CHAPTER 4

AVOIDING THE ARBITRATOR: SOME NEW ALTERNATIVES TO THE CONVENTIONAL GRIEVANCE PROCEDURE

I. THE ROLE OF THE LABOUR BOARD AS AN ALTERNATIVE TO ARBITRATION

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Prelude

The subject I will address in this paper is the use of the Labour Relations Board as a route for "avoiding grievance arbitration." That topic raises the larger issue of the proper relationship of such a *public* tribunal with the traditional system of *private* adjudication of disputes under a collective agreement. I shall examine that problem in the light of my Board's practical experience with an unusual—and a rather intriguing—statutory vehicle for involving the Labour Relations Board in the administration of the labor contract.

The Legal Foundations for Contract Administration in Canada

First, I should say something about the broader relevance of the British Columbia experience. Canadian labor law generally is poured from the same mold as the American system. Union organization is protected by a network of restraints on unfair labor practices. Board certification confers upon a trade union an exclusive authority to bargain on behalf of an appropriate unit; that, in turn, imposes a duty upon the employer to bargain in good faith in an effort to reach a collective agreement. Economic pressures to resolve negotiating impasses are subject to legal regulation of the strike, lockout, and picketing weapons. Finally, the collective agreement which emerges from this process is enforceable by private arbitration rather than in the ordinary courts.

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Having said that, I must immediately add that there are significant differences in the precise expression in Canadian labor law of these basic principles—differences which have been magnified in the 1970s as the several provinces have placed their special stamp on the evolution of their own labor codes. One such distinction lies at the legal roots of the administration of the collective agreement. Indeed, one cannot fully appreciate why a public tribunal such as the British Columbia Labour Board has been introduced into the process of contract administration unless one also realizes the extent to which the B.C. Labour Code controls the substantive terms of the contract itself.

This is the wording of the preamble to Part VI of the Labour Code, which contains the legislative framework for resolving disputes under a collective agreement: "92. (2) It is the intent and purpose of this Part that its provisions constitute a method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work."

That sentiment is much more firmly embedded in Canadian labor legislation than it is in the American. In common with just about every Canadian statute, the B.C. Code contains an absolute ban on strikes during the term of a collective agreement.[1] The Code makes it mandatory that the parties develop a mechanism for resolving *all* of their contract grievances without a stoppage of work.[2] The assumption of the Code is that the parties and the public must have a period of uninterrupted labor peace during the term of their collective agreement—a term which must be for a minimum of one year.[3] The economic sanction of a work stoppage is permitted only in connection with bargaining for the periodic renewal of the entire agreement.

In our Labour Code, there are several corollaries and refinements to that basic legal principle:

1. Every grievance under the terms of the collective agreement must have access to the system of adjudication set up to deal with grievances. If a union is not able to strike to resolve a claim, based on the contract, then, as a matter of law, it has the right to have an arbitrator pass on the merits of that claim.[4]

[1] Section 79 (1), Labour Code of British Columbia.
[2] Section 93 (2), Labour Code of British Columbia.
[3] Section 66 (1), Labour Code of British Columbia.
[4] *Cassiar Asbestos Corp.* and *United Steelworkers of America, Local 6536,* 1 Canadian Lab. Rels. Bd. Rep. 212 (1975).

2. Every collective agreement must have a clause providing for discharge or discipline only for just and reasonable cause.[5] Indeed, not only does an employee have the right to an arbitral review of the propriety of his discharge, but the Code also authorizes the arbitrator to decide whether dismissal or discipline was excessive in the circumstances and to substitute such other measure as would appear just and equitable.[6]

3. Every collective agreement must address the problem of technological change: significant alterations in the equipment, material, operation, or undertaking of an employer which affect the interest and security of the employees.[7] If the parties fail to negotiate a provision for adjustment to such technological change, the Minister of Labour can and will write the provision for them. Even if there is such a clause in the contract, if the actual technological change which overtakes the bargaining unit is of serious magnitude—affecting the rights and security of a considerable number of employees and altering significantly the basis upon which the contract is negotiated—then there may be a duty on the parties to bargain about that technological change in the midst of the contract, with a right to strike if these negotiations reach an impasse. But that exception to the no-strike provision in the statute is so carefully hedged, both in substantive language and in procedure, that it does testify to the force of the general rule.

