V. Grievance Mediation: Why Some Use It and Others Don't

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I come at this topic having presented a number of labour arbitration cases in the United States and many in several provinces in Canada. There certainly are noticeable differences in the various jurisdictions and the current practice in Ontario is very definitely at one end of the continuum.

If, however, Kevin Whitaker has described what might one day come to pass elsewhere, it occurs to me that there may be little original about it.

Sometime in the 1970s I was asked by the Amalgamated Clothing Workers Toronto Joint Board to attend at the office of a garment factory. I was asked because, for the first time, the company had insisted on bringing its lawyer to a "hearing" before Arbitrator Harry Arthurs. In fact the company had obtained a court decision quashing a ruling by Arbitrator Arthurs that had excluded its lawyer from participation.

Professor Arthurs was polite as always but not too happy. He had been developing and administering the law of that shop for many years before our intrusion. Needless to say he was only interested in hearing from the shop steward and the owner. I remember nothing about the actual grievance. On reflection, however, I have not the slightest doubt that Arbitrator Arthurs had been engaged in a form of expedited med-arb without lawyers for years.

Now the Ontario practice of med-arb as a default option is the subject of discussion 30 years later as a model for consideration—but this time with lawyers playing an active role.

As Kevin has described, in the 1970s labour arbitration in Ontario was almost always a formal affair. Short disciplinary suspension cases were tried the same way as major policy disputes. There was a lot of available advocacy experience for young lawyers and lots of work for the few arbitrators in the field. But over time the process became too expensive and simple cases took far too long. Eventually, those paying the bills started to rebel.

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More neutrals, Michel and Pamela Picher for example, entered the field. We began to see more case management, more front-end intervention by neutrals, fewer preliminary objections, and fewer debates over the admissibility of evidence.

Then, with large unions and employers with overloaded dockets, we began to see expedited arbitrations: several cases set for the same day, no precedential value, limited evidence, and sometimes lawyers expressly excluded.

Mediation came to be more frequent during arbitration hearings. It became common for arbitrators to listen to opening statements and then move directly to mediation.

More recently, parties have become accustomed to moving straight to med-arb—without locking themselves in at the start with positional opening statements. In some cases, with some arbitrators and some parties, we are now seeing what Kevin Whitaker has called "aggressive mediation."

All of you will be familiar with the conventional objections to mediation:

- Parties hire arbitrators to arbitrate and not to mediate.
- If they wanted to settle they could do so themselves.
- Mediation just adds a further cost step and creates delay.
- Willingness to mediate may telegraph weakness, either in the position maintained or in the confidence of the advocate to litigate.
- Due process/natural justice concerns: doubt that arbitrators who have worn a mediator cap can keep an open mind if they later arbitrate.

Steve Goldberg has identified several other barriers to increasing mediation usage in the United States. Some of these barriers may be more significant in the United States than in Canada, but some of them have been overcome in Ontario, at least for the time being.

Before speaking to the barriers, however, it is important to underline a crucial point made by Kevin Whitaker. The Ontario culture of med-arb as a default option was achieved only when an outstanding roster of neutrals gained the confidence of labour lawyers and their clients by demonstrating that they could command the full alternative dispute resolution (ADR) skill set.

Parties who grant med-arb jurisdiction make an exceptional leap of faith. They expect a high level of mediation competence.

They do not expect to hear a mediator say, in the first hour: "Give up, take my suggestions and settle because I can always arbitrate what I am recommending." The one who listens constructively, has a sense of timing, and building consensus is invaluable. Nasty surprises and untoward pressure are unwelcome. Mediators who diplomatically identify potential problems with cases are doing their job. Mediators who threaten what they can do are ineffective and lose respect. While both sides definitely want to come away with what Kevin calls "a normative range of outcome," they are pleased if a novel approach to their problem is found.

I defer entirely to Steve Goldberg's assessment that an important barrier to mediation may be the adversarial nature of labour relations in the United States. Without doubt, my own limited American experience has been that lawyers are expected to fight when they arrive at an arbitration. When in an American hearing I adopt our quaint Canadian convention of referring to "my friend's submissions," my "friend's" clients often start squirming. This appeals to my imperfect sense of humour—particularly if my opponent is an intense attorney from New York City in full battle cry. Arbitrators never mind.

An unrestrained adversarial attitude, whether Canadian or American, may of course be an insuperable obstacle to any kind of mediation—if the objective of one party is to try to "win" every time regardless of the issue, regardless of the stakes, and regardless of the long-term relationship. Such a contest may be unilaterally ideological. A pragmatic decision may have been made to exhaust the resources of an opponent with limited resources. The weaker party, usually the union, can lose the war even as it wins individual battles. Mediation doesn't fit into such a paradigm.

