, organizations or institutions, past or present, or to persons living or dead, is purely coincidental and not intended. That will permit me to tell you all the things that I should not tell you. Now, for what Orwell said, "Ours is one of those times when it is the duty of an intelligent man to repeat the obvious." And I think we are going to get a fair amount of that.

I. Introduction

The story of one's life is what one chooses to tell. Often it is a peek through rose-coloured glasses. But equally important, if not more so, is what the curriculum vitae cannot tell: the things that did not happen, the road not taken, the offer refused, the choice not

*Honorary Life Member, National Academy of Arbitrators; Chair, Quebec Labour Relations Board, 1961–1965; Associate Chief Judge, Provincial Court of Quebec, 1965–1970; Chief Judge, Provincial Court of Quebec, 1970–1983; Chief Justice, Superior Court of Quebec, 1983–1992; Senior Counsel, Goodman Phillips & Vineberg, Montreal, Quebec.

made.[1] But these are for another time and place. Today we will travel, for better or for worse, the roads I took, for I have always followed the advice of that immortal American philosopher, Yogi Berra, "If you come to a fork in the road, take it."

That being said, I do want to mention that though my C.V. is silent on the point, I was, for many years, Honourary Chairman of the McGill Industrial Relations Centre, where I met for the first time our own dear Frances Bairstow, who ran the Centre with an iron hand. You will not be astonished[2] to learn that Frances taught me a good deal about industrial relations, because, as we all well know, it takes more than being a lawyer (even a good lawyer) to become a good labour arbitrator.

On the other hand, Frances was untrained in the law. So, we struck a bargain. She would talk to me about labour economics, industrial relations, management policy and practice, and all the things that I didn't know, and I, in turn, would teach her labour law, the process of adjudication, arbitration practice and procedure, and the rules of evidence about which she, in turn, then knew very little. It was a fair deal all around and a happy one for both of us, but it did have a somewhat unforeseen result. We both gained weight, because our meetings were usually luncheon meetings, the only free time we had. It was up to Frances to provide lunch, and she usually came to my chambers loaded down with smoked meat sandwiches, cheesecake, and other goodies, to help us keep up our strength during those sessions. For those of you who have been deprived of this delicacy by not living in or visiting Montreal, smoked meat is a Michelin 3-star, or cordon bleu pastrami. Anyway, to this day I cannot go into a delicatessen without thinking of Frances, which some of you may consider a somewhat dubious compliment, but for those of my generation, brought up in the Jewish quarter of Montreal, it is an accolade of the highest order.

Mind you, I remember when you could get two—not one—two smoked meat sandwiches, French fries, a pickle, and a large Coke for 25 cents (a quarter, as we called it then). But on the other hand,

---

[1]Such as an appointment to the Court of Appeal, an election to a sure seat in Parliament, and perhaps even a cabinet post, an appointment to the Senate, and so on.

[2]Today we say "surprise" when, in fact, we mean astonished. There is, however, a clear difference. As scholars and purists will tell you "surprise" has its origins in the French *surprendre* (to take or catch in the act). The story attributed to the great Samuel Johnson who, you will recall, wrote the first dictionary of the English language makes the point. It seems that Mrs. Johnson came home one day somewhat earlier than expected and found her husband in the kitchen with the housemaid on his knee. "Dr. Johnson," his wife said, "I am surprised." "No, madam," Dr. Johnson replied, "I am *surprised*, you are *astonished*."

as my children are fond of telling me when I talk about how money was worth a great deal more in the past, the average hourly wage at the time was 25 cents for unskilled and, in some cases, semi-skilled labour.

Indeed, not too long ago, 25 years or a little more, when, as arbitrator on the Ports of the St. Lawrence River, I awarded the longshoremen a 25-cent-an-hour increase—from $3.75 to $4.00 an hour—management deemed me to be overly generous with their money, and I was, for a while, at least, quite a hero in the International Longshoremen's Association (ILA) and other trade union circles.

II.

Hanging on the wall in the kitchen where I eat my breakfast is a sepia enlargement of a photograph taken some 75 years ago. My father was then 30 years old, and the picture is that of his first factory. A room perhaps 20 x 20, if not smaller. He is at a sewing machine; his older brother is at the cutting table, and their younger brother is standing, looking like a boss, as befits the designer of the boys' clothing firm that they had just launched. The rest of the workforce, known as "hands" in those politically incorrect times, consisted of eight or nine young women, French-Canadian as well as Jewish and Italian immigrants, and two or three young men, probably Jewish immigrants as well.

I was then four years old, and I remember visiting "the shop," as it was called, as a treat on Saturday.[3] Later on, at the mature age of seven, I, too, became a member of the firm as the model for the boys' confirmation suits that were the specialty of the house, for it turns out that, though small in stature, I was, what was called in the trade, the perfect model and sample size. So my link to labour and management goes back a long, long way, long before the Wagner Act came to the United States in 1935 and similar labour relations statutes to the industrial provinces of Canada, shortly after.

As the years went by, the factory prospered. My father left the machine to become the plant manager or "inside man," I believe the term was called in those days, and became a real boss. But he was a boss who never forgot his years as a worker. The shop became

[3]That year, 1921, the Confederation of Catholic Trade Unions was formed in Quebec as a Catholic and Conservative response to the increasing influence of the U.S. trade unions that were organizing the Quebec workforce.

a union shop from the earliest days that the Amalgamated Clothing Workers Union of America came to Canada to organize the industry, and it remained with the Amalgamated until the factory closed down with the death and retirement of the brothers in the late 1950s.

