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**Med-Arb: A Viable  
Dispute Resolution Alternative**

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## Executive Summary

Mediation arbitration, or med-arb, is an increasingly popular alternative dispute resolution mechanism in which the disputing parties and a third-party neutral attempt to reach a voluntary agreement through mediation, and then move to arbitration by the same third party if they are unsuccessful. Some critics question the compatibility of mediation and arbitration, while others point to the possible abuse of the process if a med-arbiter threatens to move quickly to arbitration, and they worry about the detrimental impact on the final arbitration award of confidential information that emerges through mediation. The author of this study uses the results of her detailed interviews with experienced med-arbiters at the Grievance Settlement Board (GSB), a separate arbitration mechanism for public employees of Ontario, to throw new light on the continuing debate about med-arb.

- It is clear that the critics of med-arb are actually expressing doubts about the abilities of med-arbiters to perform their role, rather than about the med-arb process itself. Experienced med-arbiters will be able to move from one role to the other and ensure that arbitration is not affected adversely by information learned during mediation. Almost all GSB arbitrators indicated that they start arbitration as if there has been no mediation.
- Med-arbiters at the GSB were careful not to go beyond their role as facilitators, and the possibility of arbitration was not used as a threat during mediation, although med-arbiters did refer at appropriate times to the outcome of similar cases. They gave overt opinions about the strength of a case only if asked directly by both parties.
- Med-arb works best when the parties choose the process voluntarily and when they choose the med-arbiter they are comfortable with. These choices help to create the conditions that are most conducive to the success of mediation.
- While there is no indication that med-arb should be restricted to only some types of disputes, it may not be appropriate when the parties need an interpretation of a contentious issue or want to set a precedent.

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## **About the Author**

Megan Elizabeth Telford is a graduate of the Queen's Master of Industrial Relations program, and is currently in the LL.B. program at the Queen's Faculty of Law. She is articling with the law firm Heenan Blaikie and will be clerking for the Federal Court of Appeal.

- **The success of med-arb at the GSB is evident in the fact that GSB arbitrators have had to arbitrate only a very small percentage of the cases that have gone to med-arb.**
- **The author concludes that med-arb can be as effective in the private sector as it is at the GSB, since the appropriate conditions are present there as well. Since her empirical research fails to support the standard criticisms of the process, she concludes that med-arb will continue to be a popular and effective method for the settlement of labour disputes.**

# Introduction

As early as the 1940s some arbitrators were advocating the use of mediation-arbitration (med-arb), a dispute resolution mechanism in which disputing parties and a third-party neutral attempt to reach a voluntary agreement through mediation, and then move to arbitration by the same third party if they are unsuccessful (Taylor 1954). The advocates of med-arb believed that the real role of arbitrators in interest disputes was to assist disputing parties in completing their bargaining and that in doing so, their first tool should be mediation. Others argued that the processes and techniques of the two methods were fundamentally different and incompatible. Critics of med-arb thought that it was unethical for an arbitrator to attempt to mediate any dispute and that it was an arbitrator's duty to decide matters 'entirely on the basis of the formal record placed before him, including the contract which defines the rights and obligations of the respective parties' (Killingsworth 1972, 16).

Sam Kagel, a San Francisco lawyer and arbitrator, is often credited with developing med-arb, perhaps because he used the process to settle a very public and controversial nurses' strike in the 1970s (Kagel and Kagel 1972, 12). Afterwards, med-arb was actively encouraged in the United States by the Federal Service Impasses Panel. The panel's records indicate that it was used in approximately twenty cases between 1970 and 1975, but it may actually have been used much more frequently (Coleman 1992). The prevalence of med-arb continued to increase after Wisconsin became the first state in the United States to formally adopt med-arb as a dispute-settlement procedure on January 1, 1978 (Torosian 1978, 346). (The experience with the statute is described in further detail in the appendix.)

Chief Justice Alan Gold is usually credited with the development of med-arb in Canada. Gold introduced med-arb between 1968 and 1975, when he was an arbitrator on the ports of the St. Lawrence:

[I]t is there that I first started to use med-arb as a standard practice. Indeed, not only was it desirable, it was necessary, if the system were to survive. When there is a threat of work stoppage on the waterfront—or worse an actual stoppage—one does not have the luxury of waiting for several weeks or months to decide the issue through normal procedures. Thus, med-arb was born and became the order of the day, and indeed, of the night and of the weekends, and of the holidays. (Gold 1996, 352)

By the late 1960s and early 1970s the Quebec Department of Labour and the federal Department of Labour had become interested in the process, and med-arb was used to settle on-going disputes in the extremely volatile Quebec construction industry and in the creation of Via Rail (354).

The use of med-arb continued to increase in the United States and Canada during the 1980s. Statistics from the AFL-CIO arbitrator reporting system and data base in 1992 indicated that there was substantial growth in mediated settlements (Zalusky 1993, 51) and that med-arb was being used to settle disputes in such diverse fields as nursing, journalism, public utilities, education and commerce. Moreover, a 1994 study of some high profile cases indicated increased use of med-arb to solve a wide variety of disputes, ranging from commercial to environmental disputes (McLaren and Sanderson 1994, s.6-29).

An increase in the use of med-arb is also evident in Canadian legislation (Elliott 1995). Although provinces follow the traditional method of mediation before a strike or lockout or a multistep grievance procedure ending in arbitration, a growing number of statutes contain med-arb provisions.

*During the 1980s med-arb was being used to settle disputes in such diverse fields as nursing, journalism, public utilities, education and commerce.*

Despite the increased popularity of med-arb, the original debate about the compatibility of mediation and arbitration continues. This study looks closely at the criticisms of med-arb in the literature, in an attempt to determine if they are serious enough to inhibit the successful operation of the mechanism. Interviews conducted by the author with experienced med-arbiters at the Ontario Grievance Settlement Board provide new evidence and a new perspective on the benefits and problems of med-arb.

