Chapter 5

ARBITRATING IN THE FISHBOWL— GUPPIES OR SHARKS? HOW ARBITRATORS CAN SPEAK PUBLICLY

Moderator Susan Stewart has "cast" about for a panel of NAA members from across Canada who have taken the "bait" and will discuss the ways for arbitrators to speak publicly, such as intervening in cases before the courts and speaking to the media. Come learn how accepted Canadian practices may differ from the U.S. experience.

Moderator: **Susan L. Stewart,** NAA, Toronto, ON
Panelists: **James C. Oakley,** NAA, St. John's, NL
Kenneth Paul Swan, NAA, Toronto, ON
Michel G. Picher, NAA, Ottawa, ON

SUSAN STEWART: We do have a very talented panel today, and I hope that we're going to generate some interesting discussion. Let me introduce my panelists. I know that most of the people in the room are Canadians and that the three panelists will be well known to all of you. We tried to have representation from the west, but John Moreau from Alberta is one that got away. He had a family matter that required his attention and wasn't able to be here. So, that's unfortunate. But, hopefully, we'll have perspectives from across the country from the audience if an area's practices differ from practices that our panelists will describe.

On my far right is Michel Picher, former president of the Academy, a very experienced arbitrator who acts across the country and works in both official languages. Next to Michel is Jim Oakley. Jim is from Newfoundland, and he's the president of the Canadian region. Jim's a long-standing Academy member and a well-known arbitrator. He actually has some expertise relevant to this panel, because if you take a look at his resume, you'll see that he was involved in setting fish prices by a final-offer selection process. He's eminently qualified to speak on this panel. You're probably

going to hear some fish puns. I'm sorry, but with a title like this, we can't really help it. I think that my main job is to control the bad puns.

JAMES OAKLEY: You're off to a good start.

SUSAN STEWART: I think potential bad behavior is to my immediate right, Ken Swan. Known and loved by all Canadians and all others who know him, Ken served many years as president of the Ontario Arbitrator's Association. He was the go-to guy for not just all of us when we wanted counsel and advice, but he was someone who governments and media went to when they were interested in any matter of any kind.

We have two main topics today: the ways for arbitrators to speak publicly, such as intervening in cases before the courts, and arbitrators speaking to the media. Over the last year, particularly, and throughout North America, arbitrators have attracted a good deal of media attention. We heard yesterday about the attention given to an interest arbitration in Boston where there was a public outcry about the result. In Ontario, we've seen a lot of attention to interest arbitration, and, I think probably a good deal of misinformation. I know that a good deal of what I've read in the press doesn't accurately represent the facts. So the broad issue that's going to be addressed today is whether and, if so, how arbitrators should weigh in on the debate surrounding these kinds of issues.

Should arbitrators ever engage with the press? What kind of legal interventions are appropriate for arbitrators and for our association? Should we try to control the press and the dissemination of information about proceedings? Should we let the press in? Another topic that I think is related, to some extent, is whether, in the age of search engines, we should be anonymizing decisions, whether privacy should be protected in some way? There's also the question, of course, of whether or not we can do that.

Michel has had a particularly interesting and amusing experience with the press that took place some time ago when he was the vice chair of the Labour Relations Board and was approached by a reporter. Michel, do you want to start by telling us a little bit about that experience?

MICHEL PICHER: I would be happy to do that. In the early 1980s, I was still vice chair of the Labour Board, but I was also arbitrating. So, I sort of wore two hats. At that time, there was a fairly new network called City TV in Toronto. They had kind of colorful ways of reporting and doing things on screen. They approached the registrar of the Labour Board or perhaps the chair, and I was

designated to speak with one of their reporters, a fellow named Jojo Chinto, which may be a name some of you remember. Jojo was a Ghanaian. Having lived for a couple of years in Ghana, I knew of him and thought that it would be fun to talk to Jojo.

The reason they wanted the interview, of course, was that at that time there was a huge amount of strike activity in Canada, and particularly in Ontario. I think there was a postal strike and a secondary teachers' strike along with a strike of community college professors. The news was full of this stuff. So I was delegated to speak to Jojo and was quite happy to do that.

When he arrived, I was pleased to see there was no camera. But, he did have a tape device. I thought, well, sure, he's got to make notes in some way. During our short interview he put the obvious question to me: "Mr. Picher, what do you make of this extensive and extreme strike and lockout activity that is plaguing our society?" I, of course, said, "Well, you know, Jojo, you have to understand that collective bargaining is about the right to disagree—and to disagree forcefully. I think that what we're seeing is an expression of democratic society. If you're asking me what I make of all this, I would simply say to you the system is working. In fact the system is working well! Thank you." With that we had a handshake and ended the interview.

