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).

A parallel phenomenon which has occurred principally in the first decade of the new century is the frequency with which parties now ask boards of arbitration, whether tripartite boards or single arbitrators, to become involved in the mediation of the dispute which is brought before them. That development has been particularly pronounced in the province of Ontario, although to a lesser degree it is also found elsewhere. In April 2009, in preparation for a presentation at a seminar sponsored by the Conférence des Arbitres du Québec, I conducted an informal survey of arbitrators from several jurisdictions to determine the frequency of mediations initiated by the parties themselves at the arbitration hearing, utilizing either the single arbitrator or a tripartite arbitration board to conduct the mediation. While the survey is admittedly less than scientific and is clearly informal, its results nevertheless disclose significant differences from jurisdiction to jurisdiction and do confirm that in some jurisdictions, notably Ontario, recourse to mediation by labor arbitrators has become relatively popular among employers and unions.

In Canada the statutes which govern labor arbitration have begun to acknowledge the role of labor arbitrators in mediating the disputes before them, without prejudice to their ability to continue to arbitrate any issues which may still remain unresolved. While the labor relations statutes of some jurisdictions, for example, Nova Scotia, Quebec, and Alberta, make no reference to arbitrators acting as mediators during the course of their proceedings, a number of statutes, both federally and provincially, have come to acknowledge the role of arbitrators as mediators.

The Manitoba Labour Relations Act contains a provision whereby parties to a collective agreement can voluntarily opt for the mediation of their grievance. Section 129 of the Act provides that the parties may apply to the Minister for the appointment of a grievance mediator.[2] The mediators appointed are officers of the Conciliation and Mediation branch of the province's Ministry of Labour and Immigration. Recourse to grievance mediation has clearly become popular among employers and trade unions in the province. The branch reports having handled 213 requests for grievance mediation in 2008 and 209 such requests in 2009. Grievance mediation is also generally applied as a matter of course when grievances are referred to the Manitoba Labour Board for the appointment of an arbitrator, under Section 130(5)(c) of the

[2]Manitoba Labour Relations Act, C.C.S.M. c. L10, s. 129.

Act. At a minimum, the Manitoba experience would suggest that there is a significant demand among unions and employers for the mediation of grievances.[3]

Ontario also has a prior history of using grievance settlement officers. For many years the Office of Arbitration of the Ministry of Labour routinely appointed grievance settlement officers to cases where parties requested expedited arbitration under Section 49 of the Ontario Labour Relations Act.[4] That practice may have conditioned the community to first attempting to mediate grievances before arbitrating. Unfortunately, that program, which enjoyed a high rate of settlements, was ended for budgetary reasons in 1996. It may be that to some extent the increasing demand on arbitrators to mediate in Ontario flows from the wish of the labor relations community to continue to mediate grievances, after the demise of the settlement officers. More recently, under its new "Interactive Solutions" program, the Dispute Resolution Services office of the Ministry (formerly the Office of Arbitration) has begun to offer grievance mediation services at the request of the parties, on a fee-for-service basis.

Under the heading "Power to Mediate" the Canada Labour Code provides within Section 60(1.2):

> At any stage of a proceeding before an arbitrator or arbitration board, the arbitrator or arbitration board may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the arbitrator or arbitration board to continue the arbitration with respect to the issues that have not been resolved.[5]

A mirror provision is found in the Ontario Labour Relations Act. It provides that an arbitrator or a board of arbitration may mediate ". . . at any stage in the proceedings with the consent of the parties. If mediation is not successful, the arbitrator or arbitration board retains the power to determine the difference by arbitration."[6] Section 50 of the Ontario Labour Relations Act also makes a separate provision for a process of "mediation–arbitration." That section of the Act allows the parties to a collective agreement to refer one or more grievances under the collective agreement to a single mediator–arbitrator for expeditious and informal treatment. They must first clearly agree upon the nature of the issues in dispute and, failing a settlement, work with the

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[3]Manitoba Labour Relations Act, C.C.S.M. c. L10, s. 130.
[4]Ontario Labour Relations Act, 1995, S.O. 1995, c. 1 Sch. A, s. 49.
[5]Canada Labour Code, R.S.C. 1985 c. L-2, s. 60(1.2).
[6]Ontario Labour Relations Act, 1995, S.O. 1995, c. 1 Sch. A, s. 48(14).

arbitrator to agree upon the material facts in dispute, with the arbitrator exercising discretion as to the nature and extent of evidence and submissions, or any other procedural conditions, which he or she may deem appropriate. This section of the Act contemplates an expedited award, providing in subparagraph (9): "The mediator–arbitrator shall give a succinct decision within five days after completing proceedings on the grievance submitted to arbitration."[7]

The consensual mediation–arbitration of grievances is also provided for in British Columbia. The Labour Relations Code, R.S.B.C. 1996, c. 244, s. 105(1), provides that the parties may, "…at any time, agree to refer one or more grievances under the collective agreement to a single mediator–arbitrator for the purpose of resolving the grievances in an expeditious and informal manner."[8] As with Ontario, the section also requires agreement on the nature of any issues to be submitted, allows for the option of limited agreement on material facts, gives the mediator–arbitrator discretion as to the nature and extent of submissions and other conditions and, failing settlement, contemplates a succinct decision issuing within 21 days after the completion of the arbitration phase.

