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Unresolved Issues in Public Sector Bargaining in the 1980s

A.W.R. Carrothers

The paper falls under four main heads: 1) the environment of education in Canada, past, present and future; 2) Public Service collective bargaining at the national level, including some observations on collective bargaining for teachers, keeping in mind the special interests of this audience and your interest in the general scene, at least for purposes of this early session; 3) options in the resolution of conflict; here I propose to comment first on characteristics of third party intervention, particularly as they may lead to binding arbitration, and then make comments and criticisms on emergency arbitration. There then follows a conclusion the brevity of which will leave you in a state of disbelief.

THE ENVIRONMENT OF EDUCATION

Education in the 1960s

I believe it was the first Annual Report of the Economic Council of Canada in the early '60s which presented the plinth of Education as the great hope for the future of Canada, particularly in terms of the economic advantages it offered and the spin-offs — if that cliché was then in use to classify derivative or side effects which may not always clearly be anticipated and accounted for — of social well-being which those advantages portended. The presentation of these expectations coincided with political activity on the part of college students which, at its most serious moments, sought to radicalize post-secondary institutions as a first and noble step in the pursuit of radical social transformation. We know that heads were broken, heads rolled, lives were lost and courses of lives were permanently altered. The institutions did not become outposts of radicalism, because they were not about to be deprived of their essential conservatism.

But at the same time, governments were presented with two critical problems which were inevitable, in any case. One was the reorganization of educational structures to reflect current thinking on the twin issues of autonomy and accountability; and the other was the confrontation or rising costs, demands and expectations.

These explosions of actions, ideals and public reality — public mood may be a more accurate description, but not a passing mood — presented universities with problems, some of the more agonizing of which were (1) institutional responsibility for student behaviour; (2) the development of

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programmes to serve the urgent demands of students; (3) hiring of faculty — some unqualified and some of them unqualifiable — to cope with the turmoil of programmes and enrolments; (4) the development of forms of university government which would preserve their autonomy within a suitable framework of public accountability, while developing a style of internal decentralization appropriate to a multiversity without being caught in the snare of power without responsibility or accountability without control; (5) questions relating to the special field of research and the problems of identifying and rationalizing the appropriate roles of universities, governments and the private sector; and (6) trying to cope with rivalries between the fraternal twins of access to education and access to jobs, a conflict which nurtures the very roots of the disillusionment in the educated youth of the work force. That, it may be well to remember, was a public legacy from the early '60s.

Within the school system itself protrudes the Hall-Dennis Report, updating the liberal philosophy of John Dewey of some thirty years' impact. Of even greater import was the Parent Commission's Report, which threw open the doors of learning for generations of beneficiaries in the Province of Quebec, and became a major event in the strategy of the Quiet Revolution.

One thing was known: throughout, we had demographic information about the baby boom of the early 1950s and the population bulge that hit the schools by the end of the '50s and the universities by the end of the '60s; and now the current minus population growth and population shifts that are causing the closing of schools in some areas and the construction of new institutions in so-called dormitory suburbs. You know better than I what this and a lot more mean for the teaching profession.

Implications of the 1970s

I turn now for a moment to the 1970s for clues that might lead us into bargaining issues relating to the 1980s. I shall be briefer here because we are all closer to the events.

I enumerate them.

- At the beginning of the '70s, there was a switch in public attitudes to education which coincided with (a) a falling enrolment, (b) rising educational costs which, projected only a few years, put them out of sight, and (c) a lowering of education as an item of public priority. There was a reinforced awareness of the relevance of the question of "the relevance of education for what?"
- By 1975, the economy was in the midst of stagflation; people were planning their lives on how to get what they wanted now and to pay for it in cheapened dollars; and the anti-inflation programme came down upon us. (In 1974, in an address to a gathering of Federal public servants involved in the collective bargaining system, I suggested that wage and price controls were on their way like a Sunday punch. The audience protested that wage controls would be inequitable, and I ventured the surmise that in the eyes of the decision

makers equity would give way to efficacy. The audience then sought to hold me up by the hair as though I were a streetcar conductor personally responsible for the increase in transit fares).