So, I went home at six o'clock and turned on the TV to watch the evening news on City TV. There's Jojo, and he's going to give his report on the strike activity in Toronto. The screen is immediately filled with images of intense picket line violence—tear gas, surging strikers, and police with batons. As the mayhem plays out on the screen, there's a voice-over, and it's a taped clip of me saying, "The system is working. The system is working."

SUSAN STEWART: And Michel's career went downhill after that. He never recovered from that experience.

Now, Ken, you said to me in our early discussion that talking to the press has never been a good thing. Do you want to elaborate a little bit on that?

KENNETH SWAN: Well, Michel has actually made the point for me rather forcefully, because the disadvantage that you have is that you have no control over what the use of the perfectly normal things you say will ultimately be. Voice-overs are only possible on television and radio. But, the people who write down what you say and put it in the newspaper don't necessarily have to put it in the same order that you said it.

I was once persuaded that it would be a good idea, after some high-profile case that I did, that I should give an interview to someone from *The Globe and Mail*—unhappily not Wilf List—but somebody else who was around for the day, about what it was like to be an arbitrator. I said things that probably could have fit very neatly into yesterday's presidential address about neutrality and being scrupulously careful to listen to both sides, and that kind of thing. It came out sounding like I was the most incredibly pompous ass you'd ever come across. Now, many of you probably thought they got the tone just about right. But, I must say, I found it extremely embarrassing afterwards. Friends and colleagues occasionally quoted small bits of that at me and chuckled behind their hands afterwards.

So, I think, while I think you can deal with the press—and my colleagues, I think, are going to be more sanguine about this than I am—it can be extremely difficult to control the way that what you say is portrayed.

I also find that when I start getting into something that interests me and excites me—it won't happen here, don't worry—that I will kind of talk faster than my brain is working. This is a particularly dangerous thing to do when you're talking to the press, because all they hear is the words you're using and take no notice at all of how clever your brain is back there, just 15 steps behind your mouth.

So, personally, I would avoid speaking to press except in very formalized circumstances, a press release, a scripted commentary, some kind of interview program where you know that what you're saying is going to get onto the air live or mostly live. And, you've taken suitable depressants to ensure that you don't take off in full flight. But, as I say, there are other points of view.

The other thing I have found over the years is that it is very important to ensure that you don't make your awards particularly newsworthy. Very early on, in an award in an illegal strike at St. Peter's Hospital in which I understood that the employees had gone on strike because the Ontario Hospital Labour Disputes Arbitration Act is such a frustrating and dreadful piece of legislation, I said, basically, that I understood how they felt, and that those of us who were still doing cases under the legislation only did so out of a despairing sense of duty—words which ended up in the press, and produced one of the strangest encounters of my arbitration career.

When I was in Ottawa a few weeks later, I was crossing Metcalfe Street. In the middle of the street, I ran into Jacob Finkelman, the distinguished arbitrator and former member of this organization. He stopped me in the middle of the street. He said, "Mr. Swan, St. Peter's Hospital, Mr. Swan. You editorialized." Had it not been for the taxis honking their horns at us, as we stood in the middle of the street, I think we might have gone on for quite time. So, I now hesitate to put anything in my awards that looks like too much of a good sound bite.

I had another one where a bullying foreman had pushed a worker around long enough. So, the worker finally turned and said something, allegedly, insubordinate. I quoted Arbitrator Schulman in Ford Motor Company that an industrial plant is not a debating society. And, then I added the words, "but neither is it a paramilitary organization." This had the result of giving Jeff Sack, in one of his *Lancaster House* articles, the subtitle for his article. So from now on, I just avoid that kind of stuff.

When I recently wrote an air traffic control award, I wanted to put in the expression, "When pilots act like cowboys, the air traffic controller has to remember that he's the sheriff." I imagined that on the front page of *The Globe and Mail* and scratched it out.

So, that's all I've got to say. I must say being on this panel has provided a whole new meaning to being a "sole" arbitrator.

SUSAN STEWART: I knew that was going to happen. Oh, yes. I did tell you—I did warn you that he was probably going to be the worst. Thank you.

KENNETH SWAN: Sorry. I was just floundering around.

SUSAN STEWART: Yes. Oh my goodness.

There is a lot of discussion, of course, about transparency and access to justice. People should understand how the legal system works. Jim, do you have any comments on that?

JAMES OAKLEY: Well, I think when it comes to talking about your own award, I tend to be more of a guppy. When we're talking about the arbitration process and the role of arbitrators, I think we should be more shark-like—to keep within the theme of the title of our presentation. I think talking to the press can be useful, depending on what it is about. I wouldn't speak to the press about my own award. I was asked to do so in a high-profile case where there had been a doctors' strike for two weeks that was resolved by the parties agreeing to settle the dispute by interest arbitration. There was a lot of public interest in this topic. When the award came out, I was called by the media, and I directed them to the

parties. I didn't think it was appropriate for me to comment on the award; the parties are the ones to comment on it.

