ARBITRATION:
GRIEVANCE RESOLUTION OR
AGGRAVATION?

by
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Introduction

Grievance arbitration is the primary means of resolving disputes in unionized workplaces in Canada. Every collective agreement must contain a provision for arbitration, and arbitrators can decide employment-related disputes over everything from overtime and sick leave to defamation and even rights under the Canadian Charter of Rights and Freedoms (the “Charter”).

This paper is intended to provide an overview of some of the most important practical issues facing arbitration today. It is organized around key principles that underpin the arbitral system: expedition and efficiency, consensual appointments, accessibility, and high-quality, judicious decision-making. As arbitration becomes more complex, these principles are put under tension. It is necessary for the Canadian labour bar to discuss this tension and find creative solutions to ensure that the arbitration process continues to respect its principles while producing high-quality adjudication.

1. Expediting the Arbitration Process

One of the main purposes of grievance arbitration is to provide a speedy, efficient process for resolving workplace disputes. As the Supreme Court of Canada has stated,

The nature of Canadian labour-management relations changed dramatically following the Second World War. Federal and provincial legislation, seeking to create a better climate for the resolution of labour-management disputes, introduced grievance arbitration to provide for the quick and efficient resolution of disputes arising under collective agreements.¹

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Both the Ontario *Labour Relations Act, 1995*\(^2\) and the federal *Canada Labour Code*\(^3\) contain provisions for expedited arbitration in order to help arbitration live up to this promise. Section 49 of the LRA allows either party to a collective agreement to request that the Minister appoint a single arbitrator to hear a grievance. Once appointed, the arbitrator must begin hearing the matter within 21 days and must deliver an oral decision as soon as possible thereafter. Under the CLC, an arbitrator must render a decision within 60 days of his or her appointment, unless the collective agreement provides otherwise,\(^4\) and has the power to expedite proceedings further.\(^5\)

Despite these provisions, arbitration can be anything but speedy. The parties often get in front of an arbitrator quickly. The problem is that unlike courts, which typically schedule hearings to continue every day from the time they start until their completion, arbitrators set dates which may be months apart. The result is that a five-day hearing might take two years to complete.

This can be a major flaw in the arbitration process. Not only does it undermine a major purpose of arbitration, it creates practical difficulties. What happens, for example, if a witness is cross-examined long after his examination-in-chief and barely remembers what he said months earlier? In a recent case in our office, the grievor even served a witness with a human rights complaint in the middle of his cross-examination, which had taken several months to complete!

Another practical difficulty with the length of the arbitration process is the spectre of continuing liability. Imagine that an employee is terminated and grieves. In the meantime, the employer hires a replacement. Over the three years that it takes to arbitrate the grievance, new technology is introduced which changes the nature of the job, and in which the replacement becomes competent. Perhaps the terminated employee has also found new employment, though it is less lucrative than her previous position. Then, the grievance is finally resolved and the employer is ordered to reinstate the grievor. These types of liabilities can be very difficult for an employer, not to mention for a worker who is kept in employment limbo.

\(^2\) S.O. 1995, c. 1, sched. A (the “LRA”).
\(^3\) R.S.C. 1985, c. L-2 (the “CLC”).
\(^4\) CLC, s. 64.
\(^5\) CLC, s. 60(1)(a.4).
It might be that the best solution to such problems, in the event that further expedition proves impossible, is to address them at the remedial stage of the arbitration hearing. For example, the arbitrator might order monetary compensation instead of reinstatement when the arbitration has taken too long to complete.

Another possible solution is to award costs if one of the parties is responsible for an unnecessary delay. Parties often raise new issues before an arbitrator which had not been raised earlier in the grievance procedure. This will be permitted by the arbitrator, who will typically want to keep proceedings informal rather than insisting on technical rules of pleading. This, of course, can delay the arbitration, not only increasing the costs to the parties but also contributing the other delay problems described above.