## The Med-Arb Debate

### Mediation, Arbitration, and Med-Arb

The primary goal of mediation is to assist the conflicting parties in negotiating their own dispute and in working towards a mutually satisfactory settlement (Smith 1998, 3–8). The third-party mediator acts as a facilitator with no authority to make decisions on any of the issues that arise during the mediation. In arbitration on the other hand, the arbitrator is expected to render a final and binding decision based on the evidence presented and the parties' respective submissions. Arbitration is an adversarial process and does not encourage voluntary agreement or settlement. This win-lose approach increases the tendency of parties to take more extreme positions than they might actually be satisfied with, in hopes that the arbitrator will find in their favour.

As mentioned, med-arb may combine elements of mediation and arbitration. Med-arb is, in fact, a flexible process, and, depending on the circumstances, there can be fairly dramatic differences in how it operates. For example, in an interest med-arb, that is, a dispute based on collective agreement negotiations, the med-arbiter may move back and forth between mediation and arbitration. In a rights med-arb, a dispute based on collective agreement administration, the med-arbiter typically progresses distinctly from mediation to arbitration (Henry 1988, 387). The flexibility of med-arb is further illustrated by the various models of med-arb in use today: nonbinding med-arb, where both the mediation and arbitration stages are nonbinding on the parties; med-arb 'show cause,' where, if the dispute is arbitrated, the third-party neutral renders only a tentative decision that is presented to the parties for their consideration; 'medaloo', mediation and last offer arbitration, where if mediation is unsuccessful, the parties engage in final-offer arbitration in which the arbitrator must choose the final position of one of the respective parties; and post-arbitration mediation, where mediation is performed by the arbitrator after the arbitration session but before the final binding decision is made known (see the appendix for a more detailed description of these models).

### Cost and Efficiency

Med-arb, according to its supporters, minimizes the problems of time and expense because

- Only one third-party neutral is involved; if the dispute proceeds to arbitration, the third party is already familiar with the issues and argument; and
- Very few cases in med-arb actually proceed to arbitration (Hill 1997, 107).

Moreover, when a dispute is not resolved at mediation and proceeds to arbitration, the process may be expedited if the med-arb procedure agreed upon by the parties lays out time limits in which a decision must be rendered by the med-arbiter; expects the med-arbiter to render a decision only on issues not settled during mediation; and directs the med-arbitrer to render a final decision right after closing arguments (Hill 1997, 107).

*Med-arb is a  
flexible  
process.*

## The Threat of Arbitration

The threat of arbitration distinguishes med-arb from traditional mediation. Since the parties are aware that their inability to resolve the dispute could lead to an imposed resolution and an unfavourable result, there is an increased incentive to reach a negotiated settlement. A 1995 study, one of the few examining med-arb, found that the parties were substantially better motivated to settle their dispute under med-arb because they knew that the third party could eventually arbitrate and 'wanted to avoid loss of control over their destinies' (Pruitt 1995, 367). Thus, med-arb pays strict adherence to the axiom that the best agreement is an agreement which the parties themselves reach (Kagel 1976, 186).

While the threat of arbitration can be seen as an effective tool, some critics fear that 'having the power to arbitrate makes mediators too forceful, resulting in a decision that unduly reflects the views of the mediator' (Pruitt 1995, 366). This may be a more pressing concern when the third party is primarily an arbitrator; an arbitrator naturally, over time, develops personal concepts of what makes a good solution. The arbitrator's orientation may prove harmful during the mediation stage, when the parties should concentrate on negotiating their own solution (Kolb 1994, 102). A neutral third-party facilitator who is too ready to make tentative decisions or recommendations, may undermine the process and deny the parties the opportunity to negotiate their own solution. Arbitrators who lack mediation experience may even become offended when the parties reject their suggestions during mediation, and they may then pressure the parties into what they feel is an acceptable solution (McLaren and Sanderson 1994, ss.6-4, 6-5). While these problems may arise with any overly forceful mediator, they are more serious in med-arb because the parties may feel more inclined to concede to a forceful med-arbiter, knowing that the med-arbiter could ultimately decide the dispute. As well-known arbitrator Martin Teplitsky notes,

It is precisely because I have no power to force the parties to do anything that I feel free as a mediator to put pressure on them, by confronting each side with the reality . . . of the alternatives. If you pressure parties as a mediator when you are also the arbitrator, it makes the arbitration appear a foregone conclusion. . . . It is impossible for an overactive mediator-arbitrator to maintain the appearance of neutrality in any particular dispute. (1992, 130)

In a study comparing mediation, med-arb with the same mediator and arbitrator, and med-arb with a different mediator and arbitrator, it was observed that during the mediation stage the 'use of heavy pressure tactics—threats and strong advocacy of a particular solution' was greater in med-arb with the same mediator and arbitrator. Furthermore, it was observed that some med-arbiters pushed for a particular solution after only a few minutes of mediation and that disputants 'appeared particularly anxious to follow the suggestions of and to please the mediator, perhaps because mediator prestige was greatest in this condition' (Pruitt 1995, 367).

