II. The Development and Use of Mediation/ Arbitration in Ontario

Kevin Whitaker*

I wish to speak about a process that blends both mediation and arbitration—which we call Mediation-Arbitration or "med-arb" in Ontario. In my view and as I shall describe, this med-arb process is rapidly becoming the default process in Ontario. In many collective bargaining relationships, the traditional arbitration conducted on a civil trial model is becoming a thing of the past.

Med-arb is quite easy to describe. It is, very simply, the agreement by the parties to use one third-party neutral as the arbitrator and mediator. If the matter is not settled through the assistance of the neutral as mediator, then that same person can adjudicate and decide the case, despite having participated as mediator.

Typically, the parties will begin with mediation and if that is not completely successful, move into the arbitration phase. Mediation can occur at any stage of the process, after some disputes (points of law, evidence, or fact) have been litigated and adjudicated by hearing. My remarks are organized to address the following: How did this process become popular in Ontario; how is med-arb different from traditional arbitration or mediation; and what is needed to make it work?

For some time now and in many diverse areas of law—particularly those in which administrative tribunals play a significant role—there has been a growing general predisposition in Canada to alternative dispute resolution processes. Mediation and the use of expedited processes (but not med-arb) have been growing generally in Ontario in the tribunal sector for several decades now. Tribunals that deal with the administration of social benefits, landlord and tenant disputes, land planning issues, workers' compensation, criminal injuries compensation, and many more, all have developed either aggressive mediation processes and/or expedited hearing processes to settle the majority of disputes, or else significantly reduce the disposition time.

We see this even in the courts, which are less flexible because of the traditional constraints of natural justice and procedural

---

*Chair: Ontario Labour Relations Board, Education Relations Commission, Colleges' Relations Commission.

fairness that continue to apply. Even in the courts, however, we are seeing the introduction of mandatory mediation in civil matters, the use of less formal hearing procedures in the Tax Court, and in the criminal courts, the beginnings of focused hearings where judges play a more active—inquisitorial—role.

So it is fair to say that in just about all areas of legal dispute resolution, including matters involving personal liberty and criminal responsibility, there is a sense that we must move to a more practical, focused, and expedited form of process. Why is this occurring? I would suggest that the civil trial model is not delivering the type of high-quality product that justifies the time and expense. The formal trial model is increasingly seen as being inadequate not only from a resource perspective, but also in terms of the quality and consistency of outcome. Look at the growing concerns in Canada and in other common law countries about the phenomenon of the wrongly convicted.

In short, the traditional trial is no longer understood to be timely, practical, cost effective, or consistently capable of producing the "correct" outcome—all things that matter significantly in litigation of any sort.

The extensive history of the use of alternative processes, in labour relations in particular, orients us more easily to med-arb. Very early on in Ontario, after the initial passage of the Labour Relations Act (based on a Wagner Act model), there was an understanding that the civil trial model of adjudication was not appropriate as a way of resolving labour disputes.

In 1943, the government of Ontario created a Labour Court as a branch of the Supreme Court. Populated by judges, the court lasted less than one year because the labour relations community (both sides) was united in its view that the court was too formal and lacked expertise. What the community wanted—and got—was an agency with decision makers who had labour relations expertise, hence the birth in 1944 of the Ontario Labour Relations Board (OLRB).

For some time in Ontario there remained a few County Court judges who were regular arbitrators, but the field of arbitration was initially dominated by academics who generally spent a great deal of time studying and thinking about labour relations—Bora Laskin, a former Chief Justice of Canada, and Harry Arthurs, a distinguished law professor, as examples. It was to these experts that the parties turned, rather than to the courts.

From a process perspective, the fact that adjudicators have been understood to be experts rather than generalists, like the courts, meant that they were given more discretion around process, so that adjudication could be managed more informally and in a focused sense. There was no perceived need to hear evidence formally to establish context or background. Things moved “briskly” at the OLRB before seasoned arbitrators. There is a reason why the awards in the first series of the Labor Arbitration Cases are brief—it is because the process itself was.

There was then a period of time when we in labour relations moved away from this more informal model. Perhaps this was to establish our credibility with the courts. We adopted many of their processes, their notions of procedural fairness, natural justice, rules of practice, evidence, style of litigation, the nature of reasons, and the role of the written decision. We were not alone in this transition, as other administrative tribunals followed suit. We in labour relations, however, stood out for our formalism and rigor compared with other areas of administrative law. In the broader administrative justice community we are still recognized as leaders and have a reputation for very high standards of fairness, writing, and scholarship.

By the late 1980s and early 1990s in Ontario and the Canadian federal jurisdiction, there were a number of large bargaining relationships that covered great numbers of employees. These large bargaining relationships, locked into traditional full-trial hearing models, began to collapse under the weight of the formal processes that had been constructed. These parties included the Ontario Public Service (OPS) and the Ontario Public Service Employees Union (OPSEU), Ontario Hydro and the Power Workers’ Union, Office of the Railways, Ontario Community Colleges, among others, with a significant accumulation of outstanding grievances. In some cases there were tens of thousands of backlogged grievances teed up for formal hearing before tripartite panels, with the most infamous example being OPS and OPSEU, where grievors rather than the union had de facto carriage of the matter and wait times were two to three years to hearing.

