CHAPTER 4

EXPEDITING THE ARBITRATION

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In this paper we will examine some uniquely Canadian initiatives to streamline and expedite the grievance arbitration process. It will be our thesis that these initiatives have resulted from a mix of real and perceived concerns with the effectiveness of the existing processes from a user's point of view. We also are of the view that this trend is likely to continue and perhaps to accelerate.

To put the matter in context, members of the labour relations community have been troubled for some time by a number of elements of the process—the length of time between the determination to proceed to arbitration and the actual hearing date, the apparently interminable length of the hearings, and the length of the written awards that sometimes seem nothing more than academic chattering over arcane issues of no interest to the parties.[1] Admittedly, that may seem a harsh characterization of the process but the reality is that a number of parties have searched for ways to make the arbitration process become more effective and more responsive to their needs.

Essentially two different approaches or strategies have developed. The first is statutory. Governments, specifically provincial legislatures in Ontario and more recently British Columbia, have amended their labour relations acts to provide a separate arbitration track that parties could choose to use. The second approach is essentially private to the parties themselves. The parties to a collective agreement are free to devise their own grievance procedure, to decide for themselves what form of

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[1]Picher & Mole, *The Problem of Delay at Arbitration: Myth and Reality*, Lab. Arb. Y.B. 3 (1993).

arbitration tribunal they prefer, and by what ground rules the arbitrator will function. The key to this approach is that the arbitration process used by the parties to a collective agreement is essentially consensual and it can be shaped in their own image of what works for them. We propose to look at each of those approaches in turn.

I. The Statutory Approach

The first approach, namely, the statutory route, can be examined through the focus of section 49 of the Ontario Labour Relations Act[2] or, its counterpart, section 104 of the British Columbia Labour Relations Code.[3] These provisions begin with a recognition that the parties to a collective agreement have already created their own arbitration process. However, by virtue of the application of the statute, a party may choose to ignore or bypass the contractual provisions and to use the statutory model. The important thing to remember is that the invocation of the statute does not require the consent or even acquiescence of the other party. It can also be seen as a vivid reminder of the continued tension between the private workings of the arbitration process and what some have called a statutory intrusion into the labour relations dealings between trade unions and employers. Section 49 in part reads as follows:

Referral of grievances to a single arbitrator

Sec. 49(1) Despite the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable. R.S.O. 1990, C.L.2, s. 46 (1), revised.

Request for references

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the

[2]Labour Relations Act, 1955, S.O. ch. 1, sched. A (1995) (Can.).
[3]Labour Relations Code, R.S.B.C. ch. 244 (1996) (Can.).

grievance procedure under the agreement has been exhausted or after 30 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

Idem

(3) Despite subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after 14 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

Minister to appoint arbitrator

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

Appointment of settlement officer

(6) The Minister may appoint a settlement officer to confer with the parties and endeavor to effect a settlement prior to the hearing by an arbitrator appointed under subsection (4). R.S.O. 1990, c. L.2, s. 46 (2–6).

Powers and duties of arbitrator

(7) An arbitrator appointed under subsection (4) shall commence to hear the matter referred to him or her within 21 days after the receipt of the request by the Minister and the provisions of subsections 48(7) and (9) to (20) apply with all necessary modifications to the arbitrator, the parties and the decision of the arbitrator. R.S.O. 1990, c. L.2, s.46 (7), amended.

If the statutory arbitration system is invoked by either the employer or trade union, a number of important consequences follow. In the first place, the arbitration tribunal is a sole arbitrator, rather than an arbitration board. Secondly, the arbitrator is selected by the ministry of labour rather than the parties themselves. In practice, the appointment is made from among a list of qualified

arbitrators who, it is hoped, are seen in the labour relations community as knowledgeable and experienced persons. One practical problem is that the busiest and, in most cases, the most experienced arbitrators are not often available on short notice. Consequently, the appointments tend to be from among those who are not as frequently used by parties in setting up their own arbitration tribunals. This fact, however, tends to encourage the activities of new arbitrators and to broaden and enhance the opportunities for new people to enter the arbitration community. Thus, the statutory expedited arbitration approach has increased the pool of active arbitrators in both Ontario and British Columbia.

Under the statutory schemes, there are tight timelines for the hearing to take place. The arbitrator is obliged to conduct a hearing within 21 days (28 days in British Columbia) of the application having been made for the appointment of an arbitrator under the section. This time limit is not a matter of discretion with the arbitrator. It is mandated in the act that the hearing must take place within the prescribed 21 days. Finally, the authority, powers, and jurisdiction of the arbitrator appointed under the expedited arbitration provisions of the statute are no greater and no less than if the same person was selected by the parties to a collective bargaining agreement to conduct an arbitration under the provisions of a standard arbitration clause in their agreement.

