Chapter 2

DISTINGUISHED SPEAKER ADDRESS: A TRIBUTE TO THE GUARDIANS OF WORKPLACE JUSTICE

Introduction

Daniel J. Nielsen[1]

As a program chair, the last thing you want to see two days before the conference opens is an e-mail from one of your luncheon speakers. Late Monday afternoon, our scheduled speaker advised me that she would not be able to attend. As luck would have it, though, I am an old-hand at this type of thing.

In 2004, I was the president of the Association of Labor Relations Agencies (ALRA), and we had a beautiful conference set in Halifax, Nova Scotia. I had a distinguished luncheon speaker who was the then chair of the Canada Industrial Relations Board, an old friend, Warren Edmonson. Warren, a vital, fit figure, decided to prove that by going skiing the week before the conference, and he encountered a tree. Warren called me and mentioned that he had encountered a tree and that his arm was completely useless. He was severely disabled. So I explained to Warren that he was really just speaking and there wasn't that much lifting involved. Warren was unmoved. So I called Liz MacPherson and was pouring out all of my troubles and crying on her shoulder. Liz was, at that time, the moving force of Federal Mediation and Conciliation Service Canada. She got tired of listening to me whine and said, "Let me make a call." A week later, I was introducing the newly minted Minister of Labour of Canada for his maiden speech as Minister at the ALRA conference. So I thought to myself, well, it worked once. So, I picked up the phone and called Liz. She paused for a moment, clearly judging the value of getting caller

[1]National Academy of Arbitrators, Lake Bluff, IL.

ID, and then she graciously agreed to be our distinguished luncheon speaker. We could not be more fortunate.

Elizabeth MacPherson is the chair of the Canada Industrial Relations Board. Over time, she has held virtually every position of influence in federal labour relations service. She is deservedly one of the most influential and important voices in the labour relations field in Canada and, indeed, internationally. Liz has received numerous honors and recognitions, most recently in February of this year, when she was presented with the Queen's Diamond Jubilee Medal for her distinguished service to the people of Canada.

With that, it is my pleasure and my honor to introduce to you a treasured friend and an esteemed colleague, our 2013 Distinguished Speaker, Elizabeth MacPherson.

Distinguished Speaker Address: A Tribute to the Guardians of Workplace Justice

ELIZABETH MACPHERSON[2]

Thank you, Dan. The part of the story that Dan doesn't know is that it cost me a lobster dinner to get the Minister to come to Halifax. So, when he called me this time, I figured it would be cheaper to do it myself.

So I've only been distinguished since Monday, which didn't give me time to let my hair go grey. But I have, in the four days since Dan called me, been furiously jotting down notes and thoughts. As a result, this presentation is going to be more like a James Joyce stream-of-consciousness thing than a nicely polished presentation.

I began my career as a neutral, as a mediator with the Canadian Federal Mediation Conciliation Service. I was absolutely convinced that mediation was the very best job in the world, especially for those who need immediate gratification. Because it's always rewarding to know that you've helped the parties to find a resolution to their problem that they might not otherwise have found on their own.

I came to the job at the Canada Industrial Relations Board in 2008. I soon became convinced that board work is the best job in the world. It has a greater scope of influence than just collective

[2]Chair, Canada Industrial Relations Board, Ottawa, ON.

bargaining. You get to make decisions about a wide array of labour relations issues.

As I come to the end of my term at the Board, I'm starting to see your work as rights and interest arbitrators as probably the best job in the world. You have the opportunity to experience the best of both mediation and board work: a wide scope of interesting issues to resolve, and the satisfaction that comes with helping the parties to resolve their differences.

Now what these three functions—mediation, adjudication, and arbitration—have in common is that they are critical to the functioning of our labour relations system. Together, we are what I would call the guardians of workplace justice.

I hadn't really appreciated the degree of interplay between our respective worlds until recently. The Board received an application from a union for determination as to the appropriate method of dispute resolution for a bargaining unit that is subject to our maintenance of activities provision. This is a statutory requirement that the parties continue services that are necessary to prevent an immediate and serious danger to public health or safety in the event of a work stoppage. In this particular case, the parties had agreed that all of the employees in the bargaining unit—airport firefighters—were essential. They had included a clause in their collective agreement that, if they couldn't reach agreement on a new collective bargaining agreement, the dispute would be resolved through interest arbitration. The reason the matter came before the Board was because the parties could not agree on whether the arbitration should be conducted by a sole arbitrator or by a tripartite panel. The employer took the position the Board had no jurisdiction to decide the issue. In their view, the procedural issue should be submitted to grievance arbitration, as it required the interpretation of the collective agreement, which clearly, in their view, called for a sole arbitrator.

The union argued that the procedural issue could not be submitted to grievance arbitration because the collective agreement had expired, and the parties were in the open period, during which only discharge grievances can be submitted to arbitration under our statute.[3] The union argued that, in any event, past practice suggests that the parties had agreed that the collective agreement was permissive and contemplated a tripartite interest arbitration process.

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[3]Canada Labour Code, R.S.C. 1985, c.L-2, as am. at s.67(6).