Arbitrators have jurisdiction to award costs, but are reluctant to award them in the absence of bad faith or egregious conduct.\(^6\) It is submitted that it might be fair to award costs somewhat more liberally in situations of unnecessary delay. This would encourage the proper use of the grievance procedure by encouraging parties to raise issues early in the process, at its less formal stages. Furthermore, there is some precedent for costs in this context. An employer has been ordered to post security for costs after unnecessarily delaying an arbitration with frivolous preliminary motions.\(^7\)

Another suggestion might be for the arbitrator to impose costs as a condition for raising a new issue. The party wishing to raise the issue would then be allowed to choose whether to do so. There is arguably some precedent for this practice as well, since arbitrators sometimes impose costs on a party as a condition for granting an adjournment.\(^8\)

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\(^6\) See, for example, *Good Humour - Breyers (Simcoe) v. United Food & Commercial Workers Union, Local 175 (Costs Grievance)*, [2007] O.L.A.A. No. 605 (Q.L.) (Murray) at para. 19.

\(^7\) 1693036 Ontario Ltd. (c.o.b. Blackfield Drywall) v. United Brotherhood of Carpenters and Joiners of America, Local 675 (Drywall Acoustic Lathing and Insulation) (Collective Agreement Grievance), [2008] O.L.A.A. No. 642 (Q.L.) (Herman).

\(^8\) Thunder Bay (City) v. Canadian Union of Public Employees, Local 87 (Tenniscooe Grievance), [2007] O.L.A.A. No. 132 (Q.L.) (Dissanayake) at para. 67.
2. Government Appointments of Arbitrators

Along with expedition, another key principle underlying the Canadian grievance arbitration system is that it is driven by the parties. In his classic treatise *Reconcilable Differences: New Directions in Canadian Labour Law*, Paul Weiler describes this principle as follows:

> Just as the parties under a system of free collective bargaining are empowered to act as their own legislatures in drafting the law of the enterprise, the workplace, and the employment relationship, so also they are entitled to design their own judicial system, under which the legal standards that they have written will be interpreted and applied in concrete disputes. The institution of private labour arbitration may be the most telling illustration of the spirit of autonomy and self-government which pervades collective bargaining relationships in North America.

Indeed, the consensual appointment of arbitrators is crucial to Canadian labour relations. When arbitrators are appointed by the parties, their decisions gain legitimacy, which reduces the chance of unions attempting wildcat strikes or employers imposing unilateral decisions in response to an adverse outcome.

Nonetheless, many labour relations statutes allow for government appointments of arbitrators in certain situations. For example, subsection 48(4) of the LRA provides as follows:

> 48. (4) Despite subsection (3), if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make the appointments that are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

The CLC contains similar provisions in subsections 57(4), (5) and (6).

Despite the advantages of consensual appointments, these provisions are probably necessary. There must be some recourse in the event that the parties cannot or will not agree on an arbitrator; otherwise, one stubborn litigant could delay the resolution of a dispute indefinitely.

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10 Ibid., p. 94. Emphasis in original.
The provisions preserve legitimacy by ensuring that the government will only step in and make an appointment if a party requests it, and even so, only after the appointment mechanisms in the collective agreement have failed.

Furthermore, the Supreme Court of Canada has made it clear that the government cannot appoint just anybody to be an arbitrator. In *CUPE v. Ontario*, the Court rejected the Ontario government’s practice of appointing retired judges as arbitrators under legislation governing labour relations in the health care sector. The Court held that even though retired judges were impartial, that was not enough. The government was also required to appoint arbitrators who have labour relations expertise and who are generally accepted in the labour relations community. The Court concluded as follows on this point:

> I conclude, therefore, that, although the s. 6(5) power is expressed in broad terms, the legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability within the labour relations community. By “general acceptability”, I do not mean that a particular candidate must be acceptable to all parties all the time, or to the parties to a particular HLDAA dispute. I mean only that the candidate has a track record in labour relations and is generally seen in the labour relations community as widely acceptable to both unions and management by reason of his or her independence, neutrality and proven expertise.

Thus, even when arbitrators are appointed by the government, the principle of consent is preserved. Although the Supreme Court rejected the union’s argument that the Minister must seek the parties’ consent in each case before appointing an arbitrator, it still upheld the consent principle by, in effect, requiring the Minister to appoint people to whom unions and employers already generally consent. Government appointments do not harm the principles of arbitration.

