parties will agree to. For, if they will not, or they cannot, there is no escaping the finality of an arbitation award or a public fact-finding recommendation. There is no ratification by either party. In short, the parties need to enter the process with their eyes, and, as noted, their hearts, open.

This is hard to do for adversaries, even for adversaries who might normally get along. No party wants to give up any power it has, or thinks it has. In labor relations, med-arb is for those situations where economic power to force an agreement does not exist, such as mandatory arbitration, a grievance bound for arbitration, or, to a lesser degree, issues going to mandatory fact-finding. Med-arb is also voluntarily available in those occasional intractable instances where strikes, lockouts, or other economic pressures are either mutually inappropriate, impractical, or seemingly hopelessly stalemated. For med-arb, in the proper hands, still offers the parties the best way to reach a result that the parties could not reach themselves. It can reach the result they would have reached had they been able to do so.

II. Panel Discussion

Moderator: **Jack Clarke,** National Academy of Arbitrators, Montgomery, AL

Panelists: **Christopher James Albertyn,** National Academy of Arbitrators, Toronto, ON

John Kagel, National Academy of Arbitrators, Palo Alto, CA

Kathy Peters, FMCS Canada, Vancouver, BC

Homer Larue: Kathy, you say the grievant is usually not in the grievance mediation. What's the risk of both the union and the employer viewing the grievant as a bad actor and saying, we've got to get rid of him? There's not really an adversarial relationship going on with regard to this person. Is there a risk and do you handle that?

Kathy Peters: There could be. It doesn't happen often, but it has occurred. Often it's that the union is in front of us for political reasons. The case is a loser. Everyone knows it. Don't need to pay an arbitrator $5,000 a day to be told that it's a loser.

So, the union is possibly facing failure of fair representation charges in front of our Canada Industrial Relations Board. So,

I'm not saying we're being used, but it can be a political decision to participate, have the grievor be of the view that every effort is being made. The government is involved. My union has done everything in their power to resolve this matter. I'm aware that there is a possibility of that happening. We have managed, though, even in light of those things to resolve matters satisfactory. Once you bring the parties together and they are speaking openly and candidly, we have had some good outcomes. But, certainly, it's something that we are aware of.

Jack Clarke: Kathy, does the grievor/grievant—we have different terms for the same thing—does he/she tend not to be present even at terminations?

Kathy Peters: We don't do a lot of terminations. Even as a former Teamster, that isn't generally something where I would seek mediation. You just need a binding decision and let's just get there quickly. So, we don't do a lot of terminations. It's mainly any other type of grievance.

Jack Clarke: The gist of the comment was, appearing as an arbitrator, he was asked to mediate, and he agreed: "I will do so on one condition. That is, if I feel uncomfortable at the end, I may withdraw."

Christopher Albertyn: I think that's a very correct precaution. It's so common that people are doing this—I think a lot is taken for granted. Periodically you would come in with a counselor. You're familiar with the counsel and I'm familiar with you. So, they feel comfortable. But, the people there haven't ever done it before. You might explain that it's all confidential, that's exactly a point you might make, that if this case doesn't resolve, maybe I continue to hear it or maybe I don't continue to hear it. But I think that's right. I think that's very necessary especially with parties that one hasn't worked with.

John Kagel: I've had situations where we've actually gone through and presented the evidence and then done the mediation, when it was complicated enough and they wanted to do it with various expert witnesses and so on. So, to educate me as the neutral as to what the case was about, and then I could go in and mediate. So that might be done. It can be done partially on some issues and then not on others.

If you don't get it, then you're going to have to have a record anyway if the mediation was unsuccessful, so maybe you have to go through it again. Sometimes you can truncate it because you know generally what is going to be presented. Now and then you might

have a formal record of what the evidence is to make the decision. This might be important in the public sector, where maybe a statute lays out criteria that you're supposed to respond to in your award. You may also have wing people doing that, representing one side or the other, also, with whom you're ultimately going to be doing some final mediation to come up with the award. So that, ultimately, you're going to get the information that you need one way or the other before a decision is made if, in fact, you've got to get that far.

Jack Clarke: There are variations in the med-arb theme. One of which is to hear all the evidence as an arbitrator, put the decision in a blank envelope, and then proceed to mediate.

