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## Discussion after the Speeches of Robert B. Cottington and Roy L. Heenan

Discussion

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DISCUSSION AFTER THE SPEECHES OF ROBERT B. COTTINGTON  
AND ROY L. HEENAN

QUESTION, *Mr. Harvey*: Thank you very much for today's perspective of employment relations, and particularly for your emphasis on the difference in the union environment in Canada and the United States. We could also perhaps say that there is a difference in the constitutional environment in legislation that has forced a lot of the issues in the United States in a different way than in Canada. I know that everyone has a lot of questions for you. Rob, I thought maybe you could start off and hit this question on arbitration of employment issues because I know that that is currently an issue in the United States with a number of companies, including TRW, that has put in place, I believe, a voluntary arbitration system in the case of non-union workers.

ANSWER, *Mr. Cottingham*: I think most employers and most managements, outside of labour lawyers, would agree that going to an alternative dispute resolution mechanism certainly is a much more efficient cost-effective means to resolve these disputes. Litigation is not the answer for employers because it is time-consuming and expensive.

Unfortunately, there has been reluctance to going to an alternative dispute resolution mechanism in terms of making it a mandatory program. The courts have been lobbying to enforce that in the areas of discrimination law and in some other areas. I know that companies are trying to go to it, as we mentioned, on a voluntary basis. I think later in the program, there will be discussions on ADR. But, clearly, I think that ADR is a much more cost-effective and efficient way to resolve these disputes.

COMMENT, *Mr. Heenan*: You are all aware of the states' decision of *Gilmer*,<sup>1</sup> where it was held that arbitration was, indeed, possible if the contract was drafted fairly ahead of time. Professor Theodore St. Antoine of the University of Michigan Law School as well as Bill Gould, now the Chairman of the National Labour Relations Board, have been very interested in drafting statutes which would provide for arbitration, either mandatory or voluntary. Bill Gould was doing work on a California statute just before his nomination. I think there is a movement in the direction, but here, of course, rather than the question of public policy, it is handled more as a question of contractual right if people put this in voluntarily and it is fairly drafted and gives fair opportunity.

There is interest in the arbitration system and it has been incorporated in many of the collective agreements. We arrive at it by an en-

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<sup>1</sup> Robert D. Gilmer v. Interstate/Johnson Lane Corporation, 111 S. Ct. 1647 (1991).

tirely different route, which has promoted the use of arbitration.

QUESTION, *Professor King*: I wanted to ask a question on the influence of the United States in Canada. Do you want to comment on the influence of our culture and our decisions in the labour relations field in Canada? What is the tie-in there?

ANSWER, *Mr. Heenan*: Our system emulated yours. We took the Wagner Act. We took the concept of certification of the unions. We did not go as far as the Landrum Griffin Act. We do not have a bill of rights for unionized employees, something which I think we missed out on. We skipped that stage. The safety and health in the workplace you started, but we went much further than you did. So there has always been a certain amount of influence, particularly in the statutory area. In the area I did not talk about, the Employment Equity Act, we have taken your affirmative action programs at a time when you are abandoning them, and we have pushed them further than we should. There has been a great deal of interest in what is happening in the States, but it has been recently in the area of discrimination law.

In other words, there is a public policy debate, and we will not follow you in certain directions. We have not gone into the jury trial system. We have gone in different directions in terms of many of the employee benefits. The Medicare issue is, of course, not an employment one, per sé, but has significant influence on employment. So the answer is since we adopted your model, we have been influenced a lot by you. I find at times that it is worthwhile going down and reading the American decisions and bringing them into our courts and trying to influence them. But, for instance, on our employment equity, our courts have said that although the American experience in affirmative action is of interest, the reasons and the qualifications for doing it in Canada are different from the United States and, therefore, they are going to tread gently when being guided by the American jurisprudence.

You have been a tremendous influence. One of my counsel here used to say, it is like sleeping with an elephant; whenever the elephant moves, we feel the effect. So whenever you move in a direction, we feel the effect. But we do not always follow you in the employment area. We did not in the employment at will. We have in the certification. We have gone, I would say, probably beyond you, and beyond you is not necessarily good in the way I am using it, in employment equity or affirmative action. We even coined the term "employment equity" to get away from your term of "affirmative action." So you have a tremendous influence on us. But we do not follow blindly, and there are certain parts which we do not want to have. Comparisons between our laws are very interesting, at least to me, just for that reason.

