

# **LABOUR BOARDS' USE OF MEDIATION- ARBITRATION PROCEDURES**

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## I INTRODUCTION<sup>1</sup>

Administrative tribunals arose from the need to take specialized matters away from the courts and to provide a more expeditious route for determining disputes.

While there are different types of administrative tribunals, this paper will concentrate on those which are arm's length to government and operate in an adjudicative capacity.

The Canada Industrial Relations Board (CIRB) is the type of adjudicative administrative tribunal which, ideally, should decide disputes arising under the *Canada Labour Code (Code)* in a quick and efficient manner.

The challenge for the CIRB, and for many other administrative tribunals, is that the increasing complexity in labour law affects the ability to issue timely decisions.

The labour arbitration world has adapted to this reality by introducing more innovative and interventionist methods to resolve disputes. Mediation-arbitration (med-arb)<sup>2</sup> is one of the better known techniques. The rise of another similar mechanism, expedited arbitration, is another reaction to the need to decide cases efficiently.

This paper will explore legislative and judicial support for decision-makers assisting the parties to resolve their disputes. Labour arbitration successes may provide guidance for other adjudicative tribunals seeking to accelerate their processes.

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<sup>1</sup>The authors thank Mr. James Cameron, Senior Partner at Raven, Cameron, Ballantyne & Yazbeck, for background material he provided on mediation-arbitration during a recent presentation to the Canada Industrial Relations Board. The comments in this paper are for information purposes only and do not bind the CIRB or any of its members.

<sup>2</sup>Labour tribunals like the CIRB adjudicate as opposed to arbitrate. This paper will still use the term "med-arb" throughout given it has become a term of art in legal circles.

This paper will be divided broadly into the following topics:

- a. The success of labour arbitration; and
- b. The challenges for labour tribunals to mirror the success of labour arbitration.

## II THE SUCCESS OF LABOUR ARBITRATION

In the early days of labour arbitration, several cases could be decided within one day. The process prided itself on being far less formal than that found in the courts. The overriding principle was to provide a quick decision for the parties about their collective agreement.

Over the years, the arbitration process slowed. While it is convenient to blame lawyers, labour law clearly became more complex. Clients also played a role in choosing legal options which were guaranteed to extend the length of hearings. The introduction of the *Canadian Charter of Rights and Freedoms* was but one factor that added increased complexity to labour law matters.

Nevertheless, labour arbitration was still considered an efficient dispute resolution model. The success of labour arbitration is demonstrated by the fact that the Supreme Court of Canada, in various decisions, greatly expanded labour arbitrators' jurisdiction beyond merely interpreting a collective agreement. Labour arbitrators now have jurisdiction to interpret and apply a host of labour and employment related statutes, including human rights legislation, when dealing with collective agreement disputes.<sup>3</sup>

However, the enlarging of a labour arbitrator's jurisdiction has impacted on the primary arbitral goal of the quick resolution of workplace disputes. As a reaction to the perceived slowdown in the traditional labour arbitration model, various innovations took place.

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<sup>3</sup> See, for example, *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324 (2003)*, 230 D.L.R. (4<sup>th</sup>) 257 (S.C.C.)

The concept of med-arb has become perhaps the best known reaction. Med-arb can take different forms.

In one current embodiment, always on the parties' consent, an experienced labour arbitrator conducts a mediation. Based on what he or she has learned, if there is no settlement, the parties may ask the arbitrator to write a binding arbitration decision, without proceeding with the usual arbitration hearing process.

While the summary nature of the process may surprise some, this model addresses the cost of long arbitration hearings. It demonstrates that parties are prepared to accept expediency over theoretical perfection.

A more traditional labour med-arb process involves an experienced labour arbitrator mediating the dispute. If mediation does not succeed, the labour arbitrator then holds the traditional hearing and issues a binding decision. The arbitrator's attempt to mediate does not affect the jurisdiction to decide the case.

Individuals, including lawyers not familiar with the labour world, have expressed surprise that a neutral decision-maker, when conducting mediation, meets separately with the parties. For labour law practitioners in Ontario and elsewhere, however, this practice has existed for years.

Section 50 of Ontario's *Labour Relations Act, 1995* explicitly provides for consensual med-arb:

50. (1) Despite any grievance or arbitration provision in a collective agreement or deemed to be included in the collective agreement under section 48, the parties to the collective agreement 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.

