

The Future of Labour Arbitration

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## **What is the Future of Labour Arbitration?**

There is no future of labour arbitration. Traditional labour arbitration, as we used to know it, is dead and its future looks even more dead. Lawyers should not plan a career in labour arbitration. There is no future for new arbitrators. The private sector trade union movement is in serious decline. There are fewer and fewer certification applications being processed by Labour Relations Boards across the country. As well, union leaders are more sophisticated in settling grievances. Most importantly, lawyers have made the process so complicated and expensive that we have “killed the goose that has made our careers”.

It has become far less common for traditional arbitration cases to proceed to hearing. More and more cases settle and those that go ahead are most often resolved by mediation/arbitration or some form of expedited arbitration. In Ontario, arbitrators have been doing this for years. Other provinces are adopting the same practice; these substitutes for traditional arbitration are becoming more common.

In this paper, we raise several general points for discussion that we think explain the current state of labour arbitration and assist in helping us determine where we are headed. In order to provide some context, we first look back to where labour arbitration started. We then look at our current troubles to help understand the reasons for the demise of traditional labour arbitration. These issues include:

- The roots of labour arbitration;
- Expansion of jurisdiction;
- Human rights;
- Unavailability of counsel and arbitrators;
- Lawyers; and
- Economy and Globalization.

We will also discuss what has already started to replace and will continue to replace traditional models of labour arbitration. These include:

- Improvement of the grievance procedure;
- Government managed mediation;

- Mandatory mediation by arbitrators;
- Mediation/Arbitration;
- Expedited non-binding arbitration; and
- Early settlement by the parties, i.e., better labour relations.

Essentially, what has happened over the past several decades is that traditional labour dispute resolution has failed to achieve its promise. The market has substituted arbitration.

### **The Roots of Labour Arbitration**

Traditional labour arbitration has its origins in the *Wagner Act* model of labour law in North America. The model requires employers to recognize trade unions and to engage in collective bargaining. In return, labour agrees to labour peace during the term of a collective agreement. However, since disputes still arise, unions and employers need a quick, effective and inexpensive system to deal with those differences.

This history of labour law and labour arbitration was reviewed and summarized by the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27. As the Court explained, the adoption in Canada of the *Wagner Act* model through Order in Council P.C. 1003:

...was a compromise adopted to promote peaceful labour relations. On the one hand, it granted major protections to workers to organize without fear of unfair interference from the employers and guaranteed workers the right to bargain collectively in good faith with their employers without having to rely on strikes and other economic weapons. On the other hand, it provided employers with a measure of stability in their relations with their organized workers, without the specter of intensive state intervention in the economy (Fudge, Glasbeek at p. 370). These elements of P.C. 1003 continue to guide our system of labour relations to this day (Adams, at pp. 2-98 *et seq.*). [Paragraph 60]

In *Dayco (Canada) Limited v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230, Justice Cory commented more precisely on the important role of labour arbitration. Justice Cory stated as follows:

Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of these issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the workforce and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution. [Paragraph 93]

When considering these two passages from the Supreme Court of Canada, it becomes obvious where we have failed. Can we say that the traditional labour arbitration model is resolving disputes “quickly”? Have we met the requirement to resolve our differences “expeditiously”? In our opinion, the current traditional labour arbitration model has failed to achieve those objectives.

Can we honestly say that we have our cases heard expeditiously? If expeditious means within a year then we are expeditious. But what does the definition of expeditious mean to our clients? – We delay labour relations. Lawyers have busy schedules and good arbitrators are even busier. Sometimes it takes arbitrators six to twelve months to render a decision after we wait a year or more to have a hearing. How can that be said to be expeditious?

### **Expansion of Jurisdiction**

Successive decisions of the Courts and in particular, the development and advancement of human rights legislation and jurisprudence, has expanded the volume and type of cases that end up going to arbitration.

The key decision is *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, where the Supreme Court of Canada declared that labour arbitration is the only place a unionized worker can go with a workplace issue. This landmark decision has solidified the exclusive role of

labour arbitrators to resolve differences between a union and an employer and all of those bound by a collective agreement.

A second seminal decision was in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42. In *Parry Sound* the Supreme Court of Canada established that legislation such as human rights legislation and other employment related statutes “establish a floor beneath which an employer and union cannot contract”. While this decision was consistent with legislation in several provinces, such as Nova Scotia, that gave an arbitrator the discretion to consider “employment related statutes”, the decision in *Parry Sound* effectively incorporated all of those statutes into the collective agreements of all unions and unionized employees across the country.

The decision in *Parry Sound*, along with the decision in *Weber* made labour arbitration the only place to go for almost all disputes arising not only from the collective agreement but also for employment related statutes.