The same study concluded, however, that

most of the mediators [observed] were *not* highly directive. Their pressure tactics tended to be concentrated at the end of the sessions, suggesting a last-ditch effort to rescue a failing mediation rather than a policy of forceful advocacy. (Pruitt 1995, 368)

Moreover, when the participants in all three dispute resolution methods were surveyed, they ranked the med-arbiter as being the least forceful. The study also found that the mediation process appeared to go more smoothly under med-arb than under straight mediation or mediation and arbitration by different persons. When the mediator had the power to arbitrate,

*The parties may feel more inclined to concede to a forceful med-arbiter, knowing that the med-arbiter could ultimately decide the dispute.*

Disputants made fewer angry or hostile comments and fewer invidious comparisons. They also proposed more new alternatives for dealing with the issues, an indication of creative problem solving . . . disputants behaved most constructively under med-arb . . . and least constructively under straight mediation. (Pruitt 1995, 367)

Thus, it appears that while there are some valid concerns about the power of med-arbiters, overall, the impending threat of an imposed decision can have a very positive impact in helping the disputants reach their own negotiated agreement.

### Confidential Information

In traditional mediation, the parties may reveal personal, confidential, and then even damaging information about their case to the mediator. Mediation may also reveal underlying interests, which may not surface in arbitration (Landry 1996, 265). Critics of med-arb are therefore concerned that med-arbiters may acquire 'information in attempting to bring about a settlement that should have no bearing on their decision as . . . adjudicator[s]' (264). They suggest that it is unrealistic to expect a mediator-turned-arbitrator to put these underlying issues aside when making a decision:

[I]f parties disclose their bottom line, that information cannot be erased 'but must inevitably affect the award. . . . Thus full-born mediation may pose both a serious impediment to the independent judgment of the arbitrator and real risk for the parties.' (Kagel 1993, 87)

This is sometimes referred to as a suspension of 'natural justice,' one of the fundamental concepts of legal proceedings in Canada. It has two basic tenets: persons must be allowed to hear and answer an opponent's case, and any decision affecting a person must be made by a tribunal that is impartial and not biased (Canadian Bar Association 1989). In med-arb, private caucusing involving only one side and the med-arbiter is common. Critics are concerned that these private and confidential meetings can erode natural justice by removing the right of parties to respond directly to any accusations or information of the other party. Moreover, they fear that unchecked information obtained during private caucuses may bias the final binding decision if the case is arbitrated.

Critics are also concerned that employing a mediator who may arbitrate will encourage the parties to spend important time during mediation attempting to justify and convince the med-arbiter of the reasonableness of their offer: the disputants may use mediation as a preparation for possible arbitration, thereby making it more probable that the dispute will reach arbitration.

Alternatively, the parties may be tempted to restrict information and say as little as possible, for fear that any information they do release to the med-arbiter will ultimately weaken their case if the dispute goes to arbitration (Torosian 1978, 348).

[The] effectiveness of a mediator is likely to be lethally compromised if the parties know that there is a real chance that their mediator will subsequently change roles and either be making judgments about them or exercising power over them. Parties may find it very difficult to disclose the necessary information concerning their proposals in an attempt to arrive at a mediated settlement when they know the mediator may ultimately decide their dispute. (Landry 1996, 265)

Proponents of med-arb argue that these criticisms are dramatically overstated and cannot be considered serious impediments to med-arb. The influence of confidential infor-

*Critics fear that unchecked information obtained during private caucuses may bias the final binding decision if the case is arbitrated.*

mation on impending arbitration decisions should, in their view, amount to concern only if the med-arbiter is incompetent. Dealing with confidential information is an integral part of med-arb, and if the third party understands the fundamentals of the process and his or her role in it, it should not be problematic. Some commentators suggest that confidential information acquired in mediation is no more a risk in an arbitration than a situation in which an arbitrator or a judge has to consider the admissibility of evidence. Even if it has already been heard by the third party, if the evidence is deemed to be inadmissible, a competent arbitrator will know to discard it, and it will play no part in the final decision making. A competent med-arbiter can apply the same process when dealing with confidential information (Elliott 1995, 169). Similarly, a competent med-arbiter will be able to overcome the problem of parties who are tempted to restrict information during mediation: 'he or she will be able to . . . check out or properly prove any confidential information without betraying necessary confidence' (Simkin and Fidandis 1986, 191).

Many commentators believe that the behaviour of disputants is often related to whether they have accepted med-arb voluntarily. If they have, they will usually understand the mechanics of the process and what is expected of them. They will therefore be more likely to trust the mediator to forget what was learned in a failed mediation in deciding the case. Other commentators suggest that concerns about natural justice are mostly unfounded, since they are most often raised in jurisdictions that rely heavily on private caucusing and depend on the mediator providing formal or informal opinions on the relative positions of the parties (Elliott 1995, 167).

Finally, other authors suggest various ways to reduce potential problems. They recommend a code of ethics for med-arbiters, to assist them in handling confidential information obtained in private caucus. They also argue that med-arbiters should be trained to ensure that the release of any confidential information remains strictly related to mediation and that any arbitration decision is based directly on the evidence presented (Pruitt 1995, 368).

### Better Arbitrated Decisions?

A more controversial position is that med-arb fosters better arbitrated decisions. Supporters of med-arb contend that understanding all the merits of the case, including confidential information obtained in private caucuses, helps the med-arbiter fashion a decision which meets the real needs and interests of the parties. As one commentator notes, a 'truly competent med-arb personage is more likely to produce a result that both parties can live with and that will be closer to a solution that the parties would have reached and been able to agree on without outside assistance. It cannot properly be said that an arbitrator should be kept ignorant of important aspects of a case' (Simkin and Fidandis 1986, 192).

In some variations of med-arb the third-party neutral renders a decision based solely on the area narrowed down by the parties during mediation (Moore 1998). The parties may have reached a settlement on some of the issues, leaving less to be decided in arbitration. However, even when mediation fails to produce any settlement, the differences between the parties as they move to arbitration is often considerably narrowed, so that 'a much more reasoned and . . . more predictable result can be expected by the parties where the med-arbiter has to make the decision' (Kagel 1976, 187). Moreover, the decision may be more predictable, since the parties often come to a greater understanding of the legal strength of their case during mediation (Polland 1973, 63). As some proponents have noted, 'too much of some present-day arbitration is subject to legalistic attempts to keep the arbitrator ignorant about important facts. Med-arb is not the only way to correct that problem but it is one way' (Simkin and Fidandis 1986, 192).

