Chapter 1

PRESIDENTIAL ADDRESS: ACCESS TO JUSTICE: THE SILVER LINING IN *PYETT*

Michel G. Picher*

Thank you, Gil, for that very kind introduction—and thank you all for being here. It is an extremely great honour to be president of this Academy, but I want to share with you the fact that it is not the greatest honour that I have ever had. The greatest professional honour that I have ever had is one that I share with each and every member of this Academy. It happens every time I receive a phone call or a letter that says "Dear Mr. Arbitrator: We, the following parties, have been unable to resolve our differences in respect of a grievance and we would request your services to hear our arguments and render a decision that will be final and binding upon us."

Wow! Think about that for a just a minute. That is the highest honour that can be bestowed upon anyone. It is an honour and privilege that all members of this Academy regularly experience throughout their careers. We must never take that honour for granted. I hope today, in my remarks, to focus a bit on our relationship to those clients who bestow that honour upon us and, of course, think a little about the enormous responsibility that goes with it.

You know, when I joined the Academy close to 25 years ago, I have to confess I found it a little disorienting. When I attended my first meeting and listened to the various Academy members who were speakers, my first reaction was "My God, what am I doing here? I was not part of the New Deal and I do not own a bowtie!" Invariably the speeches were full of names of past greats from the Academy, many of whom I had never heard of. I then promised myself that if I ever had the opportunity to speak, I would not bore people with a list of past Academy greats. Well, now, here in

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public, I am about to break that promise. I understand today, as I did not understand then, the importance of the passing of the torch and the preservation of the immutable values we share as members of this Academy.

As I look back over my experience in the Academy I realize that I owe a profound debt of gratitude to a number of Academy members. In that regard, I wish to acknowledge and give my thanks to three who are no longer with us for the help and leadership by example that they provided to me: Tony Sinicropi, David Feller, and Reg Alleyne. As members of a committee on employment arbitration that I chaired, they taught me the true meaning of openness of spirit and high-mindedness.

I also want to specifically acknowledge the encouragement and guidance that I received from some who, happily, are still with us, notably George Nicolau, Arnold Zack, Ted Weatherill, and John Kagel. George got me onto the employment arbitration committee I just mentioned; Arnie showed me how much one person can do, even while flying to and from Kuala Lumpur; while Ted got me into the Academy and John Kagel got me in front of the Supreme Court of Canada. I suspect that many from my generation in the Academy would join in a common expression of thanks for the leadership and guidance of these very special people.

And there is a host of others who helped keep me out of trouble in this Academy, whose examples of tireless devotion have made me realize that I am but a very small contributor. In that regard I want to thank Rich Bloch, Barb Zausner, Margery Gootnick, Shyam Das, Dennis Nolan and virtually all of that remarkable Wisconsin Mafia, but mostly notably George Fleischli, Ed Krinsky, and Gil Vernon.

Finally, no proper list of thanks would be complete without recognizing the invaluable service to this Academy rendered by our true helmsman, our vigilant Secretary-Treasurer, David Petersen, and his extraordinary administrative assistants Katie and Suzanne Kelly. Nor, I think, is there a better moment than now to ask you all to join me in expressing our thanks to two people who made this Chicago meeting not only possible but thoroughly enriching and entertaining: our program Chair for Chicago, Marty Malin, and our gracious and generous host for our visit here in Chicago, Barry Simon. Please join me now in thanking them.

The primary theme I want to explore in my remarks today centers on the role we as arbitrators play in employees' access to justice, particularly in light of the very recent U.S. Supreme Court

decision in *14 Penn Plaza v. Pyett*,[1] a case about which I dare say we all have some pretty strong feelings, some quite negative. Even though our position as intervener did not carry the day before the Supreme Court, I want to say today that the *Pyett* decision carries within it a silver lining for employees in the realization of their statutory rights.

