Expedited Arbitration: The View from Canadian Lawyers

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I. INTRODUCTION

This study focuses on Canadian labor lawyers' opinions regarding an essential component of the dispute resolution process: expedited arbitration. The labor arbitration system was originally developed to provide speedy, inexpensive results for workplace disputes in unionized environments.[1] Since its inception, however, the traditional labor arbitration system has become increasingly time-consuming[2] and expensive.[3] The current system's dysfunction has attracted the attention of scholars,[4] practitioners, and decisionmakers.[5]

The traditional labor arbitration system allows the parties to mutually agree on an arbitrator to determine the grievance outcome. The parties may also use expedited arbitration, which quickens the arbitration process by applying to the respective government body for a quick judgment. Notably, despite anecdotal complaints of significant frustrations with the traditional arbitration system, parties do not use the expedited arbitration system to resolve workplace disputes as often as labor relations specialists would expect. This article uses interviews with Canadian lawyers practicing labor law to investigate perceptions of the expedited arbitration process and to determine some possible reasons for its under-utilization.

The article is divided into five parts. The first part provides the basis for the study; specifically, it explains the historical context of the Canadian labor arbitration system. It also reviews the disadvantages of the traditional arbitration system, including its inherent costliness and propensity for delays. Second, we examine the organizational justice dimensions of the arbitration

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[1] *See* Hon. Warren K. Winkler, C.J. Ont., Address at the Don Woods Lecture: Labour Arbitration and Conflict Resolution: Back to Our Roots 1 (Nov. 30, 2010) (transcript available at Queen's University Industrial Relations Center) (discussing the history and current issues with the current labor relations framework).

[2] Allen Ponak & Corliss Olson, *Time Delays in Grievance Arbitration*, 47 REL. INDUSTRIELLES/INDUS. REL. 690, 702 (1992); Kenneth W. Thornicroft, *Accounting for Delay in Grievance Arbitration*, 44 LAB. L. J. 543, 548–51 (1993) [hereinafter Thornicroft, *Accounting for Delay*].

[3] Kenneth Wm. Thornicroft, *The Grievance Arbitration Process and Workplace Conflict Resolution*, *in* CANADIAN LABOUR AND EMPLOYMENT RELATIONS 361, 371–72 (Morley Gunderson & Daphne Taras eds., 6th ed. 2008) [hereinafter Thornicroft, *Grievance Arbitration*].

[4] *See* Ponak & Olsen, *supra* note 2; Thornicroft, *Grievance Arbitration, supra* note 3; Kenneth Wm. Thornicroft, *Do Lawyers Affect Grievance Arbitration Outcomes? The Newfoundland Experience*, 49 REL. INDUSTRIELLES/INDUS. REL. 356 (1994).

[5] Winkler, *supra* note 1; Hon. Warren K. Winkler, C.J. Ont., Arbitration as a Cornerstone of Industrial Justice, (2011) [hereinafter Winkler, *Arbitration as a Cornerstone*].

process with a focus on distributive and procedural justice. Third, we define the methodological approach of the study. The fourth part of the paper presents the research results and details the overarching concerns and views of the labor and employment counsel participants. The fifth part concludes with the study's contributions.

II. UNDERSTANDING THE LABOR ARBITRATION SYSTEM IN CANADA

There are two primary dispute resolution processes available to unionized parties in Canada: the traditional arbitration process and the expedited arbitration process. These processes are used to resolve disputes related to collective agreements between labor and management. The most commonly used process is traditional labor arbitration wherein the parties agree to an arbitrator or board who then hears and rules on the matter of dispute. However, some collective agreements contain language that allows the parties to pursue a second option: expedited arbitration. In these cases, the parties may agree to parameters that expedite the process, pursuant to the collective agreement, including limitations on precedents, time limits, and the use of an agreed statement of fact(s). The focus of this study is the expedited arbitration process as it is pursuant to applicable legislation. This process is offered in many Canadian provinces and provincial legislation sets many of the "rules of engagement" for the arbitrations.[6] Although the rules differ by province, they typically dictate a specified time limit for the first day of hearing and the number of days within which an arbitrator must return the decision to the parties.[7]

The two primary concerns regarding traditional labor arbitration include the extended duration of the arbitration process and the increasing cost associated with labor arbitrations. In the past few decades, the duration of traditional labor arbitration increased by forty-six percent between 1994 and

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[6] Jurisdictions that have applicable legislation include British Columbia (Labour Relations Code, R.S.B.C. 1996, c. 244, s. 104), Saskatchewan (Saskatchewan Employment Act, R.S.S. 2013, c. S-15-1, s. 6-47), (The Labour Relations Act, C.C.S.M. 1988, c. L10, s. 130), Ontario (Labour Relations Act, R.S.O. 1995, c. 1, sched. A, s. 49, New Brunswick (Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 55), Newfoundland and Labrador (Labour Relations Act, R.S.N.L. 1990, c. L-1, s. 86), Nova Scotia (Trade Union Act, R.S.N.S. 1989, c. 475, s. 46(A)).

[7] *See, e.g.*, Labour Relations Code, R.S.B.C. 2019, c. 244, s. 104(7); The Labour Relations Act, C.C.S.M. 1988, c. L10, s. 130; Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 55.01(4)(b), 55.01(8); Labour Relations Act, R.S.N.L. 1990, c. L-1, s. 86(5)(b); Trade Union Act, R.S.N.S. 1989, c. 475, s. 46(A)(5)(b), 46(A)(7), 46(A)(8).

2012.[8] A number of factors are linked to this increased duration. Statistically, delays in traditional labor arbitration are linked to legalism, the expanding jurisdiction of arbitrators, and some dispute resolution procedures.[9] "Legalism" or "creeping legalism" refers to the increased use of legal influences on the arbitration process that discourage positive relationships between the union and employer.[10] It is often argued that the use of lawyers results in delays and increases the length of the arbitration process. Some of these delays are based upon representatives' busy schedules. Another significant factor that increases delays is the growing use of litigation-based tactics, which include a greater number of witnesses, expert testimony, the adoption of more cases, evidentiary disputes, and challenges to credibility.[11] Empirical literature supports the belief that delays in the arbitration process are associated with legalistic factors. Thornicroft (1993) found in the 1990s that legal representation was associated with delay,[12] although a similar study by Ponak et al. (1996) did not find a positive relationship between the use of legal counsel and delay.[13] However, more recent research has established that legalism, including the use of lawyers, is positively associated with an increased duration in arbitration.[14]

A second factor associated with time delays in arbitration is the increase of an arbitrator's jurisdiction in recent years. Cases, including *Weber v. Ontario Hydro*,[15] *Parry Sound v. OPSEU*,[16] and *OPSEU v. Seneca College*,[17] have increased the breadth and depth of the matters that arbitrators rule on. In *Weber v. Ontario Hydro*, the Supreme Court of Canada proposed an exclusive jurisdiction model in which arbitrators retain sole jurisdiction over certain legal matters that were previously regarded as concurrent between the courts and arbitrators.[18] *Parry Sound v. OPSEU* further expanded the

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[8] Bruce J. Curran, *Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed?*, 72 REL. INDUSTRIELLES/INDUS. REL. 621, 647 (2017).

[9] *See id.* at 636–48.

[10] Barry M. Rubin & Richard S. Rubin, *Creeping Legalism in Public Sector Grievance Arbitration: A National Perspective*, 30 J. COLLECTIVE NEGOT. PUB. SECTOR 3, 4 (2003).

[11] Winkler, *Arbitration as a Cornerstone*, *supra* note 5, at 7–8.

[12] Thornicroft, *Accounting for Delay*, *supra* note 2, at 549.

[13] Allen Ponak et al., *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 INDUS. & LAB. REL. REV. 105, 112–14 (1996).

[14] *See* Curran, *supra* note 8, at 647 (finding legalism to increase the delay over time).

[15] Weber v. Ont. Hydro, [1995] 2 S.C.R. 929 (Can.).

[16] Dist. of Parry Sound Soc. Servs.' Admin. Bd. v. Ont. Pub. Serv. Emps.' Union, [2003] 2 S.C.R. 157 (Can.).

[17] Ont. Pub. Serv. Emps.' Union v. Seneca Coll. of Applied Arts & Tech., 2006 CanLII 14236 (Can. Ont. C.A.).