In 1935—the depth of the Depression—I went off to Queen's University in Kingston, Ontario, and became a socialist. They were bad times; they were terrible times. Unemployment, poverty, no work, no pay, no unemployment insurance, no safety net, no social welfare benefits, soup kitchens, riots in the street, marches on Parliament: all in all, the worst of times. So if you were young and full of ideals, how could you *not* become a socialist?

Mind you, in Canada socialism was not a dirty word. It was, essentially, a Canadian version of British labour and the Roosevelt New Deal; certainly, it wasn't the bomb throwing wild-eyed Bolshevik revolutionary that we know from literature, history, and the hysteria of the later years. It was the hope for a better world, and, of course, the first trade unions, basically speaking, were all socially motivated and socialist. I make no apology for it, but it explains me to some extent.

III.

I returned to Montreal in 1938 and decided to study law. I intended—pompous as it may seem today to say it, but remember I was only 21 at the time—I intended to be a lawyer for the downtrodden and the oppressed, and though I am not sure that I had already read what Anatole France had said about the law, I surely was impelled by the same irony. Do you recall what he said? "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." So, I went to the law, and, another further irony: where do you think I ended up doing my articles? Naturally, with my father's lawyer. He was head of a well-known corporate, commercial firm and therefore a management firm, so that my early law experience was on the side of management. Be that as it may, I graduated in the law, went to war, and came back to the practice, and after some years at the Bar was appointed a judge and vice-chairman of the Quebec Labour Relations Board. Mind you, I must have done something right. In fact, I did, but that is another story. In those days—it's the same today—in order to be appointed as chairman or vice-chairman you had to have the approval of both management and

labour. I obviously passed the test.[4] I'm told that one of the leading labour lawyers applauded the appointment, saying that I knew all the management tricks, and that management, therefore, would not be able to put one over on me. At that time, Quebec had its own Labour Relations Act (modeled to some extent upon the Wagner Act), and it is there that I spent close to five happy years as vice-chairman.

Mind you, my credibility with the trade union movement, hard-earned before and during those years, did not stop the ILA from going on a wildcat in 1975, followed by a march on Parliament in Ottawa, where they burned me in effigy, because they were unhappy with the new collective agreement that I had imposed upon them by arbitral award. I will have something more to say about my experience on the waterfront later on. But for the moment, I should tell you that as a final irony, shortly after, when the smoke had cleared—that's a Freudian term singularly appropriate to the circumstances—and everyone had gone back to work and the port was operating full-blast, the union asked me to carry on as mediator and arbitrator for the future: "Nothing personal, Judge, you know," they said. I understood, of course. By then, I had learned the rules of the game, the hard way!

When my father's lawyer took me on as his pupil, he asked me what branch of the law I was interested in. I told him that I wanted to be a trial lawyer. He then asked me whether I spoke French, and I told him, not very well. I had forgotten most of my high school French and had not taken any French courses at Queen's. He said, "Well, you can't be a good trial lawyer in Quebec if you can't speak French." Indeed, with foresight only too rare at the time, he pointed out that French in Quebec was not only a must in the courtroom, it was a *must* everywhere. He then asked me where I intended to study law. I told him I was registered at McGill where, in those days, all lectures were in English. He said, "Why don't you go to the University of Montreal. The courses are all in French, and you'll learn not only the law but the language at the same time." I need hardly say that I found that a somewhat daunting prospect, but I took his advice and registered at the University of Montreal. In those days, Depression and all, getting into law school was easy—all you needed was a warm body (somewhat like the army) and the money for fees. I had both.

---

[4] I gained credibility with the labour movement through Huguette Plamondon of the United Packinghouse Workers of America and others. The stories are too long to relate.

Mind you, I hedged my bets. The U of M started the day after Labour Day and McGill started only in the middle of October. I negotiated a deal with McGill whereby if things didn't work out at U of M during the first two months, they would take me at McGill. So I went to the U of M and though it wasn't easy, I stuck it out and did rather well (in fact, only my natural modesty prevents me from telling you how really well I did).[5] I was much helped by several of my classmates who became my friends and have remained so to this day. More important, however, than learning the law and learning a second language, my years at the U of M opened my eyes to a new world, a world that I had not known before, a world that I entered warily and whose destiny I have shared ever since.

I must say that we were a most distinguished class, though no one would have guessed it at the time. One of my classmates, Jean Drapeau, became the Mayor of Montreal and remained Mayor for years and years and years; another, Jean-Jacques Bertrand, had a distinguished career in provincial politics and ended up as Premier. Others became distinguished lawyers, judges, and community leaders. Still another, Marc Andre Blain, "in a set of curious circumstances," to quote Gilbert and Sullivan, gave me a "leg-up" at the Junior Bar, which, in turn, led me to the many good things that followed. Indeed, I have often thought that my whole career is the result of his telephone call, one late afternoon in the fall of 1947, but that, too, is for another time and place.

V.

