Labour Rights Arbitration in Canada: An Empirical Investigation of Efficiency and Delay in a Changed Legal Environment

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Despite being entrusted with an important public policy mandate to provide expeditious resolution of rights disputes arising under collective agreements and statutes, Canadian labour arbitration is increasingly prone to extensive delay. The authors examine causes and propose solutions. They theorize delay as a consequence of exogenously and endogenously produced failure in markets for fair and expeditious private dispute resolution; compile a database containing party, institutional and subject-matter characteristics of every publicly reported rights arbitration decision in Ontario in 2010; and employ formal hazard models to identify causes of delay. They find little support for current theories that expansion of the jurisdiction of arbitrators, undue legalization of arbitration proceedings, shortages of qualified arbitrators, preferences of parties for particular arbitrators or for more formal or slower procedures or for mediation-arbitration, are significant causes of delay. They infer that primary causes probably lie in resource and incentive problems with clearing caseload backlogs, aggravated by unnecessarily slow fact-finding processes.

1. INTRODUCTION

Arbitration of rights disputes under collective agreements is an essential pillar and mandatory requirement of labour relations laws in every Canadian jurisdiction. It serves as the quid pro quo for legislative bans on strikes and lockouts during the term of collective agreements. It is key to the labour policies adopted after the Second World War that were designed to reconcile industrial peace with the rights of

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workers to organize and bargain collectively,[1] and is thus an essential feature of the governance of workplaces in which approximately 30% of Canadians are employed.[2] To serve these functions well, grievance arbitration must be quick, inexpensive and relatively informal, so that it remains accessible to both unions and employers, and deals with their differences in a timely manner that is sensitive to their ongoing relationships.[3] Studies have shown that delay in labour arbitration can harm contract negotiations, cause financial loss to the employer, harm the quality of the arbitration hearing itself as memories of the material events dim with the passage of time, inhibit productivity by generating both employee restiveness and uncertainty among supervisors, and impose injustice on employees whose rights under collective agreements are less likely to be fully vindicated as time elapses.[4] Arbitration is also increasingly the forum in which unionized workers in Canada must vindicate statutory rights such as the right to work free from discrimination.[5]

Yet researchers and commentators have argued since the early 1970s that the system is prone to unnecessary delay,[6] and empirical research on delay in arbitration demonstrates a steady increase in the average time from the initiation of a grievance to the rendering of an arbitration award in all Canadian jurisdictions studied from that

1 Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada – A Brief Legal History" (2010) 15:2 CLELJ 333.

2 Sharanjit Uppal, "Unionization 2010" (2010) 11:10 Perspectives on Labour and Income 18 at 18.

3 Warren K Winkler, "Arbitration as a Cornerstone of Industrial Justice," *Industrial Relations Series of the School of Policy Studies* (Kingston, Ont: Queen's University, School of Policy Studies, 2011).

4 Allen Ponak et al, "Using Event History Analysis to Model Decay in Grievance Arbitration" (1996) 50:1 Indus & Lab Rel Rev 105.

5 Elizabeth Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016) 41:2 Queen's LJ 275.

6 Howard Goldblatt, *Justice Delayed – The Arbitration Process in Ontario* (Toronto: Labour Council of Metropolitan Toronto, 1973).

time to the present date.[7] In a 2010 speech, Ontario's Chief Justice at the time, and himself a very experienced and distinguished labour lawyer, argued that "the present system of grievance arbitration can be slow, expensive and detached from the realities of the workplace," "has lost its course, has lost its trajectory, has lost its vision," and "is at risk of becoming dysfunctional and irrelevant."[8]

It is therefore vital both to labour policy and to the administration of justice in Canadian workplaces to understand the causes of delay in rights arbitration. Chief Justice Winkler posited that the dominant factors driving these trends were the increased complexity of legal issues facing arbitration due to the expansion of arbitral jurisdiction — itself the result of decisions by the Supreme Court of Canada designating arbitration as the appropriate forum for an increasing number of work-related disputes — and the growing legalization of arbitration processes. Others have made similar arguments.[9] But the literature provides no systematic theorization or recent empirical examination of the causes of delay in arbitration.

This paper first theorizes delay as the consequence of exogenous and endogenous causes of failure in a market for fair and expeditious private dispute resolution. It then analyzes a unique database compiled by the authors containing the detailed party, institutional and subject-matter characteristics of every publicly reported rights arbitration decision in Ontario in 2010. We employ regression analysis

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7 *Ibid*; Joseph B Rose, "Statutory Expedited Grievance Arbitration: The Case of Ontario" (1986) 41:4 Arbitration J 30 at 30-35; JG Fricke, *An Empirical Study of the Grievance Arbitration Process in Alberta* (Edmonton: Alberta Labour, 1976); Allen Ponak & Corliss Olson, "Time Delays in Grievance Arbitration" (1992) 47:4 RI 690; Kenneth W Thornicroft, "Lawyers and Grievance Arbitration: Delay and Outcome Effects" (1994) 18:4 Labour Studies J 39; Gilles Trudeau, "The Internal Grievance Process and Grievance Arbitration in Quebec: An Illustration of the North-American Methods of Resolving Disputes Arising from the Application of Collective Agreements" (2002) 44:3 Managerial L 46; Bruce J Curran "Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed?" (2017) 72:4 RI 621.

8 Warren K Winkler, "Labour Arbitration and Conflict Resolution: Back to Our Roots" (Donald Wood Lecture, delivered at Queen's University, 30 November 2010) (Kingston, Ont: Queen's University, School of Policy Studies, 2010) at 1.