There was a growing realization that the outcomes were not good, that the cost and delay were unacceptable and out of control, and that there was little certainty of outcome in any event. These were institutional parties who were in a long-term relationship and used to a bargaining-based model where interests and

positions could be accommodated through negotiation. At the same time these parties had developed a stable of regular arbitrators who had a tremendous quantity of experience with their collective agreements, knew the history of bargaining, knew the counsel and their law firms and the relationships between counsel, and had dealt with the same types of recurring problems.

With this quantity of experience and this body of work behind the parties—and in particular with regularly participating arbitrators—the parties began to think about whether, for example, they needed to call evidence in the traditional way on this one? We know the background and the issue and perhaps even the grievor, so we can simply tell the arbitrator what the case is about and get a quick, short result. In this context the parties started to ask the arbitrator to assist informally before the hearing started. These are the circumstances that first greased the wheels for med-arb.

At the same time there were some self-confident arbitrators who were prepared to champion the model and make it legitimate. They were doing this not in response to counsel—because to be fair, this was not what many counsel wanted. Rather, this was in response to pressure from sophisticated institutional parties who were thinking and acting in what they thought were their own interests, whether or not their counsel liked it. This convergence then led to the med-arb process becoming more widely available. Over time, it gained legitimacy and in turn attracted more arbitrators.

I would suggest that now most arbitrators in Ontario are expected to provide med-arb if the parties wish it. It has become an essential part of the toolkit. The expectation is that if a case is not settled by counsel alone before the scheduled day, then one way or the other, the parties wish to walk out at the end of the day with the matter resolved.

In my mind mediation and adjudication are not two different water-tight compartments, but rather different points on a continuum—the continuum being the degree of arbitrator discretion over process.

Whether it is a traditional arbitration or med-arb, the critical task is the same: to narrow down the dispute so that only what is really not capable of being settled gets adjudicated. In either case the neutral obtains information about the dispute and either helps the parties figure it out for themselves or ends up deciding what the parties can't agree on. Even in most traditional arbitra-

tions, there is always a number of areas of agreement, even if it is only about the ground rules.

The range of discretion that is tolerated turns on the degree of expertise, the reputation, and degree of familiarity that counsel and the parties have with the arbitrator. This can range from one end of the spectrum with an arbitrator who may have a stellar "acceptance" quotient, whose retainer says "you agree to do whatever he tells you to do or he won't take the case," to a nonconsensual appointed adjudicator who no one knows and who is permitted only to listen, write things down, and rule on everything after full submissions. Most mortals are somewhere in between.

So I see arbitration, expedited arbitration, and med-arb all along the same continuum of adjudicator or neutral third-party discretion. It is the experience first with expedited arbitration and how that developed that has paved the way for the slide into med-arb.

In Ontario, there is a stampede to find arbitrators who can be trusted, because they are known to exercise more rather than less discretion over procedure, and this includes the ability to caucus with the parties individually and then to be able to adjudicate if necessary.

We need a large enough volume of work so that arbitrators can be tested incrementally for their ability to manage the risk to the parties that comes with the process. Nobody just starts out doing things this way. All of the top performers moved in that direction slowly over a period of years, not months. All who do it well had to be able to demonstrate their ability to exercise judgment and discretion over time—moving away from the traditional model.

Counsel and the parties have to feel "safe" that they will get a normative range of outcome no matter what the problem and that there will be no surprises. There must be the appropriate skill set among the arbitrators, those who are good at all the mediation skills, such as active listening, avoiding early assessment, creative thinking around identifying needs and interests and how to accommodate them, and building trust relationships with the parties, not just with counsel.

Neutrals also have to be able to do a traditional hearing if necessary, so they need all the overlap with the traditional arbitrator skill set: impartiality, neutrality, knowledge of process and law, hearing management, and writing. The neutrals have to include senior arbitrators who are well known and well established who

are prepared to champion the model. You also need senior counsel who are prepared to work with such new arbitrators and you need institutional parties who are disillusioned enough with the old model that they are prepared to take some risks with a new one.

The mindset of the neutral has to be that of a problem solver who is there to get the parties a solution to their problem and then get them out the door, rather than a judicial mindset where the task is to make law and decide rights and obligations. The orientation should be to decide only what you have to—to meet the needs of the parties and not an item more, not to settle points of law or write the definitive and last award to resolve forever that thorny point of law.

So to conclude, this is now the default process in Ontario and almost all principal arbitrators work this way. A critical step in the process was the push by the big parties for a streamlined process with regular rosters, and then it was a gradual and incremental development. It must be the parties who have to want to make these changes and then give arbitrators permission to do it and to develop and acquire the skill set.

III. Mediation of Complex Grievances

Mei L. Bickner*

Kevin Whitaker has provided us with a glimpse of what the future of the dispute resolution process here in the United States might look like if the parties are as pragmatic, as trusting of the process and the skills of the arbitrator, and as interested in workable and cost-effective solutions as the Canadians seem to be.

Stephen Goldberg has suggested a number of reasons why grievance mediation has not been used more widely in this country, given that the process has shown to yield resolution of disputes in less time and with less cost. His suggestions included: institutional investment in a known process—arbitration, aversion to potential higher risks in the outcome, and the generally adversarial nature of the collective bargaining relationship here in the United States. Notwithstanding these adverse circumstances, he has not given up

*Member, National Academy of Arbitrators, Newport Beach, California.