Chapter 8

PUBLIC SECTOR: INNOVATIVE APPROACHES TO PUBLIC SECTOR DISPUTE RESOLUTION

I. Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitration in the Ontario Electricity Industry

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—To forget one's purpose is the commonest form of stupidity.
Friedrich Nietzsche[1]

—Men acquire a particular quality by constantly acting in a particular way.
Aristotle[2]

1. Introduction

Whatever one thinks about Nietzsche's politics, it is undeniable that he had moments of profound insight and, at least in the opinion of this author, the quote above is one of them. It truly is easy to forget why one is doing what one is doing when one has been doing it for some time. Government officials can forget they are there to serve the people, couples can forget that they are in a relationship to love and support each other, and lawyers can sometimes forget they are there to serve the best interests of their clients.

As for Aristotle, the fact that he posited the basis of behavioral psychology a couple of millennia before anyone had ever heard of B. F. Skinner is reason enough to take his comment

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[1]Human, All Too Human: A Book for Free Spirits.

[2]*Nichomachean Ethics*, Book 3, Chapter 5.

seriously. But what, one might well ask, has any of this to do with the establishment of a system of expedited arbitration in the electricity industry in Ontario, Canada at the very end of the 20th century?

The purpose of this paper is to set out in a succinct manner the story of how two parties to a collective agreement were able to radically reform an arbitration process that was no longer properly serving its purpose and then to detail the developments in the systems that evolved from the initial system after the single employer party to it was split into various successor companies. It is essentially the story of two organizations that decided to radically change a dispute resolution system so as to have it carry out the purpose it should have served from the start but that seemed to have been forgotten somewhere along the way. The change in the system required a radical change in the behavior of the parties participating in it, and that change in behavior changed the character (or "quality," as Aristotle would put it) of the relationship between the parties and the character of the parties themselves. This story is not presented as a panacea for others but as a model that might act as a catalyst to others running a traditional grievance arbitration system to consider an expedited alternative to it.

The change to the grievance and arbitration system at Ontario Hydro began with amendments to the 1998 collective agreement between Hydro and the Power Workers' Union (PWU), but in order to understand how it came about, one must understand the events preceding the 1998 round of collective bargaining between the parties.

By way of background, Ontario Hydro had been, for about 90 years, a statutory public corporation and an integrated utility that had a virtual monopoly on the generation and transmission of electricity in the most populous of Canada's provinces, as well as being a major distributor of electricity and the de facto regulator of the other local distribution companies in that province.[3] This made Ontario Hydro one of the largest integrated public utilities in North America. In 1998, the PWU represented about 14,000 Ontario Hydro employees, which was the vast majority of workers at Ontario Hydro (and hence across the electricity industry in

[3]The distinction between transmission and distribution of electricity is essentially one of voltage. The high voltage lines held up by towers one sees across the landscape transmit electricity across long distances and form the transmission system. The lower voltage (typically 50kv and under) poles and lines distribute electricity locally once its voltage is stepped down from the transmission lines in a transformer station.

Ontario).[4] Significant change had come to Ontario Hydro at the beginning of the decade by way of an employer-initiated corporate restructuring ("downsizing"). The union's membership was reduced dramatically from a high of about 22,000 at the beginning of the decade through the use of various voluntary separation packages offered by Ontario Hydro to implement its downsizing program. While the downsizing of the early 1990s was largely history by 1995, part of the legacy of the previously larger bargaining unit and the workplace upheaval caused by the downsizing was to contribute to a backlog of grievances that was disproportionately large in comparison to the size of the bargaining unit as it was in 1998. Before we turn to the issue of the backlog, however, we must review the turmoil immediately preceding the 1998 round of bargaining.

In June 1995, the neoconservative government of Mike Harris came to power in Ontario with a majority government and every intention of "restructuring" the electricity industry (meaning breaking up Ontario Hydro into smaller companies) and privatizing the restructured entities.[5] The Harris government started down that path immediately after their election by commissioning a study to investigate how its policies could be carried out. The study came out, but public opinion turned against the planned restructuring and privatization, no doubt due in part to a public campaign against the proposals carried out by the PWU. Eventually, the government put off implementation of its privatization plans until its second term (after the 1999 election),[6] although it did split Ontario Hydro into four publicly owned companies bound to the PWU collective agreement effective April 1, 1999.[7]

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[4]The PWU also represented several hundred employees at the smaller local utilities, but Ontario Hydro employed the bulk of the workers in the industry. No expedited system exists for the smaller utilities, where the volume of grievances is low compared to Ontario Hydro and its successors.

[5]This agenda also included a major restructuring of the smaller local distribution companies (LDCs), in their case encouraging amalgamation and privatization, but that is an entirely different story and not of consequence here.

[6]After a court decision (Payne v. Ontario (Minister of Energy, Science and Technology) [2002] O.J. No. 1450 (S.C.J.)) holding that the legislature had not, as a matter of statutory interpretation, granted the government the authority to privatize Ontario Hydro, the government lost the will to carry out its privatization agenda, and the successors to Ontario Hydro continue to be owned by the Ontario government to this day. Hence, while the restructuring of Ontario Hydro took place, the privatization never did.

[7]*See* Electricity Act, 1998, S.O. 1998, c. 15. While the statutory demerger date was December 1, 1998, as far as labour relations matters were concerned it is the de facto demerger date that mattered: April 1, 2009. The first-generation Ontario Hydro successor companies are now called Ontario Power Generation, Hydro One, the Electrical Safety Authority, and the Independent Electricity System Operator. There are several second-generation successors to these companies as a result of further restructuring and sales of parts of the business since the initial Ontario Hydro demerger.