It is worth noting that there are potential drawbacks to consensual appointments. A large one is that private arbitrators are businesspeople. If an arbitrator cannot remain agreeable to both parties to a labour dispute, his services will not be used in the future, and that will affect his livelihood. Although there is no suggestion that Ontario arbitrators are anything less than professional, there

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are strong incentives for arbitrators to make decisions with split results in order to preserve their impression of neutrality. In other words, arbitrators lack the security of tenure that protects judges, allowing them to make necessary but unpopular decisions.

There is even some evidence that arbitrators seek split results. The Ontario Federation of Labour has produced a survey of arbitrators covering the years 1977-2003, showing how many times each arbitrator decided in favour of an employer and how many times in favour of a union in various types of cases.\textsuperscript{13}

There are a significant number of arbitrators who have decided an approximately equal number of cases for employers as for unions. To give just a few examples, one arbitrator has decided for employers 128 times and for unions 124 times; another for employers 106 times and for unions 105 times; and another for employers 176 times and for unions 178 times. One arbitrator who had decided more than 400 cases during the survey period managed an almost even split, favouring employers by a margin of 217 to 216, and was bested only by the arbitrator who actually held for employers and for unions exactly 106 times each.

Admittedly, this may not mean that arbitrators are trying to achieve split results. If an arbitrator only sees cases wherein both parties have strong positions and can legitimately expect to win (because other cases settle at an earlier stage of the grievance procedure), one would expect employers and unions to each win approximately half the time across a large number of decisions. As well, to be sure, at least half of the arbitrators in the survey have significant disparities in their results. The most striking example was an arbitrator who decided more than 650 cases in the survey period and favoured employers more than twice as often as unions, by a margin of 456 to 211. Other margins included 327 to 232 in favour of employers, and 179 to 120 in favour of unions. Nonetheless, it is at least worth questioning why some arbitrators display a remarkable level of parity across a large number of cases.

Even if arbitrators do attempt to split results, though, the legitimacy that attaches to decisions of consensually appointed arbitrators is a significant benefit to the labour relations process and to industrial peace. Especially given the uncertainty in the data as to whether arbitrators are in fact

splitting results, their legitimacy militates against a greatly expanded role for government appointments.

3. Accessibility

If grievance arbitration is to provide speedy and efficient resolution of disputes, it must be accessible to those who need it. Accessibility is increasingly becoming a problem in Ontario, which has seen a shortage of arbitrators relative to demand in recent years. As a result, parties are experiencing long waits to have their cases heard.

Why has Ontario not seen more people, especially more young people, enter a practice whose services are highly in demand and which is potentially quite lucrative? The partisan nature of arbitral appointments may have something to do with this. As just discussed, the consensual appointment of arbitrators is fundamental to the arbitral system. A potential downside, though, is that parties may be hesitant to consent to new arbitrators whose labour relations views are unknown. This problem is compounded by the large division in the labour and employment bar between union-side and management-side practices. Why should a union accept as neutral a young labour lawyer whose entire career was spent assisting employers, or vice versa? The lawyer, too, may not want to leave her secure employment for an uncertain future as an arbitrator, not knowing whether she will be able to establish her neutrality.

Increasingly, potential arbitrators in Ontario who wish to erase perceptions of bias have applied to become Vice-Chairs of the Ontario Labour Relations Board. After a few years at the Board, they are perceived as neutral and they have also gained valuable experience adjudicating labour disputes. While this is a beneficial practice, it would be unfortunate if the Board were ever reduced to a training ground for arbitrators. That does not seem likely to happen in the immediate future, but given the need for more arbitrators in Ontario, it would be prudent to develop other methods of establishing neutrality and providing new arbitrators some guarantee that they will be accepted.

Delays in reaching arbitration are only one problem with accessibility. Another is that employees are sometimes denied access to arbitration altogether. That is because unions, as exclusive representatives of their bargaining units, have the right to control the arbitration process and may decide not to refer a matter to arbitration, as long as that decision is not made in a manner that is
arbitrary, discriminatory or capricious. As the Supreme Court of Canada held in *Canadian Merchant Service Guild v. Gagnon*,

When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.14

How much discretion? The Union’s duty is one of “fair representation.” According to Weiler’s 1975 decision in *Rayonier*,15 when assessing representation for fairness, we should look at several factors:

[. . .] how critical is the subject matter of the grievance to the interest of the employee concerned? How much validity does his claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these? What has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances? What contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them?

