CHAPTER 2

SMALL CLAIMS GRIEVANCE ARBITRATION

ALAN B. GOLD*

I.

Actually, I am always a bit nervous when being introduced to speak. It goes back to the day some years ago when the chairman, after going through my C.V. at interminable length, concluded his remarks with a flourish: "Many of you have heard Judge Gold before; those who have *not* will be eager to hear him." That's somewhat like Disraeli's reply to a writer, devoid of talent, who had sent him a copy of his latest work: "Many thanks for your book," Disraeli wrote, "I shall waste no time reading it."

I have drafted my text in English, but you will understand, I am sure, if I thank our host province and city in the official language.

Par courtoisie envers nos amis américains, j'ai rédigé mon texte dans la langue de Shakespeare, mais je m'en voudrais de ne pas dire quelques mots dans la langue de Molière, si ce n'est combien je suis heureux de voir parmi nous notre nombreuse équipe d'arbitres québécois et d'exprimer, dans la langue officielle, en mon nom et au nom de l'Académie, nos remerciements et notre appréciation au Gouvernement du Québec et à la Ville de Québec pour leur courtoisie et leur accueil chaleureux.

Being a man of the law, I am trained to rely on precedent. After all, where would a judge be without a precedent to fall back on or to distinguish, if necessary? You will not be astonished to learn, therefore, that in preparing for this occasion, I looked back to see what others had said in similar circumstances. This, naturally, involved me in research—an exercise which should strike a chord of sympathy among those of you who toil,

*Member, National Academy of Arbitrators; Chief Justice, Superior Court of Quebec, Montreal, Quebec.

or pretend to toil, in the groves of academe. Of course, I did not hold the illusion that my research in this field would extend the frontiers of knowledge, but I saw in it the merit, at least, of being an exercise in synthesis. And synthesis, as you know, is defined in academic circles as borrowing ideas from a number of others, rather than plagiarizing from a single source.

In this connection, I cannot resist reading to you what Professor J.B.S. Haldane wrote about Lord Birkenhead who had borrowed—not to use a stronger term—too heavily from Haldane's work without proper acknowledgement, and I quote: "I have no objection to anyone treading in my footsteps. I object to him stealing my boots to do so."

Here then is the fruit of my research:

1. Whenever arbitrators meet, much of their time is spent in navel gazing, soul searching, breast beating, shirt rending, the sprinkling of ashes, and, of course, the gnashing of teeth, punctuated, from time to time, by soft moans and sad cries of "mea culpa." (My, how I do get carried away!)

2. Everything that can possibly be said about labor arbitration has already been said and, in many cases, better than I can possibly say it, and, worse still, said as recently as our sessions this week and, indeed, this very morning!

3. For that reason, speeches to the Academy are hard to make and, for the same reason, hard to listen to. I don't know who is worse off in the circumstances, the *speaker* or the *listener;* I guess, on balance, the *listener* since few of you, I imagine, have had judicial experience and you are not, therefore, trained to sleep with your eyes open.

4. Our meetings are much like Sunday morning church services, with the priest preaching to the converted, while the unconverted, the infidels, to whom the message is addressed, are either sleeping at home or are out on the golf course.

II.

Further research and reflection prove, without peradventure, that members of the Academy fall roughly into two categories: (a) *lawyers* who think they make better arbitrators because they know the law, and (b) *nonlawyers* who think they make better arbitrators because they do not.

Surprisingly enough, members, moving with astonishing ease from one category to the other, also fall into two distinct groups:

(a) those who, with refreshing modesty, call themselves *simple contract readers,* and (b) those, somewhat less modest, who are prepared to go beyond the contract and to read and interpret laws, statutes, regulations, and anything else (including Playboy, Playgirl, Penthouse, and Hustler) that the parties, in their infinite wisdom, think pertinent to the issues.

I expect that, philosophical considerations aside, the contract readers believe they have more than enough to do in trying to understand what the parties have written—and who can blame them? Contracts today have become in the main bigger, fatter, and heavier than most novels except, perhaps, *War and Peace,* and certainly not as interesting to read. In any event and, alas, they don't have the titillating effect of *Peyton Place*—or does that date me? How about *Fanny Hill,* or does that date me even more?