Ultimately, the Board decided that because there was a dispute between the parties over the interpretation of their maintenance of activities agreement, the Board's public interest role was engaged. We found that the level of service to be maintained was such that a strike or lockout would be ineffective and, thus, the Board had the requisite authority to order a binding method of dispute resolution. We were, therefore, interpreting the statute and not the collective agreement.

We also observed that the Board is not restricted as to the type of dispute resolution mechanism to be prescribed, so long as it will result in a full and final settlement of the collective bargaining dispute.

Reaching and writing that decision caused me to think about all of the circumstances in which our statute relies on arbitration and establishes links between the Board and arbitrators.

First, and most obvious, is the requirement that all disputes arising during the term of a collective agreement be resolved without a work stoppage. This has caused most parties to include a grievance arbitration provision in their collective agreements. Under Section 65 of the Canada Labour Code,[4] arbitrators can refer questions to the Board, such as whether there is a collective agreement, who the parties to it are, and whether a particular employee is covered by the agreement.

In our statute, in addition to prescribing arbitration as the dispute resolution mechanism for essential services disputes,[5] the Board is authorized to arbitrate the terms of a first collective agreement when invited to do so by the Minister of Labour. The parties can also, themselves, agree to submit a collective bargaining dispute to binding interest arbitration[6] or to adopt a conciliation board recommendation as a settlement.[7]

In addition, our Board regularly defers to arbitration when the subject matter of the complaint is better dealt with in that forum. A good example of that is our duty of fair representation complaints: when an employee complains to the Board that the union hasn't represented him fairly. Frequently, these complaints are made when the union hasn't even decided whether it's going to take the employee's grievance to arbitration or not. So the Board

[4] Op. cit.
[5] *Ibid.*, s.87.4(8).
[6] *Ibid.*, s.79.
[7] *Ibid.*, s.78.

will defer deciding the complaint until the arbitrator has dealt with the grievance.

All of this is to say that arbitration is a critical and integral component of our labour relations system.

I'm not saying this to make you feel good about the work that you do, although you should feel good about it. I'm saying it because, although it may not be as obvious, I believe that the practice of labour arbitration is as vulnerable to the threats that are currently being directed at labour boards as the boards are.

Two key functions of labour boards are to certify trade unions as bargaining agents and to ensure that the rules governing collective bargaining are respected. If a board is not able to do its job, the labour relations system degrades over time and becomes dysfunctional.

I had an opportunity earlier this week to spend some time with the former chair of the National Labor Relations Board, Wilma Liebman. I was dismayed to learn that the unionization rate in the private sector in the United States is down below 7 percent, and I was appalled to hear about what is going on with appointments to the National Labor Relations Board. If I understand the U.S. system correctly, there's a good chance that if the political issues cannot be resolved, the NLRB will lose quorum and be unable to function as of the end of this year.

What is happening at the NLRB is just one example of the ongoing attack on all the institutions of labour relations, both to unions and to the neutral agencies that promote sound labour-management relations. We heard from Professor Hurd this morning,[8] and that was a chilling presentation.

Canadians have no reason to be complacent. It's true that our private sector unionization rate remains around 30 percent in the federal jurisdiction, but it's only 16 percent in Canada as a whole. We can see the same disturbing trends in efforts to weaken the foundations of our labour relations system. You're probably aware of Bill C-377, which will require detailed reporting of revenues and expenditures by trade unions. It's been characterized, by certain parties, as an anti-labour bill that is dressed up as a tax bill.

Earlier this week, another private members' bill, Bill C-525, was tabled in Parliament. It would amend the Canada Labour Code and the Public Service Labour Relations Act to require mandatory

[8]See Chapter 15, "Can U.S. Public Sector Collective Bargaining Survive the Tea Party?," this volume.

representation votes in all cases. It would eliminate our current card check system for certification and allow decertification applications to be filed with less than majority support.

We're also informed that, at the end of June, the Conservative convention will be debating Right to Work laws. There's already talk among certain government members of abolishing the Rand formula (our union dues check-off provision) for federal public servants.

Another current legislative initiative would not only permit the government to set the mandates for the Crown Corporations it owns, but also to have a Treasury Board observer at the bargaining table and require government ratification of any settlement reached by a Crown Corporation.

All of this is taking place in a context where we know the government is considering major reforms to administrative tribunals generally. They recently combined three organizations that dealt with employment insurance, the Canada pension plan and old age security into a mega-tribunal called the Social Security Tribunal. It made sense to merge the three boards into one. But the scary thing about it is that the chairperson of the Social Security Tribunal is not the chief executive officer. The chief executive officer is actually the deputy minister of the department. The employees of the Social Security Tribunal are not employees of the tribunal, they are employees of the department. Ask yourself how independent that tribunal is going to be when it is reviewing decisions made by other bureaucrats in the department.

Taken collectively, these initiatives cannot help but weaken the union movement, reduce unionization rates, and, therefore, the size and health of the community that we all serve.

I suggest this is a situation of which we cannot afford to remain neutral. We need to collectively stand up and defend the right to freedom of association, the labour relations system, and the institutions that support that system. For all of their faults, these institutions are the ones that ensure a just share of the fruits of progress to all.

Thank you.