This poses an important policy question: Is the process expedited only in the sense that the selection of the arbitrator and the hearing date is accelerated, or is the conduct of the hearing itself to be subject to constraints in the interests of expediency? While neither statute directly instructs arbitrators on this issue, the experiences in the two provinces are somewhat different. In Ontario, the hearing is generally conducted in precisely the same manner as if the parties had appointed the arbitrator in the usual way. In British Columbia, while the statutory scheme has been in place for much less time, many arbitrators appointed by the Collective Agreement Arbitration Bureau (CAAB), who administer the program, make serious efforts to expedite the hearing. The reasons are complicated: (1) the British Columbia Labour Act provides a wider responsibility to arbitrators, (2) the CAAB itself has issued policy guidelines to arbitrators encouraging such efforts, and (3) many parties have experience with private expedited arbitration systems. Of course, the arbitrator must have the cooperation of counsel to achieve real results. Nevertheless, certain practices have developed that provide a serious opportunity for all

parties to inject some positive controls on the hearing. For example, as a matter of routine, the arbitrator in British Columbia will usually arrange a conference call with counsel immediately after being appointed to deal with procedural questions such as production of documents, identification of issues, and other procedural issues. These telephone conferences often lead to a resolution on the spot of many of the more troublesome questions that clutter up the hearing. In that sense then, the conduct of the hearing itself is expedited.

There is a further dimension to the statutory process that should be discussed. Under the British Columbia scheme, a labour relations officer, a person employed and paid by the ministry of labour to act in a mediation capacity, is made available to the parties. This means in practice that unless either or both parties take the position that the labour relations officer will be of no help or assistance to them in resolving the grievance, a meeting takes place several days before the arbitration hearing at which time the labour relations officer explores options and possibilities for settlement of the grievance.[4]

The role of the labour relations officer is not adjudicative. The officer acts in a more mediative function to help the parties fashion a settlement of the grievance rather than make a decision of who is right or wrong on the merits of the grievance. There is, of course, a significant dynamic that impacts upon the process at this stage. While the grievance presumably has been discussed and debated within the parties' contractual grievance procedure, the labour relations officer and the parties are now working against a finite deadline, namely, the arbitration date. In addition, that date (and the potential expenses that will be incurred if the full arbitration process unfolds) is only a few days away from the meeting that is taking place. Understandably, the officers use these elements as pressure points on the parties.

In a significant number of cases, the labour relations officer is able to arrange a settlement of the grievance and thereby avoid an arbitration hearing. As was the case in Ontario, the settlement ratio in British Columbia averaged between 65 to 70 percent over the past few years. The parties could have settled grievances on their

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[4]A similar facilitator was available in Ontario until 1996 when the conservative government rescinded the program as part of a financial restraint initiative. The legislation was changed from mandating an appointment to merely permitting such. As a matter of government policy, funding is no longer provided for such a facilitator. For a criticism of this decision, see Burkett, *The Politicization of the Ontario Labour Relations Framework in the 1990s,* 6 Canadian Lab. & Employment L.J. 161 (1998).

own, but it seems likely from statutory process effectiveness statistics that there is an element of perceived value and a real benefit to the parties by reason of the intervention of the labour relations officer.

This makes sense, since the arbitration process is much more than a legal mechanism dealing with structured contractual rights and obligations of parties to collective agreements. The grievance and arbitration process, and indeed the entire labour management relationship, is as much a political process as it is a written collection of legal rights. Consequently, the involvement of the labour relations officer will often help the parties help themselves by the identification of grievance resolution options and, if necessary, by the officer pushing or prodding them in that direction. Ultimately, the labour relations officer has one large card to play in the grievance poker game that is being conducted. If the parties themselves cannot find a settlement they can live with in just a few days, an arbitrator will impose one on them. The result, however, may be an award that neither party wants, and one that obligates them both to pay a significant fee to the arbitrator.

II. The Negotiated Approach

There is another way in which parties to a collective agreement may enhance their relationships—by designing an arbitration structure for themselves. The parties can adopt many different mechanisms, systems, or means that will produce final and binding solutions to workplace grievances. The parties themselves have developed a wide range of processes, with labels as evocative as "troubleshooter" to those as pedantic as "commissioner." But neither the names nor the precise configuration of these mechanisms is nearly so important as the different themes that resonate through them.

Grievance Mediation

The first theme or category is that of a grievance mediator. As we have seen from the discussion of the labour relations officer in relation to the statutory expedited arbitration process, there is often value to be gained from the imposition of a mediative role between the end of the private grievance procedure and the commencement of a formal adjudicative process. Mediation, or facilitation as it should more accurately be termed, is an explora-

tion and examination of options to satisfy both the legal and the political requirements of the moment in dealing with a specific grievance problem. Of course, the parties can do this for themselves. But experience has shown that a third party, a trusted neutral, can often be the catalyst through which they can adopt a voluntary solution.

A facilitation role can be created in two ways. The first is that the parties decide to use facilitation as an independent dispute resolution technique. They may do so either on a formal basis by amending the grievance and arbitration process under the collective agreement, or by simply agreeing to a facilitation intervention on an ad hoc basis. The second is through a combination of a mediative and adjudicative function at the arbitration hearing itself.