The Labour Board and the Collective Agreement

The foregoing provisions in the B.C. Labour Code reflect the basic trend in all Canadian jurisdictions. But there is one fundamental difference in the new B.C. Labour Code: the centralization of authority in the Labour Board to administer the entire body of labor law. Traditionally, labor boards have been responsible mainly for the law governing organization and representation, but now our Board has been given the exclusive jurisdiction to administer the law governing work stoppages (strikes, lockouts, and picketing)—hitherto the preserve of the ordinary courts. As well, my Board has been given a major role in the administration of the collective agreement—traditionally the preserve of grievance arbitra-

[5] Section 93 (1), Labour Code of British Columbia.
[6] Section 98 (d), Labour Code of British Columbia.
[7] Sections 74, 75, 76, 77, Labour Code of British Columbia.

tion. But, as I shall try to show, the idea of the Code is that the Board will operate in *tandem* with arbitration, not to its *exclusion.*

There are three routes through which our Board gets involved in the resolution of grievances under a collective agreement. The first is our original jurisdiction over the typical contract grievance, conferred by Section 96 of the Code as an alternative to arbitration. I will review that section in detail as the main topic of this paper. But there are two other routes which I feel I should mention briefly in order to sketch the complete setting for Section 96 of the Code.

The Labour Board now administers the law of strikes and picketing in B.C. in place of the courts. That law includes the statutory ban on strikes during the term of the agreement. But the law notwithstanding, midcontract wildcat strikes over grievances have traditionally been a prevalent feature of the often turbulent world of B.C. industrial relations. The traditional legal approach through the court injunction gradually achieved less and less success in reducing or ending these work stoppages. One objective of the new Code, enacted in late 1973, was to try a new approach through the Labour Board, involving informal attempts to mediate the entire dispute between the employer and the employees and to end, or even to prevent, the work stoppages through voluntary accommodation in as many cases as possible. In that "administrative" approach to the problem of wildcat strikes—an approach I have written about elsewhere[8]—the Board's legal jurisdiction over the underlying contract grievance plays a central role.

The Labour Board also has the primary responsibility for reviewing arbitration awards, in place of the courts.[9] That jurisdictional change was part of an effort in the Labour Code to spell out a statutory theory of the collective agreement—a statutory mandate for the arbitrator in interpreting the agreement—in place of the model of the commercial contract and commercial arbitration which has been fastened on our industrial relations by the Canadian courts. Indeed, American lawyers, steeped in the *Steelworkers* trilogy and its aftermath, will find our analyses of the new Part VI of the Code to be quite familiar (although I should say that in several crucial

[8] Weiler, *The Administrative Tribunal: A View from the Inside,* 26 U. Toronto L.J. 193 (1976).

[9] "108. (1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground (a) that a party to the arbitration has been or is likely to be denied a fair hearing, or (b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations."

areas the legislature has taken a clear statutory stand on some of the basic issues of the authority of the labor arbitrator which regularly occupy these Academy meetings).[10] My Board has interpreted this statutory scheme as envisaging a very limited supervisory role for us. In effect, the Board now functions as a buffer between the arbitrators and the judges, who traditionally have engaged in quite searching review of the merits of an arbitration award. In our view, the Code clearly contemplates that the arbitrator, selected by the parties, should have the final say in interpreting the contract, and we are quite happy to leave it that way.[11]

Section 96 of the Labour Code

All of the foregoing is by way of preface to my central inquiry: the role a labor board can play as an alternative to arbitration in dealing with the typical garden-variety grievance. There is growing skepticism about the capacity of the arbitration process to deal effectively with that kind of grievance. I am sure the members of this Academy and this audience are familiar with the usual litany of complaints. In Canada—perhaps especially in Ontario—there is considerable interest in the idea of a public tribunal to adjudicate contract grievances. In casting about for a candidate, one tribunal which looms high on the horizon is the labor board. A striking feature of B.C. labor legislation is the fact that the labor-board alternative has been available to the parties for some time under Section 96 of our Code. I shall describe and explain our experience in administering that section in the hope that it will throw some light on the general issue: What can a labor board contribute to the administration of the labor contract?