Fundamental to appreciating this silver lining is also a recognition of something unique about our treasured National Academy—that being the rich duality, and sometimes instructive dichotomy, between the United States and Canada. These two separate jurisdictions, while serving precisely the same ends of labour relations peace and prosperity and sharing the kinship of the Wagner Act, have pursued their respective ways of doing things in a way that has sometimes taken them in very different directions. The benefit of this duality is that some principles have taken seed and developed on one side of the border without the direct influence of the other.

With my apologies to Robert Frost and his wonderful "The Road Not Taken," our dichotomy carries within it the privilege of being able to witness, and thus assess, the benefits, or not, of labour principles that have been developed on a "road not taken" on the other side of our friendly border.

Through our respective histories, there have been a number of moments in the development of labour arbitration law in which U.S. arbitrators and courts, on the one hand, and their Canadian counterparts, on the other, have come to a point in the wood where two roads have diverged, with each taking their separate distinct path around the mountain before them.

Of importance to the question of employee access to justice regarding statutory rights, our jurisprudential road diverged in 1974 when the United States Supreme Court and the Supreme Court of Canada were both confronted with the issue of the access of individual employees to the enforcement of their statutory rights. With divergent decisions from our respective Supreme Courts, arbitrators in the United States, pursuant to the landmark decision in *Alexander v. Gardner-Denver Co.*,[2] which discouraged arbitrators from dealing with statutory rights, thereafter went down one path, while their Canadian counterparts took an entirely different route on the strength of our Supreme Court's

[1]550 U.S. _, 129 S. Ct. 1456, 105 FEP Cases 1441 (2009).
[2]415 U.S. 37 (1974).

cornerstone decision in *McLeod v. Egan*,[3] which not only encouraged but required Canadian arbitrators to apply employment-related statutes in the interpretation of a collective agreement.

Now as we reach the far side of the mountain and we are confronted with the recent U.S. Supreme Court decision in *Pyett*, I believe a look at Canada's experience along the "road not taken" by the U.S. clearly points to a silver lining in the *Pyett* decision, perhaps unintended by the judges, that may be best appreciated by understanding the Canadian experience since *McLeod v. Egan*.

Before taking you down that Canadian path, your "road not taken," I want to say a few words about the rich contribution that Canadians in this Academy have made both to labour arbitration and to the Academy itself.

The list of past and present Canadians in this Academy reads like a "Who's Who" of Canadian labour arbitration. I think those of you who live in the eleventh province we call "The United States of America" would probably feel a deep sense of pride if an American Academy member found his or her way into the judiciary and emerged as the Chief Justice of the United States. Well, that is exactly what happened on the Canadian side of the Academy. One of the earliest Canadian members of the Academy was Bora Laskin, who went on to become Chief Justice of the Supreme Court of Canada. In his years as an arbitrator working from the University of Toronto and then on the bench as a member of the Ontario Court of Appeals and the Supreme Court of Canada he issued decisions that reshaped Canadian labour law and the law of arbitration in our country, including *McLeod v. Egan*, about which more in a moment.

I am the third Canadian to be honoured with the presidency of this Academy and, believe me, I have had very large shoes to step into. The first Canadian president was H.D. "Buzz" Woods. I think most would agree that his greatest contribution was heading up the massive Canadian Task Force on Labour Relations, which became known as the Woods Commission, whose report in 1969, a report co-authored by a number of others whose names I am about to mention, actually reshaped Canadian industrial relations and labour law as we know it to this day.

For example, things we now take for granted, like the reverse onus in unfair labour practice complaints and the union's duty of fair representation, both came in the wake of the Woods Report.

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[3] [1975] 1 S.C.R. 517.

From his chair at the Faculty of Industrial Relations at McGill University, Buzz Woods clearly made a difference, a difference that was well underway by the time he became president of the Academy in 1976.

One cannot talk of Bora Laskin and Buzz Woods in this company without also acknowledging one of their favourite people—and one of mine—Frances Bairstow. Frances may hail from this eleventh province called America and live here now but as she would be the first to admit, a large part of her blood runs true Canadian. Frances can tell stories of being at arbitration hearings with Canadian notables like Brian Mulroney, past Prime Minister of Canada, and Lucien Bouchard, past Premier of Quebec, in a way at which those of us who sit at her knee can only marvel. While she may not hold a Canadian passport—and by the way, Frances, we are working on that—no list of leading Canadian contributors to this Academy is complete without a page dedicated to her.

