The Seven-Year Itch: Assessing the Effectiveness of Mediation-Arbitration in Ontario Fire Fighter Collective Bargaining Disputes

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This paper was originally submitted to the Faculty of Law as a major research work in partial fulfillment of the requirements for the degree of Master of Laws, Osgoode Hall Law School, York University, Toronto, Ontario. August 15, 2007.

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**Table of Contents**

INTRODUCTION 1

METHODOLOGY 4

CHAPTER 1: THE HARRIS TORIES: A GOVERNMENT INTENT ON REFORM 8
- The First Wave: *The Savings and Restructuring Act, 1995* 10
- The Second Wave: *The Public Sector Dispute Resolution Act* and *The Public Sector Labour Relations Transition Act, 1997* 15
- The Third Wave: *The Fire Protection and Prevention Act, 1997* 21

CHAPTER 2: THE ONTARIO FIRE FIGHTER COLLECTIVE BARGAINING FRAMEWORK 26
- *The Fire Departments Act* Bargaining Dispute Resolution System 26
- Conventional Interest Arbitration as a Dispute Resolution System 27
- *The Fire Protection and Prevention Act’s* Bargaining Dispute Resolution System 30
- Legislating Uncertainty 31
- Conciliation 33
- Mediation-Arbitration 33
- Final Offer Selection 35
- Summary 37

CHAPTER 3: THE CREATION OF A UNIFIED LABOUR-MANAGEMENT DISPUTE RESOLUTION PROCESS EVALUATION MODEL 39
- Feuille Model 39
- Conlon and Meyer Model 40
- Tyler and Blader Model 42
- Bush Model 44
- The Unified Model 46

CHAPTER 4: A UNIFIED MODEL AND THE ONTARIO FIRE FIGHTER COLLECTIVE BARGAINING DISPUTE RESOLUTION PROCESS 49
- Part A: Justice Issues 49
  - Procedural Justice 49
  - Timeliness 49
  - Confidence in the Arbitration Process – Appointments 62
  - Confidence in the Arbitration Process – Procedural Bias 65
Representational Justice 67
Participation and Self-Determination 67
Power Issues 70
Oppressive Behavior 72

Part B: Substantive Issues 73
The Needs of the Parties 73
Creative Solutions 77
Transaction Costs 79

Part C: Relational Issues 80
Cooperation and Information Exchange 80
Ongoing Relationship of the Parties 82
Relationship between Parties and Arbitrator 83
Empowerment 84
Norms and Standards for Future Application 85

Part D: The Public Interest 87
Public Safety and Labour Disruption 87
Control of Public Expenditure and Decision Making Capacity of Council 87
Public Policy Interests of the Provincial Government 89

CHAPTER 5: CONCLUSIONS AND DISCUSSION 91

The Three Waves 92
The Bargaining and Med-Arb Infrastructure 92
The Tripartite Arbitration Board 94
Notice to Bargain 96
Conciliation 96
Determining the Arbitrator 97
Final Offer Selection 99
Timelines 100
Exchange of Submissions 100
Unfair Labour Practices 100
Case Management 101

The Utility of Med-Arb and Its Alternatives 101
Conclusion 105

BIBLIOGRAPHY 107

CASES CITED 114
Index of Tables

Table 1: Ontario Fire Sector: Benchmarks to Arbitration and Award 1986 to 1992 50
Table 2: Ontario Police Sector: Benchmarks to Arbitration and Award 1986 to 1992 52
Table 3: Ontario Fire Sector: Benchmarks to Arbitration and Award 1997 to 2003 53
Table 4: Ontario Police Sector: Benchmarks to Arbitration and Award 1997 to 2003 55
Table 5: Ontario Police vs. Fire Sectors – Benchmark Comparison – 1986 to 1992 56
Table 6: Ontario Police vs. Fire Sectors – Benchmark Comparison – 1997 to 2003 57
Table 7: Ontario Fire Sector: Dispute System Summary 57
Table 8: Ontario Police Sector: Dispute System Summary 58
Table 9: Interest Arbitrator Activity Rate – Fire Sector, 1986 to 1992 63
Table 10: Interest Arbitrator Activity Rate – Fire Sector, 1997 to 2003 64
The Seven-Year Itch: Assessing the Effectiveness of Mediation-Arbitration in Ontario Fire Fighter Collective Bargaining Disputes

Bill Cole

The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give.¹

Thomas Hobbes, Leviathan

Introduction:

Freedom of contract is a fundamental principle of Canadian legal and economic relationships. Our statutory and common law traditions are built on the notion that individual actors should be able to define their own terms and conditions of performance within a contract. As defined by Hobbes, the outcome of this exercise should reflect an equitable value for both parties.²

While the freedom of contract remains an important concept in economic theory, historically it has not always produced outcomes that aligned with the expectations of Canadian society. Canadian labour legislation has experienced numerous interventions by legislatures that drift further from Hobbes’ notion of freedom of contract.³ When doing so, legislatures identified a need to intercede in the worker/employer relationship to promote a more effective bargaining process, for the purpose of countering the inherent imbalance of power between an employer and individual workers. The resulting legislation allowed employees to create organizations that would bargain collectively with the employer. Over the years the collective bargaining framework evolved to obligate employers to recognize trade unions as exclusive bargaining agents for their

² The freedom of contract is not absolute. A contract can be vacated where it is unconscionable, illegal, is not in writing and refers to land, is made under duress and in some circumstances where it results in restraint of trade.
³ See generally Donald Carter, Brian Etherington & Gilles Trudeau Labour Law In Canada 5th ed. (Deventer: Kluwer, Markham; Butterworths, 2002) for a summary of the early development of Canadian labour law.
members; require employers to meet with the union, bargain in good faith, and make
every reasonable effort to reach collective agreements.⁴

Legislatures have been careful to attempt to preserve freedom of contract in the
context of collective agreement substance, despite policy decisions to intervene in the
bargaining process.⁵ At the heart of the bargaining process, however, remains the right
for either party to pursue a more favourable version of the collective agreement by
forcing economic harm upon the other in the form of a strike or lockout. As Weiler
observes, the right to strike and lockout are important pillars of Canada’s collective
bargaining laws:

The basic assumption of our industrial relations system is the notion of
freedom of contract between the union and the employer. There are
powerful arguments in favour of that policy of freedom of contract. We
are dealing with the terms and conditions under which labour will be
purchased by employers and will be provided by employees. The
immediate parties know best what are the economic circumstances of
their relationship, what are their non-economic priorities and concerns;
what trade-offs are likely to be most satisfactory to their respective
constituencies. General legal standards formulated by government
bureaucrats are likely to fit like a procrustean bed across the variety and
nuances of individual employment situations. Just as is true of other
decisions in our economy – for example the price of capital investment
or of consumer goods and services – so also unions and employers
should be free to fix the price of labour at the level which they find
mutually acceptable, free of intrusive legal controls.⁶

⁴ These obligations include limits on both employer and union behavior that if violated constitute bad faith
bargaining. These include, inter alia, changes to the terms and conditions of work during the statutory
freeze period, tabling late demands in the bargaining process etc. See generally United Electrical, Radio
and Machine Workers of America v. DeVilbiss (Canada) Ltd. [1976], 76 C.L.L.C. para. 16,009 (O.L.R.B.)
(Adams) and Graphic Arts International Union Local 12-L v. Graphic Centre (Ontario) Inc. [1976]
O.L.R.B. Rep. 221 (Burkett). The obligation to “make reasonable efforts” requires the parties to, inter alia,
provide relevant information to a union about the operations of a workplace, see Westinghouse Canada Ltd
[1980] 2 Can. L.R.B.R. 469 (O.L.R.B.) (Burkett); or efforts by either party to frustrate the collective
bargaining process through surface bargaining, see generally, United Steel Workers of America v. Radio

⁵ There are limitations that include a prohibition on negotiating terms that are illegal or contrary to human
rights principles. It is not entirely accurate to say that freedom of content exists in Canadian collective
bargaining. For example, in the federal public service unions and Treasury Board do not negotiate pensions
or benefits.

⁶ P. C. Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell,
1980) at 64.
For unionized employees in Canada, the right to strike, though infrequently used, remains an important source of power in the collective bargaining process. Bargaining parties evaluate their relative demands and make decisions on priorities, aware that at a certain point one side may act against the other in a withdrawal of service or lock out. Experienced negotiators know too well how a pending strike deadline will focus the parties on a handful of key issues, leaving others to fall by the wayside.

Canadian legislatures have limited the bargaining process even further for many sectors of workers, taking more intrusive steps to limit freedom of contract (strikes and lockouts involve the implied corollary right to refuse to enter into a contract). Exceptions to the general collective bargaining framework include those who perform work deemed “essential” to the community they serve or society in general. In these sectors the parties are prohibited from using strike or lockout strategies to influence their collective bargaining outcomes because of the potential risks to the community by a disruption of service.7 Instead legislatures have imposed various forms of compulsory dispute resolution, culminating with binding arbitration – commonly referred to as interest arbitration.

This study examines the resolution of collective bargaining disputes for fire fighters in the Province of Ontario. In particular this study will examine the efficacy of dispute resolution in this sector, comparing and contrasting the conciliation and hybrid mediation-arbitration (hereafter called med-arb) system introduced in 1996 with the conventional interest arbitration used for decades before. The study will also consider the strengths and weaknesses of the option of final-offer-selection that, although never selected by the Minister of Labour, remains a choice within the fire sector legislation.

After evaluating several process evaluation models, and creating a unified “public sector labour-management” model, this study poses the question “is med-arb/mediation-final-offer-selection the appropriate dispute resolution process for Ontario’s fire fighters?” If the answer is yes, can either process be amended to better satisfy the interest of its stakeholders? If the answer is no, what would be the preferred alternative?

By denying the right to strike to Ontario’s fire fighters, has the Legislature’s imposed dispute resolution process sufficiently replicated freedom of contract, within the

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7 These sectors include, for example, fire fighters, police, and health care workers.
limits of the currently accepted labour relations model, or does it reflect Weiler’s concern of fitting “like a procrustean bed across the variety and nuances of individual employment situations”?8

Methodology

This study is divided into five chapters. Chapter 1 will review the history of the three waves of changes that hit the public sector in general, and the fire sector specifically, during the term of the Harris Conservative government.

Chapter 2 will highlight the dispute resolution system used by fire fighters up to the imposition of the Social Contract Act that froze collective bargaining between 1993 and 1996. It will examine in detail the conciliation, med-arb and mediation-final-offer-selection system introduced by the Conservatives in 1996 and 1997.

In Chapter 3 this study begins to develop a unified dispute resolution process evaluation model. Of the four models considered, only one was created with an intended application to a labour-management relationship. Using several other processes as a foundation, this study significantly expands this early labour-management evaluation process to create a unified model intended for public sector labour-management disputes.

In Chapter 4, this study will apply the unified model to an analysis of collective bargaining dispute resolution in the Ontario fire fighter sector. As the first detailed evaluation of the fire sector’s dispute resolution process following changes in 1997, Chapter 4 identifies a number of criteria in assessing two hundred and seventy-one interest arbitration decisions. These decisions cover two seven-year periods, the first between 1985 and 1992; and the second 1997 to 2003.9 The period between 1992 and 1997 was excluded for two reasons; first the Social Contract Act prohibited collective

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8 Supra note 7.
9 There were a number of municipal amalgamations during the period of study, each requiring extensive negotiation of first collective agreements. Given the unusual circumstances and, in at least two such cases, the extraordinary number of issues referred to mediation-arbitration, the assessment metrics (number of issues, and the length of time from expiry to award) would result in distorted values. These would, in turn, have an unfair influence on the statistical analysis of the utility of the mediation-arbitration process. These cases have therefore been excluded from this study. A dispute between the Mississauga Professional Fire Fighters Association and the Corporation of the City of Mississauga has also been excluded because the issue dividing the parties involved health and safety questions of minimum staffing on fire apparatus. The dispute required more than twenty days of hearings and high number of executive sessions for the board – given the smaller sample of cases in these years and the fact that minimum staffing had only been dealt with as extensively in two other cases (Thunder Bay and Ottawa) in the entire sample of fire sector cases, it was therefore also excluded from the study.
bargaining over monetary items for thirty-six months; second because it took some time for the municipal collective bargaining environment to regain some stability following the bargaining freeze.\textsuperscript{10}

The assessment criteria measure the efficacy of the process by examining, \textit{inter alia}, such benchmarks as the length of time between the expiry of a collective agreement and the release of an interest arbitration award, the number of days of hearings, and the length of time between mediation and arbitration.\textsuperscript{11}

Critics of interest arbitration argue that the tripartite process causes significant delays that often create problems for the parties.\textsuperscript{12} To assess the effectiveness of single arbitrators relative to tripartite boards I performed a parallel assessment of interest arbitration decisions in the Ontario police sector where single arbitrators are the norm.\textsuperscript{13}

While the Ontario \textit{Police Services Act} provides the option of a tripartite process or a single arbitrator, the evidence is clear that police associations and police service boards prefer their bargaining disputes be resolved by a single arbitrator. The two hundred and seventy-one decisions are divided into two groups; one hundred and fifty-three decisions are in the Ontario police sector while one hundred and eighteen are from the Ontario fire sector.\textsuperscript{14}

It is appropriate to use the police sector as a control group for assessing the tripartite format on dispute resolution effectiveness, as police and fire fighters have historically had a bargaining symbiosis, particularly in the area of wages and benefits.\textsuperscript{15}

\textsuperscript{10} Many fire fighter associations that settled early in 1996 maintained wage freezes through voluntary agreements. Other fire associations that waited until the fall of 1996 or the spring of 1997 negotiated modest increases.

\textsuperscript{11} This study also presents interesting findings on the parties’ pattern of agreeing to arbitrators. In the fire service it is rare for the parties’ nominees to fail to reach an agreement on a chairperson. This has been a particular problem in the fire sector in 2005 and 2006. In the Ontario police sector the Ontario Police Arbitration Commission typically assigns arbitrators from a predetermined list. In this sector the Police Association of Ontario and the Ontario Association of Police Services Boards review their list of “agreed” neutrals for mediation-arbitration that is administered by the Commission.

\textsuperscript{12} The Ontario fire sector historically uses a tripartite system with each party appoints a nominee to the arbitration board. The nominees consider an arbitrator, failing agreement an arbitrator will be appointed by the Minister of Labour (formerly the Solicitor General).

\textsuperscript{13} \textit{Ontario Police Services Act}, R.S.O. 1990 C-15, section 122(2) provides the option of a single or tripartite interest arbitration board. The Toronto Police Association and Toronto Police Services Board are the only parties in Ontario who use a tripartite dispute resolution process to resolve bargaining disputes.

\textsuperscript{14} The author thanks the Ontario Police Arbitration Commission and the Ontario Professional Fire Fighters Association for their assistance in accessing interest arbitration decisions for this study.

\textsuperscript{15} Fire fighter interest arbitration decisions frequently confirm the relationship between fire fighters and police. Martin Teplitsky, a respected fire sector arbitrator commented, “…fire fighters have for forty years
Both are unique, uniform essential services, delivered at the municipal level, and both sectors have had their right to strike replaced with compulsory binding interest arbitration.16

Interspersed throughout this study are comments from key players in the fire sector negotiation and interest arbitration community. This study includes field interviews with twelve such persons, each one playing an important role in the creation of, or implementation of the fire sector’s dispute resolution process. Confidential interviews were conducted with labour arbitrators, union and management representatives (both lawyers and elected officials) and policy makers at senior levels of Ontario’s Harris government. Each interview was recorded and lasted approximately one hour. Nine interviews were conducted face-to-face while three were conducted by telephone. All audiotapes were transcribed for accuracy. Several follow-up questions were asked of all interviewees via e-mail, with the majority responding.17

The community of negotiation and interest arbitration professionals in the fire service is small; therefore, in an effort to shield the identities of individuals who play significant roles in the process, interviewees are categorized into groups. Alphanumeric symbols identify union side’s representatives as U1 U2, or U3 and employer representatives as E1, E2 or E3. Interviewees from government are identified by alphanumeric symbols P1, P2 or P3.

Arbitrators who participated in the interviews all have in excess of twenty years as labour neutrals. All are members of the prestigious National Academy of Arbitrators in the United States, the Ontario Labour Management Arbitrators Association and all are considered senior members of the arbitrator community. Arbitrators are identified by alphanumeric symbols A1, A2 or A3.

Chapter 5 summarizes findings and makes a number of observations about changes to the fire sector’s collective bargaining dispute resolution process.

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16 This includes regional police such as York, Durham, Peel, Halton, Niagara, Waterloo.
17 Best efforts have been made to conform to confidentiality requirements made in the interview process – no identities have been disclosed throughout the research process, even within the interviewee group. This was particularly important in the interviews of the three arbitrators.
While this study focuses on a very narrow part of the government’s broader labour agenda, it is useful to present a fuller historic picture of the nature of the relationship between the Harris government and organized labour – and the enmity it engendered.\textsuperscript{18}

\textsuperscript{18} Some within government have suggested that the introduction of mediation-arbitration was relatively insignificant in the larger context of labour law reform (see comments P1 infra). While this cannot be denied, the introduction of mediation-arbitration for essential services is significant. This study attempts to show that in operation such policy decisions do impact on those forced to resolve bargaining disputes in this system.
Chapter 1: The Harris Tories: A Government Intent on Reform

The labour landscape in Ontario remained relatively stable for more than forty years – most of this time under Conservative governments. Those governments believed it was their role to maintain a balance among the often-competing interests of organized labour and business. In doing so both the public interest in business investment and progressive treatment of unionized employees (with similar treatment often resulting for non-union employees) remained protected.\(^{19}\) The Ontario economy thrived under this philosophy, business invested in the country’s most populous province, and wages and benefits were at the highest levels of unionized employees across Canada.

Many consider the change to the Ontario government’s paternal role in the regulation of labour management relations began with the unexpected election, and the subsequent policy agenda, of Bob Rae’s New Democratic Party in the summer of 1990.\(^{20}\) Coming into office the Rae government inherited a *Labour Relations Act* that had remained generally unchanged since its overhaul in 1975. The NDP government was eager to implement a series of changes consistent with the interests of one of its largest constituencies – organized labour.

In the early days of the Rae government senior Ontario Arbitrator Kevin Burkett was asked to chair a joint committee to examine the *Labour Relations Act*. It soon became clear to Burkett that the review’s agenda would be largely driven by the Labour Minister’s office. Hoping to create some value in the process, Burkett’s efforts to mediate a common position between the representatives of labour and management failed to achieve any results. In the end the Minister of Labour received sixty proposed changes by the labour representatives on the joint committee, with a dissenting position from the management representatives. The Minister then recommended sixty-one changes to the legislation, all of which were enacted.


In the 1995 Ontario election Conservative Party Leader Michael Harris’ campaign brought promises of a “Common Sense Revolution.” Whether it was the seductiveness of Harris’ message, or the Rae government’s failing Keynesian efforts to bolster a deteriorating economy, the results of the election brought a government to Queen’s Park that did not hide its dislike for organized labour.

The Harris “Common Sense Revolution” was built on promises to create economic growth, job creation, reduce or eliminate various social services and a general theme of fiscal responsibility. The Common Sense Revolution presented a neo-conservative agenda similar to that of Alberta’s Ralph Klein. Harris’ government had made a number of promises to the electorate: a 30% reduction in provincial income taxes; reduction by 20% of all non-priority government spending; a program to encourage investment and job growth which included a reduction in payroll taxes, and comprehensive changes to labour legislation. The Conservatives promised to reduce the size of the Ontario public service, which included such things as selling the Ontario Liquor Control Board retail stores and TV Ontario, and promised a balanced budget within their first mandate.21

Outraged by what they saw as “one-sided” labour reform under the NDP, the Harris Conservatives promised quick action once elected – and they delivered. Burkett’s criticism was not limited to the Rae government. He noted that Harris passed legislation in record time, revoking nearly all of the NDP amendments. Harris went much further however, and sought to change both the structure of the province’s labour legislation, and how such legislation would be applied.22 Harris was clear in his criticism of organized labour, which he saw as an interest group that was impeding economic renewal. Unlike

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21 In 1995 when the Tories formed the government, residents in Ontario had a personal income tax rate per capita that was second highest in Canada (behind Alberta). Through aggressive tax cutting policies, by the time Harris retired residents in Ontario paid the lowest rate of personal income tax per capita in Canada (Statistics Canada, CANSIM Tables 385-0001 and 051:0001)

22 Harris’ Conservatives made changes to the appointment and tenure process for adjudicators under the Ontario Labour Relations Act. This included employment “at pleasure,” along with shortened terms with no certainty of re-appointment. For many observers, including both labour and management members of the bar, the changes went too far and risked the loss of confidence in the adjudication process. When the government terminated or refused to renew many of the appointments, the displaced adjudicators were represented jointly by lawyers from both the labour and employer side of the bar. Never before in the history of Ontario’s industrial relations had adjudicators been so public in their comments. See generally Judith McCormack “The Price of Administrative Justice” Canadian Labour and Employment Law Journal (1998) 6 (1999) p1; and Ronald Ellis, “An Administrative Justice System in Jeopardy” Canadian Labour and Employment Law Journal (1998) 6(1999) 53.
his Tory predecessors Harris made no efforts to balance the interests of labour and management, or perhaps sought to rebalance them in a manner that favoured business interests.

Burkett concluded that the 1990’s was an era of misguided labour policy on the part of both the Rae and Harris governments:

The 1990’s have seen successive governments, through partisan labour law reform and disrespect for the concept of impartial adjudication, sow the seeds of division and mistrust within the labour relations community and, at the same time, undermine the predictability and credibility upon which the institution of free collective bargaining depends. The Sims task force identified the disadvantages of undue politicization of our labour relations. First, such involvement by government distracts the parties from their primary role of negotiating collective agreements with individual employers, tempting them instead to seek political “fixes”. Second, it introduces political confrontation into bargaining relationships, which undermines the ability of local parties to deal with one another. Third it implies that labour relations is simply a political question which denies the higher elements of self-determination and distributive justice that underlie the process of free collective bargaining. I would add that it also destroys the opportunity for collaborative approaches to the challenges that face us at the “macro” level.23

The First Wave: The Savings and Restructuring Act, 1995 (Bill 26)24

The Tories moved swiftly to implement their labour reform agenda. One of their concerns was the approaching end to the freeze on collective bargaining originating in the Social Contract Act. In the past when free collective bargaining was curtailed by legislative intervention, unions often returned to the negotiation table seeking wage/benefit increases to catch-up to levels that would have been reached had there been no such freeze. For a government that campaigned on fiscal restraint, such a possibility had to be controlled.

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23 Supra note 20 at page 183-184.
24 The full title of Bill 26 was An Act to achieve Fiscal Savings and to promote Economic Prosperity through Public Sector Restructuring, Streamlining and Efficiency and to implement other aspects of the Government’s Economic Agenda. It received first reading on November 29, 1995, five months into the government’s first mandate.
Change would come in waves for Ontario’s public sector unions – the first representing one of the most all-encompassing omnibus bills in Ontario history – the *Savings and Restructuring Act, 1995*, commonly referred to as Bill 26.

On November 29, 1995 the government introduced Bill 26, introducing or amending over forty separate pieces of legislation. Bill 26 was remarkable in that it would vest the Cabinet and Ministers with powers to make decisions impacting on the delivery of public services. The Act would allow the Cabinet and Ministers to make changes through regulation, a process that didn’t require debate in the legislature, including, for example, the restructuring of public hospitals. It also provided authority to sweep aside many contractual agreements, including the unprecedented revocation of statutory bargaining rights. The Act also provided the government with the power to retroactively override decisions of courts and administrative tribunals made under existing legislation. It would facilitate downloading from the provincial to municipal governments, as well as the discontinuance of some public services through amendments to existing pension plan rules protecting workers during periods of significant downsizing.

For the province’s essential service workers, Bill 26 represented a threat on two fronts – the interference with the decision-making process in interest arbitration, and the threat of privatization.

