SUBMISSIONS OF THE POWER WORKERS' UNION TO THE CHANGING WORKPLACES REVIEW

Introduction

The Power Workers' Union (PWU) represents over 15,000 employees working at over 40 companies in the energy sector in Ontario. It is the largest union in the sector and represents the bulk of employees working at the companies that are successors to Ontario Hydro.

The PWU has reviewed the submissions of the Ontario Federation of Labour and fully supports those submissions. In addition, however, there are 2 matters that the PWU wishes to address briefly in these submissions, one relating to the statutory expedited arbitration provision in section 49 of the *Labour Relations Act*, *1995* ("LRA" or "Act"), and the other relating to the mandatory strike provision in section 79.1 of the Act. These matters arise from Questions 15 and 16 in the Guide to Consultation.

Submissions

The PWU makes the following submissions:

From the Guide to Consultations:

Q 15: Are there changes that could be made to the LRA that would enable the parties to deal with the challenges of the modern economy?

Q 16: Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of this review, that should be considered?

PWU response:

1. Statutory Expedited Arbitration Process

The LRA contains three sections that deal with grievance arbitration processes under non-construction collective agreements. Section 48 stipulates the process for standard collective agreement arbitration. Section 49 provides for referral of a matter to arbitration before a single arbitrator on an expedited basis, as a result of an appointment by the Minister of Labour. Section 50 provides for consensual mediation-arbitration. We submit that each of these provisions must be interpreted and applied in a manner consistent with the purposes of the Act, as set out in section 2, which include the following:

- To recognize the importance of workplace parties adapting to change.

- To encourage co-operative participation of employers and trade unions in resolving workplace issues.
- To promote the expeditious resolution of workplace disputes.

Section 49 was introduced as s. 37a of the *Act* in 1979 as a legislative response to concerns cited in the *Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration under the Labour Relations Act and the Hospital Labour Disputes Arbitration Act*, (the "Kelly Report") tabled by the Honourable Arthur Kelly in 1978, regarding the functioning of the grievance-arbitration process and the efficacy of the arbitration board model in place at that time. The Kelly Report recognized that very few parties at that time had any self-designed processes for grievance arbitration under their collective agreements, and therefore most parties were subject to the tripartite arbitration board set out in the legislation. The recommendations in the Kelly Report expressly related to the statutory arbitration process only, and not to any self-designed process under an individual collective agreement – in fact, the Kelly Report stated that parties should be encouraged to negotiate their own systems for grievance arbitration as "the cure for most of the ills which beset grievance arbitration will be found only in self-designed procedures" (p. 23) and that the Commissioner had "no intention of interfering with the freedom now afforded to the parties to a collective agreement to agree on a form of difference-resolution which they have devised as appropriate for the enterprise in which they are associated" (p.19).

The Kelly Report cited the main problems with the statutory arbitration process at that time as being cost, the delay which occurred during its progress, and the formality which enshrouded the process (p.11). To address these issues, the Kelly Report recommended, among other things, introduction of the use of single arbitrators, appointed by an independent authority, unless pre-named by the parties, who operated within a time schedule that ensured the steady progress of each matter. The legislative result was the expedited arbitration provision currently found under section 49 of the LRA. While the Kelly Report was issued at a time when arbitration procedures were more formal than today and when tripartite arbitration panels were *de rigeur*, which is no longer the case, the point of our reference to the report is that the statutory single arbitrator provision was clearly designed as an expedited alternative to the slow and cumbersome private arbitration process that prevailed at the time, not as an alternative to an expedited system willingly agreed to by the parties to a collective agreement. For example, on p. 12 of the Report, the Commissioner expressly states that "Replacement of a three man board by a single arbitrator would be one way of affording a sizable reduction in the cost of any single arbitration".

Much has changed since 1979, and modern, sophisticated employers and unions are, more and more, establishing their own expedited arbitration processes through collective bargaining. These private expedited arbitration processes can be specifically tailored in relation to the nature of the employment relationship, including taking into account non-standard arbitration processes that complement changing employment relationships and more diverse workforces. For example, parties may agree to electronic hearings spanning different geographical locations, alternatives to *viva voce* evidence, such as written witness statements shared between parties in advance of the hearing, or the

assignment of a designated arbitrator who is readily available to hear cases and has an institutional knowledge that allows for a more streamlined process. As a result of this specialization, the parties themselves are capable of developing processes that result in a faster, more flexible, less costly and more effective scheme, as measured against the objectives of the legislation, than the statutory expedited arbitration process provided for under section 49 of the LRA. Moreover, as is clear from the Kelly Report, the intention of s. 49 was not to interfere with, let alone undermine, agreed-to processes. The use of s. 49 to undermine an agreed-to expedited system would be contrary to the intended purpose of the provision.

Another change since the advent of s.49 (and one that has put upward cost pressures on grievance arbitration) is the increased workload that has been placed on private arbitration processes by both the Ontario legislature and the Supreme Court of Canada. As regards the legislature, statutory provisions such as s. 45 of the *Human Rights Code* (which allows for deferral of applications – and applications in respect of issues that are subject to grievance arbitration are routinely deferred) and s. 99 of the *Employment Standards Act* (which in effect incorporates that statute into collective agreements as far as the grievance process is concerned and prohibits complaints under the *Act* by employees governed by a collective agreement) have effectively expanded the issues that must be dealt with by the grievance arbitration process.

As regards the Supreme Court of Canada, it too has expanded the scope of issues that arbitrators are effectively required to deal with over the past two decades. For example, in *Weber v. Ontario Hydro*, [1995] 2 SCR 929, the Court held that if a difference between the parties arises from a collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute, and that includes tort claims and claims under the *Canadian Charter of Rights and Freedoms.* In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324,* [2003] 2 SCR 157, the Court went even further and held that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement.

The substantial increase in workload for arbitrators would naturally lead the parties to collective agreements seeking to streamline arbitration processes to prevent the system from becoming prohibitively expensive or bogged down in delay caused by increases in the number and the length of arbitration hearings resulting from the new reality of the work “downloaded” onto such systems by the courts and the legislature. Indeed, the Ontario legislature itself has implemented streamlined hearing methods at the Ontario Labour Relations Board in response to the amount of hearing time being taken up by jurisdictional disputes by amending the *Labour Relations Act* to state explicitly that the OLRB is not required to hold a hearing at all in such cases (s. 99(3)), which in practice has led to the use of a pre-hearing consultation process in such matters to resolve such disputes without a hearing.

Private parties should be encouraged to develop their own expedited processes in their own collective agreements as a means of managing the volume and cost of private

dispute resolution in the current era of expanding workloads for such systems. Indeed, as regards cost, Kelly himself was explicit in his view that private parties had to deal with the issue themselves: “I hold out little hope of any noticeable reduction in the aggregate cost of arbitration unless the parties radically change their attitude to it” (p. 12). Beyond this, however, is the fact that to the extent that work itself has become more precarious, and jobs themselves shorter term, the need for a quick, inexpensive and effective means of resolving workplace disputes has only increased.

Various parties have developed expedited systems, in both the public and private sectors. One such system was established by Ontario Hydro and the Power Workers’ Union in 1998 and is still in force at the successor to Ontario Hydro. It is described in Dassios, “Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitration in the Ontario Electricity Industry” in *Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators* (2010, BNA) at Tab 2 of these submissions. Multiple arbitrations and mediations are started and completed in a single day before a single mediator/arbitrator. A Chief Arbitrator is available on extremely short notice (sometimes on the same day a request is made) to deal with preliminary or interim issues. The system is extremely fast and cost effective for the parties.

The success of private expedited arbitration processes such as the PWU/Hydro model is jeopardized by the fact that section 49 of the LRA is unclear as to whether the Minister has any discretion to refuse to appoint an arbitrator in cases where the self-designed process of the parties better meets the objectives of the legislation. That is, a union or employer wishing to undermine an expedited arbitration process that they themselves agreed to might argue that they have an absolute right to use the s.49 process even where that process would cause delay and expense beyond that anticipated in the collective agreement to which they are a party.

The practical reality of a section 49 arbitration is that it is expedited to start, but not to conduct or to complete. Strict timelines apply to the start date of the hearing, but the hearing is conducted on traditional (we would say outdated) principles and in the typical event that the case is not completed in the one day, the case will typically take months to finish as the availability of the arbitrator, at least two lawyers and two parties will dictate continuation dates. This is apart from the fact that the traditional arbitration process required on a section 49 referral may be significantly more cumbersome and less responsive to the parties’ needs, as compared to a self-designed process that is customized to the particular employment relationship. Section 49 should not preclude a more effective private process which is consistent with the purposes of the legislation. The tactical use of s. 49 to avoid an agreed to expedited process would not further, but completely undermine the purposes of the Act to “recognize the importance of workplace parties adapting to change … encourage co-operative participation of employers and trade unions in resolving workplace disputes [and] promote the expeditious resolution of workplace disputes”. Given these purposes, then, it is important that the Act be clarified to ensure that s. 49 is used for the purposes it was intended – as an expedited alternative to traditional arbitration, not a means of undermining agreed to expedited processes. We propose the following recommendation in this regard:

Recommendation #1 *: Section 49 of the LRA should be amended to clarify that the Minister has discretion regarding whether to refer a matter to an appointed arbitrator and that the Minister will not exercise his/her discretion to appoint where there is a functioning expedited arbitration regime agreed to by the parties to a collective agreement.*

2. **Mandatory Strike Vote**

The LRA requires a mandatory strike vote to be held in advance of a union calling a strike. However, once the parties are in a lawful strike/lockout position, the collective agreement is no longer operative, and the employer is free to alter working conditions and terms of employment as it sees fit, even when it has not commenced a lockout, unless the union can demonstrate the employer is not bargaining in good faith. Hence, the employer is free to immediately take drastic job action, while the union is not and its economic response to the employer could be delayed for a lengthy period of time while a strike vote is held.

For example, in a case where an employer decides to cut wages and benefits, a union would still be required to conduct a strike vote before calling a strike. For a union with a large geographically dispersed bargaining unit, this could delay a strike for weeks, during which time employees are not locked out, but rather are forced to work under the substantially altered conditions. The result is imbalanced access to the economic weapons provided under the LRA.

This problem has been recognized by the Alberta Legislature and solved by the inclusion in the Alberta *Labour Relations Code*, which prohibits an employer from altering terms of employment unless it has commenced a lockout. Section 147(3) of the Alberta *Code* states:

> **(3)** If a notice to commence collective bargaining has been served pursuant to section 59(2), no employer affected by the notice shall, except
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> (a) in accordance with an established custom or practice of the employer,
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> (b) with the consent of the bargaining agent, or
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> (c) in accordance with a collective agreement in effect with respect to the bargaining agent,
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> alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences under Division 13.

Hence, no employer shall “alter the rates of pay, a term or condition of employment or a right or privilege of any employee … until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences…”. This resolves the problem and rights the imbalance between a union and employer in the lead up to a strike or lockout. We would recommend the inclusion of such a provision in the Ontario *Labour Relations Act.*

Alternatively, the Ontario *Act* could be amended to create an exception to the requirement that a union conduct a strike vote prior to calling a strike in circumstances where the employer has unilaterally and substantially altered the working conditions or terms of employment of members of the bargaining unit. This would be lesser protection and its enforcement would be more complicated because a finding would have to be made as to what constitutes “substantial alteration” of working conditions or terms of employment, but it would be preferable to the current regime.

Recommendation #2 : The LRA should be amended to state that no employer may alter the rates of pay, a term or condition of employment or a right or privilege of any employee until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences or, alternatively to create an exception to the requirement that a union conduct a strike vote prior to calling a strike in circumstances where the employer has unilaterally and substantially altered the working conditions or terms of employment of members of the bargaining unit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY THE POWER WORKERS’ UNION

Chapter 8

PUBLIC SECTOR: INNOVATIVE APPROACHES TO PUBLIC SECTOR DISPUTE RESOLUTION

I. Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitration in the Ontario Electricity Industry

Christopher M. Dassios*

—To forget one's purpose is the commonest form of stupidity.
Friedrich Nietzsche[1]

—Men acquire a particular quality by constantly acting in a particular way.
Aristotle[2]

1. Introduction

Whatever one thinks about Nietzsche's politics, it is undeniable that he had moments of profound insight and, at least in the opinion of this author, the quote above is one of them. It truly is easy to forget why one is doing what one is doing when one has been doing it for some time. Government officials can forget they are there to serve the people, couples can forget that they are in a relationship to love and support each other, and lawyers can sometimes forget they are there to serve the best interests of their clients.

As for Aristotle, the fact that he posited the basis of behavioral psychology a couple of millennia before anyone had ever heard of B. F. Skinner is reason enough to take his comment

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[1]Human, All Too Human: A Book for Free Spirits.

[2]*Nichomachean Ethics*, Book 3, Chapter 5.

seriously. But what, one might well ask, has any of this to do with the establishment of a system of expedited arbitration in the electricity industry in Ontario, Canada at the very end of the 20th century?

The purpose of this paper is to set out in a succinct manner the story of how two parties to a collective agreement were able to radically reform an arbitration process that was no longer properly serving its purpose and then to detail the developments in the systems that evolved from the initial system after the single employer party to it was split into various successor companies. It is essentially the story of two organizations that decided to radically change a dispute resolution system so as to have it carry out the purpose it should have served from the start but that seemed to have been forgotten somewhere along the way. The change in the system required a radical change in the behavior of the parties participating in it, and that change in behavior changed the character (or "quality," as Aristotle would put it) of the relationship between the parties and the character of the parties themselves. This story is not presented as a panacea for others but as a model that might act as a catalyst to others running a traditional grievance arbitration system to consider an expedited alternative to it.

The change to the grievance and arbitration system at Ontario Hydro began with amendments to the 1998 collective agreement between Hydro and the Power Workers' Union (PWU), but in order to understand how it came about, one must understand the events preceding the 1998 round of collective bargaining between the parties.

By way of background, Ontario Hydro had been, for about 90 years, a statutory public corporation and an integrated utility that had a virtual monopoly on the generation and transmission of electricity in the most populous of Canada's provinces, as well as being a major distributor of electricity and the de facto regulator of the other local distribution companies in that province.[3] This made Ontario Hydro one of the largest integrated public utilities in North America. In 1998, the PWU represented about 14,000 Ontario Hydro employees, which was the vast majority of workers at Ontario Hydro (and hence across the electricity industry in

[3]The distinction between transmission and distribution of electricity is essentially one of voltage. The high voltage lines held up by towers one sees across the landscape transmit electricity across long distances and form the transmission system. The lower voltage (typically 50kv and under) poles and lines distribute electricity locally once its voltage is stepped down from the transmission lines in a transformer station.

Ontario).[4] Significant change had come to Ontario Hydro at the beginning of the decade by way of an employer-initiated corporate restructuring ("downsizing"). The union's membership was reduced dramatically from a high of about 22,000 at the beginning of the decade through the use of various voluntary separation packages offered by Ontario Hydro to implement its downsizing program. While the downsizing of the early 1990s was largely history by 1995, part of the legacy of the previously larger bargaining unit and the workplace upheaval caused by the downsizing was to contribute to a backlog of grievances that was disproportionately large in comparison to the size of the bargaining unit as it was in 1998. Before we turn to the issue of the backlog, however, we must review the turmoil immediately preceding the 1998 round of bargaining.

In June 1995, the neoconservative government of Mike Harris came to power in Ontario with a majority government and every intention of "restructuring" the electricity industry (meaning breaking up Ontario Hydro into smaller companies) and privatizing the restructured entities.[5] The Harris government started down that path immediately after their election by commissioning a study to investigate how its policies could be carried out. The study came out, but public opinion turned against the planned restructuring and privatization, no doubt due in part to a public campaign against the proposals carried out by the PWU. Eventually, the government put off implementation of its privatization plans until its second term (after the 1999 election),[6] although it did split Ontario Hydro into four publicly owned companies bound to the PWU collective agreement effective April 1, 1999.[7]

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[4]The PWU also represented several hundred employees at the smaller local utilities, but Ontario Hydro employed the bulk of the workers in the industry. No expedited system exists for the smaller utilities, where the volume of grievances is low compared to Ontario Hydro and its successors.

[5]This agenda also included a major restructuring of the smaller local distribution companies (LDCs), in their case encouraging amalgamation and privatization, but that is an entirely different story and not of consequence here.

[6]After a court decision (Payne v. Ontario (Minister of Energy, Science and Technology) [2002] O.J. No. 1450 (S.C.J.)) holding that the legislature had not, as a matter of statutory interpretation, granted the government the authority to privatize Ontario Hydro, the government lost the will to carry out its privatization agenda, and the successors to Ontario Hydro continue to be owned by the Ontario government to this day. Hence, while the restructuring of Ontario Hydro took place, the privatization never did.

[7]*See* Electricity Act, 1998, S.O. 1998, c. 15. While the statutory demerger date was December 1, 1998, as far as labour relations matters were concerned it is the de facto demerger date that mattered: April 1, 2009. The first-generation Ontario Hydro successor companies are now called Ontario Power Generation, Hydro One, the Electrical Safety Authority, and the Independent Electricity System Operator. There are several second-generation successors to these companies as a result of further restructuring and sales of parts of the business since the initial Ontario Hydro demerger.

The government's restructuring plans, of course, put enormous pressure on the 1996 round of collective bargaining between Ontario Hydro and the PWU. Hydro came to the table demanding that the collective agreement, a book of several hundred pages in length, be stripped down to facilitate the government's plans. Needless to say, the PWU saw no reason why it should facilitate either the government's plans or Hydro's desires in this regard, particularly since the union's membership had already taken a big hit in terms of numbers, and the remaining members continued to generate huge cash revenue for the government by producing electricity at Hydro. The government, of course, knew it had a fight on its hands and appointed then-Justice Warren Winkler of the Ontario Superior Court (he is now Chief Justice of Ontario) to mediate the 1996 collective agreement.[8] The bargaining was, indeed, tough. Even with the highly skilled assistance of Justice Winkler, it took over a year of mediated bargaining to get a collective agreement signed. The changes to the collective agreement that resulted were evolutionary rather than revolutionary. More important for our purposes, a fundamental disagreement between the parties as to the term of agreement led to a compromise whereby, while the collective agreement ran from 1996–2000, there was a "reopener" clause that permitted the complete renegotiation of the agreement in 1998, with the assistance of a mediator and without the option of a strike. Justice Winkler, in consultation with the parties, appointed Martin Teplitsky, Q.C.,[9] to mediate that collective agreement.

One of the items on the bargaining agenda that Mr. Teplitsky had to deal with was reform of the grievance and arbitration system between the parties. At that point in time, there was a backlog of approximately 3000 grievances in the system. This number, in a bargaining unit of 14,000 members, is troubling enough on its face, but it is actually much worse once one considers how many cases the system was clearing in a year. The grievance and arbitration system in the collective agreement before the 1998 amend-

[8]This would be considered "bringing out the big guns." Prior to his appointment to the bench, Justice Winkler had been a top-tier management labour lawyer who enjoyed (and continues to enjoy) the highest regard of both the labour and management communities. He has successfully mediated some of the most complex and difficult labour disputes in Canada.

[9]Mr. Teplitsky's skill set as a mediator is, with all due respect, formidable. It is proof enough of this fact to note that he completed the mediation of the 1998 collective agreement in the span of five days, still a record between these parties. However, this is only one example of a record of similar achievements that spans decades.

ments contained a grievance process consisting of three steps of meetings at progressively higher levels between management and the union, followed by an arbitration process consisting of a full evidentiary hearing by a three-person arbitration board (a neutral chair, a union nominee, and a management nominee). This sort of system was common at the time in Ontario. What was less common was that the parties pre-booked arbitration dates a year in advance to minimize the delay caused by setting up ad hoc arbitration boards. However, even with this means of streamlining the process, the clearance rate was about 25 cases per year. That is, approximately 25 cases referred to arbitration were completed in some way within a calendar year. It is not difficult to do the math to figure out what the future held under the existing system: Assuming only half the extant grievances would actually ever get referred to arbitration, that the clearance rate continued at 25 per year, and that no grievance was ever filed again by the union, it would take 60 years to clear the backlog. This was hardly a satisfactory state of affairs, particularly when one considers that the oldest grievance in the system had been filed nine years before 1998 and had yet to be disposed of. Grievances are usually filed because there is a real dispute between the parties that has not been resolved on the plant floor. Behind a grievance usually lies some resentment and dissatisfaction. A grievance system that lets such disputes fester for years becomes an aggravating factor to the problem that led to the grievance, not a solution for it. Such a system has a negative impact on the character of labour relations and on the parties themselves—a resentful employee that cannot get a neutral review of her concern is not a productive employee, and an employer of an unproductive employee is not a happy employer. The system was broken and needed to be fixed and both Ontario Hydro and the PWU recognized it: There was agreement at the highest levels of both organizations that the backlog had to be eliminated.[10] The remaining question was how it would be done and how such a backlog could be prevented from recurring after it was cleared. Before we turn to this issue, however, it is

[10]Was the employer's desire to fix the problem merely an artefact of its desire to "clear the decks" to prepare itself for privatization? It is not for this author to say. However, whether that was part or all of the initial motivation is of little consequence. The fact is that both Ontario Hydro and its major successors have, as will be seen below, remained committed to an expedited system and have agreed to modify it so that it remains viable. Whatever their initial motivation, these employers clearly accept that an expedited system furthers the interests of the employer. None of them has sought to reinstitute the pre–1998 system.

important to review the purpose of a grievance arbitration system to understand why the expedited system established at Ontario Hydro makes sense.

2. The Purpose of Arbitration and the Principles of Expedited Arbitration

Nietzsche's aphorism about forgetting one's purpose is important not only because it reflects a common reality but also because the purpose of doing something is the critical determinant of how it should be done. If the purpose of tort law is to compensate victims, a strict liability system is the appropriate means of carrying out that purpose. If, on the other hand, the purpose of tort law is to punish negligent behavior on the part of the tortfeasor, a strict liability system would make no sense and would, in fact, be counterproductive—a fault-based system would be the appropriate means of carrying out the objective of the law. Hence, one can best judge the efficacy of a system by determining how well it carries out its purpose. What, then, is the purpose of an arbitration system for the parties that fund it?

We can start by pointing out what the purpose of the system is not. For the parties to it, we submit that the purpose of an arbitration system is not

1. to add arbitral case law to the published reports;
2. to have a union lawyer vigorously cross-examine a manager at a hearing, regardless of whether his or her grievance has any merit;
3. to have a management lawyer vigorously cross-examine a grievor, regardless of the fact that the grievor may actually have a point in the case.
4. to uphold the highest traditions of natural justice by allowing for oral evidence, representation by lawyers, and questioning of witnesses on all matters and in every case.

This may or may not appear to be obvious points to the reader, but it is important to view the matter from the perspective of the parties to the dispute (who, of course, are also the parties that bear the costs associated with the dispute and its resolution). As far as they are concerned, we would submit that the above points are almost trite.

Starting with point 1 above, a long, well-written, and scholarly award in a case is, in economic terms, largely a positive externality of an arbitration system. Getting a decision and a brief explanation of why the result was reached is, of course, critical to the parties. But everything beyond that—a detailed review and analysis of oral evidence led at the hearing and relevant case law—is of little incremental value to the parties, as opposed to lawyers, arbitrators, and other parties who look to the case reports for such analyses.

Regarding points 2 and 3, it sometimes happens that the relationship between the parties is so dysfunctional that one side or the other will refuse to resolve a dispute, knowing that its position is doomed to failure at a hearing. Maybe this happens for political reasons, or maybe some small solace is to be had by having a lawyer punish a witness that the lawyer's client dislikes by engaging in a tough cross-examination. It happens, but, in the long run, it is never a good thing for labor relations and is not a desirable outcome of a functional dispute resolution system. And yet, in a traditional arbitration system, there is very little control of this type of behavior—as long as the questioning is about arguably relevant matters, it goes on and on.

Regarding point 4 above, natural justice is important to lawyers, but we would submit that it is less so for the parties to a labour dispute. For the most part, what matters to them is getting a result that makes sense, rather than troubling with the finer points of procedure. It must never be forgotten that process is a means to achieve an end, not an end in itself. Hence, what is important is not the application of natural justice for the sake of applying it but the use of a sensible process for getting to a sensible decision. This leads us to the final point—no oral evidence for the sake of oral evidence.

This final point may seem odd to a law student taught the importance of the law of evidence or even to a more seasoned practitioner not familiar with a high volume grievance arbitration process.[11] However, we can assure the reader after more than a

[11]One English judge once described a courtroom full of the law of evidence as one that is "deadly dark and smells of cheese." The law of evidence, of course, is important because no matter how wise the laws, justice cannot be achieved if the adjudicator cannot get at the truth. The point is to apply the rules of evidence in a manner that facilitates the search for truth. Strict application of the law of evidence does not always assist in this search. More precisely, oral evidence, a very expensive and time-consuming means of getting at the facts, is, based on our experience, rarely necessary in a grievance arbitration setting.

decade of experience with a system where no oral evidence is the rule, that oral evidence is rarely actually needed and is often a hindrance to the expeditious resolution of a dispute. It is simply a fact that once the parties to the Hydro system started setting out their positions on the evidence in written briefs, it became evident that the number of cases where there was a dispute on a material fact in the case was near zero. There are lots of factual disputes between the parties, but very few of them actually matter to the resolution of the case at hand. As every lawyer knows, most lay persons have a vastly wider view of what facts matter to a case than does a lawyer, judge, or arbitrator. What matters is whether there is a dispute regarding a fact that matters to the decision maker's analysis so as to require the hearing of oral evidence, not whether the parties see eye to eye on every factual allegation. The former type of dispute is surprisingly rare. Even where material factual disputes arise, they can sometimes be resolved by some pointed questioning on the part of the arbitrator without having to resort to the hearing of sworn testimony. A properly structured arbitration system can apply these truths to save the parties time and money.

If none of the above matters form any part of the purpose of the system, what does? We would say that the purpose of an arbitration system is

1. to drive accountability for disputes down to the level of the people responsible for them—usually those on the plant floor;
2. to discourage disputes between the parties;
3. to resolve disputes that do arise between the parties in an expeditious manner.

The first point relates to the importance of making the real parties to the dispute (typically the supervisor on the company side and the steward on the union side) own that dispute and answer for it. Unless they realize that they must justify their positions, there is little incentive for them to act constructively to solve their problems. It becomes too easy for the union official responsible for filing a grievance (in the PWU, the Chief Steward) to file a grievance solely to placate an upset grievor, or for the company supervisor to refuse to resolve a meritorious dispute because she doesn't like the Chief Steward, or because she has a short-term budget issue, or for whatever other extraneous reason might be

present. Since this is the level where most disputes begin, this is the level where ownership of a dispute must reside.

The second issue relates to the incentives created by the system as a whole. A system that allows a backlog leading to grievances that can languish for years encourages disputes and thereby negatively impacts the quality of the relationship between the parties. Chief Stewards that file a grievance solely to placate a member have no disincentive to do so if they know that they can let it sit for years without having to "face the music." By the same token, managers who know that they're going to end up having to pay for a grievance have little incentive to settle up if they know that they can put it off to a future budget year and cut a deal at that time for something less than the total amount owing plus interest. Both sides have endless opportunities for delay in a system that has three grievance steps and an arbitration step that requires full-blown evidentiary hearings spread over months due to the availability of lawyers and the arbitration board. This brings us to the final point: expedition.