[18] *Weber*, 2 S.C.R. 929 at 956–57.

jurisdiction of arbitrators by granting them the ability to determine issues relating to employment, health and safety, human rights, and privacy.[19] Most recently, in *OPSEU v. Seneca College* (2006), the range of remedies available for an arbitrator to decide was increased to include aggravated and punitive damages.[20] Studies find that as the complexities of the cases increase, so too do systematic delays.[21] Arbitrations involving *Charter* issues, in particular, prove to be very lengthy in comparison with cases that do not involve *Charter* issues.[22]

A third factor that influences delays in the traditional arbitration process involves procedural steps and decisions. For instance, the parties may agree to either an arbitration board with three arbitrators or to a sole arbitrator. Intuitively, hearings by sole arbitrators should have fewer delays given the elimination of interruptions such as coordinating schedules or dissenting opinions.[23] In fact, many studies do support the expediency of sole arbitrators in comparison to a tripartite board.[24]

Another concern related to timeliness is the increasing cost of traditional arbitration, particularly since many of the cost increases are due to the same processes that increase time delays. Originally, arbitration was regarded as an inexpensive way to avoid the costly nature of the courts. However, cost has grown exponentially for the parties, particularly as the prevalence of legal representation has increased. Employers, in particular, typically hire legal representation to do advocacy and preparatory work including witness preparation and research.[25] Other costs include fees payable by the parties to the arbitrators and fees associated with logistics such as room rentals and transportation/travel costs.[26] Hidden costs also accumulate, including the time that the parties dedicate to case and witness preparation. Indirectly, unresolved work disputes can negatively affect the workplace culture; furthermore, where discontent interferes with productive negotiations and increases the likelihood of a work stoppage, unresolved disputes may also detrimentally influence collective bargaining.[27] In general, costs escalate in tandem with the length of arbitration.

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[19] *Parry Sound*, 2 S.C.R. 157 at para. 28–41.

[20] *Seneca Coll.*, CanLII 14236 at para. 69.

[21] Curran, *supra* note 8, at 636–44.

[22] *Id.* at 644.

[23] Ponak et al., *supra* note 13, at 108–09.

[24] Curran, *supra* note 8, at 646; Ponak et al., *supra* note 13, at 115.

[25] Allen Ponak, *Discharge Arbitration and Reinstatement in the Province of Alberta*, 42 THE ARB. J. 39, 40 (1987); Terry. H.Wagar, *The Effect of Lawyers on Non-Discipline/Discharge Arbitration Decisions,* 13 J. LAB. RES. 283, 284-285 (1994).

[26] Thornicroft, *Grievance Arbitration*, *supra* note 3, at 371.

[27] Winkler, *Arbitration as a Cornerstone*, *supra* note 5, at 3.

Research demonstrates that delays in the length of arbitration differ based on the choice of an expedited or traditional process.[28] However, despite this finding, Canadian parties do not use the expedited process to its full potential. Anecdotal evidence suggests that even with the frustration with delays, labor and management remain reluctant to use the expedited arbitration process.[29] Despite the fact that the labor relations and employment law communities have expressed discontent with the current labor arbitration system, research is absent of any contextual policy examination to explain why the number of expedited labor arbitration applications is decreasing. This article dissects factors that contribute to the under-utilization of expedited arbitration including the selection of an arbitrator, expediency, cost, and mandates. The paper also draws on data to discuss what the labor relationship community considers to be the critical features of the expedited arbitration system. Ultimately, we seek to address key research issues including: What are the disadvantages of the expedited arbitration system? How can the system be improved? Can the structure be modified to assist labor and management resolve complex disputes in an expedient manner?

III. THEORY: JUSTICE DIMENSIONS

Organizational justice is comprised of four elements: distributive, procedural, interpersonal, and interactional justice.[30] This study focuses on themes of distributive and procedural justice as it influenced participants' responses. The other two dimensions are not within the scope of this study.

A. *Distributive Justice*

Distributive justice, rooted in equity theory, focuses on perceived outcome fairness.[31] Adams (1996) on perceived outcome fairness.[32] In

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[28] *See* Shannon R. Webb & Terry H. Wagar, *Expedited Arbitration: A Study of Outcomes and Duration*, 73 REL. INDUSTRIELLES /INDUS. REL. 146 (2018) (study demonstrated that the mean delay for expedited cases was 193.34 days and traditional cases 381.58 days).

[29] Generally, participants in the study clearly indicated a preference for the traditional process given disadvantages associated with the expedited process.

[30] Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 425–27 (2001).

[31] *See* J. Stacy Adams, *Inequity in Social Exchange*, *in* 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267 (Leonard Berkowitz ed., 1966).

[32] *Id.* at 272. For detailed explanations of distributive justice, see Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); Robert Folger &

circumstances that involve a court or an arbitration, distributive justice focuses on the outcomes of a decision-making body. Litigants evaluate the outcome's fairness based on an "abstract or principled criterion" and this assessment has a bearing on their overall satisfaction with the judicial experience.[33] Casper, Tyler and Fisher (1988)[34] found that these past experiences influence whether an outcome is subsequently evaluated as "just."

In arbitration cases, the *stare decisis* principle is not strictly required; however, prior decisions are generally highly influential on subsequent decisions. Therefore, grievants with similar cases can expect similar results in arbitration compared to previous cases. However, divergent outcomes, even when the facts are distinguishable, can result in lawyers and grievants feeling that principles of distributive justice were not upheld.

Distributive justice and procedural justice should not be considered trade-offs; instead, the concepts provide "mutual strengthening."[35] Although concerns of procedural and distributive justice have traditionally been treated as distinct constructs, more recent studies acknowledge that they overlap.[36] Cropanzano and Ambrose argue that research should regard the concepts as non-mutually exclusive[37] given the concepts have a strong correlation.[38] Participants in dispute resolution view procedural and distributive justice as highly related because the fairness of the outcome is more salient.[39] However, although the justice dimensions interact with each other, each justice

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Mary A. Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115 (1989); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Plenum Press 1988); Dean B. McFarlin & Paul D. Sweeney, *Distributive and Procedural Justice as Predictors of Satisfaction with Personal and Organizational Outcomes*, 35 ACAD. MGMT. J. 626 (1992); Paul D. Sweeney & Dean B. McFarlin, *Workers' Evaluations of the "Ends" and the "Means": An Examination of Four Models of Distributive and Procedural Justice*, 55 ORG. BEHAV. HUM. DECISION PROCESSES 23 (1993)

[33] Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 486 (1988).

[34] *See id.*

[35] Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176, 182 (2013).

[36] Russell Cropanzano & Maureen L. Ambrose, *Procedural and Distributive Justice Are More Similar Than You Think: A Monistic Perspective and a Research Agenda, in* ADVANCES IN ORGANIZATIONAL JUSTICE 119, 119 (Jerald Greenberg & Russell Cropanzano eds., 2001).

[37] *Id.* at 120.

[38] *See* Neil M.A. Hauenstein et al., *A Meta-Analysis of the Relationship Between Procedural Justice and Distributive Justice: Implications for Justice Research*, 13 EMP. RESP. & RTS. J. 39, 41, 47–48 (2001).

[39] *Id.* at 41.

dimension has a distinct contribution to the establishment of fairness perceptions.[40]

B. *Procedural Justice*

Procedural justice concentrates on the fairness and system evaluation of the selected process.[41] It addresses the proposition that process control affects satisfaction levels and that assessed fairness is independent of decision control (distributive justice). For decades, research has explored participants' evaluations of legal processes where scholars have argued that the participants' opinions depended more upon the process of the legal decision(s) than the decision.[42] Thibaut and Walker (1975) found that retaining control over the process was important to individuals. For example, litigants often seek to influence the decision through indirect mechanisms such as controlling the evidence presented at a hearing.[43] Giving participants a "voice" during the decision-making process positively cultivates perceptions of procedural justice.[44] Many scholars have examined the impact of procedural justice in court settings and have found that individuals' perceptions of the court affect their evaluation of the justice system as a whole.[45] Greene et al. (2010), for instance, found that details as minute as the courtroom atmosphere can influence a participant's opinion of court legitimacy.[46]

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[40] *See* Maureen L. Ambrose & Anke Arnaud, *Are Procedural Justice and Distributive Justice Conceptually Distinct?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 59, 61–62 (Jerald Greenberg & Jason A. Colquitt eds., 2005). *See also* Colquitt et al., *supra* note 30, at 432.