However, any general employer incentive in Ontario to behave this way was ultimately overcome by the real world costs of arbitration in the vast majority of cases. Clients willing to pay to litigate any argument, real or imagined, became fewer and fewer. To the best of my recollection, private employers came around to the notion of saving money—as opposed to fighting with the union every time—a recession or two back. Other factors were also at play in the public sector.

Arbitrators with the confidence to try something new came to recognize that they were not putting themselves out of work if they helped to settle potentially lengthy cases at the outset. In fact, their skill set came to be in demand. There was an inexhaustible

supply of work for neutrals who could mediate as well as arbitrate. Now there are several Ontario arbitrators routinely holding hearings at nights and on weekends, after a full day has been scheduled with other parties. It's like calling your plumber when the pipes leak. It is amazing how much more quickly parties can get to the deal if they want to go home; much the same as the parties interest in a med-arb on a Friday afternoon in the summer.

Reference has been made to a concern that union and company staff people may prefer to preserve their skill as lay litigators and custodians of labour relations argot and procedure. If mediation begins to trump arbitration as a dispute resolution option, then their hard-earned lay skills may die a slow, unappreciated, uncompensated death.

If this was ever an issue in Ontario, then we learned that there were far more union and management staff who felt more comfortable navigating the vagaries of mediation than the rules of arbitration and the challenges of examining witnesses. In a mediation setting, they were able to regain more control of their own labour relations from their expensive lawyer top guns. They could talk to neutrals in a normal adult fashion. They liked it. Mediators were actually interested in what they had to say.

Steve also referred to the "You settled for that?" phenomenon. Buyer's remorse is one thing but it is definitely a problem if your head office boss, company or union, second guesses a mediated outcome after the fact. And, of course, it happens.

All I can say is that both union and company representatives have been up to the challenge. The mediation product has usually been solid enough to withstand Monday morning scrutiny. What we do see very often is the second guesser, somewhere else on the phone, getting in the way of a reasonable settlement. But, although the delays can be irritating at the time, the concerns are usually handled at that point.

In other cases, we still get the arbitrator to take the blame if there is some political or other need to do so. It is not uncommon for a mediated settlement to be released in the form of a brief arbitration award. The appropriate use of "informed" awards is obviously a topic all of its own.

Attorney self-interest has also been identified as a possible barrier. There will always be lawyers who "run the clock" and some arbitrators who are quite content to see multi-day cases run on. But it becomes pretty clear who is who. When the culture in Ontario

changed, I think that such conduct came to be seen more as a sign of incompetence than anything else. There should be an obvious reason for a case to take considerable time.

There have now been many situations where other neutrals are brought in part way through a runaway case to get a deal done where the first arbitrator has either failed to intervene or failed in an effort to do so. Arbitrator #1 normally does not get a second chance.

I have my own private theory about attorney self-interest. It is not as if labour lawyers in Ontario are any nobler than those anywhere else. There are several boutique labour law firms on both management and union sides in Ontario and a cadre of specialist labour lawyers at bigger firms. We have lots of work no matter how many cases settle and we don't see generalist civil litigators that often. We have learned that mediation is a growth industry and it is particularly recession proof. Younger labour lawyers in Toronto have grown up in a med-arb culture. They are not worried about finding work to do. Perhaps this simply reflects the more healthy state of the Canadian labour movement, I'm not sure.

Both Steve and Marilyn Pearson also referred to "unyielding defiance" as a concern in that some unions routinely use automatic opposition to everything management does for political purposes: this is what we do for you. This barrier may be the opposite side of the ideological employer intransigence coin. It never entirely goes away and, in our adversarial system of labour relations, unions actually shouldn't forget about "whose side are you on." Expeditious grievance handling should not be equivalent to the efficient disposal of widgets. Nor need it be.

However, med-arb in Ontario has not developed at the expense of vigorous representation by unions. Some of the most aggressive unions in the province use med-arb extensively. Unrestrained recourse to formal arbitration comes with its own significant cost disincentive. So the moral has become: arbitration if necessary, but not necessarily arbitration.

Although I have always believed in mediation as a preferred option, I came more slowly to med-arb at least as a default option. Due process concerns ("natural justice" as we say in Canada) were an issue: how exactly do people put on arbitrator hats and ignore what they have heard as mediators? Frankly, I don't believe them when they say that they do. There is the perennial problem of compromising good legal claims and being pushed to do so. I don't like the inherent conservatism of mediation where there

are interesting legal issues in play. And I acknowledge that in my experience there is something to the "narcotic effect" concern: there is a temptation to send doubtful grievances off to med-arb on the "nothing ventured, nothing gained" theory.