As for where I stand on this issue, I nail my colors to the mast and say that I belong to the second group, not because of the uplifting nature of the glossy publications to which I have referred (there's a pun in there somewhere), but, as you might guess, by professional deformation. For statutory construction is my business; it comes with the territory, as it were.

Mind you, from time to time I think that matters have gone a bit too far. Of late, I have come upon a statute or two that have given me pause. Let me give you an example for your instant bewilderment, if not pleasure.

I refer to an English statute, The Land Compensation Act 1961, and particularly to Section 26, subsection 3:[1]

> "I shall attempt to read section 26 (3) with the measured tread that it so richly deserves:
>
> " 'Subject to subsection (4) of this section, subsections (3) and (4) of section twenty-five of this Act shall apply where the provisions of section twenty-three of this Act have effect as applied by subsection (1) of this section as they apply where those provisions have effect as applied by subsection (1) or subsection (2) of the said section twenty-five.'
>
> "You may be consoled to know that a musical friend of mine has observed that with a little ingenuity this can be set to the tune of O God our help in ages past."

---

[1]I acknowledge my indebtedness to the Honourable Sir Robert Megarry, Vice-Chancellor of the Chancery Division of the High Court of Justice, for the citation that follows. *Temptations of the Bench,* 12 U.B.C. L. Rev. 145 at 157 (1978), hereinafter referred to as Megarry.

Lest you smirk and think "We don't do things like that back home," may I cite to you a gem from a Florida statute:

> "It is very short; but I think that it ought to find a place in every statute everywhere; it is unlikely to do much good; I am certain that it would do no harm; but it should be included for the sheer beauty of its language and the nobility of its concept. It runs as follows:
> " 'Whenever applicable, the provisions of this Act shall apply, notwithstanding any provision of this Act to the contrary.' "[2]

III.

All these things, of course, you know and have always known. Why then do I labor the obvious—surely not to take as the text of my sermon *Ecclesiastes,*[3] "there is no new thing under the sun," even though I find comfort in being able to cite no less an authority than the Old Testament to support my thesis.

No, I do so because I believe that André Gide was right when he wrote, "All this has been said before, but since nobody listened, it must be said again." I invite you, therefore, to walk with me on the well-traveled path of the *obvious* and the *known* and to bear with me as I stumble in my search for the betterment of the arbitration process.

I begin by saying that if it is true, as I believe, that an employer usually gets the union he deserves, and vice versa, of course, it is equally true that the parties get the arbitral process and the arbitrator they deserve.

Briefly and bluntly put, if arbitration no longer serves the interests of the parties, having become neither simple, quick, nor cheap—its original virtues and purposes—the parties have only themselves to blame. And why not? It is *they* who draft their collective agreement, it is *they* who control the process, it is *they* who choose the arbitrator, and, above all, it is *they* who control the purse. And if, as they tell me, there are no young rising stars on the horizon, it is simply because the parties themselves are not prepared to bring them into their ken.

If the process has become too legal or, if you prefer, too legalistic, as it has in the vast majority of cases, who else is to blame

---

[2] *Id.* at 158.

[3] Ecclesiastes or The Preacher, Ch. 1, verse 9: "The thing that hath been, it is *that* which shall be; and that which is done *is* that which shall be done: *and there is* no new thing under the sun." Verse 10: "Is there *any* thing whereof it may be said, see, this is new? It hath been already of old time, which was before us."

but the parties, for it is they who insist upon lawyers today and lawyers, naturally, proceed in a lawyerly fashion? Furthermore, if the arbitrator's decisions are long and complicated and drafted with the aim of preventing or minimizing the risk of judicial review, it is not simply because arbitrators fear being quashed by the court. (How vivid can one get!) No, it is because the parties are turning more often than not to judicial review, whenever displeased with the arbitrator's decision, and are making no bones about their intention to do so.

Laboring the obvious once more, this strikes at the very heart of the arbitral process. Lawyers, in anticipation of court review, no longer see the arbitrator as the final arbiter of the issue. Instead, they see him as the first step toward court review. They therefore prepare, plead, argue, and build a record, not so much to help the arbitrator decide, but rather to impress and convince the reviewing authority who, like Banquo's ghost, is ever present at the hearing—if not at the feast—and with the same tragic results.