The government's restructuring plans, of course, put enormous pressure on the 1996 round of collective bargaining between Ontario Hydro and the PWU. Hydro came to the table demanding that the collective agreement, a book of several hundred pages in length, be stripped down to facilitate the government's plans. Needless to say, the PWU saw no reason why it should facilitate either the government's plans or Hydro's desires in this regard, particularly since the union's membership had already taken a big hit in terms of numbers, and the remaining members continued to generate huge cash revenue for the government by producing electricity at Hydro. The government, of course, knew it had a fight on its hands and appointed then-Justice Warren Winkler of the Ontario Superior Court (he is now Chief Justice of Ontario) to mediate the 1996 collective agreement.[8] The bargaining was, indeed, tough. Even with the highly skilled assistance of Justice Winkler, it took over a year of mediated bargaining to get a collective agreement signed. The changes to the collective agreement that resulted were evolutionary rather than revolutionary. More important for our purposes, a fundamental disagreement between the parties as to the term of agreement led to a compromise whereby, while the collective agreement ran from 1996–2000, there was a "reopener" clause that permitted the complete renegotiation of the agreement in 1998, with the assistance of a mediator and without the option of a strike. Justice Winkler, in consultation with the parties, appointed Martin Teplitsky, Q.C.,[9] to mediate that collective agreement.

One of the items on the bargaining agenda that Mr. Teplitsky had to deal with was reform of the grievance and arbitration system between the parties. At that point in time, there was a backlog of approximately 3000 grievances in the system. This number, in a bargaining unit of 14,000 members, is troubling enough on its face, but it is actually much worse once one considers how many cases the system was clearing in a year. The grievance and arbitration system in the collective agreement before the 1998 amend-

[8]This would be considered "bringing out the big guns." Prior to his appointment to the bench, Justice Winkler had been a top-tier management labour lawyer who enjoyed (and continues to enjoy) the highest regard of both the labour and management communities. He has successfully mediated some of the most complex and difficult labour disputes in Canada.

[9]Mr. Teplitsky's skill set as a mediator is, with all due respect, formidable. It is proof enough of this fact to note that he completed the mediation of the 1998 collective agreement in the span of five days, still a record between these parties. However, this is only one example of a record of similar achievements that spans decades.

ments contained a grievance process consisting of three steps of meetings at progressively higher levels between management and the union, followed by an arbitration process consisting of a full evidentiary hearing by a three-person arbitration board (a neutral chair, a union nominee, and a management nominee). This sort of system was common at the time in Ontario. What was less common was that the parties pre-booked arbitration dates a year in advance to minimize the delay caused by setting up ad hoc arbitration boards. However, even with this means of streamlining the process, the clearance rate was about 25 cases per year. That is, approximately 25 cases referred to arbitration were completed in some way within a calendar year. It is not difficult to do the math to figure out what the future held under the existing system: Assuming only half the extant grievances would actually ever get referred to arbitration, that the clearance rate continued at 25 per year, and that no grievance was ever filed again by the union, it would take 60 years to clear the backlog. This was hardly a satisfactory state of affairs, particularly when one considers that the oldest grievance in the system had been filed nine years before 1998 and had yet to be disposed of. Grievances are usually filed because there is a real dispute between the parties that has not been resolved on the plant floor. Behind a grievance usually lies some resentment and dissatisfaction. A grievance system that lets such disputes fester for years becomes an aggravating factor to the problem that led to the grievance, not a solution for it. Such a system has a negative impact on the character of labour relations and on the parties themselves—a resentful employee that cannot get a neutral review of her concern is not a productive employee, and an employer of an unproductive employee is not a happy employer. The system was broken and needed to be fixed and both Ontario Hydro and the PWU recognized it: There was agreement at the highest levels of both organizations that the backlog had to be eliminated.[10] The remaining question was how it would be done and how such a backlog could be prevented from recurring after it was cleared. Before we turn to this issue, however, it is

[10]Was the employer's desire to fix the problem merely an artefact of its desire to "clear the decks" to prepare itself for privatization? It is not for this author to say. However, whether that was part or all of the initial motivation is of little consequence. The fact is that both Ontario Hydro and its major successors have, as will be seen below, remained committed to an expedited system and have agreed to modify it so that it remains viable. Whatever their initial motivation, these employers clearly accept that an expedited system furthers the interests of the employer. None of them has sought to reinstitute the pre–1998 system.

important to review the purpose of a grievance arbitration system to understand why the expedited system established at Ontario Hydro makes sense.

2. The Purpose of Arbitration and the Principles of Expedited Arbitration

Nietzsche's aphorism about forgetting one's purpose is important not only because it reflects a common reality but also because the purpose of doing something is the critical determinant of how it should be done. If the purpose of tort law is to compensate victims, a strict liability system is the appropriate means of carrying out that purpose. If, on the other hand, the purpose of tort law is to punish negligent behavior on the part of the tortfeasor, a strict liability system would make no sense and would, in fact, be counterproductive—a fault-based system would be the appropriate means of carrying out the objective of the law. Hence, one can best judge the efficacy of a system by determining how well it carries out its purpose. What, then, is the purpose of an arbitration system for the parties that fund it?

We can start by pointing out what the purpose of the system is not. For the parties to it, we submit that the purpose of an arbitration system is not

1. to add arbitral case law to the published reports;
2. to have a union lawyer vigorously cross-examine a manager at a hearing, regardless of whether his or her grievance has any merit;
3. to have a management lawyer vigorously cross-examine a grievor, regardless of the fact that the grievor may actually have a point in the case.
4. to uphold the highest traditions of natural justice by allowing for oral evidence, representation by lawyers, and questioning of witnesses on all matters and in every case.

This may or may not appear to be obvious points to the reader, but it is important to view the matter from the perspective of the parties to the dispute (who, of course, are also the parties that bear the costs associated with the dispute and its resolution). As far as they are concerned, we would submit that the above points are almost trite.