9 Denis Nadeau, "The Supreme Court of Canada and the Evolution of a Pro-Arbitration Judicial Policy" in Alan Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook, 2012-2013* (Toronto: Lancaster House, 2012) 325.

based on formal hazard models to identify factors causing increases or decreases in the time required to complete each stage of the arbitration process. This enables us to make observations and draw inferences about the extent to which delay at arbitration is due to (1) exogenous demands and constraints on the institution of arbitration, namely, expanded arbitral jurisdiction and legalization; (2) preferences of parties for matters other than efficiency; (3) a shortage in the supply of expeditious arbitration services; or (4) cost, incentive or coordination problems facing the parties. On this basis we formulate recommendations for public policy and for further research.

2. THEORIZING POSSIBLE CAUSES OF DELAY

Most arbitrators are professionals appointed *ad hoc* by agreement of the parties to a collective agreement. Arbitrators depend on their continuing acceptability within the labour relations community for new appointments. Rights arbitration is thus a form of private dispute resolution provided through a competitive market. In principle, therefore, the parties should be able to control the process so as to ensure its efficiency. While arbitrators obtain their formal powers to manage the arbitration process from the Ontario *Labour Relations Act*,[10] the practical extent of the mandate of an arbitrator to do so beyond ensuring basic procedural fairness flows from the agreement or expectations of the parties. There is generally nothing to prevent parties from streamlining the entire arbitration process to provide for rapid appointment of arbitrators and scheduling of hearings, limited presentation of oral evidence, compressed time for the presentation of legal argument, and short deadlines for rendering arbitral awards. Privately-developed expedited arbitration systems have for many years reduced case handling times in industries such as garment production, rail transportation, and longshoring.[11] Grievance mediation

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10 *Labour Relations Act, 1995*, SO 1995, c 1, Sch A.

11 Rose, *supra* note 7; Mark Thompson, "Expedited Arbitration: Promise and Performance" in William Kaplan et al, eds, *Labour Arbitration Yearbook, 1992* (Toronto: Lancaster House, 1992); DC McPhillips, PR Sheen & W Moore, "Expedited Arbitration: A New Experience for British Columbia" in William Kaplan et al, eds, *Labour Arbitration Yearbook, 1996-97* (Toronto: Lancaster House, 1996) 29.

systems have also proven effective at reducing backlogs of cases that can clog arbitration schedules.[12] Alternatively, parties might ask an arbitrator to manage a given hearing in some of the ways listed above, so as to expedite it.

Nevertheless, privately-administered expedited arbitration systems remain uncommon,[13] and the use of Ontario's statutorily-provided optional expedited arbitration system has actually declined in recent years.[14] This suggests that parties either prefer traditional arbitration proceedings, despite the delays increasingly associated with them, or have trouble agreeing upon or implementing alternatives.[15] It helps to shed light on these apparent difficulties to consider the market for dispute resolution services as one that is potentially subject to exogenous constraints and endogenously produced failures.

(a) Exogenous Demands and Constraints

Expansion of the jurisdiction of arbitrators may have combined with a culture of legalism to place demands and constraints upon labour rights arbitration that limit its efficiency.

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12 Elizabeth Rae Butt, "Grievance Mediation – The Ontario Experience" in ER Butt, ed, *School of Industrial Relations Research Essay Series No 14* (Kingston, Ont: Industrial Relations Centre at Queen's University, 1988); Mitchell S Birkin, "Grievance Mediation: The Impact of the Process and Outcomes on the Interests of the Parties" in *Current Issues Series* (Kingston, Ont: Industrial Relations Centre at Queen's University, 1988).

13 Thompson, *supra* note 11; Winkler, *supra* note 3.

14 Kevin Banks, Richard Chaykowski & George Slotsve, "Arbitration as Access to Justice: An Update on the Profile of Labour Arbitration Cases in Ontario" (Presentation at the Industrial Relations Conference, delivered at the Canada Industrial Relations Board, Ottawa, 16-17 June 2011) (we note, however, that Curran's results, *supra* note 7, indicate that the use of contractually expedited procedures grew from about 1% of cases in 1994 to almost 22% of cases in 2012. The general unpopularity of statutory expedited arbitration might be due to a reluctance of parties to choose it because it does not allow for the jointly-agreed upon appointment of an arbitrator, or because of its rigid and demanding time frames (Shannon R Webb & TH Wagar, "Expedited Arbitration: A Study of Outcomes and Duration" (2018) 73:1 RI 146)).

15 Webb & Wagar, *supra* note 14.

(i) *Increased Frequency of Complex Disputes Due to the Expansion of Jurisdiction*

The past 25 years years have seen an ongoing expansion of arbitral jurisdiction in Canada, by way of legislative enactment or court decision, which may have increased the proportion of cases raising multiple complex legal or factual issues that must be decided through labour arbitration.[16] In legally and factually complex cases, the goal of timeliness has always been in tension with the overriding imperative to provide a forum in which legal issues can be fully and fairly adjudicated. Since the Supreme Court of Canada's 1995 decision in *Weber v. Ontario Hydro*,[17] arbitrators in Ontario and elsewhere have been tasked with interpreting and applying a wide variety of laws that go beyond the parameters of collective agreements. As a consequence of *Weber*, arbitrators can be called upon to interpret and apply tort law, Canada's constitutional *Charter of Rights and Freedoms*,[18] and rights under pension, benefit, and welfare plans. The Supreme Court of Canada's decision in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*[19] in 2003 confirmed, in addition, that arbitrators are required to interpret and apply the provisions of human rights and other employment-related statutes as though they formed part of the collective agreement. *Charter*, common law and human rights claims, claims under other employment-related statutes, and pension and benefit claims, all arguably tend to raise issues of greater factual

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16 Winkler, *supra* note 3; Trudeau, *supra* note 7; Curran, *supra* note 7; Nadeau, *supra* note 9. Effects on timeliness were not the only concerns raised by informed observers. Some also questioned whether arbitrators had sufficient institutional independence and expertise to respond to the public law aspects of their new mandate, and whether arbitration was sufficiently accessible to employee associations seeking to raise public law claims, given the high costs associated with its use. See Gilles Trudeau, "L'arbitrage des griefs au Canada: plaidoyer pour une réforme devenue nécessaire" (2005) 84 Can Bar Rev 249; Gérard Notebaert, "Faut-il reformer le système de l'arbitrage de griefs au Québec?" (2008) 53 McGill LJ 103.