In *Rayonier*, the final consideration was the crucial one. The practice the grievor complained about, allowing an employee on layoff to decline a short-term recall without losing seniority, was found to be in the best interests of the bargaining unit as a whole. Given the Union’s obligation to represent the entire bargaining unit, its refusal to grieve this practice was completely fair. Nonetheless, the fact remained that the grievor had no legal recourse for his own layoff.

This result is not unfair. When employees choose to appoint an exclusive bargaining agent to represent them, they must be willing to accept the implications of exclusivity, both positive and negative. Even so, in an environment in which employees are increasingly choosing to circumvent arbitration by bringing appropriate complaints to other tribunals, notably the Human


15 *Rayonier Canada (B.C.) Ltd. (Employer), and International Woodworkers of America, Local 1-217 (Union), and Ross Anderson (Employee), and Forest Industrial Relations (Intervenor)*, [1975] B.C.L.R.B.D. No. 42 (Q.L.)
Rights Tribunal in Ontario, it is worth opening a discussion about whether arbitration is sufficiently accessible.

4. Independence

Traditionally, most arbitrations were conducted by boards comprised of three arbitrators: one nominated by the employer, one nominated by the union, and a neutral chairperson jointly selected by the other two nominees. Indeed, under the LRA, this is the default system which is deemed to apply to all collective agreements that do not otherwise contain an arbitration clause.\(^\text{16}\)

Now, however, parties usually appoint a single arbitrator to hear a grievance. The major advantage, of course, is cost savings. The disadvantage is that the arbitrator loses the benefit of discussing the case with two other board members who might bring to the table perspectives and insights which would make for a higher quality decision.

This disadvantage might be avoided if the single arbitrator were to discuss cases with other arbitrators. That suggestion naturally raises issues relating to the arbitrator’s independence. It may not be fair to the parties for a decision to be influenced by people who did not hear the case or the evidence.

Similar issues were considered by the Supreme Court of Canada in *Consolidated Bathurst*.\(^\text{17}\) At issue was an Ontario Labour Relations Board practice of convening meetings at which various Vice-Chairs, Board Members and Board Solicitors would discuss cases raising novel policy issues. The Court held that such discussions did not violate the independence of the panel charged with deciding the case, so long as the discussions were voluntary and certain procedural safeguards were established to prevent coercion. The Court held that independence did not mean the absence of all outside influence but the freedom to decide cases in accordance with one’s conscience and opinions.\(^\text{18}\)

\(^{16}\) LRA, s. 48(2).


\(^{18}\) *Ibid.* at para. 84.
It is submitted that for similar reasons, having voluntary, informal discussions of cases with other arbitrators would not violate an arbitrator’s duty of independent decision making. The arbitrator would still be free to decide the grievance in accordance with his or her conscience and opinions. Indeed, this practice should be encouraged, as it may improve the quality of decisions while avoiding the cost of tripartite panels. As the Ontario Court of Appeal stated in relation to judges:

. . . [B]ut it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed.19

5. Expanding Jurisdiction of Arbitrators

Since the Supreme Court of Canada’s decision in Weber v. Ontario Hydro,20 arbitrators’ jurisdiction has expanded to include more significant issues as well as more extensive remedies. In Weber, the Supreme Court held that the mandatory arbitration provision in what is now section 48 of the LRA confers exclusive jurisdiction on arbitrators over any dispute that “arises” from a collective agreement. Weber held that even some of the most significant issues and remedies in Canadian litigation, those which concern the Canadian Charter of Rights and Freedoms (the “Charter”), not only can but must be decided by arbitrators. Thus, in Weber, when the collective agreement allowed the employer to make a decision about sick leave, the plaintiff’s claim that the decision violated his Charter rights had to be arbitrated.

Following Weber, countless tort claims in Ontario have been held to come within the exclusive jurisdiction of arbitrators, including defamation,21 sexual harassment and assault,22 and negligence.23

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19 Re Toronto and Hamilton Highway Commission and Crabb (1916), 37 O.L.R. 656, as quoted in Consolidated Bathurst at para. 78.
21 DiCienzo v. McQuillan, 2008 ONCA 472.
The remedies awarded by arbitrators have also become significant. In his recent decision in *Greater Toronto Airports Authority*,\(^{24}\) upon finding that the grievor’s termination was inappropriate, Arbitrator Shime forbade the employer or any of its employees to discuss the circumstances of termination in any way to anybody, required a positive letter of reference, and awarded damages of $50,000 for mental distress. He awarded damages from the date of termination to the date of the award (approximately six years) for past economic loss, less a six-month period and less any income the grievor received from alternative employment. He also awarded damages for loss of future income and benefits, including loss of pension benefits, up to her retirement age, and an additional $50,000 in punitive damages.