Starting with point 1 above, a long, well-written, and scholarly award in a case is, in economic terms, largely a positive externality of an arbitration system. Getting a decision and a brief explanation of why the result was reached is, of course, critical to the parties. But everything beyond that—a detailed review and analysis of oral evidence led at the hearing and relevant case law—is of little incremental value to the parties, as opposed to lawyers, arbitrators, and other parties who look to the case reports for such analyses.

Regarding points 2 and 3, it sometimes happens that the relationship between the parties is so dysfunctional that one side or the other will refuse to resolve a dispute, knowing that its position is doomed to failure at a hearing. Maybe this happens for political reasons, or maybe some small solace is to be had by having a lawyer punish a witness that the lawyer's client dislikes by engaging in a tough cross-examination. It happens, but, in the long run, it is never a good thing for labor relations and is not a desirable outcome of a functional dispute resolution system. And yet, in a traditional arbitration system, there is very little control of this type of behavior—as long as the questioning is about arguably relevant matters, it goes on and on.

Regarding point 4 above, natural justice is important to lawyers, but we would submit that it is less so for the parties to a labour dispute. For the most part, what matters to them is getting a result that makes sense, rather than troubling with the finer points of procedure. It must never be forgotten that process is a means to achieve an end, not an end in itself. Hence, what is important is not the application of natural justice for the sake of applying it but the use of a sensible process for getting to a sensible decision. This leads us to the final point—no oral evidence for the sake of oral evidence.

This final point may seem odd to a law student taught the importance of the law of evidence or even to a more seasoned practitioner not familiar with a high volume grievance arbitration process.[11] However, we can assure the reader after more than a

[11]One English judge once described a courtroom full of the law of evidence as one that is "deadly dark and smells of cheese." The law of evidence, of course, is important because no matter how wise the laws, justice cannot be achieved if the adjudicator cannot get at the truth. The point is to apply the rules of evidence in a manner that facilitates the search for truth. Strict application of the law of evidence does not always assist in this search. More precisely, oral evidence, a very expensive and time-consuming means of getting at the facts, is, based on our experience, rarely necessary in a grievance arbitration setting.

decade of experience with a system where no oral evidence is the rule, that oral evidence is rarely actually needed and is often a hindrance to the expeditious resolution of a dispute. It is simply a fact that once the parties to the Hydro system started setting out their positions on the evidence in written briefs, it became evident that the number of cases where there was a dispute on a material fact in the case was near zero. There are lots of factual disputes between the parties, but very few of them actually matter to the resolution of the case at hand. As every lawyer knows, most lay persons have a vastly wider view of what facts matter to a case than does a lawyer, judge, or arbitrator. What matters is whether there is a dispute regarding a fact that matters to the decision maker's analysis so as to require the hearing of oral evidence, not whether the parties see eye to eye on every factual allegation. The former type of dispute is surprisingly rare. Even where material factual disputes arise, they can sometimes be resolved by some pointed questioning on the part of the arbitrator without having to resort to the hearing of sworn testimony. A properly structured arbitration system can apply these truths to save the parties time and money.

If none of the above matters form any part of the purpose of the system, what does? We would say that the purpose of an arbitration system is

1. to drive accountability for disputes down to the level of the people responsible for them—usually those on the plant floor;
2. to discourage disputes between the parties;
3. to resolve disputes that do arise between the parties in an expeditious manner.

The first point relates to the importance of making the real parties to the dispute (typically the supervisor on the company side and the steward on the union side) own that dispute and answer for it. Unless they realize that they must justify their positions, there is little incentive for them to act constructively to solve their problems. It becomes too easy for the union official responsible for filing a grievance (in the PWU, the Chief Steward) to file a grievance solely to placate an upset grievor, or for the company supervisor to refuse to resolve a meritorious dispute because she doesn't like the Chief Steward, or because she has a short-term budget issue, or for whatever other extraneous reason might be

present. Since this is the level where most disputes begin, this is the level where ownership of a dispute must reside.

The second issue relates to the incentives created by the system as a whole. A system that allows a backlog leading to grievances that can languish for years encourages disputes and thereby negatively impacts the quality of the relationship between the parties. Chief Stewards that file a grievance solely to placate a member have no disincentive to do so if they know that they can let it sit for years without having to "face the music." By the same token, managers who know that they're going to end up having to pay for a grievance have little incentive to settle up if they know that they can put it off to a future budget year and cut a deal at that time for something less than the total amount owing plus interest. Both sides have endless opportunities for delay in a system that has three grievance steps and an arbitration step that requires full-blown evidentiary hearings spread over months due to the availability of lawyers and the arbitration board. This brings us to the final point: expedition.

The maxim "labour relations delayed are labour relations defeated and denied"[12] is viewed (at least in Ontario) as a truism. As a rule to be abided by, however, it seems honoured more often in the breach than in the observance. At least that was the case at Ontario Hydro before 1998. It is a fact that delay has pernicious effects on labour relations —disputes become entrenched and can grow from minor irritants into major problems as one party begins to suspect that the other is deliberately delaying resolution of the matter. If an employee is out of work pending the completion of a hearing, delay can cause irreparable harm—financial collapse or even bankruptcy. By the same token, the longer the arbitration of a dismissal case takes, the greater the risk of the employer having to pay back wages to a reinstated employee for a period of time during which she contributed absolutely no labour to the enterprise. If delay is toxic, the proper purpose of an arbitration system is not only to resolve disputes but to do so *expeditiously.*

Delay can arise in many ways, both in the grievance process and after the grievance is referred to arbitration. Before the referral, parties can simply allow a grievance to languish. Once referred to

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[12] *See* Re Governing Council of the University of Toronto and Canadian Union of Educational Workers, Local 2 (1988) 52 D.L.R. (4th) 128 (Ont. H.C.J. Div. Ct.) at 139, quoting from an earlier decision of the Ontario Court of Appeal in Re Journal Publishing Co. of Ottawa Ltd. and Ottawa Newspaper Guild (unreported, dated March 31, 1977; summarized 1 A.C.W.S. 817).

a step in the grievance process, weeks or months may pass before the next step is scheduled, due in part to just finding a time when all the necessary participants are available to meet, but sometimes due to the lack of desire to push the matter along or the simple neglect of the matter. If there are three steps in the grievance process, the time delay associated with a step is tripled. Once the grievance is referred to arbitration, a date or dates must be found when not only all the relevant players on behalf of the parties are available but also when counsel and all members of the arbitration board are available. This is apart from the delay that is caused by parties bickering about whom to appoint to hear a case or, even where, as in the PWU/Ontario Hydro system, panels are preappointed by the parties, bickering about which case should be heard on which date by which panel. And then there is the delay at the hearing itself.