Having said all of this, I am here to tell you that med-arb is working in Ontario, and it is working well, and it is working in all manner of labour disputes. I am continually amazed at the ability of accomplished mediators to secure satisfactory resolution of disputes that the lawyers were sure would be impossible to settle.

There are many other positives.

Grievors and the principal parties have more ownership of a med-arb process. They can speak candidly without artifice. The company wants to explain why it did what it did—even if a manager committed some disqualifying procedural error. The grievor wants to tell someone his or her tale of woe. The supervisor wants to tell someone why the grievor is untrustworthy. The beauty of mediation or med-arb is that any such catharsis, which may be needed, can be discharged in a one-party setting. If it is only catharsis, then it is accomplished without driving the parties further apart.

As for the narcotic effect, I'm not troubled if, from time to time, dubious grievances come before neutrals. A company can always say "no" to a mediated outcome. If a grievance dismissal or withdrawal is tempered with a bit of mercy along the way, then I see no harm. In difficult cases, it is sometimes also a useful prophylactic to a duty of fair representation complaint if the matter has come in some fashion before a third party. There are limits to this of course.

Professor Goldberg has been a longstanding advocate of mediation, as we all know. Steve definitely knows of what he speaks and always has. Over many years he has inspired various creative models of mediation tailored to particular parties, as Marilyn has mentioned. Now he is a self-described older and wiser man.

We do, however, usually speak about mediation as a distinct stand-alone step that, if it fails, leads to arbitration before another neutral. It is this model that most people think of when they think of mediation and, I believe, what Steve was speaking about when he identified barriers to increased recourse to mediation in the United States.

I wonder if stand-alone mediation may be asking a bit too much of many parties, their lawyers, and of most neutrals. Paradoxically, the Ontario experience suggests that the more interventionist

med-arb model may work better and be an easier sell—at least once practitioners get used to it. Why might this be?

The very best mediators may be able to produce mediated outcomes by their power to persuade alone. They are a high wire act—without any ability to coerce an outcome by their power to arbitrate, if necessary. The Steve Goldbergs and Bill Hobgoods can do it and Michel Picher, George Adams, Brian Keller, and Kevin Whitaker do it in complex Canadian cases. It requires exceptional talent—particularly in those complex cases.

Stand-alone mediation, by definition, requires clients to take responsibility right up front and lawyers to lead, where there is always the option of postponing a difficult decision. And it is here that the problem may lie.

Experience has taught me that mediation often needs some stick. Procrastination needs to be removed as an option. The certain prospect of a decided outcome in the immediate future, arbitration if necessary, usually provides the necessary incentive for successful mediation.

At least that is what we have found in Ontario. At the end of the day, and it often is at the end of the day, parties usually prefer to decide things for themselves. They are often prepared to pay quite a price for certainty. How many times have we all heard mediators say: "You know your own business, you don't want to risk *me* getting it wrong." At the end of a mediation, clients often see the point of that admonition. They really get the point if the arbitration is not going to be held at some undetermined date in the future, but it is about to start now.

A purist view of due process is obviously a casualty of any med-arb exercise. It is for this reason that Kevin Whitaker's critical qualifier is fundamental. A mediator-arbitrator needs to have the full ADR toolkit and needs to have the trust of the parties. So what about due process?

Even where mediation is unsuccessful, there can be a silver lining. It is sometimes the case that, by the time the arbitrator hat comes out, issues have been eliminated or refined. Sometimes the parties are prepared to let the mediator issue a final arbitration award without hearing evidence. There is nothing more to be accomplished in a formal hearing. Almost without exception, hearing time is substantially reduced even if evidence is called. Most of the time I would prefer a third party to have a clear view as to what really happened, what really is at stake. Then I'll take

my chances. Even if mediation fails, I usually have a better sense of how to present the case to the third party.

All of this is good news for arbitrators who can mediate, but it isn't half bad for the lawyers either. Labour lawyers, known to be effective litigators, can call anyone's bluff. They need give nothing unreasonable away in mediation. They can concentrate on providing valuable long-term labour relations counsel to their clients and they can fight if they have to.

As for Arbitrator Arthurs and the garment factory, those halcyon days may be gone. But med-arb is very much alive and kicking—with lots of room for lawyers. Try it. You may like it.