[41] *See* Folger, *supra* note 32, at 108–09.

[42] Ken-ichi Ohbuchi et al., *Procedural Justice and the Assessment of Civil Justice in Japan*, 39 L. & SOC'Y REV. 875, 878 (2005); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 67 (Lawrence Erlbaum Associates 1975).

[43] *See* THIBAUT & WALKER, *supra* note 42, at 72–77.

[44] *See* Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333, 339 (1987).

[45] Carolyn Greene et al., *Punishing Processes in Youth Court: Procedural Justice, Court Atmosphere and Youths' Views of the Legitimacy of the Justice System*, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 527, 537–38 (2010).

[46] *Id.* at 438.

The four elements of procedural justice, as defined by Tyler (2000)[47] and Tyler and Blader (2004)[48] include: (i) participation (voice), (ii) neutrality, (iii) respect, and (iv) trust (Tyler, 2007).[49] First, participation ensures that partakers are able to present their view, in their own words, before an outcome or decision on the matter is established.[50] This is sometimes called the "voice effect"; essentially, parties expect to be able to present their argument to a decision-maker who listens to the argument.[51] Participants in the legal system are positively affected by participation, regardless of the outcome, when they perceive that the decision-maker adequately considered their argument.[52] The voice effect is a widely studied concept in the organizational justice literature.[53] Substantive participation may also create a greater sense of procedural justice by allowing participants to exert a greater level of control over the process.[54]

The second element of procedural justice is neutrality. This requires that the decision maker demonstrate equal treatment to all participants in the legal process. In addition, the individual participant must perceive that the decision-maker is impartial.[55] Notably, neutrality is multi-faceted and requires the court, or arbitrator, to abstain from bias and maintain transparency.[56] It moves beyond an overview of neutrality and extends to consistency regarding decisions and consistent application of the rules across participants and over time.[57] Studies find that providing an explanation about how rules are applied is a helpful component in establishing transparency.[58] Further, judges/arbitrators must base their decision on accurate information to promote the perceptions of neutrality.[59] An opportunity to revisit and correct an unfair

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[47] Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121–22 (2000).

[48] Tom R. Tyler & Steven L. Blader, *Justice and Negotiation, in* THE HANDBOOK OF NEGOTIATION AND CULTURE 295, 300 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

[49] Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007).

[50] *See id.* at 30.

[51] Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation*, 26 GROUP DECISION & NEGOT. 19, 22 (2017).

[52] Tyler, *supra* note 49, at 31.

[53] Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY SOC. PSYCHOL. 1167, 1167 (1993).

[54] *See id.* at 1175; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 116 (Princeton University Press 2006).

[55] Brems & Lavrysen, *supra* note 35, at 180.

[56] *See id.* at 186.

[57] *See id.* at 181.

[58] Tyler, *supra* note 49, at 30.

[59] Brems & Lavrysen, *supra* note 35, at 181.

or incorrect decision is also an important factor in developing procedural justice.[60]

Third, respect is imperative. Individuals report feeling respected when they are treated as a valued member of society.[61] In one review, Greacen (2008) analyzed the academic literature and provided advice to his fellow members of the judiciary.[62] In this review, Graegen addressed justice literature and noted the importance of court participants' treatment.[63] This included judges behaving in a neutral manner, demonstrating concern about the litigants' welfare, treating parties as valued members of society, and ensuring that the parties were able to participate in the process.[64]

Fourth, trust is a component of procedural justice that relates to how an individual assesses the decisionmaker's character.[65] When participants feel shared social bonds and understand authority figures' motives, they are more likely to trust decisionmakers.[66] In the court system, trust relates to whether individuals feel that court representatives, including judges, are making decisions in the interests of the parties and are thoughtfully considering the parties' views.[67]

IV. METHODS

We collected qualitative data by conducting interviews with practicing labor and employment lawyers in Canada. Lawyers were chosen based on their knowledge of the arbitration process, such as through prior representation of clients at arbitration and/or participation in strategic decisions as they relate to grievance resolution and arbitration. The lawyers interviewed represented clients in both the public and private sector and across industries and sectors. Our sample includes participants in jurisdictions with and without the option for expedited arbitration. The lawyers were located in the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador. Since

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[60] Gerald Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, *in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, 42–43 (Kenneth Gergen ed., 1980).

[61] John M. Greacen, *Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts?*, 47 JUDGES J. 41, 42 (2008).

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] Tyler, *supra* note 49, at 29–31.

[66] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING THE PUBLIC COOPERATION WITH THE POLICE AND COURTS 70–71 (2002).

[67] Tyler, *supra* note 49, at 30.

employment laws are provincially regulated, expedited arbitration is not practiced consistently across Canada. This is important, because we wanted to capture divergent approaches to and perspectives about arbitration practices as represented by the lawyers from multiple jurisdictions.

We interviewed 24 participants, of which 19 (79%) identified as male and five (21%) identified as female.[68] Ten (41.7%) were employer-side representatives, while 14 (58.3%) were union-side representatives. We used snowball sampling in our selection process.[69] Three lawyers were contacted, located in Ontario, British Columbia, and Nova Scotia, respectively. Each lawyer made suggestions for potential study participants. The lead author drafted the interview questionnaire, which was subsequently validated by colleagues in the academic field. Consultations indicated that the field of investigation required more information; therefore, additional questions were created. Given the geographic spread and erratic working hours of counsel living across Canada, the lead author conducted interviews by telephone. Each interview lasted approximately 30 minutes.

Our semi-structured interviews were based on open-ended general questions[70] regarding the interviewees' experiences with both expedited and traditional arbitration systems. Given the small size of the labor relations community in Canada, and concern that the interviewees' answers could negatively affect relationships with arbitrators, we did not collect any information regarding the interviewees' specific locales or organization. The interview consisted of fifteen questions that explored the following areas/issues:

a) limitations of the expedited and traditional arbitration processes;
b) experiences with the expedited arbitration process; and
c) suggestions to improve the expedited arbitration process.

V. DATA ANALYSIS

The interviews were recorded and transcribed verbatim by a qualified, experienced research assistant. The first author, who conducted the interviews,

[68] To preserve confidentiality, pseudonyms have been used in place of participants' real names where participants' statements during their telephone interviews are discussed below.

[69] *See* SAGE PUBLICATIONS INC., THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 816–17 (Lisa M. Given ed., 2008) (explaining the snowball technique).

[70] For more information regarding qualitative research methods, see STEINAR KVALE, DOING INTERVIEWS 10–11 (Uwe Flick ed., 2007).

also read all of the transcripts. The large number of interviews created a considerable amount of data. Following transcription, the lead author and the research assistant assigned codes representing general themes to the data. The interviews were coded according to the interviewee's side of practice (management or union) and province in order to assist the researchers' ability to understand the results. A second research assistant further refined codes with the assistance of the lead author.

A. *Research Findings*

We identified four overarching themes relating to the participants' experiences and perceptions of the traditional and expedited arbitration systems. These were: (1) the importance of the arbitrator; (2) the question of expediency; (3) cost of arbitration; and (4) recommendations to improve the expedited arbitration process.

1. *ALL ABOUT THE ARBITRATOR*

The most prominent issue, consistent across management and union-side respondents, was the importance of the arbitrator in the dispute resolution process. Notably, the acceptability of an arbitrator is not confined to labor arbitration; research indicates that arbitrator acceptability is also important in commercial arbitration.[71] There is significant research focusing on arbitrator acceptability in the context of organizational justice factors.[72] Other research has considered the acceptability of international arbitrators.[73] These studies have found that the evaluation of the procedural justice dimension, demonstrated by international arbitrators, was a strong predictor of arbitrator acceptability. This sentiment is likely due to the long-lasting effect of an arbitration decision in the workplace. As decisions relate to individual grievances, the decision outcome is very influential on the individual's financial and emotional well-being. Similarly, when broader decisions are related to contract interpretation, the outcome can have a long-lasting impact in the workplace by establishing or contributing to case precedent.