*Even when mediation fails to produce any settlement, the differences between the parties is often considerably narrowed.*

### Rights Med-Arb and Interest Med-Arb

Some commentators claim that med-arb is most successful at resolving interest, or contract-negotiation, disputes. They suggest that to increase negotiated settlements, med-arb should be used as an extension of bargaining, rather than as a separate procedure, because it will be perceived as a more consensual, non-adversarial approach. This is comparable to the view that med-arb works best when the parties want to settle a dispute in an amicable manner and when a guaranteed solution is needed quickly (McLaren and Sanderson 1994, s.6-2). Several authors also suggest that med-arb is best used in high-profile or difficult interest-dispute situations, for example, when a breakdown in negotiations could result in a strike that would have a serious impact on the community or economy (Pollard 1973, 63). By extension, med-arb is recommended in fields where a strike is proscribed by statute, as often occurs with public sector workers such as police, firefighters, and many health care professionals.

Others maintain, on the contrary, that med-arb is most effective in settling grievances. Med-arb can be particularly helpful when the parties want a settlement on a particular issue but do not want to set a precedent. Med-arb also gives the employer and grievor time to work out an arrangement to their mutual satisfaction, such as compensation or reinstatement, but still leaves both parties with a resolution if a settlement cannot be negotiated.

The evidence presented below indicates that med-arb has been successful at resolving a wide variety of both interest and grievance disputes.

### Voluntary Acceptance

As mentioned, some commentators argue that med-arb should be used only when it has been voluntarily agreed upon by the disputing parties. Voluntary acceptance is essential because med-arb is 'not a panacea and doesn't fit each impasse situation' (Moore 1998):

This is fundamental to the med-arb resolution process, as it cannot function well if there is resentment or bitterness due to a dispute over the appointment of the med-arb facilitator or the process itself. (McLaren and Sanderson 1994, s.6-2)

Consequently, many critics feel that to establish mandatory med-arb for the resolution of all impasses would be a grave mistake.

### The Relationship between the Parties

The existence of a prior relationship between the parties is thought to be crucial to the success of med-arb because

In mature relationships, rights eventually give way to interests, mutual goals, and a living relationship. Procedures become less binding and standards of conduct and fairness become paramount. (Zalusky 1993, 51)

Many critics are reluctant to believe that parties who are unfamiliar with each other and the med-arbiter will operate in an efficient and rational manner or that they will readily disclose confidential information. They argue that parties will think that any indication of flexibility could be interpreted as a sign of weakness which might adversely affect an award if the dispute goes to arbitration. One arbitrator concludes, therefore, that 'med-arb [is] more of an outgrowth or by-product of a relationship . . . than a procedure which can easily be complied with in any given situation' (Torosian 1978, 348). Furthermore, both parties must be 'confident with going to med-arb and [believe that] whatever the decision

*The existence of a prior relationship between the parties is thought to be crucial to the success of med-arb.*

or recommendation that comes out of med-arb, it's going to help parties with their respective constituents' (Sackman 1995, 118). Thus, many critics feel that making med-arb available to parties without knowing if the relationship that is necessary to make the procedure work exists is potentially dangerous (Torosian 1978, 348).

### Med-Arbiter Skill

The success of med-arb in resolving labour disputes is highly dependent on the med-arbiter, whose skill and experience is essential: many of the complaints surrounding the med-arb process are really concerns about possible abuse of the process by the med-arbiter.

While each third-party neutral employs different techniques and styles, it is possible to identify certain essential skills. First, the third party should be skilled and experienced in both mediation and arbitration and able to switch from the requirements and responsibilities of one role to those of the other. He or she must be able to move from being facilitative and non-judgmental in mediation to acting as a judgmental decision maker in arbitration. As outlined earlier, a neutral must be able to disregard a failed mediation and ensure that the arbitration is not affected by information learned during the mediation. Also, as in any alternative dispute resolution technique, the neutral must be able to gain and keep the trust of the parties involved, as well as to establish and maintain credibility and faith in the process (McLaren and Sanderson 1994, s.6-2).

Med-arbiters use various processes during mediation. One group of commentators argues that a 'directive' approach is the most effective (McLaren and Sanderson 1994, s.6-2). Med-arbiters using the directive approach establish solid guidelines for the parties' behaviour and interaction, which includes taking the responsibility for calling caucuses and taking breaks. Giving parties boundaries within which to operate helps by increasing their focus and commitment to a negotiated settlement. Some commentators further suggest that med-arbiters should give direct indications to the parties in private caucus about the strength of their case, letting them know whether it 'would be wise to allow the dispute to continue to arbitration' (Hill 1997, 106). Finally, supporters of the directive approach also argue that the med-arbiter should take responsibility for deciding when an impasse has occurred and thus when to move to arbitration. As McLaren and Sanderson note, the power to declare an impasse can be a powerful tool when used skillfully by the med-arbiter. On the other hand, giving the disputants the power to declare an impasse is potentially dangerous, since it is difficult for the parties themselves to evaluate objectively whether further mediation will be unproductive (McLaren and Sanderson 1994, s.6-14).