In Ontario, both the courts and the legislature have, over the years, given arbitrators a wide berth with respect to matters of both law and evidence. An arbitrator's decision will not be overturned by a court so long as it is reasonable[13] (a far happier standard for the arbitrator than that applied by reviewing courts to trial judges) and, while the courts do require arbitrators to adhere to the principles of "procedural fairness,"[14] this is a flexible standard to be viewed in a context where arbitrators have by statute very broad procedural powers, including the right to hear evidence that would be inadmissible in a court of law.[15] The intent of both the courts and the legislature is to recognize the expertise of arbitrators in labor relations matters and to allow them to resolve disputes without adhering strictly to the rules of procedure, law, or evidence. Yet, in conventional arbitration hearings, counsel persist in making preliminary motions challenging the arbitrator's authority to hear part or all of a case, sometimes insisting that the merits of the case be adjourned pending a ruling on the motion, and raising objections as to evidence, even though the result of the motion or objection is usually that the arbitrator reserves on ruling on either type of matter until the completion of the hearing. Delay can also be caused by one party refusing to provide full disclosure of relevant evidence in its possession, requiring an arbitrator to order production. While arbitrators in Ontario clearly

[13]Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

[14]Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670

[15]*See* Labour Relations Act, 1995 S.O. 1995, c. 1 , Schedule A, s. 48 (12), particularly subsection (f).

have the power to order production, even before the commencement of a hearing,[16] if this power is not exercised until the commencement of a hearing (perhaps because the counsel didn't get around to making the request until then), the usual result is that the start of the case proper is delayed until production is made and the receiving party has time to review the evidence.

It is important to understand (as we believe the PWU and Ontario Hydro came to understand before establishing their expedited system) that it is in the interest of *both* the employer and the union that a dispute resolution system drive accountabilities down, discourage unnecessary disputes, and resolve necessary disputes expeditiously. Neither side gains from having a workforce (meaning both managers and workers) that is demoralized and frustrated because grievances proliferate, only to be ignored or, worse still, deliberately delayed. People in such an environment get the sense that nobody cares about their issues, and that is hardly a motivator for them to work productively.

If delay and indifference are the problems, then expedition and accountability are the solutions. More specifically, based on our experience, an effective dispute resolution system should comprise at least the following elements:

1. A mechanism to ensure that speedy resolution of disputes occurs by default. That is, unlike most systems where a party actually has to take a step to move a grievance along in the process, an effective expedited arbitration system must, in our view, require that, once a grievance is filed, unless resolved, it automatically moves to the next step in the process if it is not resolved first. In this manner, there is no advantage to be gained by a union filing a frivolous grievance or an employer deliberately refusing to resolve a meritorious case, as both sides know that they will without delay end up at a hearing where they will have to justify their positions (and, implicitly, their conduct of the grievance).
2. A mechanism to ensure that the persons responsible for filing and responding to grievances are quickly held accountable for their decisions in that regard.

[16]Labour Relations Act, 1995 S.O. 1995, c. 1 , Schedule A, s. 48 (12)(b).

3. An expeditious means of resolving all procedural, scheduling, production, and other matters apart from the merits of a case *before* the hearing of the matter begins.
4. A hearing process that will resolve multiple cases in a day. This effectively means one requiring the parties to make full disclosure of the evidence and their respective positions on it in writing and well in advance of the start of the hearing. The calling of oral evidence will require the permission of the adjudicator and will be the exception, rather than the rule.

The process established by the PWU and Ontario Hydro in 1998 meets all of these criteria. The mechanisms the parties chose to meet them will now be reviewed.

3. The Ontario Hydro Expedited Grievance and Arbitration System

The broad outlines of the expedited system at Ontario Hydro were set out by Martin Teplitsky Q.C. as the mediator of the 1998 reopener to the 1996–2000 Ontario Hydro/PWU collective agreement. He did this in consultation with counsel to the two parties to the collective agreement.[17] At the same time, Mr. Teplitsky was appointed by the parties to be the Chief Arbitrator in the new system and he has remained such in all the successor collective agreements. In this sense, Mr. Teplitsky is both the initial proponent of this system and its ultimate overseer. His importance to the system cannot be overestimated (much of the efficiency in the system is attributable to the force of his character and the high regard that the parties have for his opinions), but, ultimately, the parties own it and the parties can make or break it. It is therefore critical to the success of the system that the parties continue to support it. After the break-up of Ontario Hydro, the system developed in different ways at the various successor companies, as will be detailed below. The point to be made, however, is that the initial system could and did get modified by the parties and the Chief Arbitrator to continue to serve the changing needs and different characters of the different workplaces governed by it. This is a testament to both the wisdom and the flexibility of the broad

[17]The author of this paper was counsel to the PWU, and John C. Murray, now a Justice of the Superior Court of Justice of Ontario, was counsel to Ontario Hydro.

outlines of the system and to the commitment of the parties to the system to keep it working effectively.

The initial system consisted of a two-phase expedited mechanism. The first phase was a system to clear the backlog; the second was a permanent expedited system, which is the system still in place at the Hydro successors, albeit in modified form.