How can I talk about my experience in labour relations without talking about Jack (also known as "Jake") Finkelman who, I am happy to see, has been honoured here today with honourary life membership in the Academy? Jake is one of the great figures in Canadian labour law, the first professor of labour law in Canada (in the early 1930s), and how he came to it is a story in itself.[6] I knew Jake by reputation through his decisions as Chairman of the Ontario Labour Relations Board. Though his decisions had no

---

[5]I led the class, and I won several prizes, including the prize in parish law. All my classmates were French-Canadian Catholics who went to church regularly and knew all about parish law and church law. It was, of course, a mystery to me so I studied it as if it were a legal issue. I memorized the entire parish code and earned a perfect score.

[6]He was doing his Masters on the law of conspiracy, and in the course of looking up conspiracy law he came across *Quinn v. Leathem* and the other leading English cases on trade union organization.

authority in Quebec they had the authority of reason, as we judges say in the circumstances.[7] So what would be more natural than to call Jake, introduce myself, and ask him if I could come and visit him to see how he ran his Board? After all, we in Quebec were trying to put our Board on the right track, after so many years of torpor—to put things charitably—under the previous right wing administration of the late and, in some circles, lamented, Monsieur Maurice Duplessis, Premier of the province.

Jake said sure, he'd be happy to help and would I come on Friday morning and we'd spend the day together. Well, Friday morning, bright and early, I came to his office and met him, and he was effusive with embarrassment and confusion. "I am stuck," he said, " with a most urgent matter. I'm sorry I can't take care of you but I'll give you the Registrar and any of the Deputy Chairmen who are available. I am sure they will help you. I'll meet you at lunch." So off he went, and I was taken in tow by others. Later, I met him at lunchtime and he said, "I'm dreadfully sorry; I've got to skip lunch. Can we meet in the late afternoon before you return to Montreal?" At 5 P.M. I returned to his office, and he was all apologies. "I'm sorry," he said, "that I haven't had time to speak to you. Why don't you come home for supper, we'll talk then, and you can take a late plane home?" I said "Fine, Professor Finkelman (he remained a professor all his life, and since many of the people in the field were his former students almost everyone called him professor) it's very kind of you. Will I be a trouble to you?" He said, "No, no, no problem whatsoever; I'll just phone my wife and tell her you're coming."

So at 6 P.M. I presented myself at their home with flowers and chocolates, and as I walked in the door, there were Jake and Dora to greet me. What do I smell coming from the kitchen but chicken soup (the same recipe as my mother's, I am sure)? Of course, I should have realized that it was Friday night, and they were going to have the traditional Friday night supper. There's a tradition about it, you know, chopped liver, gefilte fish, and chicken soup and Matzoh balls, so I said, "Oh my Lord, chicken soup. I hope you made Matzoh balls." Actually I used the word *knaidlich*, which is the Jewish or German word for this traditional dumpling. Well, Jake and Dora went through a transformation. Their faces lit up and

[7]The traditional statement of approval in citing an authority from another jurisdiction is: "This judgment is not binding upon me by reason of authority, but by authority of reason."

they said, "Judge, you're Jewish!" And I said, "Of course I'm Jewish. What would you expect with a name like Gold?" And they said, "Well, at first we weren't sure it was Gold," because Jake thought maybe it was Gould, "and, in any event, you know we didn't expect a Jewish judge in Quebec," which, of course, was a reflection not only of the times—there were no Jewish judges in Quebec except me and an earlier appointment to the Superior Court—but also of the fact that names like Gould were quite common among French-Canadians, descendants of soldiers in the Scottish regiments that came to the colony to man the garrisons and later to fight with Wolfe on the Plains of Abraham.[8] Anyway, that broke the ice, as it were, and from then on it was the beginning of a great friendship. Jake became not only my friend and mentor, he was and still is, like a big brother to me.

VI.

Shortly thereafter, Jake arranged to invite me to a conference organized by the New York State Labor Relations Board to celebrate the 25th anniversary of the enactment of the little Wagner Act of New York. Needless to say, everyone who was anyone in the world of labour relations was there, including the Governor, the Mayor, and leading members of the Academy, whom I met for the first time. The Canadian delegation was led by Jake, representing the Ontario Board. I represented the Quebec Board, and Peter Makaroff represented the Saskatchewan Board. In good time, the three of us were introduced and said the things appropriate to the occasion. When it was Makaroff's turn, he stood up and said, "I am the Chairman of the Labour Relations Board of the only socialist state in North America." Saskatchewan had a labour government at the time. Anyway, the word "socialist" was enough to elicit a loud gasp from the audience, who saw Saskatchewan as a dagger poised at the heart of the United States. The fact that he spoke without the heavy accent that one would expect from one whose name was Russian and whose origins were Doukhobor, only confirmed, for them, that he was a long-time mole brought up and raised in Western Canada, just waiting to prepare the socialist takeover of North America.

---

[8]It was not only the Scottish who were in many cases absorbed into the French-Canadian community; there are the Irish, like Johnson and Ryan, not to mention the Poles like Globensky.

VII.

I left the Board in 1965 to become Associate Chief Judge of the Provincial Court—the equivalent of your state court—where I applied my labour law background and training to try to run an efficient court system. I will have more to say about this later on, but for the moment I recall that in setting up a small claims systems for the Provincial Court (which, in passing, is by far the best in the country),[9] I was much inspired by what I had learned on the Board and as a labour arbitrator and mediator.