Another group of commentators believes, however, that the directive approach can be potentially harmful to the operation of med-arb. They argue instead for a more free-flowing, or 'flexible,' approach: boundaries and guidelines should be established only when it is evident in the course of the proceedings that they are necessary. Even then, they should be negotiated to a point of mutual satisfaction by the parties, not imposed by the med-arbiter (Experience 1981, 2,5). Moreover, the med-arbiter should not give strong indicators during private caucus regarding the strength of a party's case. If indicators are given,

there is less chance that the settlement negotiated under those circumstances will be implemented and followed voluntarily, as the disputants may be angry with the way it was forced upon them. The end result is a dispute that seems to have been reached through mediation but does not have the accommodating effects of a mutually acceptable agreement that mediation usually brings. (Ross 1982, 60)

*The med-arbiter should be skilled and experienced in both mediation and arbitration and able to switch from one role to the other.*

Clearly these two divergent positions represent extremes, and many commentators believe that the best approach is to be found somewhere in the middle (McLaren and Sanderson 1994, s.6-2). Some commentators note that the approach may vary depending on many factors, on the kind of dispute and the personalities of the parties, to name but two.

## New Evidence from Med-Arbiters

In light of the above controversies, the research described here was undertaken to determine whether the criticisms just discussed are valid and whether they are serious enough to conclude that mediation and arbitration should remain separate processes.

The research was carried out at the Grievance Settlement Board (GSB), a separate arbitration mechanism for public employees of Ontario, established under the *Crown Employees Collective Bargaining Act* (R.S.O. 1980, ss.19.1, 20(2)). Persons are appointed to the GSB by an order-in-council to act as arbitrators. GSB arbitrators have the same powers as those who act under the *Labour Relations Act*. The main unions that may appear before the board include OPSEU (Ontario Public Servants Employees Union), OLBEU (Ontario Liquor Board Employees Union), and CUPE (Canadian Union of Public Employees).

Arbitrators appointed to the GSB were interviewed in person when possible; otherwise they were interviewed by phone. The interview questions were reviewed and accepted by the Governance Committee of the GSB prior to their use, and a letter was sent by the GSB informing the arbitrators that they were going to be contacted for an interview. Arbitrators were not given a copy of the questions before the interview.

### Med-Arb at the GSB

On average GSB arbitrators have approximately twelve years of arbitration experience and five years of mediation experience, although seven arbitrators had been practising mediation to some degree for as long as they had been arbitrating. The majority of arbitrators had been at the GSB for more than seven years and were involved in one to three cases per week.

With differing degrees of frequency, the majority of GSB arbitrators will suggest mediation to the parties. Only one arbitrator indicated that he would never suggest med-arb. Interestingly, over half the arbitrators stated that when mediation was a relatively unknown technique, and thus less popular, they suggested it much more frequently. Now, however, the parties are more likely to request it themselves. None of the GSB arbitrators suggest mediation to disputants at the very beginning of a case. Three arbitrators indicated that they inquire at the outset about any previous settlement attempts; the rest decide whether to offer med-arb after listening to opening statements and, in some cases, a portion of the evidence.

Arbitrators did acknowledge that occasionally only one party requests mediation; however, slightly more than half indicated that it would be difficult to estimate how often the other party is agreeable to the request. The remaining arbitrators estimated that when one party suggests med-arb, the other party agrees 70 to 80 percent of the time. However, all the arbitrators said it would not be rare for one party to suggest mediation and for the other side to decline. While mediation can be rejected for many reasons, two arbitrators indicated that in their experience the parties usually decline mediation when they believe they have a strong legal case. Both did so when the grievor was unstable and they felt that open exchange and negotiation would be unproductive and possibly dangerous. One arbitrator also noted that requests for med-arb sometimes have to be denied, or at least delayed, because the parties do not have the requisite decision-making authority to accept a settlement, even if one could be negotiated.

Over half the arbitrators stated that when mediation was a relatively unknown technique, they suggested it much more frequently.

## Factors Influencing Mediation

GSB arbitrators did not agree with commentators who argue that med-arb should be used only in high-profile interest arbitration or with those who recommend limiting it to serious and high-profile grievances. Nor did they agree that a long-standing relationship between the parties is a necessary element in a successful med-arb. Every GSB arbitrator stated that a long-standing relationship between the various parties in a med-arb can certainly be helpful, but that it is not at all necessary for the process to succeed. While the arbitrators did indicate that it was quite common at the GSB to know at least one and sometimes both of the representatives, the only impact of having a prior relationship with the parties that they would acknowledge was on how the process was conducted. For example, arbitrators noted that they would shorten their opening statement when they had previous dealings with the parties.

The most common factor helping to determine whether GSB arbitrators suggest med-arb was the willingness of the parties to settle the dispute. The arbitrators could tell from the 'way the opening statements are presented' or 'the approach taken by the respective parties' whether they truly want a negotiated resolution to their problem. It was important to determine to what degree management was prepared to actively assist the grievor in resolving a claim—for example, whether they were prepared to pay compensation. As one arbitrator noted,

Through years of experience I can usually tell, but if I'm not sure I just ask if they're interested [in mediation]. Often parties are concerned about looking unreasonable to the arbitrator so they will at least agree to give it a try.

The arbitrators also remarked that they are more likely to suggest mediation when a case involves extremely complicated and interrelated issues. As well, they nearly all indicated that they are more likely to suggest mediation when the dispute, if arbitrated, would be extremely lengthy. When deciding whether to mediate, GSB arbitrators also contemplated what the parties required from the resolution of the dispute. They took into account whether a solution required strict adherence to the collective agreement or whether the parties were free to come to their own resolution of the issues. As well, they inquired whether parties needed an answer, an interpretation, or a resolution. Finally, they indicated that it is necessary to determine whether parties at the table have the power to negotiate and agree to a settlement. As one arbitrator noted,

I like to probe these questions at the very beginning. It not only helps me decide if the case could possibly be settled, but also helps me know where the parties are coming from and what they expect.