There are a couple of reasons not to comment on your own award. I think the award speaks for itself. Whatever you have to say should be in the award. You risk embellishing what you've said in the award, and you risk interpreting what you've already said. And there's the issue of your relationship with the parties, as well.

In terms of media interviews, generally, I'd have to say, and I think the point has come out already, that we're swimming in dangerous waters in talking to the media. Because of the lack of control over what's going to be used, words can be taken out of context. Your reputation could be affected. We've already seen examples of that today.

So, I must say I've never spoken to the media as an arbitrator. Now, I have in previous lives as a litigator or as a person active in the community. I have done media interviews on television and radio. It's important to have some understanding of what you're doing when talking to the media. If you're going to be doing very much of this, there's training available in speaking to the media. You should get some advice from media relations experts. There are simple things you can do, like preparing what you're planning to say; speak to the media person first before you get into the interview and find out what the questions are going to be; have a chat about what the conversation is before you actually get into the question and answer; have two or three key points that you want to make, and fit those points into the answers. When you observe effective politicians, you can see how they answer questions. It's just getting the message across.

We have to ask ourselves, do we have a message that we're trying to get across? If we don't, then why are we doing it? I think there could be a message that we want to get across. That message could be to present a positive image of arbitrators and to educate the public about what labor arbitration is all about. I think the judges and the courts have been doing a much better job of this in the last 20 years or so. Maybe we can take a lesson from what judges have been doing in promoting the image of judges and the idea of the new expanded role of the courts.

The other point I was going to make is that if we don't speak out on our own behalf or on behalf of arbitration, then others will, including judges. Many of us know Chief Justice Warren Winkler in Ontario. I saw in the *Law Times* on May 2nd, 2011, there was a report of an all-day session at Queens University. I know Susan

was there, and perhaps some others were at that session. What's reported is under the headline, "Labour Arbitration Gone 'Off Trajectory': Ontario Chief Justice." The Chief Justice is quoted as saying, "The current system of labor arbitration takes too much time, is too costly, and it involves too much litigation." He warned, "More should be done to make sure the grievance arbitration system doesn't become dysfunctional, irrelevant, and extinct." In the article, he referred to the "golden era of labor arbitration in the 1960s." He said that "the system is no longer going in the right direction," and that there was "a negative sea change from the golden era." So when I saw the reference to "sea," I knew I had to use this article.

The point is that someone else is talking about labor arbitration and making controversial comments. So perhaps there should be some public response. It's good to have debate about these things. But, perhaps, there should be some response from arbitrators in dealing with it. That is certainly something we can speak out about. I think it's quite ethical to do so, so long as we remain impartial and our neutrality and impartiality isn't jeopardized by what we have to say.

SUSAN STEWART: Just on the point of the session that Jim referred to, the Chief Justice of Ontario, Warren Winkler, has prepared an excellent paper, a historical perspective on arbitration. I spoke with him just prior to his remarks at a recent conference, and he said, "I'm going to be very controversial." That was his intention—to take a position—and it's not the first time he's done that to create discussion. One of our Academy members, an eminent arbitrator, Don Carter, was there. His role was to respond, and he said that there has never really been a golden age, and you're wrong in terms of your criticisms of arbitrators.

But, of course—and I think that this is a point to keep in mind in reflecting some of Ken's comments—you don't control what is reported. The substance of the Chief Justice's remarks were reported because they were critical and they were controversial. The more moderate stuff is not of interest, and that's a bit of a difficulty. The media is interested in a sensational story. What we do with it is important, but sometimes a little tedious.

Michel, do you have some comments to make?

MICHEL PICHER: Sure. I'll resist saying that I want to be on the same scale of humor as these guys.

SUSAN STEWART: Thank you. We appreciate that.

MICHEL PICHER: The thing about the media is it's clear that they go for the sensational dimension. Maybe 12 years ago, give or take, I had an arbitration involving the police force in Thunder Bay, Ontario. Up there was an old-fashioned whorehouse, literally, a red-light district establishment. What emerged in evidence is that the police morality squad used to basically get along very well with the madam. So much so they would go to this house and have drinks during their tour of duty. And, of course, if a customer came to the door, they would scurry down into the basement and take the drinks with them, I guess. Occasionally, when they needed to have a certain quota of arrests, they would come up from the basement and say, "This is a raid," and charge somebody as "found-in." All of this somehow came to light in the local press and there were some serious disciplinary consequences and other collective agreement ramifications, which I ended up arbitrating. After a fascinating and sometimes hilarious hearing, I issued my award and thought no more about it. I don't believe there were any media present in that hearing.