I have, of course, been pretty hard on the parties, and rightly so. But justice requires that I say that we, the arbitrators, have a share of the blame. Many of us, alas, have taken our cue from the courts. We are no longer satisfied to write decisions in simple and plain language. Many of us now write for posterity. Those of us who are academics and used to writing for publication tend to write decisions affected by *prolixity*, redolent of the doctoral dissertation (and this in itself is an example of what I mean). And this, too, must be said: length of the decision is, in many instances, the direct function of lack of time.[4]

The final irony, of course, is that with rare exceptions, courts, wherever they are—and I say this with regret, but it must be said—are rarely trained or suited to deal with industrial disputes. Though they pay lip service when it suits them to the dicta in the *Steelworkers Trilogy* in the U.S.[5] and to similar statements of principle in Canada,[6] they are nonetheless quick to distin-

---

[4]La Marquise de Sévigné, in one of her letters, apologized because it was too long. She did not, she said, have the time to make it short.

[5]*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). *Also see Devine* v. *White*, 697 F.2d 421 (C.A.D.C. 1983).

[6]*Shell Canada Limited* v. *United Oil Workers of Canada, Local 1, et al.* (1982), S.C.R. 181; *Shalansky* v. *The Board of Governors of the Regina Pasqua Hospital*, a judgment of the Supreme Court of Canada, dated March 24, 1983, not yet reported; *General Drivers, Warehousemen*

guish, modify, or depart from them when they simply do not like the arbitrator's award.

IV.

What then is there to be done?

I take as my model the great Jonathan Swift and offer you my immodest, not modest, proposal. Despite the obvious temptation to do so, I do not propose the breeding of grievants as a gourmet delicacy for hungry arbitrators,[7] though some no doubt will say, metaphorically speaking at least, that this has already come to pass.

Nor do I propose the equally radical solution of abolishing the grievance procedure, though there is a case to be made for that, too. After all, perhaps radical surgery rather than palliative treatment is called for. Why not, (I say) when the parties complain? If you're not satisfied with the process, why not simply strike it from your collective agreement and go back to the good old days of bargaining out grievances, good and bad, real and imaginary—and where bargaining fails, take a strike or lockout and sweat out the results?

But, of course, the parties won't do that. For, as the saying goes in another context, if grievance arbitration didn't exist, we would have to invent it.

No, my proposal is to make the process work better, and to do so I offer you *not* my experience as chief arbitrator under the collective agreements between the Government of Quebec and its employees where, though it works, it is, for reasons unnecessary to go into here, a rather formal and structured system.[8] No, I offer you my experience as Chief Judge of the Provincial (State) Court of Quebec.

---

and Helpers Union, Local 979 v. *Brink's Canada Ltd,* a judgment of the Supreme Court of Canada, dated April 26, 1983, not yet reported; *City of Toronto* v. *Canadian Union of Public Employees, Local 79* (1982), 35 O.R. (2d) 545 (Ont. C.A.); *Teamsters Union, Local 938 et al.* v. *Massicotte et al.* (1982), 134 D.L.R. (3d) 385 (S.C.C.).

[7]Jonathan Swift, "A Modest Proposal for Preventing the Children of Poor People in Ireland from Being a Burden to Their Parents or Country, and for Making Them Beneficial to the Public" (1729).

[8]In fact, I have set up a special arbitration tribunal with fixed times, regular lists, and a rota of my judges who act as arbitrators on a regular basis. The process, however, is not integrated into the court system; it remains grievance arbitration. The parties select arbitrators from among my judges for the term of their collective agreement, though I retain the right of veto. The proceedings are fairly informal, but the parties are almost always represented by counsel, and that makes for a good deal of legalism in the process.

This is neither the time nor the place to talk about my court; an explanation of its jurisdiction—civil, criminal, administrative—and its complex constitutional background will bring a glazing of the eyes and a ringing of the ears to the most sophisticated legal mind. It is sufficient to say that my *judicial factory,* as I have called it from time to time (to the dismay of some of my more conservative colleagues), has hidden away among its various divisions a small claims division whose jurisdiction is limited in money terms to the sum of $800 (and soon to go up to $1000).