Prerequisite

(2) The parties shall not refer a grievance to a mediator-arbitrator unless they have agreed upon the nature of any issues in dispute.

...

Mediation

(6) The mediator-arbitrator shall endeavour to assist the parties to settle the grievance by mediation.

Arbitration

(7) If the parties are unable to settle the grievance by mediation, the mediator-arbitrator shall endeavour to assist the parties to agree upon the material facts in dispute and then shall determine the grievance by arbitration.

Same

(8) When determining the grievance by arbitration, the mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as he or she considers appropriate.

Time for decision

(9) The mediator-arbitrator shall give a succinct decision within five days after completing proceedings on the grievance submitted to arbitration.

Application

(10) Subsections 48 (12) to (19) apply with respect to a mediator-arbitrator and a settlement, determination or decision under this section. 1995, c. 1, Sched. A, s. 50.

The *Code* provides a similar power for labour arbitrators working in the federal sphere at section 60(1)(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.

Interestingly, while labour relations practitioners are very familiar and accepting of the med-arb model, it may be the exception in the arbitration realm. For example, section 35 of Ontario's *Arbitration Act*, 1991, S.O. 1991, c-17 states:

Mediation and conciliation

35. The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially.

This limitation can be waived by the parties<sup>4</sup>.

In practice, med-arb has succeeded in speeding up the labour arbitration process. While not appropriate for every case, and being wholly dependent on the parties' consent, it has restored some of the effectiveness traditionally associated with labour arbitration.

### III THE CHALLENGES FOR LABOUR TRIBUNALS TO MIRROR THE SUCCESS OF LABOUR ARBITRATION

Many labour boards could not function without their Labour Relations Officers (LROs) settling cases prior to adjudication. For example, in 2005-2006, two-thirds of the CIRB's cases were resolved without adjudication. The *Code* protects LROs' attempts to mediate by ensuring they cannot be compelled to testify in any proceeding:

119. No member of the Board or a conciliation board, conciliation officer, conciliation commissioner, officer or employee employed by the Board or in the federal public administration or person appointed by the Board or the Minister under this Part shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Part.

Labour boards have also introduced pre-hearing procedures, such as case management conferences, to enhance their effectiveness.

The challenge for labour boards, including the CIRB, is whether they can be as effective as some labour arbitrators in using the med-arb powers that the Legislator has added to their governing legislation.

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<sup>4</sup> *Marchese v. Marchese*, [2007] O.J. No. 191 (Ont. C.A.)

The Legislator gave clear direction to the CIRB in 1999 when it added section 15.1(1) to the *Code* to consider using med-arb and other innovative techniques:

15.1(1) The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, **without prejudice to the Board's power to determine issues that have not been settled.** (emphasis added)

In other words, if the parties consent to have the Board<sup>5</sup> mediate, then those efforts do not prevent the Board from ultimately deciding the case.

Thus, from a statutory perspective, there is no legal difference between the Board's power to conduct med-arb and that of a labour arbitrator<sup>6</sup>.

#### **a) Court support of the mediation-arbitration process**

Not only has the Legislator encouraged more informal adjudicative processes, but the courts in several cases have given deference to the less court-like tools used by administrative tribunals. The courts' views often come to light when faced with allegations a mediator-arbitrator was biased or denied a party procedural fairness.

In *Canadian Union of Postal Workers v. Canada Post Corp.*,<sup>7</sup> the applicants sought to remove the mediator-arbitrator as a result of a conversation he had on a flight from Ottawa to Toronto. The mediator-arbitrator had been named under the *Postal Services Continuation Act, 1997* to establish a collective agreement for the parties. The first step was to try to mediate a solution, failing which a formal hearing would take place on the issues.

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<sup>5</sup>At the CIRB, the Chair or a Vice-Chair can decide a case sitting alone. In most situations, the CIRB uses a three-person panel which includes an employer and employee representative.

<sup>6</sup> Compare *Code* sections 15.1(1) and 60(1)(1.2) reproduced previously which are similar.

<sup>7</sup> [1998] F.C. J. No. 1090.

The two witnesses to the conversation had differing views of its content. The Court preferred one version and found that there was no reasonable apprehension of bias.

At first instance, the judge at the Trial Division of the Federal Court found that a spectrum existed when considering bias allegations. The trial judge would not have placed a mediator-arbitrator at the adjudicative extreme, “given the significant differences between the proceeding before the Mediator-Arbitrator and a civil or criminal proceeding”<sup>8</sup>.