The maxim "labour relations delayed are labour relations defeated and denied"[12] is viewed (at least in Ontario) as a truism. As a rule to be abided by, however, it seems honoured more often in the breach than in the observance. At least that was the case at Ontario Hydro before 1998. It is a fact that delay has pernicious effects on labour relations —disputes become entrenched and can grow from minor irritants into major problems as one party begins to suspect that the other is deliberately delaying resolution of the matter. If an employee is out of work pending the completion of a hearing, delay can cause irreparable harm—financial collapse or even bankruptcy. By the same token, the longer the arbitration of a dismissal case takes, the greater the risk of the employer having to pay back wages to a reinstated employee for a period of time during which she contributed absolutely no labour to the enterprise. If delay is toxic, the proper purpose of an arbitration system is not only to resolve disputes but to do so *expeditiously.*

Delay can arise in many ways, both in the grievance process and after the grievance is referred to arbitration. Before the referral, parties can simply allow a grievance to languish. Once referred to

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[12] *See* Re Governing Council of the University of Toronto and Canadian Union of Educational Workers, Local 2 (1988) 52 D.L.R. (4th) 128 (Ont. H.C.J. Div. Ct.) at 139, quoting from an earlier decision of the Ontario Court of Appeal in Re Journal Publishing Co. of Ottawa Ltd. and Ottawa Newspaper Guild (unreported, dated March 31, 1977; summarized 1 A.C.W.S. 817).

a step in the grievance process, weeks or months may pass before the next step is scheduled, due in part to just finding a time when all the necessary participants are available to meet, but sometimes due to the lack of desire to push the matter along or the simple neglect of the matter. If there are three steps in the grievance process, the time delay associated with a step is tripled. Once the grievance is referred to arbitration, a date or dates must be found when not only all the relevant players on behalf of the parties are available but also when counsel and all members of the arbitration board are available. This is apart from the delay that is caused by parties bickering about whom to appoint to hear a case or, even where, as in the PWU/Ontario Hydro system, panels are preappointed by the parties, bickering about which case should be heard on which date by which panel. And then there is the delay at the hearing itself.

In Ontario, both the courts and the legislature have, over the years, given arbitrators a wide berth with respect to matters of both law and evidence. An arbitrator's decision will not be overturned by a court so long as it is reasonable[13] (a far happier standard for the arbitrator than that applied by reviewing courts to trial judges) and, while the courts do require arbitrators to adhere to the principles of "procedural fairness,"[14] this is a flexible standard to be viewed in a context where arbitrators have by statute very broad procedural powers, including the right to hear evidence that would be inadmissible in a court of law.[15] The intent of both the courts and the legislature is to recognize the expertise of arbitrators in labor relations matters and to allow them to resolve disputes without adhering strictly to the rules of procedure, law, or evidence. Yet, in conventional arbitration hearings, counsel persist in making preliminary motions challenging the arbitrator's authority to hear part or all of a case, sometimes insisting that the merits of the case be adjourned pending a ruling on the motion, and raising objections as to evidence, even though the result of the motion or objection is usually that the arbitrator reserves on ruling on either type of matter until the completion of the hearing. Delay can also be caused by one party refusing to provide full disclosure of relevant evidence in its possession, requiring an arbitrator to order production. While arbitrators in Ontario clearly

[13]Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

[14]Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670

[15]*See* Labour Relations Act, 1995 S.O. 1995, c. 1 , Schedule A, s. 48 (12), particularly subsection (f).

have the power to order production, even before the commencement of a hearing,[16] if this power is not exercised until the commencement of a hearing (perhaps because the counsel didn't get around to making the request until then), the usual result is that the start of the case proper is delayed until production is made and the receiving party has time to review the evidence.

It is important to understand (as we believe the PWU and Ontario Hydro came to understand before establishing their expedited system) that it is in the interest of *both* the employer and the union that a dispute resolution system drive accountabilities down, discourage unnecessary disputes, and resolve necessary disputes expeditiously. Neither side gains from having a workforce (meaning both managers and workers) that is demoralized and frustrated because grievances proliferate, only to be ignored or, worse still, deliberately delayed. People in such an environment get the sense that nobody cares about their issues, and that is hardly a motivator for them to work productively.

If delay and indifference are the problems, then expedition and accountability are the solutions. More specifically, based on our experience, an effective dispute resolution system should comprise at least the following elements:

1. A mechanism to ensure that speedy resolution of disputes occurs by default. That is, unlike most systems where a party actually has to take a step to move a grievance along in the process, an effective expedited arbitration system must, in our view, require that, once a grievance is filed, unless resolved, it automatically moves to the next step in the process if it is not resolved first. In this manner, there is no advantage to be gained by a union filing a frivolous grievance or an employer deliberately refusing to resolve a meritorious case, as both sides know that they will without delay end up at a hearing where they will have to justify their positions (and, implicitly, their conduct of the grievance).
2. A mechanism to ensure that the persons responsible for filing and responding to grievances are quickly held accountable for their decisions in that regard.

[16]Labour Relations Act, 1995 S.O. 1995, c. 1 , Schedule A, s. 48 (12)(b).

3. An expeditious means of resolving all procedural, scheduling, production, and other matters apart from the merits of a case *before* the hearing of the matter begins.
4. A hearing process that will resolve multiple cases in a day. This effectively means one requiring the parties to make full disclosure of the evidence and their respective positions on it in writing and well in advance of the start of the hearing. The calling of oral evidence will require the permission of the adjudicator and will be the exception, rather than the rule.

The process established by the PWU and Ontario Hydro in 1998 meets all of these criteria. The mechanisms the parties chose to meet them will now be reviewed.

3. The Ontario Hydro Expedited Grievance and Arbitration System

The broad outlines of the expedited system at Ontario Hydro were set out by Martin Teplitsky Q.C. as the mediator of the 1998 reopener to the 1996–2000 Ontario Hydro/PWU collective agreement. He did this in consultation with counsel to the two parties to the collective agreement.[17] At the same time, Mr. Teplitsky was appointed by the parties to be the Chief Arbitrator in the new system and he has remained such in all the successor collective agreements. In this sense, Mr. Teplitsky is both the initial proponent of this system and its ultimate overseer. His importance to the system cannot be overestimated (much of the efficiency in the system is attributable to the force of his character and the high regard that the parties have for his opinions), but, ultimately, the parties own it and the parties can make or break it. It is therefore critical to the success of the system that the parties continue to support it. After the break-up of Ontario Hydro, the system developed in different ways at the various successor companies, as will be detailed below. The point to be made, however, is that the initial system could and did get modified by the parties and the Chief Arbitrator to continue to serve the changing needs and different characters of the different workplaces governed by it. This is a testament to both the wisdom and the flexibility of the broad

[17]The author of this paper was counsel to the PWU, and John C. Murray, now a Justice of the Superior Court of Justice of Ontario, was counsel to Ontario Hydro.

outlines of the system and to the commitment of the parties to the system to keep it working effectively.

The initial system consisted of a two-phase expedited mechanism. The first phase was a system to clear the backlog; the second was a permanent expedited system, which is the system still in place at the Hydro successors, albeit in modified form.

The backlog clearance began with a massive "show hearing" where the Chief Arbitrator heard and disposed of dozens of cases on a single day before the assembled masses of representatives of the parties. Essentially, the point of the exercise was to show the parties that the heart of the backlog clearance system—the hearing of a large number of grievances on a single day—could and would work. The backlog clearance system consisted of three single arbitrators appointed by the Chief Arbitrator to hear backlogged cases at the rate of 15 per day of hearing before each arbitrator. While the appointments were made in consultation with the parties, it was a deliberate intention that the appointees should be adjudicators who had not arbitrated for the parties before. They would come at their task with a fresh approach and no baggage to carry with respect to past decisions between these parties. In fact, the three appointees, although seasoned adjudicators, had relatively little experience in labor arbitration compared to the arbitrators that had been hearing cases under the old system.[18] Again, this was to ensure a new and different approach to decision making was applied. The backlog arbitrators were to issue bottom-line decisions (usually a couple of sentences for each case) based on written briefs filed by the parties and oral argument that, on the union side at least, was presented by nonlawyer union staff. Given the stripped down procedure and the lack of reasons for decision in these cases, the bottom-line decisions were explicitly not precedent setting.

If the reader thinks this is a "shock and awe" way of resolving disputes, and that this really is how one takes a "walk on the wild side" in an arbitration system, she may rest assured that it seemed even more so to the parties themselves. Contrast this system with the way that cases between these parties had been heard before the backlog clearance: Cases were heard by a tripartite panel and consisted of full opening statements followed by, usually, several live witnesses testifying under oath and being cross-examined.

[18]For this reason, all decisions of the backlog arbitrators were subject to approval by the Chief Arbitrator, a seasoned veteran labour mediator/arbitrator.

The parties often called oral evidence of what transpired in collective bargaining when a dispute involved the interpretation of a collective agreement provision.[19] Evidence and argument typically took six days of hearing spread out over many calendar months. Hearing days would start at 10:00 AM and end by about 4:30, with a 90-minute lunch break and a break before and after every examination in chief and cross-examination of every witness. Moving from that pace to arguing 10 to 15 grievances a day, for these parties, was like moving from a rural estate to lower Manhattan.[20] There was real culture shock and the parties had to make what were sometimes difficult adjustments to their modus vivendi. Happily, however, the parties did an admirable job of adjusting. The cases got done and the backlog of 3000 cases (including those cases that were older than some of the children of the representatives of the parties) was essentially cleared within six months.

Lessons drawn from the backlog clearance process which were then applied to the permanent expedited process included the following:

1. A skilled adjudicator really can hear and decide several cases in a day, so long as written briefs setting out the facts and the positions of the parties are provided in advance of the hearing and mechanisms are in place to ensure that preliminary matters are dealt with expeditiously.
2. Grievors and managers really don't care much about the procedural niceties that sometimes enrapture the legal profession. There were very few complaints from anyone about the process, compared to the relief frequently expressed by many that festering disputes were finally being resolved.
3. There was no palpable difference in the quality of the results in these cases. The bottom-line decisions made sense

[19]Such evidence of bargaining was almost always of no use to the arbitration board. There was almost never compelling evidence of a shared understanding of the intent of a provision for the simple reason that, where such discussions were actually held and understood the same way by both sides there was no need to file a grievance on the issue—the parties had a clear understanding. Usually, the evidence of bargaining amounted to what one party thought or said, without any acknowledgement from the other side that it agreed with the first party's views.

[20]Hence the reference in the title of this paper to the Lou Reed song chronicling life in certain quarters of that part of the world. On a perhaps more lurid level, one could view Holly's transformation from a "she" to a "he" in the opening verse of the song as a metaphor for the radical transformation of the arbitration system chronicled in this paper. Even the title of the album on which the song first appeared ("Transformer") is an apt description of the systemic change described in this paper.

at about the same rate that the previous full-blown reasons did, which was a very high rate indeed. The settlements of grievances made sense in the same way that they had in the past. There were just a lot more of them. While there was an increase in the number of duty of fair representation complaints filed against the PWU at the Ontario Labour Relations Board by grievors, when viewed in the context of the rate of cases being cleared, this was no increase at all. Apart from one such case that was settled, the rest were either withdrawn by the complainant or dismissed by the Board.

4. When the parties are forced to "face the music" by having a dispute put on the fast track to a hearing, they seem to see the benefit of settlement in a way they never have before. A large number, if not most, of the grievances scheduled for hearing in the backlog process were settled or withdrawn once the parties were forced to turn their minds to the merits.
5. Formal evidence (by sworn testimony) is almost never necessary. Once the parties started putting their positions down on paper in a brief they exchanged with each other, they began to realize that, on the material facts, there was usually no significant dispute between them. If there was, it could usually be cleared up by means of an interventionist arbitrator asking a few pointed questions.

The 1998 collective agreement implemented a permanent system of expedited arbitration to deal with grievances after the backlog had been cleared. This second phase of change was only moderately less radical than the first phase. The permanent expedited system comprised the following elements (correlated below to the list of necessary elements of an expedited system proposed at the end of Section 2 of this paper):

1. Grievances would have a first step meeting in the workplace between the grievor and his/her union representative on one side and the contact supervisor on the other. If not resolved at that point the grievance would proceed immediately to the next scheduled Grievance Review Board (GRB) hearing. If not resolved at the GRB, a grievance would proceed to the next scheduled arbitration day. Hence, a

grievance process consisting of three steps at the leisure of the parties became one consisting of a single step before mandatory joint review of the grievance. A grievance not resolved by that process would go directly to arbitration. This put into place a process where "speedy resolution of cases occurs by default," the first element of an effective system set out above.

2. The mechanism put in place to ensure that the persons responsible for filing and responding to grievances are quickly held accountable for their decisions in that regard was the Grievance Review Board. The GRB consists of four members, two union officials and two management representatives, who sit and review each grievance in an informal meeting to decide whether it should be dismissed, referred to arbitration, or settled. The Chief Steward that filed the grievance and the responding manager or Human Resources representative prepare written briefs and try to convince their peers of the justice of their positions in a GRB meeting. The GRB acts on the basis of consensus, but despite this it often dismisses unmeritorious grievances and imposes settlements of meritorious ones. There is nothing quite like having your peers dismiss a grievance, or impose a settlement of it, to make a Chief Steward or manager think carefully about the position she takes the next time around.
3. The Chief Arbitrator became and continues to be the "expeditious means of resolving all procedural, scheduling, production and other matters apart from the merits of a case before the hearing of the matter." The Chief Arbitrator is available by telephone hearing on very short notice[21] and has disposed of matters ranging from scheduling disputes to interim relief requests by telephone conference.
4. The "hearing process that will typically resolve multiple cases in a day" chosen for the permanent process continues to consist of oral argument based on written briefs exchanged by the parties and given to the arbitrator several days in advance of the hearing. Typically, anywhere between two

[21] Usually, the notice is a matter of a couple of days, but in one recent case the Chief Arbitrator himself sent an e-mail notice to counsel of a conference call to resolve an issue about 35 minutes before the start of the call. Everyone called in on time.

and five cases are heard in an arbitration day. The awards contain brief reasons and are precedent setting.

This last element, the oral hearing based on written briefs, merits further comment. First of all, the briefs in this system initially were written, at least on the union side, by nonlawyers. While lawyers have been increasingly involved in authoring the union's briefs for arbitration (though not the earlier versions of the briefs used at the GRB), this is largely a matter of insufficient brief-writing resources within the union. The resource issue is currently being dealt with so as to have more of the briefs written internally. While lawyers continue to argue the cases in the permanent expedited system, they were not involved at all on the union side in the backlog clearance process.

The briefs in the backlog clearance process were documents generally bereft of both literary merit and legal artifice. The briefs in the permanent system (some of which are written by lawyers) are more professional, but are short (usually a few pages) and rarely refer to case law. They are focused on facts and collective agreement provisions). And yet both processes worked, and worked well (a humbling fact for any lawyer who thinks only the members of her profession can properly write an argument in a labour case). The permanent process continues to work well. Why is this so? To the mind of this author, at least, because, given the relevant facts and collective agreement provisions set out in writing together with the positions of the parties, an experienced arbitrator can, with the assistance of counsel's oral argument, usually figure out the right result in an arbitration case without need of anything else. The truth is that both arbitrators and lawyers that have sufficient experience in the practice of labour law can get to the bottom line, if they have the will to do so, in pretty short order once the relevant facts and collective agreement provisions are identified. This is not true in every case—there will always be cases that are so important or complex or bogged down in credibility disputes on important issues that a terse brief followed by a short oral hearing will just not suffice. And yet, experience between these parties has shown that such cases are relatively rare.[22] The run of the mill promotion or discipline case can usually get sorted

[22]Dismissal cases and policy grievances (those affecting the entire bargaining unit), by agreement of the parties, were referred directly to mediation or arbitration rather than the GRB. Dismissal cases were not likely to be settled at the local level and policy grievance by their very nature were not matters that could be dealt with at a local GRB.

out in short order and, under this system, it did and still does. In fact, one of the prime lessons of life under this system is that the vast majority of the evidence the parties used to lead in days of oral hearings was utterly useless to the decision maker.[23]

The skill and ability of the arbitrator running the hearing is, of course, critical to its success. In the context of an expedited arbitration system a special skill set is required of both counsel and the arbitrator. Counsel must be prepared to do a lot more work in preparation for the hearing than they would in a conventional system. It takes a lot of time to pare down an argument so that it can be set out in a few minutes. This is apart from the fact that several cases (as opposed to a portion of one case) are heard each day. Of course, arbitrators have to review multiple sets of briefs before the hearing (as opposed to reading little more than a grievance form prior to the start of a conventional hearing). The peculiar skill required of an arbitrator in this system, however, is the force of character to intervene—ask the hard questions and, sometimes, to be painfully blunt in order to get to the bottom of a dispute. The parties know that they are taking a "walk on the wild side" when an arbitrator starts a hearing by turning to the representative of one of the parties and saying, "Neil, I read your brief last night and there is no word in the dictionary to describe how stupid your position in this case is."[24] While this might not have shortened Neil's presentation much, the other side didn't have to say a word and as a result the hearing was therefore shortened by at least half. This is just one instance of an ever-lengthening list of anecdotes about the interventionist zeal of the arbitrators and mediators that hear cases under the expedited system. While the list is too long to dwell upon here, the reader should not make

[23]This became evident to the author for reasons having nothing to do with the expedited system. In one conventional case, the arbitrator wrote a lengthy and learned decision after a very long hearing without having the benefit of *any* of the several binders of documentary evidence filed by the parties—which the arbitrator had left in the author's office for safekeeping and had not picked up until after the issuance of the award. In two other cases, an arbitrator had mistakenly issued a decision in a case that the parties had settled before the completion of the evidentiary hearing. In none of these cases was the award deficient in any way. All the arbitrators were seasoned top-tier adjudicators. Counsel should think of this the next time they consider how much evidence they really need to lead in a case. Of course, having a decision rendered in a settled case caused some consternation between the parties, but that is another matter.

[24]We suspect that many adjudicators of all ilks have secretly longed to experience the feeling of exhilaration and release that the arbitrator in that case must have felt after making that comment. For our part, we have often wished we had a video of this moment to show to the course in Constitutional Litigation he teaches. As an object lesson in the importance of counsel asking herself the hard questions before committing to a position in writing, it would be hard to beat.

the mistake of thinking that episodes such as the one above (or the many more like it) are resented by the parties. Any organization the size of Ontario Hydro, its successors, or the PWU itself contains within it (like a Sergio Leone film), the good, the bad, and the ugly. The parties generally have enough objectivity to realize that and, at least as far as this author can tell, appreciate an arbitrator who tells it like it is. Whatever is lost in decorum is more than made up for in expedition. As indicated above, experience has shown that the parties are far more interested in getting a result than the niceties of the means used to get to the result.

The other point that must be made regarding the arbitrators involved in this system is that this is not a game for "rookies." The system demands of its participants a level of skill and ability that is not common. The primary skill of any adjudicator (from the lowest level of an administrative adjudicator to the chief justice of the highest court in the land) is something that cannot be taught and must be learned: wisdom. It is the ability to come to a just result for the parties based on an understanding of human relationships that can only come from experience and careful deliberation about what a particular result will mean to the parties. Ontario Hydro and the PWU both assiduously ensured that the arbitrators adjudicating their cases in the old system were among the best in the province and this did not change with the introduction of an expedited arbitration system. Again, the lawyers presenting these cases were and remain experienced labor specialists upon whom the parties relied to approach their task on the basis of maintaining the best long-term interests of their clients at heart. This is not as simple as it may sound, as the long-term interest of a client may diverge from the immediate interest at play in any specific case. The fact that the group of lawyers involved on both sides of this system has remained relatively stable over the years is proof of their abilities and their clients' continued faith in them.

Moreover, both the arbitrators and the lawyers participating in the new system rose to the challenge of dealing with multiple cases in a day. For the arbitrators this involved writing decisions in an environment where oral evidence was generally not available. And yet, the written decisions remain at a high level of quality (and wisdom) and give the necessary guidance to the parties in a distilled (often terse) format. Highly skilled arbitrators can and do produce reasons that guide the parties and explain to them why the ultimate result in the case makes sense in the circumstances. One of the lessons learned from this system is that, stripped of

the need to explain things to the general public on the basis of an increasing body of case law, an experienced arbitrator can explain the justice of her decision to the parties in a compelling manner. This requires skill and experience, but it has certainly worked for the parties thanks to the efforts of the experience and skill and, finally, the wisdom of the arbitrators and mediators working within this system.

While the expedited system makes special and at times arduous demands of all of the participants, most, if not all, of them (arbitrators, lawyers, parties) have risen well to the challenge of this brave new world, and there are real benefits for them all: The amount of tedium at the hearings (and there was a lot of that in the conventional system) has been reduced to near zero, and, while the days are busy, they often end long before the afternoon is over.

The permanent expedited system has not, however, remained static. As indicated above, Ontario Hydro was deconstructed by the Ontario government. As a result, the system had to evolve over time as different parties at increasingly disparate workplaces made different demands of it. We now turn to a description of the principal successor systems.

4. Variation and Consistency: The Expedited Systems at the Hydro Successor Companies

The Ontario Hydro expedited system has been adapted by the parties at various successor workplaces. The larger systems and their current rules are as follows.

At one successor (which we will refer to as Company A), the parties continue to conduct GRB hearings, but virtually every grievance that comes out of the GRB goes to mediation rather than arbitration. The vast majority of cases that go to mediation are resolved there. The mediations are conducted with lawyers, but without briefs, evidence, or prejudice to the parties. The relationship between the parties, at least at the level of their representatives at the mediations, is constructive enough to make this process work. Several cases are mediated on each day, and often simultaneously. Again, the skills of the mediator and counsel are critical to the success of the process. Few cases are referred to arbitration in part because the lawyers and the mediators involved in the mediation are very good at what they do. The few cases that are referred to arbitration and that require an evidentiary hearing

have in the past been heard in a conventional "full-blown" process, but the union has recently revised its position in this regard to require the parties to agree to rules to assist in the expedition of such cases, failing which they will be referred to the Chief Arbitrator to assist the parties in expediting the evidentiary hearing. While this is the result of some recent dissatisfaction with the conventional process in this workplace,[25] such conventional cases are exceedingly rare and the system as a whole continues to run quite effectively.

At Company B, after the enterprise was taken over by new owners, the GRB process eventually became completely dysfunctional. GRB meetings were either not being held or, when they were, they were not resolving the cases before them. The Chief Arbitrator stepped in and convinced the parties to implement a "Monthly Review" system. That is, all extant grievances are put before the Chief Arbitrator for review on a pre-set date each month. The review ranges from a form of triage, to a means of cajoling parties into settlement, to a vehicle to dismiss a grievance or issue an order disposing of it. The Chief Arbitrator does this on the basis of a very short summary of each case submitted in writing prior to the hearing by each party, together with a typically very short oral representation by counsel. The monthly list usually comprises between 20 and 40 cases.[26] The few cases that end up having to go to arbitration are normally arbitrated by the Chief Arbitrator on the date of the next Monthly Review, after the completion of the Review for that month. Evidentiary hearings are conducted by means of each party filing a brief and "will say" statements setting out the evidence in chief of each witness. The witnesses are made available for cross-examination at the arbitration hearing, but because the evidence in chief has been previously submitted in writing, multiple evidentiary arbitrations are often conducted in far less than a full day of hearing.

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[25]Recently, on the first day of the hearing proper in one such conventional case, counsel for the employer reportedly spoke for 4½ hours and failed to complete his opening statement before the day ended. This brings back the worst memories of the pre–1998 system. One is tempted to ask whose interests such conduct serves. It cannot be those of the employer, which is not only paying for this display but is also running the risk that the arbitrator may conclude that the length of the opening suggests that the employer "doth protest too much" and has something to hide in a case where the union is alleging that the employer refused to hire two union members because of their age, a violation of both the collective agreement and human rights legislation.

[26]The first Monthly Review list consisted of 48 cases. As the process (and the Chief Arbitrator) has educated the parties, the numbers have dropped.

At Company C, the GRB process is usually quite successful, regularly clearing more than 80 percent of cases referred to it.[27] The few that get past the GRB are now sent to an Arbitration Day before the Chief Arbitrator. The parties themselves proposed this process to the Chief Arbitrator after cases not resolved at the GRB started turning into multiday traditional hearings.[28] The Arbitration Day is not a Monthly Review but a day on which the Chief Arbitrator arbitrates cases on the basis of briefs exchanged and filed in advance by the parties. If he decides that oral evidence is needed, the Chief Arbitrator will typically send the case for an evidentiary hearing at the next scheduled Arbitration Day to allow the parties to prepare their witnesses.

The monolithic process established in 1998 has therefore evolved to suit the changing needs of the union and the different employers that inherited it. Note, however, that the basic elements of the system are still in place: Speedy resolution still occurs by default, accountability is still driven down to the "owners" of the grievance,[29] the Chief Arbitrator still deals with procedural issues and interim matters by phone when necessary, and arbitrations generally take place on the basis of briefs without oral evidence—at the rate of multiple hearings each day. These systems continue to clear a high volume of grievances effectively: Grievances are still typically going from filing to complete disposition by settlement or arbitration in a matter of several weeks, instead of months or years.[30]

Resilience and adaptability are salutary qualities of any system, and the fact that this one has survived and been successfully modified to suit different workplace realities suggests that it may be of use to parties other than those currently bound by it.

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[27]This was not always the case. Over the years, there were two instances where, for various reasons, the GRB success rate dropped significantly. In both instances the process was corrected, the first time by the intervention of the Chief Arbitrator, the second time by means of top-level officials of the parties sitting on the GRBs to model effective conduct of the process. As indicated above, the corrective measures were successful.

[28]Not surprisingly, the parties had rather different views as to how this problem came about, but for our purposes the reasons for the problem matter far less than the fact that it was rectified.

[29]At Company B this occurs by the Chief Steward and accountable manager for each grievance appearing with counsel before the Chief Arbitrator each month, rather than before a GRB, but the result is the same. The owners of the grievance (the officials responsible for filing and responding to the grievance) must answer for it.

[30]To give the reader a sense of the volume, in 2008, the PWU booked 189 hearing dates for 977 grievances. In 2009, it booked 216 hearing days for 703 grievances. Almost all of these were in respect of the Ontario Hydro successor companies.

5. Conclusion

About 12 years have passed since the establishment of the expedited arbitration system by the PWU and Ontario Hydro. The employer itself has been cut up into smaller pieces, while the PWU continues as a unified entity, albeit now representing members across increasingly disparate workplaces that were originally part of the 1998 Hydro workplace. The electricity industry that is the milieu of the PWU, its members, and their employers have undergone dramatic changes including not only the demerger of Ontario Hydro but also the consolidation of local distribution companies and the change of government policy from the promotion of deregulation, restructuring, and privatization to the promotion of green power alternatives and the shutdown of coal-fired generating plants. Through all of this, though, the parties have maintained an expedited arbitration system, now modified in different areas to suit local needs, but still true to its guiding principles.

In the end, this must be because the parties themselves find value in the expedited system. From the perspective of this author, labour relations have improved for all the participants in the system (employers, employees, and the union) as a result of their participation in it. There are now typically about 500 extant grievances in respect of the group of employees for whom there was a 3000 grievance backlog in 1998. Grievances that used to take years to clear now get resolved in a matter of weeks from date of filing.