Of course, there is no such thing as a *small* claim, any more than there is a *small* grievance. Ask the parties and you will have the answer. Still, let me paraphrase Orwell and say that if all grievances are equal, some are more equal than others.[9] Without question, those that are *more* equal and those that are *most* equal should go, and must go, the traditional route. Those that are *less* equal should go, I suggest, the small claims route.

Examine with me, then, the enabling legislation of this small claims division which—not entirely by accident for I had some small hand in helping to draft it—has as its model, and tries to emulate in practice, the old-fashioned labor arbitration proceeding of the good old days, the intention being that the small claims process should be simple, quick, and cheap.[10]

It is perhaps ironic that I went to grievance arbitration as a model for small claims, and now I urge small claims to you as a model for grievance arbitration in order to revitalize an ailing, sclerotic, and much criticized arbitration process. It is no accident, therefore, that among my judges who feel most comfortable and achieve the best results in the small claims division you will find those who have had labor law experience, usually as lawyers and/or members of our Provincial Labour Relations Board.

True, the analogy is not perfect since the parties in a small claims dispute rarely have a continuing relationship. Furthermore, having come to court, they expect a more formal atmosphere and must have it. Still, the basic principles and the modus operandi are the same.

---

[9]Orwell, Animal Farm (1946), Ch. 10, 122. "All animals are equal but some animals are more equal than others."

[10]Quebec Code of Civil Procedure, Book VIII, Recovery of Small Claims. The original legislation, enacted in 1971, was entitled "An Act to Promote Access to Justice."

Let me summarize the relevant provisions of our Code of Civil Procedure,[11] and I suggest that they can readily and easily be inserted into a collective agreement, mutatis mutandis. (My, how men of the law love dead languages!)

Here they are in simplified form: (1) A small claim is defined as one in which the amount in issue is $800 or less and based on contract or on tort; (2) lawyers are *excluded* from the *hearing;* (3) the process is *inquisitorial,* not *adversarial,* the judge acting as lawyer for both parties, examining and cross-examining the parties and their witnesses, as required; (4) the judge acts as *mediator* in an attempt to bring about a settlement of a dispute; (5) where no settlement is reached, the judge renders judgment; (6) the judgment is not subject to appeal or review; and (7) the judgment does not have the force of precedent, that is, it does not have the effect of res judicata. (I told you, we lawyers like dead languages.)

These, then, are the bare bones of the legislation. In practice, we have fleshed them out in order to improve the process. This is what we did.

First, and above all, we have provided for *pretrial mediation* where the parties agree to the process. A lawyer attached to the court brings the parties together by a simple phone call, at hours convenient to them, and goes over the record with them. Where a settlement is reached—and it is reached in over 75 percent of the cases—the file is closed and the matter is settled.

Where mediation fails, the matter is referred to trial, but mediation has still served a useful purpose because the mediator is there to focus upon and narrow the real issues and help the parties prepare for trial.

Second, at the opening of the trial, the judge instructs the parties briefly on the basic principles of the law and the rules of evidence that he will apply in deciding their case. This makes for a more orderly and a simpler process, and also tends to eliminate irrelevant evidence which litigants on their own are prone to give. This is essential since lawyers are barred from the process.

Third—and this I would have you note particularly—when the trial is over, the judge, with rare exceptions, delivers judgment

[11]Sections 956 ff.

off the bench, taking the time and effort to explain to the parties in simple language why they have won or lost.

V.

This then is my proposal: "small claims" arbitration for "small claims" grievances.

The benefits of the process I urge upon you are clear. Eliminate the adversarial atmosphere of the courtroom and you make mediation and settlement *possible*—indeed *probable.* You remove at the same time much of the animosity, acrimony, and friction that, of necessity, pervades the atmosphere of the ordinary lawsuit. If this works where the parties generally are strangers to each other—and it does—how much more likely is it to work where the parties are not strangers to each other, but have a continuing and ongoing relationship?

Where the arbitrator takes the time and effort to explain to the parties why he has decided as he has and involves them in the process, he goes a long way towards dispelling the feeling of alienation which now characterizes the normal grievance arbitration.