But, more recently, an Ontario judge handed down a decision essentially saying something to the effect—and you'll correct me if I'm wrong—that the manner in which prostitutes are being dealt with under our system is in violation of the Canadian Charter of Rights and Freedoms. She essentially struck down those parts, I believe, of the Criminal Code that would have affected them.

Well, 20 years after my hooker case, doesn't the phone ring? It's a reporter calling me after all these years saying, "You remember that case you had about the prostitutes and the madam up in Thunder Bay? Well, what do you think about this latest decision of the courts etc., etc., etc.?" My reflex was exactly the reflex that my friends here have referred to and that is to avoid any comment and advise the reporter to call the parties and that I have absolutely nothing to say about this. I think there's just nothing to be gained by entering into that kind of a discussion that is specific to one's own case or decision, or even close.

I've had a little experience and actually had to do a bit of research once about whether the media have a right to be in an arbitration hearing. I think the distinction has to be made between the United States and Canada when this is discussed, because largely in the United States labor arbitration is a private, contractual process. There may be exceptions to that when interest arbitration is being done under a particular statute. But, by and large, the

arbitrator is not a statutory tribunal in the United States, whereas in Canada we are.

Grievance arbitration in Canada is essentially a process under statute. Our very respected colleague and former member of the Academy, George Adams, was confronted with that question when he did an arbitration involving the *Toronto Star* newspaper, the largest circulation newspaper in Canada. The press wanted to attend that hearing. The way George resolved it was to say there is no absolute right for the media to attend, and no absolute bar to attending. He ultimately ruled that whether the media will be allowed in the hearing is a subject within the discretion of the arbitrator, having regard to all of the elements at play in that particular case. That is the leading jurisprudence, at least in Canada, on whether we should or should not allow the media to attend.

What about television? I had a couple of experiences at the Labour Board. There was a very, very high-profile strike in a company called Fleck Manufacturing, which involved the Ontario Provincial Police in close to riot situations on picket lines. I ended up chairing the hearing that involved an application for consent to prosecute the local member of the provincial legislature, who had involved himself in supporting the employer on the picket line against the union, as well as the Ontario Provincial Police themselves, and, of course, the company. So this was very high profile. For the first time I think, in our experience with the Labour Board, we had a request to have the cameras in the hearing, so we obviously thought about this. And, we sort of started it off.

We finally resolved that we would allow the cameras in but only partially. There was no problem with the print media if they wanted to sit in the hearing and take notes. That was fine. But, we didn't want cameras rolling in the hearing during testimony or during argument. But on the other hand, we didn't want the visual media to be excluded altogether. So, what we did was to allow them to do what you might call a "dummy take." So, we'd set up the board, as we were, had our notes and such in front of us. We also had the people who were in the hearing room there, and explained to everyone that we were going to allow the video news cameras to come in and pan the room to get a visual of the hearing. The video crew would then leave, and we would start or resume the hearing. That seemed to satisfy the TV folks, because all they really wanted is a little bit of imagery. They got it, but they didn't interfere with what we were doing.

Now, the next time I encountered an issue with the media involved an interest arbitration. It was a police arbitration in Kitchener, Waterloo, Ontario. Before the hearing the parties spoke to the panel privately to say, "Look, we have a concern here because we've got news media sitting in the arbitration room—newspaper reporters—and we think there's going to be information that's given in these proceedings which should not be public." So we essentially said, "This should be discussed in the open hearing. Let's go in and let the media hear what you have to say, what are your concerns." So we heard open representations from both sides. I don't recall that the media asked to make any representations, but they were there. Essentially, what we were hearing from the municipality was, for example, "We are going to be talking about the response times in the territory of the municipality. How long it takes us to dispatch a car to a point at the fringe of the municipality or at the heart of the municipality or wherever it is." Why that was germane to the issues in front of us, I can't frankly recall. But, it was. I believe it had to do with manpower. They didn't want that known, because that information, they said, would be useful to the criminal element, so it shouldn't, therefore, be reported through the press that it takes fifteen minutes to respond to a call at such and such a place in town, or eight minutes or whatever it may be.

So, we scratched our heads a little and, then, sort of came up with what seemed to be a workable solution. It was simply this, we said, "Look, this is a public forum. The money being spent here is public money. The people of the municipality have a right to know through the media what is happening, what the positions of the parties are. Who's saying what? But, yes, we respect that certain aspects may be, in fact, of such a sensitive nature that they shouldn't be wide open." And so, what we ruled was, we would not throw the press out of the room altogether, as was the initial request of the municipality. We ruled that when we came to some point in the hearing to deal with an issue that had sensitivity, for example, the response times that I just mentioned, then we would go *in camera*. We would stop the proceedings, invite the press to leave, then reconvene with the door closed, as it were, hear those submissions about that issue, and then return to the open hearing once we got past that. As it turned out, that seemed to work pretty well. We certainly got no complaint from the media about that approach.