- There was a marked change in student attitude: students were now more serious about their studies than their predecessors of a few short years ago; there were more conformist; breeding and raising children was not high on their scale of demands, and governments were developing a much broader and, in my opinion, a much healthier range of educational offerings at the post-secondary level, providing a choice of realistic opportunities in competition with the demonstrably elitist system of previous generations, and competing for limited educational dollars and for public praise. Those were the days of the dreadful slogan "More scholar for the dollar", and the educational politicians meant it.
- This was the decade also in which the message of the demographers started to get through. It was a simple matter to project the existing population configuration for a couple of decades, and with a bit of imagination to project the rate of live births. Demographers expected the fertility rate, as they call it (the French term «natalité» at least defers to the termination of pregnancy), to be less than required to reproduce our own kind — to maintain Canada's population level without a net immigration of something around 100,000 persons a year. As a footnote, which I promise you is figurative only, it may be observed that the revenge of the cradle had come to an end. The birth rate in Quebec dropped from the highest to the lowest in Canada, and Quebec's population as a percentage of Canada's as a whole dropped measurably. Few people seem to recognize the significance of this phenomenon in current manifestations of the continuing crisis of national unity. But I encountered it personally at the senior political level, and it was articulate and specific.

You know the litany of reactions among educators at all levels: (1) how to maintain or raise the retention rate of students in the educational system; (2) the broadening of programmes; (3) the advocacy of smaller classes; (4) the use of educational buildings for broader community purposes with the development of new roles for educators. These are but a few, and they are nurtured by the devil-god of economic insecurity.

Implications for the 1980s

What are some of the implications of the foregoing for the 1980s?

We seem to be heading for continuing stagnation; economic activity seems to be brighter in the area of takeovers than in economic growth. The population projections show a configuration for the next decade based on declining enrolments that will perpetuate the threat of economic insecurity in the educational profession. Political dissention can be expected to continue as a significant factor in our lives in general and in the field of education in particular.

What are some of the implications for collective bargaining?

Many people sense a growing public disaffection with the right to strike in the field of education, strating particularly with a sense of the victimization of the young, and spreading out to include parents, taxpayers in general, and governments who feel their priorities being dictated by the system. School boards and other governing bodies are being regarded as major trustees of public funds and the public interest in education, combined with a tragic erosion of the teacher as a committed prvider of an essential public and human service.

We know also the tensions that are being brought to the bargaining table, some a quite foreseeable inheritance from the anti-inflation programme. I am thinking of the pressures created by claims to catch-up, the resulting whip-sawing and leap-frogging, and the phenomenon of income compression and inversion which are clear disincentives to accepting positions of responsibility and leadership. Turnover at senior administrative and policy-making levels can be foreseen, with loss of continuity, loss of institutional identity, and loss of a sense of community, a quality which heretofore has placed a special and prideful mark on the world of education.

We know that it will be no solution if, in confronting these unpleasant realities, teachers were to become demoralized, for that would erode their commitment, impair performance, and prejudice their students.

In search for ways and means for the effective management of these problems, I turn now to more specific topics, starting with the model of public sector collective bargaining at the national level.

PUBLIC SECTOR COLLECTIVE BARGAINING AT THE NATIONAL LEVEL

Characteristics

The main system of public service collective bargaining at the national level has a number of important characteristics, three of which I wish to emphasize here.

- Unions have an opportunity at regular intervals to opt for the right to strike or for terminal binding arbitration;
- The Public Service Staff Relations Board can and does designate employees the maintenance of whose services is considered essential to the public interest;
- There is very limited access to the courts for judicial review.

As to the first, initially most public service unions opted for arbitration. In the mid '70s, for reasons which students of the system are still exploring, a number switched to the right to strike, but with no consequent appreciable impact on the delivery of essential services to the public. Some have since switched back.

As for the designation of employees, which is designed to continue essential services in the public interest, the process has severe critics. The harshest criticism is that designated employees are certified compulsory strike breakers with union tickets.

As to the limitation of access to the courts, that is typical of modern labour legislation; and I have the impression from reading the jurisprudence and the literature that the courts consider themselves the beneficiaries of the constraints.