17 [1995] 2 SCR 929, [1995] SCJ No 59 [*Weber*].

18 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

19 2003 SCC 42 [*Parry Sound*].

or legal complexity than do claims raised under terms and conditions negotiated into collective agreements. Such non-collective agreement claims may also raise issues of fact and law that are not as familiar to the arbitrator or party representatives and may therefore require more time to address.

(ii) *Increased Litigation of the Scope of Jurisdiction*

Weber might also have contributed to delay by leaving the scope of arbitral jurisdiction ambiguous and thus increasing the proportion of cases raising jurisdictional issues that must be decided prior to dealing with the merits of a dispute.[20] Overlapping jurisdiction may also produce delay, as arbitration proceedings are deferred pending outcomes in other forums.[21]

(iii) *Culture of Legalism*

Some have argued that a culture of legalism has infected labour arbitration, leading to greater use of tactics such as procedural objections, unnecessarily lengthy presentation of witness evidence, unduly extensive cross-examination of witnesses and a tendency on the part of arbitrators to issue legally rigorous and extensive reasons not necessarily of direct interest to the parties.[22] Consistent with these contentions, previous research has found that the use of lawyers as representatives can increase delay.[23] Furthermore, arbitrators as a group — particularly those trained as lawyers — may be caught up in a culture of legalism, producing awards which have a level of detail in legal and factual analysis that is out of proportion to the matter under consideration.[24]

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20 Curran, *supra* note 7.

21 Randi H Abramsky, "The Ontario Law Reform Commission Report on Delay and Multiple Proceedings: A Critique" (1996) 4 CLELJ 353; Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 CLELJ 179; Craig Flood, "Efficiency v. Fairness: Multiple Litigation and Adjudication in Labour and Employment Law" (2000) 8 CLELJ 383.

22 Winkler, *supra* note 3; Curran, *supra* note 7.

23 Thornicroft, *supra* note 7; Webb & Wagar, *supra* note 14; Curran, *supra* note 7.

24 Winkler, *supra* note 3; Curran, *supra* note 7.

(b) Endogenous Demand Factors: Party Preferences

The use of traditional arbitration proceedings may also reflect party preferences that impede or trump the goal of efficient dispute resolution.

(i) *Control: Minimizing the Risk of Unpredictable Outcomes*

Analysts have hypothesized that the tendency of collective agreement parties to prefer a small number of the busiest and most experienced arbitrators may reflect an effort to minimize risk of an unpredictable and negative outcome.[25] For similar reasons, a party or both parties may hire a preferred lawyer as a representative despite the potential for delay in scheduling a hearing in order to accommodate his or her schedule.[26]

(ii) *Greater Value Placed on Perceived Fairness or Correctness*

Parties may attach greater value to the fairness or perceived fairness of arbitration proceedings, or the substantive correctness of the decision, than to timeliness. Some researchers have theorized that parties may be hesitant to pursue alternatives to traditional arbitration, such as expedited arbitration, because of the increasing complexity of cases or the perception that expedited processes may affect the outcome of the grievance.[27] In one study, employers ranked quality of arbitral awards as a greater concern than timeliness.[28] Unions, on the other hand, may seek to minimize the risk that grievors will perceive the process to be unfair if grievors tend to place greater weight on procedural fairness than on substantive outcomes in deciding whether they are satisfied with grievance processes.[29] Unions may also take

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25 Trudeau, *supra* note 7; Curran, *supra* note 7.

26 Ponak et al, *supra* note 4; Curran, *supra* note 7.

27 Webb & Wagar, *supra* note 14.

28 Arthur Elliott Berkeley, "The Most Serious Faults in Labor-Management Arbitration Today and What Can Be Done to Remedy Them" (1989) 40:11 Labor LJ 728.

29 Michael E Gordon & Roger L Bowlby, "Propositions About Grievance Settlements: Finally, Consultation with the Grievants" (1988) 41:1 Personnel Psychology 107.

a cautious approach to procedural formalities in order to attempt to minimize the risk of the legal costs and political problems associated with a duty of fair representation complaint by a dissatisfied grievor, even though expedited arbitration procedures generally do not violate legal duties of fair representation.[30] For the same reason, unions may take a cautious approach to arbitrator selection.

(iii) *Allowing Time for Public-Sector Decision-Making Processes*

Earlier research suggests that public-sector employers and unions are associated with greater delay.[31] One possible explanation for this may be that public-sector actors may place less emphasis on speed and may have more cumbersome decision-making processes for grievance resolution.

(iv) *Allowing Time for Healing*

In some cases, delaying the resolution of a dispute may benefit one or both parties by allowing time to repair personal relationships in a non-adversarial forum, to find alternative job opportunities in order to separate antagonists, or to enable persons suffering from illnesses such as addiction to seek treatment sufficient to obtain a favourable prognosis. One party or both parties might therefore deliberately delay the attempted resolution of a dispute to provide a cool-down period, so that the dispute can "ripen" to a state that makes it capable of resolution. Growing awareness of such problems may have led to increased delay across the system.