While the system has adapted to the needs of the parties, the conduct of the parties themselves has adapted to the system and, as a result, the character of their relationship has improved. Grievances are no longer ignored or interminably delayed. The parties conduct themselves in the knowledge that if they don't deal with their own problems quickly, somebody else will impose a resolution on them. At the level of the plant floor, all the players know that they will be forced to defend their position before their peers or the Chief Arbitrator. Under this system, "you can run, but you can't hide," and this has diminished dramatically the number of silly grievances and silly management responses to grievances in comparison to the pre–1998 era. Moreover, the Chief Arbitrator, in both the Monthly Review and the Monthly Arbitration hearings, makes a point of offering suggestions to the parties before him as to how to improve the conduct of labour relations. Innovative means of resolving disputes have been the result. The result

of all of this is that the parties have gotten better at resolving their problems themselves. In these ways and in this context, Aristotle's suggestion that regular practice affects the character of the practitioner has been proved to have merit.

Because there are vastly more grievances being cleared than there used to be, the system as a whole is more expensive to run than it used to be.[31] However, on a per case basis, there is no comparison between the pre- and post-1998 systems on the basis of either cost or efficiency. Consider that the typical arbitration hearing under the pre-1998 system took six days of hearing, whereas the typical day of arbitration or mediation now disposes of anywhere between two and five cases. Even at two cases a day, there has been a 1200 percent increase in efficiency, which is an impressive number by any standard.

While no system is perfect, and none can succeed when the participants are incompetent or malevolent, the expedited arbitration process described in this paper has worked and, with some modifications, worked remarkably well over the dozen or so years since its establishment. Over that period of time, the parties have proved that results do matter more than process, evidentiary hearings are rarely a necessary expense, and that people of good will can resolve their disputes both expeditiously and in a manner that enhances their working relationship. They have done this by supporting and participating in a dispute resolution process that drives accountability to the owners of the dispute, discourages unnecessary disputes, and resolves necessary disputes expeditiously. As long as the parties continue to do so, they will be furthering the purposes of the system established in 1998 and will so avoid committing what Nietzsche called the most common stupidity.

[31]The parties did implement certain cost-saving measures to offset the increased global cost. For example, tripartite panels were replaced by single arbitrators and hearings are no longer held in hearing space rented on an ad hoc basis. Instead, hearings are conducted at the Union's offices—at far lower cost than the professional space used in the pre-1998 system.

Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration Under The Labour Relations Act and The Hospital Labour Disputes Arbitration Act

1978

Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration Under The Labour Relations Act and The Hospital Labour Disputes Arbitration Act

1978

Letter of Transmittal

The Honourable Bette Stephenson, M.D.
Minister of Labour

Dear Madam Minister:

I have the honour to submit herewith my report as an industrial enquiry commission appointed by you to inquire into, report upon and make recommendations concerning grievance arbitration under the Labour Relations Act, R.S.O. 1970, Chapter 232, as amended by 1975, Chapter 76, and The Hospital Labour Disputes Arbitration Act, R.S.O. 1970, Chapter 208, as amended by 1972, Chapter 152.

I have the honour to be,

Madam,

Your obedient servant,

Arthur Kelly

Ministry of Labour

APPOINTMENT

WHEREAS in and by section 34 of Chapter 232 of The Revised Statutes of Ontario, 1970, as amended by 1975, Chapter 76, entitled "The Labour Relations Act", the Honourable Minister of Labour may establish an industrial inquiry commission to inquire into and report on any industrial matter that she considers advisable;

AND WHEREAS The Honourable Minister of Labour deems it to be in the public interest to cause inquiry to be made concerning the matters hereinafter mentioned;

NOW, THEREFORE, pursuant to the authority vested in me, I hereby appoint the Honourable Arthur Kelly as an industrial inquiry commissioner to inquire into, report upon and make recommendations concerning grievance arbitration under The Labour Relations Act, R.S.O. 1970, Chapter 232, as amended by 1975, Chapter 76, and The Hospital Labour Disputes Arbitration Act, R.S.O. 1970, Chapter 208, as amended by 1972, Chapter 152, including, without limiting the generality of the foregoing:

1. (a) The structure of grievance arbitration, with particular reference to the use of:

(i) ad hoc arbitrators or boards of arbitration selected and paid by the parties;

(ii) permanent arbitrators or boards of arbitration, established by statute, and publicly-funded;

(iii) any combination of, or variation in, (i) or (ii) or any other structure for the resolution of collective agreement disputes by arbitration;

(b) The arbitration process, with particular reference to methods and procedures for expediting the hearing and disposition of disputes;

(c) The availability and utilization of arbitrators, with particular reference to training, tenure and remuneration; and

(d) Any other matter which, in the commissioner's discretion, is deemed to be relevant to the prompt, equitable, economic and workable resolution of disputes, by arbitration, concerning the interpretation, application, administration or alleged violation of collective agreements under the Labour Relations Act or the Hospital Labour Disputes Arbitration Act.

And to review and make recommendations concerning The Ontario Labour-Management Arbitration Commission Act, R.S.O. 1970, Chapter 320

11. The commission shall have powers equivalent to those vested in a conciliation board under section 30 of The Labour Relations Act;

TO HAVE, HOLD AND ENJOY the said office for and during my pleasure.

"Bette Stephenson,M.D."
Minister of Labour

DATED at Toronto

this 16th day of

December, A.D. 1976.

Glossary

Chairman - "Person chosen to preside at a meeting".

Oxford English Dictionary

He, him, his - "may generally be allowed to stand for the common gender"

Fowler: The King's English pg.76

SUMMARY OF CONTENTS

Chapter One

Introduction

At the inception of this investigation, every labour union which was a party to a collective agreement falling within the jurisdiction of the Legislature of Ontario received a written invitation to make representations to me. In addition, I invited senior officers of the Ontario Federation of Labour and the Canadian Labour Congress to advise me of their views.

Before any general invitation was communicated to the employer-parties to collective agreements, the Canadian Manufacturers' Association informed me of its intention to present a brief on behalf of its members. Some employers also made representation individually.

In the light of the dissatisfaction with the existing procedure expressed to the Minister of Labour, the response to my invitation was dissappointing. Even after extending the time for receiving representations, I received, in all, about 50, including a number from interested citizens who expressed personal views. The names of those making representations are set out in Appendix G.

Since I was convinced that the wealth of experience in this field could afford more help than had come from written submissions, I sought out persons who I believed could provide constructive suggestions with respect to, and informed appraisal of, possible reforms in the grievance arbitration process.

I have taken the written material tendered to me to be of a public nature and available to anyone interested. Where I have approached a possible informant, I have treated as confidential what passed between me and the informant. Although I have reserved the right to adopt any views conveyed to me, I have promised such informants that their anonymity will be respected.

Therefore, I am unable to acknowledge, by name, the great assistance which I have received from many who so willingly gave me the benefit of their knowledge. Nonetheless, they were a source of help for which I am grateful, as I am to the groups and individuals whose assistance came through their public presentations.

I wish also to acknowledge the valuable assistance of E.B. Joliffe, Q.C., for his personal exposition of the workings of the Public Service Staff Relations Board.

Throughout my investigation I have drawn heavily on the research facilities of the Ministry of Labour; I wish to express my appreciation of the ever-available assistance afforded by Michael Skolnik and Lew Haywood.

I am also indebted to the Information Services Branch of the Ministry of Labour, for its assistance in the editing, design and production of this report.

The members of the Bar have been a cource of great help: to them, I extend my thanks. I am especially indebted to the Ontario Labour Relations Section of the Canadian Bar Association. The report of a Canadian Bar Association special committee, adopted after a meeting of the Labour Relations section, was of particular value. The special committee was chaired by Edward T. McDermott; the other members were Steven Grant, Alan Minsky and John Sanderson, Q.C.

Chapter Two

Grievance Arbitration: What it is: What it is not

The term "arbitration", as used in The Labour Relations Act*, is not defined in the statutes of Ontario. What is meant by the term must be garnered from its context and the manner in which it has come to be used with respect to industrial relations.**

There are two distinguishable situations for which arbitration is provided as a means of bringing about a determination of differences: first, with respect to matters in dispute between parties who are in the course of making or renewing a collective agreement; second, with reference to differences arising, during the term of a collective agreement, as to its interpretation, application or administration or the alleged violation of it.

This inquiry is not concerned with arbitration in the first sense, commonly known as "interest arbitration", as its Terms of Reference are restricted to investigating "grievance procedure under The Labour Relations Act". Arbitration in the second sense, with which I am concerned, is usually referred to as "rights arbitration". The procedure employed in labour matters in Ontario under the designation of "rights arbitration" has been adopted from commercial arbitration, but differs from it in one fundamental.

Arbitration, as a difference-resolving process, was recognized long before present labour relations legislation. It was, in essence, a means of settling differences, invoked by the parties by an agreement committing specific questions to one or more arbitrators, the arbitrators would be chosen by the parties, or in a manner prescribed by them: the parties would agree to be bound by the final decision. When invoked, arbitration ousts the jurisdiction of the Courts with respect to the issues committed to the arbitrators.

Thus, arbitration, in its original form, displays at least the

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* R.S.O. 1970 Chapter 232 and amending acts

** My terms of reference include arbitration of grievance under The Hospital Labour Disputes Arbitration Act. That Act contains special provisions with respect to the formation of a collective agreement between a health care institution and its employees which supersede the like provisions in The Labour Relations Act. However, by virtue of section 2(2) of The Hospital Labour Disputes Arbitration Act, grievance arbitrations under collective agreements are regulated by the provisions of The Labour Relations Act. On that account, I do not find it necessary to deal separately with grievance arbitration under collective agreements to which The Hospital Labour Disputes Arbitration Act applies. They will be governed by whatever provisions as to grievance arbitration result from the recommendations generally made in this report.

following characteristics:

- It was brought into operation by the agreement of the parties
- The agreement ousted the jurisdiction of the Courts and bound the parties to accept the adjudication of chosen adjudicators.
- The power of the adjudicators and their jurisdiction to adjudicate arose from the agreement made by parties and extended only to the issues which were expressly committed to them.
- The adjudicators were those selected by the parties or selected in a manner dtermined by the parties.

Unlike what prevails in the United States (with the exception of Saskatchewan) federal and provincial legislation in Canada requires, mandatorily, that every collective agreement contain procedures for grievance settlement. The Ontario requirement is contained in Section 37(1) of The Labour Relations Act, which requires that:

> "every collective agreement shall provide for the final binding settlement by arbitration without stoppage of work of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including decision as to whether or not the matter is arbitrable."

Section 37(2) sets out provisions which are deemed to be contained in any collective agreement which fails to include such a provision.

The submission to arbitration in Ontario, in non-labour matters, is the result of the choice of the parties concerned. However, the provisions of Section 37(1), coupled with the provisions of The Rights of Labour Act* denying access to the Courts in labour matters, makes the use of arbitration compulsory, thereby restricting the freedom of choice of the parties to the selection of the arbitrator or chairman of the board of arbitrators. It is not then, precisely correct to speak of grievance arbitration in Ontario as consensual.

Grievance arbitration as now carried on in Ontario under the provisions of The Labour Relations Act is an adjudicative process:

- for the final and binding settlement of all differences between the parties to a collective agreement arising from the interpretation, application, administration or alleged violation of that agreement
- by adjudicators:
  - i) chosen by the parties or
  - ii) appointed on the failure of a party to appoint an arbitrator it is entitled to appoint or
  - iii) appointed on the failure of the parties to agree upon the arbitrator required to be selected by their mutual action.

Grievance arbitration is used after all other efforts by the employer and employee have failed to resolve a difference concerning their respective rights under a collective agreement. It is, in effect, the last resort when all other means have failed. It must, therefore, be viewed as one of two stages in the grievance-resolution procedure provided to avoid work-stoppages.

Because grievance arbitration is not invoked until the parties have exhausted their efforts to agree on a settlement and because it is an adjudicative process by which a resolution is imposed, it is essentially different from pre-arbitration grievance procedure. This difference is of importance. While both are parts of the grievance resolution process, their elements must not be confused. During the first stage, the solution is in the hands of the parties; during the second, it is in the hands of the arbitrator.

The introduction of some form of mediation as part of the arbitration process has been recommended as a means of reducing the number of contested arbitrations.

Mediation, as I understand it, entails the use by the parties to a collective agreement of the services of some third party who attempts to bring the parties into agreement by advice or persuasion, but who is not invested with any power to decide the matter or impose on the parties a settlement that they are not, of their own will, ready to make.

Since mediation, thus defined, could be tolerated only in the pre-arbitration stages of grievance resolution and would be entirely foreign to the adjudicative nature of arbitration, it is not a part of arbitration. On this account, it may well be considered that is lies beyond the scope of this inquiry.

Although I appreciate the somewhat doubtful grounds upon which I tread, I unhesitatingly state that I would not consider, as complete, any procedure for resolving differences arising under a collective agreement unless it contemplated three distinct phases:

- the meeting of the parties in an effort to agree
- subsequent discussions in which they have the assistance of a third party as mediator and
- the reference of the issues to an arbitrator, other than the mediator, for final and binding decision.

It cannot be denied that in a very considerable number of grievances, which otherwise go to arbitration, mediation would have brought about the resolution of the differences without arbitration and its attendent cost, delay and escalation of the friction so often generated by the prolongation of the contest.

It is because of the possible avoidance of arbitration by the intelligent use of mediation that the inclusion of comments upon mediation in this report can be justified.

Pre-arbitration grievance procedures are designed to maximize the possibility of amicable settlement; far too often the expected benefits do not materialize. A solution which would appear abvious to an independent party receives scant attention and the position of the parties, with respect to the difference which should have been resolved, is merely solidified.

In a significant number of cases, the presence of a skilled mediator would avoid the necessity of arbitration; in many others, the mediator would serve as a catalyst to bring about, earlier, the result which emerges later.

As I have elsewhere pointed out, the procedure provided by Section 96 in The British Columbia Labour Code is essentially, in its earlier stages, mediation; it has been successful in reducing the number of arbitration cases. With this aspect of the operation of the section, there appears to be fairly general satisfaction.

So long as the essentially different qualities of mediation and arbitration are recognized and the presence of the former does not adversely affect the latter, the introduction of mediation cannot but help achieve the purpose of the grievance procedure -- to promote industrial peace and advance co-operation between employers and employees.

Mediation is, however, a delicate process and requires restraints to ensure that it does not exceed the limits of its usefulness. To attain its greatest possible effect mediation must:

- come into operation with respect to any specific grievance only with the concurrence of both parties and

- be completely divorced from the arbitration process.

To permit mediation to be initiated by one party -- against the wishes of the other party -- would be incompatible with the very nature of grievance resolution under collective bargaining. If the parties, in the course of their endeavours to resolve a difference, agree that they should invoke the assistance of a third party or if their self-designed procedure so provides, that becomes their chosen method of achieving consensus. Their efforts to work out a settlement will be promoted and the relationship between them will not be endangered.

But for either party, without the agreement of the other, to be able to introduce a third party into their negotiations to accelerate a settlement which the parties are still endeavouring to make, would amount to an enforced termination of the negotiations and could be looked upon as an expression of distrust in the other party's sincerity. Since grievance settlement is a continual process during the term of the collective agreement, invoking mediation unilaterally might well damage the future relationships of the parties, in the long run.

The role of the mediator requires that he seek to bring about agreement by demonstration and persuasion -- never by pressure, which will leave either party feeling it agreed to a result which it has not reached freely. During grievance procedure there is always present in the mind of each party the realization that, in the long run, the parties will agree on a result or a result will be enforced on them by arbitration. This type of pressure bears equally on both parties. While it is a factor which each will take into account in making a decision during the grievance steps, it is not one of which the parties are as conscious as they are of the person of the mediator. Parties will be influenced by the mediator's objective analysis of the situation, by his reference to the consequences of the inflexibility of the parties, by his ability to give information as to how others have dealt with similar circumstances or perhaps by his proposal of a face-saving compromise. But the final result is a voluntary exercise of the judgement of each party.

But when the mediator, urged on by an over-enthusiastic desire to

promote a settlement, makes use of his office to induce either party to accept a solution which, on balance, it does not freely choose, the efforts of the mediator can inhibit--rather than assist--the maintenance of industrial peace. It is understandable that, at some stages, the mediator would like to knock together the heads of the parties who appear to be unreasonable and to bring about what, in his view, would be an obvious solution. But such strong-arm tactics could be destructive to the future relationship of the parties. On this account, any formalized scheme to make available the services of mediators must have clearly defined objectives so that people engaged in it will appreciate its scope and its limitations.

Because mediation and arbitration both are characterized by the introduction of a third party when the two parties to a collective agreement have failed to resolve a grievance, it is easy to confuse them. Nonetheless, there are substantial reasons why the individual characteristics of each should be recognized and that there should be complete isolation of the persons engaged in the one process from the persons engaged in the other.

It is sufficient to mention but three of these reasons.

- Any formal association of a mediator with the arbitration process would tend to invest him in the minds of the parties, with a measure of the adjudicative power of an arbitrator and so give him an aura of authority which would be inconsistent with the office of mediator.

- To perform the role effectively, a mediator must become acquainted with all the facts and circumstances which will ultimately be exposed in any hearing before an arbitrator. If the mediator and arbitrator are, in the minds of the parties, associated with the same agency, they may think that the knowledge of the situation gained by the mediator will be available to the arbitrator, thus giving rise to the possibility that bias, (in the legal sense of that word) might exist.

- The possibility of communication between the mediator and the arbitrator would inhibit frankness with the mediator and would, therefore, reduce his effectiveness.

The use of mediation, in place of some of the grievance steps whereby the parties endeavour to work out their own settlement, would be undesirable and its availability must be in some way controlled so that to it does not curtail the effort to reach agreement. On the other hand, when a mediator is wought, he must be readily available so that the co-operative atmosphere which has lead the parties to seek mediation does not deteriorate while they are waiting for the arrival of the arbitrator. This requires that mediators be available in such numbers, geographically deployed, that the presence of one at the scene of the dispute is possible on short notice. The British Columbia Labour Relations Board has a network of Industrial Relations Officers spread throughout the province. Although each has other duties, his work as mediator is considered of importance and, on the receipt of a telephone call from the Labour Relations Board, can be moved into practically any place in British Columbia within 24 to 48 hours.

Accepting the complete divorce of mediation from arbitration, still leaves to be considered whether mediation should be furnished by an independent third party chosen by the parties or by the services of someone procurable from a public agency.

The former would have some advantages in that, the effectiveness of the mediator would be greater because of his being a person in whom the parties have signified their confidence. However, unless the names of acceptable mediators are settled in advance, the selection of one would likely give rise to the delays similar to those now encountered in the selection of a chairman of a board of arbitration. Any such delay in providing the services of the mediator would defeat its object. It is essential to success that the mediator be introduced promptly before the position of the parties has become rigid.

Into any self-designed procedure could be built the necessary provisions for mediation. But unless it is so provided, the early availability of a mediator can be assured only through the intervention of some agency which, upon the request of the parties, could dispatch a person able and trained to act as a true mediator to meet the parties.

Having regard to the consensual nature of collective bargaining, the most appropriate means of providing such a service would be through an agency established by the joint action of employers and unions. No doubt, the early availability of mediators would result if the provision of mediators were made the responsibility of the Ontario Labour Relations Board. I would see no inherent disadvantage in having this service provided bg the Board other than the hazard of enlarging bureaucratic control over the manner in which employers and employees should govern their own relationship. On balance, I would anticipate better results from the operation of mediation if it could remain under the control of the parties or association of parties working together to make available a mediation service.

Because of the doubts that I have expressed as to whether the matter of mediation falls within my terms of reference, I refrain from making any recommendations in regard to its introduction. Nevertheless, I express the hope that the advisability of, and the means for providing such a service be given immediate study.

Chapter Three

Historical Note

Labour relations legislation in Ontario has, to a great extent, followed the 1935 Wagner Act of the United States. The one noticeable feature for which there is no counterpart in the United States, is the requirement that every collective agreement provides for the final and binding resolution of mid-term differences by arbitration.

This distinguishing feature is the survival of war-time legislation in Canada. Pursuant to the provisions of The War Measures Act, Privy Council Order 1003 enacted the War-Time Labour Relations Regulations which banned strikes and provided for mandatory grievance resolution by arbitration. During the course of the Second World War, these regulations had wide-spread effect in Ontario. By enabling legislation in 1943, the application of P.C. 1003 was extended to the employer-employee relations coming under the jurisdiction of the province of Ontario.

When the first Labour Relations Act in Ontario was enacted in 1950 by S.O. 1950 Chapter 34, a requirement for the settlement of grievance by arbitration, substantially as contained in P.C. 1003, was included. This was done with the complete approval, if not at the express request of those who spoke for organized Canadian labour at that time.

The mandatory requirements of Section 37(2) of The Labour Relations Act result in every arbitration to which they apply being conducted by a board of three arbitrators, one of whom is appointed by each of the two parties, the third or chairman being appointed by the first two named arbitrators. In the event of failure to agree upon a chairman, that position may be filled by the Minister of Labour upon the request of either party. The only other specific direction s which are contained in the subsection are that the notice of the desire to submit the difference to arbitration be in writing and contain the name of an appointee to the arbitration board, and time requirements that call for the respondents nominee to the board of arbitration to be named within five days of the receipt of a notice and that the appointment of the chairman be made within a further five days.

There is no time specified within which the arbitration must be heard, nor is there any date fixed by which the award of the arbitration board must be delivered.

There is little evidence that the time requirements which have been imposed have had much success in achieving an early hearing. A survey of grievance arbitrations indicates that the average elapsed time from the notice of the arbitration to the hearing of the arbitration was approximately seven months.

Beyond what is contained in Section 37(2) of the Act, no rules have been promulgated, except with respect to the involvement of the Ontario Labour-Management Arbitration Commission in the selection of a chairman. In the absence of any further obligatory provisions, the process of grievance arbitration has more or less grown by itself, accumulating a number of unfavourable features about which complaints have been voiced.

The incorporation into the Ontario legislation of compulsory arbitration, is alleged by officials of organized labour to be the principal reason why grievance arbitration, which operated in 1945 in a manner satisfactory to labour as a swift, informal and economical means of resolving differences, has become slow, formal and costly. It is alleged that the compulsory arbitration of grievances was given as compensation of the denial of the right to strike. It is further alleged that is has failed to afford to labour what was represented it would provide and, therefore that labour has nothing to compensate it for the loss of the right to strike.

I cannot agree fully with this position. I consider that more was involved when the strike bar was enacted at a time labour insisted on grievances being settled by arbitration. The introduction of compulsory grievance resolution has afforded remedies to employees which could never have been recoverable under the right to strike regime. Under compulsory arbitration, an individual employee can initiate an effective procedure to remedy a grievance. A large percentage of such grievances would have remained unremedied in the day of the unrestricted right to strike, simply because strike action would not have been invoked on account of them.

Even the most ardent proponents of the theory that the grievance procedure was an exahange for the surrender of the right to strike are realistic and, perhaps grudgingly, accept that the removal of the right to grieve and the right to have the grievance settled by arbitration is no longer an acceptable solution of the unsatisfactory features of arbitration.

Even a cursory review of the operation of labour relations legislation during the past 25 years confirms my impression that, despite complaints about the weaknesses of the procedure, there has been no serious proposal that the redress of grievances be accomplished by some means entirely foreign to joint employer-employee action, followed--in the event of their failure to resolve the grievance--by third-party resolution. The volume of complaints regarding the undesirable operational features has tended to draw attention to the weaknesses and away from what is good about the process.

Since no alternative appears to present itself, the operation of the present system must be examined. The complaints must be assessed to identify which are justified by the facts, to determine the extent to which they can be corrected and to propose means by which they may be corrected. This I propose to do in the following chapters.

Chapter Four

What's wrong with Arbitration

Complaints with respect to grievance arbitration, as it is now carried on, are directed to its cost, the delay which occurs during its progress and the formality which enshrouds it. To a large extent, they are not without some foundation. But not all of them are equally supported by the facts nor are all equally remediable.

Before giving more details of what is complained of I mention two general reservations which apply to any remark which I may make.

Despite the rather devastating bombardment to which grievance arbitration has been subjected, its results have not been seriously criticized.

On the whole, the arbitrators to whom the parties have had recourse, have been highly competent, objective and impartial. Their awards have shown consistency and, in the opinion of counsel experienced in the field, satisfactory predictability. The faults appear to be in the process rather than with the product. For this reason, nothing I say in regard to grievance arbitration should be taken as a criticism of the performance of the arbitrators.

Where the parties have evolved a self-designed procedure for grievance resolution, the correction of any weaknesses it displays lies in their hands and does not result from adherence to the statutory system. Hence, my remarks are not directed to what may have occurred under any self-designed procedure, but relate solely to the procedures which parties to a collective agreement are required to follow because they have failed to provide one of their own making.

Cost

The total cost of a grievance arbitration includes:

- the fees of the chairman of the board,
- the fees of the party nominees,
- the fees of counsel, if any, appearing before the board,
- the value of the time of union representatives and staff members of the union and of the industrial relations officers and other staff members of the employees engaged in the preparation and presentation of the issues and
- the value of time of witnesses.

With the exception of the fees of the chairman (which are shared equally by the parties), each party bears the cost of its nominee, counsel and representatives.

Although the fees of the chairman have been most frequently criticized as being unduly high, it is significant that, in all cases of which I am aware, the obligation to pay such fees has been incurred by parties who were fully aware that the fee would be high and who had indicated their willingness to wait several months in order to have the arbitration heard by a particular arbitrator, rather than to proceed at an earlier date before an arbitrator whose fees would be lower.

It is hard to understand why the fees payable to chairmen have been singled out for criticism, unless it is that they are more readily visible than some of the other costs and, therefore, attract attention.

The recent imposition of a cancellation fee has drawn much criticism which is not wholly merited. If the parties ask an arbitrator to reserve a day for a hearing and do not proceed to make use of that time, the arbitrator may have been denied the opportunity of engaging in another hearing. If, because the arbitrator is able to arrange another hearing in place of the one cancelled or if he is otherwise compensated for the time released, the obligation to pay a cancellation fee may well be questioned. But where the arbitrator remains idle and otherwise uncompensated, the request for a cancellation fee is not unreasonable.

When the overall cost of arbitration is considered, lowering the amount of the fees paid to the chairman would not effect a great reduction in its total cost. If lower overall cost to the parties is the objective, there are other more effective means than concentrating on the reduction of the fees of the chairman of a tri-partite board.

Replacement of a three man board by a single arbitrator would be one way of affording a sizeable reduction in the cost of any single arbitration:

- As in the Courts, the successful party might be awarded its costs from the unsuccessful party.

- The whole of the chairman's fee could be paid out of the public purse. This, again, would not have a very significant effect on the reduction of the total cost since the chairman's fee forms such a small part of it.

- Methods might be involved where classes of grievances could be disposed of by a procedure which did not involve the number of persons normally now before an arbitrator.

My general impression is that, regardless of what efforts are made to reduce the cost, arbitration, when pursued by the parties as they wish to pursue it, cannot be other than an expensive procedure. I hold out little hope of any noticeable reduction in the aggregate cost of arbitration unless the parties radically change their attitude to it.

Formality

A number of presentations by labour organization have expressed disenchantment with arbitration because it is no longer the informal method of resolving differences it had been expected to be.

The hearing of an arbitration may appear to be a simpler method than a trial of an action in Court because there are no established rules which arbitrators are bound to follow. Thus, they have considerable freedom to dictate the course the proceedings will take.

In commercial arbitration, which was largely non-recurring between the same parties, the selection of an arbitrator having special knowledge of the matters involved frequently simplified the matter because it was not necessary to introduce the evidence of experts. Where, as in grievance arbitration, the same issues recur with some frequency--often between the same parties--each successive arbitration tends to follow the pattern of earlier ones and anything added, in the course of time, is likely to become embedded in the process.