For the moment, I wish to turn to the decision by Quebec to grant bargaining rights to its public service employees and, shortly after, by Canada, to its public employees in the federal field.[10] Quebec was quick off the mark in North America, but it was not without some difficulty. When the unions first organized Quebec's public employees and called upon the government to bargain, they were met by the Premier, who replied from the height of the throne, as it were—remember that Quebec, as part of Canada, is a monarchy under our Constitution—"The Queen does not negotiate with her subjects."

But times being what they were, and politics being what they were, the Queen found, to her surprise and dismay, that she was obliged to negotiate with her subjects, and, in due course, the first collective agreements between the government and its public employees' unions were signed in early 1966, and I was appointed Chief Arbitrator—without fee, I should add. In fact, I was never asked. I was told. The Premier woke me in the middle of the night to deliver the news, saying that he was making me an offer I couldn't refuse, since he had already made the announcement to the media. "Noblesse oblige," as the saying goes, so I accepted. Wicked tongues, as the French say, would observe that I welcomed the opportunity to serve since I was then negotiating salary increases for myself and my judges with the government.

So I recruited a half dozen members of my court who had labour law experience—some had served with me on the Labour Board—

---

[9]I made a speech on the subject to the Academy some years ago. *See* Gold, *Small Claims Grievance Arbitration*, in Arbitration: Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), 16.

[10]William Lyon Mackenzie King, later to become Prime Minister of Canada, was the first Deputy Minister in the Department of Labour in the ministry of the Post Office in 1900. He believed in spiritualism, communed with his dead mother and dog, frequented mediums, and wrote, single-handedly, the first modern federal labour law in Canada, the Conciliation Act—1900.

and set up a domestic grievance tribunal for the Quebec public employees. I ran it until I left the Provincial Court to become Chief Justice of the Superior Court in 1983.[11]

It was great fun, and what I learned from the experience I put to good use in running my court, using caseflow management, long before it became a buzzword in court administration. I did the same thing for mediation—a fact of life in grievance arbitration—by making it a part of the court process before alternative dispute resolution (ADR) became acceptable in legal and judicial circles.

This experience was particularly valuable to me when I became head of the Superior Court, which at the time—like most courts everywhere—was plagued with a serious backlog of untried cases, not to mention the other traditional ills of an out-of-date and creaky judicial system.

At the risk of unseemly arrogance in citing myself as an authority, here is what I said, in part, in an address before the Public Service Staff Relations Board, outlining the reforms necessary to remedy the defects in the judicial system. The title sets the tone and says it all: "The Chief Justice as Court Manager":

> The Chief Justice as Chief Executive Officer of the Court plans the direction of his enterprise and ensures its existence as a viable operation. To do so [and here I labour the obvious, I fear one must do a good deal of that in matters of this kind (shades of Orwell!)] he must know his people, his public, his plant and his product: the 4 basic P's I call it; watching your P's as well as your Q's [that is a slightly naughty bilingual pun! Classical music, as you know, has its three B's—Bach, Beethoven, and Brahms (they put in Brahms for symmetry. In my view it should be Mozart—but that's another story and another speech for another time)]. Management [I return to the subject at hand], therefore must be concerned with its 4 P's. In fact, you must add 3 more—*planning, productivity* and *profit.* Why, you may ask, do I put profit in the court equation? Simple: the operation must not cost too much to the litigant, the direct consumer, nor to the public, the taxpayer, the ultimate consumer. And talking of planning, permit me a short parenthesis. It should illuminate what I will have to say further on. I wish to tell you a fable.
>
> It is the fable of the centipede who, crippled with arthritis, asked the wise old owl how to cope with his pain: "Change yourself into a stork," the owl advised. "Then you'd only have two legs and you could stand on one and rest the other." "That's the best advice I've ever received," the

[11] I resigned from the National Academy of Arbitrators at the same time because as Chief Justice of the Superior Court with supervisory and controlling jurisdiction over lower tribunals, including arbitrators, it would have been unseemly for me to be setting aside judgments of my arbitrator colleagues.

> centipede said gratefully. "Now, how do I go about doing it?" "Don't ask me," the owl said. "My job is planning, not operations."
>
> In court management, as indeed, in all labour management relations, planning that is directed to changing a centipede into a stork is not likely to succeed. . . .
>
> Having come this far—are you still with me?—you will not be astonished to learn that I see the Superior Court as the *biggest* (and I hope the *best*) judicial factory—or plant, if you prefer—in Canada.
>
> In a word, I believe that a court should be run on sound, tried and true labour/management principles. Knowing my background—professional deformation, some will say—I guess it was inevitable. And why not? As I have said the Court is engaged in production, involving people and plant brought together for a common purpose. If that doesn't require a good healthy dose of labour/management relations, what does?
>
> And is not the lawsuit the raw material that enters the manufacturing process? Is not the judgment, the finished product that comes off the assembly line after passing through a myriad of intervening steps and stages?[12]

I then go on to list the defects in the system and the reforms that were made, or projected, and conclude as follows:

> All this and more to reflect the application of labour-management principles to the operation of the court. What we set out to do—indeed, all we could hope for—was to create a system that is reasonably efficient despite the problems, social, political and economic, inherent in its operations, with a fair balance between private rights and public interest.
>
> Note my use of the words "reasonable, fair, balance, compromise, efficient and rights" (private and public); all respectable and time-honoured terms found in labour relations, indeed, in all human relations.[13]

VIII.