(v) *Preference for Prior Mediation*

In Ontario, the use of mediation-arbitration (med-arb) — a procedure under which the appointed arbitrator initially seeks to mediate a settlement and only if unsuccessful then hears the evidence and

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30 Clarence R Deitsch & David A Dilts, "Case Characteristics Affecting the Method of Grievance Dispute Settlement" (1988) 1 Employee Responsibilities & Rights J 113; Thompson, *supra* note 11; Donald D Carter, "Grievance Arbitration and the Charter: The Emerging Issues" (1989) 44:2 RI 337.

31 Ponak & Olson, *supra* note 7; Thornicroft, *supra* note 7.

arguments of the parties — has expanded markedly in recent years.[32] This likely reflects a preference of parties to seek a negotiated settlement, giving them "ownership" of the outcome and allowing them to avoid the possible additional expense and delay of litigation. An unintended consequence of the increased use of med-arb might, however, be increased disposition time for cases that cannot be resolved through mediation. First, the mediation process will inevitably delay the start of arbitration. Second, med-arb may successfully resolve a high proportion of simpler disputes, leaving relatively more cases presenting complex legal or factual issues for arbitration. It might thus change the composition of the population of cases decided at arbitration and increase delay within that population, despite making resolution of the overall population of disputes referred to arbitration more efficient. Curran's recent paper found that mediation-arbitration was associated with greater delay at the prehearing stage and in the total time required for arbitration.[33]

(c) Supply of Expeditious Dispute Resolution Services

Some studies have found certain arbitrators to be associated with greater delay in a statistically significant way.[34] Other research suggests, however, that procrastination is unlikely to be widespread among arbitrators, and that as a group arbitrators are less prone to procrastination than the general population.[35] On the other hand, it has been hypothesized that leading arbitrators are often too busy to write awards in a timely manner,[36] while less experienced but more available arbitrators often lack the skills and experience required by the parties. One study found that arbitrators who are trained lawyers are associated with delay, and suggested that this was due to a

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32 MG Picher, "The Arbitrator as Grievance Mediator: A Growing Trend" in Alan Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook, 2012-2013* (Toronto: Lancaster House, 2012).

33 Curran, *supra* note 7.

34 Thornicroft, *supra* note 7; Curran, *supra* note 7.

35 Allen Ponak, Daphne G Taras & Piers Steel, "Personality and Time Delay Among Arbitrators" in Paul D Staudohar & Mark I Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators* (Arlington: BNA Books, 2011).

36 Curran, *supra* note 7.

tendency toward increased legalism on their part.[37] As a result, there might effectively be a shortage in the supply of expeditious dispute resolution.

(d) Coordination, Cost or Incentive Problems

There are a number of ways in which cost, incentive or coordination problems may prevent the use of more timely arbitration procedures, even where parties generally consider timeliness a priority of the highest order.

(i) *Lack of Information*

First, lack of information about the workings of expedited arbitration procedures may create uncertainty about whether it will pay off to make the investment of time and political or institutional capital in negotiating, obtaining support for and administering such procedures.

(ii) *Transaction Costs*

Second, the transaction costs of negotiating and implementing expedited procedures, other than *ad hoc* measures such as agreed statements of fact, may exceed the costs of delay where the parties have a single case or a small number of cases going to arbitration. For example, the costs of negotiating agreements for rapid scheduling of hearings by mutually acceptable arbitrators, or for case management processes providing for early disclosure, identification of issues, and agreement on undisputed facts, may exceed their return on investment.

(iii) *Risk of Defection*

Third, particular kinds of cases will often present parties with reasons for tactical delay. For example, an employer with a relatively weak case but internal political problems with a likely remedy may

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37 *Ibid.*

seek to delay resolution. Alternatively, an employer might choose delay tactics in order to raise costs for a union and weaken its position within the overall bargaining relationship or with respect to a particular case. A union may advance a grievance for internal political reasons, despite its weakness as a legal claim, and choose to delay resolution in the hopes of reaching a negotiated settlement or at least delaying the political fallout that will result from the dismissal of the grievance. In each situation, short-term incentives may trump longer-term interests in expeditious dispute resolution.

Resisting incentives to delay in such a case is a form of cooperation that depends on trust that the other party will do the same. Important aspects of expedited procedures, such as early disclosure, the negotiation of agreed statements of fact or the willingness to use arbitrator selection systems that limit party control over which arbitrator is chosen in a given case, also require such cooperation. Without some form of assurance that the other party will not seek to seize immediate advantage where such procedures present it, and then later resile from expedited procedures once they no longer do so, a party may correctly judge that it should not pursue expedited procedures. This will be so even where expedited procedures would make the party better off, if implemented on an ongoing basis. The stability of any commitment to expeditious dispute resolution may be further weakened where a lack of trust or a history of conflict undermines the confidence of parties that cooperation to implement expedited procedures will overcome incentives to strategically defect.

(iv) *Up-Front Costs*

Fourth, moving to a system in which arbitration cases are dealt with expeditiously may require clearing a backlog of earlier cases. If the backlog of cases is sufficiently large, one or more of the parties may be unwilling or unable to allocate sufficient resources to do so. A large backlog could accumulate over a period of years if parties initiate somewhat more cases than they resolve in a given year, over a number of years. A relatively small shortfall in resources or capacity to deal with grievances could eventually require making a large investment of new resources, by hiring new representatives or shifting work to new representatives, to clear the backlog. These resources would mostly no longer be needed once the backlog is cleared. Such investments

in temporary capacity may prove difficult for a union or employer to make, due to shortages of funds, lack of availability on a temporary basis of personnel with the required experience and abilities, or a preference for continuing with known and trusted representatives.