It is a misapprehension to assume that because there are few, if any, rules, simplicity of procedure will necessarily follow. Paradoxically, the very uncontrolled nature of grievance arbitration generates formality. The purpose of rules and direction is a much to limit--as to create--rigidity in proceedings. Experience in the Courts has shown that an intelligent use of rule-making serves to maintain the simplicity of a proceeding which if left to itself, would become involved and cumbersome.

Without suggesting its adoption, but by way of illustration only, I point out that a rule forbidding the introduction of oral evidence in grievance arbitration and requiring all grievances to be decided on written statement of facts would introduce a very simple procedure but one which would be undesirable except in very rare cases.

Any adjudicative process in which the adjudicator must hear oral testimony, decide questions of credibility and resolve conflicts of evidence, cannot be divorced from a large measure of formality, if the principles of natural justice are to be observed. The parties are apprehensive as to what may be the result if they fail to take every possible means of protecting their interests. Unless they are assured of the precise issues which are to be raised, they feel compelled to explore every possible avenue which they anticipate may be opened.

It is desirable that the hearing for the arbitrator be as meaningful to the grievor as possible and, at that stage of the proceedings, be shorn every complicating feature which it is possible to remove. As arbitrations are now carried on, there are a number of practices which prevent the arbitration from being short, more direct and more understandable to the grievor and the employees listening to it.

It is not uncommon for the board of arbitrators, at the opening of the hearing, to have to enquire what the matter is about and to learn, for the first time the nature of the grievance. Even granting that an arbitrator should approach the task without any preconceived ideas as to the merits of each parties case, it is not necessary that the arbitrator be denied a look at the program before the curtain goes up.

Perhaps a more serious result of this approach is that each party has to guess the nature of the case it will have to meet. It will come well prepared to adduce evidence to prove matters which the other party is ready to concede. In the event of an issue being raised which was not reasonable foreseen, an adjournment may be required to allow proper preparation to meet it.

At the opening of the hearing, preliminary objections may be raised; the arbitrator hears lengthly arguments of counsel concerning the disposition of these objections, while the grievor and the witnesses sit idly by, waiting

for the real arbitration to begin.

It is only at the beginning of the hearing that the request for the production of documents or records can be effectively dealt with. That request may produce further argument of counsel and may require an adjournment of the proceedings in order that the documents may be made available.

It is my belief that much simplicity can be restored to the hearing by two simple requirements: first, that all preliminary objections, requests for production of documents or records be disposed of as interlocutory matters prior to the hearing of the arbitration; second, that the issues be clearly defined before the hearing commences and that the hearing be confined to the issues which have been raised.

In connection with this latter requirement; it the steps of grievance procedure have been properly employed during their course, the facts alleged to have been the cause of the grievance and the facts alleged to be the foundation for the denial of the relief claimed should all have been disclosed. If such has been the case, the minutes of the grievance steps should adequately inform both the arbitrator of the issues he has to decide and the parties of the allegations which they have to meet. In far too many instances, the grievance steps, as carried out, offer little prospect of resolution of the differences and are gone ghrough as a necessary preliminary to arbitration. Too little thought is often given to the possible value of proper minutes of proceedings and how these would assist the arbitrator.

In the absence of such minutes, the following should be made available to the arbitrator prior to the hearing of the grievance:

- a statement by or on behalf of the grievor setting out:

  i) the nature of the grievance,
  ii) the relevant facts proposed to be proven and
  iii) the relief claimed;

- a statement of the respondent, responsive to the foregoing which will set out at least:

  i) the respondents position with regard to every allegation of the grievor
  ii) facts alleged by the grievor which the respondent does not dispute and
  iii) further relevant facts which the respondent proposes to prove.

The concentration of the hearing of the arbitration on the matters which are of more personal concern to the grievor would remove some of the formality; any additional formality which would appear to be added at the pre-hearing stages would be justified by the restoration to the hearing of some of the informality which will make the proceedings more readily understood by the grievor.

Delays

There is more foundation for the complaints with respect to delay than there is for those respecting cost and formality.

At the present time, it is not uncommon--in fact, it is generally the case--that up to seven months elapse between the launching of the arbitration proceedings and the hearing by the board of arbitration. If

for any reason, the hearing is not completed on the day originally set and has to be continued, it may well be another three to five months before a day suitable for all concerned can be found.

The scarcity of acceptable arbitrators is commonly given as a central cause of delay. It is reported that many of the arbitrators most commonly called upon to act have, at any one time, committed themselves to hear arbitrations which, if they are actually called upon to conduct, would occupy their full time for the succeeding four to six months.

But even if an adequate number of mutually acceptable arbitrators were available, there would be other causes of delay which, in combination, contribute to the tardiness of the process.

Having the two appointees of the parties agree on the name of the chairman seems to be a simple and straightforward way of achieving a rapid constitution of the board of arbitrators. In the majority of cases, the approval of not only the appointees but the parties and, in many cases, the approval of each party's counsel of them is required. This procedure interjects into the selection process a series of communications between those involved which may well amount to 30 or 40 telephone calls.

Once the chairman is agreed upon, the fixing of a date for hearing takes further time. There is some uncertainty on the part of arbitrators as to their authority to impose a date for hearing--at least it is apparent that there is reluctance on their part to exercise such authority if they have it. Such being the case, it becomes necessary in order to settle a date for hearing, to meet the convenience of three arbitrators, two counsels the representatives of both parties--to say nothing of the witnesses.

Busy counsels will be unlikely to have a large number of early open dates, thus further reducing the chance that the hearing of the issue can proceed at an early date. As is to be expected, many of the counsels recognized for their ability and experience in labour matters are in great demand. As counsel are able to arrange the dates of hearing in which they are to appear so as to avoid conflicting appearances, there has not been the same impetus to develop juniors to whom cases may be referred for attention at an earlier date than that at which the senior is available. In this sense, the scarcity of acceptable counsels does delay the hearing of arbitrations at any early date.

The preparation of grievances before the notice of arbitration is given and the preparation for grievance hearings is a time-consuming operation and imposes substantial burdens on the personnel of the union and the industrial relations staff of the employer. Their convenience is also taken into account in fixing a day for hearing of the arbitration. Overloading of their facilities is another element which contributes to the retardation of the date for hearing.

With some frequency, arbitrations are not concluded within the time assigned for the hearing by the arbitrator. When this occurs, the same factors affect the settling of an early day for the continuation of the hearing. Another three to five months may well be required before a suitable date for reconvening can be achieved.

Avoidance of delay in an arbitration can be achieved to a great extent, but not so long as the progress of an arbitration--from the notice to arbitrator to its hearing before the arbitrator--is left, as it is now, largely in the hands of the parties.

Not all the time which unnecessarily elapses between an occurrence of an incident giving rise to a grievance and the arbitration award settling it can be attributed to the scarcity of arbitrators.

The delay that occurs prior to the notification to arbitrate is readily admitted to be no fault of the process of arbitration. Nonetheless, the grievor does not distinguish between the causes of the delay; he is only conscious of the length of that delay.

While, I am conscious that my terms of reference do not extend into the pre-arbitration grievance steps, any efforts to expedite the process of arbitration itself will be defeated unless there is some measure of control on the time that is to elapse before arbitration starts. On this account, I feel justified in making comments in regard to the necessity for some control of the pre-arbitration grievance procedure. I do this in the most general terms to point out the need for further study of the pre-arbitration area.

The objective of industrial peace and good industrial relations requries that every incident which leads to the filing of a grievance be promptly investigated and that, the relevant evidence be immediately marshalled and expeditiously brought before those who are to consider and decide the matter.

To assure that there is continuity in dealing with a grievance, there are three time limits which should be imposed. In order that those who have to deal with the grievance not be faced with stale evidence, a grievance should be required to be filed within a very limited time of the occurrence. This will enable those who are required to investigate the occurrence to be able to do so while the memory of the events are clear in the minds of the observers. The second time limit should ensure the hearing of the evidence within a reasonable time of the filing of the grievance. On the one hand, sufficient time must be allowed to have available all the evidence; on the other, it must be remembered that the longer the time, the less reliable will be the memory of the witnesses. The third time limit--one which falls within the scope of my investigation*-is the length of time which should elapse from the last step of the grievance procedure to the filing of a notification to arbitrate.

In order that all grievances can proceed in an orderly and reasonably expedious manner, it is necessary and there must be sufficient union and management officers responsible for presenting the case for and against the grievance so that the grievance does not languish awaiting its turn. Where the number of grievances to be processed is, in the aggregate, beyond the capabilities of the staff, an avoidable element retards the process.

The processing of a grievance prior to the decision to arbitrate is more time-consuming than perhaps is normally appreciated. Figures which have been presented to me--figures which I have every reason to believe err, if at all, on the side of moderation--indicate that, where proper cost accounting has been applied, an average of 12½ hours of company time has been devoted to the preparation and presentation of a grievance at the grievance steps before arbitration. Other studies made on the basis of the cost in dollars indicate a figure running at somewhere between $45 and $600 a case. Other evidence places the average cost at $500.

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* See Chapter 8

I am satisfied that the slow progress of many grievances is due to the lack of adequate staff of the employer and of the union.

The steps of grievance are sufficiently time-consuming to require a detailed study. To this end, it would be my view that the co-ordinating office (to which I will refer later) should be record, with respect to each grievance, the date it is filed, the date each party is ready to have it placed on the agenda at any grievance step meeting and the date of final disposition.

It is likely that the mere requirement to file this data will tend to reduce the number and the length of delays. It will certainly provide a foundation for assessing the extent to which the aspiration of the grievance procedure is being frustrated.

A great deal of the delay which occurs in fixing the first date for the hearing of an arbitration is due to the efforts to meet the convenience of counsel.

Earlier dates upon which the selected arbitrator or chairmen of the board of arbitration might have been able to proceed are often passed over because one or other of the counsel engaged has a commitment for that date. Since the arbitrator does not have the power to fix a date without the concurrence of the parties and to require that the arbitration proceed peremptorily, finding a date agreeable to all engaged is bound to retard the date for the first hearing. Recommendations which I am making to enpower arbitrators to fix dates and require parties to proceed on the dates fixed, should go a long way to eliminate delays from this cause.

I expect them to be strongly opposed by counsel who are engaged in labour matters at the present time as they will take away one of the attractions of practising in that field--that counsel is never faced with a conflict of dates requiring him to forego one retainer in order to appear on the other.

The necessary consequence of the changes I have recommended will be that a greater number of counsel will have to engage in labour matters. In the case of conflicting dates for two arbitrations in which the same counsel has been retained, one of the arbitrations will have to be taken by some other counsel, likely a junior. Members of the bar have found no difficulty in accommodating themselves to this solution of a dilemma which has faced them in the Courts for years. Because of the impact this will have on counsel now commonly practicing in the labour relations field, they should be warned of the likely consequence--the necessity of bringing into the labour practice juniors, able to substitute for them in case of the inevitable conflict.

In many arbitrations, the case is presented by a staff member, of either both the union and the employers. These representatives are highly competent in the field because their abilities are built on training and experience. In such situations, the same problem of conflicting dates may confront staff members engaged in grievance arbitration. Where it does, the size of the specially-trained staff must, at all time be adequate to maintain a satisfactory rate of progress for all grievances.

I readily concede that it is necessary, order to preserve the remaining consensual features of grievance arbitration, that the parties have a reasonable opportunity to move the arbitration to a conclusion. But the performance of the parties should be assured by the establishment of time limits applicable to each step, the monitoring of the performance of the parties and the provision of sanctions to be applied on their failure to meet

the deadlines including the appointment of arbitrators and the fixing of a date for the arbitration to proceed.

The record of collective agreements which provide a more rapid method of grievance resolution demonstrates that there are ample opportunities to accelerate the pace of grievance arbitration proceedings without doing damage to it entirely. Accelleration can be accompanied with some decrease in the cost; but the most significant result will be the contribution made to the maintenance of good relations between the employer and employee.

Chapter Five

Aims, Objectives and Limitations

Despite my optimism that every collective agreement will, ultimately have its own self-designed grievance procedure, I am fully conscious that, at the present time, a very high percentage of collective agreements operating under the Ontario statutes are silent in this respect. As a result, many arbitrations are governed by the provisions of section 37(2). I further realize that, for a very considerable time in the future, a great number of collective agreements will not include provisions for self-designed grievance procedures. Consequently, for the foreseeable future, the statutorily-prescribed form will continue to be followed by a very significant percentage of employers and employees. Accordingly, for those who fail to work out a self-designed code of arbitral procedure, there must be provisions which, without departing substantially from the present form, seek to avoid the deficiencies that it demonstrates.

I reiterate that, in what I will recommend, I have no intention of interfering with the freedom now afforded to the parties to a collective agreement to agree on a form of difference-resolution which they have devised as appropriate for the enterprise in which they are associated. In fact, I would extend this freedom by allowing finality to be accomplished by arbitration or otherwise.

What I propose to consider is the procedure which, where the collective agreement does not contain self-designed procedure, is deemed to be included in the collective agreement and, thereby, mandatorily imposed upon the parties.

The field of labour relations is of comparatively recent origin and is, more markedly than some other areas of human relations, still in the stage of development. In my opinion, from time to time, changes in it must continue to take place. In grievance arbitration the trend of these changes will be in the direction of the use of single ad hoc arbitrators. They will be appointed by an independent authority, unless pre-named by the parties. They will operate within a time schedule to be set by an independent authority to ensure the steady progress of each matter. More efficient use of arbitrators' time will reduce the cost to some extent. More arbitrators will be locally available in areas having concentrations of labour-employing enterprises. The adoption of joint committees of employer and employees, meeting comparatively frequently at fixed dates will reduce the areas of conflict to be resolved at bargaining sessions. Training of shop

stewards and supervisors as to their role and the techniques to be followed in relation to possible grievances, will be more common. More sophisticated screening of grievances, with greater objectivity, will lessen the number of arbitration cases. Joint review of grievance arbitration awards will be undertaken in order to isolate the reason for failure of the grievance steps.

Interesting as it would be to embark on the drafting of a plan to embody the elements of an advanced system, I realize that it would be fatal not to keep uppermost in mind some of the unique features of the atmosphere in which it must operate -- features which will determine the nature and the degree of change which can be introduced at this time. It would be an exercise in pure idealism to imagine that there are no limiting factors. The first is one which will always condition the kind of third-party grievance resolution. The second will always regulate the extent of the acceptable changes capable of being accomplished at any one time.

It is essential to keep in mind that arbitration is but one facet of grievance resolution designed to promote good relations between an employer and its employees. The resort to arbitration occurs only when the consensual stages have been unproductive. Thus, the very fact that an arbitration is sought presupposes a failure to agree. On this account, a resolution of the difference by arbitration, even under the best of circumstances, tends to increase the tension between the parties. It is likely to do more injury to the relationship between the employer and employee than a consensual resolution not imposed on them by a third party. Arbitration is but one phase in the larger picture of good industrial relations. It may be a necessary part, but it should be looked upon always as the last resort. Before it is invoked, there should be a conviction that every other possible avenue of resolution has exhausted.

Despite the evident desirability of a rapid resolution of grievances going to arbitration, there is a real danger to the whole process of grievance resolution if sober thought does not have an opportunity to temper the effect of frayed tempers and stimulated emotions which would hasten the parties on to arbitration.

The demonstrated resistance to changes in labour relations matters is just a special aspect of the universal antipathy to change. Because of the bi partisan aspect of industrial relations, it must be expected that there will be a polarization of views growing in volume and rigidity in direct proportion to the departure from the known norms required to accommodate the changes. The supporters of labour and the supports of management are two of the largest constituencies of any government; I think it is beyond question that their joint opposition to any proposed legislation dealing with labour relations would be fatal to its adoption. In the framing of the recommendations which I propose for immediate adoption, the need to earn the acceptance of these two constituencies has been ever present.

Procedures such as grievance arbitration must be accommodated to the current state of the concept of labour relations in Ontario. Because those concepts now embodied in the law are of comparatively recent origin and are showing vigour, the pace in this development is bound to be rapid, demanding a

corresponding pace in the development of procedures.

Accordingly, I cannot expect to offer any long-lasting solutions. I can, at best, hope to make proposals which will give immediate relief and bring into the process a means of adopting the procedure to the exigencies of the situations between the parties to a collective agreement as they will exist from time to time.

It seems scarcely necessary to emphasize that the effectiveness of any grievance-resolution procedure is a matter in which the general public has an interest well beyond that of the parties principally concerned. Views to the contrary have been expressed elsewhere than in Ontario. Their proponents feel that, the Courts having been rejected in favour of a plan consensually adopted for dealing finally with grievances, what occurs in the course of the resolution of any difference is a concern only of the parties involved.

I cannot agree that there is no public interest in the grievance resolution procedure. The Domino Effect of any work-stoppage can escalate its impact on the economic life of the country. The damaging effect on the social relations within the community extends far beyond the parties. Even in those jurisdictions in which difference-resolution without stoppage of work is adopted voluntarily, the public has an interest in being assured that the grievance procedure, when adopted, will operate satisfactorily so that stoppages of work will be avoided.

Where, as here, the legislation compels the parties to resolve their differences by arbitration, the concern of the public becomes more specific. Citizens, through their representatives in the Legislature, and vicariously as electors, have required that differences be so settled and, therefore, have assumed the obligation to see that suitable procedure is available.

I look upon my commitment as involving responsibility not only to employers and employees, but to the entire community. I see this study as an opportunity to pause -- to look back on the road which has been travelled during the past two generations and to map the course of the future, to the extent that one can foresee the circumstances which will prevail and the willingness of those concerned to accept change.

However fortunate I may be in proposing grievance arbitration procedure suitable to the present era and successful in meeting the objections voiced with regard to today's state of affairs, I am conscious that those procedures will immediately begin to show strain as they become less suited to the industrial relations picture of the future. Having in mind the foregoing considerations, I propose to make, later, some suggestions for the continual examination of the process and for bringing to the attention of those responsible for legislation and rule-making changes required to maintain a workable system of grievance arbitration adjusted to the needs of Ontario.

Chapter Six

The Real Solution: A Self-designed Code

It is a reasonable assumption that the Legislature of Ontario, in adopting the predecessor of section 37 of The Labour Relations Act contemplated that, as a general rule, every collective agreement would comply with its requirements and, accordingly, would contain provisions for the final and binding settlement, without stoppage of work, of all differences arising during the term of the collective agreement.

In the light of the fact that a very high percentage of collective agreements entered into in the United States prior to the adoption of section 37, contained such a provision despite the absence of any legislative compulsion to do so, there was valid reason to expect that collective agreements to be negotiated in Ontario would follow the same pattern. Consequently, it seems unlikely that the Legislature, at that time, forsaw the broad use of a provision designed to apply only where the parties to a collective agreement failed to do what the statute required them to do.

Obviously, what was hoped for at that time has not come about. The invitation to develop a system of arbitration procedure geared to the particular needs of parties to a specific collective agreement has not had any significant response. The majority of collective agreements have displayed little or no innovation in evolving systems suited to the needs of the parties. The procedure for arbitration most commonly followed had been, and is the statutory one, varied, if at all, in only minor respects.

There are a number of instances where the parties have directed their attention to a self-designed procedure. Encouraging as they are, they remain the exceptions to the general rule.

The infrequency with which they appear in collective agreements is regrettable. It is my conviction that, ultimately, the cure for most of the ills which beset grievance arbitration will be found only in self-designed procedures.

The scarcity of self-designed procedures is understandable. If one is to be adopted, it must be contained in the collective agreement. A collective bargaining session -- and the atmosphere in which it is conducted -- is unlikely to produce it. During collective bargaining, more than at any other time during the term of a collective agreement, the attention of the members of the bargaining unit is focused on the performance of their union as their

bargaining agent. In contrast to issues of wages, fringe benefits, hours of work and working conditions, arbitration procedure generates little interest among members of the union and so merits a comparatively low priority in the minds of the bargaining team. After agreement has been reached on the more important issues, it is improbable that anyone will risk prejudicing the results already achieved by raising such an "unglamorous" issue as grievance procedure.

Furthermore, the setting up of a self-designed procedure for arbitration requires an intimate knowledge of the shortcomings of the prevailing procedure and of the possible alternatives and can be accomplished only by exact study and meticulous draftsmanship.

Despite the obvious advantages of self-designed procedures, we must be realistic. We must admit that, for the foreseeable future, a large percentage of arbitration cases will continue to be governed by the provisions of the statute, unless new incentives are introduced to bring about a more general adoption of self-designed procedures. Such initiatives would include education as to the advantages of such procedures, making more readily available information as to schemes already in operation and removing one of the principal hindrances which stands in the way of their adoption.

My recommendations with respect to the former will be found in Chapter 7 dealing generally with the educational function of the co-ordinating office; my proposals as to the latter are discussed in the following paragraphs.

A major obstacle in the way of the development of self-designed arbitration procedures is the present requirement that such provisions be in the collective agreement. As already stated, the period of bargaining is an inappropriate time for constructive dialogue in this regard. Workable results are more likely to come out of meetings of persons who:

- have familiarity with arbitration for the resolution of differences in the particular enterprise,
- at the time, do not have as their principal concern the formulation of any other part of the collective agreement and
- have available to them, information as to a variety of procedures which are operating in other enterprises and have the assistance of persons experienced in the process of arbitration as well as persons with skills in draftsmanship.

If the operation of a code of grievance procedure be looked upon -- not as limited to the terms of one agreement between the parties involved -- but as ongoing under successive future agreements, its constant review and revision, whenever its provisions fails to meet the needs of the parties, could result in a really "custom-made" procedure.

What I see as one of the outstanding opportunities afforded by the creation of such a code is the possibility of adopting several procedures, each of which would be suitable for a

particular category of grievances. I do not need to enlarge upon this feature because it is axiomatic that a procedure which is designed to operate in every class of case, cannot be that best suited to all.

It should be possible for a code of arbitration procedure to be negotiated at a time other than the collective bargaining sessions and by persons other than the bargaining team engaged generally in bargaining for the collective agreement. I have found that both employers and bargaining agents for employees will discuss grievance procedure with more objectivity than many other issues relating to industrial relations. For that reason, I am confident that meetings which are specially convened for, and restricted to, the discussion of the arbitration procedure will be more likely to produce positive results than a discussion of the same issues during the bargaining for a collective agreement.

To make possible what I suggest will require some statutory changes:

- Section 45(1) of The Labour Relations Act should be amended to enable a notice to bargain with respect to a code of grievance arbitration procedure to be given at any time during the term of the collective agreement or during the course of the bargaining for a renewal of a collective agreement.

- Section 41 of that Act should be amended to provide that a code of grievance arbitration procedure shall not, of itself, be deemed a collective agreement beyond the extent to which it is, by the terms of a collective agreement, made applicable to the settlement of differences arising during that collective agreement.

In the light of the demonstrated readiness of parties to continue to be governed during the term of successive agreements by the procedures set out in the statute, I do not anticipate that any code, once adopted, would be substantially changed thereafter. However, if the code is to continue to set out the best procedure for the particular relationship to which it applies, periodic review and the assessment of its performance should be encouraged to ensure that the code will, at all times, be that best suited to the needs of the parties. The views of the professional arbitrators with experience in arbitration under that code should also, from time to time, be sought. By bringing together the combined experience of those who participate in the arbitration process, the employer, the union, their counsel and the arbitrator before whom the parties have appeared, the shortcomings of the code should be easily recognizable and readily remedied.

The co-operative effort on the part of the participants will be the best assurance to the employer and the employees that a really serious effort is being made to maintain industrial peace by providing the most effective means of difference resolution.

I, therefore recommend:

o That parties to every collective agreement be encouraged to formulate a code of arbitration procedure in a document separate from the collective agreement

- That the procedure to be set out in such code be considered to be of continuing application and to be subject to review and amendment as circumstances dictate.

- That, the incorporation of the provision of that code into a collective agreement by specific reference thereto, shall be deemed to satisfy the requirements of section 37(1) of The Labour Relations Act.

- That, to enable the parties to a collective agreement to adopt such a code and amend it as required,

    i) section 45(1) of The Labour Relations Act be amended to authorize a notice to bargain with respect to a code of grievance procedure to be given at any time during the term of the collective agreement or during the course of the bargaining for a renewal of a collective agreement.

    ii) that section 41 of The Labour Relations Act be amended to provide that a code of grievance procedure shall not of itself be deemed to be a collective agreement except to the extent to which that code is, by the terms of the collective agreement, made applicable to the settlement of the difference arising under that collective agreement.

- That, to afford greater scope for the development of grievance resolution procedures:

    i) section 37(1) of The Labour Relations Act be amended to read as follows:

    "Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise without stoppage of work, of all differences between the parties arising from the interpretations, applications, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable".

    ii) Section 112a of The Labour Relations Act be amended to allow parties to a collective agreement to provide therein that the provisions of section 112a do not apply to grievances arising under that agreement.

Chapter Seven

The Arbitral Body

Despite the apparent satisfaction with the results of labour grievance arbitration, the frailties in the procedure, as at present carried out under the provisions of section 37(2) of The Labour Relations Act, have brought forth a variety of suggestions for the substitution of some alternative form of third-party resolution.

Elsewhere* I have dealt with the introduction of some form of external mediation. But since, in my view, mediation is not a part of arbitration -- the process for imposing a decision where the parties to a collective agreement have conceded that they cannot agree -- I propose, in this chapter, to confine myself to various means whereby a decision may be made for parties who have failed in their efforts to come to some agreement on their own.

Where authority is conferred on an outsider to resolve a difference which the parties have failed to do so, the manner of its exercise may be either inquisitorial or adjudicative.

If the powers of the dispute-settler be inquisitorial or investigative, the arbitrator proceeds to become familiar with the circumstances he considers appropriate for the discharge of the commitment. The arbitrator may, but is not required to, invite the parties to make submission and may come to a decision based upon what he considers to be evidence. The arbitrator must, of course, act fairly.

The adjudicative or adversary process differs in that the decision-maker affords an opportunity for each party to inform the arbitrator of facts and make submissions on its own behalf to the end that a decision may be arrived at on the basis of the evidence advanced and submissions presented. Arbitration in Ontario has followed the adjudicative or adversary system. Any general departure from it would be embarking on new and comparatively unexplored territory. Apart from the very real danger that the inquisitorial system might develop into a form of bureaucratic administration of labour relations, its unfamiliarity would lessen the likelihood of its being adopted.

Without departing from the present adjudicative or adversary system, there are some alternatives available within that system, the principal ones being:

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*Chapter Two

- mutually acceptable arbitrators or referees,
- the Courts and
- a statutory tribunal authorized to hear and decide differences.

The latter might be a newly-created body, the jurisdiction of which would be confined to such matters as are now required to be resolved by arbitration. Or, as has been widely suggested, it might be either the present Ontario Labour Relations Board or the Ontario Labour-Management Arbitration Commission, exercising a further jurisdiction to be conferred on it. Or, it might be the existing courts which traditionally have been available for settling disputes and differences.

A Special Tribunal

I am opposed to the creation of a special tribunal to deal exclusively with arbitration. Without going exhaustively into all the reasons for this conclusion, I mention two, each of which is weighty.

