

## CHAPTER 17

### FIRESIDE CHAT WITH J.F.W. (TED) WEATHERILL

**Interviewed by:** John Kagel, Member, National Academy of Arbitrators, Palo Alto, California

**Kagel:** Good afternoon. I would like to welcome you to the site of the 1997 50th Anniversary Black Tie Dinner. George Nicolau was the Academy President at that time. I think it's appropriate that this room has been selected for this event. I have a few surprises, I hope, for you.

Ted Weatherill is first or among the first full-time arbitrators in Canada. He had a distinguished but short career as a law professor. He's an author of authoritative books and articles on labor procedure in Canada. He is bilingual. He was the Chair of the Canada Labor Relations Board. He's been President of the National Academy of Arbitrators.

**Weatherill:** I had a wonderful dinner, many years ago now, with Mark Kahn, just the two of us. And we were talking about life, and how we got into this profession, and what our lives have been like. Both Mark and I are the sons of dentists. Our fathers were not terribly successful because of the problems that they had facing the world. They were good dentists, good people. But their financial lives were not that great for various reasons.

As a result of that, we were more or less brought up by our mothers. And our mothers faced adversity and overcame it. The main influence on my life was my mother, who had been brought up comfortably. Went to a nice girl's school. Didn't go to college because she didn't feel like it. Married my father, a lovely man, but it was a mistake. And then found herself having to make a living in a world for which she was not really prepared. That was sort of like Mark's mother, who made a very successful living in the business that she developed. Made life a lot easier for Mark. And my mother made a very successful career in the publishing business, which was a fascinating thing for me.

I had the experience of seeing my mother work very, very hard in a time when women's careers were difficult and when the business world was an unjust place for a woman to work, and I saw

that. It affected me deeply. My parents did live together from time to time. And when they lived together, they would argue quite a lot. And I could hear that as a little kid. I really believe that that is why I don't like confrontations. I avoid them when I can. And I think that's why I'm an arbitrator.

**Kagel:** You were a philosophy major as an undergraduate. In your senior year you discovered something called "legal philosophy."

**Weatherill:** A good pal of mine from school and I decided we would go to college at the University of Toronto. At that time you could choose; now you'd get chosen if you're lucky. But most of our colleagues from school went to another college. So we went where they weren't going. And that was a good thing, too, because it was very exiting. The subject of philosophy is one of the great academic disciplines. It was pretty hard, a four-year course, and it was wonderful.

But I knew that I would never really achieve anything earth-shattering as a philosopher. I didn't want to get a job as a philosopher in some third-rate university; I wanted to do something better than that. But I didn't know what do. I didn't want to practice law. I couldn't be a doctor, and I didn't want to. I couldn't be an architect. I had been a fan of Frank Lloyd Wright and I wanted to be an architect. Couldn't do that. I didn't want to be a stockbroker. And what else is there? Nothing. So I just had to wait and study philosophy. And then I took this course in legal philosophy. It was an interesting thing to do. And then I can go to law school and I can get through that and do legal philosophy. I can be a big fish in a small pond instead of a small fish in a big pond.

So I went to law school and was lucky enough to go to a very special law school at the time. The University of Toronto now has a big faculty—probably the best in the country—but when I attended it was a very small faculty. At one time, Wolfgang Friedman, who came from Columbia, taught there. I didn't catch his course, unfortunately. He'd gone before I got to that level.

I did further legal studies at Harvard. That was nice. And I was a student of Lon Fuller, which was wonderful.

After that I got called to the bar. Never practiced law. For the first three years I taught at a law school in downtown Toronto. It's now attached to York University and is the second largest law school in Canada. I never taught labor law, which is what I liked, and I never taught jurisprudence.

There was such a thing as labor arbitration, but it wasn't possible, really, for Canadians to make a living at it. In the United

States, there were people who actually were full-time labor arbitrators. It sounded to me, knowing that I wasn't doing anything as a philosopher, that this was what I really wanted to do. For the first time I had a focused ambition, which was to become a labor arbitrator. And I give praise and thanks that I was able to realize that through good fortune.

**Kagel:** As I understand it, you took one of the vice-chair jobs with the Ontario Labor Relations Board?

**Weatherill:** Yes.

**Kagel:** And by a stroke of good luck, if not good management, somebody kicked Circuit Court judges out of the arbitration jobs.