Following the Supreme Court’s recent decision in *Conway*,\(^{25}\) there is potential for arbitral remedies to become even more significant in the *Charter* context. In *Conway*, the Court considered the powers of administrative tribunals to grant *Charter* remedies. After an extensive review of the jurisprudence, the Court held that it is no longer helpful to begin a constitutional inquiry by assessing a tribunal’s “competence” over particular remedies. Instead, if a tribunal can decide questions of law, then it should be allowed to consider and apply the *Charter*, including *Charter* remedies.\(^{26}\) If this is the case, the tribunal will be able to give any *Charter* remedy that would “fit within the statutory framework of the particular tribunal.”\(^{27}\)

Although *Conway* did not expressly deal with arbitrators, the decision could apply to them. Since *Weber* decided that arbitrators can generally decide *Charter* issues, the *Conway* decision may mean that arbitrators can order the full panoply of *Charter* remedies, except those that can be clearly shown to fall outside the labour relations statutory framework.

Clearly, there is much at stake in an arbitration proceeding. The issues and the remedies have both expanded. In this context, it is perhaps inevitable that arbitration will become more court-

\(^{23}\) *Dougherty v. 601192 Ontario Ltd. (c.o.b. Simcoe Terrace Retirement Centre)*, [2005] O.J. No. 211 (Q.L.).


\(^{26}\) *Ibid.* at para. 81.

\(^{27}\) *Ibid.* at para. 82.
like in its procedural requirements. It will become increasingly important to have lawyers involved, to ensure a full evidentiary record, and to ensure that parties can effectively respond to the case against them.

Procedural protections can, however, go too far. In *Toronto District School Board and C.U.P.E., Local 4400*, Arbitrator Shime reviewed civil and criminal procedure principles on the disclosure and discovery of documents, and on that basis, developed a set of principles to govern documentary disclosure in arbitration. Among those principles were the following:

1. Once a general request for production is made every document relating to any matter in issue that is or has been in the possession, control or power of a party must be disclosed and that includes documents for which privilege is claimed. The party in possession, control or power of a document should provide a list of documents, relating to any matter in issue, to the requesting party and make those documents available for examination prior to the hearing.

2. All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. A board of arbitration, at the pre-hearing stage, is simply not in a position, and ought not to lay down precise rules as to what may be relevant during the course of the hearing.

Indeed, the principles enunciated by Arbitrator Shime mimic the procedure in civil courts. In response to a general request for production, a party must produce any document in its control, power or possession that has even a semblance of relevance to any matter in issue. Clearly, when arbitration puts so much at stake, it is important to have procedural protections. At the same time, though, the informality of arbitration has always been one of its most important virtues. It has allowed the arbitral process to remain low-cost, expeditious, and accessible. Full documentary production is expensive and onerous even in a civil trial; imposing it on arbitration proceedings would entirely defeat their purpose.


Although Arbitrator Shime’s decision has been frequently cited in Ontario, at least one arbitrator outside Ontario has refused to follow its lead. In a 2008 decision in Nova Scotia, Arbitrator Richardson identified the key drawbacks of Arbitrator Shime’s approach:

In my opinion the decision of Arbitrator Shime in the Toronto District School Board case applies the wrong test and approach towards pre-hearing production. It assumes that the rules of civil procedure as they apply in the superior courts is the “gold standard” and that the “minimal” pre-hearing production process produces a less just or less fair result. But discovery under the rules of civil procedure is not a panacea. It can be costly in money and time, and ineffective in advancing the merits of the case. Indeed, the superior courts in many provinces (including this one) are currently grappling with discovery and, in particular, how to limit its scope and thereby reduce the cost and delay associated with it.30

It is submitted that Arbitrator Richardson has taken the preferable approach, especially since providing an expeditious and low-cost mechanism for dispute resolution is a fundamental purpose of grievance arbitration.