Bill 26 introduced provisions that required an interest arbitrator to consider five criteria when making an award. Those criteria (listed in Schedule Q) included:

1. The employer’s ability to pay in light of its fiscal situation.

2. The extent to which services may have to be reduced, if the current funding levels are not increased.

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25 The scope of Bill 26 included changes to, but not limited to the; *Ministry of Health Act; Public Hospitals Act; Private Hospitals Act; Independent Health Facilities Act; Ontario Drug Benefit Act; Regulated Health Professions Act; Health Insurance Act; Physician Services Delivery Management Act; Pay Equity Act; Freedom of Information and Protection of Privacy Act; Public Service Pension Act; Ontario Public Service Employees Pension Act; Municipal Act; Fire Departments Act; Hospital Labour Disputes Arbitration Act; Police Service Act; Public Service Act; School Boards and Teachers Collective Negotiations Act.*

26 Bill 26 would extinguish contractual rights covering the Ontario Medical Association, the Ontario Public Service Employees Union and would decertify the Ontario Pharmacists’ Association.

27 Bill 26, Schedule Q made it a requirement for interest arbitrators to consider criteria when resolving disputes that arose under the *Fire Departments Act; Hospital Labour Disputes Arbitration Act; Police Services Act; Public Service Act and School Boards and Teachers Collective Negotiations Act.*
3. The economic situation in Ontario and in the municipality.

4. A comparison, as between the employees, and other comparable employees in the broader public sector, of the terms and conditions of employment and the nature of the work performed.

5. The employer’s need for qualified employees

For the Tories, the introduction of criteria in the decision making process for arbitrators satisfied its overriding goal of driving down the overall cost of public services in the province.

P1 We were interested in more predictability. [We were] interested in a process which was more reflective of the financial realities of public sector employers and of the taxpayer’s ability to support…

The government’s introduction of mandatory criteria was seen as interfering with the neutrality of arbitrators and outraged essential service workers across Ontario. According to one union representative:

U2 …[Association of Municipalities of Ontario] was pushing for the ability [to pay] criteria, the ability to pay argument. They thought that was going to be their savior…[the arbitrator] would actually have to report on how he considered [the criteria], which was a big difference. Each one of those criteria he would have had to report out on how he was going to, how he determined, how he brought that into the decision within the arbitration.

In the early 1980’s several Canadian jurisdictions enacted legislation that required public sector arbitrators to take into consideration the government’s ability to pay. In effect, these jurisdictions, in attempting to make public sector bargaining resemble the private sector, imposed a form of wage controls on public sector employees. The result is a dispute resolution process that inherently favours the public sector employer, or government. The imbalances are even greater where, for reasons of public safety, employees are prohibited from withholding their services. As one British Columbia
arbitrator has stated, the ability to pay in public sector disputes is a factor that is both “elusive and subjective.”

In the sense in which “ability to pay” is used in the legislation in other Canadian jurisdictions, it means something quite different – an arbitrary limitation of wage increases based on the decision of the public sector employer. It is the government’s predetermination of what it will provide in wage and benefit improvements and represents an imposed program of wage controls. This occurs under the assumption that free collective bargaining remains unaltered.

The ability to pay in public sector disputes consists of budget decrees by the provincial government wherein different employers receive different levels of funding. A decision by the provincial government to limit or withhold funding is seen by the commissioner as creating a lack of ability to pay in the particular employer.

The requirement that ability to pay be taken into account would force arbitrators to become executors of government budgetary policy. This would remove the arbitrator’s neutrality, requiring the arbitrator to “rubber stamp” the employer’s allowances for monetary collective agreement improvements.

Negative reaction was not limited to just Ontario’s public sector unions. One of the province’s most respected arbitrators, Martin Teplitsky, refused to participate in interest arbitrations under the government’s conditions. In a speech to the Canadian Bar Association – Ontario Labour Law Section, Teplitsky drew comparisons of the government’s ability to pay criteria to those examined in the Johnston Report in 1974. He stated:

The Johnston Report in 1974 rejected the ability to pay as an appropriate criterion in the health care sector. Prominent arbitrators such as Owen Shime and George Adams echoed the Johnston Report’s conclusions in their awards. No arbitrator of any distinction has differed with this view. If ability to pay made any sense as a criterion in public sector bargaining arbitrators would long ago have been applying it. The reality is that it is not a question of ability to pay. It is a question of unwillingness to pay.

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28 Willowhaven Private Hospital (unreported) December 28, 1983 (Hope) at page 7.
29 Beacon Hill Lodges of Canada (1985) 19 L.A.C. (3d) 288 (Hope) at 296.
What happens in Canada and in Ontario is that governments have found it convenient to avoid dealing with their problems as employers by curtailing the rights of their employees to bargain.

…while the Conservative Government has restored bargaining rights, it has skewed the process which gives expression to these rights by introducing criteria like ability to pay which do not belong in any independent arbitration system. Unfortunately the Conservative government has taken a major step backward by introducing Bill 26 and these criteria.

Although not going so far as to refuse to serve as an arbitrator under the government’s ability to pay criteria, Arbitrator Kevin Burkett was as public in his criticism of the government’s policy:

In early 1996 the Conservative government, in its *Savings and Restructuring Act*, codified “ability to pay” as a criterion to be taken into account in public sector interest disputes. As anyone with even passing knowledge of interest arbitration understands, “ability to pay” in the public sector, where purse strings are controlled by government, is an inappropriate criterion if used to undermine the link between public sector wage levels and what is paid in the private sector for work of comparable value. Ability to pay may be relied upon to stage or delay increases so as to lessen the immediate economic impact upon a public sector employer, but it ought not to be used as a mechanism by which government influences public sector wage levels by unilaterally limiting the funds made available to public sector employers.\(^\text{30}\)

In the end the criteria remained in place however the final legislation required only that arbitrators “shall take into consideration all factors the board considers relevant, including the following criteria…”\(^\text{31}\) The effect of this subtle change was to give the ability to pay criteria no greater probative value than any of the traditional considerations.

By opening the door for “alternative service delivery” models the Harris government penetrated core values for public sector unions. Bill 26 had the expected reaction from organized labour – the group most immediately impacted by privatization. From the unions’ perspective the Tory strategy became clear: create as much “noise” as possible through sweeping omnibus legislation, diverting attention from any one

\(^{30}\) *Supra* note 26 at page 161.
\(^{31}\) *Fire Protection and Prevention Act, 1997* s. 50.5(2) and *Police Services Act* s.122(5).
particular element. These observations were not limited to union leaders in Ontario. Canada’s national newspaper, the *Globe and Mail*, characterized the Harris Government’s omnibus legislation as a “legal Hydra” which was “cleverly planned to overwhelm the opposition.”

The Tories did nothing to disabuse the fire fighter unions of their concern about privatization. A confidential internal memorandum set out talking points for the Tory Caucus, stating:

Bill 26 is designed to provide municipalities with as much flexibility as possible regarding how they organize and deliver services. Experience has shown that private fire protection is an alternative that is usually employed in areas in which there has been no fire protection in the past. The provisions of Bill 26 are designed to help municipalities to rationalize their services to ensure less duplication and better use of limited resources.

Adding to the concerns for Ontario’s fire fighter associations, the internal memorandum also confirmed that the fire sector legislation, the *Fire Departments Act*, would be replaced in the fall of 1996.

**The Second Wave - The Public Sector Dispute Resolution Act and the Public Sector Labour Relations Transition Act, 1997 (Bill 136)**

The next wave of changes to Ontario’s labour laws included a proposal to radically alter the way disputes were resolved in the labour community. In June 1997, the Harris government introduced the *Public Sector Dispute Resolution Act* and the *Public Sector Labour Relations Transition Act*.

Historically, compulsory arbitration of collective bargaining disputes in the fire sector was entrusted to independent, professional arbitrators. These individuals could be appointed to hear the disputes in one of two ways – the parties, or their nominees, agreed

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32 Interview with U2.
33 G. Critternden, “The Harris Kremlin: Inside Ontario’s Revolutionary Politburo” *Globe and Mail* November 1, 1997 p. D1. In Greek mythology the Hydra was a monster that had between nine and one hundred heads atop the body of a serpent. If any of the heads were severed from the body, another would grow in its place. The Hydra was eventually killed by Heracles and Iolaus who together severed the heads and cauterized the open wounds to prevent them from growing again.
to them, or the Minister appointed them. As professional arbitrators their suitability to the parties was determined largely on their reputations as experienced, fair and impartial adjudicators. The market determined the activity rate for arbitrators – ones that were acceptable to both parties got the work, and those who were not acceptable did not.

The government was firmly of the view that arbitrators were biased, had a relationship that was too close to labour, and had lost the ability to truly appreciate the realities of the provincial economy. Accordingly, it sought to institutionalize the interest arbitration process by creating the Dispute Resolution Commission (“DRC”). The government would only employ arbitrators who would work within a decision-making framework determined by the government. The position of the government is captured in the comments of those involved in the policy’s development, interviewees P1 and P2:

P1  Bill 136 originally provided for a dispute resolution, an independent dispute resolution mechanism and there was a strong feeling in the government…that the existing interest arbitration process was flawed in that the people who were making decisions were, for economic reasons…were always looking to the next arbitration case… it was played out again when the Minister had the right to appoint arbitrators out of the Hospital Labour Disputes Arbitration Act, if you recall he appointed retired judges not professional arbitrators …the political interests in Bill 136 were a reflection of what we call the economic reality… which the criteria were supposed to address… and some kind of dispute making process which had decision makers independent and at arms-length from the parties.

P2  It was that people had lost confidence and lost trust in the arbitration community, a sense they had been complicit and were complicit in working with unions and employers to avoid hard, tough, real economically-based outcomes…as long as those guys are there, they probably have just been ignoring the ability to pay criteria for years regardless of the stripe of the government. These guys think they are like judges. They are going to ignore all that stuff. So we’ve got to change them, and we will develop a permanently employed roster of arbitrators who will work for…an independent Commission, and so you know there’ll be a few of the regular crew in there but there will also be former judges and other folks and all the rest of the stuff, and so you lose some certainty and control over who appoints arbitrators, you lose control and certainty and predictability over the dispute resolution process that you are entering into, and now you are not even sure of the community of people who are going to be making decisions, and the whole thing therefore was intended to bias people away from arbitration. That was the fundamental goal.
...you will have looked at the settlement statistics in the right to strike versus arbitration system and...they are outstandingly different because there is not a whole lot of risk in going to arbitration and there is a whole lot of risk in going out on strike. So...if you want to roll the dice and you wanted to...absolve yourselves as parties of responsibility for outcomes, sure, be our guest, kick into the arbitration process but it is not going to be the recognizable safe predictable comfortable process that you guys have known for years so you will be rolling the dice and it will be a different group of people and they will be operating on the basis of some criteria and the key notion of the Commission was they are not, they are not dependent on the parties for their income. Right, that’s the critical point, so if they see something that’s really a crock of shit coming from one party or another, they can feel comfortable in calling it for what it is, rejecting it and going down some other road. So, essentially, the design of the thing was an effort to address all of the sorts of problems and challenges and sort of calcification in the system...

The opinions of government could not have been more polarized from those of the arbitration community of which they were critical. One of Canada’s leading labour arbitrators observed that institutionalization of the interest arbitration process:

...becomes too ingrown at that point – inbreed. I think you want to have the ability to go around and get different perspectives from different arbitrators as opposed to having an institution that only deals with that. Once you become institutionalized, who’s getting appointed, who’s doing the appointing, what’s the bias they bring in. The parties no longer control the major part of the process.

The fire fighter unions never shared the government’s concerns about the integrity of the decision making process:

I think it is very insulting to the arbitrators themselves to point to the whole system and call it unfair...the city always has a lawyer sitting on the board but also a lawyer doing the advocacy work...and I am just not sure why they still deem the whole system is out of whack, the whole system is unfair... it gives them some good political spin and maybe a few headlines but, you know, that’s unfortunate.

The Harris government could not contain its strong feelings about decision makers in the labour-management community. In advancing its objectives the government came upon some strong opposition from unexpected sources.
During this same period the government actively sought changes to the composition of the Ontario Labour Relations Board. Three Vice-Chairs were removed prior to the expiry of their fixed-term appointments. Two Vice-Chairs added to the Board were employed “at pleasure” and without a recommendation of the Chair. The “at pleasure” appointments were unheard of and seen to potentially influence the impartial decision making of that adjudicator – his or her continued employment was now subject to acting in a way that pleased the government.

Ron Ellis, former Chair of Ontario’s Worker’s Compensation Appeals Tribunal, made the following comments about the Tory approach to appointments:35

To come to the essential point, it is my submission that, in an agency environment where re-appointments are a necessary and integral part of the system, a government’s assertion of the right to use its re-appointment power selectively for the purpose of screening-out individual adjudicators for undisclosed reasons apparently personal to them – must be – fundamentally incompatible with the principles of natural justice.

Ellis concluded:

…the nature and pattern of the government’s current round of reappointment decisions are such as to reasonably suggest to adjudicators in Ontario’s administrative justice system – and, at least as significantly, to the parties that appear before them – that Ontario adjudicators no longer have reason to be confident that they can make their decisions without fear of personal consequences.

As unprecedented as it was for prominent adjudicators like Teplitsky, Burkett, Ellis and McCormack to make public comments that were critical of the government, an even more remarkable comment was made by the Chief Justice of Ontario and former Conservative Attorney General, Roy McMurtry.

Fundamental to the high level of administrative justice is the requirement that tribunals be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way that reflects respect for their independence.

If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite a passive commitment or create a deterrent to courageous judgment calls.\textsuperscript{36}

Given its apparent desire to influence the outcome of tribunal decisions at the labour board it is not surprising that the government would table changes that created the Dispute Resolution Commission (“DRC”). Burkett made these observations about the DRC.

The intention was to remove arbitrators from the interest arbitration process and replace them with government appointees to the Dispute Resolution Commission. The appointment of the commissioners was to be by order-in-council with no involvement of the parties. Clearly, commissioners appointed with neither mutual acceptability nor security of tenure by a government that had already codified “ability to pay” as a criterion in public sector wage determination, are not independent adjudicators. Furthermore, in apparent disregard for the rules of natural justice, the Commission and its panels were to be given the authority to accept the submissions of “experts” without any obligation to expose these submissions to the scrutiny of the disputing parties. The panels assigned to individual disputes were to be encouraged to follow the policy statements of the Commission and were to be insulated from judicial review if they did so. The lack of sensitivity to and understanding of the interests at stake is appalling.\textsuperscript{37}

In the end, the proposed DRC did not survive the vocal and broad-based opposition and was removed from Bill 136 at second reading on September 29, 1997. With its removal, the government committed to restoring dispute resolution for essential service workers, albeit with some modifications, to the pre-existing norms of independence. At the same time the companion Labour Relations Transition Commission (“LRTC”), a body that was to oversee labour relations issues resulting from restructuring, was also abandoned, leaving transition issues to the Ontario Labour Relations Board.

Concurrent with the introduction of Bill 136 was Bill 84 – the overhaul of the Ontario Fire Department’s Act. The replacement Fire Protection and Prevention Act, 1997 (“FPPA”) was intended to provide an interest arbitration system that would be

\textsuperscript{36} Roy McMurtry, “Tribunals Bring Justice to the People” \textit{Toronto Star}, February 3, 1998 as quoted in Burkett, \textit{supra} note 26 at page 181.

\textsuperscript{37} \textit{Supra} note 26 at page 177.
determined by Cabinet regulation. With the changes to Bill 136, the replacement fire
sector legislation would now provide for the hybrid med-arb process or a process of
mediation-final-offer-selection. If the parties required the Minister to appoint an
arbitrator, he/she would also determine the style of dispute resolution between these two
options. This choice would be within the Minister’s “sole discretion.” What remained
uncertain is whether the government would select neutrals from pre-existing lists of
acceptable professional arbitrators.

Three weeks after writing to the Ontario Labour-Management Arbitrators
Association to indicate the government’s intention to maintain the status quo in assigning
independent professional arbitrators, the Minister of Labour appointed four retired judges
to sit as arbitrators in hospital sector disputes.38

The appointment of retired judges reignited the smoldering dispute over the DRC,
telling Ontario’s public sector unions that the government was going to achieve its
objectives regardless of having abandoned its plans to institutionalize interest
arbitration.39 In response, the unions involved sought judicial review of the Minister’s
appointments – a dispute that found its way to the Supreme Court of Canada. The Court
found for the unions and directed the Minister to “exercise his power of appointment in a
manner consistent with the purpose and objects of the statute that conferred the power.”40

Bill 136 made efforts to expedite the interest arbitration process by putting time
limits on the commencement of hearings and the release of arbitration awards. The
hearings were to begin within thirty days of being constituted and arbitrators were to
release an award within ninety days of their completion.

38 In his letter to Mr. Ken Swan, President of the Ontario Labour-Management Arbitrator’s Association,
Minister of Labour J. Flaherty stated, in part: “In response to concerns raised, reference to the Dispute
Resolution Commission was deleted from the Act. The police and hospital sectors will continue under
existing systems for appointment of arbitrators. The fire service sector will now be covered by a process
similar to that contained in the Hospital Labour Disputes Arbitration Act.” (February 2, 1998).
39 The judges included the Honourable George Adams, the Honourable Lloyd Houlden, the Honourable
Robert Reid and the Honourable McLeod Craig.
*Ibid* at paragraph 109. Mr. Justice Binnie concluded by saying, “A fundamental purpose and object of the
*Hospital Labour Disputes Arbitration Act*, R.S.O. 1990 c.H14 was to provide an adequate substitute for
strikes and lockouts. To achieve the statutory purpose, as the Minister himself wrote on February 2, 1998,
“the parties must perceive the system as neutral and credible”…the [act] required the Minister to select
arbitrators from candidates who were qualified not only by their impartiality, but by their expertise and
general acceptance in the labour relations community.” He went on to say, “Labour arbitration as a dispute-
resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator
chosen by the parties or being acceptable to both parties.”
...on average, arbitrated police agreements are concluded approximately 13 months after the expiry of the previous agreement. In the fire sector the figure is even longer, 20 months, and in the hospital sector agreements are finalized nearly two years after the expiry of a contract. This stands in stark contrast to the private sector where, as I indicated, it is all concluded within four months on average. This means that in some cases the employers and unions are learning the final result of an arbitration after the term of the arbitrated contract is over.41

The second part of Bill 136 was the Public Sector Labour Relations Transition Act, 1997 which provided the mechanism for dealing with restructuring in the municipal, health care and education sectors. In general terms, this part froze existing collective agreements as at the changeover dates for restructuring groups, defined the process for determining the appropriate bargaining units, and defined the process for negotiating first collective agreements. In an effort to smooth what can often be rough edges in amalgamating bargaining units, Bill 136 also directed a common grievance process and provided directions on the handling of seniority in blended bargaining units.

While it was Bill 136 that introduced the process for resolving collective bargaining disputes – the subject of this study – it is important to appreciate the third and final wave of change to hit Ontario’s fire fighters – the replacement of the fifty-year old Fire Departments Act with the Fire Protection and Prevention Act.

**The Third Wave - The Fire Protection and Prevention Act, 1997**

The Ontario Fire Departments Act (“FDA”) had applied to full-time professional fire fighters without significant change since 1949. It provided for, *inter alia*, hours of work, a general framework for collective bargaining obligating the parties to bargain in good faith and make every reasonable effort to reach an agreement, along with a process for the appointment of nominees and a neutral interest arbitrator when bargaining efforts resulted in impasse. The FDA also defined the limits of managerial exclusions in full time fire departments; provided a clear delineation between full time and volunteer fire fighters, and established a standard rights arbitration process. In all the FDA was just over seven pages in length.

The FDA withstood several attempts by previous governments to amend provisions defining managerial exclusions and collective bargaining dispute resolution. The Association of Municipalities of Ontario (“AMO”) and the Ontario Association of Fire Chiefs (hereinafter either “OAFC” or “Fire Chiefs”) took the lead in promoting a number of changes to the FDA, including ability to pay criteria for interest arbitration, managerial exclusions and revisions to the dispute resolution process. In 1987 the Peterson Liberal government was considering making these changes, including the introduction of a heavily layered dispute resolution system that was to include conciliation, fact-finding, mediation and arbitration. In the face of extensive pressure from fire fighter unions, the Peterson government abandoned its proposals on the FDA.

David Chistopherson, as Solicitor General in the Rae government, heard the same concerns from AMO and the Fire Chiefs. Earlier issues of managerial exclusions and dispute resolution were revived, but despite holding meetings with stakeholders, any interest to amend the FDA was extinguished once the Rae government became preoccupied with a deteriorating economy and the controversial Social Contract Act’s intrusion into free collective bargaining.

The Harris government’s antipathy towards public sector unions provided the ideal climate for AMO and the Fire Chiefs to renew their efforts to change the FDA. The Conservative government tabled its first draft of the Fire Protection and Prevention Act (Bill 84) on October 16, 1996.

For the fire fighter associations the proposals in Bill 84 raised a number of key concerns. Consistent with Bill 26’s controversial invitation to privatize essential public services, Bill 84 provided for a broader definition of “employer” from the FDA’s definition of employer as a municipality. The Bill also provided for the introduction of

42 Fire fighter bargaining units typically include all fire fighters and ranks with the exception of the Deputy Fire Chief or Fire Chief. The Deputy Chief and Chief positions affiliate with the OAFC.
44 The FPPA: 2rd reading on December 9, 1996; 3rd reading on May 14; Royal Assent on May 27 and proclaimed on October 29, 1997. The FPPA also consolidated existing statutes that were related to the fire protection/prevention, and not related to the sector’s industrial relations. These included; Accident Fires Act; Egress from Public Buildings Act; Fire Accidents Act; Firefighters Exemption Act; Firefighters Protection Act; Fire Marshals Act; Hotel Fire Safety Act and Lightning Rods Act.
part-time fire fighters – an issue that struck at the heart of Ontario’s fire fighter associations’ health and safety concerns about part-time workers.

U2 …we did presentations all over Ontario with regard to [Bill 84] and one of the big changes there was the definition of a full-time firefighter, and it actually allowed the introduction of part-time firefighters where in fact if it had gone to the Ontario Labour Relations Board, we would have had to represent part-time firefighters.

The Bill also opened the door to additional managerial exclusions from the fire fighter bargaining units – something the fire fighter associations viewed both as a threat to the integrity of their organizations, and a safety issue in command situations. The Bill provided for exclusions in two ways, the first would be a standard managerial exclusion test as regularly applied by the Ontario Labour Relations Board when considering scope issues at certification. This would exclude someone from the bargaining unit if he/she performed managerial functions or had responsibilities for work that was in a confidential capacity to the labour relations process. The second exclusion process involved the employer designating persons out of the bargaining unit. This would permit exclusions in proportion to the size of the fire department.

U2 What disappointed me with that is [the Fire Chiefs] could never come up with an argument on why they needed more exclusions…

The Bill included a prohibition from strike and/or lockout. While the FDA was silent on the right of either party to use a strike/lock-out weapon to influence collective bargaining, the constitutions for each fire fighter association across Ontario voluntarily rejected the use of strikes.

U1 when you look at… some [parts] of the Act…some areas were quite insulting. One of the first rumours I remember hearing as a Local President…at the time was they were actually going to legislate no strike, no lockout, and we thought how bad could this Act be when we’ve never gone on strike. It is written right in our own Constitutions that we would not go on strike. We thought ‘how heavy is this hammer going to hit us’ if they need to impose that in a legislative framework and then we looked at the management exclusion areas and that, and when we looked at a process that was totally foreign to us, we saw that it was…
The Bill also repeated the good faith obligations for collective bargaining, but left out the enforcement process accessible to either party had they been operating under the Ontario *Labour Relations Act*. This left one party to challenge the other’s bad faith or unfair labour practices through a long grievance process or more expensive court processes.

U2 What was originally in the Bill that was taken out, and it was probably by the Fire Chiefs or the AMO, was penalties for non-compliance in certain areas. There were some pretty stiff penalties that were there, and we thought that was a good move but when the final draft came out they were all gone…bargaining in bad faith, that sort of stuff.

The Bill also set out changes to the hours of work, call-in provisions in the event of a major emergency, the right of fire fighter associations to present grievances directly to municipal council, as well as facilitating the employer’s ability to terminate probationary employees. The Bill adopted a certification process similar to that found in the *Labour Relations Act*, but more troubling to the fire fighters was the concomitant decertification process. This opened the door to raiding by other unions – something unheard of in the almost fifty year history of the *FDA*.