I spent seven long and hard years (1968 to 1975) as mediator and arbitrator on the ports of the St. Lawrence River, Montreal, Quebec, and Three Rivers, and I guess that what I had not already learned before, I learned during those years. Like all learning experiences it was not always beer and skittles, but looking back

---

[12]Speech before Public Service Staff Relations Board (Canada), Gananoque, Ontario, April 24, 1988.

[13]*Id.*

upon them, I have no regrets; well, not many! The ports and the industry had gone through many years of unsettled times; there was a history of violence, theft, and strikes, lawful and unlawful, which led to most difficult times for both union and management. M&M—modernization and mechanization—were, of course, the buzzwords of the times. The arrival of containers and the replacement of manual labour by machines, unalterably changed the face of longshoring in our society. Books and books and books and doctoral theses have been written on the subject, and this is not the time or the place to review them, but I do want to tell you that, as a result of the years we spent together, the catch-as-catch-can workforce, with all the abuses that unfortunately were endemic to it, became a reasonably well-disciplined, productive workforce, and longshoring became a respectable trade with collective agreements that were as good as, if not better than, those in most manufacturing industries, including job security and pension plans, and safety and health measures, which up until then were marginal or simply did not exist. Mind you, it did not come easy. When containers first came in and we hailed their arrival as one way of putting an end to traditional pilfering on the port, someone—we never found out who—made off with one the very first day.

Insofar as violence was concerned, I made it clear that it was no longer acceptable as a way of life, and if it didn't stop I would just leave. I was particularly well placed to say that because if I left, there was the very real possibility that the government would appoint a dock-board to run the ports, which neither union or management wanted. So like it or not, I was always prevailed upon to stay. I guess it was a case of "Better the devil you know, than the devil you don't know."

Fortunately I was not alone during the first two years, and here I want to pay tribute to the labour representative on my three-person Board during the first round of bargaining and decisionmaking. We were first appointed as a Conciliation Board (I was Chairman) to recommend changes to the collective agreements between the parties, following a series of disastrous strikes and a long and involved public inquiry on the operations of the ports, all of which had led to a stalemate. Everyone was unhappy, and when I recommended that the parties accept binding arbitration, to the surprise of everyone including me, the parties agreed. So far so good. Our award would amend the existing collective agreements and extend them for one year, during which the

parties would negotiate, with our help, renewal of the agreements for the future.

So we got to work, and we heard the parties for many days, many weeks, as a matter of fact, and then we sat down to draft our award. It was quite apparent that our credibility with the parties for the present as well as the future would be enhanced if we could come up with a unanimous award. So we struggled long and mightily and managed to agree on 8 of the 10 issues; on the other two there were problems. My management member did not agree with my union member on issue number 9, and, he, in turn, did not agree with his vis-à-vis on issue number 10. We went around the track several times, and after a while I said, "Well that's it, I'll decide; we'll be unanimous on eight, and we'll be majority on 9 and 10, whichever way I go."

And that's the way I started to draft the award. Of course, I was legally trained and to me a dissent was a dissent, even though I realized that in labour matters dissents were often politically inspired (small "p," of course, but often big "P," too); but we were looking for a decision and we had a job to do, and as far as I was concerned that was it. I had not quite made up my mind which way I was going on the two points still in issue when my union colleague asked for a further meeting. Why don't we, he asked, just render a unanimous award on the eight issues and indicate that the two points outstanding are of such complexity that we require considerable more time before deciding them? And that is how I learned that there are more ways to kill a cat than to feed it sweet cream, or am I mixing metaphors? Well, that's the way we went, and we came out smelling like a rose, our credibility intact, and the parties in good spirits. The other two items, of course, went into the package for the next round.

In due course, I mediated the second contract and stayed on alone as arbitrator and mediator, and it is there that I first started to use med-arb as a standard practice. Indeed, not only was it desirable, it was necessary, if the system were to survive. When there is a threat of a work stoppage on the waterfront—or worse, an actual stoppage—one does not have the luxury of waiting for several weeks or months to decide the issue through normal procedures. Thus, med-arb was born and became the order of the day, and, indeed, of the night, and of the weekends, and of holidays. We met when required and on the shortest possible notice. I would try to settle the dispute by mediating it, and if that didn't work, I would decide. What I quickly learned was that not all

disputes were what they appeared to be when first presented. To quote Gilbert and Sullivan once more, "Things are seldom what they seem; skim milk masquerades as cream." So it was on the docks, as indeed, so it is in life itself.

In the result my practise was to ask the parties to put the issue in the form of a question to which I would simply answer "Yes" or "No," and that would be my award. Mind you, issues that required some sort of policy decision called for an award in more formal form. But generally, that's the way we got rid of most of the disputes during the years I worked on the ports.

Not long after, I was pleased, and not really surprised, to learn that at the same time that I was doing med-arb in Quebec, Sam Kagel, unbeknownst to me—as I am sure my work was unknown to him—was also doing med-arb on the port of San Francisco.

As a result, and for other reasons I am sure, med-arb was becoming known in government circles in Canada. By the late 1960s and early 1970s, officials in the federal Department of Labour became interested in the process, as did those in Quebec.[14] In due course, I ended up with two mandates, one provincial and one federal. The first was to med-arb on the on-going dispute in the Quebec construction industry, which was then in its usual state of chaos. It still is, alas, for that matter.

In any event, after the usual weeks of blood, sweat, and tears (if you like cliches), I brought down my award, much of which, to my surprise, had been agreed to by the parties, and called upon the government to pass a special decree (order in council) to put it into effect.