One of the reasons that documentary production has become so onerous is that new technology, such as computer databases and e-mail, have increased our potential for data creation. Where once a corporation may only have produced a few memoranda and meeting minutes regarding any particular matter, it may now have hundreds of relevant e-mails.

The increased costs of documentary production in the digital age are already being addressed in the realm of civil procedure. In the United States, the Sedona Conference has produced a set of principles for addressing electronic document production. It mandates a “proportionality principle” requiring “consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.”31 Furthermore, it accepts that “it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant

30 Nova Scotia Government and General Employees Union v. Capital District Health Authority (Harding Grievance), 171 L.A.C. (4th) 93 (Richardson).

electronically stored information” and that if records are stored in formats that are not reasonably accessible, the requesting party must “demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.” The Sedona principles have been adapted for use in Canada, resulting in the release of a substantially similar set of principles known as the Sedona Canada Principles. These principles have already been incorporated into Ontario’s Rules of Civil Procedure.  

Arbitrators may be starting to notice the Sedona Canada Principles as well. In an award issued earlier this year, a tripartite panel chaired by Arbitrator Richard Brown referred to the Principles and held as follows:

We agree with the employer that the cost of production may be a relevant consideration to be weighed along with the probative value of the material requested and the importance of the issue in dispute. [. . .]. In our view, the proper approach lies in the concept of proportionality. A party should not be required to produce documents if the associated cost is disproportionate to the probative value of the materials and the importance of the matter at stake.  

On this basis, the panel ordered the employer to produce e-mails relating to only three of the six individuals for whom the union had sought production.

Unfortunately, it appears that Arbitrator Brown’s award is the only one in Canada to date which refers to the Sedona Canada Principles. If civil-style documentary production is to be extended to arbitration, arbitrators should seriously consider adopting the Principles on a regular basis. As noted above, among the most important of the Sedona principles is proportionality, and one of the factors in the proportionality analysis is the nature of the litigation. All else being equal, this factor should lead to a less onerous obligation of electronic document production in the

32 Ibid., Principles 5, 8.
33 Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Section 29.1.03 mandates the creation of a “discovery plan,” and subsection (4) provides as follows: “In preparing the discovery plan, the parties shall consult and have regard to the document titled ‘The Sedona Canada Principles Addressing Electronic Discovery’ developed by and available from The Sedona Conference.”
34 Ottawa (City) v. Civic Institute of Professional Personnel (Contracting In Grievance), [2010] O.L.A.A. No. 41 (Q.L.) at para. 35.
arbitration context, so that arbitration can continue to be an efficient and cost-effective method of resolving workplace disputes.

6. Alternative Systems

So far, we have discussed a number of issues facing Canadian grievance arbitration. These include delays and inefficiencies in having cases heard, accessibility, increasing complexity and cost, and the expansion of arbitral jurisdiction to include matters traditionally within the purview of courts. All of these issues raise the question of whether grievance arbitration continues to be the best system for administering collective agreements in Canada. At the very least, it is worth discussing and exploring alternative systems.

The groundwork for one alternative system has already been laid by the CLC. Sections 240 to 242 of the CLC allow a non-unionized employee who has been terminated to complain to a government investigator, who, if unable to resolve the dispute, will refer it to the Minister. The Minister may then appoint an adjudicator to resolve the dispute. The government-appointed adjudicator has broad remedial powers mirroring those in many collective agreements, including the power to order the employer to compensate or reinstate the employee, or to do “any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.”35

Theoretically, there is no reason why a similar system could not be applied in a unionized context: a permanent set of arbitrators or adjudicators appointed by the government to resolve grievances. After all, many collective agreements already contain lists of arbitrators the parties have agreed to use, which do not change significantly from one renewal of the agreement to the next. In effect, this creates a permanent panel of arbitrators to whom the same parties will turn time and time again.

These schemes can become problematic in situations where multiple employers are party to the same (or a similar) collective agreement with a single union, so that the few arbitrators named in the agreement see the union much more often than they see any individual employer. The

35 CLC, s. 242(4)(c).
arbitrators therefore have a greater incentive to please the union than the employers. Nonetheless, no serious labour relations issues seem to have resulted from such practices.