The Bill incorporated the changes made to the interest arbitration process set by Bill 136 – the adoption of conciliation under the authority of the Ministry of Labour, med-arb, or mediation-final-offer-selection. This included the ability to pay criteria set out in the final version of Bill 26.

The fire fighters remained skeptical of the changes introduced by the Tories. Despite the assurances from the Premier during the election process that there would be no changes without consultation with the fire fighter associations, the presidents of the two provincial fire fighter organizations had difficulty gaining access to high-level decision makers in the Premier’s office.

U2 [senior policy advisor in the Premier’s office] didn’t see us as stakeholder, he wouldn’t talk to us, he talked to AMO, he talked to the Fire Chiefs but he wouldn’t talk to the unions. That’s how anti-union he was…he wouldn’t meet with me. I put out a call to the [fire fighters] in the Toronto area and I said I want you to start phoning his office, lock up the lines, that we need to talk, we need to
talk. Finally, his office phoned and said ‘what do we need to do to get you to get you to have your guys stop phoning our office?” I said all you have to do is meet with me. I said I can stop the guys like that [with a snap of a finger].

The fire fighter concerns were not assuaged by gaining access to decision makers. For the fire fighters the consultation process had little meaning.

U2 …there were hours and hours of consultation but our concerns weren’t listened to at all. We were in damage control most of the time because we knew we were, it was like two against three there. There was the Chiefs and AMO against the Professional Firefighters…. we tried to have as meaningful discussions as possible in the consultation process but sometimes we would go in and we’d argue our case and then when you saw a draft come out, they hadn’t taken any of our arguments into consideration at all. It was very frustrating actually. And the Fire Marshall got involved in it, he was brought in to kind of try to shepherd it through and he totally screwed it up.

The final version of Bill 84 contained few changes from what was presented at first reading. There were clarifications for the certification process and some protections for bargaining unit members whose positions would be in dispute when applying the managerial exclusions provisions. The government did remove the sections of Bill 84 dealing with the need for certification and de-certification – eliminating the concerns about open periods and raiding by other unions.

The three waves of legislative changes experienced by the fire fighters created real concerns about the application of the statutory criteria for interest arbitrators (originating in Bill 26); the conciliation, mediation/arbitration or mediation/final-offer-selection process for interest arbitration as well as the appointment of judges as neutrals (originating in Bill 136) and the assortment of changes that came with the government’s replacement of the FDA with the FPPA (Bill 84). Labour management relations was going to be anything but predictable as municipalities and fire fighter associations resumed bargaining after three years of the Social Contract.

U2 We didn’t think the old Act needed any changing. You could have tweaked it here or there but to do a major overhaul they way they did, we didn’t believe it needed to be done. Because it worked extremely well…the big difference…I see with the old Act and the new Act is that the old Act a guy in the fire hall can pick it up and read it and understand it. You’ve got lawyers that cannot understand Bill 84, which is sad…
Chapter 2: The Ontario Fire Fighter Collective Bargaining Framework

This study examines a small but meaningful part of the overall changes to the framework in which Ontario’s fire fighters collectively negotiate their terms and conditions of employment. Collective bargaining is one of the primary functions of any trade union; therefore, the format for the resolution of bargaining disputes has significant implications for its membership as well as the employer’s budget and control of the direction of the workplace.

The Fire Department Act’s Bargaining Dispute Resolution System

Under the FDA the parties were obligated to bargain in “good faith” and “make every reasonable effort to come to an agreement for the purpose of defining, determining and providing for remuneration, pensions and working conditions of the full time fire fighters other than the chief and the deputy chief of the fire department.” If the parties were unable to successfully negotiate a collective agreement, s 6(1) allowed one party to give notice to the other of its intent to refer unresolved issues to a board of arbitration. In so doing that party would appoint its member to the board – a position commonly referred to as the party’s nominee;

“...the council of the municipality or the bargaining committee is satisfied that an agreement cannot be reached, it may, by notice in writing to the bargaining committee or the council, as the case may be, require all matters in dispute to be referred to a board of arbitration of three members, in which case the council and the bargaining committee shall each appoint a member and the third member, who shall chair, shall be appointed by the two members so appointed.”

Although rarely if ever applied, if one party attempted to slow the process by failing to appoint a nominee within the prescribed period of time, the Solicitor General retained the authority to make such an appointment.46 Similarly if the nominees failed to agree to a suitable chairperson within five days of being appointed by the respective parties, either of the nominees, or either of the

45 Fire Departments Act s.5(1)
46 s.6(2)
parties themselves, could write to the Solicitor General for the appointment of a chair. While not required under the FDA, the Solicitor General would make appointments from a list of arbitrators that had been previously agreed to by provincial affiliates of the fire fighter associations and the municipalities.\textsuperscript{47}

The FDA required the arbitration board to commence the hearing within thirty days and deliver a written decision within sixty days of the hearing.\textsuperscript{48} The periods set out in the FDA could be extended by mutual agreement of the parties, however, like most legislation setting time limits in labour arbitration, these periods were rarely if ever enforced.\textsuperscript{49} The process used by the Board was conventional interest arbitration, which will be more fully described below. In the event that there was not a majority decision of the members of the board, the decision of the chair would bind the parties.\textsuperscript{50} Finally the parties would assume their own costs of the arbitration proceeding and would share the costs of the chair equally.\textsuperscript{51} The FDA provided general instructions on the term of the replacement agreement, as well its continuing application until replaced by a subsequent collective agreement.\textsuperscript{52} There were no other provisions in the FDA that framed the process for resolving bargaining disputes.

This study will review in greater detail the application of, inter alia, conventional arbitration, med-arb and final offer selection with a brief description of each process and its application in the fire sector.

**Conventional Interest Arbitration As a Dispute Resolution Process**

Ontario’s fire sector relied on conventional interest arbitration as its mechanism to resolve bargaining disputes for more than five decades. Conventional arbitration resembles litigation in general but is less rigid in its procedures. The neutral has low control over process but high control over decision-making. The arbitration board would convene a hearing and generally the union would present its “in-chief” submissions

\textsuperscript{47} There was no formal mechanism for adding to or deleting names from the fire sector’s list of suitable arbitrators. The Solicitor General would, from time to time, consult with the Association of Municipalities of Ontario and the Ontario Professional Fire Fighters Association on the list.

\textsuperscript{48} *Supra* note 51, s.6(4)

\textsuperscript{49} s.6(5).

\textsuperscript{50} s.6(6)

\textsuperscript{51} s.6(7).

\textsuperscript{52} s. 7(1) to 7(4).
followed by the employer’s submissions. In most cases the employer would follow its in-
chief submissions with replies challenging the merits of the union’s proposals, and the
union would follow with the replies to the employer’s proposals. While the parties would
make oral submissions, they would generally emphasize or substantiate certain proposals
in written submissions and background documents. Unlike civil litigation, the arbitration
process does not rely on discoveries and other formal processes, making it more
efficient.\(^{53}\) Seldom are witnesses called to present evidence to an arbitration board.\(^{54}\)

Collective bargaining in the fire sector, as it is in the public sector in general,
relies on comparative data from municipalities of similar demographic profile,
commercial/economic base and fire department structure. In most cases the fire fighter
submissions focus on the wages and working conditions of other fire fighters and/or
police officers working in the same community while employer submissions focus on
settlement data on fire fighters and other municipal workers as well as general
wage/benefit patterns across the broader public and private sectors.\(^ {55}\)

Under the *FDA* there was no formal conciliation or mediation stage
accompanying the conventional arbitration process. While some arbitrators were passive
in hearing the dispute, others rarely felt constrained by the *FDA* ’s conventional
arbitration process and would therefore make full use of whatever dispute resolution
techniques he/she felt were appropriate to the situation.\(^ {56}\)

Following the arbitration hearing the arbitrator and two nominees would convene
in executive sessions at which issues were discussed. In most cases the arbitrator would
attempt to mediate a settlement between the nominees, failing which the *FDA* provided

\(^{53}\) There are an abundance of publications that describe the difference processes commonly used to resolve
disputes in labour-management and other sectors. See generally Richard McLaren & John Sanderson,
*Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, Looseleaf, 2005) for detailed
descriptions of a variety of dispute resolution processes.

\(^{54}\) The notable exceptions to this involve interest arbitrations involving health and safety issues like
minimum staffing. In those cases the arbitrators have expressly stated that *viva voce* evidence was
necessary. See generally Ottawa Professional Fire Fighters Association and the Corporation of the City of

\(^{55}\) The descriptions of the arbitration and mediation-arbitration processes is based on the author’s activity in
representing fire fighter associations in these forums as both an advocate and nominee. The fire sector in
Ontario has, over the years, negotiated a relationship with police working in the same community. In many
cases fire fighters have negotiated salaries that are identical or nearly identical to police. This is unique to
Ontario as no other province in Canada has as close relationship between fire fighters and police.

\(^{56}\) One senior arbitrator active in the fire sector, Martin Teplitsky, routinely used mediation when hearing
interest disputes – whether before or following a conventional arbitration hearing. Teplitsky also brought a
unique procedural economy to the arbitration process.
the arbitrator with the final decision. Typically the arbitrator would write a draft award that would be provided to the nominees for comments. Often arbitrators leave it to the nominees to come to a proxy compromise that would be incorporated into, or form the entire collective agreement.

Arbitration differs from litigation in that the parties enjoy greater control over the selection of the arbitrator (and to the extent that they can agree they can also influence the procedure, making it more or less formal, adversarial and rule-based). As will be discussed further on in this study, the parties regularly called upon a select group of arbitrators to handle the vast majority of bargaining disputes. As a result these arbitrators undoubtedly gained extensive knowledge of fire sector issues and gained the confidence of the parties to render fair and balanced decisions.

The statutory framework for interest arbitration has always provided the arbitrator with considerable discretion on procedural issues. Over the years arbitrators have developed a sophisticated process for reaching decisions. This process is well summarized by Arbitrator Paula Knopf’s comments in *Niagara Falls Professional Fire Fighters Association and the Corporation of the City of Niagara Falls*.57

First, we fundamentally believe that a board of arbitration in an interest arbitration must strive to attempt to set the terms of a collective agreement that one would reasonably expect the parties to have achieved on their own had they been free to impose the traditional sanctions of strike and lockout. Secondly, in order to achieve that, we have examined carefully the freely negotiated and arbitrated settlements in this community as well as in comparable communities including police and other fire fighters. All these have been taken into account. Third, we have taken into account the evidence presented regarding the economic factors impacting upon this community. Fourth, while we agree with the Employer’s submission that in settling a collective agreement the concept of “total compensation” should be taken into account, we simply did not have sufficient evidence in this case to be able to do this in a precise way. However, our award is the result of our viewing the collective agreement as a whole and as a comprehensive wage/benefits package, rather than analyzing each item just in isolation. Finally, the objective of this award is to set a collective agreement that will enable the parties to work harmoniously together, that is fair to the concept of

57 (Unreported) May 15, 1992 (Knopf) page 2.
good labour relations and that will enable the parties to embark on realistic collective bargaining in their next set of negotiations.

The *Fire Protection and Prevention Act, 1997’s Bargaining Dispute Resolution System*

The *FPPA* adopted the interest arbitration process first set out in Bill 136. This new process emerged from the ashes of the Harris government’s failed efforts to institutionalize the resolution of public sector collective bargaining disputes.

Like the *FDA*, the *FPPA* set out the dual obligations on the parties to bargain in good faith and make every reasonable effort to make a collective agreement. The early drafts of the *FPPA* included the usual enforcement mechanisms for these obligations, but these sections were removed before the Bill was released for first reading. If the parties were to reach an impasse in negotiations either could write to the Minister of Labour for the appointment of a conciliation officer. The conciliator would then attempt to meet with the parties within fourteen days of being appointed, and should his/her efforts not conclude a collective agreement, the conciliator would report to the Minister that an impasse remains. The Minister in turn would report to the parties that the conciliator had issued a “no board” report, and that either party could then require matters remaining in dispute be referred to interest arbitration for a final and binding determination. The parties would be given the option of a single arbitrator or tripartite panel, and the process would begin within thirty days. The *FPPA* then requires the single arbitrator to release a binding decision within thirty days or in the case of a tripartite panel, within sixty days of the conclusion of the arbitration failing which the Minister may order a decision from, or alternatively make an order respecting the remuneration and expenses of the arbitrator or

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58 *FPPA* s.48(1).
59 The enforcement process generally included short-notice access to the Ontario Labour Relations Board to hear issues of unfair labour practices or bad faith bargaining. Interview with U2.
60 *Supra* note 59, s.49(1)
61 s. 49(3) and (4). The conciliator’s notice to the Minister is commonly referred to as a “no board” report. This is a throw back to earlier days when a single conciliator would first assist the parties and if unsuccessful, a full conciliation board comprised of nominees from each side and a neutral conciliator would then become involved. In determining that a “no board” report is appropriate the conciliator advises the Minister that the parties’ differences will not benefit from any continued form of conciliation.
62 s.50(1)
63 s.50(2)
arbitration board. As with the FDA the timelines in the FPPA are rarely if ever enforced.

One of the central planks in the Harris government’s election campaign was wrestling down spending in the public sector. If the government could not have its Dispute Resolution Commission, it would at least hold fast to requiring interest arbitrators to consider ability to pay criteria. In the end the FPPA adopted the criteria as originally set out in Bill 84.

The FPPA clarified the procedural powers of an arbitrator to issue subpoenas, enter workplaces to inspect or view processes, and to compel information from individuals. It also allowed the arbitrator to make interim orders concerning procedural matters as well as an express obligation to interpret and apply the human rights and any other employment-related statutes despite any conflicts with the terms of the collective agreements. Like most statutory schemes for resolving bargaining disputes, the FPPA provides the arbitrator with the authority to bind the parties should the board fail to reach a majority conclusion. The FPPA then goes on to prescribe a process for the execution of a final collective agreement. Finally, the FPPA provided for the sharing of the costs of the arbitrator, as well as a mechanism to register the decision of the arbitration board with the Ontario Court (General Division) in the event one party failed to comply with the terms of the award. The FPPA also excluded the application of the Statutory Powers and Procedure Act.

Legislating Uncertainty

It was clear that the government’s objective when proposing the Dispute Resolution Commission was to “bias people away from arbitration” through the creation of an unpredictable and potentially unfavorable environment for resolving their bargaining differences. The idea seemed simple enough; require those with no alternative but compulsory interest arbitration to use a dispute resolution system that presented a

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64 .s.50(4) to (6).
65 S.50(7)
66 .s.50(9) to (14)
67 s.50(16)
68 s.50(17)
69 Interview with P2.
heightened level of uncertainty of outcome making a local agreement more appealing. In legislating uncertainty the government was attempting to replicate the risk found in a strike/lock out framework.

When forced to resile from its position on the DRC the government did not abandon the notion that uncertainty of process was a catalyst to mutually satisfactory bargaining outcomes. While the government could not replace the professional arbitrators it suspected of being “complicit in working with unions and employers to avoid hard, tough, real economically-based outcomes”\(^\text{70}\) it remained determined to restructure the dispute resolution process to fulfill its objectives.

P2…it became very clear that most of the people in the system… the lawyers, the staff reps, the human resource professionals on the employer side, the union negotiators, the political leaders – generally over time became more and more comfortable with arbitration. Everybody kind of understood the ground rules, everybody understood the outcomes, the arbitrators were the same in many respects, and there became established a culture and a pattern of behaviour and some might say a pattern of outcomes and types of outcomes that for the most part actually became quite predictable.

And as a result of that predictability I think over time … arbitrators and union leaders and employer leaders at one point or another, you started to see less and less emphasis on the front end of the process and more and more emphasis on the back end of the process.

By incorporating the dispute resolution process first introduced in Bill 136, the \textit{FPPA} continued a system that gave the Minister the sole discretion to select between two significantly different dispute resolution processes, arbitration and final-offer selection – both preceded by a conciliation and then mandatory mediation stages.

P2…you may get conventional arbitration, you may get med-arb, you may get final offer selection, you know, who knows? Arsenal of weapons. But to do that, the only route into doing that was to…require…appointments be made by the Minister… when you go to the Minister of Labour for an appointment you are not just asking him to appoint an arbitrator, he’s going to… select the dispute resolution mechanism, and the thinking there was people looking around, seeing final offer selection and med-arb…would start to have them…take the bargaining

\(^{70}\) Interview with P2.
process a lot more seriously...because you are building risk and uncertainty into it. That to some extent was, you know, people would argue some of artificially some of the tension you’d find in a right to strike situation.

**Making Conciliation a Mandatory Step in Resolving Bargaining Disputes**

The *FPPA* adopted the *Labour Relations Act* model of requiring conciliation before legally gaining access to med-arb or med-FOS. In Ontario’s private sector a union is not legally in a strike position, nor is the employer in a lockout position until a conciliator has concluded that further conciliation will not result in a settlement. Conciliators play an important role in maintaining effective communications between the parties as emotions begin to escalate. While fire sector negotiations are not immune to communications issues, the compulsory arbitration system has difficulty replicating the escalating stress that comes from a pending strike or lockout. Experience has shown that conciliation in the fire sector has had an almost no success in resolving bargaining impasses. This will be further discussed in Chapter 5.71

**Mediation-Arbitration As a Dispute Resolution Process**

When the conciliation stage of the process fails to bring the parties to an agreement, as it almost always does in the fire sector, the parties proceed to the mediation stage of med-arb. Med-arb combines the unique features of the mediation process with the final and binding process of arbitration. The adjudicator first functions as a mediator - a process that generally gives him/her high control over process but very low control over outcome. However without decision making authority the mediator is left to rely solely on skills and information to influence the parties and manage the outcome. In doing this the mediator’s objective is to find overlapping interests which then form the basis for agreement. With the use of nominees in the fire sector, the adjudicator is often less directly involved with the parties in mediation, preferring to use the nominees to gather and exchange information.72

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71 Interviews with U1, U2 and E3.
72 This in itself has been a problem with the med-arb process in the fire sector, as observed by interviewee U1: “…[there] is some of the frustration as well from the members when an arbitrator isn’t a participant in the sense of the word throughout the day, yet at the end of the process they are receiving a bill for that day so there becomes some resentment.”
The principal advantage to having the same adjudicator serve in both capacities is in the efficiency that results from not having to repeat submissions to a different adjudicator when moving from the mediation to the arbitration phase. Moreover, when acting in a mediation capacity the adjudicator often engages the parties in a more free-flowing dialogue about positions and interests, or the positions and interests of the other party. Direct contact with the mediator-arbitrator and the ability to “tell their story” is often an important factor in a party’s evaluation of a dispute resolution process.

On the other hand the usefulness of dialogue between the parties in mediation can be limited by the combination of med-arb. Often seen as the most serious of its faults, critics note that parties are often unwilling to disclose information for fear that doing so may prejudice their arbitration interests in the event a mediated solution is not found. Parties are reluctant to disclose their bottom lines or make concessions through mediation, fearing that they are in fact defining the framework of the arbitrator’s award. Moreover if the other party has not engaged in a similar disclosure or concession making, it may benefit by achieving more through the arbitration phase. Critics also note the natural justice concerns that arise within the med-arb process. If not properly managed, a party can make a comment or disclose of information to the arbitrator without the knowledge of the other party or more importantly, without the opportunity to challenge its truthfulness.

Procedurally the mediation phase of med-arb is best described as “assisted negotiations” by nominees and the mediator. Depending on the individual style of the neutral the mediation phase can be quite effective at disabusing parties of unrealistic expectations. In the aftermath of mediation parties often speak of “getting beaten up” in this phase. Regardless of how the participants characterize their participation in this phase, each party still retains full control over its issues and bargaining priorities.

73 In Canada most mediation-arbitration in labour-management settings involve the same neutral. In the United States the practice is to have two different neutrals, regardless of cost and efficiency questions. Lon Fuller observed that, “since the objective of reaching a….settlement is different from that of rendering an award..., the facts relevant in the two cases are different, or, when they seem the same, are viewed in different aspects.” In “Collective Bargaining and the Arbitrator” Proceedings, Fifteenth Annual Meeting, National Academy of Arbitrators, (Washington DC, Bureau of National Affairs, 1962).
74 This factor will be examined more fully when dealing with the assessment and evaluation of the med-arb process, and in particular the commentary from employer interviewees.
75 This is the basis of the criticism of conventional arbitration’s “chilling” impact on bargaining.
The arbitration phase is not unlike that found in conventional arbitration described above. The parties’ present detailed written and oral submissions, setting out the strengths of their positions and the weakness of the positions of the other party. The most practical difference between conventional arbitration and arbitration under the med-arb hybrid is that the arbitrator has the opportunity to hear and ask questions directly with the parties during the mediation stage, often without the other party being present. This often reduces the need to have lengthy presentations in the arbitration phase.

Final-Offer Selection As a Dispute Resolution Process

It is impossible to recount the experience of the Ontario fire sector under the final-offer selection (“FOS”) process, there having been no examples of its use.76 Regardless FOS has had enormous success in resolving single-issue salary disputes in the realm of professional sports, and some success in resolving public sector interest disputes in the United States.77

FOS is a process where the adjudicator, or selector as the person is often called, has no discretion to alter the terms being proposed by either party and must select one party’s proposal over the other. The process is designed to encourage each party to abandon extreme positions, thereby narrowing the parties’ differences and encouraging settlements. The process is frequently divided into “issue by issue selection” where the selector chooses between the parties’ positions one issue at a time, or more commonly as “total package selection” where, as the name implies, the selector is to choose one entire package over the other.

FOS is designed to respond to those critics who claim that the conventional arbitration process has a chilling effect on negotiations – where the parties engage in no meaningful negotiations throughout bargaining, knowing that they will likely be going to

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76 The Ontario police sector legislation adopted FOS at the same time as the fire sector and has also not experienced its use.
arbitration. By requiring the parties to defend their final offers, the process allows for unreasonable or unsupportable positions to be rejected by the selector – thereby forcing the parties to modify their offers from what might be characterized as extreme positions.

Under the FPPA mediation precedes a FOS process, with the same board of selectors presiding over both processes, thereby preserving the benefits of a mediation stage. Like conventional interest arbitration or med-arb, decision-making under FOS is based on a comparison of wages and working conditions with other similarly situated employees.

FOS has been used in the United States to resolve public sector collective bargaining disputes. Studies have indicated that while the process encourages a narrowing of issues prior to impasse, parties are nevertheless able to manipulate the process to their advantage. As Feuille observed, in total-package FOS one party may include one untenable position in an otherwise acceptable package. A selector is still required to accept the more supportable “package” even if it includes a rogue proposal. The effect, however, is that the losing side will be forced to accept a selector’s award, and the resulting collective agreement that includes the rogue proposal. No studies were found that questioned whether a “rogue” strategy resulted in repeat or escalating “rogue” issues by either party in subsequent rounds of bargaining.

The same studies dismiss the use of issue-by-issue FOS as defeating the purpose of this dispute resolution process. By removing the total risk that results from packages, the incentive to converge on issues is significantly reduced. As Mitchnick noted, in New Jersey the selector is mandated to deal with economic issues in packages, while non-economic issues are dealt with on an issue-by-issue basis. Michigan uses a system of

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78 The chilling effect is where a party will hold back on making any changes to its bargaining positions for the purpose of anchoring the issues that will be put to the arbitrator, all in anticipation that the arbitrator will “split the difference” on many or all of the issues resulting in a more favourable award.

79 Major League Baseball has further modified FOS single-issue salary process to require the parties to submit to the selector the initial positions taken and not a position taken at the point of impasse. This removes any bluffing or positioning in the early stages of negotiations, ensuring that positions are serious. As Mitchnick notes, supra note 76, in 1995 of 58 cases submitted to arbitration only 8 required a hearing; in 1994 there were 16 hearings from an original 91 cases; in 1993, 18 hearings from 118 cases, and finally in 1992 there were 20 hearings out of a possible 157. This does not include the vast majority of baseball players, eligible for arbitration who settled.