SUSAN STEWART: Thanks, Michel. That's a very practical suggestion that I think people will find to be valuable.

I want to move on to a bit of a different area, and that's the area of interventions in judicial proceedings. That's an area where the Academy broadly has been active and where our association has had some involvement. There's one case that I think we have two experts on, Ken and Michel, and that's the intervention before the Supreme Court of Canada and the "judges" case. For those who don't know about it or may not recall what that case was all about, it arose because the Minister of Labour in Ontario in early 1988 appointed four retired judges to chair several arbitration boards. There's some history to this, but essentially that's what happened.

They were not appointed by mutual agreement and nor were they from the list of arbitrators that is compiled for appointment. The president of the Ontario Federation of Labour made a complaint to the minister that there'd been a breach of an understanding about how these matters were going to be dealt with. As well, the objection was made that retired judges lack the expertise, experience, tenure, and independence from government. Also, they complained that the minister had breached procedural fairness by not delegating the task of making appointments to senior officials within the Ministry of Labour, which had been done in the past. So, that was something that interested the members of the Ontario Association, which Ken was then president of. There was a good deal of discussion within our organization about whether we should intervene.

Ken, do you want to maybe comment or just set out the background in a little more detail? The NAA ultimately intervened and Michel Picher took Ken's robes to the Supreme Court of Canada, successfully arguing that this was inappropriate. This is a very significant decision. Ken, do you want to summarize, briefly, a little bit of the thinking around this issue within the Arbitrators Association in Ontario?

KENNETH SWAN: I think it's fair to say that there were two streams of discussion here.

SUSAN STEWART: He just can't stop himself.

KENNETH SWAN: One level of discussion was interventionist—a number of my colleagues who really wanted to intervene, to get involved in this critically important case. Another group entirely was very reluctant to get involved. They said—and I think probably reasonably—if we do this, we, as Ontario arbitrators do this, we will be effectively seen to be feathering our nests. Now, this is not a seagoing metaphor, not unless it's a sea gull nest. It just looks bad on us to be going out and trying to protect our own turf, our own

business, by saying you shouldn't be appointing retired judges to hear the cases that otherwise would go to us. That discussion went on for quite some time. It was never resolved. The main reason it wasn't resolved is when the affidavits were filed, what turned out to be most of the record was my correspondence, as president of the association, doing what my colleagues had instructed me to do, to try to save the amendments to the Labour Relations Act that had been put in place by a previous government on the basis of a recommendation of a committee for which I was chair. And, on the basis of the recommendations of our association about how the arbitration process should work.

When the conservative government took over, I had written to Elizabeth Witmer, the first Minister of Labour, and subsequently to Jim Flaherty, who was then the second Minister of Labour. I had effectively asked for a commitment not to change the arbitration provisions of the Labour Relations Act, although the government had made it clear it was going to chop away almost everything else that the previous NDP government had put in place. I didn't get an answer from Ms. Witmer, who never got around to responding to my letter. But I did get an answer, eventually, from Jim Flaherty, who said, "Don't worry, Mr. Swan. We have no intention of interfering with the arbitration provisions of the legislation."

So a big chunk of the record going up the way into the Supreme Court of Canada was my correspondence. It was, in fact, the Ontario association that had provided a substantial part of the record.

Michel was involved in the organization of the National Academy's intervention at the Supreme Court level, and the National Academy proved to be the perfect foil for all of this. It gave us an organization with essentially the same interests but a broader geographical scope; international connections and some detachment, at least, from the immediate Ontario issues. Well, they might have been feathering our nests, but they certainly weren't feathering their own. Maybe Michel can continue on the basis of where it went from there.

MICHEL PICHER: Well, yes. I think I was among those who obviously felt at the front end that the Ontario Arbitrators Association shouldn't hesitate to jump in, and it shouldn't be deterred by some cynical turn of mind that would say, "Gee, you're feathering your own nest." Well, yes, I suppose you are. But, you're also very concerned about the integrity of the arbitrator selection process. That's what was being attacked by the minister's administrative action.

As it emerged, of course, the Academy was the perfect vehicle, because we have a record of having intervened, I don't know, probably a dozen times over the years in the Supreme Court of the United States. As a member of the Amicus Intervention Committee, I knew a little bit about that. If we intervened as the Canadian Region of the National Academy of Arbitrators, we would be doing it on behalf of the B.C. arbitrators and the Newfoundland arbitrators, and all arbitrators in the country, which got us around the Ontario featherbedding problem.