While the two functions are distinct, they are complementary as dispute resolution techniques. Combining the functions, sometimes described by the process heading of med-arb, makes a good deal of practical sense. Under this approach, the person performing this dual role would begin the process wearing a facilitation hat and would sit down with the parties to attempt to find an acceptable solution for their problem. The accomplishment of that objective would end the proceedings. If the original grievance in whole or in part still remained after the facilitation effort had been exhausted, it would then be arbitrated in the normal way. The facilitator and arbitrator could be the same person. Many parties have legitimate concerns and reservations about the fact that the person would have been given information about the grievance during the facilitation efforts, and that the scope of such information might go far beyond the strict legal analysis normally associated with an arbitration hearing. Thus, it may be felt that such arbitrators would know too much and their arbitral opinions would be coloured, at least subconsciously, by the private discussions and musings they would have had with the parties. If this is a concern, the solution is simple. Another person can be selected as the arbitrator.

It might be useful to make a further comment on this form of initiative. To some purists, there is an inherent evil in the combining of the two roles in the same person. Yet the arbitration and dispute resolution model is consensual and it may be designed by the parties to suit their own needs and purposes in any form they choose, provided it meets the statutory test of a final and binding result and the rules of natural justice are not violated. If the parties freely negotiate an arrangement to use med-arb and decide that

the same person under their agreement may properly perform both roles, it is hard to see why there should be objections.

In the 1993 amendments to the Labour Relations Code, British Columbia enacted an interesting legislative innovation. Section 105 provides a statutory model for a consensual mediation-arbitration model. It also demonstrates that designing a more imaginative and flexible dispute resolution environment is not beyond the capacity of the labour relations community, at least in that province.

Section 105 of the Code reads as follows:

Consensual mediation-arbitration

105. (1) Despite any grievance or arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 84(3), the parties to the collective agreement may, at any time, agree to refer one or more grievances under the collective agreement to a single mediator-arbitrator for the purpose of resolving the grievances in an expeditious and informal manner.

(2) The parties shall not refer a grievance to a mediator-arbitrator unless they have agreed on the nature of any issues in dispute.

(3) The parties may jointly request the director to appoint a mediator-arbitrator if they are unable to agree on one, and the director shall make the appointment.

(4) Subject to subsection (5), a mediator-arbitrator appointed by the director shall begin proceedings within 28 days after being appointed.

(5) The director may direct a mediator-arbitrator to begin proceedings on such date as the parties jointly request.

(6) The mediator-arbitrator shall endeavour to assist the parties to settle the grievance by mediation.

(7) If the parties are unable to settle the grievance by mediation, the mediator-arbitrator shall endeavor to assist the parties to agree on the material facts in dispute and then shall determine the grievance by arbitration.

(8) When determining the grievance by arbitration, the mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as he or she considers appropriate.

(9) The mediator-arbitrator shall give a succinct decision within 21 days after completing proceedings on the grievance submitted to arbitration.

(10) Sections 89 to 103 apply in respect to a mediator-arbitrator and a settlement, determination or decision under this section.

Troubleshooter

Another approach is for the parties to create their own private expedited process and to agree that a person is to be given adjudicative functions, sometimes of a binding nature and sometimes not. The person is granted investigatory and decisionmaking powers and directed to act in an expeditious fashion. Perhaps the best example of this technique, as well as the one with the most descriptive title, is that of troubleshooter.

To many, the principal difficulty with the classical arbitration model is that it is cumbersome and unwieldy. A troubleshooter can move quickly to deal with grievance hot spots and inject into the process notes of both urgency and flexibility. This is usually accomplished by a combination of (1) selecting a person or persons who have the capacity, experience, and sensitivity to the needs of the parties to perform this role; and (2) designing a precise series of steps to be followed, together with a code of conduct for all the participants. While there are a number of variations, there are commonly some central or core design elements across the range of troubleshooter systems.

Troubleshooters are usually named in collective agreements to avoid the delay otherwise associated with selecting them for specific grievances. They are required to begin within a defined number of days after being notified of pending arbitrations. Troubleshooters may be given written information, including briefs, documents, and other materials to examine, and may or may not be required to conduct formal or structured hearings. Generally, they have investigatory power, that is, the authority to conduct workplace interviews about the specific facts and circumstances of each grievance. In some cases, investigation must take place within a very short time, perhaps 1 or 2 days from notification. When their investigations are complete, troubleshooters prepare written reports that include their conclusions. The solutions they advance may be (1) binding upon the parties; or (2) nonbinding, and either party may elect not to follow them. In the latter case, grievances proceed to arbitration in the usual manner.

The health care industry in British Columbia has pioneered an impressive example of this technique. Under the various collective agreements in that industry, the parties have provided three different avenues for resolving grievances. There are practices and protocols that deal with the selection of the particular process, and

they are linked in an interesting way. The troubleshooter's recommendations (the term that is used to describe the result to be achieved) are not binding but may involve a determination by the troubleshooter that a full arbitration hearing is more appropriate in the circumstances. For instance, the issue may involve a difficult and contentious legal matter that requires a review of the arbitral jurisprudence and an inquiry into areas not suited to a troubleshooter proceeding. Similarly, there may be important issues of fact to be determined on the basis of factors such as credibility.