- Because of the unwillingness to have the Courts deal with questions arising under collective agreements, that area has been removed from the Courts and the parties have been accorded complete freedom to devise means of the final settlement of differences. There is a vast difference between, on the one hand, permitting the parties to withdraw from the scope of the Courts' authority and to set up their self-designed plan to settle their differences and, on the other hand, transferring part of the jurisdiction of the Courts to another adjudicative body limited to a specialized field. To implement this suggestion would be to accept a principle that would lead to the diffusion of the jurisdiction of the Courts and the proliferation of separate adjudicative bodies, each having a jurisdiction limited to a special area. A foreseeable consequence would be the need to determine the constitutional limits of each body and to resolve the conflicts which would arise as between the bodies. Its effect on the administration of justice would be destructive.

- In this age, the idea of a body of specialists who would concentrate their efforts on the peculiar requirements of a particular sphere of human relations is attractive. But the restrictions of a tribunal to the consideration of questions related solely to labour relations has undesirable features. The judicial process is a comprehensive one and those engaged in it must be exposed to every facet of social contact and, its place in the whole spectrum of society. In the development of the expertise of a specialist, it is inevitable that the increased emphasis on a single aspect would have a narrowing effect; the specialized expertise of the adjudicator would grow but his broader concepts of the place of labour relations in society as a whole would be sacrified. The full-time arbitrator would be prone to the same narrowing influence. However, a continual reliance on being selected by the parties, in contrast to the security of tenure of a member of a special tribunal, would serve to lessen the hazard of becoming tunnel-visioned.

The Ontario Labour Relations Board

A very considerable body of opinion appears to favour directing all arbitrations to the Ontario Labour Relations Board and providing that each be heard by a panel of that Board.

In addition to the considerations which apply to any body of specialized adjudicators, further reasons seem to make the Ontario Labour Relations Board inappropriate as the arbitration authority in labour grievance matters. I fully realize that under section 112a of The Labour Relations Act, the Board is, at present, acting as an arbitrator in the construction industry, with apparent satisfaction to the parties involved. Nevertheless there are, in my opinion, substantial reasons why the practice, even if tolerated in the construction industry, should not be extended to other industries.

In The Labour Relations Act, extensive jurisdiction is conferred on the Board in the creation of a collective agreement. Where the parties through collective bargaining are not able to reach consensus, on reference to the Board, it may arbitrate the difference and settle the terms which are to be incorporated in the collective agreement. The Board having been given this authority with regard to the creation of the rights and obligations to be contained in an agreement, it is not appropriate that the same body should exercise, exclusively and without being subject to appeal, the right to interpret that same agreement. This, the Board would be required to do if upon it were conferred the right and obligation to interpret collective agreement.

Ontario Labour-Management Arbitration Commission

Section 6 of The Ontario Labour-Management Arbitration Act allows the Commission to employ full-time arbitrators. Since it would be difficult to maintain that it was not, itself, acting as an arbitrator if one of its full-time employees so acted, it is understandable that the Commission has never availed itself of this power. I consider that it would be hard to reconcile acting as arbitrator, with the principal functions performed by it at the present time. So long as the Commission is called upon to assume the duties it now performs, it would be an undesirable body towards which to direct all arbitrations. If my recommendations with respect to the creation of a grievance resolution authority are implemented, the same objections would apply to conferring on it any authority to act as arbitrator.

The Courts

The Labour Relations Act and The Rights of Labour Act are so uncompromising in their prohibition of resort to the Courts in any matter arising under a collective agreement that it can be scarcely conceivable that the Courts would be adopted as the means of resolving every difference during the term of a collective agreement. Notwithstanding my view that some questions of law now directed for decision to the arbitrator might be more effectively dealt with by the Courts (see Chapter 8), I do not feel that in the light of the experience in Ontario and the express terms of the above-named Acts, all differences now required to be resolved by final and binding arbitration should be directed for decision to the Courts.

I do not favour, as an alternative for the present procedure, the use of the existing Courts, the creation of a special tribunal, or the enlargement of the authority of any existing tribunal, such as the Ontario Labour Relations Board or the Ontario Labour Management Arbitration Commission.

I, therefore recommend:

- That grievance arbitration continue to be conducted by ad hoc arbitrators, selected by the parties or, when the parties are unable to agree upon an arbitrator, appointed by the co-ordinating office.

- That, except where the parties have otherwise provided in writing, every arbitration shall be conducted before one arbitrator.

- That, during a transitional period of 2 or 3 years, either party to any arbitration conducted under the normal procedure shall have the right, but shall not be required, to appoint an assessor to sit with the arbitrator and to advise him with respect to any matter on which the arbitrator wishes the assistance of the assessor

- That, an assessor shall not participate in the award or record his assent to or dissent from it

- That, the arbitrator, the opposite party and the co-ordinating officer be advised:

    i) of the name of the assessor first appointed not less than 72 hours

    ii) of the name of any assessor subsequently appointed not less than 24 hours

    prior to the time fixed for the hearing of the arbitration.

- That the obligation for the payment of the cost of the arbitrator continue to be that of the parties.

Chapter Eight

Solutions Recommended

My conclusion as to the retention of the use of ad hoc arbitrators does not detract from my conviction that there is ample room for making the arbitration process a more effective means of resolving grievances.

In many areas, my proposals to obviate some of the more destructive features of the present process will not change its nature. However, in two of my recommendations, it may be felt that the fundamentals of the present system are affected. I propose to deal with each of these changes separately before setting out less important changes to be shaped to conform to the two major ones.

Number of Arbitrators

In the early days of labour grievance arbitration in Ontario, there were few persons who had any familiarity with or experience in the field. Those who had been exposed to industrial relations problems were likely to have been confined to work exclusively with either labour or management. Consequently, that experience was a disqualifying factor. On this account, the search for a chairman looked for impartiality--rather than experience.

It is understandable that, under such conditions, each of the contending parties should have felt more secure if it could put onto the board of arbitration, a nominee who could interpret to the chair the conditions prevailing in the place of work and the attitude of the appointing party to the relationships flowing from the collective agreement.

A quarter-century of grievance arbitration has provided vast experience for chairmen of boards of arbitration and has produced a number of chairmen whose impartiality, expertise and intimate knowledge of industrial relations have been readily acknowledged by the frequency with which their services have been sought.

At the present stage of the development of industrial relations in Ontario, in the light of the less expeditious performance of multiple-body boards, no good purpose is served by requiring, universally, that grievance arbitrations be heard by a multi-member board.

The sophisication of a considerable number of individuals available and regularly selected as chairmen of boards of arbitration has impaired the validity of the original reason for favouring the larger board. Any review of decisions rendered by arbitration boards confirms the commonly held view that it is a very rare occasion when the majority award is not written and signed by the chairmen. In fact, so far as I have been able to ascertain, there is but one instance where a chairman made a minority award.

To one familiar with the legal system administered in the Courts, the three-member board is an anomoly. For instance, if a former president of a large corporation were to seek redress for the improper termination of his employment, the claim would be tried before one judge of the Supreme Court. But if a production worker employed in one of the corporation's enterprises sought relief from a one-day suspension imposed for alleged breach of a disciplinary regulation, the case would be heard by a board of three arbitrators.

After giving serious consideration to representation made to me and what has been disclosed by my own observations, I am of the opinion that every arbitration should be heard and decided by a single arbitrator unless overriding reasons in a special case dictate otherwise.

To prevent any misunderstanding, I repeat that my proposal will not affect the freedom of parties to any collective agreement to agree that all or any specified arbitration cases in which they are concerned be heard by a board of arbitrators constituted in any manner and of any size they may determine.

If the use of a single arbitrator be made mandatory, to lessen the impact of a sudden change, I propose that for a transitional period of two to three years, either party to an arbitration would be entitled to name an assessor to sit with the arbitrator and advise the arbitrator with respect to any matter on which the arbitrator wishes assistance. Such an assessor, however, would not be entitled to participate in the award or assent to or dissent from it.

Case Differentiation

By "case differentiation" I refer to the segregation of grievances into categories according to their subject matter so that there may be made available, for each category, a procedure which recognizes the special needs of grievances in that category.

In providing an available procedure for the parties to collective agreements which do not set out a code of their own, it was requisite that the procedure should be one which would not only be suitable to a wide variety of situations required to be resolved. It had also to serve the most serious, most involved, ones. The inclusion in the statute of why one pattern resulted in a system which, in attempting to embrace <u>all</u> instances of grievance, turns out to be ideally suited to <u>few</u>. A great many grievance arbitrations appear to involve the use of the heaviest armament for a comparatively insignificant quarry. I do not mean that the matter is one of little importance to the grievor, rather that it is one that would be amenable to resolution through a much less ponderous and time-consuming procedure than that of the average arbitration.

I am convinced that different procedures should be available for different categories of grievances. I realize that deciding into which category a particular grievance should be placed presents some initial difficulty, but the determining of the number of categories, the categorizing of grievances according to subject matter and the choice of the most appropriate procedure for each category should result from studies by the co-ordinating office.*

See Chapter 11

Accordingly, I favour the repeal of section 37(2) and the substitution therefore of a subsection which would empower the co-ordinating office, by rule or regulation to:

- Establish, for the purpose of arbitration, any number of categories of grievances

- Designate, according to the subject matter of the grievances, what grievances should be included in each category

- Specify a procedure for the appointment of an arbitrator and for the conduct of the arbitration for each category of grievances

The variety of incidents which may give rise to the filing of a grievance are far too numerous to permit any ready and immediate division of them into categories for the purpose of arbitration. However, it is apparent that the grievance arising from discharge is distinguishable from many others and is at one end of the scale of urgency. For the discharge case, early determination of the employee's status is, for that employee of paramount importance. It is also of grave concern to the employer and is an important element in the maintenance of industrial peace in the enterprise.*

At the other end of the scale there are some fairly formal questions which are of more importance to the parties to the collective agreement than to the griever. Whatever breadth may be given to each of the foregoing categories, there will be, in between, a large number of grievances with respect to which there is no urgency equal to that of the dismissal grievance. They should proceed to the arbitration at a pace appropriate to their urgency.

I propose that, initially--until the co-ordinating office otherwise provides by rule--there be three procedures which I will refer to as "expedited", "normal" and "interpretive" to be described in greater detail under each of these titles.

Interpretive Procedure

Not all arbitration cases require an arbitrator to make a decision based on a finding of fact. Some in which there is no disagreement as to the facts require only the interpretation of a statute or a regulation having the force and effect of a statute.**(In this connection "statute" will be used to refer to both statute and regulation having the force and effect of a statute.) To ensure that finality will be possible at the earliest date possible, special provision needs to be made for such interpretation of statutes whenever the resolution of a difference will depend solely on such interpretation.

In such a case, the arbitrator, in the first instance, in order to determine the rights of the parties, is now required to place his own interpretation on such statute. This decision, as it relates to such interpretation, can have no finality because the interpretation of statutes is a matter within the jurisdiction of the Courts only and cannot be taken away from them and given to a non-curial tribunal such as an arbitrator.***

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* Data collected by Professor Adams indicate that the longer the employee is absent from work during the course of an arbitration the less likelihood there is of his continuing in the same workforce for an extended time.

** Interpretation Act R.S.O. 1970 Chapter 225, section 1(2)

***McLeod vs Egan 1975 1 SCR 518

If the parties to a collective agreement are to remain in doubt as to their respective rights and obligations until an authoritative interpretation has been pronounced by a Court, it is in the interest of all concerned that the interpretation be made as soon as possible. It should not be necessary for the parties to proceed through the grievance procedure, an arbitration and on to judicial review of the award.

The Rules of Practice of the Supreme Court of Ontario already provide for the interpretation of contracts before breach.* Were a similar procedure available for the interpretation of statutes, it would, in at least some labour grievance arbitrations, simplify and expedite the resolution of differences.

There are two apprORPriate points of departure for invoking this jurisdiction of the Court in labour matters. First, where the parties are unable to resolve a difference only because of uncertainty as to the proper interpretation of a statute which will govern the result, immediate access, before arbitration, to the competent Court would avoid the expenditure of time and effort in further processing the grievance through arbitration and judicial review. Second, where, in the course of an arbitration, the arbitrator finds the award required to be made involves the interpretation of a statute, the arbitrator should be able, forthwith, to obtain interpretation by a Court of competent jurisdiction.

In the instance first quoted, the question would be required to be stated in writing by the parties or their counsel; in the second, the arbitrator would, in writing state a case for the opinion of the Court.

Both parties would have the right to advance argument before the Court. In view of the precedential nature of the decision, other parties, with the leave of the Court, should be enabled to appear and make submissions.

Pending the decision of the Court, the arbitration would be suspended, to resume, if necessary, when the Court has rendered a decision.

Such access to the Court could be accomplished by adding a sub-rule to Rule 612 reading as follows:

> "Where the rights of the parties to a collective agreement depend on the construction of a statute or regulation and there are no material facts in dispute, such statute or regulation may be construed on originating notice."

To make it possible for a case to be stated for the opinion of the Court on the interpretation of a statute, The Labour Relations Act would require to be amended by adding, to section 37, a subsection which would read as follows:

> "Notwithstanding anything contained herein or in The Rights of Labour Act, the parties, before notice of arbitration has been given, or an arbitrator, at any stage of the proceedings, may state, in the form of a special case for the opinion of the Court, any question involving the interpretation of a statute or regulation: pending the rendering of the judgement of the Court on such special case the arbitrator may, from time to time adjourn the hearing of the arbitration."

I therefore recommend:

- That the parties to a collective agreement may apply to the

Supreme Court of Ontario for the interpretation by that Court, or an arbitrator may state a case for the opinion of the Court as to the interpretation of any statutory provision or any regulation having the force and effect of a statute

- That the Labour Relations Act, The Rights of Labour Act and the Rules of Practice of the Supreme Court of Ontario be amended to the extent necessary to carry into effect the foregoing recommendation

I now turn to the details of two procedures which I recommend for immediate adoption to regulate these arbitrations, which, in the absence of self-designed procedures, will be conducted according to statute, rule, or regulation. First, however, I wish to refer to a number of unrelated matters the existence of some of which are necessarily reflected in the form of the procedures; attention to others will be required for the effective operation of the procedure.

I have already made reference to the public interest in the maintainance of good industrial relations and do not need to enlarge upon that ever-present element.

Despite the fact that the employer and the union, as bargaining agent for the employees, are universally the only parties to a collective agreement and, almost always, the only parties before an arbitrator, the institutional existence of the union and the relationship of its officers to that body, require that constant attention be paid to the possibility that, in any particular grievance, the interest of the grievor and that of the union may not be identical. Since difference-resolution processes, as applied to grievances are primarily and obstensibly adopted as a means of affording redress to individual employees, the adaptation of the procedure to any ulterior purpose should be discouraged.

In attempting to accelerate the resolution of discharge cases, a reasonable opportunity for settlement by agreement must not be sacrified. No doubt, there is a time when the advantages of early progress to arbitration outweigh the possible benefits of continued discussion, but there is a danger of prejudicing the possible agreed settlement by, too early, accepting arbitration as inevitable. Although a discharge grievance merits every effort to expedite its resolution, before it proceeds to arbitration, the parties should be required to discuss the possibility of settlement at least once at a meeting of persons who have the authority to settle the grievance without having to seek approval of their action at a higher level.

In order that the potential of any specified procedure may be realized, it must operate in a recognized framework, be supervised and supported by adequate physical and human resources. To accomplish this will require at least:

- simple rules of procedure and a body authorized to make them,
- a body to monitor the performance of the procedure and the conduct of those engaged in it,
- sanctions for serious deviation from or disregard of the procedure and
- o a physical location and adequate personnel to afford a focal point for all the activities required to make the procedure effective.

It will be helpful to an understanding of the procedure to be suggested, to outline first the operational steps required of the parties and later to describe the means whereby such procedures will be supported.

Expedited Procedure

Notice to Arbitrate

The notice by either party of its desire to submit the difference to arbitration shall:

- be in writing
- contain the details of the incident complained of and the name of at least one available arbitrator*
- be delivered to the opposite party on or before R day plus five days**

A copy of such notice shall be deposited in the co-ordinating office forthwith

Agreement on Arbitrator

If the parties agree upon an available arbitrator, that arbitrator shall fix a date and place for the hearing of the arbitration which date shall not be later than R day + 14, on which date the arbitrator shall proceed to hear the arbitration.

The name of the arbitrator and the date and place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office.

Failure to agree on Arbitrator

If the arbitration does not proceed by R day + 14, the co-ordinating office shall, on R day + 15, appoint an arbitrator and shall fix the date and place of hearing which shall not be later than R day + 25.

The co-ordinating office shall notify each of the parties of the

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* "available arbitrator" shall be a qualified arbitrator who is willing and able to conduct the hearing of the arbitration,

i) not later than the 14th day after R day if the arbitration be one to be conducted under the expedited procedure
ii) not later than the 50th day after R day if the arbitration be one to be conducted under the normal procedure

** Unless otherwise expressly stated, the last day for the performance of any requirement shall be counted from "R day", which shall mean the earlier of

i) the day upon which the decision at the final step of the grievance procedure was rendered or

ii) the day upon which the party giving notification of arbitration becomes entitled to do so if notice is given pursuant to an election to take advantage of a provision permitting notice to arbitration to be given before all the steps of grievance procedure have been exhausted

name of the appointed arbitrator and the date and place of the hearing.

If the respondent proposes to raise any preliminary objection, the arbitrator shall be advised immediately upon appointment; at the same time, the applicant shall also be advised.

Extension of Time

Any application for the extension of time which would delay the hearing of the arbitration beyond R day + 25 shall be made to and disposed of by the legal officer of the co-ordinating office.

The Award

At the conclusion of the hearing, the award of the arbitrator shall be made orally-only the key points will be put in written form,unless the arbitrator believes that, to arrive at a proper disposition of the matter, further time if required.

Every award shall be non-precedential and no reasons in writing shall be delivered unless one or both parties request that reasons be given, or the arbitrator considers it desirable to deliver reason. The cost of the preparation of the written reasons for the award shall be born by the party or parties requesting them.

The arbitrator shall deliver to each of the parties a copy of the award and deposit one copy in the co-ordinating office.

Normal Procedure

If a grievance is not within a category designated for expedited procedure and if both parties so elect by signing a written waiver, the conduct of that arbitration shall be exempted from the requirements of the established procedure and shall be conducted in accordance with the procedure set out in the waiver.

A copy of such waiver shall be deposited in the co-ordinating office immediately after it is signed.

In the absence of any such waiver, the parties to an arbitration not required to be conducted according to the expedited procedure shall conform to the requirements of the normal procedure.

Notice to Arbitrate

The notice to either party of its desire to submit the difference to arbitration shall:

- be in writing.
- contain the names of at least two available arbitrators,
- be delivered to the opposite party on or before R day + 10.

A copy of such notice shall be promptly deposited in the co-ordinating office.

Agreement Upon Arbitrator

If the parties on or before R day + 20 day agree upon an available arbitrator, that arbitrator shall fix a date and place for the hearing of the arbitration no later than R day + 5o.

The name of the arbitrator and the date and place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office.

Failure to Agree upon Arbitrator

If the parties fail to agree on an available arbitrator by R day + 2o, the legal officer of the co-ordinating office, on R day + 25 shall:

- appoint an arbitrator,
- fix a date and place for the hearing of the arbitration which shall be not later than R day + 50 and
- advise the parties of the name of the arbitrator appointed and of the date and place so fixed.

Applicant's Statement

On or before R day + 15, the applicant shall deliver to respondent and deposit in the co-ordinating office a statement in writing setting out:

- the nature of its complaint,
- the relief sought,
- the facts alleged by it which are in dispute and
- the facts alleged by it which are not in dispute

If the applicant fails to deliver such a statement, its notice to arbitrate shall be deemed to be its "statement".

Respondent's Statement

On or before R day + 25, the respondent shall deliver to the applicant and deposit in the co-ordinating office a statement in writing setting out:

- the position it takes with respect to the applicant's claim,
- the facts alleged by the applicant's statement which are disputed,
- other relevant facts which have not been included in the applicant's statement and
- details of any preliminary objection it proposes to raise and the grounds which it alleges in support of such objection.

Expedited and Normal Procedure

Preliminary Objections

With the concurrence of both parties, an application for the hearing

of any preliminary objection proposed to be made before an arbitrator may be made to a legal officer of the co-ordinating office. The legal officer may hear and dispose of such preliminary objections or may refer the hearing and disposition of it to the arbitrator.

Without leave granted by a legal officer of the co-ordinating office, no preliminary objection shall be heard, or given effect to, unless particulars have been set out in the statement of the party desiring to make it.

Unless a preliminary objection has been finally disposed of by the legal officer, the arbitrator shall hear the argument thereon at the opening of the arbitration and shall thereafter proceed to complete the hearing of the arbitration, whether or not he has disposed of the preliminary objection.

Particulars and Production

Either party shall be entitled to apply to a legal officer of the co-ordinating office for an order requiring the opposite party to:

- produce any relevant documentary evidence in its possession or control or

- furnish such particulars of its statement as shall be necessary to delineate the issues which are to be decided by the arbitrator.

Adjournment of Hearing

The additional delay which, not infrequently, occurs because the hearing does not proceed or is not completed on the day first fixed is of enough significance to merit consideration of the possibility of reducing it.

Elsewhere, I have made recommendations with respect to avoiding adjournments when preliminary objections are made as to an arbitrator's jurisdiction to proceed; I do not refer to them here. Nor do I consider that any attention need be given to adjournments which are unavoidable because of some unanticipated event. Dealing with them seldom presents a problem.

But there does appear to be some likelihood of reducing the delay now occasioned by an adjournment:

- sought by the parties before the date fixed for hearing or

- necessitated by the inability to complete the hearing in the time set aside for it.

I entertain some doubt as to the present authority of an arbitrator to require parties to proceed on a day fixed by him. Regardless of whether the arbitrator has the authority to proceed in the absence of the party which has failed to appear, an arbitrator would be less ready to refuse an adjournment to a party--upon whose willingness to accept him as an arbitrator depends his future activities--than a legal officer of the co-ordinating office. Once a hearing date has been fixed either by agreement of the parties or by the co-ordinating office, any adjournment of the hearing sought before the hearing date would be possible only by the direction of a legal officer. Such direction should also fix the date and place of the adjourned hearing and would be made only when the legal officer is satisfied that the adjournment is not prejudicial to the grievor.

When the hearing of an arbitration is started, but adjourned before

being concluded, reassembling the case is likely to require as much time as to find a suitable date for the hearing. Instances have been called to my attention where half a year has passed between the adjournment of the original hearing and its reconvening.

A sincere attempt to estimate the time required for the hearing and the reservation of sufficient time of the arbitrator will reduce the cases requiring adjournment for completion. But the time that any will occupy is not capable of prediction with precision and, unfortunately, adjournments for this cause will be unavoidable.

The intervention of a long period between the original and the reconvened hearing is harmful in several respects. The memory of witnesses will have become less vivid; much time will be lost in bringing the participants to the stage of familiarity with the matter which they had at the adjournments; to a considerable extent, the ground covered in the original hearing will be retrod.

It is not the adjournment itself which seriously extends the hearing. Rather, it is the fact that, arbitrators, counsel and representatives of the parties all have advance commitments largely, if not exclusively, for arbitrations which have not already commenced. Many of those engaged would be able to re-attend at an early date only by disrupting other hearings in which they have undertaken to take part.

Although the treatment I propose may seem unduly harsh on those adversely affected by it, I consider that, rather than to defer the completion of the adjourned hearing for a considerable period and allow new arbitrations to proceed in the meantime, it is preferrable to require the uncompleted hearing to proceed forthwith--at the cost of disrupting and delaying some arbitrations not yet started.

Accordingly, an arbitrator should be empowered, whenever a hearing has not been completed within the time set aside for it, to fix for its continuance the earliest date he can arrange to be available and require that the hearing continue on the date he fixes.

In order to accomplish the expeditious continuation of an adjourned arbitration, it may be necessary for the arbitrator to rearrange his future timetable. I foresee no difficulty arising from this contingency; according to statement made to me, even the busiest of arbitrators are usually able to offer an open date only a few days or a week or two away because of cancellations.

I am aware that this may inconvenience counsel. But it will have to be accepted by the legal profession, especially those who are busy in the field of labour relations, that if labour grievance arbitration is not to fall into disrepute, lawyers will have to deal with the problem of conflicts of cases as they have done in the Courts for years by providing alternative counsel.

Awards

It should not be necessary to impose any rules concerning the making of awards in arbitrations conducted under the normal procedure other than that a copy must be delivered to the co-ordinating office.

The arbitrator will not have to confer with and submit reasons to any colleagues--as is now required; as is now required; therefore, the arbitrator should not be delayed by any cause beyond his control.

The judgement of an arbitrator as to how long he requires to prepare an award should be the best measure. Responsible arbitrators will appreciate that they fail in their obligation to the parties if they allow other activities to interfere with the fulfullment of the undertaking they have given to the parties by agreeing to act.

There will always be arbitrations in which the making of the award will take longer than is anticipated. In such cases, an arbitrator may find it necessary to proceed with other arbitrations while preparing an award. Apart from such exceptional cases, an arbitrator should allow, between appointments for arbitrations, sufficient time to prepare one award before embarking on another case.

I do not propose any sanctions for delay. However, the fact that the co-ordinating office will have a record of the date of the appointment of the arbitrator and the day fixed for the hearing of the arbitration and will receive a copy of the award should have a salutory effect on the performance of those arbitrators who are notoriously tardy in making awards.

Notwithstanding the freedom I would accord to arbitrators with respect to awards and the time of their making, I would commend to the attention of every arbitrator the unfavourable reactions which have resulted from the complexity and wordiness of awards, particularly because of the use of earlier awards as precedents.

In the course of its comparatively short developments, arbitration in grievance resolution has in several recognizable ways, deviated from the pattern of commercial arbitration of which it was an adaptation. The tendency of awards to take on the appearance of judgements of appellate courts and the growth of the reliance on precedent are indicators of this movement, to which considerable unfavourable comment has been directed.

Arbitrators in commercial arbitrations are, principally, fact-finders. Questions of law rarely, if ever, concern them. They do not attempt to resolve them because they have the right to state a question of law for the opinion of the Court, which guides them in determining the law to be applied to the facts as they find them.

Their awards, consequently, do not have the appearance of pronouncements on law. Authorities are unlikely to be cited in them. The relevant law required to be applied comes to them either from the agreement of the parties or from the statement of law made by a Court.

Awards by grievance arbitrators in many instances have become more like judgements of a court. Prior decisions of arbitrators are quoted and relied on as precedents to be followed.

From a review of published awards, it is apparent that some arbitrators have looked upon the powers conferred to them to interpret a collective agreement as an authorization or, at least, an invitation to engage in law-making to a greater extent than Courts in Ontario recognize as being warranted by their powers to interpret statutes. Some arbitrators seem to subscribe to the philosophy that the role of the labour grievance arbitrator is to "develop the common law of the working place".

Many factors have contributed to this transition. In mentioning the principal ones, the order in which they are dealt is not intended to indicate their relative importance. Unlike commercial arbitration which was, and is, unlikely to recur between the same parties with regard to a like matter, arbitration for grievance resolution is almost certainly to recur with

some regularity, particularly when the bargaining unit is large. Access to the Courts is not available to arbitrators in grievance matters, denying them the benefit of the use of the stated case as a means of settling the law to be applied to the issues before them. The exercise of the statutory power to interpret a collective agreement to settle a difference, has tended to make the interpretation made with respect to one collective agreement, an authority for the interpretation of other collective agreements. The publication of reports of arbitration cases affords information as to many decisions made under many and varied collective agreements and encourages reference to them as authoritative statements of the law. Persons who have been working in the field of labour relations have been exposed to the influence of legislation and practices, to a large extent, imported from the United States, where the law-making role of adjudicative bodies is greater than is the case under the laws of Ontario.