QUESTION, *Ms. Houston*: I have essentially a follow-up question that is based on the earlier discussion this morning, the movement in how we structure our employment relationships. Certainly in the

United States with the employment-at-will philosophy, the movement from traditional long-term employment relationships to contract, contingency kind of work forces is much easier than in Canada. Do you foresee any change in the Canadian perspective on how we will treat the employment relationship based on the shift in the structure of employment?

ANSWER, *Mr. Heenan*: I tried to indicate this, but I had to hurry a little bit. I would have liked to have given some more examples. The public policy consideration of the courts in building in the duty of loyalty, but also the obligation of good faith and fair dealing, almost implied terms of contracts. So there has been a public policy approach to try to humanize the world of contractual work outside of a collective agreement situation. Having said that, the problem you raised is fundamental. There is a very interesting study by the OECD on structural unemployment. They look at Europe as one of the places where they have the most structural unemployment because they are too rigid in their regulations. They look to the States as one of the countries which in very challenging economic times has been able to adjust their economies much more successfully and create jobs.

The suggestion from the OECD study, and there will be a follow-up which will be coming out I am told in May of this year, is that we have to look not at inflexible rule making and never-changing regulation, but much more at the new world of work.

The introduction of a significant increase in the work force, the way people are working now, has led to the eight-hour day, the forty-hour week, overtime after eight hours and overtime after forty hours. But some of our old workplace regulations of overtime after eight hours and forty hours just do not make sense when you have twelve-hour shifts or ten-hour shifts of working quite regularly. So you have the two tendencies: one, which I do see in our country which is to try to humanize, but also to try to avoid the rigidities which have come from a lot of the European systems and which the United States has been quite successful in avoiding. That is very important. That study from the OECD I really recommend to you, both the last one which came out and the one which is coming out because it compares the European system and finds the European system lacking in its over-regulation in the world of work.

QUESTION, *Mr. Powers*: I would like to ask a question of each of the speakers. I wanted to ask you how arbitrators are selected in a non-union context in Canada. Rob, I was very interested in your suggestion in your materials that applicants be asked to consent to references from their former employers. And I wonder if you have any sense of whether that has been effective in getting employers to give more of a reference than the name, rank, and serial number would usually get.

ANSWER, *Mr. Cottingham*: It has had some success. Unfortu-

nately, there is still some apprehension among employers even when they are faced with some document signed by an employee saying I release you from any liability associated with you providing this information.

It has been a technique that has been used. I have recommended it to employers and employers have used it. As I said, it is difficult because that is probably the best source of information that you can find in terms of whether or not someone is going to work out for you. You need to have some technique to get around that. This is the one that we often recommend, and it is something that we recommend at the time of separation of employment. You have them sign a document at that time saying that if they have someone who wants to seek information from you as to their employment and the reasons for the separation, they sign this document. It not only authorizes the release of the information to you; it authorizes the prospective employer to make the request, it authorizes the employer who is going to be providing the information to do so and release it to both sides.

It has worked, but, as I said, there is still some concern about this defamation possibility.

QUESTION, *Mr. Heenan*: If we get to the heart of the matter, I arrive at my other article. How do you get arbitrators in the non-unionized sector? First, who pays them?

We have fooled around with this in Quebec for some time saying the government will basically pay, but each party will have to put up a certain amount, and the certain amounts were never what the arbitrators would make in the regular union setting. In the Federal sphere, it is the same thing. So your better arbitrators say, "thanks a lot, but no thanks. I am too busy in my unionized setting." And you, therefore, get what I call sometimes the cosmic thinkers who are usually academics who like to dabble in something. Their mind is in the cosmos, but their feet are not on the ground. The quality of arbitration in these mandatory arbitrations has sometimes been questionable. It was such a concern because the governments are notoriously poor payers except when it comes to their own collective agreements. But in terms of arbitration, they have been notoriously poor payers. So this was not a lucrative field. And what happened was that the experienced arbitrators bowed out of it, and on the whole, and there are exceptions, this was left to persons who do this, sort of dabble in this, but not the real professional arbitrator on the whole. There are, of course, notable exceptions. Every so often you will persuade the professionals that you have a public duty to accept a few of these, and so they do. But on the whole, it has been a real problem to such a point that in Quebec we went away from that and referred it back to people who are involved in the determination of unfair labour practices, part of the Quebec equivalent of the NLRB, and they have taken over this role. And it has

been the weakest of the system of mandatory arbitration and one which we are still struggling with to come up with the proper answer.