Backlogs may arise because of bottlenecks prior to referral to arbitration (in the pre-arbitration grievance resolution process), at the point of referral, or in the arbitration process itself. Backlogs in the grievance resolution steps prior to arbitration could arise out of shortfalls in the number of union or employer officials tasked with resolving grievances. Backlogs at referral to arbitration might arise in one of three ways. First, if one of the parties is represented at arbitration by staff representatives or in-house counsel and those representatives have caseloads that continue to grow over time, delay in scheduling cases for arbitration will increase. Second, where a party uses outside counsel, delay in scheduling arbitrations may increase if that counsel adds the case to a growing list of cases (on behalf of this and other clients) scheduled to be heard first. Third, if parties tend to use busy arbitrators whose wait times are growing, this bottleneck may cause backlogs to accumulate. These dynamics could be aggravated by slower, more legalistic arbitration proceedings consuming more of the time of busy arbitrators and party representatives. We note that Curran finds that over the 1994 to 2012 period the hearing phase of arbitrations became about 30% slower.[38]

(v) *Incentive Problems*

Fifth, the incentives of agents may be misaligned — those dealing with arbitration of grievances may not have incentives to resolve grievances expeditiously or reduce backlogs. This may be the case, for example, where the remuneration or career advancement of outside or in-house counsel or a staff representative does not depend upon timely resolution of a particular case or set of cases, where representatives are expected to minimize preparation time with the unintended consequence that they are not prepared to consider whether expedited presentation of cases would be in their client's interest, where timely resolution of disputes may simply increase

38 *Ibid.*

the representative's workload but not his or her remuneration, where counsel's future income is not significantly dependent upon the particular client in question, or where the client does not sufficiently monitor and emphasize timeliness in awarding further work. Where a lawyer at a law firm does not have longer-term retainers or other assurances of a continued supply of work from his or her client base, being fully booked up for several months may provide the advantage of income security over that period of time. Such incentive structures would not encourage the clearing of backlogs. They might also combine with client preferences for a particular lawyer or other representative, which may also generate a backlog.

3. EMPIRICAL RESEARCH QUESTIONS AND METHODS

This paper seeks to determine whether and to what extent delay in labour arbitration in Ontario is attributable to causes among the first three types hypothesized above, namely: (1) external demands and constraints on the institution of arbitration; (2) preferences of parties for matters other than efficiency; or (3) a shortage in the supply of expeditious arbitration services. These determinations may permit inferences with respect to whether the length of delays is influenced by incentive and coordination problems at the level of the parties.

(a) The Database

The database for our analysis contains the main characteristics of every publicly reported arbitration decision in Ontario in 2010. The year 2010 is a good one to study because it is seven years after the most important expansion of arbitral jurisdiction, i.e. the one resulting from the Supreme Court's *Parry Sound* decision, and that is enough time for the implications of that Supreme Court decision to have worked their way into the day-to-day practice of labour arbitration. Arbitrators are required by law in Ontario to file their awards with the Ontario Ministry of Labour. The Ministry makes those awards publicly available. They are also published in Quicklaw's Ontario Labour Arbitration Awards (OLAA) database. This provides access to a complete census of awards outside of the Ontario public service (provincial government employees), which has a separate grievance dispute settlement system.

Using a coding frame for the arbitration decisions piloted in and adjusted following initial research, detailed information regarding the characteristics of the arbitration decisions was recorded using the decision as the unit of observation.[39] The final database includes a total of 648 cases; in the analysis the number of observations varies because of missing values for certain variables in individual cases.

The database included detailed information (refer to Table 1, Panel A) about the characteristics of the case and the parties involved, including the following: (1) the arbitrator; (2) the type of arbitration board (sole arbitrator or three-person panel); (3) the gender of the arbitrator; (4) the gender of the grievor; (5) whether the employer is in the government, health, education or private sector; (6) whether the award was issued under expedited arbitration or the med-arb provisions of the Ontario *Labour Relations Act*; (7) whether the parties used an agreed statement of fact; and (8) whether the employer or union was represented by counsel. On the basis of our arbitrator data we were able to identify the number of decisions that an arbitrator wrote in 2010. We use this as a proxy for how busy an arbitrator was that year. We recognize that this measure will omit some arbitrators who are highly in demand but who tend more often to settle cases during mediation-arbitration. Nonetheless, we can be confident that an arbitrator who issued numerous awards was likely to be highly in demand, given that it is well-known in the Ontario labour relations community that many cases tend to be settled even after they are referred to arbitration, often without any intervention by the arbitrator, so that an arbitrator would need a heavy caseload to generate a high volume of awards.

The database also included the procedural and substantive subject matters decided in the award, which formed the basis of case subject-matter variables that are a main focus of this analysis. Each subject was constructed as a dichotomous variable (coded 1 if a

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39 Coders were instructed in the application of the coding frame. Their data was recorded on paper coding sheets and then entered into a database. A doctoral student with three years of labour law practice experience then reviewed all of the coding sheets against the arbitration awards and corrected any errors. One of the authors then reviewed a sample of code sheets against the actual awards. Where he encountered inconsistency in the coding of a variable, he recoded that variable himself.

subject of the case and 0 if not). A detailed list of the subjects is provided in Table 1, Panel A. The subject-matter categories capture the main substantive and procedural issues that have been traditionally litigated at arbitration, as well as issues that have been added to the jurisdiction of arbitrators, as described above. The coding frame also captures findings of fact on a disputed matter.

We chose to record only decisions by arbitrators with respect to legal or factual issues, as opposed to all issues raised by the parties in their arguments.[40] We see a number of advantages to this approach. Where an issue is decided by an arbitrator, not only does there tend to be a fully pleaded question supported by a factual record, but the arbitrator will also have fully deliberated upon it. This means that when we measure the impacts of particular legal issues on delay, our observations will not be affected by the lack of centrality of a given issue to the case, as would happen where parties raise an issue that the arbitrator does not in the end need to decide, and therefore spends no time deciding.