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[71] *See* Richard A. Posthuma & James B. Dworkin, *A Behavioral Theory of Arbitrator Acceptability*, 11 INT'L J. CONFL. MGMT. 259–61 (2000)

[72] *Id.* (examining the issue of arbitrator acceptability including concepts from control theory, organizational justice theories, and the theory of planned behavior integrated into a framework).

[73] *See, e.g.*, Yongkyn Chung & Hong-Youl, *Arbitrator Acceptability in International Commercial Arbitration*, 27 INT'L J. CONFL. MGMT. 379 (2016) (examining the detriments of arbitrator acceptability).

If union or management disagrees with a decision, they have three choices: (i) have the decision judicially reviewed by the courts, (ii) attempt to distinguish subsequent, similar situations by the facts, or (iii) negotiate the language in the next round of collective bargaining. First, a party that disagrees with the interpretation may apply to the courts for a judicial review of the decision. Case law recognizes the expertise of the arbitrators and applies a standard of correctness or reasonableness.[74] Considering that most decisions fall within the standard of reasonableness, courts are generally reluctant to interfere with an arbitrator's decision. Therefore, the arbitrators' decisions typically stand without interference. The judicial review process itself is rarely pursued, not only due to the low likelihood of success, but also because it further increases the time and cost of the process. A second option for the union or employer is to distinguish similar cases according to their facts. The likelihood of the success generally depends on the language, facts, and case history. A third option is for the parties to renegotiate the contract language in the next round of collective bargaining. However, given that the grieved issue was contentious enough to lead to an arbitrated decision, it is unlikely that the successful party would easily agree to different language.

In determining the importance and acceptability of the arbitrator, two sub-themes became apparent: voice in selecting an arbitrator and perceived quality of the arbitrator. These two issues are explained below.

a. *Selecting an Arbitrator*

Labor arbitrators are consensually appointed to hear workplace disputes in traditional arbitration. However, in expedited arbitration hearings, pursuant to the applicable legislation, arbitrators are typically appointed by a government body.[75] Thus, each option offers different amounts of control in the appointment of the arbitrator. Many participants disclosed that this was a pressing issue for both management and union-side participants. As one participant stated directly: "[O]ne of the frailties of the [expedited arbitration] process of course is that you don't get to choose your arbitrator."[76] Another counsel noted that, "[T]here's a real desire of most lawyers to . . . control that process of appointment."[77] A counsel noted that the process was akin to "roll[ing] the dice."[78] Yet another participant, re-iterating the importance of

[74] *See* Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 (Can.) (clarifying the former process of three standards of review into two standard model).

[75] *E.g.*, Ontario Labour Relations Act, S.O. 1995, c. 1, s. 49(1)(4).

[76] Telephone Interview with Mark Jones (Jan. 9, 2013).

[77] Telephone Interview with Patricia Morgan (Feb. 26, 2013).

[78] Telephone Interview with Oliver Good (Oct. 31, 2012).

the arbitrator selection, stated: "I think choosing your arbitrator is the most important thing that I do prior to the start of the case . . . ."[79]

Elaborating on the topic, the participant stated: "[W]e'd rather have the right arbitrator as opposed to getting whoever you know the Ministry gives you as your arbitrator."[80] Further, another participant noted that "the consensual nature of an arbitrator appointment is lost. And as a result of that, I think that there can be a loss in trust in the process."[81] Reiterated by another participant in Newfoundland: "if the parties . . . don't know the person who is making the decision . . . they rarely have confidence."[82]

In some jurisdictions, namely British Columbia and Manitoba, the absolute appointment was not definitive. For example, a participant in British Columbia said:

> [I]t is a strange process . . . Labour Relations Board appoints somebody for 104 and some of the time they will just appoint somebody in to tell you and you have no say in who it is. However, sometimes depending on who is dealing with the file with the Board . . . who counsel are, the board will call up those counsel and check with them if they are okay with someone and try to get the parties to actually agree as opposed to just appoint someone. Usually people who the parties agree to don't have any availability.[83]

Another British Columbia-based participant stated that "the Tribunal will listen if . . . particularly important case . . . we need somebody who is acceptable to the parties. We need somebody who is experienced who knows the industry . . . because you've got a reputation and a relationship with them [they] will listen to you."[84] Further, in Manitoba there is an unofficial policy that either side, union or management, can veto an arbitrator that they find unacceptable: "if anybody on the list is unacceptable then you get to cancel one name. So that's good . . . that's part of the process."[85] In every jurisdiction

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[79] Telephone Interview with Jane Walsh (Oct. 24, 2012).
[80] Telephone Interview with Fransesco Hernandez (Oct. 12, 2012).
[81] Telephone Interview with Chen Wu (Jan. 16, 2013).
[82] Telephone Interview with Mark Colvin (Oct. 16, 2012).
[83] Telephone Interview with Ming Wang (Feb. 25, 2013).
[84] Telephone Interview with Chen Wu, *supra* note 81.
[85] Telephone Interview with Mark Jones, *supra* note 76.

and regardless of affiliation with management or union, the interviewees agreed that the selection of the arbitrator was important. Whenever input was allowed, even unofficially, participants welcomed the ability to influence the process.

b. *Personal Preference and Arbitrator Quality*

Two important factors used when selecting an arbitrator included: personal preference and general hesitancy about the quality of arbitrators. One participant referred to this as "the potluck of arbitrators"[86] who may be appointed, in which you "look at the list" and determine the "worst case scenario and sometimes it's pretty bad."[87] This sentiment was echoed by another participant: "I'll tell you why I don't use expedited arbitration. I'd be very reluctant to do it because you don't have any control over who the arbitrator is and there are some bad ones out there!"[88] Another participant questioned the outcome: "You're not sure who you're getting, who is the decision maker so that's a bit of a 'wild card.'"[89] One management-side participant stated her apprehension about working with certain arbitrators on "the list"[90]; notably, this same participant observed that she was willing to collaborate with union counsel in order to jointly select an arbitrator.[91] She stated:

> I can think of one arbitrator in particular who is on the [Section] 49 list and I took over a file where somebody else has agreed to him and it was just a horror show from the onset. . . . [T]here are arbitrators on that list I would not agree to in 175 years, why would I take that risk and that's what I've said to unions. I usually use that example 'what if we've got this guy, would you want this guy?' And the union counsel always goes, 'Well no, I guess not.[92]

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[86] Telephone Interview with Jane Walsh, *supra* note 79.
[87] Telephone Interview with George O'Malley (Feb. 27, 2013).
[88] Telephone Interview with Morgan Dale (Jan. 19, 2013).
[89] Telephone Interview with Patricia Morgan, *supra* note 77.
[90] Telephone Interview with Morgan Dale, *supra* note 88.
[91] *Id.*
[92] *Id.*

Similarly, an Ontario-based participant echoed a similar dislike of certain arbitrators:

> [S]o there are some arbitrators who may not be as popular and there may be reasons that they're not too popular, and if they live in your area and you've got a Section 49 then odds are you might very well get that person as your arbitrator. And, in some cases there are some arbitrators that I would avoid like the Plague.[93]

For some participants, their apprehension in having an arbitrator assigned to their case was not just about personal preference, but due to concerns about potential justice. As one participant stated:

> I'm a bit nervous frankly on one level about this . . . jamming stuff through ADR . . . something less than a full hearing and the arbitrator/mediator that comes in . . . there's certain ones that have this reputation. If that's what you want then you ask for them to be appointed. But basically . . . [they] sort of run roughshod and say 'look I don't need to hear this . . . and we'll go out in the hallway then I'll give you a ruling at the end of the day.'[94]

He furthered clarified that, "most of the cases that I bring . . . the unions are quite committed to all of these cases . . . I get nervous about a process which is sort of less than the full deal."[95]

This apprehension was not completely universal across participants. Some of the counsel acknowledged the personal nature of arbitrator preference. In acknowledging the strengths and weaknesses inherent to the arbitrators, one interviewee stated:

> I think all legal counsel have their arbitrators they prefer and arbitrators they prefer to avoid. And . . . working in an office in a

[93] Telephone Interview with Jane Walsh, *supra* note 79.
[94] Telephone Interview with Trevor Tulusk (Oct. 18, 2012).
[95] *Id.*

> group of lawyers, what I found was that every arbitrator that one person prefers, somebody else prefers to avoid, and vice versa . . . That is personal preference.[96]

Another participant had a similarly moderate view in acknowledging the client's role in forming perceptions about arbitrators:

> The inability to mutually agree on an arbitrator is a frustration but not a limitation. There are many arbitrators out there and each have their own strengths and weaknesses or at least their perceived strengths and weakness; some of our clients don't want to use certain arbitrators because of past decisions.[97]

Nevertheless, we found consistent apprehension and reluctance to use arbitrators in expedited arbitration because selection was restricted to a pre-formed arbitrator list/roster. Although some participants were reluctant to discuss this issue for fear of retribution given the close nature of the labor relations community, it is evident that concern about arbitrators was apparent in virtually all of the jurisdictions of our study.