The actual contractual provision reads as follows:

> 1. Issues Referred to Troubleshooter
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> Where a difference arises between the parties relating to the dismissal, discipline, or suspension of an employee, or to the interpretation, application, operation, or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, during the term of the Collective Agreement, such difference shall be referred to an Industry Troubleshooter.
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> 2. Roster
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> It is understood that the Industry Troubleshooters named below (or substitutes agreed to by the parties) shall be appointed on a rotating basis commencing with the first Troubleshooter named:
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> S.F.D. Kelleher, Q.C.;
> H.A. Hope, Q.C.;
> H. Laing;
> J. McEwen;
> J. Korbin;
> V.L. Ready.
>
> In the event the parties are unable to agree on an Industry Troubleshooter within a period of thirty (30) calendar days from the date this Collective Agreement is signed, either party may apply to the Minister of Labour for the Province of British Columbia to appoint such person.
>
> 3. Roles/Responsibilities of Troubleshooter
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> At the request of either party, the Troubleshooter shall:
>
> (a) investigate the difference;
>
> (b) define the issue in the difference; and
>
> (c) make written recommendations to resolve the difference.
>
> 4. Issuance of Report
>
> Within five (5) calendar days of the date of receipt of the request and for those five (5) calendar days from that date, time does not run in respect of the grievance procedure.

5. Agreement to Statement of Facts

The parties will endeavour to reach agreed to statement of facts prior to the hearing.

It might be useful to make some general comments on the experience of the parties in using this mechanism. In the first place, more grievances are processed under this provision than through the alternate routes of expedited arbitration or the traditional arbitral proceeding. In the second place, significant proportions of the disputes are resolved through the mediative efforts of the troubleshooter. Finally, in the vast majority of cases (in fact over 90 percent) where recommendations are made, the parties accept the proposed resolution as a final result. Thus, the parties have designed a flexible, multitrack system that meets their needs and priorities. The system allows for the orderly and effective resolution of disputes through an approach suited to the nature and complexities of the grievance in question.

Privately Arranged Expedited Arbitration

Another design approach for resolving grievances effectively and efficiently is even broader in its scope. While arbitrators are given wide-ranging powers and authority by virtue of the labour relations acts of the various jurisdictions in Canada, the parties to a given collective agreement may modify those provisions by negotiating their own private arbitration processes. They may also devise the procedures by which the arbitration hearing is to be conducted. The parties may jointly determine whether such procedures will govern all of their arbitration proceedings, whether they will apply only to certain kinds of arbitral matters, or whether they are optional.

Of course, there are any number of variations that can be used. In our view, there are certain key issues to be considered in creating an internal expedited arbitration system. The first is the specification or identification of the cases to be processed under this separate arbitration procedure. Frequently, the parties may decide on an alternative twin track arbitration process so that at the option of either party or by agreement of both, a given grievance may be set along the expedited arbitration road while all other unresolved grievances must proceed to conventional arbitration. If the expedited procedure is chosen, the names of persons selected to act in that capacity are usually set forth in the collective agreement. Short and rigid timelines are created to govern all steps of the process.

Often the parties agree that the decisionmaker must be provided with written briefs by both parties in advance of the hearing. Such briefs contain an outline of the facts, submissions, and/or representations of the parties on the particular issue. In some cases, the parties are given the right to file prehearing reply briefs as well. In still others, there are restrictions on the length of the briefs. The decisionmaker usually conducts a hearing with the parties. Lawyers often are specifically excluded from the expedited hearing. There are in most cases restrictions on what happens at the hearing and by what means evidence may be called.

In general, the purpose of the hearing is to clarify for the decisionmaker any contentious issues that were not sufficiently dealt with in the written briefs. The hearing itself may range from 20 minutes to 2 hours. When the hearing is completed, the decisionmaker is provided with a short period of time, perhaps a week but seldom longer, to issue a written decision. It may or may not include reasoning, again depending upon the arrangement agreed upon by the parties. In many cases the parties specify that the decision is a final determination only of the specific grievance and cannot be used as a precedent in any other arbitration or in any other dealings between them.

It is worthwhile to look at some Canadian examples of both private- and public-sector collective agreements to give a sharper focus to some of the concepts we have been discussing. This is not done to advocate any particular choice of words, but to illuminate by illustration what the parties can negotiate. The health care sector collective agreement in British Columbia is a good example of the extent to which the parties are prepared to detail how they want an outside party to administer their differences.

8.08 Expedited Arbitrations

(1) A representative of HLRA and the Secretary-Business Manager of the Union, or his/her designate, shall meet each month, or as often as is required, to review outstanding grievances to determine, by mutual agreement, those grievances suitable for expedited arbitration. In addition, the parties will meet quarterly to review the expedited arbitration process and scheduling of hearing dates.