80 See generally articles listed supra in note 77 including Feuille, P. “Final-Offer Arbitration and Negotiating Incentives” (1977) 32 Arb. J. 203 as cited in Mitchnick supra note 76.
issue-by-issue on economic items and conventional arbitration on non-economic. In Michigan the parties are also given an opportunity to return to negotiations for a three-week period after final submission are made, prior to any award from the selector. Variations on the process are used in Massachusetts and Oregon. Despite its popularity in a number of American jurisdictions, FOS has simply not found favour in Canada.81

Summary

With a backdrop of seismic changes in the legislative framework in the 1990’s, Ontario fire fighters felt a deep-seated mistrust of the new med-arb or med-final-offer selection process. With no regulations speaking to, or policy guidelines addressing, the appointment of a final-offer selector, or a mediator-arbitrator, the fire fighters were in the dark on how dispute process selection decisions would be made by the Minister. In addition the fire fighters were apprehensive of a more complicated, costly and drawn-out arbitration process, given the ability to pay provisions and the evidence necessary to address such criteria. The fire fighters braced themselves for assaults on their bargaining unit scope clauses, anticipating municipalities would flock to the Labour Board seeking managerial exclusions. Finally the Minister’s appointment of retired judges in the healthcare sector reinforced concerns about the use of professional arbitrators and the ongoing acceptability of the “only process in town.”82

Municipalities would return to negotiations feeling better armed to withstand anticipated wage catch-up arguments after three years of imposed wage freezes. The ability to pay criteria would, it was expected, support municipalities as they struggled with the downloading of services and restructuring of transfer payments from a provincial government seemingly eager to get out of certain areas of business thus reducing its financial obligations. Furthermore municipalities and their fire chiefs, advocated a restructuring of management groups, either for the purpose of more broadly distributing responsibilities, or eliminating former bargaining unit ranks and “flattening” the structure of their fire departments.83

81 FOS is used to settle some police and fire fighter bargaining disputes in Atlantic Canada. It was also used in the Ontario education sector.
82 Interview with U1 and U2.
83 Interviews with E1, E2 and E3.
From the government’s perspective the instability created by the “arsenal of weapons” strategy for dispute resolution would reduce the reliance on third parties in resolving collective bargaining disputes. The threat of final offer selection would compel parties to re-evaluate their bargaining priorities well before impasse was reached, thereby encouraging more voluntary settlements. Government, while unable to directly wrestle the professional arbitrators away from this work, would remain optimistic that the statutory criteria addressing ability to pay would help curb what it considered excessive decisions made in the past.84

This study will now discuss and apply various process evaluation models to the dispute resolution processes in Ontario’s fire service in an effort to determine whether the stakeholders are better off today than under the previous conventional arbitration system.

84 The government’s earlier versions of Bill 136 contained much more forceful language than what would be included in the final Act. Earlier versions would have required arbitrators to explain their reasons for relying on or rejecting individual criteria. Despite a watering down of the force of the criteria, many in the provincial and municipal governments were anticipating their application.
Chapter 3: The Creation of a Unified Labour-Management Dispute Process Evaluation Model

There are many factors to consider when evaluating the effectiveness of a dispute resolution process. Does the process focus on short-term objectives like resolving a single bargaining dispute or, over the longer-term, the amelioration of a strained relationship? Considering the parties’ interest in the administration of justice, does the process expect the adjudication of each item submitted, or does it seek to replicate agreements by balancing competing interests of each side and jettisoning some issues? Does the process facilitate the parties’ principal interests – cost containment for the municipalities against the interests of the fire fighters in equitable wages and safe working conditions, for example? For the broader public, those who provide for fire departments through their taxes, does the system prevent labour disruptions? Does it encourage positive industrial relations in an important public service? Does it ensure their fire fighters are paid at market rates without causing excessive tax pressures?

Many studies have constructed assessment tools, or models, to measure the effectiveness of dispute resolution systems. In recent years greater attention has been focused on process evaluation, and even more sophisticated models have emerged. This study examines several such models, and after creating a unified model suitable to evaluating public sector labour relations, then examines the dispute resolution process in the Ontario fire sector.

The Feuille Model

In an earlier study, Feuille determined that there were central elements in measuring the efficacy of labour arbitration systems.\(^85\) He observed that an effective arbitration system: (1) protects the interests of the public by preventing strikes; (2) protects employee interests by replicating freely-bargained settlements, i.e. producing timely settlements with fair and equitable outcomes relative to suitable comparators; and (3) reduces hostility and encourages compliance with the awards by interested groups. His study also identified a number of risks in using arbitration to resolve public sector

disputes, including limitations on the role of government in determining the allocation of funding requirements with the effect of shifting government priorities and second the potential to limit the effectiveness of collective bargaining through the chilling or narcotic effects\(^{86}\) of a relatively easily accessed dispute resolution system.\(^{87}\)

Feuille’s evaluation criteria were developed some twenty-eight years ago and are a broad measure relative to the more detailed processes set out below. What is of particular value in Feuille’s criteria, however, is that they were designed with a labour-management process in mind, and represent a useful point of departure for the development of a more detailed model in this study. The rest of this chapter will briefly summarize more contemporary evaluation models culminating in a detailed description of a public sector labour-management evaluation process.

**The Conlon and Meyer Model**

Another model was developed by Conlon and Meyer, who after conducting an extensive review of the literature on system evaluation, found four general categories for system evaluation, each with many sub-categories.\(^{88}\) The four categories include: settlement characteristics; the process’ respect for justice; the longer-term effects of the process on the relationship between the parties, and transaction costs.

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\(^{86}\) Critics have argued that a higher frequency of impasses occur in sectors that have compulsory interest arbitration because there is little risk in proceeding to arbitration. Critics say the easily accessed system has a “chilling” effect on negotiations. The easy access also has a “narcotic” effect in that negotiator are often criticized for not making difficult priority decisions at the negotiation table, preferring to require a third party decide the terms of the replacement collective agreement.

\(^{87}\) It is interesting to note that as public sector collective bargaining evolved in the United States it raised complicated constitutional questions about the exclusive jurisdiction of government to decide on the spending of public funds. For many years municipalities argued that granting authority to interest arbitrators to make binding decisions which impacted municipal budgets was an unconstitutional delegation of authority. In the majority of US jurisdictions this question has now been resolved, bringing some stability to the use of interest arbitration.

Settlement Characteristics

Conlon and Meyer argue that in designing and evaluating a dispute resolution process it is important to consider the ability of the process to encourage voluntary settlements. This builds upon the widely accepted notion that a solution reached by the parties voluntarily (albeit through varying levels of encouragement by a third party) is preferable to one that is imposed upon the parties by a third party. The authors question whether a process achieves a joint benefit to the parties, and whether that settlement represents an enduring solution or becomes the source of future problems.

Justice

There are four elements to Conlon and Meyer’s evaluation of justice. They include: evaluating the parties’ subjective reactions to the outcomes of the process – did the parties achieve their objectives through use of the process (a distributional question – did we win, did we lose?). Secondly the authors are concerned with questions of procedural justice – were the parties satisfied that the process was free of bias, the decision-maker relied on accurate information and, where possible, that the parties played an active part in the process which the authors referred to as giving the participants “voice” in the process. A third element includes an evaluation of interpersonal justice – were the parties treated with dignity, politeness and respect. The final part of justice as defined by the authors includes the quality of the information – did the neutral give adequate information about the process being used, and did the neutral provide detailed reasons for the outcome of the dispute?

Relationship

Conlon and Meyer identify three criteria when considering relationships. First, does the dispute resolution process facilitate cooperation or information exchange in the attempt to resolve the problem? Does the application of the dispute resolution process make efforts to improve the parties’ relationship in the long term? And finally what is the nature of the relationship between the disputing parties and the third party?

89 And is consistent with the notion that a negotiated agreement conforms with the broader communities’ expectation of freedom of contract.
90 See generally Conlon and Meyer at page 259.
Transaction Costs

The final evaluation category defined by Conlon and Meyer involves transaction costs of the process. What has the use of the system cost the parties in both time and money? This factor would have a particular application to smaller fire fighter associations and municipalities – can the system be accessed easily, or does the cost of resolving a collective bargaining dispute effectively foreclose the resolution of bargaining disputes through arbitration?91

The Tyler and Blader Model

A study by Tyler and Blader expands on the importance of justice as a measurement of process effectiveness.92 The authors first address issues of procedural justice, identifying four considerations; (1) opportunities for participation by the parties; (2) the neutrality of the forum; (3) the trustworthiness of the authorities, and finally (4) the degree to which people are treated with respect.

Participation

Levels of participation of individuals in dispute and their resulting satisfaction with the system is one of the most frequently measured aspects of procedural justice, regularly found in studies of plea-bargaining in criminal law settings. Research supports the conclusion that people find dispute resolution processes more acceptable if they are able to play a role in the resolution of their own dispute. There is, however, a broad definition to “playing a role” underlying Tyler and Blader’s observations, which includes the ability to interact with the decision maker personally on the one hand, and having the

91 While beyond the scope of this study, this interesting question would be answered in evaluating various aspects of the parties’ collective agreements. In other words, does the cost of arbitration mean that smaller fire fighter locals have less developed collective agreements? Does one side in those bargaining relationships (typically the employer) benefit from what might be a cost-prohibitive process? A general analysis of fire fighter salaries might conclude that smaller fire fighter associations have suffered as a result of the costs of administrative justice. Salaries for fire fighters in Towns like Gananoque, Picton or Napanee are significantly lower than municipalities that are slightly larger. One must not totally rely on this observation, however, since there have been small fire fighter organizations and municipalities who rely on the arbitration process, where special union dues assessments for bargaining unit members are significant and continual.

ability to make presentations, including examination in chief and cross examination, on the other.

Neutrality of Forum

The forum in which a dispute is heard and determined is also fundamental to the acceptability of a dispute resolution process. Tyler and Blader note that people are strongly influenced by their perception of the honesty, impartiality and objectivity of the decision maker in their disputes. The likelihood of a decision being acceptable to the parties is directly related to their feelings that the neutral is making an impartial decision.

Trustworthiness

The third factor includes the trustworthiness of the authorities in administering the dispute resolution process. This includes the arbitrator’s motives and fairness in exercising his/her discretion over procedural aspects of the case. When considering trustworthiness the parties are often judging whether the arbitrator is “concerned about their situation and needs; whether he or she considers their arguments and tries to do what is right for them; and whether he or she tries to be fair. All these elements combine to shape a general assessment of the third party’s trustworthiness.” For Tyler and Blader a key element of trust is providing justification and explanation for decisions.

…a key antecedent of trust is providing a justification and explanation for decisions. When authorities are presenting their decisions to the parties, they need to explain how they reached their conclusions and communicate that they listened to and considered the parties’ arguments. Such explanations convey to the participants that processes were fair and that the third party was concerned about making reasoned, defensible decisions.

93 Ibid p.300.
94 Ibid at p. 301.
As the authors show, providing clear explanations for decisions reduces the tendency of the parties to introduce their own biases into the outcomes of procedural justice.

…third parties have the ability to manage the socio-emotional aspects of negotiation and to gain acceptance of negotiation outcomes because they draw attention to the centrality of process-based judgments as opposed to self-interested, outcome based judgments and reactions. This focus alleviates competition to maximize resources and fosters compromise and mutually acceptable agreements among parties to the negotiations.96

This is a particularly important concern identified by several interviewees for this study, and presents a frequent policy/practice divide between fire sector stakeholders and arbitrators. This trust factor will be further considered in the Chapter 4.

Respect

In the same way that the justice component of the Conlon Meyer model identified respect as an important measurement of the acceptability of a dispute resolution process, Tyler and Blader include the parties’ feelings of being respected within their evaluation of the dispute resolution process.

The Bush Model

The fourth and most comprehensive model for evaluating dispute resolution systems was created by Bush.97 This process involves fifty quality “statements” that are considered in evaluating a dispute resolution process. These fifty statements are generally categorized by the following six quality standards: individual satisfaction, individual autonomy, social control, social justice, social solidarity and personal transformation. Of the various models set out in this study, Bush’s evaluation takes the broadest view of process evaluation.

96 Ibid at p. 302.
Individual Satisfaction

Like the three models set out above, Bush places particular emphasis on the parties’ satisfaction as measured by the following criteria. Bush asks whether the process was expeditious, and were the parties reasonably satisfied with the process and its outcome? Did the parties feel fully heard in the process? Did the parties feel that the outcome was more favourable to one side over the other? Did they have direct participation? Was there an opportunity for creative outcomes? Was there some finality brought to the dispute? Was there an enduring compliance to its result? Finally, did the parties have the choice of participation and in doing so did it have a positive impact on their ongoing relationship?

Individual Autonomy

Bush identifies the need for an effective dispute resolution process to educate the parties in dispute resolution skills. The process would confirm the parties’ empowerment to resolve their dispute, including their ability to control the outcome.

Social Control & Social Justice

These criteria evaluate broader community interests, including relief to the pressures on court dockets; the reduction of social conflict and the resolution of dominant political interests. The first two criteria can be recast to better fit a labour-management setting by asking whether the process results in a higher degree of freely negotiated agreements prior to conciliation (relief on court dockets), and whether it prevents strikes (social conflict). Bush goes on to ask whether the process gave a procedural advantage to one side – did the process neutralize any procedural imbalance? Did it challenge power relationships? Did it stop oppressive behavior?98

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98 Bush’s model goes on to identify criteria such the redistribution of wealth, preventing harm to the poor, institutional change, de-legitimization of institutions, surfacing social conflict, empowerment of women and minorities, challenging patriarchal attitudes and mobilization of the poor. These criteria have been isolated from this labour-management study.
Social Solidarity

As with the social justice criteria above, many of Bush’s questions involving social solidarity can be isolated from a labour-management study. However, given that a labour-management relationship, particularly in the fire sector, has significant underlying political characteristics, it is appropriate to question whether a dispute resolution process assists either party in strengthening of community. This would include a strengthening of the relationship between a fire association and its membership, the community and their elected council or cross-relationships within these groups.99

Bush also asks whether the process defines rules of law that impact upon future negotiations, akin to his questions relating to the educational value of the experience.

Personal Transformation

Bush asks whether the process stimulates personal growth in the parties – whether the process causes each party to better understand the situation of the other, whether it encourages greater honesty and truthfulness in the exchanges, and whether it facilitates the expression of emotions.

A Unified Labour-Management Model

Of the four models set out in this study, only Feuille’s 1979 work applied specifically to a labour-management dispute resolution system. Process design and evaluation systems have evolved considerably since Feuille’s early study, as evidenced by the work of Bush, Blade and Taylor, and Conlon and Meyer. Accepting that there are various areas of overlap, this study attempts to harmonize these models in the creation of a unified evaluation system designed to assess public sector labour-management dispute resolution systems.100 The resulting unified labour-management model contains the following four classifications: Justice Issues, Substantive Issues, Relational Issues and the

99 Cross relationship might include a strengthening of the relationship between a union and the general public, or the strengthening of the relationship between management and bargaining unit members.

100 In creating a unified approach to labour-management dispute resolution system evaluation this study will not attempt to apply each criterion in the following chapter. The extensive analysis of interest arbitration decisions will have specific application to justice/process questions posed while the stakeholder interviews will address a number of other criteria.
Public Interest. These four general headings are then further divided, with the following questions:

A Justice Issues

(1) Procedural Justice
   i. Does the process result in a timely arbitration award?
   ii. Do the parties have confidence in the arbitrator appointment process; confidence in a mediation/arbitration hearing free of bias; and confidence in the integrity and accuracy of information – all of which lead to confidence in the arbitration outcome?
   iii. Do the parties have confidence in the neutrality of the forum?

(2) Representational Justice
   i. Did the parties have an opportunity to participate, have adequate self-determination?
   ii. Did the process account for power issues, and imbalances in representation?
   iii. Did the process account for any advantage that one side had over the other?
   iv. Did the process end oppressive behavior?

B Substantive Issues

(1) Outcome
   i. Did the decision satisfy the needs of the parties?
      1. Did the decision replicate freely negotiated agreements?
      2. Was there an opportunity for creative outcomes/solutions?
      3. Was there a sense of win/lose?

(2) Compliance
   i. Will the parties comply with the outcome of the process?

(3) Transaction costs
   i. What are the costs of the system in both time and money for the parties?
   ii. Can the system be accessed, or do cost/time issues militate against its use?

C Relational Issues

(1) Does the system facilitate cooperation, information exchange?
(2) Does the system improve the ongoing relationship of the parties?
(3) Does the system encourage a positive relationship between the parties and the arbitrator?
(4) Do the parties feel empowered in the process?
(5) Does the process articulate norms or reasons for the outcome, does it create standards for future application?

D  **The Public Interest**

(1) Does the system protect the public interest in the prevention of labour disruptions?
(2) Does the system protect the public interest in the control of public expenditures and the decision-making capability of City Council to determine priorities?
(3) Does the system satisfy the public policy interests of the provincial government?
This study concludes, even without an exhaustive application of the unified model, there is sufficient evidence to support change in the dispute resolution system covering the fire sector in Ontario. This chapter will apply the unified model, combining the empirical research from the extensive interest arbitration review and the comments from sector stakeholders, in support of such change.

Part A Justice Issues

The first section applies the unified model’s procedural justice questions to assess the med-arb process.

Procedural Justice

Timeliness

In measuring the timeliness of the fire sector’s dispute resolution process this study reviewed two hundred and seventy-one interest arbitration decisions. These decisions are roughly divided between Ontario’s fire sector and the police sector, the non-equivalent control group.  

The fire and police sector interest decisions are further divided into two seven-year assessment periods, one preceding the imposition of the Social Contract Act, a period when the fire and police sectors used conventional interest arbitration, and a period following the passing of Bill 136, when med-arb or mediation final-offer-selection was introduced.

Before reviewing the following data it is helpful to further comment on some of the methodological challenges in conducting this part of the research. The first challenge was to ensure that an adequate sample was available for each of the four sample periods. Interest arbitration decisions are rarely found in the reports. It was therefore necessary to source the awards from stakeholders or, in a few rare situations, from arbitrators’ own

101 Rolph and Moller identify the importance of analysis using a true control group and a non-equivalent control group in Evaluating Agency ADR Programs: A User’s Guide to Data Collection and Use (Santa Monica, CA: Rand Institute for Civil Justice, 1994).
archives directly.\textsuperscript{102} Notwithstanding these issues the volume of decisions from both the police and fire sectors is sufficient to consider the efficacy of the process.

Another challenge in the study was the inconsistency in the style of interest awards among the arbitrator community. Some arbitrators provided scant information about the dates, number of hearing dates or executive sessions, or the number of issues in dispute. For the purpose of this study arbitration decisions that provide no reliable benchmark information (of which there were less than 3\%) have been excluded.

Table 1 examines the seven-year period between 1986 and 1992 covering Ontario’s fire fighters. During this period fire fighters resolved their bargaining disputes using conventional interest arbitration.

<table>
<thead>
<tr>
<th>Year</th>
<th>n</th>
<th>Days to Hearing</th>
<th>Days to Award</th>
<th>Avg. Hearing Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>17</td>
<td>269.1</td>
<td>363.5</td>
<td>1.1</td>
</tr>
<tr>
<td>1987</td>
<td>13</td>
<td>396.8</td>
<td>548.3</td>
<td>1.2</td>
</tr>
<tr>
<td>1988</td>
<td>4</td>
<td>355</td>
<td>534.5</td>
<td>1</td>
</tr>
<tr>
<td>1989</td>
<td>7</td>
<td>358</td>
<td>576.1</td>
<td>1.3</td>
</tr>
<tr>
<td>1990</td>
<td>12</td>
<td>340.3</td>
<td>471.6</td>
<td>1.1</td>
</tr>
<tr>
<td>1991</td>
<td>20</td>
<td>326.9</td>
<td>492.9</td>
<td>1.1</td>
</tr>
<tr>
<td>1992</td>
<td>11</td>
<td>385</td>
<td>492.7</td>
<td>1.2</td>
</tr>
<tr>
<td>Average</td>
<td>12</td>
<td>347.2</td>
<td>497.1</td>
<td>1.1</td>
</tr>
</tbody>
</table>

Table 1: Ontario Fire Sector: Benchmarks to Arbitration and Award 1986 to 1992

Table 1 summarizes 84 interest arbitration decisions in the fire sector measuring the length of time between the expiry of the collective agreement and the first day of the arbitration hearing. It then provides, in the fourth column, a measure of the number of days from the expiry of the agreement to the release of the arbitration award. The final column presents the average number of days the parties appeared before a third party.\textsuperscript{103}

\textsuperscript{102} The author is indebted to the Ontario Professional Fire Fighters Association and the Ontario Police Arbitration Commission for access to unreported interest arbitration decisions.

\textsuperscript{103} One of the factors that can not be accounted for in this study is the length of time the parties made efforts to negotiate a collective agreement before declaring an impasse. The general practice in the Ontario fire sector was for the parties to exchange bargaining demands in November of each year, and negotiate between four to six sessions before declaring an impasse. Given the number of awards in the overall sample, any significant deviations from this have been accounted for.
The table presents interesting data on the length of time to a hearing. The shortest period is in 1986, when it took the parties an average of 269.1 days to reach the first day of arbitration. The 1986 average is 79.1 days below the seven-year sample period average, 347.2 days. The longest period is 396.8 days, the average of 13 arbitrations in 1987. That year’s average was 49.6 days longer than the seven-year average. Four of the sample years are within approximately 20 days of the seven-year average of 347.2, validating the statistical reliability of the seven-year average. One year is 37.8 days longer. Between the lowest and highest years there was a gap of 128.7 days.

Table 1 then sets out the average length of time between the expiry of the agreement and the release of the arbitration award – 497.1 days over the seven-year fire fighter sample. In this column the most efficient year was 1986, with an average of 363.5 days before the release of the award, 133.6 days below the seven-year average. The most inefficient year was 1989 where the 7 interest arbitrations required on average 576.1 days, 79 days more than the seven-year average. Three of the seven sample years fall within approximately 30 days of the seven-year average.

The table also indicates that on average the length of time the fire fighters and municipalities spent with third parties was 1.1 days with a high of 1.3 days in 1989 (a three-day hearing in a health and safety minimum staffing arbitration in Thunder Bay raised the average).

In the end the fire fighters, on average, took approximately eleven and one-half months from the expiry of their collective agreement to get to an arbitration hearing (347.2 days), and then waited approximately 5 months (149.9 days) for the release of their award.

104 Two awards in particular lowered the average in 1986. The Kitchener fire fighters held their interest arbitration 167 days after the expiry of their former agreement, while the Mississauga fire fighters waited only 202 days. Otherwise seven arbitrations that year had hearing days later than 269.1 days.

105 In 1989 one arbitration took 754 days from expiry to award. The parties in Thunder Bay arbitrated issues of minimum staffing before Arbitrator John Clement. While other minimum staffing arbitrations have been excluded from this study, the Thunder Bay arbitration was not, largely because the parties called a minimum number of witnesses, the Fire Chief in particular who supported minimum staffing. If the Thunder Bay arbitration was excluded from that year’s average, it would drop the average by approximately 30 days to 546.5 days from expiry to award.
A parallel analysis of the Ontario police sector is informative because it allows for a comparison between the fire sector’s tripartite system and the police sector’s use of a single arbitrator.

Table 2 presents data from an analysis of 127 interest arbitration decisions in the Ontario police sector. Like the data in Table 1, Table 2 indicates the length of time between the expiry of a police collective agreement and the first hearing date – an average of 243.8 days. The longest period between expiry and hearing was in 1991, when the average of 25 arbitrations took 286.4 days - 43.4 days longer than the seven-year average. The most efficient year was in 1988, when it took 207.2 days for 5 arbitrations to reach a hearing. The gap between the highest and lowest years is quite narrow compared with the fire sector’s 128.7-day gap. For the police sector the difference between the most efficient year and the most inefficient year was 68.8 days.