The backlog clearance began with a massive "show hearing" where the Chief Arbitrator heard and disposed of dozens of cases on a single day before the assembled masses of representatives of the parties. Essentially, the point of the exercise was to show the parties that the heart of the backlog clearance system—the hearing of a large number of grievances on a single day—could and would work. The backlog clearance system consisted of three single arbitrators appointed by the Chief Arbitrator to hear backlogged cases at the rate of 15 per day of hearing before each arbitrator. While the appointments were made in consultation with the parties, it was a deliberate intention that the appointees should be adjudicators who had not arbitrated for the parties before. They would come at their task with a fresh approach and no baggage to carry with respect to past decisions between these parties. In fact, the three appointees, although seasoned adjudicators, had relatively little experience in labor arbitration compared to the arbitrators that had been hearing cases under the old system.[18] Again, this was to ensure a new and different approach to decision making was applied. The backlog arbitrators were to issue bottom-line decisions (usually a couple of sentences for each case) based on written briefs filed by the parties and oral argument that, on the union side at least, was presented by nonlawyer union staff. Given the stripped down procedure and the lack of reasons for decision in these cases, the bottom-line decisions were explicitly not precedent setting.

If the reader thinks this is a "shock and awe" way of resolving disputes, and that this really is how one takes a "walk on the wild side" in an arbitration system, she may rest assured that it seemed even more so to the parties themselves. Contrast this system with the way that cases between these parties had been heard before the backlog clearance: Cases were heard by a tripartite panel and consisted of full opening statements followed by, usually, several live witnesses testifying under oath and being cross-examined.

[18]For this reason, all decisions of the backlog arbitrators were subject to approval by the Chief Arbitrator, a seasoned veteran labour mediator/arbitrator.

The parties often called oral evidence of what transpired in collective bargaining when a dispute involved the interpretation of a collective agreement provision.[19] Evidence and argument typically took six days of hearing spread out over many calendar months. Hearing days would start at 10:00 AM and end by about 4:30, with a 90-minute lunch break and a break before and after every examination in chief and cross-examination of every witness. Moving from that pace to arguing 10 to 15 grievances a day, for these parties, was like moving from a rural estate to lower Manhattan.[20] There was real culture shock and the parties had to make what were sometimes difficult adjustments to their modus vivendi. Happily, however, the parties did an admirable job of adjusting. The cases got done and the backlog of 3000 cases (including those cases that were older than some of the children of the representatives of the parties) was essentially cleared within six months.

Lessons drawn from the backlog clearance process which were then applied to the permanent expedited process included the following:

1. A skilled adjudicator really can hear and decide several cases in a day, so long as written briefs setting out the facts and the positions of the parties are provided in advance of the hearing and mechanisms are in place to ensure that preliminary matters are dealt with expeditiously.
2. Grievors and managers really don't care much about the procedural niceties that sometimes enrapture the legal profession. There were very few complaints from anyone about the process, compared to the relief frequently expressed by many that festering disputes were finally being resolved.
3. There was no palpable difference in the quality of the results in these cases. The bottom-line decisions made sense

[19]Such evidence of bargaining was almost always of no use to the arbitration board. There was almost never compelling evidence of a shared understanding of the intent of a provision for the simple reason that, where such discussions were actually held and understood the same way by both sides there was no need to file a grievance on the issue—the parties had a clear understanding. Usually, the evidence of bargaining amounted to what one party thought or said, without any acknowledgement from the other side that it agreed with the first party's views.

[20]Hence the reference in the title of this paper to the Lou Reed song chronicling life in certain quarters of that part of the world. On a perhaps more lurid level, one could view Holly's transformation from a "she" to a "he" in the opening verse of the song as a metaphor for the radical transformation of the arbitration system chronicled in this paper. Even the title of the album on which the song first appeared ("Transformer") is an apt description of the systemic change described in this paper.

at about the same rate that the previous full-blown reasons did, which was a very high rate indeed. The settlements of grievances made sense in the same way that they had in the past. There were just a lot more of them. While there was an increase in the number of duty of fair representation complaints filed against the PWU at the Ontario Labour Relations Board by grievors, when viewed in the context of the rate of cases being cleared, this was no increase at all. Apart from one such case that was settled, the rest were either withdrawn by the complainant or dismissed by the Board.

4. When the parties are forced to "face the music" by having a dispute put on the fast track to a hearing, they seem to see the benefit of settlement in a way they never have before. A large number, if not most, of the grievances scheduled for hearing in the backlog process were settled or withdrawn once the parties were forced to turn their minds to the merits.
5. Formal evidence (by sworn testimony) is almost never necessary. Once the parties started putting their positions down on paper in a brief they exchanged with each other, they began to realize that, on the material facts, there was usually no significant dispute between them. If there was, it could usually be cleared up by means of an interventionist arbitrator asking a few pointed questions.

The 1998 collective agreement implemented a permanent system of expedited arbitration to deal with grievances after the backlog had been cleared. This second phase of change was only moderately less radical than the first phase. The permanent expedited system comprised the following elements (correlated below to the list of necessary elements of an expedited system proposed at the end of Section 2 of this paper):

1. Grievances would have a first step meeting in the workplace between the grievor and his/her union representative on one side and the contact supervisor on the other. If not resolved at that point the grievance would proceed immediately to the next scheduled Grievance Review Board (GRB) hearing. If not resolved at the GRB, a grievance would proceed to the next scheduled arbitration day. Hence, a

grievance process consisting of three steps at the leisure of the parties became one consisting of a single step before mandatory joint review of the grievance. A grievance not resolved by that process would go directly to arbitration. This put into place a process where "speedy resolution of cases occurs by default," the first element of an effective system set out above.