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[10] For example, Section 92 (3) provides: "An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute." See also Weiler, *The Role of the Labour Arbitrator: Alternative Versions,* 19 U. Toronto L.J. 16 (1969).

Section 98 provides that "For the purposes set out in section 92, an arbitration board has all the authority necessary to provide a final and conclusive settlement of a dispute arising under the provisions of a collective agreement, and, without limiting the generality of the foregoing, has authority . . . (g) to interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement notwithstanding that its provisions conflict with the terms of the collective agreement." See also Weiler, *The Remedial Authority of the Labour Arbitrator,* 52 Canadian Bar Rev. 29 (1974).

[11] *Simon Fraser University* and *Association of University & College Employees, Local 2,* 2 Canadian LRBR 54 (1976).

The Legal Scheme of Section 96[12]

First of all, I will give you a thumbnail sketch of Section 96 of the Code. A party to a collective agreement may apply to the Labour Relations Board under Section 96 of the Labour Code in connection with a "difference" (i.e., a grievance) about the administration of that agreement. The party seeks the appointment of an officer to assist in the settlement of the difference. The application may be made by *either* party, at any time before the appointment of an arbitration board to adjudicate the difference. The Board normally requires that the grievance procedure be exhausted before it will make the appointment. Once the appointment is made and while it is in effect, this statutory procedure takes precedence over the contractual arbitration procedure. The Board appoints one of its regional industrial relations officers who confers with the parties in an attempt to achieve a voluntary settlement of the matter. In those cases where he is not able to secure such a settlement, the officer makes a detailed report to the Board of the circumstances of the grievance, the positions of the parties, and his recommendation about the appropriate disposition. At that stage, the Board exercises its discretion either to decide the grievance on the merits or to refer the matter back to the parties to be dealt with under their arbitration procedure.

The Use of Section 96

Section 22 (4) of the Labour Relations Act, the predecessor to

[12] Section 96 (1) of the Labour Code provides: "Notwithstanding the provision required or prescribed under section 93 or 94, (a) if, at any time prior to the appointment of 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; (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." The Board has issued a detailed policy statement regarding the exercise of its authority under this provision, which is reported at *Statement of Policy: Section 96 of the Labour Code*, 2 Canadian LRBR 17 (1976).

Section 96 of the Code, was first enacted in March 1963. In its first full year of operation, a total of 128 applications were made to the previous Labour Board. That number increased gradually to a total of 325 applications in 1973, the last year of the old labor-law regime under the Labour Relations Act. For a variety of reasons, the use of Section 96 has increased dramatically since then, more than doubling in number to a total of 675 applications in 1976.[13] Of that total, 550 were finally disposed of at the Labour Board stage, either by way of voluntary agreement or binding decision by the Board. A better appreciation of the dimensions of these figures may be gained from these comparisons: the 675 applications made to the Board under Section 96 were about 20 percent of its total workload of 3500 applications under the entire Labour Code; the 550 grievances disposed of by the Board under Section 96 was double the 275 arbitration awards reported to the Ministry of Labour in 1976.

The Ills in Grievance Arbitration

What are the ailments in the arbitration process that Section 96 was designed to remedy? Grievance arbitration has always been heralded as the most *effective* vehicle for providing legal justice within the employment relationship—fast, cheap, and informal. Indeed, partially as a consequence, the world of collective bargaining has traditionally been one of the most litigious environments in our society. Employees are able to take before a third party the kinds of affronts from, or beefs with, their employers which customers, tenants, citizens, and others have had to accept as the "slings and arrows of outrageous fortune."