Table 2 also presents data on the time between the expiry of the agreement and the release of the arbitrator’s award. Police arbitrators have a relatively short turn-around period, averaging 284.9 days to the release of the award. The most efficient period covered collective agreements expiring in 1988, when five disputes took an average of

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106 There were 114 police associations in Ontario in 1992 compared with 78 fire fighter associations. In the years that followed there was restructuring in the Ontario police sector as many smaller municipalities made decisions to disband their local police services in favour of contracting police service from the Ontario Provincial Police. The Ontario fire sector also went through changes as the Harris government amalgamated a number of municipalities. Today there are 63 police associations and 76 fire fighter associations [a number of new associations affiliating during this period]. While the number of associations has decreased, the total number of police officers and fire fighters in the province has increased overall.
232.4 days. The slowest period was in 1991, when 25 bargaining disputes took an average of 336.6 days to release the arbitrator’s decision.

The police sector took slightly longer to present their arbitration cases, averaging 1.4 days per arbitration to the fire sector’s 1.1 days. The police sector had a high of 2.2 days for the 13 hearings in 1987.

In the end the parties in the police sector took approximately 8 months (243.1 days) to get to arbitration from the date of expiry of their former agreement, and then waited just over a month (41.8 days) to receive a final award.

<table>
<thead>
<tr>
<th>Year</th>
<th>n =</th>
<th>Days to Mediation</th>
<th>Days to Hearing</th>
<th>Days to Award</th>
<th>Hearing Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>5</td>
<td>-</td>
<td>707</td>
<td>863.6</td>
<td>1.6</td>
</tr>
<tr>
<td>1998</td>
<td>10</td>
<td>610</td>
<td>646.9</td>
<td>850</td>
<td>2</td>
</tr>
<tr>
<td>1999</td>
<td>7</td>
<td>449.4</td>
<td>495.6</td>
<td>739.4</td>
<td>2.1</td>
</tr>
<tr>
<td>2000</td>
<td>3</td>
<td>594</td>
<td>723</td>
<td>1072</td>
<td>1.7</td>
</tr>
<tr>
<td>2001</td>
<td>3</td>
<td>-</td>
<td>1143</td>
<td>1305.7</td>
<td>3</td>
</tr>
<tr>
<td>2002</td>
<td>4</td>
<td>354</td>
<td>685.5</td>
<td>799</td>
<td>1.5</td>
</tr>
<tr>
<td>2003</td>
<td>2</td>
<td>562</td>
<td>603</td>
<td>743</td>
<td>2</td>
</tr>
<tr>
<td>Average</td>
<td>4.9</td>
<td>513.9</td>
<td>714.9</td>
<td>910</td>
<td>1.98</td>
</tr>
</tbody>
</table>

Table 3: Ontario Fire Sector: Benchmarks to Arbitration and Award 1997 to 2003

Table 3 presents a similar analysis of a smaller sample pool of 34 interest arbitration decisions between 1997 and 2003 in the Ontario fire sector. This is an analysis of the new med-arb dispute resolution process (there being no examples of mediation-FOS). In addition to the information set out in the earlier tables, this analysis now includes information tracking the length of time between the expiry of the collective agreement and the mediation date. Table 3 indicates that it took an average of 513.9 days to hold a mediation hearing from the expiry of the collective agreement. The lengthiest period in the seven-year sample was in 1998, when it took 610 days on average to reach mediation (n=10). The most efficient year was 2002, when the four disputes took an average of 354 days to reach mediation.\(^{107}\) The gap between the most efficient year and

\(^{107}\) There was insufficient data on the records to track mediation in the first years 1997 and 2001.
most inefficient year was 256 days. There seemed to be no discernable pattern in the length of time between expiry and mediation.

It was more difficult to track the date parties applied for and participated in conciliation. It was the experience of the Association and Employer interviewees that the appointment of a conciliation officer by the Ministry of Labour was a generally efficient administrative process. The records maintained by the Ontario Ministry of Labour reveal that most applications for conciliation occurred before the end of the first year from the expiry of the collective agreement. Further, most conciliators were appointed and hearings convened within eight weeks of the application.108 Both association and employer interviewees observed that conciliation was an obstacle to the overall resolution of bargaining disputes.109

As difficult as it seemed to schedule mediation dates, scheduling arbitration dates added considerably to the length of time to resolve these bargaining disputes. Over this seven-year period it took on average 714.9 days to convene an interest arbitration hearing. The most inefficient year was in 2001, when it took three disputes (originating in that year) an average of 1143 days to reach arbitration.110 The most efficient year was 2003, when two disputes took an average of 603 days to reach arbitration.111 While there are no reliable trends from this data, three years had averages in the 600’s for convening an interest arbitration hearing. The gap between the most efficient and inefficient years is 540 days.

The table goes on to show that the average length of time the fire sector waited for an arbitration award was 910 days during this seven-year period. The shortest year was 1999, when seven disputes took on average 739.4 days to receive an arbitration award. The longest year was 2001 when three disputes averaged 1,305 days. Clearly the unusual length of time it took the 2001 disputes to issue awards raised the seven-year average. If one isolates that year from the sample period, the average would be 844.5 days.

108 Ministry of Labour records on file with the author.
109 Interviews with E1, E2, E3, U1 and U2. It was interesting, but not surprising, that employer interviewees blamed the associations for these delays, citing most frequently the association’s broader provincial bargaining agenda while the association’s blamed municipalities for using improper comparables or having an unwillingness to make difficult political decisions to follow bargaining trends.
110 The three arbitrations were Brampton (669 days to hearing), Pembroke (1,266 days to hearing) and Orillia (1,494 days to hearing).
111 Kenora (563 days to hearing) and Markham (643 days to hearing).
Unlike the seven-year sample of the conventional arbitration system from 1986 to 1992, the new med-arb system (sampled from 1997 to 2003) nearly doubles the number of hearing days to 1.98. It should be remembered, however, that with med-arb the FPPA also requires the parties to undergo conciliation. This would add one day to the number of days the parties appear before a third party – making the average number of hearing days 2.98 overall.

The data shows clearly that there are significant additions of time to the handling of disputes under the FPPA’s med-arb process. Under this new process the fire sector waits, on average, one year and five months (513.9 days) to convene a mediation hearing. Failing agreement in mediation the parties wait another 6.5 months (201 days) to convene an interest arbitration hearing. It then takes, on average, another 6.5 months to receive an award from the arbitration board. In total the 34 collective bargaining disputes covering Ontario’s fire fighters between 1997 and 2003 took an average of 2.6 years from the date of expiry of the collective agreement to the date of the release of the arbitration award.

<table>
<thead>
<tr>
<th>Year</th>
<th>n =</th>
<th>Days to Mediation</th>
<th>Days to Hearing</th>
<th>Days to Award</th>
<th>Hearing Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>5</td>
<td>343.5</td>
<td>379</td>
<td>412</td>
<td>1.2</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>316</td>
<td>514</td>
<td>562</td>
<td>1.5</td>
</tr>
<tr>
<td>1999</td>
<td>3</td>
<td>data not available</td>
<td>597</td>
<td>632.7</td>
<td>1</td>
</tr>
<tr>
<td>2000</td>
<td>3</td>
<td>data not available</td>
<td>594</td>
<td>657.7</td>
<td>2</td>
</tr>
<tr>
<td>2001</td>
<td>4</td>
<td>data not available</td>
<td>441.25</td>
<td>533</td>
<td>1.25</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
<td>data not available</td>
<td>373.5</td>
<td>527</td>
<td>1.5</td>
</tr>
<tr>
<td>2003</td>
<td>7</td>
<td>459</td>
<td>463.43</td>
<td>511.1</td>
<td>2.4</td>
</tr>
</tbody>
</table>

Table 4: Ontario Police Sector – 1997 to 2003

Table 4 presents the same analysis of 26 interest arbitration awards in the Ontario police sector between 1997 and 2003. Like the fire sector this is the first period in which the police resolved their collective bargaining disputes using med-arb. The data is less clear on the use of mediation – at least from the records of the arbitration decisions. What is clear however is that for the three years that data was reliable it took an average of 372.9 days to convene a mediation hearing. The longest period was in 2003, when it took
seven disputes an average of 459 days to reach mediation. The shortest period was 1998 when two disputes averaged 316 days to reach mediation.

Table 4 goes on to show that on average it took police associations and employers 480.3 days to reach an arbitration hearing. The most inefficient year was 1999 when three disputes took an average of 597 days to reach arbitration while the most efficient year was 2002 when 2 disputes took an average of 373.5 days to reach arbitration. While the gap between the most efficient and inefficient was 223.5 days, remarkably most years had arbitration hearing differences within 30 days of the seven-year average.

Finally Table 4 shows that it took an average of 574.9 days to receive an award from the arbitrator. The most efficient year was in 1997 when five bargaining disputes took on average 412 days to be resolved by an arbitrator. The most inefficient year was 1999 when 3 disputes took on average 657.7 days to receive an award. While the gap between the most efficient and inefficient years was 245.7 days, the gap in most years remained within 50 days of the seven-year average.

The length of time before the third party in med-arb only rose to 1.55 from 1.4 under the conventional arbitration process. However, like the fire fighters, police were now to participate in conciliation managed by the Ontario Police Arbitration Commissions, therefore for consistency with the fire sector data above, the police were now spending 2.55 days before a third party.

<table>
<thead>
<tr>
<th>Sector</th>
<th>n</th>
<th>Days to Hearing</th>
<th>Days to Award</th>
<th>Hearing Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>127</td>
<td>243.1</td>
<td>284.9</td>
<td>1.4</td>
</tr>
<tr>
<td>Fire</td>
<td>84</td>
<td>437.2</td>
<td>497.1</td>
<td>1.1</td>
</tr>
<tr>
<td>Difference</td>
<td>194.1</td>
<td>212.2</td>
<td>0.3</td>
<td></td>
</tr>
<tr>
<td>% Difference</td>
<td>79.84</td>
<td>74.48</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 5: Ontario Police vs. Fire Sectors – Benchmark Comparison – 1986 to 1992

A comparison of the conventional interest arbitration processes used in the Ontario police and fire sectors, prior to the change to med-arb, indicates that the fire fighters took, on average, 194.1 more days (79.84%) to get to the first day of an
arbitration hearing than do police. Moreover, it took the fire sector 212.2 days (74.48%) more than the police to get to a final arbitration award.

A comparison of the med-arb processes used in the Ontario police and fire sectors today indicates that the fire fighters take, on average, 139 more days (37.28%) to get to mediation than the police sector. It takes the fire sector 234.6 more days (48.84%) than the police to get to an arbitration hearing. Finally it takes 336.1 more days (58.56%) for the fire sector to receive an arbitration award.

When assessing Table 7 it becomes clear that the length of time to get to an arbitration hearing has increased dramatically – by 105.9%. It is interesting, when evaluating the question of timeliness, to make allowances for the compulsory two-stage process in the 1997 to 2003 time period that the parties are required to use. In doing this
we isolate the length of time from expiry of the collective agreement to the first dispute
resolution process event – in this case mediation. While under the conventional
arbitration format fire fighters took on average 347.2 days to get to a hearing, under the
new med-arb process, it took fire fighters 564.7 days, 217.5 days (62%) longer to reach
the first stage of the dispute resolution process. Overall the process took an astonishing
910 days to complete, requiring 412.9 days (83.06%) more to reach an arbitration award
than under the conventional arbitration system. Including the compulsory conciliation
hearing, the fire sector took on average 2.98 days before a third party to conclude
submissions. This was an increase of 1.88 days. Removing the conciliation day from the
equation reveals that the mediation arbitration process increases the required hearing days
by less than one full day.112

<table>
<thead>
<tr>
<th>Sample Period</th>
<th>N =</th>
<th>Mediation Hearing</th>
<th>Arbitration Hearing</th>
<th>Arbitration Award</th>
<th>Hearing Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986-1992</td>
<td>127</td>
<td>n/a</td>
<td>243.1</td>
<td>284.9</td>
<td>1.4</td>
</tr>
<tr>
<td>1997-2003</td>
<td>26</td>
<td>372.9</td>
<td>480.3</td>
<td>574.9</td>
<td>1.6 (+1 conciliation day)</td>
</tr>
<tr>
<td>Differential</td>
<td></td>
<td>372.9</td>
<td>237.2</td>
<td>290</td>
<td>1.2</td>
</tr>
<tr>
<td>% Differential</td>
<td></td>
<td>-</td>
<td>97.57</td>
<td>101.79</td>
<td>85.71</td>
</tr>
</tbody>
</table>

Table 8: Ontario Police Sector: Dispute System Summary

Assessing the police sector’s experience with med-arb in the same manner as the
fire sector above, it takes 129.8 days (53.4%) longer for the parties to reach the first stage
of the dispute resolution process (mediation) under the new process than before under
conventional arbitration.113 Overall the police sector’s process now takes an average
574.9 days – 335.1 days less (58.28%) than the fire sector’s 910 days from expiry to

112 It is possible in a two-stage hearing process to only increase the required hearing days by 80% as in the
case of the Ontario fire fighters. This is achieved where the arbitrator and nominees receive sufficient
information in the mediation stage to waive (with the consent of the parties) the formal hearing – relying on
written submissions in its place.
113 These calculations exclude the parties participating in conciliation.
There has been a modest increase in the total number of days required to hear a police interest dispute – from 1.4 to 1.6 days (excluding 1 day of conciliation).

There are likely many reasons for such dramatic increases in the length of time from expiry to release of an arbitration award. It is difficult to determine with any reliability a specific cause of such significant increases, particularly when compared with both the conventional arbitration process, and the experience of the police sector. There can be little doubt that the tripartite system plays a significant role in delay in the period for resolving bargaining disputes. This is generally attributed to the administration of the process, delays that result from scheduling an arbitrator, two nominees, the parties and their representatives. It is interesting to note that in the fire sector the average length of time to reach arbitration under the conventional system was 437.2 days, while under med-arb it took 513.9 days to reach mediation. The 76.7-day difference might be accounted for by scheduling issues. It is also important to note that both the fire fighters and municipalities have generally used senior counsel and senior arbitrators in the process, further contributing to scheduling difficulties.

In the fire sector labour and management representatives have a long history of agreeing to a chairperson for arbitrations rather than having one appointed by the Ministry (or Solicitor General under the conventional arbitration process). Delays in mediation under the new system may also be the result of increased conflict in the nominees’ efforts to agree to suitable chairs. This is exacerbated by decisions of previously active arbitrators to limit their involvement, or entirely disengage from the interest arbitration process in the fire sector, requiring repeated efforts by nominees to agree to an arbitrator willing to serve.114

It is also the case in the public sector where pattern bargaining is so entrenched that delay can result where one or both parties wait for a particular settlement or pattern of settlements to occur that are helpful to their arbitration objectives. Employers are often critical of this factor but given arbitration’s often-cited purpose, to replicative free collective bargaining, any compulsory dispute process cannot be faulted where one or

114 Interview A2. Arbitrators often cite, inter alia, the awkward balancing of interests between two parties (often zero-sum); a preference to work as single arbitrators in rights disputes in place of working with nominees in the fire sector’s tripartite system; the maneuvering that often occurs as nominees attempt to best position their clients, and the general politics of resolving collective bargaining disputes as reasons for refusing work in interest arbitration.
both parties wait for helpful patterns to emerge. Despite the frequent complaints of delay in the process, in a recent study of interest arbitration used in Ontario, survey respondents from both the union and employer side noted the importance of delay in the arbitration process in anticipation of developing trends, agreements or awards.\textsuperscript{115} Taken together these reasons account for much of the delay in convening mediation and arbitration hearings in the fire sector. However, given the importance of timeliness of awards for participant satisfaction, as set out in the dispute resolution models reviewed in Chapter 3, it can be argued that the delays that result from awaiting settlement trends cause irreconcilable tensions between process and outcome.

Resolving collective bargaining disputes in the police sector falls under the supervision of the Ontario Police Arbitration Commission (“OPAC”). OPAC maintains a list of twenty-five arbitrators deemed suitable by the Police Association of Ontario and the Ontario Association of Police Services Boards. With virtually no use of tripartite panels, most police bargaining disputes are heard by arbitrators appointed by OPAC. In fact, OPAC’s administrative process is such that it often determines the availability of the disputing parties, then appoints an arbitrator from the list of arbitrators is available for those dates. While there is efficiency in the OPAC appointment process there can also be risks. Given the limited number of interest arbitrations in the Ontario police sector, a long list of arbitrators could mean fewer appointments, all of which restricts the development of a pool of arbitrators who have developed an expertise in the police service and its current trends and issues. This is indeed the case in Ontario’s health care sector. Rose determined that despite interest arbitrators being appointed from the general list managed by the Ministry of Labour, both union and management representatives frequently had concerns about the qualify and skills of arbitrators appointed for these exact reasons.\textsuperscript{116}

It is helpful to compare this study’s fire and police sector data to a similar study conducted by Rose.\textsuperscript{117} In his study of public and private sector collective bargaining

\textsuperscript{115} Joseph Rose, “Attitudes Toward Collective Bargaining and Compulsory Arbitration” \textit{Journal of Collective Negotiation in the Public Sector} Vol. 25(4) 1996 at page 21. The study examined the police, fire and health care sectors in Ontario. Surveys were distributed and interviews were conducted with representatives of both union and management.

\textsuperscript{116} \textit{Ibid}, page 140 and page 151. Rose’s study reached a similar conclusion to an earlier study conducted by Andiappan, Cattaneo and Murphy, “Interest Arbitration in Ontario Hospitals: Result of an Attitude Survey of Union and Management Officials” \textit{Relations Industrielles} 39:4 pp. 680-694 (1984).

between 1982 and 1990, Rose examined 3,883 settlements covering approximately 3 million employees. His research examined both the public and private sectors and examined the length of time between the exchange of notice to bargain and either the negotiation of a collective agreement or the release of an interest arbitration award. Rose found that in the public sector, crown employees operating within an interest arbitration scheme took on average 129 days to negotiate a settlement or 331 days to receive an arbitration award. Similarly in the health care sector, a significant consumer of interest arbitration, parties took an average of 142 days to negotiate a collective agreement compared to 329 days to resolve their differences at arbitration. In the Ontario police sector, negotiated settlements took an average of 164 days while arbitrated decisions took 283 days. Finally, in the Ontario fire sector it took an average of 175 days to negotiate an agreement and 518 days to arbitrate.

Despite the greater length of time required in the fire sector, the introduction of mediation has nearly doubled the amount of time to reach an award. Given the clarity of the data, it is hardly a surprise that representatives from both sides of the bargaining table express frustration over the delays from impasse to award:

U1 I think probably both parties, and I think I can speak on behalf of a lot of employers that I’ve seen go through the process, my own included, get very very frustrated…because it is so lengthy and having a prolonged process puts a greater strain on the relationship when issues are still in dispute and on a daily basis, the issues…just seem to accumulate where you cannot make a decision on Monday

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118 Interestingly the earlier Rose study (supra note 109 at page 23) found that in the health care sector only 54% of collective agreements were freely negotiated while in police and fire sectors in Ontario the percentage of freely negotiated agreements was 70% and 84% respectively. Rose concludes that the higher percentage of successfully negotiated agreements in police and fire was primarily based on the stability and predictability of the interest arbitration process. On the other hand, the more complicated and diverse health care sector meant that union and management negotiators had greater difficulty predicting outcomes, making impasse in negotiations more likely. Moreover, less predictability in the health care sector resulted in greater criticism of the interest arbitration process by both union and management. The concept of predictability of the arbitration process, and the conclusions reached by Professor Rose seem to conflict directly with the government’s policy decisions in implementing Bill 136 (infra pages 15 and 16).

119 The Rose study acknowledged greater access to information from the Ontario health care sector. Professor Rose noted that data for police and fire was based on limited information, unlike this study that has examined 271 decisions from the police and fire sectors in a similar window of time. Despite the difference in access to unreported interest arbitration decisions, the data in the Rose study does not differ in any significant statistical way from this study. For police between 1982 and 1990, Rose found that the length of time to an arbitration award was 283 days – compared to this study’s 284.9 days between 1986 and 1992. Similarly for the Ontario fire sector the Rose study found that it took 518 days compared to this study’s finding of 497.1.
because you are still waiting for the arbitration, while on Tuesday maybe the same issue is applying to a different individual [in] the bargaining unit but you still cannot make a decision and that gets very frustrating for internal management of the fire service but also City Hall, I believe equally so to the members… before we were looking at months, now we are looking literally at years… it makes it difficult on a daily basis, especially if there are a lot of operational issues on the table…

E3  It’s longer, it’s more expensive. Costs for arbitrations are going too high…it takes too long…

E2  I think it leaves them frustrated that they don’t get decisions but at the same time the party wonders if that is also the arbitrator either (a) waiting to see which way the wind is blowing in relationship to the rest of market, or (b) in their mind making the process so unpopular that people will think twice about whether they are going to go back there… and so they at least created an incentive that if you make a deal now, everybody can get the terms and conditions of employment in place and they can move forward as opposed to waiting two years.

Confidence in the Arbitration Process - Appointments

In this section this study poses such questions as, do the parties have confidence in the process? Was the arbitrator free of bias? Was the information provided clear and accurate? Did the arbitrator consider the evidence in a fair and balanced way?

In terms of confidence in the appointment process, under the conventional arbitration process the parties selected an arbitrator or, if necessary, one was appointed from a jointly determined list retained by the Solicitor General. Under the med-arb system should the parties fail to agree to an arbitrator, one is appointed off the Ministry of Labour’s significantly longer general list. The result can be appointments of arbitrators who may have had long and successful careers, but have never presided over an interest dispute in the fire sector. Alternatively the result could be the appointment of arbitrators who have only recently begun to practice as labour neutrals. This unpredictability poses great risks for both the employers and the unions, and is a fundamental aspect of procedural justice.

In reviewing interest arbitration decisions in the fire sector, this study also tracked the activity rate of the arbitrators hearing the disputes. Noting that historically it had been rare for the Solicitor General to make an appointment, the following tables present
interesting information on the practices and preferences of the union and management nominees in selecting arbitrators.

In the seven-year period between 1986 and 1992 there were 85 interest arbitrations in the fire sector.¹²⁰ During this period there were twenty arbitrators active in hearing fire sector interest disputes. However, of the twenty, four arbitrators were selected by the parties directly to hear over 65% of the disputes. Ten arbitrators presided over only one interest arbitration each during this seven-year period.

<table>
<thead>
<tr>
<th>Arbitrator</th>
<th>Hearings</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>M. Mitchnick</td>
<td>19</td>
<td>22.35</td>
</tr>
<tr>
<td>M. Teplitsky</td>
<td>14</td>
<td>16.47</td>
</tr>
<tr>
<td>J. Clement</td>
<td>13</td>
<td>15.29</td>
</tr>
<tr>
<td>K. Burkett</td>
<td>10</td>
<td>11.76</td>
</tr>
<tr>
<td>Total</td>
<td>56</td>
<td>65.87</td>
</tr>
</tbody>
</table>

Table 9: Interest Arbitrator Activity Rate – Fire Sector, 1986 to 1992

Following the introduction of med-arb the pattern of the parties to agree to a small group of arbitrators continued. Despite fewer arbitrations in this second sample period, five arbitrators heard 60.06 percent of the cases. There were sixteen arbitrators active in the fire sector over this period and despite all being agreed to between the parties, nine presided over only one hearing each. It is interesting to note that in the 1997 to 2003 period five of the nine arbitrators that had presided over only one hearing had not been active in the 1986 to 1992 sample period. Combining the two periods, of the twenty-seven active arbitrators, there were twelve who had presided over only one hearing.

