III. "ARBITRAL INITIATIVES": A BRIEF OVERVIEW

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Surely, almost every arbitrator exercises some kind of "arbitral initiative" at some point in almost every case we hear. We may, for the most part, seem "passive." But inevitably, unavoidably, circumstances drive us to act on our own motion and intervene in the proceeding.

Let me cite some common examples of that behavior. Who among us has not asked the parties, *in advance of the hearing,* to provide certain case information? I refer, of course, to a copy of the collective bargaining agreement (CBA), the grievance, and the employer's written answers to the grievance. Nothing in the CBA ordinarily requires that the parties disclose such information before the hearing day. The reason for this request is obvious. The more I know about the case—and the sooner I know it—the better prepared I am at the onset of the hearing. I can think of only one instance in several thousand such requests where one of the parties objected to producing such information.

And, *at the hearing* itself, who among us has not been confronted by a situation where one or both parties provide too much information and unnecessarily burden the record? Either the testimony is repetitive, the cross-examination is excessive, or the evidence itself is irrelevant to the issue. However patient you normally are, at some point, the need arises to make the hearing process more orderly, more purposeful. My experience tells me that such an intervention is usually welcome.

Again, *at the hearing,* who among us has not requested clarification of some statement of a witness or some argument by an advocate? The clarification may take many forms, small or large. But the information you seek may be critical to a full understanding of the dispute.

Again, *at the hearing,* who among us has not attempted to mediate? Some disputes cry out for rational compromise. Whether you simply suggest a basis for settlement or play a larger role in helping the parties explore a basis for settlement, such behavior seems

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perfectly appropriate. Indeed, the Code of Professional Responsibility expressly permits such behavior, provided only that you advise the parties in advance of such mediation and they "readily agree."

One final example. *At the hearing,* who among us has not had occasion to request that the parties file posthearing briefs even though they are prepared to conclude with final arguments at the hearing? That may not happen very often, but there is on occasion good reason for such a request.

Most of these "initiatives" seem commonplace and should not trouble us. The problems are likely to occur when we receive too little information. Even here a request for "additional evidence, either at the hearing or by subsequent filing," is expressly contemplated by the Code of Professional Responsibility. However, when we take a further step and ask for truly new information or ask one party or the other to produce a missing witness, we sometimes go too far. So long as this "initiative" remains within the theories of the case as propounded by the parties, we are on safe ground. When you go further, the danger is that you will open up new lines of argument and change the nature of the dispute in some small but critical way. Before choosing such a course, you should be reasonably certain of the significance of what you seek and probably check with the parties' advocates about whether they have any objection to your proposed inquiry. Moreover, any such initiative should probably be withheld until you have heard the full presentation of the parties.

After the hearing, after the posthearing briefs have been submitted, there are very few occasions for "initiatives." But even at that late stage of the process, it is possible for an arbitrator to see new realistic opportunities for settlement. To pursue such an idea with the parties would simply be an extension of the mediation "initiative" mentioned earlier.

There is still another special situation I dealt with at last year's Annual Meeting. Assume a complex and significant contract interpretation case in which you discover, in analyzing the dispute, that there are several reasonable rationales for the result you have chosen. You understandably wish to minimize the impact of the award on the parties, but you cannot be sure of what the impact of such rationale might be. In such rarified circumstances, it seems perfectly sensible to seek such "impact" information from the parties so long as they understand that your ruling, grievance granted or denied, will not change. However necessary this "initiative"

seemed to me, it was not shared by the union and management lawyers who commented on my paper.

To summarize, even though arbitration is essentially a conservative institution and even though arbitrators tend to be conservative in their approach to "initiatives," there are always circumstances in which we ought to take independent steps to ensure a sensible and efficient hearing and to ensure we have the information we need to reach a sound and sensible decision. Wherever we are on the "active–passive" spectrum of arbitral behavior, we must be sensitive to the occasional need for some "arbitral initiative." A balance between the "search for truth" and a healthy self-restraint is probably where most arbitrators live, although we may not always recognize it.

In any event, "arbitral initiatives" are a good example of the ever-changing landscape or arbitration, one of the many reasons why our work is so challenging and satisfying.

IV. The Arbitrator as Grievance Mediator in Canada: A Growing Trend

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The world of labor arbitration is constantly changing. In the earliest days of arbitration, in the post-war era, boards of arbitration were generally tripartite tribunals, with a neutral chairman and two nominees representing the respective parties. Resort to single arbitrators was the exception. By the 1980s and 1990s the situation had reversed itself, with tripartite labor arbitration boards being the exception, largely restricted to public sector employers and unions. The emergence of the single arbitrator brought measureable reductions in hearing days, hearing time, and the time it takes for an award to issue.[1]

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[1] *See generally* Picher, M. G., and E. E. Mole, *The Problem of Delay at Arbitration: Myth and Reality*, Labour Arbitration Yearbook, 1993, Vol. IV, Kaplan, Sack and Gunderson, eds. (Toronto, 1993).