2. *Question of Expediency: "Expedited is Oxymoronic"*

The second theme addressed in the interviews was the question of expediency. Counsel generally reported that they did not believe the expedited process offers a comparative advantage to the traditional process. One counsel indicated, "it isn't something that gives us any advantage [and] expedited is sort of oxymoronic now . . . [since] it's the same length, same duration as a regular arbitration."[98] Further, "because practically speaking there really isn't any difference in terms [of] how quickly it's . . . proceeding to a hearing, my view of the expedited process under the *Labour Code* is that it really doesn't often end up with a decision that much quicker."[99] Respondents based these views on personal experiences with the process by reflecting on recent cases that used the legislative process.

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[96] Telephone Interview with Gerald Mazuko (Oct. 20, 2012).
[97] Telephone Interview with Jaley Smith (Oct. 12, 2012).
[98] Telephone Interview with John Moore (Oct. 30, 2012).
[99] Telephone Interview with Mohammad Patel (Feb. 18, 2013).

Across our interviews, several sub-themes emerged. These included flexibility, legalism, lack of adherence to timelines, and scheduling conflicts.

a. *Flexibility*

A contributing factor causing delays in the process was the inherent flexibility of arbitral legislative interpretations. Several counsel, particularly those located in British Columbia, described the practice of a formal telephone call to initiate the hearing within the requisite time limit even though the actual first day of the hearing was typically scheduled significantly later. One participant argued that this happened upwards of "ninety-five percent of the time."[100]

For unions, who are typically the ones initiating the grievances leading to arbitrated decisions, this is particularly disappointing because it defeats the supposed advantage of an expedited system. Specifically, "the way that it happens here is that the hearing is convened within the statutory time period by telephone and the remainder of the substantive hearing is scheduled, and it happens basically on the same time line as any other process."[101] Another counsel, from Saskatchewan, also reported the same experience. One interviewee recalled only "one occasion where the Union insisted that the hearing . . . start within the prescribed 28 days."[102] A participant from Ontario noted: "[I]n some jurisdictions they . . . rely more heavily . . . on . . . telephone call and then they push off the date."[103] Conversely, in some jurisdictions such as Ontario, the participant noted that, "[I]t's very strict and they really follow the true process."[104] The apparent contradiction in the opinions of Ontario participants regarding the flexibility of the Section 49 process is due to the ability to remove the arbitration from the expedited process when not adhering to the strict timeline. Another counsel indicated that even one-day hearings rarely appear much quicker than traditional arbitration.[105] The participant stated:

> I've had a lot of simple one-day cases that have been referred to expedited arbitration, but they just don't seem to be done any quicker. For some reason . . . they'll start by

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[100] Telephone Interview with Jaley Smith, *supra* note 97.
[101] Telephone Interview with Patricia Morgan, *supra* note 77.
[102] Telephone Interview with Jaley Smith, *supra* note 97.
[103] Telephone Interview with Trevor Tulusk, *supra* note 94.
[104] *Id.*
[105] Telephone Interview with Jaley Smith, *supra* note 97.

> phone and get set down for two or three months down the road and something will happen. They don't seem to proceed any quicker.[106]

Since counsel is often reluctant to address this issue with the arbitrator, the advantage of an expedited process is often lost. The participant related:

> I can recall personally being involved in one case where an arbitrator had been appointed and advised us it was best to start this by telephone. I think what happens is that some of the arbitrators are very well-experienced and very well-esteemed and when they say this is how it's going to be, that's how it's going to be.[107]

b. *Legalism*

Participants noted that increasing legalism in the arbitration system is another factor that decreased expediency. One counsel described a former case in which legal processes escalated the delay:

> See that's part of the difficulty . . . you have the hearing and then get some more of the disclosure and you issue some subpoenas and then you have the continuation of it. I think it was in April or May and the decision was issued in June and that's not very expedited."[108]

Pointing to the negative role of lawyers, that same participant argued:

> You have to exclude lawyers from the process. In real terms that is the issue . . . getting set in a timely fashion because arbitrators that are appointed under the Act will have to assign them in a particular way.

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[106] *Id.*
[107] *Id.*
[108] Telephone Interview with John Moore, *supra* note 98.

> There are so many arbitrators that can hear cases within 20 days, that's not the issue. The issue is the lawyer's schedule.[109]

c. *Scheduling Dates and Conflicts*

Arbitration hearings are generally subject to significant scheduling delays. Rather than consecutive days of hearings, delays mean that the hearings are often held in "dribs and drabs,"[110] which results in an inefficient process for the parties. One participant noted that when scheduling an expedited process, parties "only get one date with an arbitrator and no guarantee of any further dates . . . it gets you 'there' but it doesn't get you to the end of the process, it gets you started."[111]

The interviewees often referred to scheduling conflicts, particularly by lawyers, as delay factors inherent to the conflict. Pointing more broadly to the time conflicts of all parties involved, one counsel stated: "sometimes it's hard to juggle your witnesses . . . especially if you have to get any health, physicians, or professionals of that nature . . . they usually like a bit more heads up than three weeks."[112]

Providing a fulsome description, a counsel for New Brunswick detailed the difficulties in scheduling a hearing within the requisite timeline. He describes scheduling issues, the right to counsel, and the practice of adopting an initiating telephone call that together make the expedited process only "marginally quicker":

> The arbitrator has to meet within 20 days I think with the parties and the way it works in New Brunswick is this, is that the parties, it's a small Bar, they simply go to the same lawyers that they always have been, the employers do and the unions do and it gets slotted in the time frame as any other arbitration. So the arbitrator will give a spiel as to how it's important to do it in an expedited fashion but also recognizes the calendars of the various counsel and recognizes that each litigant to that expedited

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[109] *Id.*

[110] Telephone Interview with Trevor Tulusk, *supra* note 94.

[111] Telephone Interview with Julie Brown (Oct. 25, 2012).

[112] Telephone Interview with Christi Miller (Feb. 26, 2013).

> process has the right to the legal counsel of their choice. And if the counsel is not available, the counsel is not available and what they do is they hold a telephone conference call within that 20 days to comply with the legislation that they have actually held a hearing and then they schedule it whenever the schedule permits. So you might get it a month earlier or six weeks earlier just because the arbitrator 'puts your feet to the fire' and does have that initial telephone conference call that's only marginally quicker . . . I think the intent of it is, you have the hearing within 20 days, you have the full hearing scheduled, but it's just not practical with lawyers involved . . . to do it in that fashion.[113]

Scheduling conflicts generally force participants to be flexible. This appeared to be especially apparent in Ontario where the first day of hearing was generally held to the 21 days stated in the legislation. This is likely due to a procedural rule specific to Ontario in which using a telephone call to commence the process prevents the hearing from being governed by the expedited process. One participant noted that:

> Practically speaking this Section 49 that I'm about to file . . . we're ready to go on that date and we've got circled on our calendar but when the 49 gets filed, the opposing counsel picks up the phone and says 'I'm not available' . . . we're not going to get that date.[114]

Another counsel similarly described the difficulty of adhering to legislated timelines:

> [Scheduling is] challenging, we've had some weekend cases and some moving things around in order to comply with the legislation

[113] Telephone Interview with John Moore, *supra* note 98.
[114] Telephone Interview with Trevor Tulusk, *supra* note 94.