¹²⁰ This number differs from the number used in the evaluation of timelines in the Tables above. The total number used there was 84 – one arbitration was excluded because the arbitrator had no useful benchmarking information on his award.
### Fire Sector Arbitrator’s Activity Rate – 1997 to 2003

<table>
<thead>
<tr>
<th>Arbitrator</th>
<th>Hearings</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>K. Swan</td>
<td>7</td>
<td>20</td>
</tr>
<tr>
<td>K. Burkett</td>
<td>4</td>
<td>11.43</td>
</tr>
<tr>
<td>M. Mitchnick</td>
<td>4</td>
<td>11.43</td>
</tr>
<tr>
<td>B. Keller</td>
<td>3</td>
<td>8.6</td>
</tr>
<tr>
<td>G. Adams</td>
<td>3</td>
<td>8.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>21</strong></td>
<td><strong>60.06</strong></td>
</tr>
</tbody>
</table>

Table 10: Interest Arbitrator Activity Rate – Fire Sector, 1997 to 2003

Given the fact that practically all arbitrators in the fire sector during these sample periods were mutually agreed to, it becomes clear that the preference of the fire fighter associations and municipalities is for a small cadre of highly skilled arbitrators who have developed an expertise in the fire sector.\(^\text{121}\) This is hardly a surprising observation given the police sector’s support for OPAC and the observations made by Rose that the health care sector’s stakeholders prefer a shortened list of specialized arbitrators.\(^\text{122}\)

Although outside of the scope of the current study, it is interesting to note the changes to the parties’ history of agreement on arbitrators occurring between 2004 and 2007. Compensation restructuring issues in the fire sector have resulted in an unusually high number of interest arbitrations during this period. Contrary to a pattern of agreement in the past, today nominees are having much greater difficulty agreeing to arbitrators. The result has been numerous arbitrator appointments from the Ministry’s general list. This is a departure from the parties’ history of agreement, and an ongoing issue impacting on the confidence of the arbitration process.\(^\text{123}\)

\(^{121}\) While this observation is made on the patterns of agreed to arbitrators over the two seven-year periods, of the twelve arbitrators who were selected for only one arbitration, it is entirely possible that some of these arbitrators refused requests for future fire sector interest arbitrations.

\(^{122}\) Supra note109.

\(^{123}\) Interviews with U1 and U2. When considering the reliance on Ministry of Labour appointments in the fire sector it is interesting to note Rose’s conclusions about the stakeholder concerns in the health care system (supra note 109). In that study Rose concluded that the parties’ desire to move to an OPAC-type list of specialized arbitrators for the health care sector was the result of the concerns about experience in the
Confidence in the Arbitration Process – Procedural Bias

An area of concern raised in the debate on the merits of combining mediation and arbitration is the handling of information in the distinct mediation and arbitration phases. One of the attractions of med-arb, for many, is the ability to access the arbitrator directly to candidly discuss bargaining issues and priorities. Med-arb as a rule is less structured than conventional arbitration – the arbitrator frequently meets one party alone, or with that party’s nominee. Nominees will often shuttle between their clients and the arbitrator, transmitting information in the absence of the other party or nominee. These practices can have serious natural justice consequences, due to the lack of direct interactions between the disputing parties, and therefore represent a concern falling under the unified model’s procedural justice heading.

Information management in the mediation stage presents an interesting challenge for arbitrators – on the one hand disclosure can be a jurisdictional minefield should the arbitrator reach a conclusion in drafting an award based on “untested” information received in mediation. On the other hand, and by all indications, the ability of the mediator to meet privately with one party significantly increases that party’s satisfaction with the dispute resolution process.¹²⁴ These private meetings allow the parties to disclose priorities or discuss creative solutions that might not otherwise surface during face-to-face meetings with the other side. For some participants these private meetings represent the best of what the med-arb process allows:

E1 …[clients] want to have their day in court as a rule, and that’s partly because of the bargaining, because they don’t feel as if their issues have been exposed, so part of the responsibility of counsel is to…ensure that the client in the mediation gets an opportunity with the arbitrator to explain all of their positions, all of their emotions and all of their concerns, and one of the really good things about mediation is they can do that without the other side there. So they can be as honest as they want to be and they can leave at the end of the day saying ‘you sector translating into acceptability questions of arbitrators from the Ministry of Labour’s general list. Rose observed that both labour and management had concerns about arbitrator qualifications in health care.¹²⁴ Each of the evaluation models in Chapter 3 in this study noted the importance of a party’s direct participation in the negotiation of agreements when evaluating the effectiveness of a dispute resolution process.
know what, I had my opportunity to tell the arbitrator what I really thought” and that I think makes the process better, not worse…

Critics of med-arb argue that parties will often resist open discussions in mediation because they feel that too much disclosure to the mediator will prejudice their position when the process shifts to arbitration. It is often the case, particularly with less experienced negotiators, that pressures exerted by a skilled mediator will push them well beyond what they feel would be the outcome of arbitration. Given the intensely political nature of collective bargaining, it is often preferable, to one or both of the parties, for the arbitrator to reach a conclusion through arbitration than through mediation.125

U2 …whatever you hear in mediation is going to stay with you unless you have [not participated in the mediation] then you can go in there and do an arbitration, write a brief or write a decision, so no way. And I’m saying, in my opinion, there’s probably three or four skilled mediator arbitrators in the Province of Ontario and their whole goal is to get a deal. They don’t give a shit if the firefighters get the best deal or the municipality gets the best deal. They beat you up until they get a deal. They can say they mediated a deal. They don’t care what the outcome is, as far as I’m concerned… [negotiators] don’t want to piss the [mediator] off too much because they know that eventually he’s going to write the award.

Experienced arbitrators are aware of this issue and ensure that they have adequately tested comments from both sides to offset procedural questions that might arise.

E2 A good mediator-arbitrator understands that, or tells you upfront, that anything you tell me to justify your position I am going to disclose to the other side unless you give me information which you specifically say I can’t share and so I really think that goes to the quality of the adjudicator/mediator as opposed to the process.

A2 Mediation process is such that there will absolutely be natural justice issues because you necessarily spend more time with one party than the other. You won’t necessarily disclose what you hear from one party to the other because there are things that are going to be told to you in confidence, remembering that it’s a mediation process where you’re trying to get a deal. It’s inherent in the process. If anyone says untoward I don’t think [they] understand the process.

125 The study by Rose (supra note 109) noted the political nature of collective bargaining, particularly in the public sector. Rose’s survey found that political impediments were experienced more by management negotiators requiring the arbitration process to escape the political fallout from an unpopular result.
I think it’s important that the mediator moving into the arbitration process, if you are going to use anything you heard in mediation, you’ve got to test it on the other side during the arbitration. That’s where the natural justice issues come in, but in terms of trying to make a deal during the mediation process, I don’t think you have that same requirement. Once you move into the formal adjudication stage, you can’t use anything you heard on either side without giving the other party a chance to respond and deal with that issue. That’s critical.

The general concern over information management, however, further underscores the importance of arbitrator acceptability.

This following will address the second sub-section of justice questions – representational justice.

Representational Justice

Participation & Self Determination

This study has already commented on the importance of participation in the dispute resolution process. Each evaluation model considered in the previous chapter cited disputant participation as one of the central features of a successful resolution process. Interviewees, particularly those representing the employer’s side, noted the importance of having direct and unvarnished access to the decision maker.126

Arbitrators too have noted the importance of having more direct and informal access to the disputing parties in the mediation stage, allowing for more discussion of issues and their possible resolutions.

A2 What mediation allows you to do is actually sit down, you know, you are looking eye to eye with the parties, you are getting a better feel for what it is that they really need, what they really want, what the issues really are, and you can get a much better sense for yourself of how the issues should play out. So I think it is a quantum leap over the straight arbitration process, it should be in terms of the quality of the awards and being able to actually give the parties what is necessary in that award…the problem an arbitrator always has is not really understanding what the issue really is between the parties…you get words on paper put in front of you, that doesn’t necessarily define the real issue between the parties and what

126 See comment from interviewee E1 at page 66 infra.
mediation allows you to do is go in there and say “talk to me about this” and then you get through the crack if you want and you get to the real underlying issue which is much easier to deal with at that point, so, yes, that is the definite advantage to the mediation process. You can try and actually figure out what the problem is and then deal with the problem.

Self-determination has long been considered the fundamental ingredient of any dispute resolution system – indeed its furtherance was the underlying objective of the government in its strategy to legislate uncertainty into the compulsory arbitration process. In the broader literature on conflict resolution, mediation has been lauded as the process best suited to fulfill this self-determination goal.  

Arbitrators working in sectors with compulsory interest arbitration have consistently encouraged the parties to resolve their own bargaining differences, and been vocal in criticizing parties who attempt to use the compulsory interest arbitration process as a substitute to negotiations.

Interest arbitration ... has never been an easy process for arbitrators. It is becoming a great deal more difficult in these times of economic restraint... Bargaining, which has never been prevalent, is nonexistent. The parties' disputes are being dumped on Arbitrators by employers who find it politically expedient and unions who expect to do better than by settling. The process won't survive this onslaught. The parties will have to make the process work by more extensive bargaining or interest arbitration will break down.

In assessing the utility of a dispute resolution process based on a criterion of self-determination one must consider the inherently political nature of labour-management collective bargaining – particularly in the public sector. As observed by Arbitrator Richard McLaren in Innisfil Police Services Board, arbitrators resist becoming a substitute for the collective bargaining process where the parties avoid collective bargaining. In these circumstances, the addition of compulsory mediation only

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128 Innisfil Police Association and the Innisfil Police Services Board, (Unreported) September 11, 1992 (McLaren) pg. 2.
contributes to timeliness concerns, negatively impacting upon the credibility of the dispute settlement process for achieving settlement.

Interviewees had mixed observations on the utility of compulsory mediation where one party was a reluctant participant. On the one hand parties are frustrated that the settlement potential at mediation is very low, while other parties note that even where there are unwilling parties, some benefits can emerge from accessing the mediator directly, or, for the adjudicators, having the ability to make preliminary assessments of the parties and their dispute.

E3 …going back and forth because neither side really wants to show where it’s really prepared to go, it’s a big waste of time…and money. And then the process of litigation gets more expensive because those…arbitrators and those…nominees and…lawyers are all charging way more money than they did ten years ago. The system will collapse on the cost alone so do you need that at mediation – no, it’s all internal politics and everybody has the politics.

U1 I think the employer more so, I mean that’s what we hear at times at bargaining tables. They may say we recognize it is going to come from arbitration but we can’t give it to you. When there is a recognition of the resolve, that doesn’t say much for the process…but you know there are some politics, I think less so within our own memberships.

A2 It happens all the time, in which case do you go through the motions? Do you say thank you very much for the day but having said that, I still think it’s a valuable exercise because you can still get the information you need for the next step of the process even though you know the parties aren’t there necessarily to get a deal, so the mediation part of the process is either (a) to get a deal, or (b) to get the information you need to find them a deal maybe later.

E2 If one party doesn’t want to be there, the other party gets a huge advantage because they have the opportunity to explain their position to the mediator in an informal way that they are not going to get later on.

A3 I largely subscribe to the theory that you need voluntary mediation…the parties, if they don’t think it’s going to work themselves or they don’t have the right attitude for it then they don’t get involved in but I have certainly seen in situations where somebody is not very keen on having a mediation but then something happens that motivates them, usually it is some part of a proposal that they had never anticipated or something to do with the results of the end results of the process, and they get interested in it and then they do participate and it works out so I think even forcing people to go through the process you
know, from time to time result in settlements or narrowing of issues, even with a reluctant party, but the system certainly works at its best and its optimum with really participants who have the right attitude and voluntariness of going to mediation. I think there is a self-filter that assures you, you are more likely to have that kind of participation on all sides so I think that’s why people say “yes it works if it’s voluntary” – nah, it works in other situations too but it works at its optimum when it’s voluntary.

Power Issues

In this section the assessment model asks the questions; does the process account for power issues, and imbalances in representation?

Power is an interesting consideration in labour-management collective bargaining. While the legislature provides statutory assurances that the union will be given a fair opportunity at operating within the workplace, it makes efforts to keep the power relationship unaffected in the content of collective bargaining. At its elemental, power is expressed in one party being able to exert economic harm on the other through a withdrawal or lockout of service to further its bargaining objectives.

For Ontario’s eleven thousand professional fire fighters, the legislature has determined that giving either party the right to exert economic harm on the other would present too great a risk to the greater community interest of being safe from fire, and benefiting from the many other emergency services delivered by fire fighters. While few would doubt the policy reasons for denying the right to strike/lockout, from a dispute resolution process perspective, does this policy neutralize power between the bargaining parties? If it does, which party benefits from this?

Setting aside the strong essential/community service mindset of the fire fighters, it would first appear that it is the unions that are most weakened by the imposition of compulsory interest arbitration. Municipal council, wearing dual hats of employer and elected officials, would seem less likely to invoke a lock-out strategy to further its bargaining objectives; therefore being denied that right would have little practical impact upon a municipality’s bargaining strategy.

129 While the Fire Protection and Prevention Act expressly prohibits the right to strike, it was debatable whether the parties had the right to strike under the former Fire Department’s Act. Whether the right to strike existed there, it was common for each individual fire fighter association to have a no-strike commitment set out in their constitutions.
A more considered analysis of the impact of compulsory arbitration on a bargaining party’s power focuses the elasticity of using substitute labour. For example, in a smaller municipality that operates a combined fire service (both full time professional and part-time or volunteer fire fighters) the extent to which a municipality can withstand public pressure during a strike by continuing to deliver fire protection through part-time/volunteer fire fighters is a measure of the elasticity of substitute labour. If the employer has sufficient volunteer/part-time resources to withstand a strike, then the leveling of the power that comes through compulsory arbitration is to the benefit of the union. Conversely, in a large municipality where the use of substitute labour is relatively inelastic, where there simply are not enough (or any) part-time/volunteer fire fighters, then it is unlikely that a community would tolerate an extended strike. In this case the compulsory arbitration process benefits the employer. In the end we can conclude that the compulsory interest arbitration process plays a significant neutralizing role in the distribution of power between the parties. Indeed, the criticisms of compulsory arbitration – that the ease of access and the minimal risk of outcome further support the conclusion that it has a neutralizing effect on power in the bargaining relationship. Is this a constructive policy for the legislature to have made?

In simple terms the neutralization of power in the essential service bargaining relationships is the price paid for continued labour peace. It is quite likely that a small fire fighter union, outnumbered by part-time/volunteer fire fighters, would argue that compulsory arbitration has provided a benefit. At the same time the large employer, knowing that it would be unable to tolerate a city-wide strike of thousands of fire fighters would also make the same argument. Does this translate into a more beneficial negotiation outcome for the party benefiting from compulsory arbitration? This study has not considered this question in detail but it is the case that fire fighters, particularly in smaller municipalities, have consistently negotiated higher rents than other unionized employees.

130 A small essential service union may benefit from compulsory arbitration in theory, but may have limited access to it as the costs of going to arbitration increase. We will return to the issue of accessibility in this chapter.

131 The converse isn’t necessarily true of larger municipalities, therefore it is difficult to say that a large employer benefits by negotiating substandard rents in a compulsory arbitration sector.
When we get the arbitration briefs everybody always talks about...the application theory and stuff like that, but the reality is when you have compulsory arbitration, none of that stuff really means anything because you can only replicate what’s happening at the bargaining table and there is actually true bargaining going on and if the parties are setting themselves up to arbitration, what are the opportunities of replicating other than the arbitration awards and trends in arbitration, so power depends. I don’t think there are powers...I think compulsory arbitration sets up a false bargaining process. I mean, I don’t think either party entering into bargaining wonders whether it is compulsory arbitration at the end even considers power. When you bargain in the sector, does power ever enter into your thinking? You’re saying, I know I can get this because I know what the arbitrators are doing in this. So you’re playing the arbitration, not playing the powers. The dynamics are 100% different.

If there’s power, it is power of the research which leads to a compelling argument on a particular issue. It’s neutralized already. That’s why the unions, if they have enough money to go to arbitration, which is a lot cheaper than going on strike, and if they can come to arbitration they can hope to remedy any issue, and I think that it’s more likely therein lies the power.

**Oppressive Behavior**

It is difficult to define what constitutes oppressive behavior in labour management negotiations. The process is, after all, one that contemplates adversarial relations with interests vigorously advanced or defended. There is also an expectation that parties will manage the exchange of information in a way that optimizes their objectives. One negotiator’s “oppressive behavior” is another negotiator’s “hard bargaining.”

It is more appropriate to recast the question to ask “does med-arb encompass procedural safeguards that encourage collective bargaining on a balanced playing field?” Given the fluid nature of med-arb, and the parties’ general use of experienced adjudicators, the answer to this question is likely yes. Since all interviewees in this study agreed that mediation was essentially a continuation of negotiations, it is appropriate to reframe the question once again to ask “does the negotiation process that precedes med-arb manage oppressive behavior?” It would seem that the answer to this question would be no.

To reach this conclusion it is necessary to juxtapose the *Fire Protection and Prevention Act* with other public and private sector labour legislation. Unlike the Ontario
Labour Relations Act, the FPPA does not allow the Labour Relations Board to police collective bargaining infractions, such as unfair labour practices or bad faith bargaining complaints. Under the Labour Relations Act behavior by a party that is inconsistent with a party’s obligation to “bargain in good faith and make every reasonable effort to reach a collective agreement” can be subject to a complaint to the Labour Board.\(^{132}\) The Labour Board can resolve such a complaint in a very short period of time – keeping the collective bargaining process moving forward. In the absence of equivalent remedial steps, fire fighter associations are required to process a complaint through a time-consuming grievance process. This has the practical effect of preventing fire fighter associations from challenging employer unfair labour practices – and vice versa. While the negotiation process is outside the assessment model developed in this study, the dispute problems that appear in the med-arb process have their grounding in the negotiations that precede them.

Part B Substantive Issues

The second section applies the unified model’s substantive justice questions to assess the med-arb process.

The Needs of the Parties

This section explores the question of whether the dispute resolution process rendered a decision that satisfied the needs of the parties. Did the decision replicate free collective bargaining? Did the process allow for creative outcomes/solutions? And finally was there was a sense of win/lose in the outcome?

\(^{132}\) Labour Relations Boards have interpreted statutory obligations to bargain in good faith to include such things as disclosure by the employer of significant changes to an enterprise, Westinghouse Canada Ltd 80 CLLC 16,053 (OLRB); disclosure of employer information relative to negotiations, United Electrical, Radio and Machine Workers of America v. DeVilbiss (Canada) Ltd. [1976], 76 C.L.L.C. para. 16,009 (O.L.R.B.) (Adams); prohibitions on employer communications directly with employees if for the purpose of undermining the exclusive bargaining role of the union, Taggart Service Ltd. 64(3) CLLC 16,015 (Can LRB) at p.687. “Reasonable efforts” has been interpreted to prohibit surface bargaining (where one party goes through the motions of bargaining with no intention of settlement) Royal Oak Mines Inc. v. Canada (Labour Relations Board) [1996] 1 S.C.R. 369.
Fire association interviewees all identified the need to receive detailed awards that address all of the issues being put before the adjudicator. The fire fighters view detailed awards as being both educational as well as helpful to future rounds of negotiations.\textsuperscript{133}

U1 It is either accept it, deny, accept it, deny, and then they might add a few paragraphs around some justification for a salary increase or benefit increase but typically the older awards I thought were written on more solid ground. They did provide some reasoning when they are only dealing with you know maybe a half a dozen issues in total... well I think that’s where they are falling short, just to simply have an issue denied without any justification... what is within those documents to provide some additional justification...leads you to believe at least there is some credibility to the argument but when it is just a straight deny, you don’t know if you are going down the right road or as a party whether you should just forget about that issue. So I think it isn’t doing us justice when we are paying far more for those [awards] at the end of the day.

Fire associations also place a value on having all of their issues addressed in the arbitration process.

U1 If those issues are valuable enough to either side, it doesn’t matter if it is the employer or employee side, if they value those issues enough to take them to arbitration, then they should be given the due consideration by the arbitration board.

Arbitrators have their own reasons for the styles of decisions they write. Many arbitrators set out general details and address disputed issues with little or no reasons, while others write more detailed opinions. Arbitrator Martin Teplitsky noted the differences in his own approach to writing decisions when using mediation:

It has not been my practice to deliver detailed reasons for decision when I am both mediator/arbitrator, for several reasons. First, I seek to avoid as far as possible the disclosure of confidential positions shared with me during the mediation. The parties are more candid in the

\textsuperscript{133} Association interviewees also note the importance of the arbitration process for membership participation. Fire fighter associations actively encourage, and often have large numbers of members attend arbitrations, as noted by U2, “300 guys showed up and it was held on a Saturday morning. So you know, it was done, our guys need to see that sort of stuff to know what the positions of the corporations are, how they argue their case, how we argue our case.”
informal atmosphere of mediation than they can be in formal interest arbitration. They do not anticipate that their candor be used against them in the formulation of reasons. Second, a mediation/arbitration more closely approximates “real life” bargaining than does standard interest arbitration. Mediation assists in shaping the bargain because it is easier for the mediator to determine the actual priorities of the parties and it is their priorities which justify the choice between “rational demands.” Without disclosing their priorities directly, it is difficult to explain how the bargain is arrived at by the arbitrator. I proposed to continue this practice in this case.\(^\text{134}\)

Despite the importance of there being reasons for a decision, particularly for the building of “trustworthiness” as described in the Tyler and Blader assessment model (at page 44) it is likely that a tension will continue between the expectations of the associations and the degree to which arbitrators are prepared to set out detailed reasons for their awards.

**Replication**

Replication exists at the core of resolving collective bargaining disputes. Arbitrators have, for decades, commented that the only legitimate method to resolve levels of compensation or working conditions is to examine those same items being paid to others doing the same or similar work. Arbitrator Ken Swan has observed that:

> It is, I think, fair to say that virtually all interest arbitrations in Canada are resolved by an appeal to a relatively limited number of criteria: the ability of the employer to attract and retain competent employees, internal relativities, external relativities, changes in the cost of living, changes in productivity, the ability of the employer to pay, and a general doctrine of fairness and equity. There is probably nothing exceptional in any of these criteria taken individually, and they should all bear, more or less, on the outcome of any public sector arbitration.

> Fairness remains an essentially relative concept, and it therefore depends directly upon the identification of fair comparisons if it is to be meaningful, indeed, all of the generally stated pleas for fairness inevitably come around to a comparability study. It appears to me that all attempts to identify a doctrine of fairness must follow this circle

\(^\text{134}\) Metropolitan Board of Commissioners of Police and the Metropolitan Toronto Police Association (Unreported) February 16, 1986 (Teplitsky) page 1.
and come back eventually to the doctrine of comparability if any meaningful results are to be achieved. 135

Arbitrator Martin Teplitsky echoed Swan’s comments in St. Catharines Professional Fire Fighters Association where he stated:

As already noted, fire fighters have for forty years been compared with other fire fighters and with the police. No evidence was adduced in this case to suggest a different approach. Given the link between police and fire fighter salaries, I for one can sympathize with the employer’s concern about settlements made by Board of Commissioners of Police over which they have little control. One also hears from time to time Boards of Commissioners of Police expressing concerns about salary settlements made by Municipal councils and fire fighters which impact police salaries. It must be recognized that arbitrators have no control over such settlements. These settlements represent for arbitrators collective bargaining facts. As I said in a previous award, arbitrators do not sit in judgment of collective bargaining results.136

All collective bargaining relies on patterns and comparability. For fire fighters, as with police, the range of comparisons is very narrow – there being few other occupations that do similar work. Comparability within the narrow pattern of fire/fire or fire/police settlements is itself not absolute. If in previous rounds of bargaining, the parties relied on settlement trends outside of the fire or police sectors, arbitrators may give consideration to those outside trends when rendering a decision.

First, the role of this arbitrator is to try to replicate, as much as possible, what could be expected to be achieved in free collective bargaining. In order to determine that, an arbitrator looks at the pattern of bargaining of these parties in the past as well as to settlements in similar communities and settings.137

136 St. Catharines Professional Fire Fighters Association and the Corporation of the City of St. Catharines, (Unreported) 1985 (Teplitsky) page 3.
137 Saugeen Shores Police Association and the Saugeen Shores Police Services Board, (Unreported) July 4, 2003 (Knopf) page 3.
Replication, therefore, is first grounded in the patterns established by the parties themselves in previous rounds of negotiations. The extent to which an adjudicator strays from this pattern will impact upon the acceptability of the dispute resolution process to one party.

Creative Solutions

This study has already noted at least one prominent arbitrator’s preference for the mediation phase for exploring more creative solutions. This view is shared by other arbitrators interviewed for this study.

