CHAPTER 2

THE CUCKOO'S EGG IN THE MARE'S NEST—ARBITRATION OF INTEREST DISPUTES IN PUBLIC-SERVICE COLLECTIVE BARGAINING: PROBLEMS OF PRINCIPLE, POLICY, AND PROCESS

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The evolution of tripartite arbitration of interest disputes is not obscure. In the latter part of the nineteenth century, the English Court of Appeal held that it was contrary to public policy for members of a commercial-trade association to settle differences between their members by reference to an internal tribunal. Parliament reversed the effect of that decision by prescribing a process of private arbitration. Each party names a representative, and they try to reach a settlement by whatever means. If they fail, an umpire is appointed. He decides the dispute, with the other two acting only as advisers. The disputes for which this process was designed were doubtless in the nature of rights disputes, but doubtless also the question was never asked. Nearly every province in Canada copied the British Arbitration Act of 1889.

A *rights* dispute conventionally describes a case in which a party claims he has a legal right which another party has infringed. The term is used in contrast to the term *interest* dispute, in which each party is seeking to convert a mere interest into a legal right which can then claim the protection of the system. Grievances are archtypical rights disputes. Disputes over the negotiation of a collective agreement, and which conventionally lead to the right to strike, are archtypical interest disputes. They are both, generically, labor disputes; yet they are different as chalk and cheese.

At the beginning of this century conciliation was introduced into the Canadian industrial relations system for the settlement of *interest* disputes, and the tripartite conciliation board was devised.

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Note: Dr. Carrothers was unable to attend the meeting. His paper was read by Kenneth Edward Norman, Member, National Academy of Arbitrators; Professor of Law, University of Saskatchewan, Saskatoon, Sask., Canada.

But the chairman had no special powers, and the board was there to help the parties reach an agreement, not to tell them what they must do. When the tripartite board for grievance disputes was introduced, in practice, under the wartime labor code, the commercial cuckoo's egg was laid in the industrial relations nest.

After the war most labor codes said that the parties must settle disputes during the term of a collective agreement without strikes or lockouts. Usually that meant tripartite arbitration. The codes then started to prescribe arbitration procedures to make arbitration better fit labor problems. At this point something must have bothered the "parliamentarians" because the codes began to disqualify from membership on arbitration boards persons who had a direct interest in the dispute. It is not clear why an indirect interest should have been acceptable in an area of human relations in which indirection can be pretty direct. If you think that is an adventurous remark, note the practice of the parties of holding their nominees accountable for an adverse award, a practice which proliferates dissenting opinions which, in turn, induce the preparation of painfully elaborate majority awards.

The cuckoo's egg hatched beyond doubt with the statutory introduction of arbitration of interest disputes, although the cuckoo's wings were clipped and some of its tailfeathers were pulled, perhaps to make it look like a cross between a hawk and a dove.

The Canadian industrial-relations "system" of collective bargaining was designed, in its main features, for the private sector, and largely to meet the characteristics of secondary industry; it in fact extends to basic industry and to the service or tertiary sectors, notably in privately owned public utilities and in crown corporations in the fields of transportation and communications. As early as 1950 it became apparent that collective bargaining and the right to strike in the service sector had acquired environment qualities which they did not have in primary and secondary industries. The first of these qualities is that the sanction of the work stoppage operates, essentially and effectively, against innocent third parties who are the users of the services. An inevitable result, but one which has taken rather longer to surface than one might have expected, is that users of services, whose collective interests frequently are reflected in the term "public interest," become unwilling partisans in the dispute, and appear to be adverse in interest to those withdrawing their services. A consequence is that striking employees regard the public interest as hostile to their own, and therefore to be opposed. Where the government (or a government agency) is the employer,

the "public interest" is viewed by employees as being allied with the government of the day as a party adverse to those exercising the right to strike. Private citizens are being conditioned to react in accordance with that imposed role.

A second quality of collective bargaining and the right to strike in the service sector is that the employer cannot be put out of business—at least so runs the convention. The contemplation of this result does not operate as a constraint either on the employer or on the striking employees. Even where the private employer in the service sector is subject to rate controls by a government agency, it is inevitable that the employer should adjust, and be given permission to adjust, its rates in order to permit services to continue. That is about the only consistent legal precept that has emerged after decades of litigation over public regulation of private utilities—that a utility be able to make such return as to permit it to continue to provide services in the future. Where a government (or a government agency) is the employer, the open-ended character of the employer's position derives from its taxing authority and from its capacity to pass increases in costs to the tax-paying public. It does not have those constraints that inhere in private-sector collective bargaining, where market forces normally (in a relatively free market) impose constraints on both sides as to what is a reasonable, or a reasonably attainable, objective.