Whether or not it be accounted for by the foregoing circumstances, it is a common complaint that the ordinary grievor does not--and cannot--understand the award which finally decides whether the grievance is to be upheld or not.

The prevalence of this complaint, which is not without foundation, points out the need for caution in the preparation of awards, particularly with regard to the use of precedent.

Desirable as it may be to preserve consistency, regard must be had to the limitations imposed by certain qualifying conditions:

- A considerable proportion of grievances require the arbitrator to be, primarily, a fact-finder. About 20-25% of the grievances taken to arbitration in Ontario arise from disciplinary action and, as such raise, questions of fact with respect to which precedent is rarely a relevant consideration.

- Unlike a judge of a common law court, an arbitrator has no inherent jurisdiction. His jurisdiction is limited to what has been committed to him by the parties or has been expressly conferred by statute. The powers of the arbitrator, whether they come from the parties or the Legislature, cannot be enlarged or supplemented by the prior decision of another arbitration.

- Law-making in Ontario is the function of the Legislature; interpretation of laws enacted by the Legislature is the function of the Courts. As a general rule, the power to interpret a collective agreement cannot be enlarged by those exercising it to make laws which the Legislature has failed to make or to interject into a collective agreement some provisions which the parties to it have not themselves included in it.

- The doctrine of "stare decisis"--the rule of precedent--requires that a court apply the law as it has been pronounced earlier, by a court of co-ordinate or superior jurisdiction, where such pronouncement was necessarily made by the earlier court in order to arrive at the decision. Properly applied, the rule of precedent is one of narrow application. The facts before the two courts must be sufficiently similar to raise the same issues of law. The statement which the latter court is to follow as a precedent must not only have been made in the earlier case but must have been one the earlier court found it necessary to make in order to arrive at the decision which it was called upon to make. Statements of law pronounced by a judge, however profound, on which his decision did not have to be founded are gratuitious in nature and are styled "obiter dicta". They do not constitute precedent.

To avoid mere case-matching, which can be a very misleading exercise if the facts of the cases are not actually identical, requires that the governing principle be distilled out of the earlier case or cases in order that the precise limits of their precedential value may be assessed.

The Courts, in which the following of precedent is required, are part of a tiered system in which the accuracy of a judgement may be tested in a Court to which an appeal lies. Conflict between the judgement of two courts of co-ordinate jurisdiction can be resolved by an appellate court. The appellate court decision becomes a binding authority until overruled by yet a higher court.

Lacking this means of resolving conflict between the awards of two arbitrators, the conflicting views of the two or more arbitrators will have equal precedential value. The very real possibility of this situation occurring seriously impairs the value of precedent in arbitration, since the awards of all arbitrators are in the nature of decisions of Courts of first instance and are pronounced by adjudicators having co-ordinate jurisdiction.

No one can question that a single collective agreement should be similarly interpreted by two or more arbitrators who are required to pass upon it. But giving to two collective agreements, each of which was specifically negotiated for the peculiar needs of one employer and his employees, the same interpretation because they contain identical words can very well be the misuse of precedent. The overruling requirement for the interpretation of a contract is the intention of the parties gathered from the words they have used to express themselves. Therefore, words can never be given the appropriate meaning unless consideration is given to the circumstances with which they are intended to deal.

In making these comments I draw a distinction between the arbitration decision and the reasons given for the award. It is a sound rule for any adjudicator that, in deciding what must be decided, he refrain from deciding anything not required to be decided and in making any decision, to make no remarks beyond those necessary to make understandable the decision made. Many can testify from bitter experience that the remarks included in a judgement, which could have been left out, are the ones that later rise up to confound the author.

Some written awards read as if the author has been awaiting an opportunity to expound his views in an area which encompasses far more than was essential for the decision given. To give in to this temptation does not improve the reasons, however much it may satisfy the author.

Practically every grievance has arisen out of an employees dissatisfaction with some circumstances which confronted him in the course of employment. Since the primary purpose of arbitration is to resolve that grievance, the crucial test of an award should not be its contribution to the law of labour relations; it should be whether it is understood by the grievor and conveys that the resolution of the problem was the principal concern of the adjudicator before whom the arbitration was held.

If the author of the award remains conscious that the grievor is the audience for whom the award is written and that the award must not only dispose of the grievance but must do so in a manner to be understood by the parties and to convey to them succintly why the arbitrator reached a particular conclusion, a great deal will have been done to restore confidence in the grievance procedure as a means of promoting good industrial relations between employers and their employees.

I, therefore recommend:

A. That, the rules to be made for the conduct of arbitration for which the parties have not made other provisions shall:

- establish categories of grievances according to their subject matter
- designate what grievances are to be included in each category
- specify, for each category of grievance, the procedure to be followed in the appointment of an arbitrator and the conduct of the arbitration

B. That, initially three procedures be provided to be titled respectively "special", "normal" and "interpretive"

C. That, until other procedures are established by the co-ordinating office in every grievance arbitration the parties shall conform to the normal procedure unless:

- both parties have signed a written waiver setting out an alternative procedure to be followed with respect to it, a copy of which waiver shall have been deposited in the co-ordinating office
- the grievance is within a category for which expedited procedure is specified
- the parties have invoked the interpretive procedure

D. That, the provisions to be included in each of the foregoing three procedures be respectively as hereafter set out under the title of each procedure

Expedited Procedure

F. The notification of either party of its desire to submit a difference to arbitration shall:

- be in writing
- contain the details of at least one available arbitrator*

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* "available arbitrator" shall be a qualified arbitrator who is willing and able to conduct the hearing of the arbitration,

i) not later than the 14th day after R day if the arbitration be one to be conducted under the expedited procedure

ii) not later than the 50th day after R day if the arbitration be one to be conducted under the normal procedure

- be delivered to the opposite party and deposited in the co-ordinating office not later than the 5th day after R day*

Agreement on Arbitrator

G. If the parties agree upon an available arbitrator

- that arbitrator shall fix the date and place for the hearing of the arbitration which date shall not be later than the 14th day after R day

- on the day fixed, the arbitrator shall proceed to hear the arbitration

- the name of the arbitrator and the place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office

Failure to agree on Arbitrator

H.
- if the arbitration does not proceed by R plus 14 day, the legal officer of the co-ordinating office shall, on R + 15 day, appoint an arbitrator and shall fix the date and place of hearing which shall not be later than R + 25 days.

- the co-ordinating office shall notify each of the parties of the name of the arbitrator so appointed and the date and place of hearing.

- if the respondent proposes to raise any preliminary objection, the arbitrator shall be so advised immediately upon his appointment: at the same time, the applicant shall also be advised.

The Award

I.
- at the conclusion of the hearing, the award of the arbitrator shall be made orally and its purport only reduced to writing unless the arbitrator is of the opinion that, to arrive at a proper disposition of the matter, further time is required

- every award shall be non-precedential and no reasons in writing shall be delivered unless at the express request of one or more of the parties or the arbitrator consider it desirable to deliver reasons: the cost of the preparation of the written reasons for award shall be born by the party or parties requesting them

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** Unless otherwise expressly stated, the last day for the performance of any requirement shall be counted from "R day", which shall mean the earlier of:

i) the day upon which the decision at the final step of the grievance procedure was rendered or

ii) the day upon which the party giving notification of arbitration becomes entitled to do so if notice is given pursuant to an election to take advantage of a provision permitting notice to arbitration to be given before all the steps of grievance procedure have been exhausted

- the arbitrator shall deliver to each of the parties a copy of the award and send one copy to the co-ordinating office

Normal Procedure

J. The notice by either party of its desire to submit the difference to arbitration shall:

- be in writing
- contain the names of at least two available arbitrators
- be delivered to the opposite party and deposited in the co-ordinating office not later than the 10th day after R day

Agreement Upon Arbitrator

K. If the parties, not later than the 20th day after R day, agree upon an available arbitrator:

- that arbitrator shall fix a date and place for the hearing of the arbitration which date shall not be later than the 50th day after R day
- the name of the arbitrator and the date and place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office

Failure to agree upon Arbitrator

L. If the parties fail to agree on an available arbitrator within 20 days after R day the legal officer of the co-ordinating office, on this 25th day after R day shall:

- appoint an arbitrator
- fix the date and place for the hearing of the arbitration which date shall not be later than the 50th day after R day
- advise the parties of such an appointment, date and place

Applicant's Statement

M. Not later than the 15th day after R day, the applicant may deliver to the respondent and deposit in the co-ordinating office a statement in writing setting out:

- the nature of its complaint
- the relief sought
- the facts alleged by it which are in dispute
- the facts alleged by it which are not in dispute

If the applicant fails to deliver such a statement, its notice to arbitrate shall be deemed to be its "statement".

Respondent's Statement

N. Not later than the 25th day after R day, the respondent shall deliver to the applicant and deposit in the co-ordinating office a statement in writing setting out:

- o the position it takes with respect to the applicants claim
- o the facts alleged by the applicants statement which it does not dispute
- o the facts alleged by the applicants statement which it disputes
- o other relevant facts which have not been included in the applicants statement
- o details of any preliminary objection it proposes to raise and the grounds which it alleges in support of such objections

Expedited and Normal Procedure

Extension of Time and Adjournments

O.
- o an application for either an extension of time or an adjournment which, if granted, would defer the hearing of an arbitration beyond the last day fixed by the rules for its hearing may be granted only by a legal officer of the co-ordinating office
- o if such application be granted, the legal officer shall fix the date on and time at which the arbitration shall be heard

Adjournment of Hearing

P. Where an adjournment of the hearing becomes necessary because the hearing could not be concluded in the time set aside for it, the arbitrator shall adjourn the hearing to reconvene at the earliest possible date he is available to hear it, and the arbitration shall be heard on the date so fixed.

Interlocutory Matters

Q.
- o with the concurrence of both parties, an application for the hearing of any preliminary objection proposed to be made before an arbitrator may be made to a legal officer of the co-ordinating office
- o the legal officer may himself hear and dispose of such preliminary objection or may, in the exercise of his discretion, refer the hearing and disposition of it to the arbitrator
- o without leave granted by a legal officer of the co-ordinating office, no preliminary objection shall be heard unless particulars thereof shall have been set out in the statement of the party proposing to make it
- unless a preliminary objection has been finally disposed of by a legal officer, the arbitrator shall hear the argument thereon at the opening of the arbitration and shall thereafter proceed to complete the hearing of the arbitration whether or not he has disposed of the preliminary objection

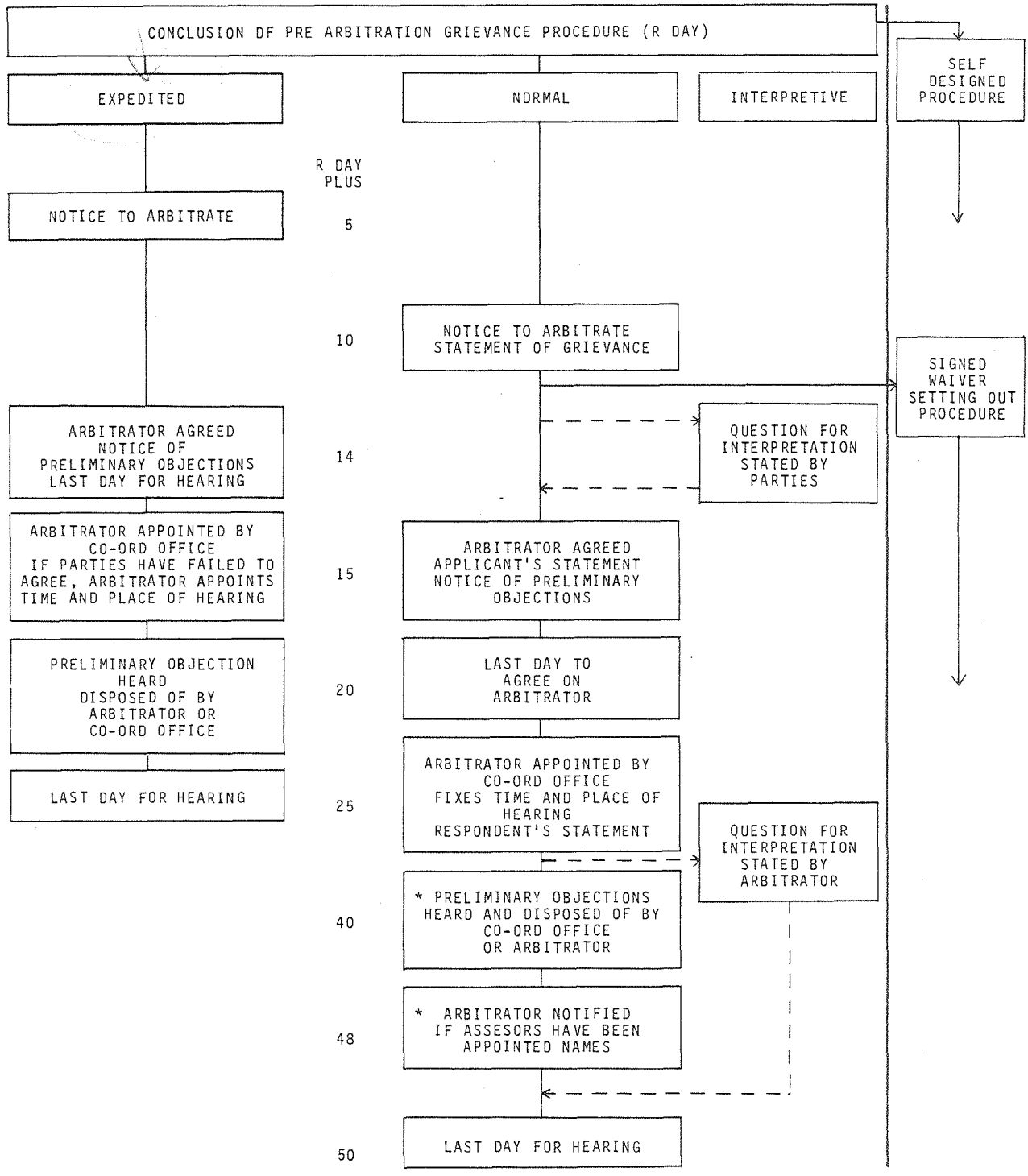
R. On application, of which notice shall have been given to the opposite party, a legal officer of the co-ordinating office may order a party:

- to produce any relevant documentary evidence in its possession or control or

- to furnish such particulars of its statement as shall be necessary to delineate the issues which are to be decided by the arbitrator

S. That the Labour Relations Act, The Rights of Labour Act and The Rules of Practice of the Supreme Court of Ontario be amended to the extent necessary to implement the foregoing recommendations.

DIAGRAM OF PROCEDURE



* IF HEARING FIXED FOR DATE EARLIER THAN R PLUS 50, COMPLETION OF THESE STEPS WILL BE REQUIRED 10 DAYS AND 48 HOURS RESPECTIVELY BEFORE TIME OF HEARING

Chapter Nine

Proposals Considered

Some of the suggestions made to me for the improvement of grievance arbitration procedure have, on examination, proven to be impractical or incompatible with the procedures I have decided to recommend. I have not thought it necessary to list them, nor to give reasons for rejecting them. However, a few which were made either frequently or with vigour, along with my reasons for not adopting them, will be discussed.

Because of the serious consequence to an employee from the imposition of any disciplinary sanction, whether discharge, suspension, or the entry of the occurrence on the employee's record, I have been asked to recommend that the implementing of any penalty should be postponed until the final disposition of the grievance.

If such a provision were adopted the person discharged would continue to be an employee so long as the grievance was not finally resolved. Actual instances indicate that it is not unusual for months to elapse before it is finally determined whether the discharge of an employee will be upheld or over-turned.

The result sought could be brought about in either of two manners. In the course of collective bargaining, a provision could be included in the collective agreement governing the relationship between a particular employer and its employees. Like any other term in the collective agreement having been accepted by the parties, it would, on that account, become part of the obligations to be observed by the employer.

Alternatively, a statue could set out provisions which were deemed to be included in every collective agreement which did not itself so provide. In this latter event, it would not be a matter upon which the parties had reached agreement, and would, therefore, lack the consensual character which marks the provisions of a collective agreement. Being mandatorily imposed, it would curtail the management rights of the employer. Doing so would be dealing not only with a matter related to grievance arbitration but would entail a fairly fundamental change in rights and obligations of employers and employees -- a subject not within the ambit of my terms of reference and upon which I am not prepared to make any recommendations.

I have indicated my concern with respect to delays in arbitration following a discharge, by recommending that the arbitration in such cases should follow an expedited procedure and that it should not be within the power of the parties, without the concurrence of the

co-ordinating office, to exceed the time limits I have specified. Since an extenstion of the time for completion of an arbitration to which the expedited procedure applied, would be a matter of privilege -- not a matter of right, -- it would be appropriate that conditions should be attached to the granting of a delaying adjournment. Because such an adjournment would only be granted at the request of one or both of the parties, the exposure of any party to the conditions would be a matter of its choice.

An adjournment could be granted on the condition that the discharged grievor be entitled to receive, during the period from the granting of the adjournment to the final disposition of the grievance, an amount equal to the basic pay to which the employee would have been entitled had he continued to be employed.

Where the request for adjournment is made by only one of the parties, it should have the obligation to make this payment. Where the adjournment, is either asked for or concurred in by both parties, the payment should be shared equally.

In making this recommendation, recognition is given to the fact that the discharged grievor has an interest in the arbitration which should not be dealt with to his detriment at the request of the other two parties and that, if the final disposition of the grievance is delayed for their convenience, the employee should not suffer thereby.

The radical enlargement of the powers exercisable by an arbitrator hearing a grievance arbitration was proposed.

The conditions which it is alleged require to be remedied are the result of:

- deficiencies in the provisions of all or nearly all collective agreements and

- the limiting of the powers of an arbitrator to matters which are now held to be arbitrable under the terms of the collective agreement between the parties.

The written collective agreement never provides for all the rights and duties of the parties. In some cases this may be due to oversight on the part of the parties. More commonly, it occurs because parties have deliberately refrained from setting out provisions which would deal with some of the situations which exist or are foreseeable. Frequently they do so because they feel that they cannot reach any agreement on the particular matter and choose, in the agreement, to disregard it. Such omissions are described as "gaps" and "silences". "Gaps", are deficiencies which are alleged to be capable of being filled in by interpreting the collective agreement in a purposeful fashion. "Silences" are deficiencies which are not capable of being filled in by reference to the express or implied agreement or the relationship of the parties.

In this respect, a collective agreement differs from the ordinary commercial contract. Parties negotiating a commercial contract endeavour to anticipate every possible situation which may arise and make provision for it. They are commonly assisted by draftsmen who have the same objectives and endeavour to leave no matter unprovided for.

The intent and purpose of the parties is sought and must be found in the words they have used to express their agreement. If the

parties be not ad idem in regard to any essential matter of their agreement, they have failed to make a contract with respect to that matter. Where they have deliberately refrained from including provision, it is to be assumed that that matter was not part of their agreement.

Although, at one time there was considerable disagreement among arbitrators as to the scope of the arbitrator's authority in this connection, that matter has now been resolved and it is generally accepted that matters for which provision is not made in a collective agreement are not arbitrable.

Those who advocate the extension of the power of an arbitrator in grievance arbitration want the arbitrator to be given authority of the broadest scope possible, -- powers which will enable the arbitrator to add to or subtract from the language of the collective agreement in order that the arbitrator may reflect what he considers to be the bargain made by the parties. It is advocated that the arbitrator be given the authority to resolve all differences which may arise between the employer and its employees during the term of a collective agreement even though the agreement makes no provision for the particular matter brought into issue by the grievance.

Any matter which, at present, is not arbitrable because the collective agreement fails to make provisions with respect to it, remains a matter which is still to be dealt with by the parties under their obligation to bargain in good faith. Conferring on the arbitrator of powers to impose obligations concerning which the parties had not pursued their bargaining efforts to a conclusion, would undermine one of the essentials of good industrial relations -- that, in the first instance, the parties endeavour to bring about a common understanding of what their relations are to entail through their joint effort, subject to external influence only where they have exhausted their own efforts.

Further, where bargaining proceeds, but fails to bring about agreement on any matter, The Labour Relations Act makes extensive provisions for mediation, conciliation and interest arbitration with respect to it. The exercise of the powers sought to be conferred upon an arbitrator would circumvent the use of the provisions which the Legislature has attached to bargaining for a collective agreement.

A writing-in of terms by the arbitrator would be inconsistent with adherence to the process which the Legislature has indicated the parties should follow. If the powers of an arbitrator, sitting to resolve a difference between the parties involving the interpretation, application, administration or alleged violation of a collective agreement made by the parties, were enlarged to give the arbitrator the authority to decide the respective rights and obligations of the parties in areas in which they had failed to make any provision, the jurisdiction of the arbitrator would be legislative rather than adjudicative.

Were I to recommend the implementation of such a proposal, I would feel that my recommendations must be directed not to grievance arbitration procedure but to the amendment of the legislation for creating or renewing collective agreements -- another matter beyond the scope of my terms of reference.

More than one union urged the adoption of a procedure similar to that at present provided by The Labour Code of British Columbia. The reduction in the number of arbitrations since the introduction of that procedure was sufficiently impressive that I considered a first-hand examination was justified.

While in British Columbia, I had the opportunity of discussing the procedure at length with Paul C. Weiler, chairman of the Labour Relations Board of British Columbia, and with D.F. Munroe, vice-chairman, to whom I express my gratitude for their assistance.

I also sought the views of members of the Bar of British Columbia who had considerable experience in labour relations matters from having acted either for unions or employers.

In Appendix F2 will be found the text of section 96 of The Labour Code of British Columbia. Appendix F1 sets out a summary of the procedure as applied by the Board. This summary appears with the imprimatur of Mr. Weiler, who graciously consented to read it over and revise it. I am further indebted to him on this account.

A primary feature of the procedure is the introduction of mediation by an official of the Labour Relations Board in an effort to bring about a settlement by consensus. In this respect it has proven to be effective; however, the exact measure of its success is difficult to determine. In Ontario, a substantial number of grievances with respect to which notices to arbitrate have been given, are resolved by the parties prior to the arbitrators being called upon to make an award. I assume that some of the settlements made in British Columbia before arbitration would have occurred even in the absence of section 96. Nevertheless, persons with experience in British Columbia agree that the proportion of grievances settled without adjudication since section 96 became operative is greater than the rate prevailing previously.

One of the significant innovative features of the procedure is that the Board has recognized the fact that not all differences arising during the terms of a collective agreement are amenable to the same form of external resolution. It has made a unique evaluation and established its own criteria for case differentiation.

There are certain features of the British Columbia procedure which lead me to decide to refrain from recommending the adoption of a similar procedure in Ontario.

- As already stated, the administration of a mediation service by the body which may later be called upon to act as an arbitrator results in a mixture of functions which I consider to be incompatible.

- Section 96 may be invoked unilaterally by one party without the concurrence of the other. This may result in a matter being decided without a hearing and without any opportunity for a party to make oral representations to the Board.

- The contents of the report of the Industrial Relations Officer to the Board is not always made available to the parties. As a result, the parties may remain unaware of what facts and circumstances the Board relied on in making its decision as to the manner in which the matter would proceed.

- If the Board is later to act as arbitrator with respect to the grievance which is a subject matter of the report, the fact that the members of the Board are already in possession of information about it, may be put forward as grounds for disqualification because of bias (in the legal sense of that word).

- The position of the Industrial Relations Officer and his relationship to a Board which may later exercise adjudicative power

may tend to leave one or other of the parties feeling that the settlement arrived at was not entirely an independent exercise of its judgement. Any residual feeling of compulsion would not be conducive to the betterment of relations between the employer and the employee.

- Where an application under section 96 does not result in a mediated settlement or a final disposition by the Board without a hearing, the ultimate resolution of the difference will almost invariably take longer than if the parties had proceeded directly to arbitration. The Board is frank in warning the parties that they may be delayed on this account by as much as four to six weeks.

  If a mediation service, separate from anybody concerned with arbitration, were to be set up in Ontario, many of the features of the British Columbia procedure will prove to be useful guides. If the recommended grievance resolution authority were constituted, it should keep under observation the progress of the special procedure in British Columbia under section 96.

With respect to the interim remuneration of a grievor whose discharge is the subject matter of a grievance, I, therefore recommend:

- That, where any adjournment of an arbitration which is proceeding under expedited procedure is sought, as a condition of its granting, the party or parties seeking the adjournment shall undertake that, from the date of the granting of the adjournment until the final disposition of the grievance, the grievor will receive, currently, an amount equal to the basic pay which the grievor was entitled to receive at the date of discharge such amount to be paid by the party seeking the adjournment or, if the adjournment is sought by both parties, equally by them.

Chapter Ten

Whence Arbitrators

Statements concerning the scarcity of arbitrators are as common as complaints about delays and excessive costs. Obviously, if sufficient arbitrators to hear and dispose of the volume of arbitrations presented were not available, the competition for arbitrators would tend to increase the fees payable to any sought-after arbitrator and would lengthen the waiting time for a hearing.

I do not agree that the delay which, as I have already said, does occur and the alleged high fees charged by arbitrators are attributable exclusively to an overall scarcity of arbitrators. In my view, they are principally accounted for by the insistence of the parties, in a high percentage of arbitrations, on retaining the services of one of a comparatively small group of arbitrators knowing both that an inordinately long time will elapse before the arbitration can be disposed of and that a fee larger than average will be paid.

There are between 45 and 50 persons listed as qualified arbitrators by the Ontario Labour-Management Arbitration Commission, which is charged with the task of passing on the qualifications of applications for such a designation. In addition, there are about 15 names on a tentative list.

It is not easy to reconcile all the statistics furnished in the presentations I have received. There is no official depository of statistics and the data which have been collected, in good faith, do not relate to a common time frame. Taking all that into consideration, there is still such an overall similarity in them that I feel justified in assuming the following data to be reasonably accurate.

The average annual number of arbitrations in Ontario is about 1,000. In one year, 60 to 65 different individuals have taken part either as chairmen or single arbitrators; twenty-one different arbitrators have appeared in 70%; six in over 50% and each of two in more than 12.5% of those arbitrations. This means that 40 to 45 arbitrators have, between them, conducted less than 300 arbitrations, slightly more than the number of cases disposed of by the two busiest arbitrators.

I have taken as an attainable goal the hearing of an arbitration within 50 days of the decision to move to the last step of grievance procedure. Two factors which are hindering the attainment of this goal are to be found from an examination of the

use which is now being made of the time of qualified arbitrators:

- Some of the time of arbitrators, even the busiest of them, could be less wastefully used.

- Too many parties are seeking the services of a small number of arbitrators and failing to appoint some who would be available earlier.

There is considerable scope for the improvement in the use of arbitrators' time. The present system of selecting the chairman of a board, two members of which have previously been named, makes it virtually impossible that more than one arbitration can be heard by the same chairman during one day. The hearing of a great many arbitrations does not consume one full day but when such is the case it is unusual, in the extreme, for the same arbitrators or the same parties to be able to proceed with another arbitration during the remainder of the day. In this connection, it is interesting to note that in the commissioner system provided in the agreement between Inco Ltd. and the United Steelworkers, the commissioner attending Sudbury periodically may hear as many as six or seven grievances during a day.