Expedition

A point that is raised strongly in favour of interest arbitration under the *Public Service Staff Relations Act* is that it is expeditious. Let me list the main reasons:

- The system is voluntary;
- The number of issues that may be arbitrated is very limited;
- The statute provides criteria for the guidance of arbitrators and hence for the parties in the negotiation of items that may go to arbitration;
- The application of the criteria is backed by extensive data provided by the Pay Research Bureau, an independent body attached to the Public Service Staff Relations Board;
- Certain information relating to the criteria is required of the parties in advance of the arbitration and is available from the Pay Research Bureau;
- The process tends to be normative or quasi-judicial, applying standards of norms to data to reach an award, as distinct from being accommodative, or seeking to function as an adjunct of collective bargaining and involving the parties as intimately as possible to reach an award acceptable to them;
- No reasons are given;
- The process is backed by a substantial administrative infrastructure;
- There has now been 13 years' experience with the system;
- There are few and sophisticated unions and there essentially is one employer, the Treasury Board. This last point is made in contrast with the private sector, not with teacher arbitration processes.

Criticisms

The principal criticisms of arbitration in the Federal public service are almost a mirror image of the characteristics that make it expeditious:

- The system should be more voluntary;
- The range of arbitrable issues is too limited both by the statute and by a conservative arbitral interpretation of "disputes";

- Pay Research Bureau data tend to be out of date in inflationary periods;
- The arbitration board should not dictate the information which it considers relevant to the application of the statutory criteria;
- The criteria are both too confining and too open-ended, leaving too much discretion in the arbitration board;
- The inference is that the arbitration board should be more accommodative and less normative in its approach;
- Reasons should be given;
- Treasury Board tries to impose “its way of doing things” in the determination of relevant information;
- There is little or no room for innovation;
- Awards tend to be conservative and tend to favour management;
- The process tends to shift the scene of action from the bargaining table to the arbitration hearing;
- Parties who have been exposed to arbitration tend to become recidivists, what I later identify by the term the “narcotic effect” of third party intervention;
- The arbitrators themselves tend to present an upper middle-class profile and are remote from the work place.

Response

I offer the following in brief reply, not as a refutation, but as a response.

- Arbitrators are charged by statute with applying the policy of comparability.
- It is essential to the system to ensure that information is useful. By way of analogy, if you are shown a photograph of a boy on a playing field, surrounded by other boys in identical clothing, with his foot out, and with a ball off the end of his boot, you may guess that they are playing football. If you are shown a series of stills that represent the ball approaching and leaving the boy’s boot, you may be able to surmise where the ball is going. If you are shown a motion picture of the incident you may have an opportunity of understanding the game. So it is with cross-section comparisons and trends of data in the game — the war game? — of disputes settlement (I don’t care if you compare fifth quartiles, if the trends are accurate).
- Centrifugal forces are built into the process of interest arbitration, and they must be held in check.
- If an arbitration board is to be accommodative, one must recognize the time and expense which the process involves, and must be

prepared to pay those costs; furthermore, the process requires thorough understanding by the arbitrator and the parties.

- Reasons are not given because a tripartite board may agree on an award but not on reasons.
- If the system is not conducive to innovation, and if unions seek innovation — or breakthroughs — within the system of arbitration, as distinct from the potential use of the strike, it should not be surprising that on a count of issues the awards favour management.
- Depending on one's concept and assessment of conservatism, the system and its results may be conservative; but they may be about as fair as third party intervention will allow.
- The Federal public service embraces the so-called "common man" through to the most sophisticated professional. One could easily staff half a dozen universities from the present Federal public service, to use a phrase of Ernest Bevin's, from the dustman down to the Duke.
- Unions still use arbitration, opting for it overwhelmingly — in over 80% of the cases.
- There is a recognized danger of substituting numbers for judgment, to produce bargaining by computer.
- There is also the danger of pulling oneself up by one's bootstraps, through the overuse of arbitration resulting from what students of the system call the chilling and narcotic effects of intervention.

Federal influence

It may strike you as ironic that while 90% of Canada's labour force falls under the jurisdiction of provincial legislation for collective bargaining purposes, the Federal model of interest arbitration is so influential. In addition, two Federal reports address the subject of disputes settlement. First, the Prime Minister's (Woods) Task Force on Labour Relations of 1969 recommends special processes for addressing emergency disputes. The text of that report is now forming a model for provincial legislation. The second is the report of a Commission of Inquiry, which reported in 1979, appointed by the Federal Minister of Labour to advise on the management of problems relating to redundancies and layoffs in the work force. The Commission, tripartite in structure, came down single-mindedly in support of a co-operative approach among employers, unions, employees, and government services in addressing these problems, to develop a programme to manage the problems so as to minimize their impact. It was not a case of latching onto models from Western Europe, where the union movement is more securely accepted as part of the socio-economic structure; there is clear evidence in this country that such co-operative endeavours are working, and in major industries. This country has had five Ministers of Labour since the Commission was appointed in 1978. But apart from legislative reinforcement, I reckon it may take half a decade, and I may be unduly optimistic, before this co-operative approach will have an observable impact on at-

titudes in labour-management relations in general and collective bargaining in particular. And recessions will doubtless produce setbacks.