**Weatherill:** I had been offered a job by Jake Finkelman as an administrative law judge. I had even done my first arbitration case in January 1960. Anyhow, I heard one or two arbitrations. And when I realized that I didn't want to stay teaching law and my only hope was for the Labor Relations Board to move more toward arbitrations, I called Finkelman and said, "Is that offer still open?" He said, "It is." So I came and had an interview with him. And I said, "I want to do arbitration." And he said, "I encourage that. You will have time to do that. Obviously, your work here comes first. But there will be time when you can do some arbitration." And I said, "Thank you. That's great."

As a result, I moved back to Toronto, thank God, and began work with three good things about it. One, I worked with a very nice group of people, led by Jacob Finkelman, a great man, one of the most important figures in the development of labor law in Canada. Two, it was a group of really nice colleagues, about half a dozen of us. It was very collegial, very companionable, and with good people, including Howard Brown. And three, I was hearing cases day after day, which were fairly simple cases. But occasionally I'd get some of the more interesting ones. And it gradually developed into handling cases with more complexity to them.

I had one other good piece of luck because I'd been to Harvard and had an extra degree. It was the early days of the publishing of arbitration awards in Ontario. And they began to get a little more professional. So they wanted someone with some degrees at the end of his name to be the editor of the Labor Arbitration cases. So I got to do that. And it paid a little bit of money, which was nice. But there were two main things: you got to see the work that the arbitrators at the time were doing, and most of it was sloppy. Some of it was very good. You got to do the editing of all that, which was

great. And second, you got your name on the front of the Labor Arbitration cases, which was great.

As the result of all those factors, I got asked to do some arbitrations in the time I had, and it would be maybe one in the first month, two in the second month, and so on. And I was there for three years. At the end of that, I was doing about two a week or maybe more sometimes. And it began to get a little edgy, getting too much, and colleagues were getting a little envious.

So, you could see things building up. And it was then that the economic miracle happened. The federal government appoints what are called County Court Judges in Ontario. They're federal appointees, maybe a hundred or so. But in the rural locations, the County Court Judge is a pretty big cheese, has lots of spare time, and is usually a sophisticated-type person. In the cities, they work hard and they don't get paid well. And it's too bad. There were about a dozen or so of these County Court Judges who got virtually all the labor arbitration hearings. But they couldn't write very well, with but four or five exceptions.

Well, there was lots of money doing all this arbitration. The city judges were envious. Judges generally aren't the right group to be chosen to do labor arbitration, although some did it well. So, there was a little turmoil with respect to that. Therefore, the federal legislation was changed under Pierre Trudeau, dear friend, Mr. Trudeau. The best thing he ever did was to prevent judges from accepting fees for extra work. And that's the economic point. It changed a buyer's market into a seller's market, just like that. The arbitrators saw it, and it was terrific. I got all sorts of letters asking me to be an arbitrator. I then had to decide whether I was going to stay at the Board or whether I was going to achieve the only ambition I ever had or still have—to be an arbitrator. So it wasn't hard. Left the Board, and took my secretary with me. Set up a small office in downtown Toronto.

**Kagel:** Well, now that you became an arbitrator—and you were a very busy one, as you just described—permanent appointments started rolling in, I take it.

**Weatherill:** Yes.

**Kagel:** And they were practically gushing about the way you wrote decisions.

**Weatherill:** Well, I took the lessons to heart. Let's just keep it short and to the point. Don't get too convoluted. I find that's true because when you're writing, the longer it takes to explain your-

self, the more likely it is that you're wrong. And you've got to go back and unravel it. It's getting too complicated.

**Kagel:** Do you do several drafts and reduce it?

**Weatherill:** No.

**Kagel:** Is it pretty much a first time around kind of thing?

**Weatherill:** Generally, it's the first time around.

**Kagel:** So what do you think you've contributed to the practice of arbitration in Canada?

**Weatherill:** About 5,000 wonderful decisions.

[Audience laughter.]

**Kagel:** You wrote a book on procedure. You have two editions. I don't know what the first one was about.

**Weatherill:** It's very embarrassing, the second edition, because it's practically identical to the first edition.

[Audience laughter.]