That still remains true in a comparative sense. Arbitration is a much more accessible procedure to handle a discharge, for instance, than is a lawsuit in the ordinary courts. But that is *not* the reference point which comes to the mind of the parties. They compare arbitration now with what it was like in some idealized "Golden Age." Within that frame, it is equally clear that arbitration has become a rather cumbersome instrument to bring to bear on the garden-variety grievance. That vice is the by-product of a desirable trend: by and large, arbitration is a much more sophisticated, a much more painstaking, instrument than it was in its early years. But it has fallen prey to what we might call "the iron law of adjudication." As the jurisprudence evolves and is refined to deal

[13] These figures are drawn from the annual report of the Labour Relations Board for the year 1976.

sensibly with the nuances of particular situations, fewer and fewer people are able to function adequately within that legal network, whether as arbitrators or as counsel. The members of the small group that is well versed in the process have their time booked months in advance. They can and do charge fees which enable them to clear the market demand for their services. And it is these facts of life which now present a major deterrent to the typical grievance being pressed forward for adjudication.

What are the results of this large obstacle now erected on the road to arbitration? The individual employee, often rightly aggrieved about an injustice done to him by management, is denied a forum in which his case can be aired, for reasons extraneous to its merits. The union finds its flanks exposed to a charge of unfair representation by an employee who does not agree with the collective priorities adopted by the majority. Employers—especially those whose managers are tempted to win *most* grievances by default, by stonewalling on *all* of them—face an even greater risk: the shutdown of their operations through a wildcat strike by employees who have lost confidence in the peaceful alternative promised them by the collective bargaining statute.

The Central Theme of Section 96 of the Labour Code

Section 96 of the Labour Code responds to precisely these deficiencies in the arbitration process. But the central theme of the Code, including Section 96, remains that arbitration is the preferred vehicle for resolving grievances under a collective agreement. The statute does not envisage that private arbitration will wither away in its entirety, as a rather drastic cure for its localized ills. Instead, the parties are provided with a specialized form of assistance from the Labour Board, tailored to the specific problems one finds in the standard arbitration procedure. Put another way, the Board does not offer a substitute forum in which the parties obtain essentially the same relief which they seek in arbitration: namely, *adjudication* of the grievance, with the usual paraphernalia of a full-blown hearing, reasons for decision, and so on. We offer a qualitatively different mechanism of dispute resolution, in which we try to resolve most of the grievances coming before us through *mediation,* and to dispose of much of the remainder through a process of *investigation.*[14]

[14] These several modes of proceeding are analyzed in detail in Weiler, *The Administrative Tribunal, supra* note 8.

The Board's Primary Tack

When the Board receives a Section 96 application, it appoints one of its industrial relations officers to handle the matter—an experienced official located in one of the larger communities in the province. The officer meets with the parties with the primary objective of achieving an informal accommodation in the dispute.

That tack meets with some resistance, I might add, from certain quarters. There are people who say that they have negotiated a collective agreement, that agreement is intended to provide some stability in the conditions agreed to by each side during its term, and therefore they should be entitled to their day in court to have their contract "rights" determined. The assumption of Section 96 of the Code is that this is a superficial view of life under a collective agreement. Administration of the agreement should be animated, at least to some extent, by the same spirit of give-and-take which pervades the larger bargaining relationship. Certainly the presence of negotiated standards of employment provides a new frame of reference for evaluating the merits of claims made during the life of the contract. But it is a common experience that the contract does not dictate the right answer to every grievance. The facts may be in doubt. The language of the agreement may be unclear. A party that insists on an authoritative ruling by an outsider runs the risk that it might win a "victory" it can't live with—but one from which it can't gracefully back down. From the perspective of the long-run relationship of the parties, it is preferable that they try to fashion their own solution to grievances which are sincerely felt and sincerely resisted.

Our experience is that such solutions are possible more often than not, at least with the assistance of an experienced third party. Our industrial relations officers do achieve voluntary settlements in approximately two-thirds of the Section 96 applications made to the Board. That proportion has remained remarkably constant, as the rate of applications has increased from 100 to 700 per year. In 1976, of a total of 676 cases disposed of by the Board, fully 440 were voluntarily settled at the officer stage. That is a telling statistic. Almost all of these are differences which filtered through all of the stages of the grievance procedure, but which the parties were not able to resolve on their own. But a third party, one who has some authority and good judgment and who serves as a means of communication and guidance, is able to achieve this degree of accommodation. And what is the significance of that success rate for the

overall process of contract administration at the province? A large number of contentious disputes that have survived the grievance procedure are disposed of informally, without encumbering the system which gives legally binding decisions.