The Federal influence has always been strong. It started at the turn of the century, under William Lyon MacKenzie King. When the Privy Council in 1925 found Federal labour laws unconstitutional as falling within provincial jurisdiction, many provinces then adopted those laws as a model. The same thing happened in 1947 when the Federal Government introduced a post-war labour code and left it for a year as a Bill, while many provinces adopted its main features as their own.

Important provincial innovations have surfaced in comparatively recent years.

Relationship to Collective Bargaining for Teachers

What is the relationship of all this to collective bargaining for teachers?

I want to make two brief points.

To begin with, the Federal system is a model from which much can be learned, to accept and reject. In this regard, I should like to comment on the system of teacher arbitration in British Columbia. It is compulsory. It is based *de facto* on comparability. There is agreement on criteria and data. The parties are sophisticated. There are rigid time constraints. The issues are limited. It has been observed that the system works because the results are acceptable, whereas in the arbitration of grievances the results are acceptable because the system works.

Second, I venture the view that some difficulties in teacher collective bargaining stem from the dual role of your organizations. Teacher associations were first recognized by provincial legislatures and granted union security as a means to preserving educational standards. They became collective bargaining agents as collective bargaining took hold as social policy.

When a school board, which may claim to be as close to the grass roots of educational policy as the association is, looks across the negotiating table, does it see the protector of educational standards, or does it see a collective bargaining agent? Can it see both? It is not unheard of for a profession to have two organizations: one essentially an accrediting and disciplining body concerned with matters of standards, competence and ethics, and the other a collective bargaining agent "pure and simple".

ARBITRATION AS AN OPTION IN CONFLICT RESOLUTION

Is, then, arbitration a credible option in conflict resolution as it relates to resolving issues in public service collective bargaining in the 1980s?

As you know, collective bargaining and the right to strike are widely accepted public policy as a means to social justice and as an instrument of social and economic control. Governments move against it only when the public interest in the performance of service overwhelms the public interest in the right to act in concert and to withdraw services. Yet the record of *ad*

hoc legislation in Canada imposing arbitration in place of the right to strike is impressive. The growing presence of or interest in standing legislation in the area of emergency disputes should be noted, as it may relate to both the public and the private sectors of our socio-economic system.

The right to strike in teachers prevails today in some form in all but three provinces. But whatever may be the recommendations of the Ontario Commission of Inquiry into Teacher Bargaining, one may surmise that it was not appointed with the object of preserving the *status quo*.

I turn, therefore, to making a few comments about some characteristics of third party intervention leading to binding arbitration, and to a consideration of emergency arbitration.

Characteristics of Third Party Intervention leading to Binding Arbitration

GENERAL

- In our society, third party intervention in the settlement of collective bargaining disputes is very much a second-best solution to independent settlement by bargain and agreement.
- Interest arbitration is not limited to the public sector, and occurs only where the right to strike loses out in the political arena. Who is to decide to invoke the process? The parties? A government agency? Parliament? The Executive?
- In the public sector in Canada, there is a considerably greater right to strike than in the United States. The impact of arbitration on the collective bargaining process therefore has a character of its own, for there is not the same dependence on the process, and the experience of others ought not to be assumed uncritically to have application here. What the process has in common in the two countries is that it has become an acceptable alternative to work stoppage and to unilateral action by employers and governments as employer.
- Where third party intervention does occur, it seems to be most enlightened when it is regarded as an integrated part of collective bargaining, as ancillary to the process, or accommodative in nature, imitative of collective bargaining as far as may be possible.

Having uttered a note of caution, I should like to refer to two processes of third party intervention with which there has been considerable experience in the United States. They may be considered generally appropriate to the management of collective bargaining problems in the 1980s and to teacher disputes in particular.