The consequence for arbitration and arbitrators has been well documented in academic literature and journals (see, for example, the articles from the *Labour Arbitration Yearbook*, 1999-2000, Volume 1, under the chapter titled “Defining the Scope of Arbitration: The Impact of *Weber*” and “From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration, (2004) 11 C.L.E.L.J. 1). The *Weber* and *Parry Sound* decisions, along with other changes, increased the volume and nature of cases headed to arbitration.

There is no doubt of the value and propriety of these decisions. The concept of leaving all labour management issues to the labour arbitration system is a reasonable approach. However, is the labour arbitration system ready to accept all the additional responsibility? Although labour arbitrators have a wonderful reputation for “speedy and inexpensive dispute resolution”, was the institution of labour arbitration ready for all this new work?

### **Human Rights**

At the recent inaugural Innis Christie Symposium in Labour and Employment Law in Halifax, Professor Bernie Adell stated in his lecture that Volume 4 of the LACs is best described as the “human rights series” of the LACs. A flip through the index of Volume 4 clearly demonstrates that Professor Adell was correct.

In part, this is because of the general rise of human rights legislation and jurisprudence in Canada. It also is because of the decisions of the Supreme Court of Canada that were discussed above.

On one hand, this is a good thing. Unions are defending the rights of their members. More than ever, unions are advancing the rights of their members who suffer from physical and mental disability. In our opinion, this serves those employees who would otherwise be vulnerable. In defence of labour arbitration, it is recognized that delay does occur. It is important to note that it is the complexity of the cases which sometimes causes these delays. Human rights cases take a long time and are fraught with bitterness and misunderstanding. Neither side wants to lose a human rights case. Unions are faced with difficult decisions especially when there is a “duty to accommodate” issue. Ringing in the back of the union’s mind at all times is a complaint of “failure to represent”. Difficulties within bargaining also arise. When modifications of the workplace dynamics are involved in a duty to accommodate case, many persons are impacted. Those persons who suffered an impact from the duty to accommodate issues are often disturbed and upset by the impact of “one person’s case”. These members do not understand why the union takes the position it does, nor do they understand why they as individuals have to pay the price for the accommodation of another employee. It is a difficult and sensitive issue for unions, the employer and certain employees. Is there any wonder that these cases are lengthy and expensive? Is arbitration the best way to handle cases like these? Is there a more expeditious way?

The problem, in terms of the speedy resolution of disputes, is that in many instances, cases require the use of experts, including medical experts, human rights experts, accommodation experts, workplace experts, etc. At a minimum, cases require having physicians as witnesses and the inclusion of lengthy medical records as exhibits.

Arbitration hearings that involve human rights issues are often more complicated legally because of the volume of human rights jurisprudence and the continuing evolution of issues such as the duty to accommodate. More often than not, lawyers have to be involved representing their clients and disputes take longer to settle.

The inclusion of medical evidence causes delay and expense. Parties have not been successful in finding more expedited means of including this type of evidence or sorting it out in advance of arbitration hearings. As a result, arbitration hearings can only be scheduled at the availability of, not just the lawyers and the arbitrator, but of physicians

and in many cases other specialists. The fees for those physicians and other specialists are paid for by the parties and are increasingly onerous. Dealing with medical files and documents gives rise to issues around privacy and the sensitivity of medical evidence. Issues such as pre-arbitration discovery and disclosure and pre-arbitration motions all lead to excessive and sometimes necessary delays.

All of the above factors combine to cause delay, increased costs and a backlog of cases.

### **Unavailability of Counsel and Arbitrators**

Unavailability is becoming a huge problem. We continue to struggle to have our hearings set down by an arbitrator in a timely manner. For the most part, the juggling of the schedules of both counsel and the arbitrators is the biggest problem. On occasion, but not as frequently, it is also the schedule of union or employer clients and witnesses.

The issue with delay in availability is tied in with the expansion of jurisdiction and the complication of matters that often end up before an arbitrator. Under the traditional arbitration model, these cases which are more complex factually and legally require more time and quite frequently many days to resolve. There is a suspicion that some counsel at the request of their clients deliberately seek to delay the scheduling of a case. Certainly, in an extended case it is very difficult to schedule the number of days as necessary. Counsel and arbitrators are both to blame. But the delay is caused by the length of some cases. There are many solutions to this problem, such as permanent arbitrators who set predetermined dates with the parties to meet and resolve disputes at whatever stage the arbitration grievance or arbitration process there may exist. Other examples include mandatory mediation, or on pre-scheduled dates.