> . . . but with reasonable people on both sides if it can't be done and there's recognition that it can't be done then you move it out of the expedited process . . . It certainly makes it much more challenging because of the timelines in the legislation. If you didn't have the timelines in the legislation then it wouldn't be expedited arbitration so . . . you have to take the bad with the good.[115]

Another Ontario-based counsel noted that the strict deadlines regarding the first day of hearing provided incentive for the parties to work together: "[T]he practice is that the parties waive those deadlines. And if I had a Section 49 and the union wouldn't change the date and I had to have one of my colleagues step in . . . ."[116] However, this same counsel did acknowledge that this could result in "a confidence issue."[117]

d. *Timelines*

Legislated timelines enforce both time to the first day of the hearing and length to the required decision date. However, our interviews indicated that these timelines are waived in certain circumstances. Respondents who work in more than one jurisdiction described the practice of circumventing these timelines by using a phone call to officially initiate the first day of hearing, even when the actual hearing date was days, weeks, or months away. In only one jurisdiction—Ontario—did this practice formally void the legislated expedited process.

When questioned if arbitrators complied with timeline restrictions in releasing their decisions, one counsel based in Saskatchewan stated, "I have never experienced that."[118] Across multiple jurisdictions, participants generally reported personal experience that legislated timelines were not adhered to. Further, many participants expressed reluctance to pressure the arbitrator into enforcing the timelines for fear that this could dissuade experienced arbitrators from wanting to hear cases under the expedited system. One participant described the conflict around timelines as follows:

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[115] Telephone Interview with Mark Jones, *supra* note 76.

[116] Telephone Interview with Jane Walsh, *supra* note 79.

[117] *Id.*

[118] Telephone Interview with Jamie Jones (Feb. 26, 2013).

> I believe what the result would be is [that] the best and most experienced and most senior and therefore most busy and the least desperate of arbitrators are going to be the ones that avoid that roster and the parties will end up getting newbies and people [who] may not necessarily be the best person for the job.[119]

Participants also described their reluctance to pressure arbitrators into adhering to the expedited timeline for fear that this could negatively affect their subsequent decisions. One counsel noted:

> [Y]ou wouldn't . . . object to that unless you want to piss the arbitrator off right at the get-go . . . arbitrators are busy, they have a hard time getting it out in 60 days, they recognize that they deal with it right up front, both parties waive it and you get your decision whenever you get [it].[120]

Another counsel described a similar experience from a recent hearing:

> [T]hey rarely follow the 21 days. I've had up to four or five months. I've actually received a decision last week where an arbitrator reinstated an employee with a two-month suspension. The employer's really angry about it because if the arbitrator had followed the timelines . . . there would have been no back pay but because he took so long there is now an issue of back pay.[121]

Across Canada, parties reported delays in the expedited timeline as a significant deterrent from using the expedited arbitration system. Not only is it an accepted practice to waive timelines out of respect for the arbitrator's busy schedule, but counsel are often apprehensive about making any request that could influence the arbitrator's decision. Without any guarantees to

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[119] Telephone Interview with Brody Wilson (Feb. 19, 2013).

[120] *Id.*

[121] Telephone Interview with Marg Singh (Feb. 20, 2013).

expediency due to these practices, the counsel we interviewed generally agreed that the expedited process normally did not have any advantage over the traditional system.

3. *COST: NOT USUALLY AN APPRECIABLE DIFFERENCE*

Overall, our interviews revealed that cost was not a noteworthy factor for counsel in considering whether or not to pursue the expedited or traditional process. One respondent stated:

> [W]ith every arbitration, cost . . . is always going to be a factor and in some cases it is more important than others. If . . . the arbitration is about money, it's probably a big factor; if the arbitration is about principle, then it's probably less of a factor.[122]

Other respondents stated that they did not believe the expedited process offered any significant cost-savings over the traditional process: "My view is that it's seldom the case that the expedited arbitration ends up being any cheaper than a regular arbitration."[123] A respondent from British Columbia similarly observed: "The cost I don't think would be that different if you picked an arbitrator consensually and it's a one or two-day case, it's going to be a one or two-day case. If it's a 104 application, you just don't have a handle on who the arbitrator will be."[124] Yet another participant agreed that there were no appreciable cost-savings:

> You pay the same arbitrator's bill regardless and the same documents are going to be relevant, the same witnesses are gonna be material to the issue and you are gonna call the same evidence and argue it the same way. It's just a question of how quickly it happens and even there it's not necessarily the case that it happens any quicker.[125]

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[122] Telephone Interview with Gerald Mazuko, *supra* note 96.
[123] Telephone Interview with Jaley Smith, *supra* note 97.
[124] Telephone Interview with George O'Malley, *supra* note 87.
[125] Telephone Interview with Jaley Smith, *supra* note 97.

Cost consideration was a notable factor in two particular situations: (i) when a three-party panel heard the grievance; and (ii) when less experienced arbitrators heard the decision. Not surprisingly, the use of three-panel boards escalates costs. As one respondent stated, "I don't think there is any appreciable cost differential unless the collective agreement has a three-member panel in the arbitration process and this goes to a single arbitrator which is obviously . . . considerably less expensive."[126] A Newfoundland-based participant observed that, "lawyers that have entered the system as arbitrators have. . . driven the cost of arbitration in the province exponentially out of reach."[127] Another respondent from Saskatchewan echoed similar beliefs: "the more experienced arbitrators paradoxically tend to be the most reasonable. Some of the very, very new arbitrators would be just charging the hourly rate that they would charge for legal advice."[128]

4. *RECOMMENDATIONS*

A thorough review of the data from the interviews we conducted demonstrated the prevalence of the following themes: increased legalism, rising costs, and lack of timeliness in the arbitration process. In some cases, differences in practice or legislation altered individuals' perceptions; however, participants were usually aware of practices in other jurisdictions and frequently practiced themselves in multiple jurisdictions. Thus, these recommendations consider jurisdictional differences and suggest modifications that address elements of procedural and distributive justice more broadly.

Our recommendations consider our participants' own experiences with the expedited arbitration process, including whether counsel practiced on the management or union side and their jurisdiction. As one participant noted:

> It certainly does seem that labor arbitration is not the efficient process [it was] designed to be . . . I think we do need to do something to make it more efficient, especially when you see the courts becoming more efficient. It is kind of worrying that labor arbitration is supposed to be at least more efficient than the

[126] Telephone Interview with Mark Jones, *supra* note 76.
[127] Telephone Interview with Mark Colvin, *supra* note 82.
[128] Telephone Interview with Jamie Jones, *supra* note 118.

> court system . . . and that is definitely concerning to me.[129]

Thus, our recommendations include a number of the respondents' own suggestions, including mandates regarding choice of arbitrator, the legalistic nature of arbitrations, costs, and enforcement of time limits.

a. *Selection of Arbitrator*

Participants consistently voiced their desire to have more choice in selecting an arbitrator based on perceived quality and availability. Respondents in jurisdictions that allow for more input into the selection process provided more positive opinions of the selection process than those in jurisdictions that limit choice. Thus, giving counsel some input into arbitrator selection, as long as it does not impede the expediency of the process, would likely be a welcome change. One model to follow could be Manitoba's process, where each side has the ability to de-select one arbitrator from their list. We anticipate that this would likely be well received in other jurisdictions because it gives both parties more choice in arbitrator selection.

b. *Legalistic Nature*

Multiple participants discussed the role of legalism. Although many responses were based on anecdotal experiences with the increasingly legalistic nature of arbitration,[130] the counsel we interviewed did recommend some mandates. One respondent suggested that it would be "beneficial for there also to be a mandated exchange of particulars or documents or some form of pleadings process which we haven't seen in labor arbitration to date."[131] Another participant commented:

> If the process was set up where it required the parties to exchange relevant or potentially relevant documents prior to filing the Section 104 application which is just the straight arbitration provision, that might go a long way in order . . . to allow the things to

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[129] Telephone Interview with Ming Wang, *supra* note 83.

[130] Winkler, *Arbitration as a Cornerstone*, *supra* note 5, at 7.

[131] Telephone Interview with George O'Malley, *supra* note 87.