Med-Arb

The first is known colloquially as “med-arb”, and is a combination of mediation and arbitration. Its prototype was known euphemistically as “mediation to finality”; modern labour relations philosophers probably would like to call it “mediation to accommodation”. The process is reasonably straight-forward, if sophisticated. The “intervener” starts as a

mediator and uses his talents to narrow the issues and bring the parties into agreement. Where agreement does not result, within such time constraints as may prevail, the mediator then becomes an arbitrator and makes a binding award.

The mediator has special leverage in that he ultimately has power of arbitration; the parties are not likely to give short attention to a proposal for settlement. It is equally important to note that the arbitrator is seized of information obtained in the confidentiality of mediation processes, without the knowledge of the other party and without probative evidentiary techniques.

Two conclusions should be noted. First is that the process requires unqualified confidence in the mediator and in the total process, if there is to be the candor and flexibility to make the mediation process work. Second is that the use in the quasi-judicial process of arbitration of evidence received in confidence in mediation, to the potential prejudice of either party, raises an important question of "due process". In my view, if med-arb is to be used in this country it should be supported by the Legislature (or Parliament) as public policy and spelled out accordingly in legislation.

F.O.S.

The second method of third party intervention with which the United States experience may be enlightening is final offer selection, or F.O.S., sometimes known as forced choice arbitration.

You are probably quite familiar with the process, because it is provided as an option by legislation in Ontario, and has been used a number of times at the University of Alberta. It may have appeared elsewhere in Canada.

The Ontario scheme is a typical model. The parties deliver their positions to the "Selector", who functions as a kind of postal exchange at this point, to pass on the respective positions of the parties. The parties then prepare their final offers on each item in dispute. The Selector, presumably after a hearing in which the parties defend their positions, must select one package or the other, in total.

I have strong reservations about F.O.S., for three reasons: (1) it is based on fear; (2) there is no room for any real intellectual exercise of judgment between right and wrong or, more properly, between competing rights and claims; and (3) there is a palpable risk of bad spin-offs or side-effects.

- As to the element of fear, it is quite clear that the object of F.O.S. is to make each party move toward the centre and hopefully settle the dispute without third party intervention out of fear that it will lose the selection. I find it very hard to reconcile the blatant use of the sanction of fear in the process of third party intervention in the settlement of labour-management disputes with the term public policy. The element of fear may intrude into any process, but that is different from deliberately building it into the process from the beginning.

- As to the exercise of judgment, the Selector may, on the basis of reliable and cogent data relating to each item in dispute, conclude that his judgment dictates a reconciliation of the issues on terms which neither party proposes in its final offer; that intellectually uncomfortable position of the Selector is aggravated by the fact that he must select a total package.
- As to the bad spin-offs, the Selector may decide to favour the package of one party because its position on Item One comes closest to the arbitrator's judgment. The arbitrator may in advance decide that item to be the critical one, or he may reach that conclusion after examining the offers and concluding that the position of the other party on that item is so far out that the Selector cannot underwrite it. There may be four more items on which the arbitrator may prefer the position of the second party, but which, according to the system, must fall to the first. The Selector may thus decide that it is the lesser of two evils to allow the first party to win the pot on one good position and four bad ones than to allow the second party to win on an unacceptable position on the first item although it is the more meritorious on the next four. The parties are then left to live for the duration of the collective agreement with inequitable results in four issues and to try to straighten out the mess in the next round of negotiations. The process, as I understand it, especially with the feature of "winner take all", fails utterly to leave room to take into account that there can be sensitive trade-offs within an issue and between issues, as I have already observed.

That is why, by way of the above example, I have on other occasions referred to F.O.S. as "the-least-lousy-position arbitration", and that is why I have difficulty in reconciling the elements of fear, chance and inequity with the term public policy.

Incidentally, an article written not too long ago on the University of Alberta experience indicates that over a period of years (the author uses the term "inter-temporal"), the Selector favours one side on one occasion and the other side the next. Perhaps the system does equity, or performs industrial justice, over time by balancing inequities.

A variant of the example given above is to allow the Selector to choose item by item. Another possible variant would be to allow the parties to review their positions and freshen their offers after each selection is made.

Ghosts in the Arbitration Process

I should like now to address the topic of ghosts in the arbitration process as a characteristic of third party intervention.