(2) Those grievances agreed to be suitable for expedited arbitration shall be scheduled to be heard on the next available expedited arbitration date. Expedited arbitration dates shall be agreed to by the parties and shall be scheduled monthly or as otherwise mutually agreed to by the parties.

(3) The location of the hearing is to be agreed to by the parties but will be at a location central to the geographic area in which the dispute arose.

(4) As the process is intended to be non-legal, lawyers will not be used to represent either party.

(5) All presentations are to be short and concise and are to include a comprehensive opening statement. The parties agree to make limited use of authorities during their presentations.

(6) Prior to rendering a decision, the arbitrator may assist the parties in mediating a resolution to the grievance. If this occurs, the cost will be borne in accordance with Section 112 of the Industrial Relations Act.

(7) Where mediation fails, or is not appropriate, a decision shall be rendered as contemplated herein.

(8) The decision of the arbitrator is to be completed on the agreed to form and mailed to the parties within three (3) working days of the hearing.

(9) All decisions of the arbitrators are to be limited in application to that particular dispute and are without prejudice. These decisions shall have no precedential value and shall not be referred to by either party in any subsequent proceeding.

(10) All settlements of proposed expedited arbitration cases made prior to hearing shall be without prejudice.

(11) The parties shall equally share the costs of the fees and expenses of the arbitrator.

(12) The expedited arbitrators, who shall act as sole arbitrators, shall be H.A. Hope, Q.C.; S.F.D. Kelleher; H. Laing; J. McEwen; D.R. Munroe, Q.C.; V.L. Ready.

(13) The expedited arbitrator shall have the same powers and authority as an arbitration board established under the provisions of Article 9 excepting Article 9.03.

(14) It is understood that it is not the intention of either party to appeal a decision of an expedited arbitration proceeding.

(15) Any suspension for alleged cause that is not dealt with under this Section shall be referred immediately to Section 8.05 for resolution.

An example of expedited language from a private-sector agreement is found in the agreement between the Alberta-based company of Brewster Transportation & Tours and the Amalgamated Transit Union Local 1374:

The date of the hearing shall be within three (3) weeks of the contract date and if the arbitrator cannot be available in that time frame, the

President shall go to the next name on the list. The arbitrator who is available to conduct a hearing within the three week time frame shall set the date of the hearing and the parties will make themselves available to present their case on that date.

The selected arbitrator shall be placed at the bottom of the list.

Legal counsel shall not be used by either party. The parties will equally share the fees and expenses of the arbitrator.

The Union and the Company each shall pay their own expenses as well as the expenses and wages of their respective witnesses, if any.

If possible, an agreed upon statement of facts will be presented to the arbitrator.

The arbitrator shall hear the grievance(s) and shall render a decision within three (3) working days of the hearing. This does not preclude the arbitrator from giving a bench decision(s) with written reasons to follow, in the above time frame.

These expedited arbitration awards shall not set a precedent and shall not be referred to by the parties in respect of any matter in any other setting.

All settlements of expedited arbitration cases prior to the hearing shall not be referred to by the parties in respect of any matter in any other setting.

All settlements of expedited arbitration cases prior to the hearing shall be without prejudice.

A cursory review of the above examples underscores the point that the parties are generally looking for a short decision that does not bind their future disputes. Both sides, it appears, are also just as happy to have their grievances resolved without lawyers at the hearing. The British Columbia procedure, at section 8.08(4), even defines the expedited process as a nonlegal exercise. This last point reinforces the often-heard comment that lawyers just slow down the proceedings. Some typical complaints: it is the lawyers who dream up the technical objections; or, it is the lawyers who drag out the case with endless questioning. The clear and not so subtle message is that lawyers are not welcome in these types of hearings.

Both sides are also evidently not interested in establishing a bank of precedents from the expedited awards. There is an implicit recognition that the parties' expedited method of resolving their short-term problems is one that does not necessarily lend itself to rectifying long-term issues. Discipline cases of the less serious variety are natural choices for the expedited track. On the other hand, the expedited process is not likely the right place to deal with

cases involving human rights issues. Those cases, it is often said, are better suited to a more formal hearing with proper legal briefs. But are they really?

The risk of the expedited arbitration is that an issue may not have been addressed as it could have been in a more formal arbitration setting. That risk, however, is often outweighed by the immediate results achieved by a less expensive process. The arbitrator may not have written the parties into arbitration history or rectified all their concerns. On the other hand, it may be more important to have achieved some results, even if they are only short-term, through the parties' self-designed expedited model of dispute resolution than through a prolonged and fractious hearing.

There is an enormous vitality and inherent flexibility in the arbitration process. Those who complain of its rigidities and the technical and legal tactics that sometimes weigh it down overlook the reality that the process can be restructured. Parties who want a model responsive to their own sense of arbitral priorities and rhythms have a choice. They can maintain a classic arbitration process, fine tune their presentation skills, and make it work better for them. On the other hand, they can negotiate alternative processes and procedures, quite distinct from the traditional arbitration norm. They can sculpt existing procedures to reflect their specific concerns. In a real sense, the parties are limited only by their lack of creativity, and perhaps as well by a reluctance to exercise their joint authority to design dispute resolution systems specific to their unique needs.