2. The mechanism put in place to ensure that the persons responsible for filing and responding to grievances are quickly held accountable for their decisions in that regard was the Grievance Review Board. The GRB consists of four members, two union officials and two management representatives, who sit and review each grievance in an informal meeting to decide whether it should be dismissed, referred to arbitration, or settled. The Chief Steward that filed the grievance and the responding manager or Human Resources representative prepare written briefs and try to convince their peers of the justice of their positions in a GRB meeting. The GRB acts on the basis of consensus, but despite this it often dismisses unmeritorious grievances and imposes settlements of meritorious ones. There is nothing quite like having your peers dismiss a grievance, or impose a settlement of it, to make a Chief Steward or manager think carefully about the position she takes the next time around.
3. The Chief Arbitrator became and continues to be the "expeditious means of resolving all procedural, scheduling, production and other matters apart from the merits of a case before the hearing of the matter." The Chief Arbitrator is available by telephone hearing on very short notice[21] and has disposed of matters ranging from scheduling disputes to interim relief requests by telephone conference.
4. The "hearing process that will typically resolve multiple cases in a day" chosen for the permanent process continues to consist of oral argument based on written briefs exchanged by the parties and given to the arbitrator several days in advance of the hearing. Typically, anywhere between two

[21] Usually, the notice is a matter of a couple of days, but in one recent case the Chief Arbitrator himself sent an e-mail notice to counsel of a conference call to resolve an issue about 35 minutes before the start of the call. Everyone called in on time.

and five cases are heard in an arbitration day. The awards contain brief reasons and are precedent setting.

This last element, the oral hearing based on written briefs, merits further comment. First of all, the briefs in this system initially were written, at least on the union side, by nonlawyers. While lawyers have been increasingly involved in authoring the union's briefs for arbitration (though not the earlier versions of the briefs used at the GRB), this is largely a matter of insufficient brief-writing resources within the union. The resource issue is currently being dealt with so as to have more of the briefs written internally. While lawyers continue to argue the cases in the permanent expedited system, they were not involved at all on the union side in the backlog clearance process.

The briefs in the backlog clearance process were documents generally bereft of both literary merit and legal artifice. The briefs in the permanent system (some of which are written by lawyers) are more professional, but are short (usually a few pages) and rarely refer to case law. They are focused on facts and collective agreement provisions). And yet both processes worked, and worked well (a humbling fact for any lawyer who thinks only the members of her profession can properly write an argument in a labour case). The permanent process continues to work well. Why is this so? To the mind of this author, at least, because, given the relevant facts and collective agreement provisions set out in writing together with the positions of the parties, an experienced arbitrator can, with the assistance of counsel's oral argument, usually figure out the right result in an arbitration case without need of anything else. The truth is that both arbitrators and lawyers that have sufficient experience in the practice of labour law can get to the bottom line, if they have the will to do so, in pretty short order once the relevant facts and collective agreement provisions are identified. This is not true in every case—there will always be cases that are so important or complex or bogged down in credibility disputes on important issues that a terse brief followed by a short oral hearing will just not suffice. And yet, experience between these parties has shown that such cases are relatively rare.[22] The run of the mill promotion or discipline case can usually get sorted

[22]Dismissal cases and policy grievances (those affecting the entire bargaining unit), by agreement of the parties, were referred directly to mediation or arbitration rather than the GRB. Dismissal cases were not likely to be settled at the local level and policy grievance by their very nature were not matters that could be dealt with at a local GRB.

out in short order and, under this system, it did and still does. In fact, one of the prime lessons of life under this system is that the vast majority of the evidence the parties used to lead in days of oral hearings was utterly useless to the decision maker.[23]

The skill and ability of the arbitrator running the hearing is, of course, critical to its success. In the context of an expedited arbitration system a special skill set is required of both counsel and the arbitrator. Counsel must be prepared to do a lot more work in preparation for the hearing than they would in a conventional system. It takes a lot of time to pare down an argument so that it can be set out in a few minutes. This is apart from the fact that several cases (as opposed to a portion of one case) are heard each day. Of course, arbitrators have to review multiple sets of briefs before the hearing (as opposed to reading little more than a grievance form prior to the start of a conventional hearing). The peculiar skill required of an arbitrator in this system, however, is the force of character to intervene—ask the hard questions and, sometimes, to be painfully blunt in order to get to the bottom of a dispute. The parties know that they are taking a "walk on the wild side" when an arbitrator starts a hearing by turning to the representative of one of the parties and saying, "Neil, I read your brief last night and there is no word in the dictionary to describe how stupid your position in this case is."[24] While this might not have shortened Neil's presentation much, the other side didn't have to say a word and as a result the hearing was therefore shortened by at least half. This is just one instance of an ever-lengthening list of anecdotes about the interventionist zeal of the arbitrators and mediators that hear cases under the expedited system. While the list is too long to dwell upon here, the reader should not make

[23]This became evident to the author for reasons having nothing to do with the expedited system. In one conventional case, the arbitrator wrote a lengthy and learned decision after a very long hearing without having the benefit of *any* of the several binders of documentary evidence filed by the parties—which the arbitrator had left in the author's office for safekeeping and had not picked up until after the issuance of the award. In two other cases, an arbitrator had mistakenly issued a decision in a case that the parties had settled before the completion of the evidentiary hearing. In none of these cases was the award deficient in any way. All the arbitrators were seasoned top-tier adjudicators. Counsel should think of this the next time they consider how much evidence they really need to lead in a case. Of course, having a decision rendered in a settled case caused some consternation between the parties, but that is another matter.