In some provinces, there are not enough arbitrators that are regularly agreeable to both parties. This has been a problem for a number of years but it continues to become more pronounced. When good arbitrators, who are regularly used by the parties, cease practice because of retirement or ill health (or unfortunately death), it leaves gaping holes in the arbitrator field. It takes many months, if not years, for the parties to be comfortable with a new arbitrator. That arbitrator has to have the ability to gain the trust of the parties and to be comfortable as a new “middle man”. Arbitrators do not grow on trees. They are seasoned professionals who have a reputation for fairness and equity. Busy arbitrators are a result of success in the market place. The attainment of a

position on the “list of arbitrators” from the Ministry of Labour is no guarantee of success in the marketplace.

### **Lawyers**

In almost all circumstances, when a case gets unduly delayed it is the fault of the lawyers.

We are too busy and our schedules are jammed. As a result, the scheduling of hearings becomes difficult and cases are put off and delayed.

Too often, instead of focusing on the real issues between the parties and working on solutions, lawyers make cases overly complex. We are guilty of pursuing too many legal issues in cases that could be very simple (death by a thousand preliminary arguments). We are all guilty of calling too many witnesses. We are all guilty of spending too much time in direct examination. We are all guilty of spending too much time in cross-examination.

Over the years, I have wondered about case law research for labour arbitration hearings and the amount of time spent. How many legal issues do we need to pursue in a case? How many cases on the same issue do we need to establish a legal principle? Do we really need ten cases on the same point that rehash the same uncontested legal principle?

Despite our best efforts, sometimes we still cannot help ourselves.

We have not been true to the *Wagner Act* principles of labour arbitration. We should all, on a regular basis, turn back to the words of Justice Cory in *Dayco*.

### **Economy and Globalization**

For the past 30 years, we have been talking about the inevitable decline of labour arbitration. One of the major reasons is economic globalization. We have seen this occur rapidly in the past 10 years with the obliteration of the manufacturing sector, particularly in Ontario. In Atlantic Canada, it has been the forestry industry that has taken a dramatic hit and decline in the past decade. Obviously, there is nothing new about our observations. In 1998, Professor Hairy Arthurs wrote a paper for the Canadian Labour and Employment Law Journal titled “The New Economy and the New Legality:



Industrial Citizenship and the Future of Labour Arbitration”, (1998) 7 C.L.E.L.J. 45. As noted by Professor Arthurs:

...I have identified globalization as the source of powerful, long-term pressures – public and private, real and imagined – which are working against social democracy and all its progeny, labour arbitration not the least. (pages 48-49).

He continues to explain:

For various reasons – good, bad and indifferent – social democracy, in this generic sense, has fallen out of favour. What we have instead is the Washington consensus; the wide spread believe that entrepreneurial freedom, reduced taxation and regulation, more extreme disparities of wealth and increasing insecurity and social exclusion will somehow produce positive economic outcomes. Countries which adopt these policies, we are assured, will become more competitive, will attract more investment, and will generate more jobs, at least so long as they follow the gospel according to St. Market. Maybe that is true, maybe not. What seems undeniable, however, is that the decline of the social democratic state has created a very different policy environment for labour relations than the one which prevailed in Canada from the end of the war into the late 1970s. (page 50)

We agree with Professor Arthurs that this “New Economy” is not one which is going to be friendly to labour, particularly in the private sector. If the Canadian economy is going to be competitive in the global economy and also retain energized workplaces then the expense and delay in dispute resolution is something which is going to have to be dealt with by all concerned. It is not only a problem with trade unions; it is a problem of employers, industries and government.

### **Solutions**

If it is accepted that labour arbitration is in serious decline and about to go the “way of the dodo bird”, what do we as lawyers have to do to promote good industrial relations? If we accept that we are in the business of fostering labour relations and not in the labour relations destruction industry, then what can we do to assist our clients in dispute resolution? We propose the following six solutions:

- (1) Improvement of the grievance procedure;
- (2) Government managed mediation;
- (3) Mandatory mediation by arbitrators;
- (4) Mediation/Arbitration;
- (5) Expedited non-binding arbitration; and
- (6) Early settlement.

### **Improvement of the Grievance Procedure**

More often than not, the grievance procedure is not a settlement process. There is no discussion of settlement at any point of the grievance process until usually at the very last step. And often at that point in time there is no real discussion either. Positions of both the union and the employer are entrenched; no one wants to admit to having done anything wrong, so inevitably nothing gets decided in the grievance procedure. Industrial relations become stalled at this level. New methods must be developed by unions and employers to adjust to the new industrial reality. It seems to us that in the days at the beginning of labour relations many issues were resolved at the grievance level. Today, it seems that often times unions and employers do not address grievances with an "open mind". Fresh thinking needs to be brought to the grievance process. Unions need to know when not to proceed with "junk grievances" and employers need to know when they cannot respond simply with a customary "no".