Finally, it should be noted that despite these various influencing factors, approximately half the arbitrators did agree that monetary disputes have a high rate of settlement in med-arb.

## Threat of Arbitration

As mentioned, Pruitt (1995) and other commentators have raised concerns about how the threat of arbitration is used by med-arbiters during mediation. They have questioned, first, whether med-arbiters are too forceful in advocating their own proposed solutions; second, whether they use the threat of future arbitration to apply pressure and threats in order to obtain a negotiated settlement; third, whether, on the other hand, they turn to arbitration after only a few minutes of mediation, thereby compromising the possibility for a negotiated settlement.

*Monetary disputes have a **high** rate of settlement in med-arb.*

*How arbitrators regard the influence of confidential information on arbitration varies.*

While it is difficult to accurately assess the degree to which GSB arbitrators employ the threat of possible arbitration during mediation, the interviews gave some general indication that the tactic is not being abused at the GSB.

In response to the first concern, the majority of arbitrators indicated that they do not propose solutions to parties. While they were 'actively' involved in the mediation, they saw their role as that of a facilitator of the proceedings, helping with formulating and carrying offers between the parties, assisting the parties in uncovering underlying issues and concerns, and engaging in creative problem solving. As one arbitrator noted,

Creating and suggesting solutions for the parties would be stepping way beyond my role as mediator. Not only is it not a good idea, since I might not understand what the best solution is under the circumstances, but it is also really unfair to the parties, since it puts them in a position of having to reject them [the proposed solutions].

Thus, according to GSB arbitrators, med-arbiters are very unlikely to be too forceful about proposed solutions. There was also no indication that GSB med-arbiters use the threat of arbitration in an abusive manner to elicit a negotiated settlement. Nearly all the arbitrators did use the threat of arbitration, but they did so subtly, by referring to the outcome of similar cases or by asking probing questions. With only one exception, GSB arbitrators give overt opinions regarding the strength of a case only if requested directly by both parties. Thus, while the evidence is not conclusive, it would appear that arbitrators at the GSB do not use the strength of a party's case to overtly pressure the parties into a negotiated settlement.

There was also no indication that med-arbiters proceed to arbitration after only a few minutes of mediation. When asked about stopping mediation, nearly all GSB arbitrators voluntarily commented that they put a great deal of time and effort into assisting parties in obtaining a negotiated settlement. Many of the arbitrators would agree with one respondent who indicated, 'I'm extremely patient. I try never to end a mediation unless I truly believe it is absolutely hopeless.' Many of the arbitrators felt it was important that they have responsibility for declaring an impasse, because they want to 'push mediation as far as it [can] go, until any last possibility of a settlement is extinguished.' Obviously, these comments offer no support for the idea that med-arbiters at the GSB forcefully control the proceedings by turning to arbitration after only a feeble attempt at mediation.

Thus, to summarize, while these are not conclusive, the interviews do indicate that med-arbiters at the GSB use the threat of settlement in a positive and effective manner to assist parties in obtaining a settlement, rather than attempting forcefully to bring the parties to a negotiated settlement or an imposed decision.

#### **Confidential Information**

With the exception of two, all the GSB arbitrators acknowledged that the parties, particularly those inexperienced with the process, have expressed concern about the impact on any possible arbitration of information relayed to arbitrators during mediation. However, how arbitrators regard the influence of confidential information on arbitration varies and parallels the range of opinions in the academic literature. Some arbitrators 'don't consider this to be a problem whatsoever,' while others 'have serious reluctance to perform med-arb for this reason. It seems to be wavering on a dangerous unwritten line which could be a very serious compromise of either role.' With the exception of three, all the arbitrators recognized the influence of confidential information as a potential problem but added at the same time that it is not currently a problem at the GSB.

Judges, arbitrators, persons with any sort of adjudicative role must deal with this type of problem. It only becomes a problem in med-arb if the neutral is incompetent or is not conscious of their role in the proceedings. Anyone who understands their role wouldn't allow it to effect them.

With one exception, all GSB arbitrators indicated that they take active steps to guard against confidential information compromising the proceedings. One commonly cited way was to inform disputing parties in the opening statement about how confidential information would be treated, both in private caucusing and in arbitration. Many arbitrators noted that they often restate guarantees of confidentiality at certain stages of the proceedings, for example, if a party appears to hesitate to divulge information or if they are carrying information or offers between the parties.

With the exception of one, all GSB arbitrators indicated that they start the arbitration as if there has been no mediation. As one arbitrator noted, 'when I arbitrate, it is as if I have temporary amnesia.' Another arbitrator indicated that the formal and legalistic nature of arbitration guards against any improper influence from the mediation, since the decision must be founded on the evidence presented during arbitration. Thus, nearly all the arbitrators felt that concerns about confidential information are grossly overstated. Even the five arbitrators who acknowledged that it would be very difficult to appraise the actual impact of information obtained in mediation on the final arbitration decision were clear that the impact is not serious enough to compromise their abilities as effective adjudicators.

### Cost and Efficiency

Although it was not a significant issue in the interviews, med-arb does seem to reduce costs and increase efficiency. The arbitrators noted that they are more likely to suggest med-arb when the hearing will be extremely long and when there are many complex, interrelated issues. Many arbitrators referred to cases that they mediated in three days or less which would have taken up to fifteen days to hear in arbitration.

### Voluntary Med-Arb

The argument for voluntarily choosing med-arb is grounded in the belief that the parties should be free to choose the dispute resolution technique that best suits their particular situation. Thus, many critics have argued that med-arb should never be forced on the parties, since it is 'not the right method of resolution for every dispute,' while others have gone further, maintaining that med-arb is appropriate only for some types of disputes (Landry 1996, 268). As detailed previously, there was, however, no indication at the GSB that med-arb should be restricted to only some disputes, but med-arb may not be appropriate if the parties seem very unwilling to settle. Similarly, med-arb may not be appropriate when the parties need an interpretation or want to set a precedent.