Classification Grievance and Expedited Arbitration—The CAAT Experience

An interesting illustration of the inherent flexibility of the negotiated approach to expedited arbitration is found in Ontario, which has a system of provincewide community colleges that are post-secondary education institutions designed to fill the gap between a high school education and university degree. Though they are provincially funded, each is autonomous and a separate legal entity. They coordinate their activities through the Ontario Council of Regents for Colleges of Applied Arts and Technology (CAAT). That entity negotiates a single collective agreement on behalf of all colleges with the support staff and with the academic staff. The CAAT and its union, the Ontario Public Service Employ-

ees Union (OPSEU), have created a distinct and unique expedited arbitration system quite unlike any traditional arbitration norm.

The community colleges of Ontario have used a job classification system for a number of years. The support staff includes such diverse positions as secretaries, custodians, technicians, programmers, nurses, and systems analysts. This classification system "combines the major strengths of two traditional job evaluation techniques—the classification system and the point rating system."[5] In order to explain how the parties redesigned the classification grievance and arbitration procedure it is necessary to explain in broad form the classification system.

The CAAT Classification System

The purpose of the job classification system is to determine the pay range into which various occupational categories should be placed. It is not an exercise to determine what an individual employee should be paid. It is a complex system used to ensure that while employees are engaged in many different types of activities, there is a mechanism that evaluates the activities to group them in a fair and equitable fashion. This permits wages to reflect classifications of jobs despite the differing requirements of particular work within the college support staff.

Every bargaining unit position is classified under a "Job Family," which is a category of similar positions. For example, all positions that are essentially secretarial fall within the family "Secretary." Under most job families, there are a number of classifications for specific positions. In the secretary family, for example, there is Secretary A, Secretary B, and Secretary C. Each classification represents a position with different duties and responsibilities and is assigned to a payband level (i.e., pay grade or range) that is commensurate with skills and other factors considered. Unfortunately, not all positions can be as neatly defined. The position of programmer/analyst also has three specific positions: Programmer/Analyst A, B, and C. While the tasks that define the various secretarial positions are easily identified in many cases, the work factors and tasks of the various programmer/analysts are often difficult to distinguish.

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[5]Ontario Council of Regents for the Colleges of Applied Arts and Technology, CAAT Support Staff Job Evaluation Manual, §1 (rev. 1994) (unpublished), at 1.

The first step in the classification system is to describe a position by identifying and describing the duties associated with the position according to a structured framework. This evaluation is concerned with the content of a position, not the individual's performance in it. The framework for description is laid out on the Position Description Form (PDF). The position is described on the basis of percentage of time spent on various duties and on 12 specific factors, or evaluation criteria. These factors describe the requisite skill, effort, responsibility, and working conditions of the position. Each existing position is described in great detail according to the same factors as the PDF. If the position that is being analysed matches an existing job classification description satisfactorily, the position is classified accordingly and the employee is placed within the corresponding payband.

The PDF is the foundation document to the system and is used throughout the classification process. It is ingrained in the grievance and arbitration system, thereby incorporating those processes into the overall classification scheme as an integrated whole. The utilization of the PDF greatly facilitates the expedited arbitration process. It brings all the parties and the dispute itself to a common denominator. The PDF, coupled with the whole system, defines the parameters the arbitrator is to work within, allowing the arbitrator to relax conventional rules concerning evidence and procedure in order to expedite the process.

The creation of new positions within the CAAT system introduces special challenges, as does the assumption of additional responsibility by some employees. Such incremental responsibilities may transform their original positions into those of different classifications, or even into yet-to-be classified task / responsibility mixes. New or atypical positions are analysed using a Core Point Rating Plan (all the existing job classifications were determined under this same method). Under this scheme, values are assigned to a series of 12 factors based on a predetermined, weighted point-rating scheme. The maximum value for each factor is weighted according to its importance to the overall evaluation. The value increments between a factor's minimum and maximum score are predetermined as well. The characteristics of the factor that should be exhibited to warrant a particular score level are clearly laid out for the rater in the system. Once the job rater completes the evaluation of each factor, the total score is tallied. Based on this total, the corresponding payband is identified. Each of the 14 distinct

paybands covers a different range of core point rating totals, representing increasing levels of hourly wages.

Expedited Job Classification Arbitration—The Design

Anyone who has served as an advocate or an arbitrator in a job classification grievance will appreciate that the traditional process does not work efficiently and effectively in resolving such disputes. Copious evidence about similar jobs is introduced in excruciating detail; ultimately the arbitrator often is unable to use it in the classification determination. There is rarely a traditional classification arbitration that is completed in 1 day. Once the results are known, the decision frequently causes more disruption and upheaval than it solves.