Audience Member: I always insist that the parties execute a written agreement that confirms exactly what the ground rules are of the process. Confirms everyone to read it in the event that there are communications that might otherwise be ethically questionable or precluded, and make very clear what happens in the event that the dispute was not resolved. Also, it includes an escape valve, which fortunately I've never had to use.

Ira Jaffe: A comment, not a question. The gist of which is, that if he is doing an arbitration and moving into mediation, he gets a full, complete agreement in terms of what the possibilities are. A little bit of CYA.

Christopher Albertyn: A slightly different point, which is that the parties in a med-arb can also agree on a variation of the process. I mean, I had a case where we spent a lot of time developing the process where there is division within the workforce. A lot of racial strife between them, a lot of harassment complaints, a lot of discrimination complaints—it was a poisoned work environment.

People had a very bad experience because what had happened was some anonymous person was writing incredibly racist letters to individual employees within the jail. It had had a very traumatic effect—threatening to kill them, threatening to kill the families, and so on. So, what we agreed on among a series of processes—one of the processes was that the individuals could come forward and just tell their story without, with a relatively small number of people in the hearing, and no cross-examination at all. It was a very helpful process for everybody. We all listened. It was quite emotional. I said, thank you for coming. We really appreciate your coming forward and so on. There was no record of it, obviously. That formed the basis of the mediation of their damages claims against the Ministry for not providing a harassment-free

workplace. That worked incredibly well. That's a process that was developed as a med-arb.

Jack Clarke: It strikes me, Chris, that it's an example of the malleability of both processes: arbitration and mediation.

Christopher Albertyn: Yeah.

Jack Clarke: Be creative.

John Sands: In a situation where a testosterone-driven plaintiff who was insisting on $450,000. There was 250 on the table. He wasn't going to get the 450. What I had him do was call his wife. Spoke to his wife. Yes, dear. Yes, dear. Yes, dear. Settle it.

John Kagel: That reminds me of the case where I got my only fan letter, where I upheld a discharge and the grievant wrote back and said, thank God, I really hated that job.

Homer Larue: Does the panel see a distinction between settlement conferences and mediation? And, do you see yourselves doing one or the other or some kind of combination of the two?

Kathy Peters: I do both. We discuss settlements and we resolve virtually all of the grievances brought to us. Acting strictly as a mediator and that describes the nature of what we do.

John Kagel: Well, I'm not necessarily clear on the distinction. You're talking about some sort of formal judicial settlement conference where there's a settlement judge. Then the case either settles or goes on. We're talking about where you would have both roles essentially, if necessary.

Jack Clarke: When corporations are bought out by somebody else, there's apt to be a previous commitment to mediation that may go by the boards.

Christopher Albertyn: I think one of the causes why arbitration has become so much med-arb in Ontario is that when our Tory government was in power in 1995, they changed the labour legislation and they reduced government expenditure. Part of the government expenditure reduction was to eliminate the very group of people, the grievance mediators that Kathy represents at the federal level. So, provincially, that was the end of the service. I wonder to what extent this change in process is a function of the fact that they were accustomed to having it available, and that it was just transferred into the arbitration process. It seems to me that was a consequence. It may be that when that's removed, the option of arbitration becomes more available.

John Kagel: You also have a dynamic I think that's going on now in addition to the power problem of within a corporation or within a union. It can certainly be the political process of a

union as well. You've got a change in the bar. I think that there used to be a nice, cozy group of labor and management lawyers who would get along, got along and worked out well. Now, I see a dynamic where not only are there younger lawyers who really have not as much labor relations experience as they have court experience in discrimination cases and employment cases as they are used to litigation. In addition, you've got fierce competition among firms. You'll have clients who might even have two or three firms representing them at different times to sort of play off one over the other in terms of fees. Then you've got the law firms who would like to bill by the hour. This has caused, I think, some diminishment of being willing to mediate at least more than on an ad hoc basis, because people are, frankly, afraid to make a decision. Let the arbitrator make the decision, let it rest on his or her head. It wasn't because I did a lousy job. It was the arbitrator who just blew it. So, you're not having a kind of environment—at least at the moment—I think that is lending itself to these more innovative tasks of trying to get resolution. We try to overcome it, but I don't know how successfully.

Jack Clarke: Let's give our panel a big thanks.