But the time, alas, was not ripe. For reasons that I will not comment upon, the award was never imposed, and the file was put away to gather dust in the government archives. Still, the exercise was not entirely futile. First of all, some of the recommendations—those that were acceptable to the parties—were implemented, and as for the rest, the documentation, reports, and other material have served ever since as a constant source of Ph.D. theses on the construction industry. Indeed, every now and then I still get a call from some academic or other asking for the behind-the-scenes story of the process.

---

[14]More recently, Mr. Justice Winkler was appointed mediator in the Ontario Hydro and Power Workers' Union dispute on May 13, 1996. If mediation failed, the matter was to be referred to binding arbitration by a three-person board of arbitration with Winkler as chair and the other two members chosen by each of the parties.

My federal med-arb mandate dealt with the creation of Via Rail, the Canadian passenger service system, the equivalent of the American Amtrak. The labour relations negotiations took about three months, and we ended up with a dozen or so collective agreements. In only one case was I obliged to render an arbitral award and there, too, if I had pushed a little harder I am sure I could have gotten agreement, but for reasons of their own, the parties preferred that I decide the issue, and I did. It was a source of some amusement to me and, indeed, to all of us who were in the know, to hear the parties say on television and radio in commenting on the award, "Sure, we would have liked to get more," or "Sure, we would have liked to have given less," but that, naturally, they could live with the award. Indeed, what else could they say or do? In an interesting sidelight, when I informed the government that I had a deal, I was asked to hold off the signature so that the appropriate favourable publicity could be generated. Sure enough, two days later, the powers that be and their entire entourage flew down to Montreal for a press conference to take credit for the success of the venture. Only the parties and I knew that we had signed the day we settled, taking no chances that things might go sour in the meantime. The later signatures were "for show."

IX.

I mentioned earlier that Canada was quick off the mark in giving the right to organize and bargain to its public employees or civil servants, as we still call them. There were some surprises. To the amazement of some, including the Prime Minister at the time, himself a former diplomat, the Canadian Foreign Service officers decided to form a professional association. When I informed some of my friends at the Academy of this—actually I said, "Our diplomats have joined a union"—they thought I was putting them on. Thus was born the Professional Association of Foreign Service Officers (PAFSO), and it fell to me to mediate the terms of their first collective agreement. So I took off my coveralls, figuratively speaking, of course, since I was still involved with the waterfront, and put on my cutaway and striped trousers, and took off for Ottawa where I spent a couple of weeks. It was quite interesting, as you would expect, because the people involved were all senior civil servants and kept changing their hats from day to day. One day they were PAFSO representatives, and the next day they were representatives of the Canadian government, negotiating the General

Agreement on Tariffs and Trade (GATT) or Kennedy rounds, or what you will. Needless to say, they were seasoned, experienced, and able negotiators, and I learned a great deal from them.

I am glad to say that we ended up with a very good collective agreement; times were good in those days. But it wasn't a piece of cake, as we used to say in the army. It was long and hard and stressful, and when it was over and the deal was done, there was the usual blood on the floor, the ceiling, and the walls; blood that was mostly my own.

Another mediation I was called upon to do was for a small group of technical clerks who shall remain nameless. The special feature of the process, however, was that I required full security clearance from the Royal Canadian Mounted Police (RCMP) before I could even begin my work. This group was a very special group indeed.

So, since success breeds success, it was not too long before I got another call asking me to mediate another dispute, this time involving a different professional association that, too, shall remain nameless. Here, the association bargaining team was made up of highly skilled negotiators, and I looked forward to the same success I had already enjoyed with PAFSO, and certainly things went very well indeed. In fact, after a few days all major issues were settled except for money. In a private meeting the employer offered a 6 percent wage increase and the association, also in private, said that it would settle for 6.5 percent. So I said to myself, "I've got a deal at 6.25 percent."

And that is where I learned a lesson that I have never forgotten. The lesson, simply stated, is, "If you have a deal in the works, *have it in your pocket before you offer it.*" I didn't think it was necessary to do so, here, because, after all, I was dealing with sophisticated, intelligent, and highly experienced negotiators who knew the score. Right? Wrong! When I called them in and said, "Gentlemen, we have a deal at 6.25 percent and we can now all go home," well, you would have thought that I had insulted their mothers, and to my everlasting shame they both said, "No thanks." I was so hurt, humiliated, and angry, not only with them, but mostly with myself, that I said, "Okay, you can't make a deal, so long, chums, you don't need me," and off I went. Anyway, the dust finally settled and the smoke cleared. Both sides realized that something had to be done, but neither side wanted to lose face by calling me back. In the end someone blinked—I never found out who—and Ottawa called me back. We bargained for a day and a half and settled for 6.25 percent, but everyone's honour was saved, including my own.

Some years later, I was talking to a union leader, and I told him the story. And he said, "You think that's bad, Judge; let me tell you what happened to me." He then told me the following story, which I believe, though it sounds a little strange. For obvious reasons, I will not tell you the name of the man, his union, the industry involved, or the province, state, or country that he comes from.