But let there be no mistake about my meaning. When I say that lawyers ought to be excluded from the hearing, I do not mean that they should be removed from the arbitral process, nor do I want them replaced by management or union representatives who would then proceed to do the lawyers' job. (Cynics will say that they do it better, or as well; others will say they will be more lawyerly than the lawyers and therefore worse.) What I mean simply—and I repeat it for emphasis—is that you convert the process from *adversarial* to *inquisitorial.* It is now the arbitrator's enquiry, not the lawyers'.

Still, even in small claims arbitration lawyers may have a role to play. They may give counsel and advice, and they may assist in the preparation of the case. But beyond that they should not go. The intention is to create a climate where the grievances are deemed to be nothing more than honest disagreements between reasonable parties, to be resolved without rancor or bitterness, and not as disputes that must be won at any cost.

I am, of course, no Swift (though I have adapted the title of one of his most famous works), and certainly as a man of the law I find it hard to swallow what he had to say about lawyers. I quote: ". . . [there is] a society of men among us, bred up from

their youth in the art of proving by words multiplied for the purpose, that WHITE is BLACK and BLACK is WHITE, according as they are paid. To this society all the rest of the people are slaves."[12]

Yet this is inevitable in an adversarial process. It comes with the territory and is not restricted to lawyers. As we all know, management and union representatives are pretty good at it, too, if need be.

Which brings me to Voltaire. I had no intention of bringing him in, but he is obviously so popular with Academy members that I cannot resist citing him anew! "I have been ruined twice in my life," he said, "once when I lost a lawsuit, the other time when I won."

Still, in small claims arbitration, surely we can try to eliminate, or at least curtail, the undesirable features of the adversarial process, which leaves for the winner as well as the loser a residue of mistrust, ill will, and alienation. There is no magic in the inquisitorial process, but if it is done properly, it makes less acute the combat between the parties and softens the blow for the loser.

On the other hand, it is clearly harder on the arbitrator, for reasons that are obvious. It is he (or she—and wherever I use *he,* I obviously include *she*)[13] who, from time to time, will surely draw the ire of one side or the other, or both. But if the arbitrator has credibility, this resentment also passes—and who knows, it may even have the desirable effect of uniting the parties in common cause against him. In any event, as we all know, the arbitrator, according to tradition, is always expendable (until, in good time, he is picked by others, and so on, and so on).

There is another advantage to my proposal. If we use *pretrial* mediation in the arbitration process, we will achieve another objective. If we use the young interns, the chosen beginners, for that purpose, not only are we training them for the future, but we are reducing costs and helping to make the arbitral process what it always was intended to be—simple, quick, and cheap.

Which brings me to the arbitrator himself mediating the grievance (as my small claims judges do with such success). They settle about 35 percent of the cases that come to trial. Med-arb, we call it, for want of a better name. I know that some, perhaps

---

[12]Gulliver's Travels (New York: W.W. Norton, 1970), Pt. IV, 215.

[13]Lawyers are wont to say that in law, as in life, man embraces woman.

even many, among you look with horror upon this concept. How does one reconcile, they say, two essentially contradictory roles? How, they continue, can you expect the parties to be entirely frank with you in the mediation process, to show you their hole card, as it were, when they know that you may then decide against them on the basis of what they told you in confidence?

There are several answers to that.

First of all, it works, and I know it works in the small claims process in Quebec, and elsewhere in Canada, too.

Second, those of us who have practiced this art—some will call it *black art*—in grievance as well as in interest arbitration know that it works. It only needs the desire of the parties to make it work and, above all, their confidence in the integrity of the arbitrator. (If you don't believe me, ask Sam Kagel.)[14]

Finally, the very nature of med-arb is not unlike Russian roulette. The risk involved encourages the parties to settle. After all, we know—indeed, lawyers have made it a cliché—that even the worst settlement is better than a good lawsuit. To footnote my point, let me cite to you the great Samuel Johnson, speaking in another, and more morbid, context: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."[15]

Depend upon it, ladies and gentlemen, in med-arb, when the parties know that the arbitrator knows where the bodies are buried, it concentrates their minds wonderfully towards settlement.

VI.