It is not clear whether the federal statute, as well as the Ontario and British Columbia statutes, have been particularly instrumental in promoting the mediation of grievances by arbitrators, by the agreement of the parties. At a minimum, however, the statutes likely have residual significance to the extent that they would eliminate any argument, and possible judicial review, to the effect that arbitrators who engage in mediation should be disqualified from thereafter continuing to arbitrate the same dispute if settlement is not achieved through mediation. In a distant past there was a body of opinion that held that it is not appropriate for the same person or persons to both mediate and arbitrate the same dispute.[9] The courts in Canada tend to separate case management and mediation activities from the adjudication function. To the extent that the judicial mind would draw a line between case management and mediation on the one hand and adjudication on the other, the concept of arbitrators engaging in both the mediation

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[7]Ontario Labour Relations Act, 1995, S.O. 1995, c. 1 Sch. A, s. 50(9).

[8]Labour Relations Code, R.S.B.C. 1996, c. 244, s. 105(1).

[9]*See, e.g.,* Fuller, Lon, "The Forms and Limits of Adjudication," 92 Harv. L. Rev. 353–409 (1979); Fuller, Lon, "Mediation: Its Forms and Functions," 44 S. Cal. L. Rev. 305–39 (1971).

and arbitration of given cases might, absent statutory *imprimatur*, risk being struck down by some reviewing courts. These statutory provisions bring clarity to that question and to that extent can be understood as encouraging the mediation of grievances by arbitrators.

Because my own experience, as well as information gained from my colleagues, principally in Ontario, suggests that there is a growing willingness on the part of parties to grievances to request that their arbitrator should first attempt to mediate their dispute and, failing success, then proceed to arbitrate it, I felt that an informed empirical survey would be useful, particularly as it might reveal regional similarities or differences in practice. To that end I indentified a body of well-established and well-recognized arbitrators to be surveyed with respect to their estimate of the percentage of arbitration cases in which the parties asked them to mediate and which resulted in a mediated settlement. I divided the arbitrators into four regional groups: Ontario, Western Canada, Maritime Canada, and the United States. It should be stressed that the survey was conducted very informally, without any attempt to apply any generally accepted statistical rules or principles and involved a relatively limited number of arbitrators. Respondents were asked only for their personal recollection and overall impression, without conducting any exhaustive review of their files, based on their last 100 cases.

A total of 44 arbitrators were surveyed. They are all busy, well-respected arbitrators of whom all but three are members of the National Academy of Arbitrators. The results which emerged are as follows:

Ontario

Twenty Ontario arbitrators were surveyed. Eleven of those arbitrators reported that in more than 50 percent of their cases they were asked to mediate and did so to a successful settlement. Two arbitrators estimated their rate of such activity as representing 80 percent or more of their cases, while fully ten of them recorded a mediation rate of 60 percent or more at their grievance arbitration hearings.

The Ontario figures clearly represented the most active mediation role to be found in any region. The lowest number of mediated outcomes recorded among the Ontario respondents was 25

percent. The average for the 20 arbitrators surveyed is 53.4 percent. In other words, on average, in better than half of the cases which went to hearing among the surveyed group, the arbitrator became involved in mediating the ultimate settlement of the grievance.

Western Canada

Five arbitrators from Western Canada, from Alberta and British Columbia, were surveyed. Their estimated percentage of cases in which they have been involved in mediating settlements over their last 100 cases ranges from a low of 5 percent to a high of 30 percent. On average, in Western Canada, the reporting arbitrators have been involved in the mediation of grievances at the arbitration hearing at a rate of 23.9 percent.

Maritime Canada

Bearing in mind that the number of arbitrators in Canada's Maritime Provinces is relatively small, it is not surprising that only two arbitrators from that region responded. One recorded a 7 percent rate of involvement in mediating settlements at the arbitration hearing, while the other estimated a 10 percent involvement, for an average of 8.5 percent.