**Weatherill:** I'll talk about the book briefly for you because I thought it was a good idea. It's not really a text at all. And it's not an analysis of decisions. In hearing cases, sometimes there are serious procedural problems. People will object to hearsay, or you can't do that or we're not prepared, whatever. Various forms of objections are raised. And the great majority of objections you can deal with. You can say, "yes, that's hearsay," or "no, it isn't." You can do it immediately—the moment the objection is raised. You can deal with it like that. Or, say, "What do you think? Here's your objection, what do you say on the other side? What is the response?" And, then you give them an answer quickly. Or sometimes there will be a difficult objection that will matter to the course of the case or to the length of time it takes. And you want to think a little about your decision. So you say to them, "That's a serious objection. I'm going to take a few moments for a recess. And I will give you my decision." And I write it out. I'm a great believer in writing things out.

Never decide something you can't give a reason for. So I would write that piece, put in a few lines, maybe even a paragraph, saying why such and such an objection was granted or rejected. And I would say to the parties, this has been an important point and I will put this into the decision, subject to my editing it. And then after some fair a bit of years, there were a lot of decisions, some of which contain these little pearls of wisdom, that were lost to an eager world.

So one summer I hired a law student to go through all these things. We put them into the computer and then used that as the skeleton for this book about procedures. It includes various didactic pronouncements by myself on how to do things. It's a slender volume. But it apparently did quite well.

The second edition was done after a long gap. I hadn't produced any of these pearls of wisdom because I was doing other work. And, anyhow, I couldn't do another one without really trying to do a whole text on procedure of labor arbitration. And that's a big project.

**Kagel:** So what about the bench decision question, whatever that involved?

**Weatherill:** Some years ago, we would have discussion in the Academy about saving money and saving time and getting decisions right away. "I heard the case; let's have the decision right away, especially on a discharge case because those are so important to people's lives." I know some of these judges who hear discharge cases, they send a telegram saying, "Reinstate. Reasons to follow." Well, folks, "reasons to follow," once you have given that kind of decision, are not reasons. They are justifications. Unless, of course, you have the courage to write out the real reasons and then change your decision, which is very difficult, even if you're courageous. It proves you're a fool. Because a bench decision is a gut decision. And why should people have gone through the grievance procedure, had a hearing, and paid you all this money for a gut decision?

You should not take long to write decisions. People who delay writing decisions should be ashamed of themselves. You should get at it and get the decision settled. Fine. They should be reasoned. They don't have to be long. They should be logical and they should persuade you. And you shouldn't issue a decision until you've written it out or typed it out. I'm a believer in tactility. Anyhow, you'll be writing it up. And you sign it. You send it. That's a real decision. These other things are gut reactions, and, you shouldn't get paid for them.

**Kagel:** As I understand it, the practice in Canada is that all decisions are supposed to be published in some fashion, or through the current editor of the Labor Arbitration Cases or whoever your successor is at the moment. And so I was curious about that practice, because in the United States we don't have something that's similar. Now, what happens if you don't choose to have a decision published? Do you get punished?

**Weatherill:** Well, you could. No, they're not all published. They all have to be filed with the appropriate government agency. But in most provinces and for the federal jurisdiction, arbitration awards are to be filed. And I send them all. When presented to the editors of the arbitration cases or arbitrator publishing agencies, they become public documents. They can go through them and publish those they think have merit. They don't all get published, by any means, but they're all public documents.

**Kagel:** Now, you've had some cases in the United States, is that right?

**Weatherill:** A few many years ago, yes, once in upstate New York.

**Kagel:** And you get in contact with all our colleagues year after year. Is there anything further about the American system of arbitration that differs from the Canadian experience?

**Weatherill:** I think the differences are probably more regional. Certainly in upstate New York, they didn't seem too upset by what I was doing, which is what I always did. And from time to time, some carpet-bagging American lawyers would turn up in Southern Ontario trying their sophisticated Yankee pap. But we would handle it then.

[Audience laughter.]

**Kagel:** Well, they made a mistake with me, because I did get some British Columbia cases. One of the things we Americans have also marveled at is the practice that you can go online and you can find arbitrators' calendars.

**Weatherill:** Yes.

**Kagel:** And if the parties happen to like you as an arbitrator, and they see you've got a vacant spot on Thursday of next week, they can call you and say, "Come and do my case." Is that a good thing?

**Weatherill:** Yes.

**Kagel:** Why?

**Weatherill:** I like it. What they do is they agree on a date. That's the hardest part of the case. And they're more concerned about the date than they are about the arbitrator, although they don't want the loony arbitrators.

Ontario is a highly industrialized province and moderately organized from the union point of view. So it's fairly sophisticated, but the list of approved arbitrators is well over 100, which is too many.