The second president of the Academy to come from the Great White North is none other than Ted Weatherill, the gentleman of elegance and intellect whom we have the honour of welcoming as the speaker at our fireside chat tomorrow. When Pam and I joined the Academy in 1985 it was at Ted's urging. I can recall standing at the podium with Pam in Seattle thanking Ted, who we simply and very accurately acknowledged as the Dean of Canadian Arbitrators. Like many of us, Ted used the springboard of being a Vice-Chair of the Ontario Labour Relations Board to develop a remarkably successful arbitration practice. For decades his awards topped the list in published leading Canadian decisions.

The National Academy of Arbitrators has been home to a host of other truly great Canadian labour arbitrators and leading academics in the field. Paul Weiler, who grew up in Ontario and has been known to most of you as a leading academic in labour law at the Harvard Law School, graced the membership of this Academy from 1970 until 1984. He oversaw the implementation of post-Woods reforms as chair of the British Columbia Labour Relations Board.

Don Carter performed a similar task in shepherding important amendments, post-Woods, as Chair of the Ontario Labour Relations Board, one of North America's biggest and busiest labour tribunals. It was Don who hired Pam and me, his former students, as vice-chairs of the Ontario board, and the rest is history.

Another giant within the Academy who, sadly, recently left us is Innis Christie, another contributor to the Woods Report. In his

native Nova Scotia he served as Dean of the law school at Dalhousie University, Chair of the Nova Scotia Labour Relations Board, as well as Chair of that province's Workers' Compensation Board and its Deputy Minister of Labour. He also wielded a wicked squash racquet and golf club.

And there are so very many more, like Alan Gold, Jacob Finkelman, Ted Jolliffe, Howard Brown, and Owen Shime. I won't name them all, but 12 other past and present Academy members, most of whom are in this room, have chaired various labour boards in Canada, including Pamela Cooper Picher.

As I mentioned earlier, Pam and I joined the Academy together in 1985. As other Academy couples can attest, it is a rich although sometimes challenging act for those of us who are a part of a husband and wife arbitration team. There is the fact that people out there inevitably make comparisons. I have to stand here and admit to you that when they talk about "the Pichers" on the street, the general comment is that one of them can talk and write, and, thank God, the other one can think.

Pam has done enormous service to the Academy by bearing the burden on the home front over these years when I have been so heavily involved in various committees, Board of Governors activities, and that amicus intervention that we brought to the Supreme Court of Canada. However, I do want the record to show, very clearly, that she played an invaluable role in writing and editing our brief in that case.

The real burden, though, has been our dog, Cubby. For those of you who may not have visited our house in the woods of the Gatineau Hills outside Ottawa, we have a wonderful Nova Scotia Duck Tolling Retriever called Cubbybear, who—as becomes quickly evident to anyone who darkens our door—insists on fetching a tennis ball at all hours of the day or night. So, in addition to carrying on her own full-time arbitration practice, when I have been away on Academy business, which has been a lot of the time, Pam has been left to hold the fort, which means flinging a tennis ball off the deck of our house as far as possible downhill into the woods for virtually hours on end. She has done this without complaint and, apart from her prowess as a marathon runner, she has now developed a heck of a throwing arm—all in furtherance of Academy interests. I owe more to Pam than I could ever express here.

And if Pam and I can look back on some of our most treasured accomplishments, none comes close to the four beautiful kids we somehow produced, all of whom are here today. If they

could take over this podium, you would quickly see, as guests to our house have commented, that our Sunday dinners are debate-filled discussions that are frighteningly similar to a hotly disputed arbitration. Listening to the blend, and sometimes the clash, of their opinions at our dining room table, each with his and her strong perspective on so many different issues, has helped keep our minds supple, our hearts humble, and our spirits grateful for the life we share as a family. Thanks for being here, Jean-Michel, Grégoire, Coach, and Marielle. But most importantly, for Mom and me, thanks for just being.