On appeal, however, the Federal Court of Appeal declined to follow that finding and held the mediator-arbitrator should be held to a standard “pretty close to the highest one, that attributed to a judge in a civil case”.<sup>9</sup>

Nonetheless, the Federal Court of Appeal upheld the trial judge’s findings that while certain comments on a plane by the mediator-arbitrator may have constituted an indiscretion, they did not give rise to a reasonable apprehension of bias.

This somewhat rigid position about the standard to be applied to a mediator-arbitrator may have softened over time.

In *Air Canada Pilots Assn. v. Air Line Pilots Assn.*,<sup>10</sup> an arbitrator had been given the authority to determine a seniority dispute following the merger of Air Canada and Canadian Air Lines International. The CIRB had the authority to decide this question, as part of a bargaining unit review, but had agreed with the parties to refer the matter to an experienced arbitrator.

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<sup>8</sup> Para. 25.

<sup>9</sup>*Canadian Union of Postal Workers v. Canada Post Corp.*, [1998] F.C.J. No. 1439; at paragraph 2.

<sup>10</sup>[2005] F.C.J. No. 906. Upheld by the Federal Court of Appeal: *Air Canada Pilots Assn. v. Air Line Pilots Assn.*, [2006] F.C.J. No. 255.



The applicant asked for judicial review of the arbitrator's decision due to alleged breaches of procedural fairness. The applicant alleged, *inter alia*, that the mediator-arbitrator had attended a wine and cheese reception hosted by one party without the other party present and had spent more time with one party in mediation than with the other.

The Federal Court's decision acknowledges that med-arb differs from a judicially modelled process. The Court noted the parties had agreed to written ground rules for med-arb and found that there had been procedural fairness throughout:

58 Such a process was interactive and inconsistent with a more judicially modelled process. The parties agreed to a process whereby one or more members of the panel met with one party in the absence of the other, where the panel was to ascertain the positions of the parties before the formal arbitration hearing started, and where even after the arbitration session ended the Chair engaged the nominees in more mediation. Mr. Vorster, in his dissent, noted that, at least until the ACPA merger committee stated it was no longer participating in the process, even during executive sessions the parties had the capability and willingness to demonstrate the effects of elements of an award.

59 In the face of such agreement as to the process to be followed, in my view, it is inappropriate to apply principles or jurisprudence taken from rights based arbitrations.

60 The parties, urged by the Board, elected to opt for a system that was flexible, adopted to their needs and essentially fair. That agreed process requires a degree of deference from the Court and significantly impacts on the content of the requirements of procedural fairness.

The decision suggests that med-arb should not take place in a vacuum. Indeed, tribunals contemplating using this tool may want to provide the parties with a full written explanation of how the process works. In addition, the tribunal may want the parties to acknowledge the ground rules in writing. Almost every mediation process follows this approach.

The Court also dismissed allegations that the arbitrator had acted inappropriately in accepting an invitation to a wine and cheese event hosted by one party:

69 In my view, an informed person would consider that the Chair was an experienced arbitrator who was at least initially, acceptable to both sides, and who was participating in a mediation phase of the proceeding where *ex parte* communications with one party was contemplated and acceptable. Also relevant to the informed person would be that the other members of the panel were invited, Mr. Keller's wife and Mr. and Mrs. Pink attended, the event was not arranged for the Chair, and

Mr. Vorster did not consider it necessary to even mention the event to ACPA until almost two months later. Considering those factors, in my view, an informed person, looking realistically and practically at the issue, and thinking the matter through, would not conclude that the Chair would not decide the merger issue fairly because of his attendance at this event. No reasonable apprehension of bias arises from the Chair's attendance at the wine and cheese reception.

The Court also found that the amount of time spent with one party as opposed to the other during the mediation phase did not imperil the process:

78 I find nothing untoward in the fact that more time was spent with one side in mediation than with the other. This is a common occurrence.

In summary, the Legislator and the courts both recognize and respect the utility of med-arb.

#### **b) Challenges for a labour board offering mediation-arbitration**

There is no statutory impediment why labour boards cannot be as effective as labour arbitrators in conducting med-arb. However, there are unique challenges facing labour boards which want to offer med-arb.