There are two circumstances in which one can feel the presence of ghosts.

- The first is at the bargaining table and in arbitration, especially where an accommodative approach is taken to arbitration, where one or both parties are accountable to principals who have so instructed the negotiators or representatives that they have little, if

any, room to manoeuvre. The ghost may be less obvious on the employer's side, but that may be because, by the nature of union politics, the union's instructions may be the product of public or quasi-public meetings; further, in bargaining, the negotiators hold in reserve the ratification vote and their own recommendations to the membership on the acceptance or rejection of an offer. But the employer's negotiators or representatives may also have their hands tied and may have to seek new instructions from their principals from time to time. Not every request for an adjournment should be assumed to be a response to a call of nature.

These ghosts affect the positions of the parties and what is presented to the arbitrator.

- The second circumstance of the presence of the ghost is in the impact of the decision of the arbitrator. Assuming that arbitration is binding at law, and assuming that the arbitrator makes a decision on cost items, his decision affects public priorities, including the quality of education, through the allocation of limited public resources.

For example, a salary increase in a school board arbitration affects the allocation of funds by the school board and consequently the configuration of budgets of the schools within the district. Where moneys must be recovered from a Municipal Government, the Municipality's priorities are directly affected. Where the funds are raised by an increase in the mill rate, the taxpayers' priorities are affected. Where moneys are recoverable by the school board from the Provincial Government, that Government's budgeting is affected, and within the Ministry of Education and among Ministries in the competition for funds. That, in turn, can effect claims to tax transfers from the central government and to its exercise of control over its funds available for research and development, two functions critical to the economic welfare of the country and functions performed to a very high degree in educational institutions that are creatures of provincial legislation. (I observed on another occasion and in another context that Canada proves it is possible to govern a country which is impossible to govern.)

It may be observed that arbitrators' decisions on that same issue doubtless affect priorities of domestic spendings as well.

Arbitrators are quite aware of their ectoplasmic qualities; but that awareness may do little more than heighten their sense of the nature of the assignment they have undertaken. Observers of the phenomenon of interest arbitration should not overlook it.

Emergency Arbitration, Comments and Criticisms

- Emergency arbitration tends to be *ad hoc*, has been used extensively in Canada, both federally and provincially, is involuntary, and occurs in situations of a high level of tension. The process *may* not be political, but the atmosphere is likely to be highly charged politically.

- The data used in emergency arbitration tend to be “dealer’s choice”, unsophisticated, and riddled with evidentiary problems.
- Criteria are rarely spelled out in the legislation except in the most general terms.
- If the arbitrator opts for an accommodative approach, the process can be time-consuming, and people should be prepared for it. Furthermore, as observed before, as a character of third party intervention at large, the process involves trade-offs both within issues and among issues.
- The process may be affected by the kind of board that is appointed. A one-man board may be faster. A tripartite board may be more accommodative, but it is likely to be more political and the roles of the three members may be slippery, inasmuch as they may be less easily defined and maintained.
- Centrifugal forces are bound to be at work, eroding the reliability of data and challenging the focus of issues.
- Lawyers may very well be involved; their relative utility or disutility depends on their understanding of the nature of labour-management disputes settlement and the kind of processes within which they must work.
- If *ad hoc* legislation is foreseeable there may be no real bargaining — that is what is currently called the chilling effect of intervention.
- The union, especially if it is a large national organization, may not be able to develop clear priorities for its members as a whole, and may thus find the process internally disruptive.

CONCLUSION

At a recent seminar in Vancouver on the subject of interest arbitration, Professor Charles Morris, a highly distinguished American scholar, teacher and industrial relations practitioner, put the following thematic question: “Collective bargaining has altered the governmental process... How can that alteration be structured to assure not only that collective bargaining will be compatible with the democratic process, but also responsive to the legitimate needs of all the parties?”

As a more specific focus to that penetrating question, I should like to restate the following, at least as a partial response: “Short of radical transformation in our industrial relations system, voluntary binding arbitration appears to be the most plausible alternative to the work stoppage. We must seek to improve processes, to ensure that as a matter of course, and not relying on the discretion of the parties or the personal style of any particular arbitrator, the quasi-judicial process, whether normative or accommodative, will be made to work at an optimal level of sophistication, and will be seen so to work.”

“The job must be done.”