Now that you can share my admiration for the quality of the Canadian branch of this wonderful National Academy, I turn again to the theme of employee access to justice respecting statutory rights. I want to explore how, by viewing the recent U.S. Supreme Court decision in *Pyett* through the Canadian lens, we can see that there are elements of the decision to celebrate, notwithstanding that we did not carry the day in our amicus intervention.

You may recall that our dear friend David Feller wrote of the passing of the golden age of arbitration. By that he meant that in a past time, arbitration was the only venue for dealing with the rights of employees and their union. With the advent of a host of civil rights and employment rights statutes, much of the action shifted to the courts and to specialized administrative tribunals, resulting in the relative diminishment of the importance of labour arbitration. Now a new day is dawning. With the decision of the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[4] and now *Pyett*, the Court has confirmed that by agreement arbitration can be the exclusive venue for the enforcement of statutory rights in the workplace, including the unionized workplace. While some may see that as a problem, on the strength of our Canadian experience, I say it is an opportunity for a return to another golden age of arbitration in the collective bargaining setting, as labour arbitration emerges as the primary single-stop forum for dealing with all employment-related rights, be they statutory or contractual. Like the sea washing upon the rocks, statutory employment rights will always be with us, likely in forms more numerous and complex as time goes on. Employers, unions, employees, and arbitrators should embrace the opportunity to have those rights and obligations dealt with in the more accessible and informal setting of arbitration.

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[4]500 U.S. 20 (1991).

You will recall that *Pyett* involved employees who were members of the Service Employees International Union, which bargained on their behalf with their employer, a building maintenance and cleaning contractor. Among the terms of that collective agreement was a provision that stipulated that in the event that an employee should have any claim in respect of his or her statutory rights as against the employer, those claims must be dealt with exclusively through arbitration, to the exclusion of the courts. When the contracting out of security work caused a number of the employees to feel that they were discriminated against by reason of their age, and their union declined to pursue their age discrimination claims under their collective agreement, a number of them filed claims of discrimination in the U.S. District Court for the Southern District of New York, alleging that the reassignment of their work violated the Age Discrimination in Employment Act as well as state and local laws that protect against age discrimination. The employer moved to dismiss the court action and effectively declare arbitration to be the only venue for the adjudication of their claims.

The District Court denied the employer's motion on the basis that a union-negotiated waiver of an employee's right to litigate federal and state statutory rights within the courts is unenforceable. The U.S. Court of Appeals for the Second Circuit affirmed that result, citing the cornerstone 1974 decision of *Gardner-Denver* and the then pronouncement of the U.S. Supreme Court in that decision "....that a collective bargaining agreement could not waive workers' rights to a judicial forum for causes of action created by Congress."

The Supreme Court reversed the decisions of the lower courts and in my view significantly reduced the scope, or at least the influence, of *Gardner-Denver*. It held that the parties to a collective agreement can effectively waive an employee's access to the courts for the pursuit of statutory rights by including in the collective agreement a provision stipulating that arbitration will be the only forum for the adjudication of the individual statutory rights of the employees.

In the result, the Supreme Court's determination in *Pyett* substantially qualified its earlier 1974 decision in *Gardner-Denver*, which, as I noted earlier, is the point at which the U.S. and Canada went their different ways, with Canada taking a separate path respecting statutory rights through Bora Laskin's leadership,

including his decision as Chief Justice of the Supreme Court of Canada in *McLeod v. Egan*.

Before further discussing *Pyett*, let's look for a moment at the key differences in these two divergent approaches to statutory rights straddling the border at the point *Pyett* was decided.