**Kagel:** My wife, Mary Pat, who regrets that she is not here, has a question, so I said I would carry it on. We had the pleasure of visiting you and Nicole in Ottawa, and you said that the harpsichord was out for repair. Was it really a harpsichord and where is it?

**Weatherill:** Well, it was a harpsichord. It has not been repaired. Still is a harpsichord and it still isn't there. The sounding board is cracked and I'm sorry to say I don't play the harpsichord anymore. But I also have a piano. And Mary Pat played a little, wonderful bit of Scarlatti on the piano. And she really pleased me by saying, "It's not so badly out of tune."

[Audience laughter.]

**Kagel:** How comforting that must have been. One other question on the Canadian procedure is that we've also been led to believe that the practice in Canada—once you get selected off this calendar system or by your merits or whatever—is that you're expected to mediate the dispute as opposed to having a formal hearing, and only if that fails do you have to go through the formal process. Is that true?

**Weatherill:** That is done a great deal. Some lawyers really want mediation above all else. Others don't. I think the arbitrator should be very sensitive to the requirements of the parties. The parties vary a great deal in sophistication. Some have counsel whom you know and who have been at it for a long time. It's just natural how it is going to unfold. And if they want to do some mediating, they can say, "We're going to talk for a few minutes." I say, "If I can be of any use, I'm here. That's what I'm here for." They say, "Thank you." They don't need me at all because they're very sophisticated. They will probably settle the case. You spend the morning sitting around. It's a good idea to have a book because you run out of the daily papers. And they settle it because they know what they're doing.

A few people don't know what they're doing and then you take more charge of the case. You hear what it's about. And depending entirely on what you've heard, you may or may not say, "Let us move toward the possibility of settling this." We do it very delicately because you don't want to frighten them. They're easily frightened. There are other arbitrators whom I know who have this type of skill much more than I do. You feel it. You have a good feel for what these parties can accept, where they're going. What are the real possibilities? I have some ideas about that. But it all depends on who you've got, what they understand, how they get along with each other, what their degree of sophistication is. So there's no requirement that you have to mediate first.

**Kagel:** Now I'd like to switch a little bit. You served as Chair of the Canada Labor Relations Board. It was a position where you gave up your private practice for nine years. You went from a

position where you were solely in control of a proceeding, where your decisions could not be questioned in any meaningful way, as you've already described, to heading an institution. And so for those of us out here, who are waiting for an Obama appointment, would you describe the pluses and minuses of such transitions?

**Weatherill:** Well, I had been arbitrating for 21 years, which I thought led me to maturity or something. And it was time to do something else. I also had been on the Ontario Labor Relations Board. I thought I knew what the Labor Relations Boards did, but I didn't know that. The sorts of cases were the same, but the Canada Board is a little different. It's not as big as the Ontario Board, which is very large, relatively speaking.

The Canada Board deals with a narrower jurisdiction, which involves matters of national scope like the railroads, airlines, and broadcasting. But it's a strange mix of stuff. And they do not only certifications and bargaining questions, but also safety complaints, unfortunately. All that is interesting work, and I was used to that.

And when I arrived, there were a group of colleagues on the Board, vice-chairs and members. The members were not necessarily representatives. The vice-chairs were independent. The members usually had a labor or management background, but not in any organized way. They weren't equally balanced. They didn't sit as labor or management representatives. And for the most part, they behaved as neutral members. To the extent that they were experienced in the field, as many of them were, they were excellent.

But it was a bigger organization somehow or other. It had a bureaucracy that I wasn't used to, and it involved managerial work of which I really had no experience. I also did not realize how political it was. I was appointed by Prime Minister Mulroney, but I was not a Conservative when I was appointed. Mulroney had appeared before me as a lawyer in the early days and was a good labor lawyer.

When I arrived, I expressed some desire to have at least some input into appointments and was assured that I would have input, although I didn't control them. And one or two of the earlier appointments were good, very lucky. And then that just all fell apart. They became, for the most part, political appointments, and some of them very bad. The atmosphere in the place went very sour, and there were a number of just bad decisions. Still, most of the work that was done was good. The vice-chairs did a good job. They did the best they could. And they knew what they

were doing. The decisions were fine. I myself got to hear a number of cases. But the atmosphere went downhill and it became miserable. It was a bad experience.