A third quality, which relates closely to the first two, is that the demand for services is inelastic—in fact some services are essential—and the employer, and hence the labor force, are in the monopolistic position, produced by the operation of market forces or protected by law, presumably in the public interest.

These three characteristics throw into question the nature of the public interest in the collective bargaining process in the service sector of the economy.

Exceptions should be recognized at two extremes. One is the case of public servants for whom the right to strike is of no practical value because the withdrawal of their services would be a matter of indifference to the public, and principally only of political significance to the employer. The other extreme is the stoppage of work in the private sector where essential goods or services are being supplied or where the passage of time makes the unavailability of such goods or services a critical matter. The classic example of the latter, which heralded the modern epoch of Canadian industrial relations, is a strike in the Alberta coal mines at the beginning of the century. It reduced farmers to burning fence posts and brought

the personal intervention of the new Deputy Minister of Labour, William Lyon MacKenzie King. That led to federal legislation incorporating the strategy of conciliation combined with delaying the right to strike. A current example is the 1975 forest-products dispute in British Columbia. Combined with other private-sector disputes, it induced back-to-work legislation.

The collective bargaining system in the federal public service attempts to deal with the disparities. The employees' association is given the option of selecting, at regular intervals, the right to strike or binding arbitration. Where the right to strike is selected, the legislation provides machinery for "designating" employees whose services are deemed to be essential to the public interest. Where arbitration is selected, the legislation provides for a system of arbitration and sets out guidelines by which judgments can be made as to the terms on which a particular dispute shall be settled.

In recent years the federal collective bargaining system has produced some settlements substantially higher than those reached in the private sector, and at a rising cost in inconvenience and harm to the citizen-user. It has also exacted another price, the significance of which cannot be quantified and totalled, but which may be of enormous consequence. It is the intervention of the government, and consequently of Parliament, to put an end to disputes and to impose terms of settlement by means other than those prescribed in the labor codes. The significance of these developments relates to the role of collective bargaining, the parallel roles of government-as-employer and Parliament-as-sovereign, and the role of powerful special-interest groups in the determination of economic and social policy and in the realpolitik of the country.

When collective bargaining as we now have it first came to the federal public service in the 1960s, great effort was made to make the system work. Studies were made of job functions and rates and scales and relationships. Anomalies were identified, and steps were taken to work them out of the system. In early arbitration cases, the parties agreed on what the disagreement was about and pleaded their cases within the framework of guidelines prescribed in the legislation, within the data base developed by the Pay Research Bureau, and within the essential characteristics of the adversary style of the judicial process.

In some recent cases the parties have shown little basic agreement as to what the dispute is about: that is, there has been no really effective "joinder of issue." The adversaries present to the arbitration tribunal a choice between apples and oranges. Furthermore, parties

can stray a long way from the criteria prescribed in the legislation. Presentations can lack crispness as to the case being made. In addition, confidence in the data base provided by the Pay Research Bureau has been challenged by partisan attacks on it, grounded in alleged inadequacy, if not incompetence, and lack of currency, even though there is a joint council through which the parties can influence the scope and nature, if not the caliber, of Bureau studies. Doubtless the high rate of inflation has prompted some of the attacks on the timeliness of survey reports and has led to some curious calculations as to how the reports might be updated as a proxy for current and future facts.

Complementary with this challenge to the stature of the Pay Research Bureau data base, parties have been submitting data from other sources, such as the Department of Labour, research units of labor organizations, employers' associations, and other private-sector sources, such as professional consultants, and even from studies conducted for the particular dispute—what a lawyer would rightly call self-serving evidence. There is no assurance that these sources collect and use their information in the same way; to the contrary, there is every reason to believe that the data cannot be compared and used to determine even the generalities of what the terms of settlement should be.