> actually start and finish within the 28 days but that's often the problem.[132]

Other suggestions were aimed at moving away from the legalistic process itself. Specifically:

> I think the answer . . . is for the employer and the union to have two parallel processes in their collective agreement or in their workplace to deal with grievances. One where there are more formal arbitrations similar to Canada Post. So you have more formal arbitrations where lawyers are permitted and represent . . . their clients and you [go] through the normal course. And then you have more of an expedited process in the collective agreement where lawyers are not permitted because that is the problem.[133]

Other counsel supported reducing the legalistic process. As one participant indicated, "[T]he whole point of the arbitration process . . .when originally established . . .was cheap, quick and resolution without strike or lockout. . . . [A]ll of those principles have been lost, in my personal opinion."[134]

c. *Costs*

Although not a prominent factor, in some cases, cost dissuaded counsel from using the expedited arbitration process. These costs were related to the rates charged by arbitrators, which arbitrators were able to set themselves. In particular, one participant noted that legislation should better address cost overruns by applying principles of procedural justice to cost:

> I think there should be a transaction cost to it. I think . . . there should be some finessing of the cost of the arbitration where the loser has to . . . pay for more of the cost or all of the

[132] Telephone Interview with Jaley Smith, *supra* note 97.
[133] Telephone Interview with John Moore, *supra* note 98.
[134] Telephone Interview with Mark Colvin, *supra* note 82.

> cost or all of the adjudicator's cost or something like that, perhaps to be some deterrent in abusing the system. . . . [I]t's obviously a good thing because you're gonna get quicker justice, speedier justice and . . . less expensive justice, and [those] in isolation are all good things. But there's potential for abuse that . . . can outweigh any of the benefits of an expedited process.[135]

In some jurisdictions, new arbitrators are charging exorbitant fees given that the arbitrators are able to set the fees. Many arbitrators, who are predominantly working as lawyers, charge their hourly billable rate. This results in a higher rate for unions and employers to compensate the arbitrators. Thus, it may be beneficial to legislate maximum fees associated with expedited arbitration to ensure that costs are not subject to overruns. This would provide the parties an incentive to use the expedited process over the traditional model.

d. *General Mandates*

Our respondents also had general recommendations about improving expedited arbitration. One suggestion was that the expedited arbitration process "limit access . . . to discipline cases."[136] Further, some counsel suggested that arbitration awards in the expedited system should be "non-precedential."[137] By adopting these limits, one participant thought that this would fix the expedited process "to get the thing dealt with quickly."[138] Moreover, it would provide a "training ground for new arbitrators."[139] This was consistent with the view that "significant cases are not going to expedited [arbitration] through the statutory processes."[140] These suggestions could have a positive effect on both the expedited and traditional arbitration system. If awards are non-precedential, parties may be less hesitant to use the expedited system. Further, the opportunity for new arbitrators to demonstrate their abilities could benefit the traditional arbitration system as well. In effect, if less experienced arbitrators are able to gain the trust of potential clients, the pool of arbitrators could expand. This could result in more counsel using the

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[135] Telephone Interview with George O'Malley, *supra* note 87.
[136] Telephone Interview with Morgan Dale, *supra* note 88.
[137] Telephone Interview with Mark Jones, *supra* note 76.
[138] Telephone Interview with Trevor Tulusk, *supra* note 94.
[139] Telephone Interview with Chen Wu, *supra* note 81.
[140] Telephone Interview with Oliver Good, *supra* note 78.

expedited system and quicker resolution in the traditional system. That is, if there is an increased number of arbitrators who are perceived as acceptable, the backlog of cases awaiting a few select arbitrators would lesson as the supply of arbitrators increases.

e. *Time Limits*

Consistent with our participants' general complaints about the lack of timeliness in the expedited process, one interviewee specifically noted that ensuring timelines are met would significantly benefit the process. Specifically: "What I would want . . . to see is the legislature mandating particular time limits on . . . the arbitrator getting their decisions out within a certain period of time."[141] Another participant suggested a more fundamental change to the hearing process wherein a "panel of government appointed arbitrators" heard "your whole case—in a row" rather than in "dribs and drabs,"[142] as is consistent with the current system. Notably, this counsel acknowledged the question of resources and acknowledged that some labor arbitrators would be apprehensive about this change in process. Hence, counsel further noted that if "you could apply for an arbitrator for x number of days in a row that would be better."[143] Further, counsel suggested a re-appointment process in which arbitrators who do not comply with time limits are not re-appointed. This would ensure that time limits are enforced, thereby encouraging both management and union members to use the expedited system because they are more confident in the timeliness of hearings and decisions—the chief advantage of the expedited system.

B. *Discussion*

1. *DISTRIBUTIVE JUSTICE*

Respondents consistently described concerns about distributive justice. One concern, in particular, was the fear of being assigned a non-preferential arbitrator under the expedited system. This fear was primarily based on concerns regarding arbitral case outcomes. In effect, participants were apprehensive about being assigned an arbitrator who would be inexperienced or have a history of siding with either union or management in decisions. Ultimately, counsel was concerned that this could lead to unfair

[141] Telephone Interview with Brody Wilson, *supra* note 119.
[142] Telephone Interview with Trevor Tulusk, *supra* note 94.
[143] Telephone Interview with Christi Miller, *supra* note 112.

outcomes. Furthermore, participants—regardless of which side they were affiliated with in labor disputes—all preferred arbitrators with experience in the field. Overall, participants feared that the outcome of certain arbitrators could be "really bad," with one participant noting that there are certain arbitrators she would not choose under any circumstance.

In the case of inexperienced arbitrators, there are few cases that counsel can review to assess the perceived fairness of the arbitrator in their role as adjudicator. Without this information, counsel is arguably less likely to agree to a process in which the perceived quality of the adjudicator cannot be evaluated in advance. It is possible that more experienced arbitrators working in the expedited system combined with better defined normative standards to evaluate arbitrators would reduce the concerns regarding perceived case fairness. In addition, the use of non-precedential decisions would further alleviate concerns that the outcome of cases could have wide-ranging and long-lasting implications for organizations.

Contrary to fears over the outcome of expedited cases, empirical research demonstrates that in at least one scenario—dismissal cases—the difference between expedited and traditional arbitration is not statistically different.[144] This finding is important because it suggests that the choice of arbitration method does not have an effect on the decision outcome. This finding counters many of our respondents' fears about case outcomes and distributive justice.[145] Although this research was confined to dismissal cases, other research points to equitable outcomes between the expedited and traditional systems.[146] This is likely due to the general role of case law in which well-established legal principles form the basis for arbitral jurisprudence. Case law guides arbitrators on precedents which heavily influence subsequent arbitral outcomes.[147] Thus, although the scope of cases that arbitrators hear is expanding, it appears that this has not resulted in any inherently unjust outcomes.

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[144] *See* Webb & Wagar, *supra* note 28, at 155–64 (noting no statistically significant differences were found in the relationship between the arbitral outcome and the chosen arbitration process).

[145] *See id.*

[146] Heather De Berdt Romilly, Law reform of the arbitration process: A comparative evaluation of conventional and expedited arbitration in the Province of Ontario and Nova Scotia (1994) (unpublished LL.M. dissertation, Dalhousie University) (on file with Killam Library, Dalhousie University).

[147] *See* DONALD J.M. BROWN & DAVID M. BEATTIE, CANADIAN LABOUR ARBITRATION 1:3100 (5th ed. 2019).

2. *PROCEDURAL JUSTICE*

The participants we interviewed all discussed elements of procedural justice within the expedited arbitration system. All four dimensions of procedural justice[148] —voice, neutrality, respect, and trust—were influential on the responses of interviewees. Specifically, counsel noted concerns about choice in the arbitrator selection process and apprehensions about legislated timelines. This is consistent with previous research finding that perceptions of procedural fairness in trials are strongly determined by a party's sense of control.[149] Many participants voiced distresses about the lack of "control" in choosing their preferred arbitrator in the expedited system. A second concern was the practice of circumventing legislated timelines in the expedited system by holding an initial hearing via telephone days or weeks before the true commencement of the hearing. Counsel generally agreed that this violated the "spirit" of the expedited process. However, counsel reported feeling uncomfortable about pressuring the arbitrator to adhere to legislated timelines out of fear that this would influence the arbitrator's subsequent ruling.