For each decision, the database includes, where the information is available in the decision, the date intervals at each of the following three stages of the arbitration process: (1) event giving rise to the grievance and/or the initiation of the grievance to the commencement of hearings; (2) the commencement of hearings to the close of hearings; and (3) the close of hearings to the rendering of an award. This information formed the basis for the construction of the dependent time variables utilized in the analysis, including: Event to First Hearing Time; Grievance to First Hearing Time; Hearing Days; Hearing Time; and Award Time (refer to Table 1, Panel B for definitions of these variables). We work with the date of events giving rise to grievances and not simply the dates of grievances themselves. This is because the dates of events are recorded far more often than the dates of grievances in the population of arbitral awards. We thus have a much larger number of observations of event dates than of grievance dates. While event dates are not a perfect substitute for grievance dates, in that events necessarily take place before the initiation of grievance proceedings, we contend that they are a reasonably good substitute because under most collective agreements grievances

40 For a study taking the latter approach, see Curran, *supra* note 7.

must be filed promptly upon the discovery of an alleged agreement violation.

(b) Statistical Methods

We estimate formal hazard models where the dependent variable of interest is the duration of a process, or the time to exit from a state. In this analysis, the variable is the elapsed time between the close of arbitration hearings to the rendering of an award.[41] The duration distribution function represents the probability of exit from the state after a specified amount of time has elapsed. An alternative representation is the probability of survival in a given state to a given point in time. The basic building block in duration modelling is the exit rate or hazard function at some given point in time. For example, in discrete terms, the hazard function is the probability that a grievance for which the hearing has been concluded for "x" days will have an award rendered in the near future (short time interval of length x + y days). The survival function, or the duration density, can be completely described in terms of the hazard function.[42]

The hazard rate can be allowed to depend on observed characteristics of the grievance process. It is useful to distinguish between two classes of covariates.[43] The first class of covariates are termed time-invariant covariates, where the values of the covariates do not depend on the period of duration in a state, for example the gender of the grievor. In the case of time-invariant characteristics, the duration in a state does not influence the value of the covariate since it does not change with time; therefore one would treat these covariates as exogenous to the duration process.

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41 John D Kalbfleisch & Ross L Prentice, *The Statistical Analysis of Failure Time Data*, 2d ed (New York: John Wiley & Sons, 2002).

42 The characteristics of the hazard function have important implications for the pattern of the probability of exit from some state over time. Negative (positive) duration dependence represents a situation in which the probability of exit decreases (increases) as the elapsed time increases. The potential patterns of duration dependence depend on the form of the hazard function rate. For example, the hazard rate may first increase with elapsed time before decreasing, as the elapsed time increases.

43 Mario A Cleves, William W Gould & Roberto G Gutierrez, *An Introduction to Survival Analysis Using Strata,* 2d ed (College Station, Tex: Strata Press, 2004).

On the other hand, for time-varying covariates, for example, arbitrator caseload, the level of the covariate depends on the duration in the state in question. There are various parametric and non-parametric specifications to introduce covariates into duration and survival analysis.[44] For example, an oft-used mechanism is the proportional hazard specification, which adjusts the conventional hazard specification by assuming that a baseline hazard is proportional to a covariate function, where the covariates are thought to influence the duration in a state and the exit rate. The specific mechanism(s) to introduce covariates is an empirical issue and will be determined when we analyze the data.[45]

We first estimated each model as a Cox proportional hazard and tested the proportional-hazards assumption using the Schoenfeld residuals. If the model Cox proportional hazard was rejected, we then estimated an accelerated failure time (ATF) model for each of the following distributions: exponential, loglogistic, weibull, lognormal, and gamma. We chose the preferred distribution based on a Likelihood Ratio test in cases where the distributions were nested, and based on Akaike's information criteria in cases where the distributions were not nested.[46] We also estimate each AFT model as a frailty model (a model with unobservable heterogeneity), using both gamma and inverse-gamma distributions. In all cases the frailty models were rejected based on a likelihood ratio test.

We control for the economic sector of the employer because previous research indicates that arbitration in the public sector tends to take longer, as noted above. We also control for whether the parties invoked expedited arbitration or mediation under the *Labour Relations Act, 1995*, as this tends to shorten the time to reach a hearing. We control for possible gender biases by controlling for the

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44 Marc Nerlove & S James Press, *Univeriate and Multivariate Log-Linear and Logistic Models,* (Santa-Monica, Cal: Rand – R1306-EDA/NIH, 1973).

45 Nicholas M Kiefer, "Economic Duration Data and Hazard Functions" (1988) 26:2 J of Economic Literature 646.

46 Hirotogu Akaike, "Information Theory and an Extension of the Maximum Likelihood Principle" in BN Petrov & F Csaki, eds, *2nd International Symposium on Information Theory* (Budapest: Akadémia Kiadó, 1973); Hirotogu Akaike, "Likelihood of a Model and Information Criteria" (1981) 16:1 J of Econometrics 3.

gender of both the grievor and the arbitrator. In addition, we control for whether the parties used an agreed statement of fact, as this would tend to shorten the hearing of evidence (though it may increase preparation time and may therefore increase the time required to reach a hearing). Interim and consent awards were excluded from the population of final awards subject to analysis.

4. PROFILE OF CASES AND TRENDS IN THE TIME ELAPSED AT EACH STAGE OF GRIEVANCE ARBITRATION PROCEEDINGS

(a) Overall Profile of the Cases

The sample of cases is balanced by sector, with a slight majority of cases (about 54%) arising in the broader public sector (Table 2); that 54% is composed of about 29% from the health sector, 13% from government, and 12% from education (Table 4).