Labour tribunals do not use med-arb consistently throughout the country. There can be resistance to using a process which departs so fundamentally from some people's view of how a court should operate. There are also some valid reasons why med-arb will not be appropriate in certain cases.

#### **i) Delay**

Some parties express concern that mediation will only delay the resolution of their case, particularly where they need a timely decision from the tribunal. In addition, mediation could be used by a party which is unprepared to plead its case.

## **ii) Settlement efforts have already failed**

Some experienced parties believe they can identify which cases require a decision and which cases can be mediated. In other words, if the case could have settled, they would have done it already. While the parties' wishes must be respected given that med-arb is consensual, many experienced legal counsel can still be surprised when a case they expected to plead nonetheless settled.

## **iii) Regional differences**

For a pan-Canadian board like the CIRB, there are also significant regional differences affecting the acceptance of med-arb. In some provinces, such as in British Columbia and Ontario, labour board Vice-Chairs have a history of mediating some cases prior to moving into formal adjudication or even at a point after adjudication has already begun. In other provinces, such as Quebec, however, the governing legislation does not yet contain any explicit med-arb provision.

## **iv) Familiarity with the mediator-arbitrator**

In labour arbitration, the parties generally choose a mutually agreeable arbitrator, unless they ask the Minister of Labour to appoint one. Therefore, the parties know in advance their level of confidence in the mediator-arbitrator.

Adjudicators working for labour boards, on the other hand, are appointed by government. The parties often have no actual experience with them. Indeed, by the time the parties gain the necessary confidence in an adjudicator to consent to mediation-adjudication, the appointee's term may already have ended.

There is similarly no guarantee that all appointees will have the necessary real life experience or willingness to engage in med-arb. Not all labour arbitrators believe in med-arb.

The CIRB has the added challenge of having a small number of neutrals and representative members to cover the entire country. This lowers the chance of having

the same legal counsel and parties appearing frequently enough before the same panel to gain the necessary confidence. A provincial labour board, which might deal continuously with a handful of the top labour law firms, may therefore have an advantage.

**v) Evidentiary concerns**

A common med-arb concern arises from the fact that the adjudicator may hear inadmissible evidence when meeting with a party alone.

However, decision-makers often hear evidence, and then are called upon to determine its admissibility:

Concerns about the possible contamination of the neutral by receiving information or arguments in private meetings are overstated. Judges regularly rule on the admissibility of evidence, and if that evidence is rejected the judge disregards the information that has been tendered. In my view, an experienced neutral should be given the same respect<sup>11</sup>.

**c) Benefits arising from a labour board offering mediation-arbitration**

Notwithstanding the disadvantages that labour tribunals may have in being as effective in med-arb as labour arbitrators, med-arb's advantages still cannot be ignored.

The reality is that labour boards do have appointees with significant practical experience in labour law as well as in med-arb. Willing parties can leverage this experience in the interest of a quicker resolution of their cases.

Even if the mediation process does not result in a full settlement, hearing time will be saved if only a few key issues remain for determination after mediation. Indeed, one key issue may be the lynchpin for the entire case. In addition, the decision-maker will be very familiar with the evidence that will be presented.

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<sup>11</sup>*Claude R. Thomson, Q.C., Med-Arb: A Fresh Look*, (Spring 2006) 24 *Advocates' Soc. J. No. 4*, 9-15.

The CIRB already has a significant advantage over a labour arbitrator due to its prehearing procedures. The CIRB has the benefit of full pleadings and generally holds a case management conference with the parties in advance of any hearing dates. By contrast, most labour arbitrators usually learn about the case on the morning the hearing starts. They thus have had little or no time to prepare for a possible resolution.

#### **IV CONCLUSION**

It is unlikely that labour law will become less complex.

The labour arbitration process has adapted to this increasing complexity by finding alternative dispute mechanisms, such as med-arb, to deal with the parties' differences in less legally formal ways.

Several labour boards have already followed the lead of labour arbitrators and are using a med-arb process where appropriate. Other labour boards which have the statutory authority to be innovative may want to consider ways to publicize these initiatives. This involves not only educating the parties about the existence of mechanisms like med-arb, but also assuring that those adjudicators who will be called upon to mediate have the proper experience and training.

For those tribunals not operating in the labour law field, they may want to verify their constituent legislation in order to see if they have the flexibility to offer innovative methods of solving problems. The labour law field can provide a guide to just some of the innovative approaches in current use.

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