In addition, some participants questioned whether the expedited timeline itself could violate procedural justice. Specifically, some respondents noted that the short timeframe of the expedited process may require clients to choose non-preferential counsel based on their availability rather than expertise. Put another way, strictly adhering to expedited time frames may not give the party's preferred legal representation enough time to prepare for the case. This would force the client into hiring a different lawyer based solely on their availability, which would likely negatively affect choice of legal representation and perceptions of voice.

Many of the respondents' concerns and recommendations were ultimately motivated by concerns about neutrality. Some counsel had prior experience with the expedited system whereas other participants simply hypothesized about potentially unfair outcomes. One concern was that arbitrators are often former counsel themselves who were aligned with either labor or management when they were practising law. Hence, our respondents voiced concerns that arbitrators could have a bias towards the side they were previously aligned with. In other cases, respondents were concerned that arbitrators may be inexperienced and such arbitrators would not have many cases for counsel to review in assessing neutrality, leading to skepticism about perceived quality and fairness. Both scenarios made our participants cautious about using the expedited system in which they do not get to participate in the arbitrator selection process.

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[148] Tyler, *supra* note 49.

[149] THIBAUT & WALKER, *supra* note 42, at 72–75.

Additional dimensions of procedural justice include respect and trust. In the traditional arbitration process, counsel establish a relationship through successive meetings over time. However, there is little opportunity in the expedited system to build a relationship prior to a hearing. In some instances, it was clear that the arbitrators and counsel had negative past experiences with certain arbitrators. However, in most cases, our respondents simply feared working with an arbitrator who was unknown or inexperienced. These findings are consistent with research that stresses the importance of relational factors in establishing procedural justice.[150] Without the opportunity to develop trust and respect, many respondents felt that procedural justice was impaired.

The concept of procedural justice may be even more important given that there is no meaningful way to revisit issues considered during arbitration. Unlike trials where there is a well-defined appeal system, arbitration decisions are typically not appealed.[151] The arbitration system has minimal opportunities for judicial review, which means parties on both sides desire to receive a favourable judgment from the onset. This is consistent with research finding that individuals using arbitration processes emphasized the need for review.[152]

One specific recommendation that emerged from our interviews was the need to increase the number of non-binding decisions in the arbitration system. Not only could this enable counsel to build trust with the arbitrator, but it could ultimately result in a larger pool of arbitrators. This would essentially allow organizations to test out new arbitrators without the fear of long-lasting consequences. These decisions would allow arbitrators to demonstrate neutrality and increase parties' perception of control and choice in the selection process. If this leads to an increase in arbitrators, it would also favorably affect timelines and increase perceptions of fairness in the expedited system. The perceptions of fairness would increase due to the ability to review past cases of relatively new arbitrators.

Not all participants agreed that the expedited system was more likely to violate notions of procedural justice. Some participants agreed that the failure of the expedited system to be timely actually increased perceptions of procedural justice; that is to say, some participants noted that the number of hearing days was essentially the same between the traditional and the

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[150] LIND & TYLER, *supra* note 32; Ohbuchi et al., *supra* note 42; THIBAUT & WALKER, *supra* note 42.

[151] For instance, in 2018–2019 the Ontario Labour Relations Board reported only 13 new applications for judicial review. ONTARIO LABOUR RELATIONS BOARD, ANNUAL REPORT 2018–2019 31 (2019), http://www.olrb.gov.on.ca/english/AnnualReports/OLRB-AnnualReport-2018-19.pdf.

[152] Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 51 (2011).

expedited system. Others stated that lack of voice in selecting an arbitrator was not a concern in the expedited system. It was also argued that the number of documents, materials, and witnesses were not affected by the choice of arbitration venue. This opinion is consistent with theories predicting that individuals will be more satisfied with an outcome and procedure when given an opportunity to present information.[153] These respondents evaluated their perceptions of the dimensions of procedural justice in the expedited system in comparison to the traditional arbitration system.

3. *EXPEDIENCY*

Participants generally expressed the view that the expedited system did not offer a quicker resolution than the traditional arbitration process. However, studies have consistently found that the expedited arbitration processes are, in fact, more expedient than traditional arbitration processes.[154] In fact, research demonstrates that there is a statistically significant difference between the duration of expedited and traditional arbitration cases in both the pre-hearing and post-hearing stages as well as in its cumulative duration.[155] In particular, the expedited system provides a speedier resolution to cases involving termination grievances.[156] This research was supported by other statistical research on arbitration delays in both the expedited and traditional arbitration systems, which similarly found that expedited systems provided a quicker resolution of the grievance.[157] The studies produced by Webb and Wagar[158] and Curran[159] suggest that counsel's reluctance to use the expedited process due to these perceived time delays may be unfounded since literature indicates that the expedited system does, in fact, offer the parties an accelerated dispute resolution process.

4. *LIMITATIONS*

The study included a number of limitations. First, the respondents were recruited using a snowball method in which they were self-selected and willing to discuss their experiences with arbitration. This selection method may potentially exclude some individuals. A second limitation was that the

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[153] THIBAUT & WALKER, *supra* note 42, at 72–77.
[154] Webb & Wagar, *supra* note 28 at 156–57.
[155] Webb & Wagar, *supra* note 28, at 155–64.
[156] Webb & Wagar, *supra* note 28.
[157] Curran, *supra* note 8, at 647.
[158] Webb & Wagar, *supra* note 28.
[159] Curran, *supra* note 8.

sample was male-dominated; however, this generally reflects the ratio of male and female lawyers practicing labor law.[160] Third, the sample size was not large enough to conduct multivariate statistical analysis.

VI. CONCLUSION

The study provided insight into union and employment counsels' perceived concerns about the Canadian expedited arbitration system. Counsel has consistently voiced misgivings about the expediency of the labor arbitration system and this issue has attracted academic attention. Our study complements the newly emerging quantitative work assessing arbitration decisions and delay.

The participants provided a detailed assessment of their experiences with the expedited arbitration system. Respondents noted concerns over the availability and selection of arbitrators. This was a pressing issue for individuals where the apprehension was based on the availability and quality of arbitrators. These trepidations appeared rooted in distributive and procedural justice. That is, concerns rooted in distributive justice appeared to be related to the desire to have fair and appropriate decisions. Participants suggested that the arbitrators in the expedited system often lacked experience or the neutrality to provide fair awards. Anxieties regarding issues of procedural justice surrounded issues of voice, neutrality, respect, and trust.

These various hesitations could be addressed by improvements to the expedited system. Perhaps the single most important change that could motivate counsel to adopt the expedited system would be more voice opportunities, particularly in terms of arbitrator selection. Furthermore, non-precedential decisions would give inexperienced arbitrators an opportunity to establish a base of neutral decisions and establish relationships with counsel on both sides. As relationships develop, anxieties related to trust would diminish.

Participants also expressed concerns related to the expediency of the process. Specifically, counsel expressed the view that the process was not more expedient than the traditional process. Although research has proven this to be an incorrect perception,[161] some recommendations would improve the perception of expediency in the expedited system. Specifically, counsel agreed that the use of a telephone call to initiate the start of hearings was a false start. Ensuring that the actual first day of hearing begins within the legislated

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[160] CANADIAN CTR. FOR INCLUSION & DIVERSITY, DIVERSITY BY THE NUMBERS: THE LEGAL PROFESSION (2016), https://ccdi.ca/media/1391/20180125-dbtn-qualitative-research-final-updated.pdf.

[161] Webb & Wagar, *supra* note 28, at 157–61.

timeframe would significantly improve the perception of expediency—which is, of course, the chief advantage and goal of the expedited system.

Although counsel also assessed cost concerns, most noted that the expedited process generally offered the same opportunities to the parties as the traditional processes. As such, cost is not typically impacted except in traditional arbitration cases that are extensively lengthy (which generally increases costs). Ultimately, these were lesser concerns that could be addressed by regulating costs and fees in the expedited process to ensure that they are not prohibitive.

These experiences, expressed by counsel across Canada, provide policy makers with an opportunity to respond to suggested improvements to the system. These suggestions speak to concerns about distributive and procedural justice by providing the parties an opportunity to address voice, neutrality, respect, and trust. Improvements such as increased input into the selection of the arbitrator and better supporting the development of relationships between counsel and arbitrators would likely increase the use of the expedited system. If the expedited system is used to its full potential, this should ease the backlog in the traditional system and ensure that management and labor receive timely decisions.