The range of subject-matters of the grievances is quite broad, as expected (refer to Table 1 Panel A). Decisions included a finding of fact on a disputed matter in about 37% of the cases (Table 2). The most frequent subject-matter of the grievance cases were: Wages or Related Benefits (21%), Disciplinary Discharge (20%), and Assignment or Scheduling of Work (17%) (Table 4). The second tier, in terms of frequency, included three legal subject-matters associated with the expanded jurisdiction of arbitrators: Human Rights or Other Discrimination (9%), Non-Human Rights Legislation (5%), and Benefit or Welfare Plan (whether insured or not) (5%); and two arguably associated with a culture of legalism: Jurisdiction (7%) and Matter of Procedure (7%). The frequency of issues in our study is somewhat lower than that of comparable issues recorded in Curran's 2017 paper. This likely reflects our decision to code by issues decided rather than to code by content analysis.

Representation by legal counsel was relatively pervasive. The employer (at about 79%) was more likely to be represented by counsel than the union (at roughly 63%). Both the union and employer used counsel in about 61% of the cases; in 2.4% of cases only the union used counsel, whereas in about 18% of the cases only the employer used counsel (see Table 2). Taken together, counsel are used in a

high proportion of the cases, and management is much less likely to proceed without counsel than is the union. The average number of lawyer representatives in our study (1.42) is very similar to that recorded by Curran[47] for the year 2012 (1.47).

In terms of choice of procedures, about 95% of the cases were decided by a sole arbitrator (and about 4.5% by a tripartite board) (Table 2). The parties used statutory expedited arbitration only about 6.9% of the time, and statutory mediation-arbitration procedures only about 1.3% of the time.[48] The parties provided an agreed statement of fact to the arbitrator in only about 13% of cases.

(b) Time Elapsed at Each Stage of Grievance Proceedings

The grievance process itself extends from the date of the initial event through a hearing to the issuance of the final award (refer to Table 3). We observe the following median durations:

- Event to first hearing: 215 days
- Grievance to first hearing: 275.5 days[49]
- First to last hearing: 1 day (0 days elapsed between these two points in time)
- First hearing to award: 48 days
- Last hearing to award: 26 days
- Event to final award: 345 days
- Grievance to final award: 380 days

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47 Curran, *supra* note 7.

48 We note that it is possible that these numbers understate the use of such procedures, since an arbitrator may not mention in the text of an award that he or she was appointed pursuant to statutory expedited procedures.

49 Note once again that not all awards record the date of the grievance or the date of the events giving rise to the grievance, and in many cases the award records one date but not the other. It is thus not contradictory that the median number of days from grievance to first hearing would be longer than the median number of days from event to first hearing. The data providing those measurements are taken in large part from different decisions.

The number of hearing days ranged from 0 to 24 days, with 50% taking only 1 (or no) day(s), about 68% of cases requiring 2 or fewer hearing days, and 95% taking 8 or fewer days. Thus, the overwhelming majority of cases are decided within 8 hearing days.

These results suggest that a large proportion of total time is accounted for by the period from the event or grievance to the first hearing.[50] This result is consistent with the very high correlations observed between "Event to First Hearing" and "Event to Final Award" (.85) and "Grievance to First Hearing" and "Grievance to Final Award" (.82) (refer to Appendix Table 1 at the end of this article).[51] We note that the median time lapses at each stage of the proceedings that we observe are nearly identical to those observed by Curran in his composite sample taken in 1994, 2004 and 2012.[52]

These descriptive results suggest that hearings tend to move forward relatively quickly compared to their scheduling, and that most awards are issued in a timely manner. The time it takes to get to the first hearing — whether it be the time from the event or the actual grievance to the first hearing — appears to be where most of the time is taken up in the process. We note that Curran finds that between 1994 and 2012 the transition from the prehearing to the hearing stage slowed by 40%, all else being equal. This is consistent with the presence of growing backlogs in the prehearing stages.

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50 This result must be interpreted with caution because the number of observations for the "Grievance to First Hearing" and "Grievance to Final Award" variables is low and we expect that it may skew the result in favor of longer duration.

51 In addition, the "Event to First Hearing" and "Grievance to First Hearing" variables are very highly correlated (at .96), as are "Event to Final Award" and "Grievance to Final Award" (at .98) (refer to Appendix Table 1). These correlations are all statistically significant at the 99% level.

52 Curran, *supra* note 7 at 629.

TABLE 1
Variable Definitions

TABLE 1 PANEL A
Explanatory Variables

Variable	*Variable Definition*	*Coding*
year	Year	Number
caseid	Case ID	Alpha
filedby	Grievance filed by employer or union	0 "Employer" 1 "Union" 2 "Both"
ind	Industry of firm/employer	0 "Government" 1 "Health" 2 "Education" 3 "Other"
aname	Arbitrator or Chair's name	Alpha (Converted to Numeric)[3]
agender	Arbitrator or Chair's gender	0 "Male" 1 "Female"
tripartite	Sole arbitrator or tripartite board [pubtri is interaction of public sector and tripartite]	0 "Sole Arbitrator" 1 "Tripartite Board"
exped	Award issued under the expedited arbitration provisions	0 "No" 1 "Yes"
sec50	Award issued under the expedited mediation/arbitration provision of Labour Relations Act (section 50)	0 "No" 1 "Yes"
juris	Subject: Jurisdiction	0 "No" 1 "Yes"
admiss	Subject: Admissibility of evidence	0 "No" 1 "Yes"
proced	Subject: Matter of procedure	0 "No" 1 "Yes"
hrights	Subject: Human rights or other discrimination	0 "No" 1 "Yes"
nhr	Subject: Non-human-rights legislation	0 "No" 1 "Yes"
pp	Subject: Pension plan	0 "No" 1 "Yes"
bwp	Subject: Benefit or welfare plan (whether insured or not)	0 "No" 1 "Yes"
cc	Subject: Canadian Charter	0 "No" 1 "Yes"
estop	Subject: Estoppel	0 "No" 1 "Yes"
cba	Subject: Interpretation of collective agreement	0 "No" 1 "Yes"
discd	Subject: Discharge as discipline	0 "No" 1 "Yes"