There appear to be two principal reasons for this attenuation of the arbitration process. First, the considerable increase in the public service at large in recent years, together with the substantial rise in demand for high-level manpower, has caused governments-as-employer in some instances to offer or to defer to demands for what, on the basis of comparability, are enriched salaries. The second cause is the rate of inflation, already referred to, which renders information out of date before it is even compiled. Underlying these two causes is the much-discussed open-ended nature of the government's position as employer. In fact, the wage- and price-constraint program may find its strongest case in the public sector. Critics might offer a third cause in anomalous arbitration awards which establish claims to new differentials.

Five years ago there was increasing advocacy of voluntary binding arbitration for the settlement of employer-employee disputes. The most notable championship has been that of George Meany, president of the AFL-CIO, and the most notable case that of the 1973 steel agreement. The inflation of the past few years has swamped the argument. Nevertheless, voluntary binding arbitration may be the most plausible option to the right to strike that is compatible

with the political, economic, and social characteristics of our society and the values avowedly shared by its peoples. It probably is not realistic to consider anything but a voluntary system superimposed on collective bargaining and the right to strike. That system has been part of the ethos of the country in varying forms and degrees for three-quarters of a century, and it claims intractable adherents. The judicial process in arbitration also reflects an essential ethos which makes it more acceptable than a return to a "free labor market" or than determination by inquisition and edict.

The form of judicial process to which we are accustomed is the adversary form. The parties are at the same time antagonists and protagonists. They contend with one another, but they function within the system. The parties adverse in interest put their case to an independent judge. They are responsible for presenting evidence and developing arguments. The conventional process is so regulated that by the time a case is ready to be heard, the parties have identified the issues on which they disagree. In other words, there is a clear joinder of issue. Another characteristic, which often goes unobserved, is that the issue is not over rights and wrongs, but is over competing rights. Civil disputes over rights and wrongs almost invariably get settled out of court: insurance adjusters thrive on them. Criminal disputes over rights and wrongs go to trial in order that an accused cannot be condemned unheard.

The identification of the issue is a critical first step in judicial reasoning. The second step is to determine the facts relating to the issue. The third step is to determine the law relevant to the facts and the issue. The fourth step is to apply the facts to the law in order to reach a conclusion that resolves the issue. Inherent in the process is the chicken-and-egg problem of which comes first, but that can be handled by what these days is called "iteration." Rules of evidence regulate argument over facts, and the process provides for argument on the law and on how the facts and the law should be interrelated to conclude the dispute. In the end, the judge decides. The process of judicial reasoning is so time-honored that, in simple cases, it can appear to be almost ritualistic, although the integrity of the process requires that it be followed with care and understanding.

The application of the process is most obvious in a court of law. It can also be observed in the operations of an administrative tribunal, although the tribunal may also make regulations and may go out to determine "facts." It can also be seen in private or "domestic" tribunals. It can be seen in courts martial. It is evident in the arbi-

tration of grievance disputes in industrial relations. Here the issue normally is easy to state; it is exceptional when the parties cannot agree on their disagreement. The facts are determined by presenting evidence in a conventional way, although the rules of evidence may be bent. The law may be found in the collective agreement, in customs and practices, in previously decided grievances, and in the law of the land. The application of judicial reasoning is not difficult.

A special set of problems arises in the arbitration of interest disputes, that is, in determining not what are the rights of the parties under a collective agreement, but what ought to be prescribed in the collective agreement as the rights of the parties for the next bit of time. One must be able to state the issue, find the "facts," and determine the "law" in order to apply the facts to the law and reach a conclusion that resolves the issue. That is the rhythm of the quasi-judicial process.

The "facts" in interest arbitration are the data as the parties put them in. Agreement between the parties as to the source and the form removes the need to hear evidence and, more importantly, to determine the facts in the manner of an inquisitorial investigation. Agreement also removes the need to put witnesses under oath and to examine and cross-examine. Nonetheless, what really happens is that parties present submissions—not evidence at all in any conventional sense—which speak at cross-purposes and which are not probed by oath and cross-examination.

The relevant "law" is to be found in the guidelines. These criteria are derived for the most part from the policy of comparability. Where there is agreement that the criteria are to be found within a prescribed list, the task is simplified. Where the parties present new criteria and disagree over their relevance, the task becomes much more complex—and this happens.