[24]We suspect that many adjudicators of all ilks have secretly longed to experience the feeling of exhilaration and release that the arbitrator in that case must have felt after making that comment. For our part, we have often wished we had a video of this moment to show to the course in Constitutional Litigation he teaches. As an object lesson in the importance of counsel asking herself the hard questions before committing to a position in writing, it would be hard to beat.

the mistake of thinking that episodes such as the one above (or the many more like it) are resented by the parties. Any organization the size of Ontario Hydro, its successors, or the PWU itself contains within it (like a Sergio Leone film), the good, the bad, and the ugly. The parties generally have enough objectivity to realize that and, at least as far as this author can tell, appreciate an arbitrator who tells it like it is. Whatever is lost in decorum is more than made up for in expedition. As indicated above, experience has shown that the parties are far more interested in getting a result than the niceties of the means used to get to the result.

The other point that must be made regarding the arbitrators involved in this system is that this is not a game for "rookies." The system demands of its participants a level of skill and ability that is not common. The primary skill of any adjudicator (from the lowest level of an administrative adjudicator to the chief justice of the highest court in the land) is something that cannot be taught and must be learned: wisdom. It is the ability to come to a just result for the parties based on an understanding of human relationships that can only come from experience and careful deliberation about what a particular result will mean to the parties. Ontario Hydro and the PWU both assiduously ensured that the arbitrators adjudicating their cases in the old system were among the best in the province and this did not change with the introduction of an expedited arbitration system. Again, the lawyers presenting these cases were and remain experienced labor specialists upon whom the parties relied to approach their task on the basis of maintaining the best long-term interests of their clients at heart. This is not as simple as it may sound, as the long-term interest of a client may diverge from the immediate interest at play in any specific case. The fact that the group of lawyers involved on both sides of this system has remained relatively stable over the years is proof of their abilities and their clients' continued faith in them.

Moreover, both the arbitrators and the lawyers participating in the new system rose to the challenge of dealing with multiple cases in a day. For the arbitrators this involved writing decisions in an environment where oral evidence was generally not available. And yet, the written decisions remain at a high level of quality (and wisdom) and give the necessary guidance to the parties in a distilled (often terse) format. Highly skilled arbitrators can and do produce reasons that guide the parties and explain to them why the ultimate result in the case makes sense in the circumstances. One of the lessons learned from this system is that, stripped of

the need to explain things to the general public on the basis of an increasing body of case law, an experienced arbitrator can explain the justice of her decision to the parties in a compelling manner. This requires skill and experience, but it has certainly worked for the parties thanks to the efforts of the experience and skill and, finally, the wisdom of the arbitrators and mediators working within this system.

While the expedited system makes special and at times arduous demands of all of the participants, most, if not all, of them (arbitrators, lawyers, parties) have risen well to the challenge of this brave new world, and there are real benefits for them all: The amount of tedium at the hearings (and there was a lot of that in the conventional system) has been reduced to near zero, and, while the days are busy, they often end long before the afternoon is over.

The permanent expedited system has not, however, remained static. As indicated above, Ontario Hydro was deconstructed by the Ontario government. As a result, the system had to evolve over time as different parties at increasingly disparate workplaces made different demands of it. We now turn to a description of the principal successor systems.

4. Variation and Consistency: The Expedited Systems at the Hydro Successor Companies

The Ontario Hydro expedited system has been adapted by the parties at various successor workplaces. The larger systems and their current rules are as follows.

At one successor (which we will refer to as Company A), the parties continue to conduct GRB hearings, but virtually every grievance that comes out of the GRB goes to mediation rather than arbitration. The vast majority of cases that go to mediation are resolved there. The mediations are conducted with lawyers, but without briefs, evidence, or prejudice to the parties. The relationship between the parties, at least at the level of their representatives at the mediations, is constructive enough to make this process work. Several cases are mediated on each day, and often simultaneously. Again, the skills of the mediator and counsel are critical to the success of the process. Few cases are referred to arbitration in part because the lawyers and the mediators involved in the mediation are very good at what they do. The few cases that are referred to arbitration and that require an evidentiary hearing

have in the past been heard in a conventional "full-blown" process, but the union has recently revised its position in this regard to require the parties to agree to rules to assist in the expedition of such cases, failing which they will be referred to the Chief Arbitrator to assist the parties in expediting the evidentiary hearing. While this is the result of some recent dissatisfaction with the conventional process in this workplace,[25] such conventional cases are exceedingly rare and the system as a whole continues to run quite effectively.

At Company B, after the enterprise was taken over by new owners, the GRB process eventually became completely dysfunctional. GRB meetings were either not being held or, when they were, they were not resolving the cases before them. The Chief Arbitrator stepped in and convinced the parties to implement a "Monthly Review" system. That is, all extant grievances are put before the Chief Arbitrator for review on a pre-set date each month. The review ranges from a form of triage, to a means of cajoling parties into settlement, to a vehicle to dismiss a grievance or issue an order disposing of it. The Chief Arbitrator does this on the basis of a very short summary of each case submitted in writing prior to the hearing by each party, together with a typically very short oral representation by counsel. The monthly list usually comprises between 20 and 40 cases.[26] The few cases that end up having to go to arbitration are normally arbitrated by the Chief Arbitrator on the date of the next Monthly Review, after the completion of the Review for that month. Evidentiary hearings are conducted by means of each party filing a brief and "will say" statements setting out the evidence in chief of each witness. The witnesses are made available for cross-examination at the arbitration hearing, but because the evidence in chief has been previously submitted in writing, multiple evidentiary arbitrations are often conducted in far less than a full day of hearing.

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[25]Recently, on the first day of the hearing proper in one such conventional case, counsel for the employer reportedly spoke for 4½ hours and failed to complete his opening statement before the day ended. This brings back the worst memories of the pre–1998 system. One is tempted to ask whose interests such conduct serves. It cannot be those of the employer, which is not only paying for this display but is also running the risk that the arbitrator may conclude that the length of the opening suggests that the employer "doth protest too much" and has something to hide in a case where the union is alleging that the employer refused to hire two union members because of their age, a violation of both the collective agreement and human rights legislation.

[26]The first Monthly Review list consisted of 48 cases. As the process (and the Chief Arbitrator) has educated the parties, the numbers have dropped.