Anyway, here is what he said. When the collective agreements for the industry were coming up for renewal, the union targeted one employer who, if a deal was struck, would set the pattern for the whole industry in the area. The union had a long and close bargaining history with this employer, and things were going well. The union had the usual demands, of course, but the basic issue was money; it wanted and expected to get a 30 or 35 cents an hour wage increase, so naturally they asked for 75 cents, got a strike vote from the membership, just in case, and began bargaining. Things were going well, and, in fact, looked quite promising, when the head of the management bargaining team had a heart attack, and was replaced by a young man just out of law school, with no practical experience and very determined to show his mettle. Anyway, things soon went from bad to worse; the union took an increasingly hard line; bargaining became more bitter until it finally broke down completely. Then, for reasons that no one seems to know—certainly, the union leader told me that to this day he doesn't understand what happened—the employer caved in and offered a wage increase of 65 cents an hour. Well, this was an absolute horror. For the union, it was a victory containing the seeds of defeat. If you're a classicist, "pyrrhic victory" comes to mind. The other employers in the industry couldn't afford to pay that sort of an increase and would refuse to go along, which made a strike or a lockout inevitable. Equally disastrous, however, was the situation for the union, which counted among its members a strong and dissenting splinter group contesting its leadership. "Why," they would ask, "did we ask for only 75 cents if the employer was ready to pay 65? Surely, if we had asked for more we'd have gotten even more."

So, for the union, the settlement was a disaster anyway you looked at it. So they called the employer back to the bargaining table, using other issues as a pretext, and as the union leader told me, "Believe it or not, Judge, it took us two and a half days of hard bargaining to get the young jerk *down* to 35 cents an hour."

X.

At this point I must confess that I have always felt a little guilty about the success I enjoyed in mediating or arbitrating national or industrywide strikes in the public or parapublic sectors. I say this because in some respects it's easier to mediate a high profile case than an ordinary industrial dispute. Usually when I got there, the parties had pretty well exhausted all their resources and were at the end of the line, with no one to turn to but the mediator. Everyone knew that if mediation failed, the alternative was back-to-work legislation, which would impose terms of settlement or binding arbitration, rarely a happy solution for either side. Worse still, if the process broke down further and the back-to-work legislation was not respected, there was always the risk of civil disobedience, contempt of court citations, and, from time to time, violence and police intervention.[15] So for better or for worse, I had a whip to help bring the parties to their senses, or to mix metaphors, a sword—the sword of Damocles—to hang over their heads.

Still, if, in one sense, the job was a little easier, the fact is that, when you're doing it, it's not easy at all. When we say, "You don't have to be crazy to be a mediator, but it helps," believe me, we know what we're talking about.

And, of course, things don't always work out for the better. There are strikes and lockouts that are impossible to settle, for political reasons (both small "p" and big "P"), and there the mediator and the parties are hung out to dry. In some case, the parties *want* Big Brother, that is government, to order them back to work and to impose a settlement. Then both sides are off the hook, and each can blame the other, the government, or the arbitrator, as the occasion requires.

On the other hand, one of the advantages of doing these high-profile disputes on a fairly regular basis is that you get to know the players, so that if you're lucky, you can get a preview of what is going to happen, before you agree to take on the job. It helps, too, if you're in demand. Now, I have no illusions about this. Being in demand comes and goes with the times; today it's me—grammatically it's "I," but "me" sounds better—and tomorrow it's someone else. But if you are in demand and can afford the luxury of saying

---

[15]In my experience with the Oka (Kanasatake) native land claims it was the provincial police and the army.

"No" if the prospects don't please, you can always sniff about to see what the chances are for success, and you then go into the case with your eyes open. This doesn't mean, of course, that you're sure of success, but at least if things go bad, it doesn't come as a complete surprise.

As you may know, I'm a music lover, so that the sweetest music to my ears, after Mozart, is to hear the parties say, "Well, Judge, it's going to be a tough one, but we're sure that if you whip us hard enough, we'll end up with a deal."

Of course, some cases are hopeless. I had a strike almost settled when it blew up in my face. The only issue left was money, and believe it or not—I still don't believe it myself—we were only a few cents apart—I said *cents*—and management was ready to move. Yet I broke off the mediation and told the government that the only solution was back-to-work legislation and *immediately*. There had been increasing incidents of violence and sabotage, which, through good luck—nothing else—had up to then caused no injuries, but there was reason to fear that things were now out of control, and that accidents, perhaps even deaths, were inevitable. You will understand why I can say no more in the circumstances.

You will also understand why I cannot speak of the most difficult and yet most exhilarating experience of my professional life. I refer to my role as a mediator in the armed stand-off between a group of native peoples and the Quebec provincial police force on the scene and the Canadian army waiting in the wings. I refer to what has become known as the Oka Crisis in 1990, which you may have heard of or seen on television. Bargaining for the native peoples was a team of 25 men and women, about half of whom were masked. As a courtesy to me, they checked their A-K 47s at the doors of the meeting room on the site behind the barricades. The bargaining team for the government included six senior Cabinet ministers, various high-ranking civil servants, and a group of skilled technicians. The Canadian army was represented by a General, senior officers, and support staff.

And there I leave you for I can say no more.

XI.

Early on, I mentioned Frances and the McGill Industrial Relations Centre. One of the great things about the Centre and my experience as Chair of the Board of Governors of McGill and later as Governor Emeritus, was that it gave me the opportunity to invite

some of our friends at the Academy to give papers at the Centre, or at the university itself, on different occasions. It is on one of these occasions that I invited Peter Seitz to come and speak to us, and as you would expect, he was as brilliant as ever. We had a marvelous time, which I recall with much pleasure every time I think of him, which knowing Peter and the love that we all bore for him, is very often, indeed. My, how I miss that lovely man.