The importance of having the freedom to choose a particular med-arbiter is evident at the GSB. The majority of arbitrators stated that it was the parties who requested med-arb and that they did so because of their familiarity and comfort with a particular arbitrator. The comments of one arbitrator are typical:

The parties know me and what I can do; they come to me looking to try mediation because they know that it is something I do a lot of. I guess it is my area of expertise.

Thus, while the evidence is not conclusive, it does appear that the freedom to choose the med-arb process, as well as the particular third party who will be involved contributes to the success of med-arb at the GSB.

*Med-arb does seem to reduce costs and increase efficiency.*

*The arbitrators indicated that it would be difficult to list all the different techniques they used to assist the parties during the mediation.*

### Med-Arbiter Skills

As noted previously, most of the criticisms of the med-arb process are really concerns about possible actions by the med-arbiter. While it would be difficult to say which skills are the most effective, the interviews did throw some light on the problem.

The evidence indicates that all the GSB arbitrators had experience in both mediation and arbitration. Responses gathered from arbitrators, particularly concerning how they deal with confidential information, appear to indicate that they had a very good understanding of what was required from them in each of the roles. Moreover, med-arbiters at the GSB are appointed, and both sides must agree to the appointment. Because appointments are often limited to one year, it would appear that persons seen by the parties as less skilled would not be reinstated to the board. Thus, there is some evidence that GSB arbitrators are experienced and skilled at both mediation and arbitration. Their skills are also evident in the fact that GSB arbitrators have had to arbitrate only a very small percentage of the cases that have gone to med-arb. The majority of arbitrators have had to arbitrate less than seven times, while five have never had to arbitrate a med-arb case.

### Med-Arbiter Strategies

The arbitrators differed on how they conducted the process, but the majority appeared to fall somewhere between the 'flexible' and 'directive' approach as defined earlier. However, a few arbitrators were careful to make it clear that they did not adopt a directive approach.

A small minority of GSB arbitrators indicated that they offer little or no introduction to the parties and thus set no initial boundaries or ground rules. One arbitrator commented that 'the whole process should always be in the hands of the parties' and that it is 'up to the parties to determine their needs.' However, more commonly the arbitrators do not actively set boundaries and guidelines but instead discuss the general process and expectations with parties. If a need arises during the proceedings to discuss or formulate some rules, they deal with the problem then, clearly indicating that they are willing to use a more directive approach when it is necessary.

After specifying the degree to which they set boundaries and guidelines, all GSB arbitrators stated that they are cognizant of the sophistication of the parties and tailor their opening approach accordingly. Most of the parties at the GSB have been involved in numerous med-arbs. However, some parties, particularly grievors, are often inexperienced, and the arbitrators indicated that if they are, explaining the process and outlining guidelines for behaviour becomes most important. A few GSB arbitrators indicated that while they varied their opening statements depending on the experience of the parties, they always outlined ground rules for confidentiality and declaring an impasse.

The majority of arbitrators felt that they were active participants in the process and that they were responsible for 'directing the flow' of the proceedings, which was done primarily by calling caucuses and carrying offers and information between the parties. Their role included guiding parties so that they would direct their momentum towards a settlement, which was necessary since it was fairly common for disputing parties to attempt to convince the arbitrators of the relative strength of their case. The arbitrators indicated that it would be difficult to list all the different techniques they used to assist the parties during the mediation. However, they all acknowledged that they would press the parties for compromises, engage in creative problem solving, and maintain flexibility throughout the process, in order to allow the parties to negotiate their own settlement.

With a couple of exceptions, the arbitrators did, on occasion, give 'subtle indicators'—by citing similar cases, by asking probing questions, or by inquiring whether the parties had considered the legal strength of their argument—and then leaving it up to the parties to draw their own conclusions. With the exception of two, the arbitrators noted that they would not tell the parties outright about the strength of their case unless both parties asked

them directly for an opinion. The arbitrators claimed that this was extremely rare and noted that they would be careful to indicate that they were only 'giving their opinion' and that the case could 'evolve quite differently and result in a different outcome should it be arbitrated.'

Furthermore, most GSB arbitrators indicated that they do not actively encourage the disclosure of a party's bottom line or the details of any previous settlement attempts. Such details must remain confidential in order to maximize the flexibility of the process and to avoid compromising their possible role as adjudicators. As one arbitrator noted,

I don't want to know what their bottom line is because once I do, it's fixed and everyone becomes really aware of it. It undermines my ability to push the parties toward settlement. What someone sets as a 'bottom line' when they start mediation and what they are actually able to settle with are often very far apart.

Despite the approach of the majority, two arbitrators did state that they 'tell parties outright, it's my experience that if you take something like that to arbitration you're going to lose.' As well, a couple of arbitrators mentioned the importance of being a 'vice-chair.' ('Vice-chair' means 'arbitrator'; see s.19(2), *Crown Employees Collective Bargaining Act*.) They felt that the GSB wanted them occasionally to put on their 'vice-chair hat,' and tell parties where their case was headed so that arbitration could be avoided.