First, *Gardner-Denver*. That case concerned the individual court claim of a black employee who alleged that his discharge involved discrimination contrary to statutory law in Title VII of the Civil Rights Act of 1964. He had previously grieved his discharge to arbitration, where the arbitrator found that the employer had just cause. He then moved to once again challenge his discharge with an individual action in the courts, alleging discrimination in breach of his statutory rights. The U.S. Supreme Court held that the arbitration did not preclude him moving in the courts, but it went further. In coming to that result in that case, Powell J. said, for a unanimous Court:

> If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation" rather than an interpretation of the collective agreement, the arbitrator has "exceeded the scope of the submission" and the award will not be enforced. The arbitrator has the authority to enforce only contractual rights…[5]

and

> The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.[6]

Accordingly, *Gardner-Denver* led to the view of a substantial segment of U.S. arbitrators that the arbitrator does not have any general right to interpret or apply statute law in the process of interpreting and applying a collective agreement.

Now, I do not propose to revisit the ongoing discussions, many of them in this Academy, about the role in arbitration of external law and the impact of *Gardner-Denver*. I would simply refer those with the appetite for it to the thoughts of Bernie Meltzer, Bob Howlett, Ted St. Antoine, Harry Edwards, Dick Mittenthal, and Rich Bloch as they appear in our *Proceedings* from 1967, 1989, 1995, and 2004.

With all the disclaimers of an interloper from north of the border, and with allowance for a little familiarity among friends,

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[5] *Id.* at 53.
[6] *Id.*

let me just say that for an observer from Mars, or from Ottawa, *Gardner-Denver* has made intellectual contortionists of some of the finest arbitrators in America trying to rationalize collective agreements and statutes. It has been of no help, and arguably of some hindrance, to access to justice for the little person in an ever-growing world of employment-related statutory rights. That is so because a substantial segment of American arbitrators still hold to the view stemming from *Gardner-Denver* that they cannot properly consider or apply statutes, on the reasoning that they are bound to stay within the four corners of the agreement. Their answer to most statutory claims is to show the grieving employee to the door, and point him or her to the courthouse. On the other hand, many do find ways, notably through just cause standards or promotion standards, to arrive at results that reflect statutory norms.

In thinking about the *Gardner-Denver* debate and now thinking about the result in *Pyett*, I am reminded of a fable that I would like to share with you. It is not really a fable; it is a true story that was part of the course in jurisprudence I had the privilege of attending at the Harvard Law School, then taught by Lon Fuller. To help us think about law, the role of law, and our own orientation toward the law, Lon told the story of the Cambridge Common—an apparently true story. As he told it, when Cambridge was being planned and laid out in its very earliest stages, the elected councillors finally came to discussing the layout of their town common. As you know, most New England towns have a lovely green space in a central location and Cambridge was to be no exception. As the councillors met and discussed the design of the Common, two camps quickly formed. The question to be resolved was where the walkways would be placed in the Common. The first group, which tended to be the opinionated if not authoritarian members of the Council, quickly drew lines on paper dictating where it was that people should walk, anticipating tidy right angles and intersections all bolstered and protected by "Do Not Walk on the Grass" signs. The second group had a whole different view. They said, "Why do we not just put away the paper and the pencils and the "Do Not Walk on the Grass" signs? Let us first sow lovely green grass everywhere on the Common. Then we wait. Let us wait and see where people walk. Let us see where the beaten paths emerge. It is only once those beaten paths become clear on the face of the Common that we will know where people want to walk. That is where we should put our walkways." As Lon told it, the second school of thought carried the day and the Cambridge Common,

to this day, has a series of winding and angled walkways that very nicely serve the people of Cambridge as they go across it.

So there are two ways of thinking about the law. Is the law an instrument of high principle handed down from the mountain top by an authoritarian voice, or is it the instrument that seeks to best facilitate those things that people and society choose to do? As arbitrators, are we called upon to assume a magisterial role, handing down pronouncements from on high to impose a form of governance on those who choose to come to plead their case before us or, as I believe, are we not in fact more the servants of the parties, persons invited by them into their relationship, as a plumber might be invited into their homes, to perform an essential repair, but most importantly to respect and serve their needs and wishes?

In addition to other great thinkers, some of whom are indeed in this room, I think Bora Laskin, who walked more than a few times across the Cambridge Common as a student, well understood the importance of the law of arbitration truly serving the needs and interests of the parties, rather than imposing its own authoritarian agenda—both when he was a leading arbitrator and when he was Chief Justice of Canada.