The nature of a job classification grievance is such that it cannot be resolved by a line manager. The dispute is based on a complex classification system embraced by both CAAT and the union; its outcome could have widespread organizational effects. The conventional multistage grievance process is inefficient. In most instances the particular line manager will not have the requisite authority to deal with the matter. Also, the subject matter of the dispute does not deal with a single incident. Rather, it poses a challenge to the classification of the position and activities of the grievant's job. Attempting to classify a job, where the duties may be varied, into watertight compartments is apt to give rise to disagreement in some material aspect. Given the significant financial consequences for the parties, such conflicts will not be readily resolved between them without the aid of a third party. Therefore, classification disputes will likely only be settled by arbitration.

For these and other reasons CAAT and the OPSEU sought to escape the constraints of their traditional arbitration procedure and craft one suited to their particular needs. The expedited arbitration process allows the parties to obtain an arbitration decision more quickly and with less expense. The process described in the collective agreement is premised on the existence of a comprehensive job classification system. It is within the guidelines, factors, and analysis of the system that the arbitrator is to adjudicate the dispute. To ensure that the expedited process retains the parties' confidence, both the CAAT and the union jointly train each arbitrator in the use of the job classification system.

The evidence that is typically heard in a traditional classification hearing is voluminous. Decisions often turn on factual minutiae that are difficult to reconcile. It is unlikely that the parties themselves would be able to analyse the evidence and work through the key differences to reach an agreement. While the use of conventional arbitration will deliver a resolution to the parties, it shifts the burden of dealing with this evidence to lawyers and the arbitrator, taking the process out of the hands of managers and union officials. Traditional arbitration does not address the quantity or form of the evidence. The mass of evidence still has to be sifted through, analysed, and understood by one individual. The challenge to designing a revised system is to contain the evidentiary process and leave the dispute with the parties. After all, they are responsible for implementing the classification system. The principals' lawyers and a third party are not.

While every case is unique in some way, the type of evidence introduced in classification disputes is generally the same. It consists of information about what the employee does, what other employees within the same classification do, and what the employees of a different classification generally do. CAAT and OPSEU designed an expedited arbitration procedure that permits the evidence to be condensed and standardized for use in the grievance and the arbitration hearing. Such formatting also aids in clarifying the parties' positions and pinpointing the issues of contention. If the grievance procedure is unsuccessful in resolving the dispute, the standardized information is given to the arbitrator in advance of the hearing. It is used to orient the arbitrator to the facts of the particular grievance before the hearing. This crucial information enables the arbitrator to conduct the hearing effectively and, ultimately, to decide the grievance.

Expedited Job Classification Arbitration—The Process

The grievance and arbitration processes are woven into the classification system and become an integral part of the overall management tool being used to standardize community college pay across the province. Position classification disputes generally arise in two circumstances. In both, employees seek the end result of being placed in a higher payband. First, employees may submit that their duties emulate, or are more akin to, job classifications that are in higher paybands. The claim may be based on the regular work done or on other work done temporarily. This sort of dispute

may arise because the position was improperly classified in the first place. In most cases, however, such disputes arise from the gradual increase in responsibility undertaken by employees. The cumulative effect alters the greater part of their positions. Second, employees may assert that the particular aspects of their positions are not accurately described by any of the existing job classifications. The assertion is that the total core point rating of their positions will fall within higher paybands not currently identified by any existing job classification in the same job family.

Grievance Procedure. Once the union initiates a job classification grievance, a two-step procedure with strict time guidelines must be followed. At the first step, the union and CAAT investigate the differences of opinion as to the accuracy of the PDF in describing the grievant's position. They exchange their views as to what they believe the appropriate core point rating should be. If there is agreement concerning the PDF but a final resolution has not been reached, the matter can be referred to expedited arbitration immediately. If not, then the matter proceeds to the second step, which is a meeting with the college president or representative. Should the grievance not be resolved there, it proceeds to expedited arbitration.

The grievance procedure has the benefit of creating an agreement on the PDF, which means that the actual job being done by the grievant is not in dispute by the time the matter goes to arbitration. The parties have also used standardized information and forms that have the effect of integrating the grievance procedure into the job classification system, rather than being an alien missive to the process. The use of the PDF, which is a foundational document in the classification process, ensures that the grievance procedure is integrated into the overall administration of the classification system. Furthermore, the PDF becomes a core document in the arbitration procedure. It obviates the need for calling evidence, and more particularly, it informs the arbitrator in advance about the nature of the grievant's job activities.

Arbitration Procedure. If the matter goes to expedited arbitration, a sole arbitrator is selected either by agreement or by lot from a preselected list incorporated into the collective agreement. Any arbitrator selected must have completed the special training the parties jointly provide to arbitrators on their roster for expedited classification arbitration. The use of a sole arbitrator is in contrast to an arbitration board used by the CAAT for other grievances. The preselected list avoids the time lags created by nonagreement in

choosing a sole arbitrator or board of arbitrators, either on an ad hoc basis or through the use of an arbitration service. The specialized training ensures the arbitrator is equipped to direct the arbitration process in an appropriate fashion and that the outcomes will be consistent with the overall job evaluation scheme deployed in the colleges. The training also ensures that the arbitrator does not require evidence about the design and application of the classification system.