The major difficulty in applying the section 240 system to grievances, however, is that government adjudicators are not appointed based on the consent of the parties. As discussed earlier, consent is critical to the legitimacy of decisions, which in turn helps to create labour peace. Even when collective agreements create *de facto* permanent arbitration panels, at least the members of those panels have been agreed upon by the parties and can be renegotiated each time the collective agreement expires. As argued above, consent is so fundamental to the Canadian labour relations system that a major expansion in government appointments is undesirable.

Another alternative that is worth investigating is the creation of a labour court, with the same legal status as a superior court. Unlike a government-appointed arbitrator, who is typically still paid by the parties, a court would be publicly funded. This would go a long way toward addressing accessibility issues relating to the increasing cost of arbitration. As a court, it might be better equipped to deal with the broad range of issues and remedies that have become part of arbitral jurisdiction over the last fifteen years. The institutional nature of a court might also make it easier to schedule several hearing dates in a row, rather than having dates spread out over the course of several months.

On the other hand, a labour court would face the same difficulties as government-appointed arbitrators. Not only would judges lose the legitimacy that comes with consensual appointments, they also would be less specialized and knowledgeable with respect to the industries in which they adjudicate. Weiler makes this point quite persuasively:

> Even more significant is the selection of the decision-maker. Public tribunals are composed of people who will work for the government, and who are acceptable to the government of the day. Once selected, presumably they will have tenure for a period to ensure their independence. Presumably they will be or will become experienced neutrals in industrial relations. But it is only by chance that they will prove to be aware of the nuances of industries as diverse as forest products and newspapers, construction and longshoring. Therein lies the primary virtue of our private system of arbitration. The parties have the right to select their own adjudicator, a person who will interpret and apply the contract standards which they have written. They can choose
someone whose talents, style and philosophy are compatible with their own. Indeed, from a deeper perspective, it is apparent that labour arbitrators are really selected by the industrial relations community as a whole. In spite of some roadblocks, there is a constant infusion of new blood into the system. New arbitrators are utilized, their work is sifted and appraised, quite a few are weeded out, and the good ones pass the best test of all – acceptance by those who are the consumers of their judgments.36

The more important downside to a new court, from a practical perspective, is the cost to the public of establishing and operating it. Even if this was found to be the best alternative from a labour relations perspective, it would be difficult to muster the political will to implement it.

In short, despite the issues that have been raised in this paper with respect to the current practice of grievance arbitration in Ontario, there is no reason to believe that an increase in government appointments and/or a labour court would be preferable.

Conclusion

The grievance arbitration system is meant to provide a fast, efficient, accessible and consent-based scheme for resolving labour disputes in Canada. However, the increasing cost and complexity of arbitration, combined with the expansion of arbitral jurisdiction, has created a great deal of tension for the practical application of these principles. This certainly does not mean that the arbitration system is broken, but it does mean that the tensions should be discussed to see if there are ways to improve the practice of arbitration while advancing its key principles.

Arbitration should strive to become more efficient. Litigants should be aware and take advantage of the processes available under both provincial and federal legislation to expedite hearings. Parties and arbitrators should try to find ways to schedule arbitration dates closer together. Steps should be taken to encourage talented lawyers to enter the arbitration field, in order to reduce the current backlog. If all else fails, the results of a delay should be addressed in the remedial part of the arbitrator’s award.

Arbitrators should be encouraged to discuss their decisions informally with other arbitrators. There is no reason to believe that this practice will impact their independence. This may result in

36 Weiler, supra note 6 at 118.
an improvement in the quality of decision-making, without requiring the substantial extra cost of a tripartite panel.

Finally, alternative systems of settling workplace disputes should be considered. Existing legislative provisions, as well as the Supreme Court of Canada’s decision in *CUPE v. Ontario*, show that safeguards can be established to protect the legitimacy of government-appointed arbitrators. Thus, such systems are sufficiently feasible that the Canadian labour bar should engage in these discussions. However, despite the flaws of the current arbitration system, it is unlikely that alternative systems such as government-appointed arbitrators or a labour court will actually prove superior. To paraphrase Winston Churchill’s famous pronouncement on democracy, grievance arbitration appears to be the worst form of workplace dispute resolution, except for all those others that have been tried.