I have gone on long enough—far too long, perhaps. But I must remind you that if we—all of us, parties and arbitrators—do not set our minds and hearts to making the process work better, sooner or later, in this 1984 world that we are fast approaching, if we are not already there, *Big Brother* will do it for us.

Let me tell you of a dream that has been haunting my nights of late. I dream of the arbitration of the future. On each side

---

[14]It is interesting and perhaps no coincidence that the process first surfaced in connection with disputes on the waterfront. Both Mr. Kagel and I, unknown to each other, were using the process extensively by the late sixties or early seventies, he in San Francisco and I in Montreal, Quebec, and Three-Rivers.

[15]Boswell's Life of Johnson. New ed.; reprint (London: Oxford University Press, 1965) 849, September 19, 1777.

of the table is a small computer—one for the union and one for the employer. Where the issues require it, there is a third computer, for the grievant himself. At the head of the table there is a big computer. Otherwise the room is empty—not a soul in sight. The hearing is short. The small computers feed their cards into the big computer. Then, after a small interval (for digestion and reflection, one might say), the big computer lights up, its silicon chips begin to flash, and hissing sounds come forth. Then, to the strains of appropriate music of an inspiring nature, a card appears with the printed decision, along with the reasons, of course, and the standard admonition, "Do not cut, fold, spindle or staple."

It's time to stop, but I do not wish to leave you without telling you a bit of Canadian history to which I will append a personal note.

On a warm July day in 1904, William Lyon Mackenzie King, Canada's first Deputy-Minister of Labour (Under-Secretary of Labor, as you would call him, later to become Prime Minister)[16] was in Sidney, Nova Scotia, to act as arbitrator in an industrial dispute. While there, he was invited to dine on a French cruiser that was then in port. When he stepped aboard the vessel, he was greeted with an eleven-gun salute.

I think this is entirely appropriate for an arbitrator. True, it is not an event likely to recur, but that is what we should aim for—or at least a flourish of trumpets. For I believe—and I am happy to say it—that labor arbitrators deserve salutes, trumpets, flowers, and kudos for the work they do in the field. The industrial relations system, and our industrial society itself, could not function as well, and indeed would function far worse, if they were not there. Think for a moment what would happen if the trial and decision of labor disputes were handed over to the courts or to state-controlled administrative commissions, agencies, or boards.

Grievance arbitration as we know it, despite the alarums that we hear—and we ourselves are the first and the best chosen to criticize the process in order to improve it—has proven its worth. Indeed, as I have said earlier, if it did not exist, we would have to invent it.

This is so much the case that Canada, Quebec, and other

---

[16]Known in his later years for his convoluted language, it was said of him that "he had great difficulty in compressing a 10-minute speech into a half hour."

provinces, too, I believe, have expressed their confidence in the process by providing for arbitration, rather than recourse to the courts, for certain segments of the unorganized work force.[17] This, I note with pleasure, has met the hope expressed by Judge Harry Edwards in his splendid address to the Academy in Washington last year. It's nice to know we are appreciated—perhaps even loved—in some circles.

One final word on mediation: I urge grievance mediation upon you. And why not? We all do it, or have done it at one time or another. Why not then—and I use the term that has been made popular in another context—*come out of the closet,* and if I may continue the metaphor, made famous by Oscar Wilde, proclaim the love "that dares not speak its name"?[18]

That's it. But I cannot go on without telling you my favorite story about judges, and if you have been listening to me at all, you will see that it applies equally to arbitrators.

"The judge," we are told, "seems to float along on the Bench with effortless serenity like a swan on the mirrored surface of the lake." But, we are also told, the litigant should be reminded that "the judge, like the swan, is paddling madly underneath."[19]

That's us, arbitrators, all paddling madly underneath.

---

[17]*Canada Labour Code*, Part III, R.S.C. 1970, Chapter L-1, s. 61.5; An Act Respecting Labour Standards, R.S.Q. 1977, Chapter N-1.1, ss. 124 ff.

[18]Wilde in De Profundis refers to "the love that dares not tell its name" (p. 36). He is misquoting the last line of Lord Alfred Douglas's poem, "Two Loves" (Poems, 1896) which ends ". . . the Love that dare not speak its name."

[19]Megarry, *supra* note 1 at 145.