Quebec

There are two schools of thought in Quebec. Traditionalists assert that it is inconsistent with the role of arbitration for arbitrators to involve themselves in mediating a dispute they may ultimately arbitrate. However, a small group of arbitrators who are increasingly active in mediating grievances is now emerging. Quebec arbitrators of my acquaintance confirm that the mediation of grievances by arbitrators is still relatively exceptional and remains in single-digit percentages. Although the Quebec Labour Code is silent on the mediation of grievances by arbitrators, a decision of the Quebec Court of Appeal has expressly approved the practice, but only where there is a clear agreement between the parties as to the procedure to be followed: *Re Collège Lasalle Inc.* (2002) CanLII 41277 (Qc. C.A.).

United States

Seventeen prominent American arbitrators, all well-known members of the National Academy of Arbitrators, responded to the survey. The lowest level of estimated successful mediation activity recorded by any one arbitrator was 2 percent, while the highest in the range gave an estimate of 25 percent. Nine of the 17 arbitrators sampled reported that their settlement of cases by mediation at the arbitration hearing was in a single-digit percentage. The overall average for the 17 American arbitrators' involvement in settling cases at the hearing through mediation is 9.4 percent.

Conclusion

As can be seen from the foregoing, with all disclaimers for the obviously informal nature of the survey, based as it is on asking arbitrators for their impression of the rate of mediated settlements they would estimate occurred in their last 100 cases, there is nevertheless an arguably meaningful pattern that emerges. In Ontario and British Columbia, where the basic labour relations statutes expressly recognize the role of arbitrators becoming involved in the mediation of grievances with the agreement of the parties, the settlement of grievances by mediation at the arbitration hearing is a significantly greater reality. In Ontario, on average, the rate of settlement of grievances with the assistance of the arbitrator at the hearing exceeds 50 percent, while in Western Canada it approaches 25 percent. The situation is radically different in Maritime Canada and, based on a more significant sample, in the United States. The Maritime arbitrators recorded an average of just over 8 percent of their cases settling through their mediation efforts, while on average their American counterparts report that they have experienced mediating just over 9 percent of their cases to a settlement at the arbitration hearing. They obviously do not come close to their Ontario colleagues, whose estimated rates of their mediated settlements is more than five times the rate of those experienced in the Maritimes and the United States, and close to twice the rate of mediated settlements experienced on average by arbitrators in Western Canada.

What conclusions can be drawn from the survey data? Firstly, it can be observed that arbitrators are obviously much more active in mediating the settlement of grievances at the arbitration hear-

ing in the two regions which have legislation expressly recognizing that arbitrators may, with the agreement of the parties, engage in mediation without compromising their power to ultimately arbitrate the dispute if the mediation effort is not successful. There may also be some indication of regional differences in the dispute resolution culture of labour relations practitioners, whether union and management representatives or union and management legal counsel, in the way they view the arbitration process. For those communities, particularly in Ontario, there would appear to be an acceptance that mediation does offer certain advantages: It gives the parties their last opportunity to fashion their own outcome rather than have it imposed upon them by a third party; it avoids the "win–lose" scenario and the risk of ongoing resentment; it involves greater informality; it can bring factors into the settlement which might never be part of the discussion at arbitration or within the arbitrator's remedial jurisdiction given the more limited confines of arbitration, and, generally speaking, mediation will be a shorter and less costly process. It is also arguable that in Ontario there is a greater incentive for arbitrators to attempt to mediate grievances to a settlement. Generally, labour arbitrators in Ontario are paid in accordance with a "block fee" system. Under that system they generally charge the parties no more than their set fee for single or multiple days of arbitration. There is, in that system, an incentive for arbitrators in Ontario to settle their cases and avoid the burden of lengthy decision writing. That incentive may not operate as vigorously in jurisdictions where arbitrators are paid on either a per diem or per hour basis, separately charging for the time expended in writing awards.

Hopefully, this survey will prompt a more systematic and statistically meaningful review of the mediation phenomenon as it appears to be growing among labor arbitrators in North America, and particularly in Canada. This study obviously did not examine some significant questions, such as the rate of prehearing settlement achieved by the parties themselves or settlements which the parties make at the hearing without any participation by their arbitrator. The survey also did not ask arbitrators to estimate the rate of mediation attempts that were unsuccessful. Nor did this study attempt to gauge the important question of the perception of the parties themselves as to their level of satisfaction or concern with arbitrators being involved in mediating grievances at the hearing. Do the experience and impressions of the parties mirror the suggestion that the arbitrator who mediates carries a big stick, and if

so is that something that they deliberately choose to assist them in getting to a settlement? Are arbitrators' skills at mediation a factor in arbitrator selection? Hopefully, these and other questions may be taken up in the subsequent research of others. Whatever such research may uncover, it can only help to improve our understanding of the alternative dispute mechanisms that play such a critical role in the resolution of labour relations disputes which arise under collective agreements.