Prior training also helps the arbitrators ask better questions of the parties. Being familiar with the system, they are able to identify the underlying issues and make relevant inquiries. They may also be better at uncovering issues missed by both parties, possibly leading to awards more acceptable to them.

One of the most innovative adaptations to the conventional arbitration model relates to the use of evidence. Unlike traditional arbitration, where evidence can take any form within very broad guidelines, the evidence that may be submitted in an expedited arbitration is explicitly outlined in the collective agreement. The permitted materials are: the CAAT's completed PDF; an Arbitration Data Sheet (a one-page summary of each of the parties' factor ratings, with space where the arbitrator lists the factor values as per the decision); a brief from the union, with particular reference to the PDF and any disagreement with it; and a brief written submission from the CAAT.

In addition, any information to be considered at the hearing must be delivered to both the arbitrator and the opposing party no less than 14 days prior to the hearing. The agreement provides that any information submitted after this time period cannot be considered at the hearing. The benefits of this are numerous.

By receiving the evidence prior to the hearing, the arbitrator arrives at the hearing knowing what the major issues will be, what evidence will be critical to canvass, and how to best organize the process. This leads to a process that will be completed faster at less cost to all parties. Indeed, in the authors' experience, these proceedings have never taken a full day.

Arbitration Hearing. As noted, the collective agreement specifies what evidence can be considered at the hearing. The parties are to submit briefs that include the PDF, the evidence supporting their respective positions, and what they view to be the core point rating. This standardized information highlights which particular areas are in dispute and which are in agreement. Having the parties follow the job evaluation system format forces them to focus their

attention on the same issues. This allows the arbitrator at the hearing to focus on the areas of disagreement without having to spend time trying to identify them.

The hearing is conducted without the presence of lawyers. The arbitrator is required to drive the process; thus, the hearing can be somewhat inquisitorial. The parties refer to this aspect of the process as being "arbitrator driven." Nobody actually calls witnesses to give evidence. The arbitrator gives the grievant and the manager an opportunity to speak. The parties' representatives may ask questions, but the arbitrator remains the primary questioner.

As indicated above, one of the goals of expedited arbitration is to eliminate the legalities and formalities that tend to encroach on the benefits of arbitration over litigation. To ensure an expedient and flexible process, the parties have incorporated into the collective agreement a statement of intention that the process is to be free from legalism. The clearest indication of the parties' commitment to an informal process is their stated intent that legal counsel will not represent them. The agreement does allow for the parties to have counsel present. However, the opposing party must be notified no less than 10 days before the hearing date that counsel will attend. Job classification is not a legal issue, nor is it truly an exercise in contract interpretation. Rather, it is more a human resource exercise in determining the content of a job. Given the nature of the workplace and the inherent limits of language, it is the essence of the description of a job classification, as opposed to its literal interpretation, that will lead to a fair result. Counsel may be skilled in presenting argument, but that same skill can increase the risk of legalism finding its way back into the process.

One of the inherent risks of expedited arbitration is that issues of importance will not be given their due process in a forum designed to reach a resolution quickly. This risk may be increased when the parties' counsel are excluded from the hearings. In order to protect the interests of both parties and to negate fears that may lead to parties introducing counsel into the process, the jurisdiction of the arbitrator is precisely confined to the classification of jobs as governed by the job classification system. This enhances the parties' confidence in the process by ensuring that issues requiring more thorough (and perhaps legal) presentation and analysis will not be railroaded through a forum not designed for such purposes. Given the confined scope of the hearings and specially trained arbitrators, the parties can be confident that the outcome will be

fair and will not inappropriately spill over into more complicated matters.

The Award. The arbitrator is required to produce a decision within 14 days. Accompanying that decision must be the standardized form for rating the job (the Arbitration Data Sheet). The arbitrator's ratings are final and binding. If the rating places the employee in another payband, then the appropriate wage compensation adjustments must be made with interest dating back to the grievance (and in some unusual cases, to an earlier or later date). The decision itself is in large measure an explanatory evaluation of the arguments and evidence associated with the core point ratings the arbitrator adopted.

Summary of the CAAT Experience. By eliminating those areas that were burdening the process and stripping away the cumbersome formalities that did not add value, the CAAT has developed a system that exploits the benefits of alternative dispute resolution over conventional mechanisms. The evidentiary and procedural innovations have melded arbitration and job classification into one seamless process. This logically extends the classification process by producing a final decision and ensuring that related disputes can neither be postponed nor dropped from an agenda. Lastly, through limiting standardized evidence and excluding legal counsel, the CAAT system has created an informal, amicable environment that produces quick resolution more easily than does conventional arbitration.

Conclusion

The statutory and negotiated approaches discussed herein reveal a variety of responses to the problems associated with traditional arbitration. They are excellent illustrations of creativity and ingenuity that can be used to design systems of dispute resolution that are adaptable, flexible, and responsive to the parties' needs and perceived concerns about the effectiveness of arbitration.