It was a fairly high-stakes matter. We could have lost our shirt in that case. If we had, it would have been a fairly unfortunate result. As it happens, the reverse was the outcome. We now have judicial precedent that says the provincial governments, and presumably the federal government, can't interfere with the basic statutory concepts of independent arbitrator selection from an approved panel of neutrals, which, of course, is what they were deviating from in that case in Ontario. So, it worked out extremely well. I don't know how much interest the media had in that particular case. I certainly never got a call. I don't know whether it even got reported.

That media indifference reminds me a little bit of an experience I had when I was doing an environmental mediation once. It was back in the 1980s, and I was invited to do an environmental mediation of a hugely contested dump dispute north of Toronto in the area near Midland, Ontario. There were about 20 parties. Being a Labour guy, the first thing I said was, "Okay. We've got 14 parties. We've got about five municipalities and a good number of citizens groups." I got them all into one room and said, "Now, we're going to have no one to speak to the media. We can't have parties posturing and negotiating through the press. We have to do this behind closed doors." Of course, three days later, headlines appeared in the local press, "Mediator Gags the Press in Dump Dispute." Questions about my "gag order" were promptly raised by the opposition parties on the floor of the provincial legislature suggesting the government-appointed mediator was just parachuted in to get the dump issue off the front pages.

So I thought, okay, I've got an idea. Let's let the media in. All of the parties were okay with that. Of course, our meetings were, to a great extent, presentations on the hydrogeology of the sandy and porous soils under Tiny Township, where the dump was situated and the flows of the effluent plumes through the underground. I mean you could put a patient to sleep for surgery with the stuff that we were doing. After two days of arcane technical

presentations the press disappeared. They just lost interest, and in the end it was no problem.

SUSAN STEWART: Thank you, Michel. Certainly, the result before the Supreme Court of Canada was a spectacular result, a complete victory, and one that set a valuable precedent in terms of independence of the arbitration system in Ontario. Go ahead, Jim, did you want to comment?

JAMES OAKLEY: Just a comment on the case. I think it shows the value of court interventions and that we probably should be doing more interventions if the occasion arises. It is an important precedent. I've actually made reference to the case recently, as our labor legislation was amended to incorporate a labor-management arbitration committee. I'm one of the two arbitrators on the committee. We're working our way through the guidelines for appointment of arbitrators to the roster of arbitrators that would be recommended to the minister for appointment. I have referred the committee to the Supreme Court of Canada decision in terms of the qualifications of a labor arbitrator, that it's not enough to be an adjudicator or to be a retired judge with all the abilities of an adjudicator. To be an arbitrator is much more than that. There's labor relations expertise. This is all in the Supreme Court of Canada decision that qualifications include labor relations expertise, independence, impartiality, and general acceptability within the labor relations community.

I think these are very important points that come out of that decision. If we can do more court interventions as a group, I think we should.

SUSAN STEWART: Well, it was a ringing endorsement of all the things that we hold dear. Ken, in Ontario, there's been a fair bit of activity in connection with the Human Rights Tribunal (HRT). Our arbitrators have been named in complaints. Would you like to comment a bit about that and the role of arbitrators in defending themselves?

KENNETH SWAN: Yes. I should just point out that maybe we might temper our enthusiasm of the Supreme Court's decision a little bit by reminding ourselves of the shelf life of their early pronouncements about the importance of collective bargaining. But apart from that, the difficulty with the Human Rights Tribunal cases is that an arbitrator who is named as a respondent has absolutely no way of mounting a defense. For the sake of full disclosure, I should point out that I am the named respondent in the latest of these, and I hope that will end soon. One of the positions

we felt was important to take right at the beginning was that an arbitrator who is named in a human rights dispute should have a form of judicial immunity. But in addition to that, the arbitrator is simply in an impossible position. The arbitrator cannot respond in any way, because the arbitrator is by statute—at least by the interpretation of the Labour Relations Act, Section 121, I think it is—the arbitrator is neither a competent nor a compellable witness in any proceeding relating to the arbitration process that the arbitrator has been involved with.

So if an arbitrator is neither competent nor compellable, he or she can hardly go leap to his or her own defense. So, right at the beginning, we named the Ontario Labour-Management Arbitrators Association as intervener in all of the six original cases, represented by the same counsel that we had retained for individuals. But with the purpose in mind that if a factual issue should come up that had to be addressed to OHRT, an affidavit could be provided by me, as president. Or, I could be called as a witness as president to testify about the arbitration process. That would never put the arbitrator in the position, one, of asserting a right to be a witness, which would have been dreadful because then arbitrators would be under subpoena almost immediately for every human rights case in which there had been an arbitration proceeding. Indeed, one of the cases was just that, a subpoena to an arbitrator to come and talk about what happened at the arbitration.