At Company C, the GRB process is usually quite successful, regularly clearing more than 80 percent of cases referred to it.[27] The few that get past the GRB are now sent to an Arbitration Day before the Chief Arbitrator. The parties themselves proposed this process to the Chief Arbitrator after cases not resolved at the GRB started turning into multiday traditional hearings.[28] The Arbitration Day is not a Monthly Review but a day on which the Chief Arbitrator arbitrates cases on the basis of briefs exchanged and filed in advance by the parties. If he decides that oral evidence is needed, the Chief Arbitrator will typically send the case for an evidentiary hearing at the next scheduled Arbitration Day to allow the parties to prepare their witnesses.

The monolithic process established in 1998 has therefore evolved to suit the changing needs of the union and the different employers that inherited it. Note, however, that the basic elements of the system are still in place: Speedy resolution still occurs by default, accountability is still driven down to the "owners" of the grievance,[29] the Chief Arbitrator still deals with procedural issues and interim matters by phone when necessary, and arbitrations generally take place on the basis of briefs without oral evidence—at the rate of multiple hearings each day. These systems continue to clear a high volume of grievances effectively: Grievances are still typically going from filing to complete disposition by settlement or arbitration in a matter of several weeks, instead of months or years.[30]

Resilience and adaptability are salutary qualities of any system, and the fact that this one has survived and been successfully modified to suit different workplace realities suggests that it may be of use to parties other than those currently bound by it.

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[27]This was not always the case. Over the years, there were two instances where, for various reasons, the GRB success rate dropped significantly. In both instances the process was corrected, the first time by the intervention of the Chief Arbitrator, the second time by means of top-level officials of the parties sitting on the GRBs to model effective conduct of the process. As indicated above, the corrective measures were successful.

[28]Not surprisingly, the parties had rather different views as to how this problem came about, but for our purposes the reasons for the problem matter far less than the fact that it was rectified.

[29]At Company B this occurs by the Chief Steward and accountable manager for each grievance appearing with counsel before the Chief Arbitrator each month, rather than before a GRB, but the result is the same. The owners of the grievance (the officials responsible for filing and responding to the grievance) must answer for it.

[30]To give the reader a sense of the volume, in 2008, the PWU booked 189 hearing dates for 977 grievances. In 2009, it booked 216 hearing days for 703 grievances. Almost all of these were in respect of the Ontario Hydro successor companies.

5. Conclusion

About 12 years have passed since the establishment of the expedited arbitration system by the PWU and Ontario Hydro. The employer itself has been cut up into smaller pieces, while the PWU continues as a unified entity, albeit now representing members across increasingly disparate workplaces that were originally part of the 1998 Hydro workplace. The electricity industry that is the milieu of the PWU, its members, and their employers have undergone dramatic changes including not only the demerger of Ontario Hydro but also the consolidation of local distribution companies and the change of government policy from the promotion of deregulation, restructuring, and privatization to the promotion of green power alternatives and the shutdown of coal-fired generating plants. Through all of this, though, the parties have maintained an expedited arbitration system, now modified in different areas to suit local needs, but still true to its guiding principles.

In the end, this must be because the parties themselves find value in the expedited system. From the perspective of this author, labour relations have improved for all the participants in the system (employers, employees, and the union) as a result of their participation in it. There are now typically about 500 extant grievances in respect of the group of employees for whom there was a 3000 grievance backlog in 1998. Grievances that used to take years to clear now get resolved in a matter of weeks from date of filing.

While the system has adapted to the needs of the parties, the conduct of the parties themselves has adapted to the system and, as a result, the character of their relationship has improved. Grievances are no longer ignored or interminably delayed. The parties conduct themselves in the knowledge that if they don't deal with their own problems quickly, somebody else will impose a resolution on them. At the level of the plant floor, all the players know that they will be forced to defend their position before their peers or the Chief Arbitrator. Under this system, "you can run, but you can't hide," and this has diminished dramatically the number of silly grievances and silly management responses to grievances in comparison to the pre–1998 era. Moreover, the Chief Arbitrator, in both the Monthly Review and the Monthly Arbitration hearings, makes a point of offering suggestions to the parties before him as to how to improve the conduct of labour relations. Innovative means of resolving disputes have been the result. The result

of all of this is that the parties have gotten better at resolving their problems themselves. In these ways and in this context, Aristotle's suggestion that regular practice affects the character of the practitioner has been proved to have merit.

Because there are vastly more grievances being cleared than there used to be, the system as a whole is more expensive to run than it used to be.[31] However, on a per case basis, there is no comparison between the pre- and post-1998 systems on the basis of either cost or efficiency. Consider that the typical arbitration hearing under the pre-1998 system took six days of hearing, whereas the typical day of arbitration or mediation now disposes of anywhere between two and five cases. Even at two cases a day, there has been a 1200 percent increase in efficiency, which is an impressive number by any standard.

While no system is perfect, and none can succeed when the participants are incompetent or malevolent, the expedited arbitration process described in this paper has worked and, with some modifications, worked remarkably well over the dozen or so years since its establishment. Over that period of time, the parties have proved that results do matter more than process, evidentiary hearings are rarely a necessary expense, and that people of good will can resolve their disputes both expeditiously and in a manner that enhances their working relationship. They have done this by supporting and participating in a dispute resolution process that drives accountability to the owners of the dispute, discourages unnecessary disputes, and resolves necessary disputes expeditiously. As long as the parties continue to do so, they will be furthering the purposes of the system established in 1998 and will so avoid committing what Nietzsche called the most common stupidity.

[31]The parties did implement certain cost-saving measures to offset the increased global cost. For example, tripartite panels were replaced by single arbitrators and hearings are no longer held in hearing space rented on an ad hoc basis. Instead, hearings are conducted at the Union's offices—at far lower cost than the professional space used in the pre-1998 system.