Arbitrators were split on whether they or the parties were responsible for deciding when mediation should end. Some arbitrators were very clear that they believed it was the right of the parties to determine an impasse. As one arbitrator stated, 'they (the parties) know what is best, it is their process. It is up to them to decide when they have had enough, subject to my remarks about whether I think they are giving up too soon.' On the other hand, other GSB arbitrators considered themselves wholly responsible for deciding when mediation had ended, and they were clear about that role in their opening remarks to the parties. As one arbitrator noted, 'Clearly if parties are adamant (about stopping) then fine; however, this rarely happens. I usually have to step in and say look, I don't think we're getting anywhere here.' Some of those arbitrators indicated that their personal experience, in conjunction with an evaluation of the progress that has taken place during mediation, assists them in coming to a decision about whether further mediation would be unproductive.

## Conclusion

This study of the controversies surrounding med-arb has led to some important conclusions. First, it is clear that most of the critics of med-arb are actually voicing their suspicions about the ability of the med-arbiters themselves to perform the role that is required of them and not necessarily about the process itself.

Second, med-arb appears to be functioning very effectively at the GSB, but its success must be understood in context. Med-arb at the GSB operates in a very controlled environment. All GSB arbitrators are skilled in the process, lending support to the contention that med-arbiter skill is extremely important to the success of the process. Freedom in choosing med-arb was also found to have a significant impact: the parties at the GSB voluntarily choose the process and often the med-arbiter.

Concerns that confidential information could adversely affect the outcome of the process if the case was arbitrated were found to be valid but not problematic at the GSB. The research indicated little likelihood of abuse of the process. Such abuse is unlikely to be tolerated by the parties, who do not have to approve any arbitrator for reappointment.

*Most of the critics of med-arb are actually voicing their suspicions about the ability of the med-arbiters themselves.*

Furthermore while the majority of the parties are familiar with each other and have experience with the process, familiarity was not essential to the success of the process.

Overall the most common response at the GSB to critics of med-arb can be seen in the following comment of one GSB arbitrator:

In the theoretical model, people, usually people who have never done it before, are very afraid of med-arb. In reality this doesn't make sense. Especially with all variations on the main theme and the flexibility of it, there is no real reason not to try it.

It is important to note that these findings can be extended to other areas. Many of the elements that are present at the GSB can be found in the private sector, where the parties are free to choose the method of dispute resolution they want to follow and the third party they desire. Neutrals who are abusive or ineffective will not be selected and thus will not be able to maintain a practice. Considering the growing use of med-arb and the lack of research support for many of the criticisms surrounding the process, it seems likely that med-arb will continue to be a viable and effective method for the settlement of labour disputes.

## Appendix Med-Arb Models

### Nonbinding Med-Arb

Nonbinding med-arb, which is similar to fact finding, is the same as the traditional med-arb model. However, both the mediation and arbitration stages are nonbinding on the parties. Not surprisingly, this process is rare, since most parties are not willing to risk investing time and effort in two non-binding procedures. However, in high-profile disputes the final nonbinding arbitration decision may have a significant impact on the parties, leading them either to accept the arbitrator's decision or to negotiate a settlement of their own.

### Med-Arb Show Cause

Med-arb show cause is somewhat similar to traditional med-arb. However, during the arbitration stage the third-party neutral renders only a tentative decision, which is presented to the parties for their consideration. The participants then have an opportunity to demonstrate flaws in the decision or to 'show cause' as to why the case should not be decided in that manner. Med-arbiters can then take these submissions into consideration and change their decisions, as they deem appropriate.

### Medaloea (Mediation and Last-Offer Arbitration)

The second most common model of med-arb combines mediation with last-offer arbitration. Medaloea can be performed with two different third parties or with the same third party acting as mediator and arbitrator. If mediation is unsuccessful, the parties engage in final offer arbitration in which the arbitrator must choose the final position of one of the respective parties (Bartel 1991, 668). This model has been used in both interest and grievance disputes, and it may take several different forms. In some models, the final offer positions are chosen after the failure of the mediation session (Experience 1981, 2).

### Wisconsin Med-Arb Statute

The most prominent use of medaloea was in a Wisconsin med-arb statute. On 1 January 1978 Wisconsin became the first state to formally adopt med-arb as a dispute-settlement procedure. The statute applied to teachers and a wide spectrum of blue and white collar employees from different cities and counties. Med-arb was combined with final offer inter-

est arbitration, whereby the parties were expected to formulate a final offer before the commencement of mediation. No time constraints were placed on the parties during the process, and they were free to move back and forth between mediation and arbitration as needed. However, during a specific stage of mediation or arbitration, the parties were required to adhere strictly to each process. It was the responsibility of the med-arbiter to declare an impasse at mediation, after which the parties could proceed to final offer arbitration, where the med-arbiter was responsible for choosing between the pre-mediation final offers. Alternatively, the parties could withdraw their final offer and proceed to strike (Torosian 1978, 346).

Research by Stern (1984, 41-5) indicates that of the 1,200 contracts that came up for renewal in the first five years of the law, 40 percent, or approximately 703 cases, went to med-arb. Of the 703 disputes, 50 percent were resolved by med-arbiters through mediation. What happened with the other 60 percent was not stated. Nevertheless, when the research was narrowed to specifically examine the results of the six most experienced med-arbiters, the mediation success rate rose to more than 70 percent. This gives further credibility to the view that the skill and experience of the med-arbiter plays an integral role in the success of the process. Some commentators speculated that the nonvoluntary nature of the statute contributed substantially to its varied success—and to its repeal. In 1985 the Wisconsin med-arb statute was amended, and the med-arb provisions were replaced to provide for the settlement of disputes through traditional interest arbitration.

#### Post-Arbitration Mediation

In a variation of med-arb known as post-arbitration mediation, mediation is performed by the arbitrator after the arbitration session but before the final binding decision is made known. This model is thought to provide a 'last-ditch' period in which parties may negotiate and settle their dispute. Settlement is thought to be encouraged by the threat of the pending, unknown arbitration award (Bartel 1991, 668).

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