On many occasions, arbitrations are settled before the day of hearing, but the arbitrator's time released as a result seldom can be used to hear another arbitration. Other parties who might welcome the availability of the day, cannot be marshalled so as to be able to proceed. The cancellation fee which has drawn much unfavourable comment points out the frequency of the unused time but does nothing to make effective use of that time.

The operation of a scheduling service, which is proposed as part of the co-ordinating office, would offer two benefits. Were each arbitrator to keep the scheduling service informed of his future commitments for arbitrations and the days he is free to hear arbitrations, any party seeking to find an available arbitrator could, by enquiring of the scheduling office, immediately be informed of the open dates of any one or more arbitrators the party might wish to select. This practice would also drastically reduce the communications now necessary to constitute a board of arbitration.

Such a service could also assist in the utilization of the time of arbitrators freed by the cancellation of projected arbitrations for which a date has been fixed. Even on short notice, an arbitrator so released could be enlisted to hear some other arbitration; if his availability were known to be recorded in the scheduling office promptly, that office could furnish information as to dates so released and the arbitrators so made available.

I do not consider it necessary to set out the details of the operation of such a scheduling service. From enquiries I have made, I am satisfied it is feasible and that there is evidence of the desire of at least some arbitrators to use it.

Despite the better utilization of the available time of busy arbitrators, work of labour grievance arbitration must be distributed more evenly among persons capable of performing it. The chief impediment here is the attitude of those who really select arbitrators in seeking the services of only a limited

number of arbitrators. They account for this concentration on comparatively few arbitrators by saying that they do not want an arbitrator who has not been proven by experience in actual arbitration. Yet they readily admit that anyone aspiring to be an arbitrator cannot gain the necessary experience unless someone, like themselves, selects a novice arbitrator.

The imposition of time limits for the completion of each arbitration will result in favourable consideration being given to a wider variety of arbitrators. The power to appoint, on the failure of the parties to do so, an arbitrator who will be available at an early date will also encourage the more frequent appointment of arbitrators other than those now most commonly retained.

In addition to employing these incentives, there must be active recruitment, and the education and indoctrination of persons suitable as arbitrators in the special field in which they are expected to operate. As will be discussed in more detail*, this is an activity in which the co-ordinating office should engage.

Full-time or Part-time Arbitrators

In carrying out such a program, emphasis on the increase in the number of full-time arbitrators might seem logical but the results of such a program will not, in the long run, best serve the needs of the province. First, I do not believe that it would be effective. The demands for the services of a particular arbitrator, being eventually what will determine whether any person will become a full-time arbitrator, the uncertainty of forthcoming invitations makes it unlikely that many persons, lacking some success as part-time arbitrators, could be induced to launch out as full-time career arbitrators.

Second, there being in Ontario approximately 1,000 arbitrations annually, the number of full-time arbitrators who could be supported is limited. Since, on the average, the preparation of an award requires at least as much time as the hearing of the arbitration, one arbitrator cannot average more than two or, at the outside, three arbitrations a week. Having regard to the vacation period and statutory holidays, an annual case load of 125 per arbitrator would be high. Thus, if all arbitrations were to be heard before full-time arbitrators, eight to ten would be as many as could be kept engaged. An increase beyond that number, in the absence of an increase in the number of arbitrations, would result in a restraint on income which would have a deteriorating effect on the availability of arbitrators and the quality of arbitration.

But a more serious consequence would be the likelihood that the full-time arbitrators would be concentrated in two or three centres in the province and that many parts of the province would be without the benefit of local arbitrators.

These considerations lead me to the view, that an increase in the number of qualified <u>part-time</u> arbitrators is the most appropriate solution and one more readily accomplished.

Consideration must be given, however, to factors which may detract from the suitability.

Obviously a part-time arbitrator, to be readily available, should have no full-time employment which would interfere with the priority given to arbitral assignments.

It is not the fact that he has permanent employment that affects his suitability as an arbitrator. His freedom to engage in outside remunerative work is a matter to be settled between him and his employer and is not a matter of concern to those who might retain him or to the co-ordinating office which might appoint him. But, if the time between the filing of the notice of arbitration and the hearing and disposition of the arbitration is to be kept at a minimum, the availability of a part-time arbitrator must not require waiting until his employer is prepared to release him: he must be able to act promptly when the parties want him to or the co-ordinating office wishes to appoint him. Elsewhere than in Ontario is has been found possible to enlist the services of part-time arbitrators who are able and prepared to accord to arbitration the necessary priority, and to act, when called upon, even on very short notice. There should be no difficulty in duplicating this performance in Ontario.

Although academics usually would come within the category of those having permanent employment, the nature of their work affords them some measure of control of their own time. Nevertheless, there is the possibility that teaching assignments might delay the preparation of an award: this should be taken into account in accepting an appointment.

Persons who are otherwise employed on a permanent basis in any public service should not act as arbitrators in labour grievance matters. I hold this opinion notwithstanding the fact that, at present, some members of the Ontario Labour Relations Board and some provincial judges do engage in grievance arbitrations.

I have stated elsewhere reasons why I consider that the Ontario Labour Relations Board should not act as the arbitral body in grievance arbitration. The same reasons underlie my opposition to the post of grievance arbitrator being filled in any particular matter by a member of the Ontario Labour Relations Board.

There are different reasons why no provincial judge should engage in a grievance arbitration. The complete objectivity required of one who discharges a judicial function in the Courts has been recognized by his appointment to the bench and is preserved by the independence the judge enjoys while in office. A major factor in the appointment of an arbitrator would be his acceptability to the parties whose differences he will be called upon to decide. The judge's exposure to this process and to the possibility of being rejected, could well impair the public image of independence and impartiality. The preservation of that image of the judiciary is far too important to place at risk.

Without seeking as prospective arbitrators, members of the foregoing groups, there are many categories of persons from which part-time arbitrators could be drawn. I mention but a few.

The opportunities which the members of the Arbitrators' Institute of Canada Inc. have had to gain experience in actual arbitration, although principally in matters other than labour relations, suggest that they would be a source of supply that could be tapped.

The enforced retirement of senior personnel, still highly competent and physically capable, will continue to provide a reservoir of persons, many of whom are only too anxious to devote some of their time to public service. Executives of unions who have reached the retirement age, retired industrial relations officers and others with management experience, senior lawyers, not necessarily with labour experience, whose practice no longer demands their full-time attention, are all possible candidates who should be amenable to an invitation to devote a limited amount of their time to acting as arbitrators. Retired academics should also be sought. Younger men with special training in industrial relations, industrial engineering or law, particularly, outside Toronto, might be attracted to this field.

Mutual acceptability has been over-employed as a qualification for being an arbitrator. Arbitration being an adjudicative process, impartiality should be the prime consideration. Such persons as I have already mentioned, with a minimum of experience -- which could be gained as observers of arbitrations -- could perform a great service to the community. In the case of retired persons going into this field, the community itself would be doing them a service by prolonging their span of useful activity.

An additional advantage of the use of part-time arbitrators would be the greater possibility of securing persons whose places of residence would be located reasonably close to labour-using industries. Provided some study is given to the incidence of labour arbitration, the requirements of different areas for arbitrators could be assessed and the search for arbitrators guided accordingly. The reduction in the sizeable amount of travelling expenses incurred by arbitrators travelling from the large centres would be a small, but measureable, advantage.

An active program, involving personal contact with suitable persons would be a function of the co-ordinating office; its authority to appoint an arbitrator where the parties fail to agree on one could be exercised to provide actual experience for those who had none.

As a means of reducing that part of the cost of arbitration to be paid by the parties, it has been directly suggested that the cost of providing arbitrators be borne by the public purse and only indirectly that the fees of arbitrators should be lower.

Traditionally, the Courts of Law have provided a dispute-settling service available to every person in the community claiming a legal remedy. This is available to everyone and the Courts make only a nominal charge for it. However, when a person seeks unsuccessfully to extract a remedy from another, it is the usual practice for the Courts to order the unsuccessful party to pay a portion of the expenses the successful party incurred by reason of having been brought into Court.

The development of the collective agreement and the legislation under which it now exists, has sought to provide remedies beyond that which would have been available in a Court of Law under the Common Law. The jurisdiction of the Courts over the relationship of the parties to a collective agreement has been displaced and a system of difference-settlement by arbitration substituted to meet the wishes of the constituencies or at least

one of the constituencies concerned. In lieu of adhering to the rule of charging the unsuccessful party with the cost of the successful party, the usual collective agreement requires each party to accept responsibility for its own costs and one-half of the fees and expenses of the arbitrator.

Those who wish to shift the cost of the arbitration to the public purse do not wish to accept the Court as the difference-settling medium and do not wish to revert to the common law position where costs are available against the unsuccessful party. Since the services afforded by the Courts remain open to them if they are prepared to forego the special privileges claimed for labour matters, I consider it would be unreasonable to set up, at public expense, another difference-settling process solely for the benefit of those who express a desire to be excluded from the operation of the process which is supplied in the Courts at public expenses. It would be inappropriate to set up another difference-settling process to administer the rules which the parties have themselves adopted in collective agreements. If they wish to keep themselves outside the sphere of the Court, it is only reasonable that they should support the cost of the system which they wish to have.

Therefore, I recommend that the obligation for the payment of the cost of arbitration continue to be that of the parties.

As I have already stated, the allegedly high fees paid to arbitrators appear to have been incurred by parties who were aware of the extent of the financial obligation they were incurring and who have shown little inclination to retain an arbitrator who would charge a lesser fee.

There are isolated instances in which the fees charged by arbitrators are unconscionable but there is no foundation for the charge that fees are generally too high.

The arbitrators most in demand, those in a position to charge the highest fees, usually charge $800 per day of sitting, including the time in which they are engaged in writing the award, for which no extra charge is made. The figures which have been presented indicate that the average of fees payable to arbitrators is $600 per day.

It must be noted that the arbitrator must, from his fee, provide for his own expenses, which include the rental of an office, clerical help and the fees paid to professional associations; expenses of attending professional conferences; and the cost of the reports of arbitration cases and current professional periodicals. The overhead of an arbitrator may well absorb 15 to 20% of the fees he receives. Thus, the net income of an arbitrator, when compared with the incomes that could be earned in other areas of endeavour, is not excessive according to today's scales of professional incomes. If arbitrators were to be required to act for lesser fees, there would undoubtedly be a noticeable reduction in the quality of available services.

If the recommendations of this report are implemented, there will be three distinct situations each of which merits a different treatment.

When the parties select an arbitrator without the help or intervention of the co-ordinating office, they are in a position to make with the arbitrator any agreement they wish concerning fee. If they do so, the payment of the fee becomes a matter of the contract made between them and cannot reasonably be the subject of any complaint. There would be no justification for imposing any constraints on the amount of any such fee.

At the present time, it is not usual for the arbitrator's fee to be negotiated between the parties and the arbitrator. Where that continues to be the case, the arbitrator, having agreed to act on the invitation of the parties -- without the intervention of the co-ordinating office -- the parties have tacitly agreed to pay the arbitrator a reasonable fee. The fee payable to the arbitrator should be subject to taxation before a legal officer of the co-ordinating office. In the interest of consistency in the taxation of fees, the co-ordinating office should establish, by regulation, and publish a tariff.

In cases where the arbitrator is appointed by the co-ordinating office, the fee to be paid by the arbitrator should be fixed by the co-ordinating office in accordance with an established tariff. The parties and the arbitrator should be informed of the amount before the arbitrator's appointment is confirmed.

The purpose of any tariff to be adopted is to act as a guide to what is considered to be a fair and equitable charge for the time and services involved. In this case, the discouraging effect on the acceptance of appointments by the most qualified arbitrators must be appreciated. The services of the most capable arbitrators might not be attracted and the high quality of arbitration work jeopardized if the scale were unjustifiably low. In the days of mounting inflation, any scale of fees must be capable of constant adjustment in order to represent the current fair value of the services performed by an arbitrator.

Chapter Eleven

The Co-ordinating Office

Throughout this report reference has been made to the co-ordinating office, as if I were referring to a physical location. The selection of this term was made with the intention of indicating the necessity of collating a number of inter-related activities and bringing them to a focus at a single point.

To give a better understanding of a place of the co-ordinating office in the pattern of which my recommendations form part, a more detailed description of the functions that it will perform and the constitutional framework within which it will operate, are now offered.

Functions

Rule-making

Its rule-making powers would be exercisable mainly in the areas of:

- case-differentiation*,
- arbitration procedures and
- simple rules of practice for the control of the process and the guidance of the parties to arbitration

Registry

Because of the requirements for the deposit of certain papers, -- notice to arbitrate, plaintiff's statement, respondent's statement etc. -- the co-ordinating office would, in respect of arbitrations, be akin to the office of the registrar of a Court.

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* The segregation of grievances into separate categories in order that a grievance arbitration procedure appropriate for the resolution of grievance in each category may be made applicable to it.

Scheduling

Keeping up to date and available for reference lists containing:

- the date fixed for the hearing of each arbitration,
- the names of the arbitrators to be engaged in them and
- the dates each arbitrator is available to hear arbitrations, which would be an important factor in conserving the time of arbitrators and the parties and in the more efficient use of arbitrators time.

Appointment of arbitrator

According to my proposals, after the expiry of the time allowed to the parties to agree upon an arbitrator, an arbitrator would be appointed by the co-ordinating office. The notice of arbitration would, of course, have been filed in the co-ordinating office. In the absence of notification as to the name of an agreed arbitrator, the appointment of an arbitrator by the office could be made without further consultation with the parties.

Monitoring of progress

The progress of each arbitration would be kept under observation by the co-ordinating office in order that sanctions for failure to comply with the rules as to time requirements may be initiated by the co-ordinating office.

Proceedings

In a pending arbitration, a legal officer located in the co-ordinating office would have the power to hear and dispose of applications:

- for adjournments,
- for production of documents and
- concerning preliminary objections.

Recruitment and Indoctrination of prospective arbitrators

This function will be an important and exacting one. Through the use of the statistical information, the gathering of which will be another function of the co-ordinating office, reasonable predictions of the needs for arbitrators would be possible and would enable the co-ordinating office to take steps to meet them.

Persons considered to be suitable to act as arbitrators would be sought out. Their capabilities would be assessed and sufficient training and indoctrination given to assure reasonable competence. Experience could be afforded by appointments by the co-ordinating office to conduct actual arbitrations.

Research and Statistics

Statistics on grievance resolution, not now anywhere available, should be assembled for use within the co-ordinating office as well as for general use. The design of a system for statistical information which is meaningful is a professional one, requiring the collaboration of the persons by whom the information will be used, the professional statisticians whose expertise is the determination of the source of such information and the persons who would be called upon to furnish the required figures. It is fundamental that every statistic which may be useful should be recorded, that no statistic should be sought for which no use can be foretold and that each statistic should be reported but once.

According to the information which has been furnished to me, the volume of statistics which would be so involved is comparatively small and would not entail an elaborate system.

Education and Development

The scope of the function of the co-ordinating office in this area is more fully explored in Chapter 12.

Review and Reporting

The present state of the arbitration process appears to have come about largely because no one in particular has been responsible for assessing its performance and proposing reforms.

The co-ordinating office, if to it be committed the functions above outlined, will be in a unique position to keep the arbitration phase of grievance resolution under constant surveillance and to formulate and introduce remedies as soon as the need for them has become apparent. It should be charged with this responsibility and required to make, from time to time, any changes which can be brought about by the exercise of its rule-making procedure.

It should further be required to forward to the Minister of Labour for presentation to the Legislature, an annual report, including recommendations for any changes in grievance resolution procedures which require statutory amendments for their implementations.

Constitution

The constitution of the co-ordinating office must take into account that all the functions to be performed by it are not of an identical nature. Some, like rule-making, are largely legislative; some are judicial and others are purely administrative.

Some of the activities proposed to be allocated to the co-ordinating office are now being performed by the Ontario Labour-Management Arbitration Commission. Others come within the scope of the authority conferred on that Commission by its statute. Still others would require the exercise of powers which the Commission does not have now.

The first question to be answered is whether what I propose can be best accomplished by expanding the jurisdiction of the Commission. No doubt that would be legislatively possible. But the significance of the changes which will take place will be more readily appreciated by those required to deal with the co-ordinating office if all of its responsibilities were committed to a newly constituted authority, the present Labour-Management Arbitration Commission being wound up. For identification I will use the designation "Grievance Resolution Authority" in referring to the authority to be newly constituted.

Legislative Function

In the promulgation of its policies and the enactment of rules and regulations the "Grievance Resolution Authority" will be required to act legislatively. To obtain a high level of effectiveness in this aspect of its work, compliance with certain conditions and criteria is essential. Its impartiality, objectivity and independence must be unquestionable. Its size must be limited. Being principally a policy-making body, it must refrain from interference with the implementation of its policies and the administration of its rules and regulations.

The Ontario Labour-Management Arbitration Commission is required by law to be composed of a chairman, three representatives of employees and three representatives of employers. That requirement has lessened the ability of that Commission to fully exert its potential influence. The naming of a representative presupposes that he or she will express the views of those represented. There should be no such limitation on the members of the "Grievance Resolution Authority." Those who agree to discharge the responsibilities of that Authority will be committed to making decisions which they believe will best achieve the objectives of the Authority. In this, they should represent the public and perform their duties without undue regard to the wishes of any segment of the public.

It is unfair, in appointing a person to a body exercising such legislative powers as will be used in grievance arbitration, to restrict his usefulness by styling him as a representative of any identifiable constituency. The public interest in the promotion of good industrial relations demands that the members of the Authority not only represent the employers and the employees but that they represent equally those members of the public who are neither employers nor employees. In legislating the affairs of employers and employees it must give priority to the public good. It should be kept in mind that the Authority will not be dealing with employers and unions which have accepted the task of providing a self-designed procedure but -- in the main, if not exclusively -- with the residue of employers and unions which have, by decision or neglect, left differences to be resolved by arbitration according to the manner provided by statute or regulation. Having chosen to come under the aegis of the Authority, I see no reason why, employers and employees should have particular representation on the Authority.

A small body will operate more effectively than a large one. A small body is more easily convened and generates more general participation of its members and more fruitful discussion

of the matters before it. Personally I would prefer to see the membership limited to three; five would be the upper limit I would be prepared to recommend.

Administrative Function

The members of the Authority must be empowered to employ an adequate staff to implement the policies adopted and administer the activities of the authority; the key member of the staff would be the administrator.

The success of the operation of the Authority will depend on the quality of the administrator and the observance, by the Authority, of the dichotomy between its function and that of the administrator.

Any possible candidate for the post of administrator must have a background of proven performance in the field of industrial relations and must have the competence necessary to devise, assess and apply plans for the various administrative functions of the Authority. The administrator's status must command recognition from the people with whom he will be in contact and respect from the staff.

The administrator must be able to distinguish between the respective functions of the Authority and the administrator, disposing promptly of those which come within his authority and referring to the attention of the Authority those matters which require action by it.

In order to attract and hold an administrator having the necessary qualifications, the salary range established must be competitive with what a person with similar capacity would receive in the private sector. It would be regrettable that the recruitment of a suitable administrator were made difficult becuase of any attempt to equate the salary range to the existing ranges in the Ontario Public Service. Unless adminstration of the Authority can be placed in the hands of a properly qualified person, the full usefulness of the Authority will be sacrificed.

Adjudicative Function

In order to deal with preliminary objections, adjournments and the production of documents, the Authority must be provided with a legal officer, whose jurisdiction would be similar to that now exercised by a Master in the Courts.

It is essential that the person acting as legal officer should have legal training and, at least, a limited experience in arbitration. In view of what would be anticipated to be the volume of adjudicative work to be performed, the duties of the legal officer, for the time being, could be performed by the administrator, if he had the necessary qualifications.

By the melding of these functions into one cohesive apparatus, the process of arbitration acquires greater efficiency. However, the arbitration process, flexibility will not be sacrificied because the rein by which it is lead will be a loose one. The Authority will provide a vantage point from which the process can be continually scrutinized and a ready means of accomplishing adjustments which will be necessary from time to time.

To those who may be apprehensive that they will be subjected to rigid control by the Authority, I would point out that they are always free to remove themselves from that control by evolving a self-designed code of grievance resolution.

The universal adoption of self-designed procedure of grievance resolution is the ultimate goal toward which the parties to collective agreements should be moving. Therefore, it may be appropriate that the procedure which becomes operative only in default of such self-designed procedure, should include some objectionable features. These features may encourage more parties to devise their own plan and so avoid the rigidity to which they object. My recommendations have not been designed to this end; however, if it should be the result, it will not be a matter of regret to me.

I, therefore recommend:

- That there be a grievance resolution authority to exercise powers and perform functions with respect to grievance arbitration:

- a) That the authority consist of three members appointed by the Lieutenant Governor in Council;

  b) That no member thereof shall be appointed as a representative of any constituency of the people of Ontario, that each appointee shall be appointed solely because of his ability, independence and objectivity with respect to industrial relations matters:

- That the powers, duties and functions of such authority shall be those of the present Labour Management Arbitration Commission* and such additional powers, if any, as the authority shall require for the performance of the functions recommended to be assigned to it:

- That the activities for which the authority shall be responsible shall be, as far as is practicable, carried on in and from one co-ordinating office:

- That the functions of the authority shall include:

  a) the recruitment, training and approval of persons it considers suitable to act as arbitrators;

  b) the appointment of an arbitrator where the parties to an arbitration have failed to agree on an arbitrator within the time allowed to them to do so;

  c) the maintenance of a registry for the receipt of notices, statements etc. required to be deposited in the co-ordinating office;

  d) the monitoring of the progress of every arbitration for the purpose of observing whether the rules and regulations are being observed;

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* See Appendix D for the texts of relevant sections of The Ontario Labour Management Arbitration Commission Act R.S.O. 1970 Chapter 320

e) the maintenance of a scheduling service to facilitate the parties in finding and selecting an available arbitrator and to bring about the better utilization of arbitrators time;

f) the collection and collation of statistics relating to grievance resolution;

g) the stimulation and support of research directed to improvement in grievance resolution and grievance arbitration;

h) the promotion of educational activities:

a) for those concerned in collective bargaining and in the formation of collective agreements to improve the quality of the provisions in collective agreements for grievance resolution;

b) for those concerned with the pre-arbitration phases of grievance resolution particularly at the level of shop stewards and foremen;

c) generally to enhance the understanding and appreciation of industrial relations in the social structure of Ontario;

i) the making of rules and regulations for the more effective carrying out of its responsibilities including the establishing of tariffs of arbitrators fees and of the fees to be collected by the authority for such services as it provides to employers and employees;

- That, in order to discharge its duties and to implement its rules and regulations, the authority employ an adequate staff to be under the immediate direction of a fully qualified administrator having extensive experience in industrial relations matters.

Chapter Twelve

Education and Development

Arbitration is an element in maintaining industrial peace when it replaces work stoppage. Nevertheless, every arbitration is the result of the failure of the parties to find a consensual solution for their difference.

In the long run, the frequency of arbitration and its overall cost will be reduced only by decreasing the number of occasions when the parties abdicate their responsibility to come to some agreement and permit a third party to impose a solution. It is reasonable to expect that harmony in the work place will be more likely when the parties have reached a solution on their own -- without arbitration.

This view may not be accepted in those quarters where resort to the grievance procedure is a matter of strategy, rather than the result of the impact of an employment practice which requires adjustment. But the great variation in the incidence of grievances in different enterprises of comparable size indicates the scope for improvement in some enterprises in employer-employee relations.

Over a long period of time and without any assistance from the outside, employers and employees will, no doubt learn the advantages of settling more of their own differences and the manner in which this can be done. In view of the present atmosphere in most enterprises, it is unlikely that this will occur soon; it is even more unlikely that it will occur without some external stimulus. The possibilities of efforts directed to this end by the authority are practically unlimited. There are several levels at which the work of the authority could be directed.

At the level of the employer and the union, information should be collected as to various schemes which have been tried and the success or failure which has attended the use of them. This information should be furnished to all employers and unions so that the vision of the parties responsible for the formation of the collective agreement will be enlarged.

The collection and dissemination of this information would be part of the research program of the authority. Other elements of that program should entail the use of research grants, fellowships and scholarships to promote investigation

and studies by those already interested in the field in industrial relations, as well as to induce other to engage in the field.

Perhaps the most fertile field for improvement in working relations would be at the level of the work-place. Here, the development of conferences and seminars, particularly those which would bring together both stewards and supervisors, could add a new dimension to the training which, now if available, is usually afforded separately.

At two levels, the authority should encourage the Community Colleges to expand their work in industrial relations education. The development of programs of particular significance to local industries would not only make instruction in these areas more accessible but should make the content of the courses more realistic and provide both employee and employer with a better understanding of the means of accomplishing industrial peace.

In order that full advantage might be taken of these courses, the authority should urge local industries to increase the participation of their staff numbers in the programs. At the pre-employment level, the co-operation of Community Colleges should be sought in order that instruction in the technological areas at least introduces students to the importance of maintaining good industrial relations and to some of the fundamental principles to be observed in doing so. In this latter connection, perhaps the most important result would be an increase in the general appreciation of the importance to the community of good industrial relations.

The recent interest that has been shown in the improvement of the Quality of Working Life makes it an area to which more attention must be directed in the immediate future. The social implications of the possibilities of programs directed to this end may require that they be, chiefly, the concern of other agencies. Nevertheless, the potential of such programs for the betterment of the life of the industrial community must be recognized by the association of the authority with the existing programs in this field and by its readiness to participate in future programs which evidence concern for the Quality of Working Life.

If the educational activities of the authority bring about an improvement in the manner in which grievances are resolved or any reduction in the incidence of grievances to be resolved, the authority will have aided materially in the development of better industrial relations.

To make it possible for the authority to engage in educational activities such as have been outlined, it must be furnished with a budget specially earmarked for that purpose. However, it should not be used as a conduit pipe to administer a budget which has been predestined for a particular project. The administration of the budget which is furnished to it for education should be in its sole discretion, which, of course, whould be exercised in the light of its knowledge of related educational or research programs.

Envoi

When I was asked to undertake an examination of the grievance arbitration procedure in Ontario, my almost complete unfamiliarity with the subject assured that I would approach the task with a mind that was, on that subject, not only open but blank. Since then I have suffered from no lack of opportunity to improve my knowledge: arbitrators, counsel, union representatives, personnel managers and a large section of the general public have answered my questions and afforded me more information than I expect I have absorbed.

My report represents my best efforts towards a more effective grievance procedure but, as I brought my inquiry to a conclusion, I have been left with the uncomfortable feeling that I have been dealing with symptoms only and that the underlying causes remain to produce more symptoms.

Without referring to any particular situation, I have felt that, even where industrial relations are good, the atmosphere is that of an armed truce which is not expected to be permanent: that, even when the relationship may appear cordial, there are intimations of mutual distrust which linger but a little below the surface: and that there has been a failure to achieve a commitment to a common goal.

No doubt these attitudes have historical roots. But the acceptance that it must be so obscures the possibilities of the future to which the present is but a prelude. In particular there are some basic considerations the influence of which on the development of industrial relations should be given more recognition.

A realignment of the respective roles of employer and employees, which have maintained during the memory of people now living, is taking place. The growing importance of the enhancement of the quality of working life indicates the direction the changes are most likely to take. The expectation of employers that employees will accept a greater responsibility for the achievement of the goals of the enterprise will be realized only by a correlative transfer of authority from the employer to the employees: the employees, seeking greater authority and a larger measure of self-determination, must come to realize that greater authority is inseparable from greater responsibility.