The need to keep the process simple and obvious is heightened where the tribunal includes persons identifiable with each side. The simpler and clearer the process, the less likely that the deliberations of the tribunal will be partisan. The federal system deals with this in part by stipulating that the award is the award of the chairman only, and the reasons are not to be given. The other two members, appointed from panels "representative of" the parties of interest, do not sign the award, although there is a big difference between being appointed to represent an interest and being appointed from a panel "representative of" an interest, which leaves the appointee

free to be independent. That, at least, is how I regard them and seek to work with them.

If there is disagreement over the information presented with no prospect of resolving it, the disagreement can degenerate into tendentious argument; and in due course it is likely to become confused with argument on the guidelines, and thence on the application of the information to the guidelines. The arbitrator must unwind the arguments and then resolve the issues, first over the data and then over the criteria; only then can he resolve the argument on the merits. Where the submissions do not make full disclosure of all relevant data, or of all relevant comparisons of the data, the arbitrator is forced either to proceed with less than the best available information and comparisons or to take the initiative in getting the important data and making the comparisons.

What, therefore, can appear on the record of an arbitration hearing is a mélange of information and argument, each morsel persuasive in its own way. If it were devoid of conjecture, it would resemble a series of vectors producing a sum of forces giving a measurable thrust in one direction. That would dictate the terms of the arbitration award. However, the arbitrators cannot ignore conjecture, accuracy, currency, and even relevance, in comparisons.

The normal role of the judge in the adversary process is passive, but a conscientious arbitrator may not be prepared to be that passive because that role may be inconsistent with confidence in the system. Yet when an arbitrator takes the initiative, the process becomes inquisitorial, not adversary; and if the parties are following the courses of conduct that oblige the arbitrator so to act, they should think hard about the implications. Furthermore, the arbitrator has no staff to "devil" anything; thus, not only can he ask himself the wrong questions, for he does not likely know the case as the parties do or should, but he can find the wrong answers because the supplier of the answers does not likely know the case as the parties do or should—and the parties by their own conduct have weakened or surrendered their participation in both the identification of questions and the determination of responsive answers.

Most grievance arbitrations arise out of an event, a "happening," and that helps keep the dispute in focus. The dispute, conventionally, is over conflict of rights. There have been hundreds of years of experience with the settlement of that kind of dispute through judicial proceedings, and we generally have learned to live with them. We have discovered principles, rules, standards, institutions, roles, and practices. There is something called "jurisprudence."

In interest disputes, where there is an absence of an equivalent ju-

risprudence, the presence of a third party seems to drive the parties apart, and that contributes significantly to the unpredictability of the system. Yet certainty is an ingredient of justice because, if a result is foreseeable, one can then arrange one's affairs, whether the result be "fair" or not.

This characteristic of interest arbitration may be obscured to the casual observer because of the quasi-judicial nature of the proceedings. It is *not* obscured to the performers, even though they might not elect to describe it in the language of elementary legal theory.

The task then is to give interest arbitration a focus, as the "event" focuses grievance arbitration. That is where "forced choice" or "final offer" arbitration claims attention. It produces the kind of wonderful concentration of the mind which Samuel Johnson attributed to the knowledge that one is to be hanged in a fortnight. My concern is to see the process brought into focus by bringing to it a sensible jurisprudence of interest arbitration, to minimize the element of adventure in the process, and to see disputes pleaded and determined with the four corners of reasonable foreseeability. For legalism I have no time. I have plenty of time for the rule of law.

Into the current milieu of unease and distemper has been introduced the notion that all will be well if only the adversary process could be excoriated, as if it were the arcane creation of some clever devil for the aid and profit of his soulmates in what claims to be the oldest *learned* profession in the world.

It is a wrongful enticement for two reasons. First, it proposes a substitute that will work only up to the point of impasse. Anything that lowers those barriers merits careful examination. Continuous consultation and communication are above reproach; fence-mending and noncrisis bargaining have long been tested for their enlightenment, and for the contribution they can make to the identification of community of interests. "Fair comparability" is also an enlightened policy and deserves to be pursued, as it has been, into the next step of asking "What is fair?" and "What is comparable?" But it cannot keep the power struggle from rising to the surface of impasse. No one has discovered a foolproof way of preventing even persons of good will and community of objective from falling out. That is the point at which we must have processes, not to man the barricades but to dismantle them. Where the process of bargain and agreement is not successful, third-party determination must come into play. The challenge is to connect principles to processes.