Lawyers can play a hand in advising their clients on grievances at a very early stage. Lawyers can take an objective view of the issues and look at the issues as an arbitrator looks at them rather than as their clients look at them. Lawyers should not see a "case" in every grievance, but should instead see the enhancement of labour relations in every grievance for the good of the parties.

### **Government Managed Mediation**

Before any case is permitted to go through the expense of an arbitration process, it would be worthwhile to have the union and the employer appear before an experienced government mediation officer to attempt to resolve the dispute. This process, which could be paid for by the parties, would require early attention to the merits of the case.

It is recommended that before the parties could even appoint an arbitrator they would have to proceed to the government mediation process. If the government appoints experienced persons to do the mediation then the parties would be much advantaged by this system. The parties would have the opportunity to express their case to an independent person and over time this person would become very familiar with the industry. Although mediation is non-binding, calmer heads will prevail to look at their case in the “cool light of day”.

### **Mandatory Mediation by Arbitrators**

Every arbitrator should be required to attempt to mediate the dispute before him or her. Without the advantage of hearing witnesses, an arbitrator can listen to the position by the parties and can quickly ascertain through the arbitrators experience where this case is actually proceeding. In labour relations areas today there is not “too much that has not already been argued”. It is only the facts that change and the facts are oftentimes not in dispute.

Skilled arbitrators have a unique ability to synthesize the positions of counsel, to quickly come to a resolve and to find an industrial relations solution.

The experience in Ontario is such that arbitrators seldom decide cases, but in 90% of the matters often find solutions to mediation. It is a practice which ought to be emulated throughout Canada on a mandatory basis.

### **Mediation/Arbitration**

Failing to actually mediate a case successfully, the arbitrator should be able to tell the parties exactly what evidence the arbitrator desires to hear. Rather than the union and employer setting out extensive evidence in direct examination, an arbitrator having been unable to mediate the matter can tell exactly those issues that the arbitrator wants to hear. An arbitrator should be able to utilize the information they learned in the mediation process and apply that in the arbitration process to expedite the hearing.

An arbitrator who has gone through the mediation process should be able to expedite the hearing and to bring about a faster resolve. Once an arbitrator goes into the arbitration process after mediation, any decision that the arbitrator reaches should be done on an expedited basis. The arbitrator should not be required to write 50, 75 or even 100 pages of a decision but should instead be able to give “bottom line” decisions.

The parties want to know the result; they do not very often want to know how the arbitrator came to the conclusion. The law is of little interest to the parties. They need to know the answer and they want to move on.

We must adapt our procedures to allow the parties to move on to their real reason for the relationship, mainly making the enterprise successful.

### **Expedited Non-binding Arbitration**

In some industries in Canada, there is an expedited arbitration process in place. The Steel Workers had expedited arbitration operating in their Stelco and Inco operations. CUPW have a form of expedited arbitration in their Collective Agreement which works extremely well.

These methods of expedited arbitration are unique. In essence, they call for no lawyers. Decisions are non-binding. Timelines are fast, evidence is restricted, and material before the arbitrator is often in writing with evidence which can be disputed to be limited and very circumscribed. Arbitrators render decisions often from the bench and, if not from the bench, then in one or two page decisions shortly after the case is concluded.

The Canadian railway industry has had a system of expedited arbitration for many years, which has been generally very successful in moving grievances through the system.

The need to find an expedited solution is one that should be left to the parties, but the parties recognize that grievance and arbitration has to be a problem solving exercise not a “poke in the eye”.

### **Early Settlement**

Our experience has also been that more and more cases settle. There are a number of reasons for this:

- Parties have become more sophisticated. More often, employers have highly skilled and trained human resources professionals who resolve issues, understand labour relations values and approach matters by looking for solutions. The same is true for unions. More often, union representatives are also highly skilled human resources personnel who have a sophisticated

understanding of the interests of their members and their collective agreement rights.

- Cost – this is self explanatory – if you settle the case and avoid having to go to arbitration you avoid arbitrator costs, witness expenses, legal fees and booking expenses.
- Parties have control when they settle. Parties realize that when they are in the hands of an arbitrator even a successful outcome may not solve the labour relations issue.

More frequently, even lawyers get involved in settlement discussions. Over the last number of years, the numbers of cases that are settled between counsel dramatically outnumber the cases that actually proceed to arbitration. Again, the reasons are likely practical – cost and time.

### **Conclusion**

Arbitration as we have known it for the past 30 years is no longer viable. For the reasons stated in this short paper there is a considerable need for change. Lawyers must assist in making the changes, but the parties must be willing to change themselves. Failure to change the grievance and arbitration process will leave the parties' industrial relationships in the "dustpan of failure". Something has to happen because if life continues as it has in the past there will be no future for labour arbitration as we have known it.