The second thing is, we could not put an arbitrator in the position of being cross-examined on an affidavit if that cross-examination were to go beyond the bounds of the affidavit itself and go into the decision-making process. That would be unthinkable.

So we filed those interventions in each case solely for the purpose of providing a mechanism to get stuff before the tribunal, if necessary, but that the individual arbitrator concerned could never present, and we would never want that arbitrator to present. As it turned out, we never did have to establish a factual basis, so, we never used it. But, that tactic, I think, is something that came out of our brainstorming about those cases. And it is a tactic that we ought to keep in mind. From time to time an intervenor can provide material to put before a court or a tribunal that an arbitrator involved in the same circumstances would not be able to submit.

SUSAN STEWART: Thanks, Ken. There may well be questions about that developing area. Now, one of the things that happens periodically is that governments may be interested in our

expertise; it's happened on occasion—Ken, I think a couple of times when you have been invited to give advice to government, and Paula Knopf was involved in a federal review. This is an area that seems to potentially create problems in terms of neutrality. Is there a potential for becoming the "mouthpiece" of government in some way? Is that a real concern? Should we be doing these kinds of things? How do we protect our neutrality in connection with those kinds of things?

MICHEL PICHER: That's tricky. I remember being invited to participate in a kind of a brainstorming thing that was put on by the then Law Reform Commission of Ontario, the chair at the time being Rosie Abella. Rosie had an interest in drug testing, which was kind of a hot topic at the time about which I'd had a few cases, so she asked me if I would come and join in this discussion. I did. I felt I could, as it seemed to me a fairly responsible organism, and the discussion forum, which was not public, was reasonably structured. I could at least go there and say, "Well, as an arbitrator, here's what I've experienced and here are things that I think will be issues as to the civil liberties dimensions, as to the collective bargaining dimensions, and as to the problems unions might be involved with." Because I certainly knew that unions and employees were very concerned about employees who might be using drugs or alcohol on the job. So, it was kind of a complex and interesting topic. I believe nothing in the way of legislation emerged from that particular effort, although a comprehensive report did follow. Overall I felt comfortable in the way it was being done. The positive outcome may be that no U.S.-style general drug testing was adopted in Ontario. There certainly were no media in that forum. It was a closed-door kind of brainstorming.

I think that we're going to be called upon from time to time to do those kinds of things and I don't see why we shouldn't do them. But I guess I'd say you want to first make sure of the structure in which you're going to be involved. I mean, is it wide open? Is it discrete? How is that going to play out?

SUSAN STEWART: You've been involved in a couple, Ken.

KENNETH SWAN: Yes. I was involved in the 1970s in a study done for the federal Department of Justice on the illegal strikes and how to deal with them, along with Bernie Adell, and we produced a huge report. Actually, Nimal Dissanayake, who is now a member of the Academy, was our research assistant at the time. When we produced our report, I guess we thought, well, this will now become the bible on how to deal with unlawful strikes, but it

disappeared from view. When a request was put in to publish our study by ourselves, my recollection is that the answer was, "Well, you get it into publishable form, get the publisher and tell us who that is, and then send it to us, and we'll tell you whether you can do it or not." So that was a lesson.

The second time was the appointment as chair of a committee to advise the Minister of Labour. That minister was in the new NDP government in Ontario, and they wanted to amend the Labour Relations Act. Our committee was to deal with the arbitration provisions of the Act. It was a tripartite committee with a member from management and a member from unions. There was, effectively, an understanding that whatever we reported to the minister would become public and would be available for discussion. That went reasonably well. I stepped down as president of the Arbitrators Association, briefly, so that I could be seen as neutral. My vice president came forward with the association's brief on the subject, which was a little tricky, but, you know, from then on it was a relatively smooth exercise.

Afterwards, I was retained to come and help the people in the Ministry of Labour to put together the new draft legislation. I was retained rather more broadly, not just on the arbitration provisions but on some of the other provisions as well. I found that much more difficult. I was retained as a lawyer, of course, not as an arbitrator, so I was playing quite a different role. But, I think if I had been retained as an arbitrator to do the same thing, I probably would have said no, simply because doing it all in secret is not the way arbitrators like to proceed in giving advice that you are fairly sure will not be accepted. Being unable to go public about that afterwards is quite a significant restraint on your independence and freedom.

SUSAN STEWART: I think Michel and Jim both want to comment on that.