The second reason why the proposal for a public-service collec-

tive bargaining system of "fair comparison with selected good employers" in isolation is bad is that it is based on the false sequence that the "adversary system" serves the "power struggle process" which "inhibits communication" and "drives the parties apart." Canada prides itself on being an "open society" in which ideas can be exposed to public view and debate and probed for their validities and their invalidities. They can be rejected where they are bad and can be replaced with less indefensible propositions, which in turn can be exposed to the same critical inquiry which is nurtured by the open society. Such is to be contrasted with a closed society of authoritarianism. Canada also prides itself on being pluralistic, of succoring diverse interests which are free to form and reform and to state their cause, and their case, in the perpetual probing that is the ideal of the "open society." Karl Popper would say that such a society need not be defended on moral grounds, but on the quality of its results, and perhaps one ought not to push the case beyond the point of success.

Popper's thesis of the open society was developed in the 1940s as an assault on a totalitarianism that had virtually enclosed the whole world, part under its heel and part to marshal forces to destroy it. He identified the approach of the natural sciences to the pursuit of truth as one of verification—of setting experiments to prove the truth of a thesis. He propounded the obverse theory, for what today are called the policy sciences, of falsification—of setting out to find what is untrue in a thesis and replacing it with a better one.

Philosophically that is what the adversary process is all about. Nothing is taken as true or false until it has been probed. Evidence is admitted for its *probative* value, whatever conclusion it may lead to. It is *exposed* in open hearing. It is *prodded* by interested parties—and it is *observed* by impartial observers. And the process has been around for ages. I do not think it irrelevant to note that there is now much talk of establishing science courts to pass judgment on controversial scientific findings. The adversary process is something more than the psychologist's "symbolic violence" that characterizes so much role-playing. It is a device—a strategem—in the game of the open society; the performance of poor players should no more condemn the stratagem than should poor journalists the stratagem of the free press. Poor players should instead be probed by the open eye of the open society, and bad advocacy should be marked for what it is, without condemning the process for what it seeks to be.

I realize that the opponents of the adversary element in our industrial-relations system would like to replace it with attitudes, val-

ues, and relationships—and hence with institutions and processes—which would maximize mutuality of interest and minimize conflict and harm to the public interest. I far from scorn the objective. But the proponents of this change do not, on my understanding, put it forward in the only context in which I suspect it would have a chance of working, that is, a substantial transformation in the institutions and processes through which the market system operates on this continent; and I have already made a fleeting reference to the intractable adherents to the status quo. That is a wholly new and agonizingly tempting topic. My remarks here are limited to the context of the present industrial-relations system where the advocates of the "fair comparison" metaphor—and I think the word metaphor gives the present proposal its fair due—would apparently have it first impinge.

The proponents say, "Do all these things and you can do away with the adversary component which breeds conflict." I say, "Do all these things, if you can, to minimize conflict. But be prepared to manage unresolved conflict by making the adversary process as honorable and effective as possible."

I cannot resist an aside. I venture to suggest that no one wants his fair share of anything. One wants a system to manipulate in order to secure more than fair shares would grant, for "use every man after his desert, and who should 'scape whipping?" Some versions of the "fair comparison" proposal have in them plenty of bugs—or, more properly, leaping frogs—which allow for just that. But those details are a digression from my main point of disagreement.

There have been more specific, more intellectualized, criticisms of the present system of collective bargaining in the public service. I wish here to deal only with the proposal that the parties should be given the opportunity to nominate their representative from the employer and employee panels to bring the process more closely in line with conciliation, and that "efforts should be made to have arbitration proceedings conducted in a less legalistic way, with as much emphasis being given by the tribunal to inquiry and fact-finding where necessary as to the receipt of advocacy."

The first alternative to the adversary process is an appealing placebo. This one is an innocent-looking evacuative. Where the parties nominate people to the tribunal—and it has been happening for years—nominees can be expected to act as advocates; it would be most unusual if they did not. That kind of tribunal rehashes the case, and the chairman is obliged to hear it twice. (I think it was Fred Allen who said his favorite hobby was collecting old echoes.)

That is a violation of the judicial process and the principles of natural justice even though it be honored by time and practice; it is wrong for persons who sit in judgment to perform an adversary role which makes them a party of interest. Furthermore, those actions introduce an element of bargain that takes over the responsibilities of the parties.