We occasionally hear the comment that this success rate is artificial, in the sense that if the parties anticipate external intervention at the end of the grievance procedure, then they will be less likely to settle the dispute themselves. Certainly this is logically possible. For example, an incumbent trade union, fearful of a raid by a rival union, may remain adamant about a shaky grievance for fear of offending the employee-voter, at least until the industrial relations officer can be invited in to tell the griever that he has no case. Concerned about that stance, the employer in turn may refuse to make concessions that would ordinarily resolve grievances because the union (and the employee) would simply treat such an offer as a platform from which to look for more from the officer. We are conscious of this risk, but our sense is that it is not a serious problem in practice. Take this fact: Of the 414 employers involved in Section 96 applications in 1976, fully 381 (or 92 percent) were the subject of only one or two cases that year. Only two employers in the entire province were involved in more than 10 Section 96 applications in the year, and one of these was a large mining/smelting employer bargaining with six different local unions. What is the basic pattern which emerges from our statistics? Individual parties use Section 96 only occasionally; they do so in a large number of collective bargaining relationships in every industry in the province; and in these relationships the parties do continue to settle most of their grievances by themselves.

What Follows Unsuccessful Mediation?

Suppose the officer reports to the Board that his efforts to resolve the dispute through mediation have not succeeded. The Board then has two choices under the Code. It can refer the difference back to the parties for arbitration, or it can issue a legal ruling of its own. How do we make that choice? By deciding whether the dispute is the kind which warrants *adjudication* or may adequately be disposed of by *investigation*.

One can appreciate the contrast between the two procedures by imagining two clear-cut examples of cases which take one route rather than the other. Take a grievance such as this one: An employee has claimed a promotion on the basis of his seniority. That

involves a contest not just between the union and the employer, but also between two employees—the junior incumbent and the senior applicant. There is factual conflict about the respective qualifications and experience of the two employees. There is also a dispute about the precise meaning of the clause, about which both parties have marshalled a great deal of extrinsic evidence and arbitration jurisprudence. The decision not only determines which employee gets the permanent, higher paid position, but will also constitute an important precedent in the administration of an agreement, one which governs a large bargaining unit. That case obviously requires a hearing, testimony under cross-examination, legal argument, and reasons for decision. That is what I mean by an adjudicative proceeding. Our policy in the administration of the Labour Code is that the parties should expend their resources to obtain that adjudication through their own arbitration procedure, in cases which are as important as these.

But contrast that grievance with this one: An altercation has arisen between an employee and his supervisor. A two-day suspension is meted out. The contract language is clear. There is no sophisticated disciplinary system in the small unit. Whether the penalty is upheld or reversed depends on what one can learn from the small number of people who participated in or observed the incident. The representatives—a union official and an industrial relations manager—don't really have a great deal more to say. They do need an authoritative ruling, but they certainly don't need a craftsmanlike award. Cases like this one are not unusual. Indeed, in my experience both as an arbitrator and in the administration of Section 96, perhaps a majority of cases are at about that level of magnitude. And in my view, the paraphernalia of full-scale adjudication simply is overkill for grievances like this. It is like using a cannon to kill a mosquito. The members of my Board believe these differences are adequately resolved by an investigative procedure. The officer goes around and talks to the eyewitnesses, probes their versions, and writes us a report that contains their statements, the arguments of the representatives of the parties, and his recommendation. That report, supplemented by written submissions and exchanges between the parties, goes to a panel of the Board. It is reviewed in the privacy of the vice-chairman's office, a decision is agreed to, and a ruling goes out, without reasons, to dispose of the case without further ado.