With this perspective in mind, it is interesting to ask where employees would walk if given no direction from "on high" to access their employment-related statutory rights. Would they walk to the sumptuous courthouse door or to one of the arbitrators in this room?

As I have noted, in the very same year as *Gardner-Denver*, 1974, Canada took a radically different approach to the adjudication of statutory rights in *McLeod v. Egan*.

In our time on the Ontario Labour Relations Board, Pam and I had the privilege of working with a wonderful adjudicator and arbitrator named Rory Egan, the very Egan in the case at hand. In the 1970s Rory was close to retirement age, blessed with an elegant white moustache, a glint in his eye, an Irish humour, and a profound sense of fairness and decency. One day he found himself arbitrating a case with an employer called Galt Metals.

The issue in that case concerned whether an employee could be disciplined for refusing to work overtime when the overtime hours were in excess of those allowed by the *Employment Standards Act of Ontario*. Rather than declare that the *Employment Standards Act* fell outside the four corners of the collective agreement and wash his hands of the dispute, Rory, in interpreting the overtime

obligations under the collective agreement, looked at the *Employment Standards Act* provisions respecting overtime and determined how those overtime standards impacted the rights of the parties under the collective agreement.

His decision, which found in favour of the employer in light of his interpretation of the statute and the collective agreement, went on judicial review all the way to the Supreme Court of Canada, where fortunately it landed in front of Bora Laskin.

With respect to whether arbitrators could interpret and apply statutes, Laskin did not hesitate in finding not only that they could, but that where the issue under the collective agreement demands it, they must. However, he added, where an arbitrator involves him- or herself in interpreting a statute for the purposes of interpreting the collective agreement, the arbitrator's interpretation of the statute is subject on judicial review to examination on the basis of a standard of correctness regarding the meaning of the statute. There can be no curial deference to the arbitrator as to the meaning and application of the statute, and the standard of review for that question alone was established to be that of correctness.

Accordingly, in contrast to *Gardner-Denver*, the decision in *McLeod v. Egan* gave legitimacy to the concept of boards of arbitration interpreting and applying external law in the form of employment-related statutes.

The seed that was sown in *McLeod v. Egan*, that arbitrators not only could, but sometimes must, interpret and apply statutes, has grown and thrived in Canada. Demonstrating the labour relations soundness of the principles developed by Bora Laskin in *McLeod v. Egan*, virtually all labour relations acts in Canada now contain language expressly giving that same authority to boards of arbitration. For example, section 48 (12) (j) of the Ontario Labour Relations Act stipulates that an arbitrator or arbitration board has the power:

> . . . to interpret and apply human-rights and other employment related statutes, despite any conflict between those statutes and the collective agreement.

Moreover, the Supreme Court of Canada recently extended the principle of employee access to statutory rights through the collective agreement in a case called *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324*,[7] where the Court

[7] [2003] S.C.C. 42.

declared that all employment-related statutory rights and obligations, whether or not referred to in the collective agreement, are deemed to form part and parcel of any collective agreement being considered at arbitration.

So now, in the United States, comes *Pyett*, against the backdrop of two divergent paths taken around the mountain of statutory rights. The first path, the one in the United States though *Gardner-Denver*, holds that arbitrators are not, as a general rule, to apply external statutes to the interpretation of an employee's rights under the collective agreement. The Canadian path through *McLeod v. Egan*, *Parry Sound*, and another key case called *Weber v. Ontario Hydro*,[8] holds to the contrary that arbitrators have not only the right but also the obligation to interpret and apply relevant external statute law to the determination of employee rights under the collective agreement, and that they now do so exclusively, to the entire exclusion of the courts.