A1 …mediation allows you to step outside the confines of the collective agreement and the confines of the arbitration process and become really creative, and view the dispute as a problem that’s in need of a solution whereas in the arbitration role, you’re in a more confined and narrow arena and the different sorts of issues then deal with the collective agreement being paramount whereas in mediation the collective agreement doesn’t even have to exist at certain points, and you can always figure out what you want to do with it, so I think you’ve got incredible flexibility as a mediator…

As creative as the mediation process can be, at least from the arbitrators’ perspective, others participants have had less positive reactions.

E3 The clients… hate the mediation process because they don’t see any of this actually being done. Usually, it’s just rehashing the same thing that they’ve gone through five times

U1 …I think more and more, from what I have witnessed anyway, it has become just another step.

A2 It’s likely too short a time to actually put the headstone on [it] but it’s not too short a time to have a hold out…

It is reasonable to conclude that, as professional dispute resolution practitioners, arbitrators bring more experience to the med-arb process. Despite the arbitrator’s experience and confidence in the potential of med-arb, one can not ignore the common

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138 See comments of A2 at page 68 and 69.
dissatisfaction with the process on the part of both associations and employers, typified in
the above quotes. In light of these conflicting expressions about the efficacy of the
process, this study proposes, in Chapter 5, alternatives to the present med-arb process.¹³⁹

Compliance

This part of the unified assessment model asks whether the parties comply with
the award of the med-arb process?

In broad terms it can be concluded that under both the conventional arbitration
and the med-arb process, associations and municipalities comply with arbitration awards.
A crude measure of the acceptability of the awards is whether either party ignored the
ruling of the arbitrator and engaged in a wildcat strike or lockout. In practical terms this
is not an effective measure, particularly with a government as employer and the strong
public service/essential service mind-set of the fire fighters. Regardless, the statutory
framework for resolving disputes in this sector permits either party to register the
arbitrator’s decision with the divisional court, having the effect of making the decision
one of the court.

There are many other reasons for the high acceptability rate of interest arbitration
awards in the fire sector. Given the fluid nature of the collective bargaining, adverse
decisions by arbitrators can be addressed in subsequent rounds of bargaining. Also, one
of the important roles of nominees in the process is to assist the arbitrator in making an
award that will not further escalate tensions between the parties.

There is a difference, however, between compliance and a measure of
contentment with the outcome of an award. This study has not examined in any detail the
contentment of the parties with med-arb outcomes. There is, however, an abundance of
literature on how mediation enhances opportunities for resolution and in doing so,
increases the acceptability of outcomes to disputants.

¹³⁹ This study will not comment on the question, “was there a sense of win/lose?” After a review of two
hundred and seventy-one interest decisions for this study, this study observed that arbitrators make efforts
to word their decisions to avoid the “win/lose” conclusion. This does not prevent either party from its own
interpretation of win/lose. It is interesting to note that the Tyler/Blader assessment model noted the
importance of detailed awards to build the trustworthiness of the dispute resolution process.
Transaction Costs

This final section of the substantive justice assessment of the med-arb process examines the costs of the process in time and money. This study has already set out data on the significant increase in time required to achieve a final result, and so this section will focus on the costs in terms of money. The analysis of costs of the process will be further sub-divided into: costs of process and costs of outcome.

In terms of process costs it is the common observation of both the fire fighter and employer interviewees that the process is more expensive. This results from simply doubling the number of days the parties appear before a professional arbitrator – the costs associated with the adjudicator, the nominees and counsel/advocates.\(^{140}\)

E3  It’s longer, it’s more expensive. Costs for arbitrations are going too high.

The second question in this part includes the costs of outcome, or opportunity cost of negotiations. With the significant increase in time to the release of an award, many arbitration awards are released covering three- and four-year terms where the process might have begun with an expectation of a two-year term.\(^{141}\) When this happens the parties have effectively lost the opportunity to negotiate issues that arise during the extension period. These longer terms may also contribute to the growing trend of the parties to bring higher number of issues to med-arb.

Association interviewees noted that it is very difficult for many smaller fire fighter organizations to afford arbitration. Many of these associations, which consist of bargaining units of less than ten members, may simply be unable to go to arbitration because of the costs and, as a result are often forced to tolerate substandard wages or benefits in the intervening years.

U1  They are intimidated by the costs so as a result they are looking at multi-year deals which I think favour employers because it is very tough to predict where

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\(^{140}\) It has not been the practice of either the employer or association sides to use counsel in the conciliation stages.

\(^{141}\) Extensions to an arbitrator’s jurisdiction require the consent of the parties. It is unlikely, however, given the power of the arbitrator, that a party will object to an invitation to extend jurisdiction when it is made by the decision maker.
salaries are going to go and you start lagging behind in benefits where obviously the employers are benefiting in those years in the lags.

**Part C  Relational Issues**

The third section considers relational issues in assessing a dispute resolution process.

*Cooperation and Information Exchange*

In this part of our analysis it is appropriate to ask whether the med-arb process facilitates cooperation and information exchange? To more carefully consider information exchange issues this question is further divided into “substance exchanged” and “qualify exchanged.”

In general terms the dual med-arb stage should present opportunities for improved information exchange. This is particularly true in relation to the conventional arbitration process where each party would present the other with extensive briefs only at the commencement of the arbitration hearing. While it would be expected that an exchange of information would improve in the dual process, it is not always the case. Information exchange can be influenced by the particular style of an arbitrator, the nominees or counsel. Some arbitrators take a more “hands-on” approach to the management of the process, ordering (or strongly urging) the parties to exchange in-chief and reply submissions prior to the hearing. Other arbitrators take a more passive approach and leave exchange issues to the parties. In such cases it is common for no information to be exchanged prior to the date of the hearing.

Seldom, if ever, are formal written submissions exchanged prior to mediation – rather, submissions exchanged at the commencement of the mediation are often nothing more than skeletal descriptions of party demands, something the parties are already familiar with.

Information exchange can also be a function of the parties’ sophistication in the bargaining process. It is often the case that the introduction of more experienced, skilled representatives will bring more efficiency to the dispute resolution process. This is particularly true in high-volume disputes, where the parties have had little or no success
at the negotiation table, with each side bringing twenty or thirty issues to mediation. Experienced representatives work with their sides to reprioritize demands, often injecting knowledge of the arbitrator or jurisprudence in the sector – reducing the list of items that remain in dispute. For these parties successful mediation is often measured by how many issues are removed from the arbitration submission’s Table of Contents.

E3 …we started off with 80 things on the table and we finished I think with 37 things on the table. In a year and a half of bargaining over eight sessions, they were able to agree, I think, on three useless little things and two things were removed from the table, so yesterday, to have all the parties and to pay an arbitrator, two nominees, lawyers, rooms, etc., etc., I would call successful simply because we reduced the number of issues outstanding by half. I think there is a role for mediation in some situations but if people don’t do the homework and the issues don’t…give rise to the ability to use mediation, or if there’s just too many issues and mediation is just a process to get dead wood off the table,…

While the above quotation addresses the substance of the exchange, it is important to consider the quality of the information exchanged. In the absence of exchanged materials in the mediation stage, the parties may be no further advanced in their understanding of each other’s positions than when they reached an impasse in their negotiations. Moreover, the mediation process itself, with the physical separation of the parties, further limits the ability for either party to hear the other’s issues.

In many cases the mediation stage has been a pro forma step to get to arbitration. At times it reduces the list of issues in dispute for arbitration, and represents a fact-finding opportunity for counsel, nominees and the arbitrator.

U1 …how bad could it be if it is now giving us three opportunities or two more opportunities to resolve before we get to arbitration, but what it has done is put an absolute choke-hold on negotiations right from the outset. Very unfortunate…

E3 I think the people on my side who do the med for the most part [think] it’s a colossal waste of time, and, an expensive waste of time.
Ongoing Relationship of the Parties

It is more difficult to measure the effect med-arb has on the parties’ relationship. There are many factors to consider when assessing med-arb’s capacity to enhance or restore a harmonious labour-management relationship. To begin, the parties must first be genuinely motivated to improve their relationship. This is not always the case in the highly political environments in which the labour-management relationship competes.

The med-arb process does influence the parties’ relationship in terms of the delay getting to the more formal processes. As outlined earlier, the average number of days from the expiry of the collective agreement to the release of an arbitration award under the med-arb model is 910. Requiring 2.5 years to get to a result generates considerable pressures on the parties – a problem experienced more acutely by the association’s leadership. It is sometimes the case that association negotiators (usually the organization’s president) who initiate the process are replaced with more assertive leaders as the process drags on. Measured on this criterion alone, the delays resulting from the med-arb process can further polarize the parties’ relationship.

U1 I am finding [that], you can almost count on very few fingers the number of presidents that last longer than two collective agreements.

Despite this observation, interviewees’ opinions remain mixed. For some the potential of med-arb to improve labour management relationships remains – subject to the willingness to maximize the opportunities that come with mediation.

A2 I think that if the parties really understand mediation and are prepared to use it properly, it should have a positive effect on your relationship because you can use the mediator as a go-between to understand what the real issues are that the other parties need to have resolved and the mediator can help you establish that relationship, that maybe for other reasons you can’t do face to face across the table.

I think that any arbitrator/mediator who is only concerned about the “now” and doesn’t concern himself or herself about what it’s going to do to the parties in the future is doing a gross disservice to the parties.

The collective agreement that you leave the parties with is the basis of the next collective agreement, so how can you say I’m not concerned about the
future. Every time we write an award, and in particular when we give reasons, you’re setting yourself up to be used in the next round of collective bargaining.

E1 I would like to think that the job of anybody who becomes involved with the process is to make it better and the whole goal of a professional being involved with parties who are trying to effect a mutual resolution of the problems is to help them get to that point, and so every med-arb person, every nominee, every counsel is supposed to be there ultimately with the same goals which is to make the parties be able to achieve what they need more effectively, and that doesn’t mean just for this particular round of bargaining, because every set of bargaining sets precedents for the next set of bargaining

However there are many in the process that are more focused on the immediate issues and have less regard for the long-term relationship.

A1 …long term relationships are something that parties deal with on their own, away from third party involvement, and you shouldn’t expect the third party to come up with a way of enhancing your long-term relationship. The third party might be able to show you how to fight better and then not be so goofy in your fighting and how to agree to how to disagree kind of thing, but you know you are not there to build a long-term relationship. The long-term relationship led them to the point where they got a third party so it’s not working…my view as a mediator I am there to get a deal and that’s what I’m going to do, and if I see one party getting beaten up, I feel real bad. On the other hand, I am to get a deal.

**Relationship Between Parties and Arbitrator**

Few comments need to be made concerning the relationship between the parties and the arbitrator. Like many other parts of our inquiry, this relationship is influenced by the personal style of the individual arbitrators. Given the presence of nominees, many arbitrators choose to take a passive role in the mediation, apart from preliminary opening comments. Other arbitrators will play a more active role in the mediation, however this is often limited to interaction with the nominees and counsel. A minority of arbitrators will interact with the parties directly.

U1 I think mediation could be far more effective if the mediators became more engaged at times.
As discussed in the previous chapter, the relationship between the decision-maker and the parties plays an important role in their acceptance of the process and outcome. In the assessment models reviewed in Chapter 3 the relationship between disputant and decision maker was cited as important for the development of trust that the decision-maker heard their arguments and received all the necessary information to render a fair and equitable decision. This “day in court” factor builds confidence in the dispute resolution process.

Under the Ontario Police Arbitration Commission interest arbitration process the common practice is for a single arbitrator would hear interest disputes. In that system, single arbitrators routinely interact with the parties. This study has not undertaken to assess whether there are differences in quality of arbitration award between the police and fire sectors in Ontario.142

**Empowerment**

As noted earlier, for many disputants having direct access to the arbitrator in the less formal mediation stage is an important opportunity to speak more openly about their issues. It also presents the opportunity to discuss creative options to resolve problems. Again this aspect of the empowerment largely turns on the individual style of the arbitrator.

However when assessing a dispute resolution process’ ‘empowerment’ factor it is necessary to consider the tripartite board structure in an administrative justice process. Nominees in this process are, in many ways, “in-between” the parties and the arbitrator and therefore play a critical role in a party’s sense of “empowerment” in the process. It is now widely accepted that nominees play a partisan role in interest arbitration and therefore represent the parties’ ‘proxy’ with the arbitrator.143 As such it is necessary that

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142 An interesting research question. This might be accomplished by more direct surveying of the participants, their expectations entering the process and their experiences upon implementing arbitration awards.
143 Hospital Employees Union, Local 180 and Health Labour Relations Association of British Columbia August 16, 1979, No. 62/79 (BCLRBe) where the Board stated at page 417; “If “interest” arbitration is to acquire and retain credibility as an alternative to economic warfare, the parties can be expected to insist that they be allowed to appoint nominees in whom they have complete confidence and who they have to have a familiarity with the employment situation....The neutral chairman can be greatly assisted, and thus the system has a better chance of working in fact as well as on paper, if his colleagues on the arbitration board
the nominee in the process have an understanding of all aspects of the party’s issues in
dispute. In effect in the tripartite process the ‘empowerment’ factor, a relationship
between the party and the decision-maker, is dependent on the relationship between the
party and its nominee.

Norms and Standards for Future Application

The question “does the process articulate norms or reasons for the outcome; does
it create standards for future application?” can be divided into macro and micro
standards. This section first assesses the macro standard.

One of the major criticisms of the mediation process in any dispute resolution
system is that it often fails to establish longer-term standards for decision-making in the
broader community. In the settlement of private disputes, as argued by Professor Fiss,
there is a risk that a mediated outcome would deprive one party of the application of
community or legal standards. For example, in a personal injury matter an insurance
company may bring virtually unlimited resources to bear against the limited resources of
a disabled person. In that case the disabled person may be motivated to settle for damages
that are much lower than what courts might award – simply because of the enormous
power imbalance with the insurer. It is in this circumstance, and those like it, where Fiss
argues that mediation is not appropriate.

It is uncertain whether Fiss’ argument fits comfortably within the framework used
to resolve public sector labour-management collective bargaining disputes – particularly
where the right to strike is substituted by compulsory arbitration. Arbitrators have made it
clear that the replication of other collective agreements covering similarly situated
employees is paramount. The disputing parties would be aware of this fundamental role
of the arbitrator at all stages of negotiations, in particular as they engage in mediation.
Therefore med-arb, or conventional arbitration, should not run counter to the important
notion of creating standards for future application – in fact given the importance of
replication, standards are reinforced. A difference in the purpose of the process is
important to note. Unlike court systems that adjudicate between two or more disputing

144 Owen Fiss, “Against Settlement” 93 Yale L.J. 1073.
parties, the resolution of collective bargaining disputes has been characterized as an ‘accommodative’ model. In that model issues are not adjudicated on the merits of each, rather a ‘balance’ is sought by the arbitrator that he/she thinks would have been the outcome of negotiations.

We recognize that some members of the negotiation teams entertained the view that if a particular demand was warranted then it ought to have been granted by the other side. But this approach fails to take into account the fact that there must be give and take in bargaining, as well as considering the cost factor associated with certain items that are on the table. While the demand may be very meritorious it may not be possible to extract that item from the other party for a variety of reasons...

However, there can be a risk that norms and standards are not applied to a dispute, and therefore justice of outcome denied, where a party is forced to make decisions based on factors that are unrelated to the merits of the issues. One such example might be caused by the length of time to an arbitration award – an extraneous factor that can place extraordinary stresses on the parties – more often on the leadership of the associations. It might be suggested this is a better replication of the strike-lockout environment, or simply the exigencies of the compulsory arbitration process. This argument does not withstand scrutiny.

The “micro” aspect of this question relates to the degree to which the results of med-arb provide reasons, norms or standards for future application between the parties themselves. The answer to this question turns entirely on the style of the arbitrator. Many arbitrators write awards that set out the decision with few reasons, while others provide reasons that may define how a decision was reached, rationale that the parties may rely on in future rounds of bargaining. For settlements in the mediation stage the norms or standards may be much more difficult to define for future application.

\[\text{\textsuperscript{145}}\]
150 Participating Hospitals (Unreported) July 11, 1986 (Simmons) at page 3.
Part D  The Public Interest

The final section considers public policy interests in assessing a dispute resolution process.

Public Safety and Labour Disruptions

There are no records of labour disputes involving a withdrawal of service or lockout of fire fighters in Ontario. This has been the case under both the conventional arbitration and the med-arb processes – therefore it can be observed that the dispute resolution process has been successful in meeting this fundamental public policy concern.\textsuperscript{146} It should be noted that fire fighters organizations have historically taken a strong position against the withdrawal of service, most having a provision in the organizations’ constitution against such action.

Control of Public Expenditures and Decision Making Capacity of Council

There has always been a tension between the role of government as representative of the public interest and government as employer of public service employees. In its public interest capacity municipal governments make decisions on the allocation of its resources, primarily through its budget (derived through setting mill-rates to generate taxes) and public policy decisions. When the policy decision is made, for example the decision to create a fire department, the government’s role shifts to that of employer. In that capacity the employer is obligated to negotiate the terms and conditions of employment with the bargaining agent representing the employees (where the employees are unionized).

In the design of a process for resolving collective bargaining disputes the focus should only be on the government as employer and not public policy maker. Arbitrators have been mindful of this fact for many years. Any efforts to alter the process to require arbitrators to consider the public policy responsibilities of government are subject to risk of shifting difficult political decision making to unaccountable third parties. The

\textsuperscript{146} The \textit{FPPA} expressly prohibited the right to strike in this sector. There have been no examples of wildcat strikes since the introduction of the \textit{FPPA}. 
amendments proposed by the Harris government attempted to do just this, injecting public policy considerations into resolving labour-management disputes.

The decision as to whether a specific service should be offered in the public sector or not is essentially a political one, as is the provision of resources to pay for that service. Arbitrators have no part in that political process, but have a fundamentally different role to play, that of ensuring that the terms and conditions of employment in the public service are just and equitable.\textsuperscript{147}

In determining what is just and equitable for public sector employees, arbitrators are mindful of what is being paid to others doing similar work in similar communities. At the same time arbitrators are keenly aware of the local economic circumstances but must not let them override basic principles of fairness in dealing with these employees.

Public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions...on balance, the total community which requires the service should shoulder the financial loss and not expect the employees of the industry to bear an unfair burden by accepting wages and working conditions which are substandard. If the community needs and demands the public service, then the members of the community must bear the necessary cost to provide fair and equitable wages and not expect the employees to subsidize the service by accepting substandard wages.\textsuperscript{148}

This resolution of collective bargaining disputes can impact upon the control of public spending for municipalities. This is a necessary encroachment on the decision making ability of government to ensure that employees are not, as Arbitrator Owen Shime stated, “subsidizing the community by accepting substandard wages and working conditions.”

\begin{footnotesize}
\begin{enumerate}
\item Kingston Hospital, unreported, June 12, 1979 (Swan), at 12 of the award.
\item British Columbia Railway Co., unreported, June 1, 1976 (Shime), at 5 of the award.
\end{enumerate}
\end{footnotesize}
Public Policy Interests of the Provincial Government

As outlined earlier in this study, the Harris government made no effort to conceal its interest in exerting control over what it saw as “out of control” public spending. The government took a number of extraordinary steps in this regard, attempting to introduce a Dispute Resolution Commission staffed with its own selected adjudicators, and appointing retired judges who had varying degrees of understanding of labour-management relations to act as adjudicators – two examples of a broader assault on the public sector.

One of the controversial policy changes considered by the government was the introduction of ability to pay criteria that were to be applied above the more traditional decision making criteria used by interest arbitrators. As a result, from the political maelstrom that followed their introduction the DRC was abandoned while the criteria remained in the legislation but were not given any weight over any traditional criteria. In this regard the public policy interests of the government failed to get off the ground. The appointment of retired judges found its way to the Supreme Court of Canada, where the Court determined that the Minister had to appoint adjudicators that would be acceptable to both parties.

While many of the ideologically-driven policies of the Harris government failed, there were other reasons underlying many of the changes made to the dispute resolution process. As quoted above, the Minister of Labour referred to the inefficiencies of the conventional arbitration process in releasing timely awards in comments in the Legislature. As quoted earlier in this study, Minister of Labour Elizabeth Witmer stated:

…[on] average, arbitrated police agreements are concluded approximately 13 months after the expiry of the previous agreement. In the fire sector the figure is even longer, 20 months, and in the hospital sector agreements are finalized nearly two years after the expiry of a contract. This stands in stark contrast to the private sector where, as I indicated, it is all concluded within four months on average. This means that in some cases the employers and unions are learning the final result of an arbitration after the term of the arbitrated contract is over.149

149 Supra note 42.
On this basis the government introduced stricter timelines for convening a hearing and for the release of the award. It is clear from this study’s analysis of police and fire fighter interest arbitration decision that the modifications made to the dispute resolution process have failed to respond to time concerns.

Another objective of the government was to encourage more freely negotiated agreements through its “legislating uncertainty” policies. The government sought to create doubt in the minds of the disputing parties as to the type of dispute resolution process that would be assigned should the Minister be required to appoint an arbitrator. In doing this, the government thought the parties would prefer a locally negotiated agreement than casting their dispute into the unknown waters of an unpredictable dispute resolution process. It is unlikely that this policy had any impact on the parties. While there have been fewer collective bargaining impasses over this period, there is no obvious nexus between the fewer impasses and the uncertainty of the format of dispute resolution. Where there have been impasses most arbitrators have been agreed to between the nominees. Where there hasn’t been agreement and a Ministerial appointment was necessary, there has not been a single order to engage in final-offer-selection.

150 There are many reasons for the drop in the number of bargaining impasses requiring arbitration following the introduction of the FPPA. The most significant factor is the health of the Ontario economy. There was a higher number of bargaining impasses in the late 1980’s and early 1990’s as a result of the deteriorating economy of the time. This was not the case as parties emerged from the Social Contract period, into the late 1990’s and beyond.
Chapter 5: Conclusions and Discussion

Collective bargaining is an exercise in balancing the competing interests of two parties. There are many factors that have an impact on the success or failure of the collective bargaining process – unrealistic bargaining objectives; front-page politics between labour and management; tightly wound constituencies or short-lived leaders. As Tyler and Blader noted, the culmination of all these and many more influences often cloud rational thought and lead to impasse in the place of considered self-interest. Against this backdrop it may be impossible or naïve to think that even the best public policy decisions will result in a dispute resolution panacea. Policy decisions are made in broad strokes, and there are limitations to what can be accomplished through various dispute resolution systems. The purpose of any review then is to determine whether the direction of those broad strokes ought to be changed to effect some preferred outcome.

This study has attempted just that. In Chapter 3 it distilled various dispute resolution process evaluation models to create a unified model with a focus on assessing labour-management dispute systems in the public sector. This study then applied the unified model to the med-arb process introduced into the Ontario fire sector in 1996. Through a detailed analysis of two hundred and seventy-one interest arbitration decisions in the police and fire sectors, field interviews with nine key players in the formation and administration of the med-arb system, plus field interviews with three prominent labour arbitrators, this study has sought to evaluate the efficacy and suitability of the med-arb process. From this analysis, what is left to determine is whether improvements can be made to the process, and if so, to what extent do the government’s ‘broad policy strokes’ require redirection? Finally what alternatives exist that might better suit the needs of the stakeholders?

This last chapter will trace the application of this study’s unified dispute resolution process assessment model. In doing so it will first look at the infrastructure of the negotiation and med-arb processes, followed by a consideration of the utility of the med-arb process and its alternatives. It is inevitable that when considering the bargaining

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151 *Supra* note 92 at page 296.
and arbitration infrastructure, other questions listed in this paper’s unified assessment model will intertwine.

**The Three Waves**

Med-arb was introduced at a difficult time for Ontario’s public sector unions. The Harris government made no effort to conceal its hostility towards public sector workers. In three major waves the government set to restructure public sector labour-management relations. The first wave, Bill 26, was one of the most encompassing omnibus statutes in the province’s history. It hit the public sector with the threat of privatization and the reorientation of decision-making criteria for interest arbitrators. A second, larger wave, soon followed in Bill 136, which directly attacked the interest arbitration process covering the province’s essential service workers, and the professional arbitrators who resolved these bargaining disputes. The final wave, Bill 84, was a comprehensive overhaul of the *Fire Department’s Act*, with *inter alia*, provisions for excluding or designating personnel out of the bargaining unit, part-time fire fighters, and incorporating the med-arb or mediation-final-offer-selection models for resolving bargaining impasses.