That procedure does evoke horror in the hearts and minds of some B.C. lawyers, who believe it denies due process, natural jus-

tice, and a great many other fundamental rights dating at least as far back as the Magna Carta. But when I first discovered it—upon coming to the Board from Ontario three years ago, and ten years after the provision was enacted—it struck me as an eminently practical procedure and a sensible response to the ailments that were visible in contract administration in Ontario. I would mention these three reasons:

1. While it may not serve all of the symbolic functions of adjudication—of an open hearing—by and large an investigative procedure reaches comparably accurate results in the broad flow of these relatively straightforward cases. (And I add that if the panel's initial ruling appears to go badly awry in what turns out to be a significant case, the losing party can request reconsideration of the decision by the Board.)

2. Even if adjudication might *hypothetically* air the issues in a more adequate way, the virtue of investigation is that it provides some *actual* review of management's decision. Given ten grievances, each of them of this minor type, most unions could probably afford to take no more than one of them through to arbitration. It is *not* likely that the procedure which does deal with the other nine—disposition by default—provides a higher quality of legal justice than does third-party investigation. And this is our experience, in B.C. at least: If enough of these examples accumulate and fester in the minds of employees—of minor grievances which they sincerely believe to be meritorious, but which have had to be dropped—then both the employer and the union may have cause to regret it.

3. Suppose one does have a larger union that has the policy and the resources to push all valid, minor grievances through to arbitration. That policy, while defensible on its own hook, can have the effect of routinizing arbitration. A Gresham's Law may operate, in which the trivial grievances swamp the significant ones. A particular virtue of investigative disposition under Section 96 is that it clears away the nuisance cases that can clog up the arbitration process even in sophisticated units. That gives the parties the breathing space to give faster and more thorough attention to the more important issues arising under their contract.

A further point might be made at this stage. It is not just the trade union which feels the need for an alternative to the typical arbitration procedure. An interesting trend in recent years is the consistent utilization of Section 96 by employers, to the extent of 30 to 40 applications a year. Why does this happen? First, there is a con-

siderable number of small employers who feel the pinch of high arbitration costs as much as do local unions. They will often refer a grievance to the Board even though the trade union wants to take it to arbitration. But even major corporations invite the Board to settle a grievance lodged by the union. They are motivated by a different deficiency in arbitration: the fact that normally it takes quite a bit of time. Sometimes an instant decision is essential in the case of a grievance which is the source of an actual or incipient wildcat strike. The virtue of a public agency—especially one that is not forced into the adjudicative mold—is that a telephone call from either a management or union official will have the industrial relations officer parachuted immediately into such a dispute. Our experience is that in a high percentage of these cases a solution to the entire dispute is worked out in a matter of hours, often heading off any work stoppage at all, and without forcing either party into a formal confrontation in which it feels compelled to defend its rights and save its face.

Contracting Out of Section 96

Suppose the parties have developed their own specialized system of administering their collective agreement. This may be designed as a response to the distinctive needs and opportunities in their collective bargaining relationship. Examples which come to mind include: (1) a grievance commissioner who is authorized to dispose immediately and informally of minor grievances which arise in large numbers in a remote mining unit; (2) a mediation/arbitration scheme to resolve jurisdictional disputes in a newspaper chain; (3) a reference procedure to obtain general interpretations of a master collective agreement, which will bind the umpires who hear concrete grievances at individual plants. Intervention by the Labour Board, however well meaning—indeed, however effective in the short run—can easily damage the integrity of these systems in the long run. It simply is too easy for us to issue a ruling which will fit awkwardly into a setting of whose contours we are, almost of necessity, unaware.

In our administration of Section 96, we are sensitive to that concern. If the officer cannot get a voluntary settlement, we will normally refer the difference back to the parties to be formally disposed of under such a specialized procedure. But, quite understandably, there are parties who are not willing to place all their faith in the exercise of discretion by the Labour Board. The Code

does afford them a further protection by allowing them to agree to oust this Section 96 jurisdiction of the Board entirely.[15]

I should note that the statute requires that the parties specifically contract *out* of Board intervention under Section 96, rather than requiring them to contract *in*. That would seem to accord with the practicalities of collective bargaining about grievance procedures. Recall that in Canadian law—by contrast with the American—the parties will automatically have the standard arbitration procedure unless they agree to their own specialized system. In British Columbia, so also will they automatically have access to the Labour Board under Section 96 of the Code. In the normal course of events, how will the parties likely reach a mutual agreement to exclude Section 96? Only if at the same time they turn their minds to administration of their contract and develop their own procedure which they believe will prove more adequate than ad hoc assistance from the Labour Board. The presence of that escape route confirms my earlier remarks about the general flavor of Section 96, designed as it is to facilitate effective self-government through arbitration, not to dilute it.