It would be less than innocent to give the decision-making tribunal the added function of "inquiry and fact-finding." Fact-finding tribunals have not had a function to decide; their function is to report. Furthermore, power of inquiry involves inquisition, and the tribunal would end up being a horrible mixture of adversary and inquisitorial methods. Something is bound to go wrong with the principles of natural justice, of due process.

Finally, one must not mix the judicial process of arbitration with the creative and innovative processes of bargain and agreement, of which conciliation and the right to strike are stages. Giving the employees in arbitration what they would have gained through the right to strike is a hypothetical objective which knows no reality except as it may be found within the constraints imposed by the application of guidelines. There is no possible way of establishing that had the dispute gone to strike, the settlement would have been innovative. The hypothesis that it would have been is fictitious. Comparison is not conducive to innovation. It is not realistic to try to have the best of both worlds.

Models for labor arbitration may be found in many places. One needs to be extremely careful, however, in importing experience from other countries. Experience with different systems of industrial relations often reflects significant differences in ideology, values, attitudes, objectives, roles, relationships, centers of power, and degrees of commitment. To attack the adversary element in industrial relations without recognizing these factors is unproductive. It is often better to take a wild but native idea and raise it in captivity than it is to import a popular foreign domesticated breed.

On the Canadian scene, the Prince Edward Island experience with "comparability guidelines" seems promising to some observers. But economic conditions in the province are such that pacesetting settlements are highly improbable; they are bound to follow the lead of others, and the question then remains as to how the following should be managed. Prince Edward Island was the last province to adopt the Canadian "system" of free collective bargaining (it followed a United Kingdom turn-of-the-century model until after World War II), and it is not surprising that the province may

have had greater apparent success at the public-sector bargaining table with the use of comparability guidelines than any other Canadian jurisdiction. It means that Prince Edward Island, no doubt advisedly, considering its size and the highly dependent nature of its economy, has determined to live with the results of collective bargaining efforts made on the frontiers of the system. It may be part of the beauty of smallness.

If voluntary binding arbitration is to replace the right to strike, it is essential that the application of the judicial process to public-service disputes be improved. That means five things.

First, there must be processes by which essential issues are identified before pleadings are prepared and the case is heard. At present, some parties are even reluctant to exchange briefs in advance of a hearing for fear that each may take improper advantage of the other. As a process, it is absurd. Second, there must be agreement as to the data base. There is no reason why this problem should get out of hand; statistical and other methodologies are well known, and human and technical resources are at hand. What remains is joint determination of the kinds of data needed for these disputes. The joint council ought to provide an adequate forum. Perhaps the time has come for the arbitrators themselves to play a "pretrial" role. Third, it may be necessary to sharpen the criteria, although I suspect that attacks on them are in part, again, self-serving. Fourth, the parties must stay inside the process. Complex, complicated, and discursive presentations should not be mistaken for sophistication.

Fifth, and most emphatically, the parties must accept that their duty to the arbitrators must rise to the standard of utmost good faith and full disclosure. The parties cannot discharge their duty to the arbitrators by discharging their duty, narrowly perceived, to their clients or constituencies, as they may in grievance arbitration. In the arbitration of interest disputes, *that will not work*. The distinction I draw is not between bad faith and good faith; it is between good faith and *utmost* good faith, and in my view the circumstances of arbitration of interest disputes in the federal public service require adherence to the duty of *utmost* good faith. If that standard should be beyond reason, consideration might be given to the appointment of counsel to the tribunal. I do not urge this move. The role of inquiry for the arbitrator, as distinct from the role of hearing, would likely predominate over time to the detriment of initiative from the parties; the tenor of the hearings would likely change; and the attractiveness, such as it may now be, of arbitra-

tion as a feasible process of dispute resolution would suffer. The dangers of the inquisitorial role I have already described.

Short of radical transformation in our industrial-relations system, on which I have reserved argument, voluntary binding arbitration appears to be the most plausible alternative to collective bargaining and the right to strike. We must seek to improve specifications for processes, to ensure that as a matter of course, and not relying on the discretion of the parties and the personal style of any particular arbitrator, the judicial process will be made to work at an optimal level of sophistication, and will be seen so to work.

The job must be done.