JAMES OAKLEY: I would say that I think there is an important role for us to play on task forces or commissions. It's important to be independent. I chaired a labor standards review board and I think many of us have done this kind of thing where you have public hearings and make a report to the government recommending reform of legislation. In that particular case, quite a few of the recommendations were later adopted into legislation. I felt, after the legislation had been passed, that I could go to conferences or luncheons and speak about the process that was followed and how the recommendations were achieved. But I didn't think it was part

of my role to advocate for the report. Once the report was submitted, then it's in the hands of government to deal with. I think it's important for us to play those kinds of roles.

MICHEL PICHER: I want to just shift the attention away from that to something that I think is worth adverting to, and that is the new reality of the social media, the Internet in particular. We used to arbitrate quite privately, in a hotel meeting room or whatever it might be. Our decisions would go to the parties. We might, in Canada, have to file it with the ministry and it would go into some deep drawer and that would be the end of that, unless it got picked up by a reporting service. So, largely, the arbitration process was fairly quiet and anonymous for the people involved in it.

Then I had this experience. I happen to chair the Canadian Railway Office of Arbitration in Montreal. For many years now we've posted our decisions on the Internet, making them available to everyone in the industry. A few years ago we had a case involving an employee who had been discharged for theft. He lost his grievance in front of me. Several years later he came back, virtually in tears, saying, "Can you please do something? I can't get a job. When I go to apply for a job, I give them my name. They run my name through Google and up comes the arbitration award about John Smith Jones, thief. Now I can't get away from this decision that's floating in the eternal ether with my name on it, that will forever brand me as a dishonest person." In the age of the World Wide Web, arbitration is no longer the private process it once was.

I don't know that I have a solution to this. I'm not sure that thieves should have their names redacted from arbitration decisions. We certainly do redact the names of people who have illnesses and personal problems that shouldn't be made public. But there's a whole different dimension now.

Another aspect of the Web I have experienced was the fun I had going on the various websites of airline pilots, after I issued a controversial seniority decision, to see the kinds of things they were saying about Picher and whether I should hire a lawyer to start a defamation action. Of course, I didn't and I wouldn't. But now there is a big marketplace of buzz out there, around arbitrators' decisions, around the issues we deal with and the people we deal with. I think, as quiet as the hearing may seem, we've got to keep that in mind.

SUSAN STEWART: A related issue is the dissemination of information about our process, as well, by people who may be tweeting

or making reference to it on their Facebook pages. We feel that we control the process; and it probably was the case in the past by the usual order to witnesses not to discuss their evidence. Well, do we really have control of that anymore? And, should we attempt to be asserting control in cases that generate tweets or Facebook postings?

MICHEL PICHER: Pam Picher had a case where one of the counsel was working off his BlackBerry as the case proceeded. As he was making his arguments, he was getting support sources from his office, or from somebody else who was e-mailing him stuff, that he was literally throwing into the case as he went. I guess there's nothing wrong with that. But, that's the world we're starting to live in.

SUSAN STEWART: Ken, do you want to comment?

KENNETH SWAN: Just an observation about the absence of any real control over information that leaves an arbitration hearing. I had a case a while ago, a police civilian employee who'd been discharged for what amounted to sexual assault. He'd been charged criminally. The criminal charges had been thrown out on the basis of improper delay, which seems remarkably to happen to a lot of charges against police officers. I have no idea why—someone should do some research. But, he still had been fired.

And, effectively, the complainant came and gave her evidence and there was some video evidence as well. Ultimately, I found that what he had been accused of, he in fact had done, and I upheld his discharge. But, that's a case where in court there would be a suppression order about the complainant's name and probably a non-publication order about the videotapes, which were from a hotel's security system, and she'd be protected in those circumstances. I protected her, of course, in my award as much as I could. But anybody in the room could have done what they wanted to. If the press had decided to come because it was a police arbitration—and both Michel and I have had that experience, the police somehow attract the press more than anybody else does—they could have reported her name, because they wouldn't have been under any of the same restraints that they would have been in the criminal court.

So, Michel's comments earlier about kicking out the press for the important parts, is only part, I think, of the extent to which we have to find a way to control our process. We have to find some way to ensure that the press will not breach the normal courtesies of

humanity, and destroy someone's life by reporting things, reporting identities that they should never report.

SUSAN STEWART: Thanks, Ken. Well, we have reached the conclusion of allotted time. I'd like you to join me in thanking the panel, excellent panel.

MARGARET BROGAN: I wanted to say three things that I'm very thankful for. One is how many Canadians were on our program. The reviews we've been getting, including this session, are spectacular. So, we're very thankful for that and, very thankful for the new Canadians that have come into our Academy today, that was a joy. The third thing that I'm very thrilled about is that I am no longer Program Chair with Barry (Winograd), and that a Canadian is going to be our next Program Chair. So, Allen (Ponak), we hand you the baton. You'll do a spectacular job.