Should the Labour Board Act as a "Labor Court" for All Contract Grievances?

In sum, the thread running through this paper is that the Labour Board conceives its role under Section 96 of the Labour Code as a supplement to private arbitration, not as a replacement. That is not a self-evident posture. Occasionally we are asked why the Board feels that it can refer back to the parties a difference which one side has asked us to resolve. We are asked why the parties should be able to agree—or rather, why the Board should hold them to an agreement—to oust the jurisdiction of a public tribunal. Put in other terms, why shouldn't this jurisdiction of the Labour Board evolve into a full-fledged "labor court" in which either party may, as a matter of right, demand adjudication of its contract grievance?

I think it is fair to say that there is no real appetite for that kind of evolution in British Columbia. But the same is *not* true in Ontario. Indeed, the issue of whether the institution of grievance arbitration should be replaced by a public tribunal is high on the agenda of an Inquiry now being conducted in Ontario. The Ontario Labour Board already has jurisdiction over grievances in the

[15] "96. (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."

construction industry. Several major unions, such as the Steelworkers, reportedly are proposing that the Labour Board should have jurisdiction over grievances under all collective agreements.[16] I am told that there is some considerable appetite for that "final solution" for the ailments of arbitration among other knowledgeable participants and observers. Indeed, that step has evident appeal, as a matter of principle. Canadian labor law requires peaceful adjudication of grievances. That procedure serves a public policy: the prevention of industrial unrest during the term of a collective agreement. In return, should not the state provide the mechanism for legal justice, without requiring the parties to pay for adjudication of their own legal disputes?

Perhaps that is a largely academic question in most places in North America, but we are meeting in Ontario right at the time that debate is going on. I think it worthwhile to confront the issue directly, and since I have a rather special perspective on the two systems—as an arbitrator in Ontario for a number of years, and now as the administrator of Section 96 of the B.C. Labour Code—I hope you will forgive me for spending some time to state my own views.

I think that step would be a major error in labor relations policy, and probably an irretrievable one. It ignores perhaps the basic virtue of grievance arbitration: the fact that it is a system under the control of the parties themselves. Indeed, arbitration is a natural implication of the logic of free collective bargaining. The parties are free to act as their own *legislature,* setting the basic rules of employment with a minimum of government control. In turn, the law invites the parties to set up their own *judicial system* for settling the claims which arise under these contract standards which they have negotiated.

No doubt this feature of grievance arbitration—that it is an integral part of industrial self-government—is a subtle virtue, easily lost sight of by a union (or even an employer) which is trying to make ends meet and is discouraged by the increasingly high costs of arbitration. But I think one should be fully aware of the underlying imperatives in the alternative system. A labor board is concerned with the larger statutory issues: for example, certification policy, bargaining structure, prevention of employer unfair labor practices, and control of union work stoppages. Increasingly, boards are drawn into such new tasks as first-contract arbitration, or the designation of life-preserving services in public-sector strikes. Contract

[16] See List, *Labour Movement Seeking Overhaul of Costly Arbitration Process,* Toronto Globe and Mail, April 6, 1977, p. B2.

grievances, no matter how important to the parties, inevitably will play second fiddle. Parties who are forced to take all of their grievances to the public tribunal will soon see significant, tangible differences in the way their grievances are disposed of.

Take such a simple matter as hearing dates, locations, adjournments, and so on. In the final analysis, an arbitrator serves at the pleasure of the parties and is subject to their wishes as to these matters. True, the parties must accommodate themselves to the schedule of a busy arbitrator, if that is the person they really want and they are not willing to go elsewhere. But they must make a qualitatively different adjustment to the prerogatives of a labor board, an agency exercising a statutory authority, if that is the only game in town.