One of my favourite other guests at McGill was the great English barrister, John Mortimer, Q.C. Aside from being a brilliant advocator, defending liberal causes in the United Kingdom and indeed throughout the Commonwealth, he was famous as a writer of books, manuscripts, and the T.V. series, "Rumpole of the Bailey," which you may have seen on PBS. His father was a famous divorce lawyer, and when John told his father that he wanted to be a writer, his response was, "You want to be a writer? My dear boy, have some sort of consideration for your unfortunate wife. You'll be sitting around the house wearing a dressing-gown, brewing tea and stumped for words. You'll be far better off in the law. That's the great thing about the law, it gets you out of the house."[16]

I love that story because it's not too far removed from my father's advice to me when I told him that I had decided to become an actor—I had been offered a scholarship in New York—or, even more surprisingly, the chance to study political science under professor Harold Laski at the London School of Economics. "Go to the law," he told me. Though he didn't add, "It gets you out of the house," he did say, "It's a noble profession." I believed him then and I still believe it now.

So I, too, in the end, went to the law and haven't looked back since. But as a lawyer, I cannot fail to tell you one of my favourite stories about John Mortimer's father, who enjoyed nothing more than a good old-fashioned battle as to whether or not adultery had taken place, which in those days was one of the few grounds for divorce in England. According to John Mortimer's autobiography, and I quote, "Often he would tell me of his triumphs [referring to his father] and I must have been very young when he said: 'Remarkable win today, old boy. Only evidence of adultery we had was a pair of footprints upside down on the dashboard of an Austin Seven parked in Hampstead Garden Suburb.'"[17] The Austin Seven, for those of you who are not car buffs, was a very, very small car.

---

[16]Mortimer, Clinging to the Wreckage (Ticknor & Fields 1982), 15.
[17]*Id.* at 6.

XII.

As you may have noticed by now—I noticed it myself when I reviewed my notes in anticipation of our meeting—I seem to have nothing to say about today, but only of yesterday, the day before, and the day before that. It is the privilege of old age—"anecdotage," it has been called—to look at the past and recall the good times and, perhaps, to forget the bad ones. One of the things that I remember as vividly as if it were yesterday goes back to when I was a boy of 10. That would be in the late 1920s when the Yiddish Theatre in New York (the 2nd Avenue Theatre) was at the height of its powers and made regular visits on tour to Montreal. Montreal was then a great centre of Yiddish culture, and by one of life's ironies, the theatre where these plays were staged was the "Monument National," a centre that had been built in honour of the Societe St.-Jean Baptiste, an organization dedicated to preserving French-Canadian culture and language. With the passing years it became more and more political and today has a distinct nationalist and narrow view, but in the years gone by, at least, it was a perfect example of the peaceful—well, more or less peaceful—coexistence of the French-Canadian and Jewish communities in the heart of downtown Montreal, centered around St. Lawrence Boulevard—"The Main," as we called it—where the Jews congregated with the first waves of immigration from Europe at the turn of the century.

Be that as it may, the great stars of the Yiddish theatre were as well known to the Jewish community here as were the silent movie stars of the day and, in fact, some of these movie stars first trained in the Yiddish theatre. The great Paul Muni got his start as Muni Weisenfeld, I think; John Garfield got his start as Julius Garfinkle, as well as the Adlers and others too well known to mention. Anyway, one day, as I said, when I was 10 years old the New York troupe came to Montreal to put on King Lear in Yiddish, of course, and the question arose as to whether or not I was mature enough to go to a play of that kind. My father argued that I was, and won the day, saying to my mother that I was old enough to learn the facts of life and that, in any event, King Lear was a typical Jewish play where the father works all his life to build up a little business, later gives it to his children, who then throw him out in his old age.

But what I recall most of all about the play is the advertising poster that appeared outside the theatre. Here is what it said—in Yiddish, of course—and I translate freely, "The Second Avenue

Theatre of New York proudly presents King Lear, a play by William Shakespeare, *Translated, Abridged,* and *Improved.*" Improved! How do you like that for chutzpa, a word that had not entered into the English vocabulary at the time? Actually, I think this is a better example of chutzpa, than the traditional one, which, you will recall, is the case of the young man who murdered his parents and, who, when convicted, pleaded for mercy on the ground that he was an orphan.

XIII.

Well, we have now come to the end of our long—too long—journey together. It's time to go, for I would not want you to say to me what a famous Englishman once said to a departing guest who had long overstayed his welcome, "You must come again, my dear man, when you have a little *less* time."

I leave you with my favourite comment by Stendhal, which, though it loses something in the translation, I cite as my own, "I have had the joy to have, as my profession, my passion!" I wish you all the same joy!

Oh, yes! One final word. How is it, I am often asked, that despite the obvious stresses, strains, tensions, anxieties, and setbacks that have been part and parcel of my life, particularly my professional life, I seem to be ever calm, relaxed, and even serene. The truth is that I'm not serene at all. I just look serene. It's something that comes with the territory. Here is how a famous English judge answered the question: "The judge seems to float along on the beach with effortless serenity, like a swan on the mirrored surface of the lake. But, the litigant should be reminded that the judge, like the swan, is paddling madly underneath."

That, ladies and gentlemen, is the story of my professional life: "Ever paddling madly underneath!" Thank you.