For municipalities across the province the new legislation was to bring greater fiscal control through the ability to pay criteria (despite their being less forceful than originally proposed), increased ability to remove senior ranks from the fire service through the new managerial exclusion/designation provisions, and the ability to consider the use of part-time fire fighters. With the downloading of a number of services from the province to municipalities, local councils and administrators were happy with the new powers the three waves delivered. Emerging from a three-year statutory ban on negotiations, collective bargaining in the Ontario fire sector was going to be anything but predictable.

**The Bargaining and Med-Arb Infrastructure**

Despite the expectations that med-arb would enhance dispute resolution for Ontario’s fire fighters the consensus is that in practice it has not. In this study’s field interviews both association and employer side representatives expressed the same frustrations over delay, cost, and the limited utility of conciliation and mediation
processes. The most striking issue is the delay in receiving the award. For the fire fighters 
this can mean working under a collective agreement that expired two or three years 
earlier (with salaries and benefits lagging behind those in comparable municipalities). For 
the employers the extraordinary delays result in protracted budget uncertainties, 
uncertainty around various management rights that are locked up in negotiations, and 
deteriorating morale in the workplace. Each party to an interest dispute has an interest 
in reducing the time required for resolution.

As outlined in Chapter 4, under the conventional arbitration process it took fire 
fighters an average 347.2 days to the date of an arbitration hearing and 497.1 days to the 
release of the arbitration board’s award. Under the new med-arb process the timeline is 
remarkably different – on average it took 513.9 days to get to mediation, 714.9 days to 
arbitration and 910 days to the release of the award. Within the med-arb process there is 
also the requirement to participate in conciliation prior to mediation.

On average the increase in the length of time to the arbitration hearing is 105.9% 
higher than under conventional arbitration – more than double. In fact it takes longer to 
get to mediation than it did to get to arbitration under the old dispute resolution scheme. 
The increase in length of time from arbitration hearing to award is 83.06%. With 
conciliation, the parties now appear before neutrals an average of 2.98 days compared to 
the 1.1 days under conventional arbitration.

Under the Ontario Police Arbitration Commission process it takes an average of 
372.9 days to mediation, and 480.3 days to arbitration. The arbitrator’s award is released 
an average of 93.6 days later, a total of 573.9 days from the expiry of the collective 
agreement. Under the conventional arbitration process, Ontario’s police took on average 
243.1 days to go to arbitration followed by an award an average of 41.8 days later – a 
total of 284.9 days from the expiry of the collective agreement.

While both the fire and police sectors experienced an increase in time under the 
new med-arb system, the disparity between police and fire is significant. With few

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152 Fire fighters are quick to point out that municipalities can earn interest on held-back wages and benefits 
– arbitration awards do not generally award interest on retroactive salary adjustments. Employers quickly 
respond that having to pay interest penalizes the employer’s side for delays that could result from 
association bargaining strategies (interview with E2).
differences in the bargaining process between these two groups, what accounts for the disparity? The fire fighters’ use of the tripartite board.

The Tri-Partite Arbitration Board

In Ontario, as in other Canadian provinces, fire fighters have used tripartite arbitration panels for generations. The tripartite board versus single arbitrators was recently considered in the federal sector after the Toronto Pearson airport fire fighters reached a bargaining impasse with the Greater Toronto Airport Authority. In finding that a tripartite panel was more appropriate for the Toronto airport fire fighters, Canada Industrial Relations Board Vice Chair Michele Pineau made the following observations:

In the Board’s view, the depth of the issues to be resolved in interest arbitration should be persuasive. In rights arbitration, the arbitrator is called upon to make a decision on a finite matter within the framework of a pre-existing arrangement between the parties. The arbitrator also relies on legal principles and precedents to assist in rendering a decision. Issues that arise in interest arbitration rarely admit to yes or no answers or even a single answer for that matter. Thus, the process benefits by having more than one person decide them. The complexity and impact of certain issues may require industry knowledge and expertise. The presence of nominees ensures that, even though the presiding panel member may side with one party or the other, both sides of an issue will be examined. As the presiding member will most likely not side with the same nominee on every issue, the parties are assured of a balanced approach, even though every issue is not decided in its favour. Few arbitrators have what Arbitrator Shime calls “the Solomon-like ability to deal with all of the issues that arise in interest arbitrations with the wisdom that is required.” He also wisely states that “this is a situation where the old adage of two hears (and in this case three) being better than one is applicable.”

Another consideration is that not all issues that come before the interest arbitration panel concern wages and benefits. In this case, issues such as how emergency services are deployed, government regulations, time lines and other complex matters that are particular to the industry will necessarily creep into the arbitration process. Nominees are able to provide what constitutes the acceptable outer limits for their constituents as well as contribute a conciliatory approach to some of the more difficult or hot-button issues.
The expertise of the nominees outweighs by far the factors of cost and any inefficiencies of the process. This panel agrees with Arbitrator Shime’s conclusion that interest arbitration is a single and finite occurrence, as opposed to the limitless number of grievances that may come up in the course of the life of a collective agreement. The timetable for the process lies in the hand of the parties who appoint the nominees. It is within their control to set the time period within which the process should be concluded.

…

This panel also fully agrees with the views of the BCLRB that, as an alternative to economic warfare, interest arbitration will more likely retain its credibility where the parties are allowed to appoint nominees in whom they have confidence and who have familiarity with the employment context. In this sense, nominees ensure a critical relevancy of the working conditions imposed by the panel in the final instance.153

Arbitrators and employer counsel have also commented on the benefits of having nominees in the interest arbitration process:

A2 I think there’s a great value to having nominees in the interest process...because it allows you to test out issues, it allows you to get a better feel for where the parties are but it is absolutely critical that there be the right nominees…

E2 …it works better with nominees who actually understand the business. The risk of having pure arbitrators is they don’t understand the industry and I mean there are certain industries like fire and police where I think having knowledge of the industry really helps because it is a different workplace than the other workplaces.

A1 I think it works when you are sitting as a panel in an interest dispute, mainly because the neutral chair cannot possibly know that much about the operations as the sides-persons. They’re there because they have some insight into how the organization functions and the concerns and so on, so to that extent it cuts short a lot of things and you can use them as sort of surrogate mediators from your perspective because you can sort of tell them let’s do this at this time and relying completely on their knowledge of the organization…

153 Greater Toronto Airports Authority (Re) [2005] C.I.R.B.D. No. 16 (Canada Industrial Relations Board) (QL).
Ontario’s fire fighters and municipalities have preferred the tripartite system for some time, and there appears to be little appetite to change by any of the stakeholders. Therefore it is necessary to examine other means for resolving the time delay problems.

There are limited options to consider within the infrastructure of both the bargaining and arbitration processes that reduce the amount of time required from expiry to award. While it is doubtful these changes will provide anything more than modest reductions, taken as a whole they move the process in that direction.

Notice to Bargain

Collective bargaining begins with the delivery of notice to bargain, almost always initiated by the association. Under most collective agreements the parties set out a window in which notice to bargain can be provided – often 30 to 60 days before the date of expiry of the agreement. From that point the parties schedule meetings and commence negotiations. The timelines defining the bargaining window are entirely arbitrary and can be easily amended to allow the parties to start bargaining earlier – 90 to 120 days before the expiry for example.\textsuperscript{154} Since the vast majority of collective agreements are freely negotiated, the ability to commence negotiations earlier could mean having a settlement prior to the expiry, something that is rare under the current systems. Where there is no agreement, the dispute resolution process can begin much earlier, shaving time off the averages set out in Chapter 4.

Conciliation

Conciliation was added as a required step prior to accessing mediation. Interviewees shared the same view of the utility of conciliation – with a success rate estimated at less than five percent, conciliation has simply failed to assist the parties in

\textsuperscript{154} There are other non-infrastructure considerations, for example better managing meeting schedules prior to impasse with an understanding of how long the process can take once control is lost to the process. Reopening negotiations after impasse if there are developments in comparator groups that clarify bargaining trends.
Removing conciliation as a required step can reduce the overall process between 60 and 90 days.

Determining the Arbitrator

Following impasse the parties appoint their nominees. The nominees then exchange lists of potential arbitrators in search of a suitable chairperson. This process can be as easy as a phone call, or a longer drawn out series of letters back and forth. If no agreement is reached, either side can seek an appointment from the Minister of Labour, who in turn appoints from the Ministry’s general list of arbitrators. For a number of reasons the appointment of arbitrators could be streamlined.

In place of selecting arbitrators from the Ministry’s general list, a short list of eight arbitrators could be created, from which the Minister could choose if requested to do so. The list would be determined jointly by representatives of the fire fighters and the municipalities. The parties would be required to review the list at defined intervals, every thirty-six or forty-eight months for example. In the event the parties were unable to reach an agreement on the composition of the list, a senior member of the labour arbitrators community would decide.

This process more closely resembles that in use in the Ontario police sector. The Ontario Police Arbitration Commission maintains a list of approximately twenty-five arbitrators who preside over both rights and interest disputes. The Chair of OPAC, together with two representatives from both the Police Association of Ontario and the Ontario Association of Police Services Boards review the list at regular intervals. For the number of interest disputes that arise in the sector, twenty-five is a large number and presents the risk of “rust out” – where no particular expertise in policing is developed or where an arbitrator is limited to chairing an interest arbitration every few years.

The proposal for eight designated arbitrators in the fire sector would allow arbitrators to build a greater level of expertise in fire fighter labour relations. In Chapter 4

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155 Interviews with E3, U1 and U2.
156 The stakeholders would be represented through their affiliates, the Ontario Professional Fire Fighters Association, the employers represented by the Association of Municipalities of Ontario.
157 This could be a senior member not presently on the fire sector list. Alternatively the assignment could come from the President of the Ontario Labour-Management Arbitrator’s Association after hearing brief submissions from the parties.
we examined the importance of the level of confidence in the appointment, understanding of issues, and accuracy of information as parts of the unified model’s list of procedural justice questions. A limited list of arbitrators will enhance each of these factors. A list of eight arbitrators would also enhance the parties’ confidence in the outcome, develop better relationships between the arbitrators and the parties and, as arbitrators develop their levels of knowledge of the fire sector, enhance the opportunity for more creative outcomes of the dispute resolution process. Overall confidence in the arbitrators is particularly important where the arbitrator does not provide detailed reasons for reaching a conclusion.

Most importantly, the creation of a list of eight interest arbitrators is consistent with the parties’ own history on arbitrators. Tables 9 and 10 in Chapter 4 make it clear that associations and municipalities have had confidence in a limited number of arbitrators in both seven-year study periods. Under the conventional arbitration system the parties referred 65.87% of the interest disputes to four arbitrators. Under med-arb 60.06% of disputes were referred to five arbitrators. Twenty-seven arbitrators in total were active during these two periods, but the parties assigned, by agreement, the majority of the work to a very limited number.

A shorter list of arbitrators will also bring some predictability to the decision-making norms and standards in the sector. This conflicts directly with the expressed policy objectives of the Harris government – policies that sought to introduce uncertainty into the dispute resolution process. This study’s unified model of assessment, and those reviewed in Chapter 3, all speak to the importance of decision-making norms and standards for encouraging freely negotiated or fairly adjudicated outcomes. Research has indicated that lack of norms and standards actually contribute to bargaining instability and failure to reach settlements – one of the reasons identified by Rose as contributing to the less successful collective bargaining history in Ontario’s health care sector.158 While each of the association and employer interviewees have expressed preferences in arbitrators, none have shared the views of the government’s policy makers that arbitrators were complicit with unions and employers.

158 Supra footnote 115.
Final Offer Selection

Currently the *FPPA* provides the Minister with the option of requiring the parties to use final offer selection to resolve their bargaining impasse. There have been no examples of the use of FOS in the Ontario fire sector and none of the field interviewees expressed a desire to have it assigned. FOS should therefore be removed from the *FPPA* as a process option.

FOS was part of the Harris government’s “legislating uncertainty” strategy – not knowing what dispute resolution process would be assigned, the government hoped the parties would be “biased away…” from arbitration.\(^\text{159}\) FOS has not been a deterrent to arbitration in the fire sector. More importantly, the government’s instability strategy is entirely inconsistent with the literature on the effectiveness of FOS as a process.

There are examples of FOS in many areas, including police and fire services in the United States. Where it has been used however, it is understood at all points in the bargaining continuum that FOS is the dispute resolution process used when the parties reach impasse. This shapes the parties’ priorities and decision-making along the way, not after they have reached impasse. In Major League Baseball FOS is the dispute resolution process for resolving salary disputes. There the player and owner must table its “opening” salary offers before the selector. This requires the parties to put on the table what is akin to their “final offers.”

The literature is critical of the FOS process in the polycentric disputes common in labour-management relations. Where there are monetary and power-distribution questions before the arbitrator FOS is simply too blunt an instrument to have any credibility.

Finally, collective bargaining is a continuing process between parties who share long, often challenging relationships. Legislating uncertainty into the process is not grounded in any dispute resolution theory that seeks to assist parties in resolving their differences. A “Russian roulette” process seems more certain to ensure dissatisfaction with the dispute resolution process, risking the parties’ flight to less appropriate alternatives.

\(^{159}\) See comment from P2 at page 16 and 17.
**Timelines**

The *FPPA* stressed the importance of timelines in convening the arbitration hearing and releasing an arbitration award. The *Act* also provided that the timelines could be amended by agreement of the parties. The timelines have never been followed and while consent is not generally sought by arbitration boards, neither party is about to force the arbitrator to rule within such narrow windows. What the timelines do, however, is create a false sense of entitlement for constituents who see them as “law” and become disenchanted with the process when the “law” is not followed. Since timelines have never been enforced they should be deleted.

**Exchange of Submissions**

One of the critical elements of a dispute resolution process is that it enhances communications and exchange of information between the disputants. Communication remains one of the central causes of impasse in any negotiations. Given this importance, and the need to make a hearing day more efficient, arbitrators should be more assertive in directing the parties to exchange “in chief” submissions in advance of the hearing. Parties could then be able to review these materials and better shape their reply submissions in advance of the hearing day. Overall this would make the hearing day and the quality of the parties’ arguments more efficient.

**Unfair Labour Practices**

Another important part of the bargaining infrastructure is the *FPPA’s* missing provisions that resolve unfair labour practices. While not directly part of the dispute resolution process, unfair labour practices, when they occur, contribute to conflict between the parties – conflict that is then inherited by the interest arbitration board. The ability of the parties to operate within a bargaining framework that enforces each party’s obligation to bargain in good faith and make every reasonable effort to reach a collective agreement supports freely negotiated outcomes. The *Labour Relations Act* provides expedited access to the Labour Relations Board to police these obligations. There is no reason why fire fighters should be denied the same bargaining rights of virtually all other
unionized employees in Ontario. The *FPPA* should be amended to provide expedited access to the Labour Relations Board to police unfair labour practices.

**Case Management**

Despite any changes made to the infrastructure of the process, the most effective means for tackling the extraordinary time requirement is for the dispute resolution professionals to attempt to streamline the process.

Throughout the early 1990’s Ontario’s legal community became self-conscious of costs and delays in various forms of litigation. An alternative had to be found, otherwise access to legal remedies would simply become unattainable for large segments of Ontario’s population. In the result, the Attorney General launched pilot projects that required mandatory mediation in civil litigation in Toronto and Ottawa. This became part of a larger case management system and brought greater efficiency to the litigation process.

The interest arbitration process would benefit from a similar case-management approach. In the absence of a Master, the arbitrator would work with the nominees to create a time-frame in which the board would convene and then render a decision.

As noted early in this study, the interest arbitration process is, in practical terms, a continuation of the bargaining process. It is subject to pattern development and positioning by parties to best achieve their bargaining objectives. A case management system will not supplant these process realities, it will simply attempt to more concretely define the periods in which critical steps in decision making will take place.160

**The Utility of Med-Arb and Its Alternatives**

After considering factors that might address one of the chief complaints of the med-arb process this study now considers the dispute resolution system itself.

This study began with commentary on the value of parties negotiating their own terms and conditions of employment. While there is ample evidence of successful

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160 To use an example, it may be preferable for an arbitration board to wait for a settlement in the police sector or another fire fighter bargaining group before rendering a decision.
negotiations in the fire sector, this study has focused on the dispute resolution process used where negotiations does not result in an agreement. In this, the last section of this study, we look at the utility of the med-arb process and its alternatives.

If it is expected that a dispute resolution process would facilitate the parties’ ability to reach their own agreements, within a reasonable timeframe, and under conditions that promote confidence in process and outcome – then the med-arb process has been less than satisfactory. In Chapter 4 it was shown that interviewees from both union and employer sides shared the opinion that med-arb was not serving the needs of employer and union negotiators in the fire sector. Many employers think it is a “big waste of time and money.” Unions express similar frustrations with the process, and see mediation as “just another step” in a long process.

If the parties are unhappy with med-arb, what alternatives exist that placate these common concerns, yet maintain the fundamental objective of encouraging the parties to reach their own decisions?

There are a number of hybrid systems in place for police and fire fighters. In Oregon fire fighters use a system of arbitration where the arbitration panel renders its decision but does not make it effective for thirty days, allowing the parties to negotiate something different from the arbitrator’s award. There are variations in other mid-Western states, arbitration hearings where the arbitrator writes his/her decision, seals it in an envelope and then engages in mediation with the parties, for example. Under that system the parties remain in control of their outcome until impasse, when the arbitrator opens the envelope and releases the award. There are states where the parties use FOS for salary, together with conventional arbitration for all other matters in dispute and others where FOS is applied on an issue-by-issue basis. In an effort at democracy, in one state negotiated or arbitrated settlements must be submitted to the public through plebiscite who then approve or reject of the deal – injecting significant costs into the ‘politics’ of public sector bargaining.

161 See comment by E3 at page 70.
162 See comment by U1 at page 78.
163 These are mostly in the United States where policing and fire sectors fall under the jurisdiction of the state. As such, within these jurisdictions there are plenty of examples of variations on dispute resolution processes.
Common to many of these dispute resolution processes is the combination of mediation and arbitration – sometimes with a sealed envelope in view, sometimes with thirty days counting down. Regardless, the combination of non-binding and binding processes created the optimum framework for resolving the disputes. Another common feature of these alternatives is the presence of arbitration before mediation.

After considering med-arb’s issues, as identified by interviewees, and the alternatives to the med-arb process, this study concludes that fire sector disputes might better be resolved through a process of arbitration-mediation (“arb-med”).

Fire fighter associations place significant value on the arbitration process. The fire fighters place a premium on the ability to make public submissions, “on the record.” Unlike arbitration in other sectors, interest disputes in the fire sector draw an audience of association members to witness the process, hearing first hand the arguments advanced on their behalf, and the arguments against them.

This is consistent with a study of fire fighter preferences in dispute resolution identified interest arbitration as the preferred option by a significant margin.\(^{164}\) This same study identified employers’ preference for mediation over arbitration.

Arbitration before mediation also plays a significant role in the effectiveness of communications and the exchange of information – the key contributors to resolving the bargaining impasse. At arbitration the other side hears the arguments as they are made to the arbitration board, the final decision maker. In this way the boundaries are created in which the mediation can then take place. Depending on the nature of the issues, the sophistication of the parties in the bargaining process, and their ability to effectively communicate, an arbitration hearing may be the first time each side hears the full arguments on the merits of each other’s demands.

Having all of the information before the board allows the arbitrator to “work” the parties more effectively in the mediation stage, using the evidence of the other to encourage a party to reconsider priorities or expectations. Furthermore, the arbitrator is able to replicate strike/lock-out conditions by introducing time thresholds to party decision making: “my plane leaves at five, you have two hours to consider your options,

which may be better than what I’m prepared to award if I write a decision…” The arb-med process then maximizes the opportunity for parties to make their own decisions – the objective of the dispute resolution process. Parties have the opportunity to more fully participate in the decision making that will define their working relationships – an important objective of the system identified in the unified assessment model. In circumstances where one party simply has no desire to mediate, the arbitrator can simply conclude the process after receiving arbitration submissions. This would have a significant impact on the length of time and cost of the process.

In Chapter 4 this study identified a number of issues involving “substantive justice,” which should be considered in designing a dispute resolution system. Among them is the confidence the parties have in their outcome replicating other freely negotiated agreements, as well as presenting the opportunity for creative settlements. Arb-med responds effectively to both of these concerns – it better informs the arbitrator of bargaining trends in the sector, and will likely form the basis of the mediator’s strategy to move parties off unrealistic demands, while at the same time reinforcing the merits of strong arguments.

The arb-med process may also present the best learning opportunity for the parties, which can translate into improved collective bargaining relationships in the future.

Few studies have considered the arb-med model, but those that have prefer it to the med-arb process. McGillicuddy, Welton and Pruitt studied the med-arb process under two formats – the first where there was a different neutral for both the mediation and arbitration processes. In these cases their research indicated that parties were more civil to each other in the mediation stage. These studies concluded that while the parties were more civil to each other under this format, there was no improvement to the settlement rate. The same study considered med-arb where there was a common neutral. In this format the parties were more antagonistic to each other in the mediation stage, which was reflected in poorer settlement rates at mediation.\(^{165}\) In another studies on arb-med, Conlon, Moon and Ng found that arb-med resulted in a higher frequency of voluntary

settlements than med-arb, and that the parties felt the settlements were of a higher value than under alternate forms of dispute resolution.\textsuperscript{166}

\textit{Conclusion}

This study has examined the efficacy of the med-arb process in use by Ontario’s fire fighters. In doing so it has created and applied a unified assessment model with a particular focus on the resolution of public sector collective bargaining disputes. This study identifies a number of considerations that address the infrastructure concerns raised by interviewees, primarily the delay to get to an arbitrated result. Moreover this study, after considering the comments of the interviewees, the literature on dispute resolution and the application of the unified assessment model, identifies alternatives that might better suit the objectives of the process, specifically the use of arb-med to encourage freely negotiated agreements.

The Harris government’s objective was to facilitate the resolution of bargaining impasses through a strategy of uncertainty of process preceded by mandatory mediation. In the government’s view, with the rising popularity of mediation in other areas of the law it only made sense to introduce it to labour-management.

P1  It’s the philosophy of the Ministry of Labour and everyone in the ministry that a consensual outcome is preferable to an opposed outcome…as I recall that time it was trumpeted as one of the big innovations and it was anytime you’ll see a press release or a Minister’s thing about it med-arb was referred to as a list of features of the new Bill…

As well-meaning as that objective was, professionals in the labour-management community defend their long traditions of using mediation to resolve their differences, amidst their frustrations of a system that doesn’t work.

E3  Clearly [it’s] not working. It definitely is not cheaper, and the parties aren’t any happier than they were before…so that it has not achieved all of those

\textsuperscript{166} D. E. Conlon, H. Moon & K. Y. Ng, (2001) “Putting the Cart Before the Horse: The Unexpected Benefits of Arbitrating before Mediating” Paper Presented at the 61\textsuperscript{st} Annual Meeting of the Academy of Management, Washington, DC.
objectives…and what people fail to realize is that labour practitioners, be they reps, lawyers, whatever, we know how to mediate. We mediate every day of our lives, whether it’s at the labour board, whether it’s rights arbitrations, whether it’s interest arbitrations. We amongst everyone certainly in the lawyer community, where people started…ADR…all of a sudden everyone’s now a sort of Johnny come lately, come out with ‘oh, this is a great idea, let’s do it for family law, let’s do it for civil litigation” and the difference…that exists between what we do and what happens in the rest of the legal community is that in all of our relationships, it’s a continuing relationship so I have to, no matter how much I piss off that union, I still have to have them all back working Monday morning and, I can have them mad but I can’t have them destroying my equipment or, you know, pissing off the customers or the clients or building defective parts, or.. in civil litigation [or] insurance matters, personal injury, I don’t see that insurance company again so I don’t care if they hate my guts. I can be as rude, as obnoxious, as uncivil as I possibly want, and if I divorce my wife by definition I hate that woman. So, I don’t have to be civil. Where in labour and employment, it’s one of the few areas where it’s just one bump in the road on an ongoing relationship. You can divorce your spouse – you can’t divorce the union.
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