More important in principle is the format for contract administration. Parties are free to design the arbitration system with which *they* feel comfortable: either permanent umpire or ad hoc appointment; single chairman or tripartite panel; formal and legal or informal and without lawyers. The statute gives the parties the freedom to develop an adjudicative procedure whose style and character are suited to the peculiar needs of their collective bargaining relationship. But a public tribunal develops its own approach and philosophy, one which operates across the entire spectrum of its statutory responsibilities. If that procedure appears to fit like a procrustean bed across certain labor-management relationships, well, those parties simply have to live with that fact.

But most fundamental of all is the selection of the decision-maker. A labor board (or, alternatively, a specialized "labor court" for contract grievances) is an organ of the state. Its members are selected by the government, because of qualifications acceptable to the government, and for a term set by the government. Contrast that with the grievance arbitrator selected by the parties because his talents, his style, his philosophy, are acceptable to them. Indeed, from a deeper perspective, one can see that arbitrators are really selected by the labor-relations community as a whole. With some roadblocks, no doubt, there is a constant infusion of new blood into the system. New arbitrators are utilized, their work is sifted and appraised, quite a few are weeded out, and the good ones pass the best test of all—acceptance by those who are the consumers of their decisions. There are not many segments in society which are either equipped or entitled to select their adjudicators in this fashion. Both unions and management should think long and hard before advocating the demise of a system which gives them that privilege.

I am fully aware that there is a good deal of the romantic in that picture of arbitration. To a considerable extent, my remarks smack of the potential ideal rather than the current reality. The warts on the process are all too visible and can be missed only by those who hide their heads in the sand. Indeed, my Board sees them only too clearly. The reason is that we regularly have to decide, under Section 96, whether the parties will have to arbitrate a grievance or not. Often, both parties almost beseech us *not* to refer the difference back to them and to give it our own brand of quick, inexpensive, but rough justice instead. A large share of the responsibility for these deficiencies must be laid at the door of the parties. There are many steps which the parties can take to make their contract administration more acceptable and effective than the standard Canadian model of ad hoc tripartite arbitration. By and large, Canadian unions and employers have exhibited very little imagination and creativity in the design of their arbitration procedures. (I believe that a major explanation for that fact lies in the automatic no-strike bar and the presumptive arbitration clause contained in the statute, which remove much of the incentive for serious negotiations in this area of the contract.[17]) For these reasons, it is inevitable that some relief will be forthcoming as a matter of public policy, to ensure that the arbitration process serves its public function as an antidote to industrial unrest during the term of the collective agreement.

That, I think, is the virtue of a procedure such as Section 96 of the B.C. Labour Code. This provision contemplates a form of *peaceful coexistence* between private arbitration and the public tribunal. Rather than trying to jettison grievance arbitration, the more modest effort is made to try to channel into arbitration those grievances for which it is suited. A labor board can provide qualitatively different forms of disposition—by way of mediation or investigation—to clear away, expeditiously and inexpensively, the minor cases which cannot afford or would clog up the arbitration process. As well, a labor board can ration some of its scarce resources to adjudicate key grievances—those which have broader statutory implications.[18] But within that framework, arbitration can and should continue to play this traditional and valuable role: dealing with cases which arise under the contract terms negotiated by the parties, which are of serious concern to the parties, and for which the

[17] As I attempted to demonstrate in Weiler, Labour Arbitration and Industrial Change (Ottawa: Queen's Printer, 1969).

[18] See *Statement of Policy, supra* note 12, at 24-25.

parties should be able to select an adjudicator who can and will give the cases the care and attention which do them justice.

The thrust of my message, then—the lesson I draw from my experience—is that the government, through the labor board, can give the parties some considerable assistance in "avoiding the arbitrator," but it would be a retrograde step to try to eliminate the arbitrator from labor relations. And I suppose that last proposition would attract a high degree of consensus in this audience.