**Kagel:** It seems that Canadian arbitrators are destined to higher or different jobs, judicial jobs, to a much greater degree than American arbitrators can aspire to, or at least have been appointed to. I think we've had one Circuit Court judge out of our ranks.

**Weatherill:** Bora Laskin was Chief Justice of the Supreme Court of Canada. Alan Gold was the Chief Judge of the Labor Court in Quebec, before becoming Chief Provincial Judge, before becoming the Chief Judge of the Superior Court of Quebec. There have been other members of the Academy, like Nathan Green of Nova Scotia, who was a busy arbitrator and a wonderful judge and a great man.

**Kagel:** Do you want to pitch in on this business about the ability of arbitrators to do statutory rights cases?

**Weatherill:** When I read about *Pyett*, I wondered why the Academy had actually intervened. I don't really like it much, having the authority to hear these statutory matters.

Under Canadian legislation, arbitrators have all sorts of discrimination and accommodation cases. And even if they're not in the collective agreement, they have a concurrent jurisdiction with, say, human rights tribunals, which tend to be nasty organizations. They are the wellspring of political correctness. They don't do very good work for the most part. That's my view.

**Kagel:** The last thing we have is about the Academy. And I will relay that, when I did my presidential tour around the regions, I was privileged to go to the Canadian region, which at that point was meeting in some very lovely resort about 30 or 40 miles north of Montreal, where we took a limo for dinner. Maybe it was my fault you no longer did that sort thing in Canada. But I also understand that is changing and Canada is going back to having its own form of meeting. Are you planning to reinstate this rather lovely tradition that you had in the past?

**Weatherill:** Well, I'll tell you, you didn't bring it to an end. Can I go back? Go back in time? Do we have enough time?

**Kagel:** Well, it depends on how many centuries you're talking about. Yes, we have some time.

**Weatherill:** Humor me. The Canadian region began in 1974, when I got a letter from then-President Dave Miller, saying "You are the Chairman of the Canadian region." So I thought, at first, it doesn't look too good. But I accepted. I went into Howard Brown's

office and I said, "Howard, this is actually good. It means we have to have a meeting. And we get to say where the meeting is going to be. And what it's going to be like." So I said, "Now, where would you like to go? I think for this first meeting we should go to Quebec City," which is a beautiful place, you know. By this time, the total membership of the Canadian region was 11. We were going to get the government of Quebec to pay for a lovely dinner.

[Audience laughter.]

**Weatherill:** "And we're going to proselytize for the Academy. We're going to invite arbitrators known to us, especially from Quebec, also Eastern Canada or anyone we think of." We had a good meeting. Frances Bairstow was there, of course, and it was terrific.

I'll now talk, also, of my credible language skills. I had just really learned to speak French seriously. I had high school French, but it doesn't count. But I said to myself about a year or two before, this was in an era of Trudeauistic, jingoistic patriotism, I said, "It's not right that I can't speak the other official language of my country." So I went to a language school and learned to speak French. And it worked very well. I speak French pretty well. I hear cases in French. Write decisions in French. This was one of my early tests. And I went to Quebec City and I made a speech of some sort all in French, not a word in English. And, anyhow, Cabinet Ministers came up and said, "We've haven't had any one of you Anglo square heads talking nothing but French here ever."

We had meetings across the country for a number of years in interesting places. We couldn't always get the governments to cough up as much as the government of Quebec had done. But we did what we could. And we had nice meetings and proselytized for the Academy and a few more members joined.

Then—this is the fault of the Academy Board of Governors—we decided to have the Fall Conference because the Canadian meeting is usually in the fall, this being a big meeting. Two meetings a year is enough to travel to. It's a big country. But the fall meeting made it really too much. After that the Canadian meetings declined in attendance. And we were saying, "This really can't go on. I don't know what we're going to do." And you were there. And you had the idea of "We'll tag along to the annual meeting and hold a Canadian session," which we do. Canadians don't know much about the Academy.

**Kagel:** My final question to you has two parts. You've traveled the world. What is your favorite city? And what place have you not been to yet that you would like to go?

**Weatherill:** This may surprise some of you. Paris is my favorite city.

**Kagel:** Oh, that's shocking.

[Audience laughter.]

**Weatherill:** That's the most wonderful place. But one I discovered only last year is Sydney. Sydney is a great place. It would be nice to live there, because my son lives there.

**Kagel:** Ladies and gentlemen, Ted Weatherill.

[Audience applause.]

**Weatherill:** Thank you very much.

APPENDIX A

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