Such a shift will entail the acceptance of new concepts not only by the employer and employee but by the union as bargaining agent which will not, as is often feared, lose its influence, but find, as its members become more intimately integrated into the organization by which they are employed, that is drawn into a closer relationship and a more cooperative association with the enterprise.

Without suggesting that there are no further areas in which may be sought the realization of the aspirations of labour, it is well to keep in mind that present conditions in Ontario are preferable to what prevails in many other countries. Employers, employees and unions have a common interest in making the most of the social and economic atmosphere in which we live: we are not exempt from influences which would destroy what we have. The preservation and improvement of what we enjoy is important to every element of society: the risk of loss of the freedoms which have given all of us the right to disagree may be of more serious consequence than the concessions necessary from everyone to achieve the unity of purpose which will ensure the survival of the way of life so deservedly valued.

Appendix A

Summary of Recommendations

The Real Solution: A Self-designed Code

Chapter 6:

1. That parties to every collective agreement be encouraged to formulate a code of arbitration procedure in a document separate from the collective agreement.

2. That the procedure to be set out in such code be considered to be of continuing application and to be subject to review and amendment as circumstances dictate.

3. That, the incorporation of the provisions of that code into a collective agreement by specific reference thereto, shall be deemed to satisfy the requirements of section 37(1) of The Labour Relations Act.

4. That, to enable the parties to a collective agreement to adopt such a code and amend it as required,

   a) section 45(1) of The Labour Relations Act be amended to authorize a notice to bargain with respect to a code of grievance procedure to be given at any time during the term of the collective agreement or during the course of the bargaining for a renewal of a collective agreement.

   b) that section 41 of The Labour Relations Act be amended to provide that a code of grievance procedure shall not of itself be deemed to be a collective agreement except to the extent to which that code is, by the terms of the collective agreement, made applicable to the settlement of the differences arising under that collective agreement.

5. That, to afford greater scope for the development of grievance resolution procedures:

   a) section 37(1) of The Labour Relations Act be amended to read as follows:

      "Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise without stoppage of work, of all differences between the parties arising from the interpretations, applications, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable".

b) section 112a of The Labour Relations Act be amended to allow parties to a collective agreement to provide therein that the provisions of section 112a do not apply to grievances arising under that agreement

The Arbitral Body

Chapter 7:

1. That grievance arbitration continue to be conducted by ad hoc arbitrators, selected by the parties or, when the parties are unable to agree upon an arbitrator, appointed by the co-ordinating office.

2. That, except where the parties have otherwise provided in writing, every arbitration shall be conducted before one arbitrator.

3. That, during a transitional period of 2 or 3 years, either party to any arbitration conducted under the normal procedure shall have the right, but shall not be required, to appoint an assessor to sit with the arbitrator and to advise him with respect to any matter on which the arbitrator wishes the assistance of the assessor

4. That, an assessor shall not participate in the award or record his assent to or dissent from it

5. That, the arbitrator, the opposite party and the co-ordinating officer be advised:

- of the name of the assessor first appointed not less than 72 hours
- of the name of any assessor subsequently appointed not less than 24 hours

prior to the time fixed for the hearing of the arbitration.

6. That the obligation for the payment of the cost of the arbitrator continue to be that of the parties.

Solutions Recommended

Chapter 8:

1. That the parties to a collective agreement may apply to the Supreme Court of Ontario for the interpretation by that Court, or an arbitrator may state a case for the opinion of the Court as to the interpretation of any statutory provision or any regulation having the force and effect of a statute.

2. That the Labour Relations Act, The Rights of Labour Act and the Rules of Practice of the Supreme Court of Ontario be amended to the extent necessary to carry into effect the foregoing recommendation

3. That, the rules to be made for the conduct of arbitration for which the parties have not made other provisions shall:

- establish categories of grievances according to their subject matter
- designate what grievances are to be included in each category

- specify, for each category of grievance, the procedure to be followed in the appointment of an arbitrator and the conduct of the arbitration

4. That, initially three procedures be provided to be titled respectively "special", "normal" and "interpretive".

5. That, until other procedures are established by the co-ordinating office in every grievance arbitration the parties shall conform to the normal procedure unless:

- both parties have signed a written waiver setting out an alternative procedure to be followed with respect to it, a copy of which waiver shall have been deposited in the co-ordinating office
- the grievance is within a category for which expedited procedure is specified
- the parties have invoked the interpretive procedure

6. That, the provisions to be included in each of the foregoing three procedures be respectively as hereafter set out under the title of each procedure

Expedited Procedure

7. The notification of either party of its desire to submit a difference to arbitration shall:

- be in writing
- contain the details of at least one available arbitrator*
- be delivered to the opposite party and deposited in the co-ordinating office not later than the 5th day after R day**

Agreement on Arbitrator

8. If the parties agree upon an available arbitrator

- that arbitrator shall fix the date and place for the hearing of the arbitration which date shall not be later than the 14th day after R day
- on the day fixed, the arbitrator shall proceed to hear the arbitration
- the name of the arbitrator and the place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office

Failure to agree on Arbitrator

9. - if the arbitration does not proceed by R + 14 day, the legal officer of the co-ordinating office shall, on R + 15 day, appoint an arbitrator and shall fix the date and place of hearing which

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* See Chapter 8
** See Chapter 8

shall not be later than R + 25 days.

- the co-ordinating office shall notify each of the parties of the name of the arbitrator so appointed and the date and place of hearing.

- if the respondent proposes to raise any preliminary objection, the arbitrator shall be so advised immediately upon his appointment: at the same time, the applicant shall also be advised.

The Award

10.
- at the conclusion of the hearing, the award of the arbitrator shall be made orally and its purport only reduced to writing unless the arbitrator is of the opinion that, to arrive at a proper disposition of the matter, further time is required.

- every award shall be non-precedential and no reasons in writing shall be delivered unless at the express request of one or more of the parties or the arbitrator consider it desirable to deliver reasons: the cost of the preparation of the written reasons for award shall be born by the party or parties requesting them.

- the arbitrator shall deliver to each of the parties a copy of the award and send one copy to the co-ordinating office

Normal Procedure

11. The notice by either party of its desire to submit the difference to arbitration shall:

- be in writing

- contain the names of at least two available arbitrators

- be delivered to the opposite party and deposited in the co-ordinating office not later than the 10th day after R day

Agreement Upon Arbitrator

12. If the parties, not later than the 20th day after R day, agree upon an available arbitrator:

- that arbitrator shall fix a date and place for the hearing of the arbitration which date shall not be later than the 50th day after R day

- the name of the arbitrator and the date and place fixed for the hearing of the arbitration shall be communicated to the co-ordinating office

Failure to agree upon Arbitrator

13. If the parties fail to agree on an available arbitrator within 20 days after R day the legal officer of the co-ordinating office, on this 25th day after R day shall:

- appoint an arbitrator

- o fix the date and place for the hearing of the arbitration which date shall not be later than the 50th day after R day

- o advise the parties of such an appointment, date and place

Applicant's Statement

14. Not later than the 15th day after R day, the applicant may deliver to the respondent and deposit in the co-ordinating office a statement in writing setting out:

- o the nature of its complaint

- o the relief sought

- o the facts alleged by it which are in dispute

- o the facts alleged by it which are not in dispute

If the applicant fails to deliver such a statement, its notice to arbitrate shall be deemed to be its "statement".

Respondent's Statement

15. Not later than the 25th day after R day, the respondent shall deliver to the applicant and deposit in the co-ordinating office a statement in writing setting out:

- o the position it takes with respect to the applicants claim

- o the facts alleged by the applicants statement which it does not dispute

- o the facts alleged by the applicants statement which it disputes

- o other relevant facts which have not been included in the applicants statement

- o details of any preliminary objection it proposes to raise and the grounds which it alleges in support of such objections

Expedited and Normal Procedure

Extension of Time and Adjournments

16.
- o an application for either an extension of time or an adjournment which, if granted, would defer the hearing of an arbitration beyond the last day fixed by the rules for its hearing may be granted only by a legal officer of the co-ordinating office

- o if such application be granted, the legal officer shall fix the date on and time at which the arbitration shall be heard

Adjournment of Hearing

17. Where an adjournment of the hearing becomes necessary because the hearing could not be concluded in the time set aside for it, the arbitrator shall adjourn the hearing to reconvene at the earliest possible date he is available to hear it, and the arbitration shall be heard on the date so fixed.

Interlocutory Matters

18.
- with the concurrence of both parties, an application for the hearing of any preliminary objection proposed to be made before an arbitrator may be made to a legal officer of the co-ordinating office
- the legal officer may himself hear and dispose of such preliminary objection or may, in the exercise of his discretion, refer the hearing and disposition of it to the arbitrator
- without leave granted by a legal officer of the co-ordinating office, no preliminary objection shall be heard unless particulars thereof shall have been set out in the statement of the party proposing to make it
- unless a preliminary objection has been finally disposed of by a legal officer, the arbitrator shall hear the argument thereon at the opening of the arbitration and shall thereafter proceed to complete the hearing of the arbitration whether or not he has disposed of the preliminary objection

19. On application, of which notice shall have been given to the opposite party, a legal officer of the co-ordinating office may order a party:
- to produce any relevant documentary evidence in its possession or control or
- to furnish such particulars of its statement as shall be necessary to delineate the issues which are to be deemed by the arbitrator

20. That the Labour Relations Act, The Rights of Labour Act and The Rules of Practice of the Supreme Court of Ontario be amended to the extent necessary to implement the foregoing recommendations.

Proposals Considered

Chapter 9:

1. With respect to the interim remuneration of a grievor whose discharge is the subject matter of a grievance, I, therefore recommend:
- That, where any adjournment of an arbitration which is proceeding under expedited procedure is sought, as a condition of its granting, the party or parties seeking the adjournment shall undertake that, from the date of the granting of the adjournment until the final disposition of the grievance, the grievor will receive, currently, an amount equal to the basic pay which the grievor was entitled to receive at the date of discharge such amount to be paid by the party seeking the adjournment or, if the adjournment is sought by both parties, equally by them.

Whence Arbitrators

Chapter 10:

1. That, the obligation for the payment of the cost of arbitration continue to be that of the parties.

Chapter 11:

1. That there be a grievance resolution authority to exercise powers and perform functions with respect to grievance arbitration:

2.
- that the authority consist of three members appointed by the Lieutenant Governor in Council:

- that no member thereof shall be appointed as a representative of any constituency of the people of Ontario, that each appointee shall be appointed solely because of his ability, independence and objectivity with respect to industrial relations matters:

3. That the powers, duties and functions of such authority shall be those of the present Labour Management Arbitration Commission* and such additional powers, if any, as the authority shall require for the performance of the functions recommended to be assigned to it.

4. That the activities for which the authority shall be responsible shall be, as far as is practicable, carried on in and from one co-ordinating office.

5. That the functions of the authority shall include:

- the recruitment, training and approval of persons it considers suitable to act as arbitrators;

- the appointment of an arbitrator where the parties to an arbitration have failed to agree on an arbitrator within the time allowed to them to do so;

- the maintenance of a registry for the receipt of notices, statements etc. required to be deposited in the co-ordinating office;

- the monitoring of the progress of every arbitration for the purpose of observing whether the rules and regulations are being observed;

- the maintenance of a scheduling service to facilitate the parties in finding and selecting an available arbitrator and to bring about the better utilization of arbitrators' time;

- the collection and collation of statistics relating to grievance resolution;

- the stimulation and support of research directed to improvement in grievance resolution and grievance arbitration;

- the promotion of educational activities:

  a) for those concerned in collective bargaining and in the formation of collective agreements to improve the quality of the provisions in collective agreements for grievance resolution;

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* See Appendix D for the texts of relevant sections of The Ontario Labour Management Arbitration Commission Act R.S.O. 1970 Chapter 320

b) for those concerned with the pre-arbitration phases of grievance resolution particularly at the level of shop stewards and foremen;

c) generally to enhance the understanding and appreciation of industrial relations in the social structure of Ontario;

- the making of rules and regulations for the more effective carrying out of its responsibilities including the establishing of tariffs of arbitrators fees and of the fees to be collected by the authority for such services as it provides to employers and employees;

6. That, in order to discharge its duties and to implement its rules and regulations, the authority employ an adequate staff to be under the immediate direction of a fully qualified administrator having extensive experience in industrial relations matters.

Appendix B

Extracts from The Hospital Labour Disputes Arbitration Act

2. -(1) This Act applies to any hospital employees to whom The Labour Relations Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

(2) Except as modified by this Act, The Labour Relations Act applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

Appendix C

Extracts from The Labour Relations Act

RSO 1970 C 232

37.-(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is no majority the decision of the chairman governs.

(3) If, in the opinion of the Board, any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection 2 is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection 1, but, until so modified, the arbitration provision in the collective agreement or in subsection 2, as the case may be, applies.

(4) Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

(5) Where the Minister has appointed an arbitrator or the chairman of a board of arbitration under subsection 4, each of the parties shall pay one-half the remuneration and expenses of the person appointed, and, where the Minister has appointed a member of a board of arbitration under subsection 4 on failure of one of the parties to make the appointment, that party shall pay the remunerations and expenses of the person appointed.

(5a) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

(6) Where a difference has been submitted to arbitration under this section and a party to the arbitration complains to the Minister that the arbitrator or the arbitration board, as the case may be, has failed to render a decision within a reasonable time, the Minister may, after consulting the parties and the arbitrator or the arbitration board, issue whatever order he considers necessary in the circumstances to ensure that a decision will be rendered in the matter without further undue delay.

(7) An arbitrator or the chairman of an arbitration board as the case may be, has power,

(a) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and

(b) to administer oaths,

and an arbitrator or an arbitration board, as the case may be, has power,

(c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

(d) to enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;

(e) to authorize any person to do anything that the arbitrator or arbitration board may do under clause d and to report to the arbitrator or the arbitration board theron.

(8) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

(9) The decision of an arbitrator or of an arbitration board is binding.

(a) upon the parties; and

(b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision; and

(c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and

(d) upon the employees covered by the agreement who are affected by the decision,

and such parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

(10) Where a party, employer, trade union or employee has failed to comply with any of the terms of the decision of an arbitrator or arbitration board, any party, employer, trade union or employee affected by the decision may, after the expiration of fourteen days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, in the prescribed form, whereupon the decision shall be entered in the same way as a judgement or order of that court and is enforceable as such.

(11) The Arbitrations Act does not apply to arbitrations under collective agreements.

Appendix D

The Ontario Labour Management Arbitration Commission Act

RSO 1970 C 320

1. In this Act,

(a) "Commission" means The Ontario Labour-Management Arbitration Commission;

(b) "Minister" means the Minister of Labour;

(c) "regulations" means the regulations made under this Act.

2.-(1) The commission known as The Ontario Labour-Management Arbitration Commission is continued.

(2) The Commission shall consist of seven members appointed by the Lieutenant Governor in Council, of whom one shall be designated as chairman to hold office during the pleasure of the Lieutenant Governor in Council.

(3) Three members of the Commission shall be representatives of employers and three members shall be representatives of employees.

(4) The representatives of employers and employees on the Commission shall be appointed for terms of one, two or three years and are eligible for reappointment.

(5) Vacancies in the membership of the Commission caused by death, resignation or otherwise may be filled by the Lieutenant Governor in Council.

(6) The members of the Commission shall receive such remuneration and expenses as the Lieutenant Governor in Council may determine.

(7) The Commission may appoint such officers and clerks as are necessary for the proper conduct of its work and, subject to the approval of the Lieutenant Governor in Council, may fix their salaries.

3.-(1) The Commission may issue its approval to any person whom it considers suitable to act as an arbitrator.

(2) The Commission shall cause to be entered in a register maintained for the purpose the name of every person to whom its approval is issued under subsection 1.

(3) The Commission may, after a hearing which may be either public or in camera as it considers proper, refuse to issue its approval or may suspend or revoke its approval.

(4) There shall be a verbatim record of every such hearing.

(5) Where the Commission refuses to issue its approval to any person or suspends or revokes its approval of any person, he may within fifteen days after receipt of the decision of the Commission, appeal to a county or district judge of the county or district court of the county or district in which he resides and if the judge finds, upon the record or other evidence admitted by his leave, that there has been a denial of natural justice occasioned by the action of the Commission he may make such order as he considers proper, and thereupon the Commission shall act accordingly.

4.-(1) The Commission may employ on a full-time basis such persons as it considers necessary to act as arbitrators and may fix their salaries.

(2) In order to ensure adequate levels of remuneration for arbitrators who act part-time, the Commission may schedule assignments and adopt such other methods and procedures as it considers proper.

5. The duties and functions of the Commission are to,

(a) maintain for the use of parties to an arbitration a register of approved arbitrators;

(b) assist arbitrators by making the administrative arrangements required for the conduct of arbitrations;

(c) sponsor training programs for arbitrators;

(d) sponsor the publication and distribution of information in respect of arbitration processes and awards; and

(e) sponsor research in respect of arbitration processes and awards.

6.-(1) The Commission may collect such fees for services provided to employers and employees as are fixed by the regulations.

(2) Fees collected by the Commission shall be expended to defray its expenses in carrying out its duties and functions.

7.-(1) The Commission shall report annually to the Minister upon the affairs of the Commission.

(2) The Minister shall submit the annual report to the Lieutenant Governor in Council and shall then lay the report before the Assembly if it is in session or, if not, at the next ensuing session.

8. The moneys required for the purposes of this Act shall be paid out of the moneys appropriated therefor by the Legislature.

9. Subject to the approval of the Lieutenant Governor in Council, the Commission may make regulations,

(a) governing the assignment of arbitrators to conduct arbitrations and the carrying out and completion of such assignments;

(b) providing for and fixing the remuneration and expenses payable in respect of arbitrations carried out by arbitrators registered with the Commission and providing for the payment of such fees and expenses by the parties to the arbitration;

(c) providing for and fixing fees for services provided to employers and employees by the Commission;

(d) governing the conduct of hearings and prescribing procedures therefor;

(e) prescribing forms and providing for their use;

(f) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Appendix E

The Rights of Labour Act

RSO 1970 - 416

1. In this Act,

(a) "collective bargaining agreement" means an agreement between an employer and a trade union setting forth terms and conditions of employment;

(b) "trade union" means a combination, whether tempoary or permanent, having among its objects the regulating of relations between employees and employers or between employees and employees or between employers and employers.

2. A trade union and the acts thereof shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade.

3.-(1) Any act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, is not actionable unless the act would be actionable if done without any agreement or combination.

(2) A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of any of the provisions of this Act or of The Labour Relations Act.

(3) A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of The Labour Relations Act.

(4) Nothing in this Act shall be construed to prevent or otherwise affect the prosecution of a trade union or a member thereof under The Labour Relations Act.

4. The Reinstatement in Civil Employment Act (Canada) applies in Ontario notwithstanding the termination of World War II and notwithstanding the repeal thereof by the Parliament of Canada.

Appendix F(1)

Procedure under Section 96 Labour Code of British Columbia

The Labour Code of British Columbia set out in section 96 (quoted in full in appendix) a special procedure which is available to a party to a collective agreement unless its application has been expressly excluded by a written agreement between the parties.

The Labour Relations Board, established under the Labour Code (Statutes of British Columbia 1973 2nd session Chapter 122) has published a useful summary of the special provisions and in pursuance of the powers conferred on it by section 27 of the Labour Code, a statement of policy dated 24 February 1976.

The following is the text of the summary

1. An application under section 96(1) may be made by either the employer or trade-union where there is a dispute about a provision of a collective agreement. An application may not be made if the collective agreement contains (as it may) a provision whereby the parties agree not to utilize section 96(1).

2. A section 96(1) application should be based on a difference arising under the terms of the collective agreement. The application should clearly state which section of the collective agreement is the cause of the dispute.

3. An application will not normally be entertained by the Board if the steps in the grievance procedure have not been exhausted. The Board will not insist on exhaustion of the grievance procedure if the matter is one of urgency and a source of industrial unrest.

4. In the minority of cases where the matter cannot be successfully mediated by an officer there are three manners in which it may be resolved.

a) If the matter is relatively straightforward, (e.g. involving only a question of two possible interpretations of the agreement or minor disciplinary action) and the Board is in possession of adequate submissions from both sides, the Board may make a final disposition of the matter without a hearing. When this occurs, written reasons generally will not be issued.

b) If the matter appears to be of considerable significance to the parties and one which should be the subject of an oral hearing, it will be referred back to the parties for arbitration under the collective agreement.

c) The Board may itself convene a hearing in rare circumstances where the dispute involves a question of statutory policy under the Labour Code.

5. Where a section 96(1) application does not result in a mediated settlement or final disposition by the Board without a hearing, ultimate adjudication of the dispute will almost invariably take a longer period of time than if

the parties had proceeded directly to arbitration. The Board has alerted the parties to this potential delay which should be considered before they make a particular grievance the subject of an application to the Board under section 96(1) of the Code.

In practice on the receipt of a request from either party prior to the appointment of an arbitration board or other board, the Board sends out one of its Industrial Relations Officers (IRO) to the scene of the dispute. Sufficient number of these officers are geographically spread throughout the province to enable one to be readily available when his services are required.

The IRO intervenes, as a mediator, seeking out the facts: each party is asked to set out a statement of its position: these statements are exchanged and each party may furnish a reply.

Failing settlement by mutual agreement the IRO makes a report to the Board attaching the statements of the parties and appending his own recommendations.

If, as a result of the observation of the IRO, an emergency is seen to exist, the Board is in the position to deal with it immediately.

In the absence of a settlement through the assistance of the IRO, there are three possible procedures any of which may be adopted as the Board determines.

a) a panel of the Board being in possession of the submissions in writing from both sides, may decide the issues forthwith without any further representations from the parties: in this event written reasons will not be issued. There is an appeal procedure whereby the Board may reconsider the issue, where that appears desirable.

b) The matter may be referred back to the parties to proceed by arbitration or otherwise in accordance with the provisions of the collective agreement.

c) The Board may itself, as an arbitration board, hear the matter. The first method is applied to a simple matter involving no disputed facts or serious matters of policy.

The second is the most commonly applied and its use recognizes "the legislative preference for arbitration as the primary method for the formal resolution of claims under the collective agreement".

The third, infrequently invoked, is brought into play where the dispute which has arisen under the parties contract is "inextricably tied into the general law of the statute."

In its statement of policy the Labour Board set out some examples of issues to which each of these available procedures is applied; these are examples given as illustrations and are not intended to be exhaustive catalogues of the subjects which would be appropriate for each of the procedures

a) collection of contract debts;
minor discipline
bare contract interpretation

b) discharge
seniority claims in lay-offs or promotion
major issues of contract interpretation
specialized procedure for dispute resolution

c) discharge or work assignments which led to wildcat strikes or other forms of industrial unrest
grievances in which the primary issue or proper application of such statutory concepts as "employees", "independent contractor", "collective agreement" and the like
grievances involving major issues of law and policy relating to the collective agreement - including the jurisdiction under the amended section 108 of the Labour Code which gives the Board supervisory jurisdiction to ensure that "the decision or award of the arbitration Board is consistent with the principles expressed or applied in this act, or any other act dealing with Labour Relations".

In summaries of the Boards performance under this special procedure contained in an essay submitted by Andrew W. Whittaker in partial fulfullment of the requirements for the degree of Master of Arts in the Department of Economics and Commerce at Simon Fraser University, figures are set out as to the stage at which resolution is attained. They appear in the attached schedule.

Appendix F(2)

Extracts from The Labour Code of British Columbia

SBC 1973 C 122

96. (1) Notwithstanding the provision required or prescribed under section 93 or 94;

(a) if, at any time prior to the appointment or an arbitration board or other body, either party to the collective agreement requests the board in writing to appoint an officer to confer with the parties to assist them to settle the difference, and where the request is accompanied by a statement of the difference to be settled, the board may

(i) appoint an officer to confer with the parties; or
(ii) proceed in the manner provided in clause (c):

(b) where an officer is appointed under clause (a), the officer shall, after conferring with the parties, make a report to the board;

(c) where the board decides, under paragraph (ii) of clause (a), to proceed under this clause, or the report of the officer is made to the board under clause (b), the board may, if in its opinion the difference, when referred to the board, is arbitrable,

(i) refer the difference back to the parties; or
(ii) inquire into the difference and, after such inquiry as the board considers adequate, make an order for final and conclusive settlement of the difference;

(d) where the board refers the difference back to the parties under paragraph (i) of clause (c), the parties shall follow the procedure in the provision required or prescribed under section 93 for final and conclusive settlement of the difference;

(e) where the board

(i) inquires into the difference under paragraph (ii) of clause (c); or

(ii) advises the parties that in its opinion the difference is not arbitrable,

neither the Arbitration Act nor any other procedure for settlement of the difference applies; and

(f) where the board does inquire into the difference under paragraph (c) (ii), the board may exercise all of the powers of an arbitration board under this Part, and the order of the board for final and conclusive settlement of the difference is final and binding on the parties and on all other persons bound by the collective agreement, and all those parties and persons shall comply with the order.

(2) Parties to a collective agreement may at any time, by written agreement, specifically exclude the operation of subsection (1), and in that event subsection (1) does not apply during the term of the collective agreement.

Appendix G

Presentations Received

Arbitrators Institute of Canada Inc.

Association of Municipal Electrical Utilities

Automotive Hardware Ltd.

Canadian Chemical Workers Union

Canadian Food and Allied Workers

Canadian Federation of Independent Business

Canadian Manufacturers Association - Ontario Division on behalf of itself and

The Board of Trade of Metropolitan Toronto

Electrical & Electronic Manufacturers Association of Canada

Motor Vehicle Manufacturers Association

Ontario Chamber of Commerce

Retail Council of Canada

Construction Labour Relations Association of Ontario

Canadian Textiles Institute

Central Ontario Industrial Relations Institute

City of London Ontario Canada

City of Waterloo

Canadian Union of Public Employees - Local 1142

Canadian Union of Public Employees - Metropolitan Toronto District Council

Canadian Union of Public Employees - Ontario Division

Canadian Union of Public Employees - Ontario Hydro Employees Union-Local 1000

Canadian Union of Public Employees - Ontario Provincial Joint Council #22

Electrical Power Systems Construction Association

Grocery Products Manufacturers of Canada

International Association of Machinists and Aerospace Workers

International Beverage Dispensers' and Bartenders' Union

International Union of Operating Engineers

Meat Packers Council of Canada

Ministry of Attorney General

Motor Transport Industrial Relations Bureau of Ontario (Inc.)

Niagara District Personnel Association

Office and Professional Employees International Union

Oil, Chemical & Atomic Workers International Union - Local 9-599

Ontario Federation of Labour

Ontario Forest Industries Association

Ontario Hospital Association

Ontario Labour Management Arbitrators Association

Ontario Labour Section of Canadian Bar Association

Ontario Mining Association

Ontario Nurses Association

Provincial Building and Construction Trades Council of Ontario

Retail Wholesale Department Store Union

Rubber Association of Canada

Thunder Bay Chamber of Commerce

Toronto Dress and Sportswear Manufacturers Guild Inc.

True Temper Canada Ltd.

Union of Canada Retail Employees

United Rubber, Cork, Linoleum and Plastic Workers of America

United Steelworkers of America

Individual

H.W. Arthurs	Larry Hebert	Stanley Schiff
David Beatty	Francis Lorenzen	Murray Tate
C. Roy Bernardi	J.D. O'Shea,Q.C.	J.F.W. Weatherill
H.D. Brown, Q.C.	Vic Perroni	G.B. Weiler, Esq.,Q.C.
Eric Etchen	J. P. Sanderson, Q.C.	W.H. Wightman