So how does *Pyett*, perhaps ironically handed down on April Fool's Day of this year, fit into all this? In *Pyett*, the U.S. Supreme Court held, in contrast to the principles of *Gardner-Denver*, that when the parties to a collective agreement agree that employees' statutory rights, such as those under anti-discrimination statutes, can be accessed solely through arbitration, those employees are no longer entitled to pursue their statutory rights in court. Up to that point, employees were often required to access their statutory rights through only the courts because a substantial school of arbitrators held that arbitrators are without jurisdiction to apply statutory rights. Now let me stress that all unionized employees in Canada are in exactly the same position as the employees in *Pyett*, unable to enforce their individual statutory rights through the courts when their claims arise expressly or inferentially through the application of their collective agreement.

Understandably, the Academy moved in *Pyett* to file an amicus intervention because of what we perceived as a threat to the access to justice available to individual employees through the courts. At the risk of oversimplifying, the gist of our argument in *Pyett* was that the discretion of a union to decide whether or not to proceed to arbitration with a grievance respecting a statutory right could not be substituted for or preclude an individual's right to choose to proceed individually before the courts for the vindication of his or her statutory rights. There is an unassailable logic and decency

[8] [1995] 2 S.C.R. 929.

to that position. But the Supreme Court decided otherwise, sustaining the view that the agreement of the parties under their collective agreement effectively ousted the jurisdiction of the courts to deal with individual statutory claims.

Some Academy members now have serious concerns about the outcome in *Pyett*. However, having walked the "road not taken" by the United States to the other side of the mountain of statutory rights, Canadians can see a silver lining in *Pyett*. *Pyett* now bypasses or at least qualifies *Gardner-Denver* and allows employers and unions in the United States to agree to putting their employees in the same place as all employees under collective agreements in Canada. To that extent, the two paths have now re-converged. I say that's a good thing.

As a Canadian arbitrator, I celebrate the holistic approach to an employee's access to justice through labour arbitration set in motion by Bora Laskin more than a quarter of a century ago. There is enormous satisfaction for an arbitrator to adjudicate the fullness of an employment problem, which frequently has its roots entwined in the soil of both the specific articles of a collective agreement and the provisions of an employment-related statute.

To be sure, *Pyett* reduces the right of individual employees to access the courts. But those who feel stung by that side of the Supreme Court's decision in *Pyett* might consider visiting a state or federal court. If they were to ask the clerk of the court to produce the file containing all law suits brought by individual employees for the vindication of their statutory rights, the clerk might well say, "Oh, you mean the executive cases?" When you answer, no, that you really want to see the claims brought individually, and not through class action, by janitors, warehousemen, plumbers, assembly line workers, secretaries, and similar employees, you would, I expect, be presented with a very, very thin file. Those people generally do not cross the Cambridge Common, in any direction, to and from the stately courthouse, no matter how glorious the rights bestowed upon them by statutes governing employment and nondiscrimination.

Now, I confess that I have done no empirical research, but I strongly suspect that per capita the vindication of statutory rights in matters of employment and discrimination is far more frequent through the labour arbitration process in Canada than it is through the system of court litigation in the federal and state courts of the United States. I do not mean to be too starkly comparative, but let me put it bluntly. There is every reason to believe

that *McLeod v. Egan* has outperformed *Gardner-Denver* on all counts when it comes to access to justice for employees in respect of their statutory rights.

At this point let me stress a few things about the Canadian system that imposes a *Pyett*-like situation on all unionized employees in Canada. First, in Canada every union has the same duty of fair representation as do unions in the United States. In compliance with that duty, they have brought many deserving statutory claims before arbitrators. Our labour boards are not clogged with unfair representation complaints against unions flowing from this. Second, employment-related statutes are not rocket science. In Canada, non-lawyer arbitrators regularly deal competently and comfortably with employment-related statutory rights, and that includes some leading arbitrators from both east and west who are in this room. Finally, judicial review on the standard of correctness as regards the interpretation of statutes has not tainted or reduced the traditional deference of the courts toward arbitrators as they interpret and apply collective agreements. Finally, please rest assured that employers and unions alike are happier arguing their employment-related statutory issues before arbitrators with workplace experience, rather than in the marble precincts of the courts before a judge who may have spent his or her entire professional life dealing with real estate or corporate and commercial law.

Now, to be sure, there may still be plenty of *Gardner-Denver* left after the decision of the Supreme Court in *Pyett*. As a number of commentators have said, the impact of *Pyett* may be seen as confined to those relatively few cases where the collective bargaining agreement language expressly stipulates the jurisdiction of a board of arbitration to deal exclusively with the statutory rights of individual employees. Some of those same commentators suggest that unions will be pressured to avoid negotiating *Pyett*-like language, presumably out of fear of alienating their members.

I am not so sure. While we may regret the exclusivity principle enunciated by the Court in *Pyett*, whereby access to the courts is precluded, the fact remains that, in my opinion, in *Pyett* the Court accomplished a great deal for employees by affirming that boards of arbitration can be given jurisdiction to deal with individual statutory claims through the grievance and arbitration provisions of a collective agreement.

The silver lining in *Pyett* may ultimately prove to be the thin edge of the wedge that broadens and enhances the access to justice of

organized employees in the United States by opening the possibility of having individual statutory rights dealt with through the grievance arbitration process. *Pyett*'s trenching at long last on *Gardner-Denver*, in fact, gives to unions an opportunity that was not so clearly there before. Now unionized employees in the United States can, by their union's contractual agreement, come to the same place as all organized workers in Canada. It is true that their members would trade off the ability to move individually in the courts to pursue their statutory claims, but I would suggest that that is a little like losing the freedom to choose the bridge they would like to sleep under.

In fact, *Pyett* also gives to the union movement yet another argument to make to unorganized employees, which is that a collective agreement can give them a more realistic chance at vindicating their individual statutory rights than they would realistically have if they are compelled to seek a remedy on their own in the marble and oak panelled halls of the courts. And at arbitration their rights won't be decided by a judge who may or may not have a grasp of employment law, but by an arbitrator they have a hand in choosing.

I may be wrong in my prediction, but it is not for us as arbitrators, or indeed as advocates, to make any choice as to which way the wind will blow. Under the *Pyett* principles it will now be for the parties themselves—employees, unions, and employers—ultimately to choose their path across the Cambridge Common. And I say it is for us to recognize their choice and, in keeping with the highest standards of integrity and due process, to assist them in the direction they lawfully choose. Far be it for me to heap praise on those judges who comprised the majority in the *Pyett* decision, but they, despite themselves, may in the end have struck a positive blow for arbitration and for real access to justice for organized employees. In the future they may think twice about issuing a major decision on April Fool's Day.

In closing, let me share one last thought. You know, my neighbours and friends sometimes take me aside and say, "Michel, how do you do it? Day in and day out you find yourself in the middle of conflict. The very essence of your work is disputes between parties, nonstop. How can you possibly stand doing that all the time?" My answer is simple. Conflict, the ability to disagree, and to disagree openly and strongly, is fundamental to our most basic liberties. The ability to disagree openly is a cornerstone of any free society. But critically, the way we deal with our disagreements, the way we

channel and resolve our disputes, is nothing less than the ultimate measure of the quality of our civilization.

That, in the end, is the business that occupies each and every one of you in this room, whether arbitrators, management and union representatives, or legal counsel, for the way in which you handle and resolve disagreements. You perform for our society a service that is always vital and sometimes heroic. I congratulate you.

Let me share one experience whose memory I cherish. Decades ago, when I was a young law professor organizing a symposium on law and technology, I invited then Chief Justice Bora Laskin to chair our proceedings. He graciously accepted. After a working lunch, I left him on the sidewalk in front of the Supreme Court building. After I shook his hand and headed across Wellington Street, I heard him call after me. As I turned, he looked at me and said, "Good luck young feller!" I think of that often these days as I sit in the railway arbitrator's chair that he once occupied. And I have never felt the realization of that wish more deeply than I feel it at this time, in this place, and in this very special company.

Finally, if you'll allow me to sound one last note in shared celebration of our duality, as we say in my beautiful first language, "Merci, merci beaucoup et vive l'Académie!"