Variable	*Variable Definition*	*Coding*
discip	Subject: Discipline (non-discharge)	0 "No" 1 "Yes"
assign	Subject: Assignment or scheduling of work	0 "No" 1 "Yes"
senior	Subject: Seniority	0 "No" 1 "Yes"
wages	Subject: Wages or related benefits	0 "No" 1 "Yes"
urights	Subject: Union rights and liabilities	0 "No" 1 "Yes"
ndterm	Subject: Non-disciplinary termination	0 "No" 1 "Yes"
other	Award also dealt with other issues	0 "No" 1 "Yes"
only	Award dealt with ONLY subjects NOT LISTED	0 "No" 1 "Yes"
nsubj	Total number of subjects dealt with in the award	Number
afact	Did the parties provide the arbitrator with an agreed statement of fact?	0 "No" 1 "Yes"
dfact	Finding of fact on a disputed matter	0 "No" 1 "Yes"
frep	Employer represented by legal counsel	0 "No" 1 "Yes" 2 "Unknown"
urep	Union represented by legal counsel	0 "No" 1 "Yes" 2 "Unknown"
Ccount	Number of cases arbitrator carried in the year	Number
wcount	Total word count	Number

TABLE 1 PANEL B
Dependent Variables

Variable	*Variable Definition*	*Coding*
Efdur	Days (duration) between event and first hearing dates	Number
Eadur	Days (duration) between event and award dates	Number
Gfdur	Days (duration) between grievance and first hearing dates	Number
Gadur	Days (duration) between grievance and award dates	Number
Fldur	Days (duration) between first hearing and last hearing dates	Number
fadur	Days (duration) between first hearing and award dates	Number
ladur	Days (duration) between last hearing and award dates	Number
ndays	Number of hearing days	Number

TABLE 1 PANEL C
Variables Used to Construct the Duration Variables

Variable	*Variable Definition*	*Coding*
edate	Event date	Day – Month – Year
gdate	Grievance date	Day – Month – Year
Fdate	Date of first hearing day	Day – Month – Year
Ldate	Date of last hearing day	Day – Month – Year
Adate	Award date	Day – Month – Year
arbdate	Appointment date of arbitrator	Day – Month – Year

TABLE 2
Proportion of Cases by Major Characteristic

		Obs	*Mean*	*Std. Dev.*	*Min*	*Max*
% Cases Decided by Three-Person Panel (Tripartite Board)		580	0.044828	0.207104	0	1
% Cases by Jurisdiction	Private	581	0.45611	0.498499	0	1
	Public	581	0.54389	0.498499	0	1
% Cases by Selected Matter/Issues:	Finding of fact on a disputed matter	576	0.366319	0.482217	0	1
	In which jurisdictional issues are raised	575	0.073044	0.260434	0	1
	In which procedural issues are raised	575	0.074783	0.263269	0	1
Use of Counsel	Neither party used counsel	572	0.183566	0.387469	0	1
	Only union used counsel	572	0.024476	0.154655	0	1
	Only employer used counsel	572	0.18007	0.384582	0	1
	Both union and employer used counsel	572	0.611888	0.487747	0	1

TABLE 3
Elapsed Time by Stage

Percentiles	*Event to First Hearing (Efdur) (1)*	*Event to Final Award (Eadur) (2)*	*Grievance to First Hearing (Gfdur) (3)*	*Grievance to Final Award (Gadur) (4)*	*First to Last Hearing (Fldur) (5)*	*First Hearing to Award (Fadur) (6)*	*Last Hearing to Award (Ladur) (7)*	*Hearing Days (Ndays) (8)*
1%	27	42	19	21	0	0	0	0
5%	56	97	39.5	36	0	1	1	1
10%	80	122	62.5	87	0	3	2	1
25%	123.5	189	131	205	0	11	9	1
50%	215	345	275.5	380	0	48	26	1
75%	404	602	496	665	105	186	62	3
90%	648	964	788	1043	288	383	125	5
95%	870	1231	931	1290	432	559	178	8
99%	1365	1935	1442	2983	826	1096	337	20
Obs	268	299	180	198	506	507	507	529
Mean	306.6045	460.9833	364.7944	515.1313	89.97036	141.8915	51.38264	2.47259
Std Dev.	287.4381	378.6675	346.4932	468.4913	189.9446	227.9139	95.60062	3.267683
Variance	82620.66	143389.1	120057.5	219484.1	36078.95	51944.74	9139.478	10.67775

TABLE 4
Descriptive Statistics by Key Variable

Variable	*Number of Observations*	*Mean*	*Standard Deviation*	*Minimum Value*	*Maximum Value*
gov	581	0.1342513	0.3412159	0	1
health	581	0.292599	0.4553479	0	1
educ	581	0.1170396	0.3217445	0	1
frep	573	1.010471	0.3446321	0	2
urep	573	0.9179756	0.584091	0	2
furep	572	0.993007	0.8514663	0	4
tripart	580	0.0448276	0.2071039	0	1
pubtri	580	0.0396552	0.1953162	0	1
exped	580	0.0689655	0.2536142	0	1
sec50	581	0.1273666	0.3336705	0	1
afact	577	0.135182	0.3422145	0	1
ccount	581	20.29088	25.4555	1	82
ccount2	581	1058.587	2285.867	1	6724
nsubj	576	1.5	0.7890556	0	5
nsubj2	576	2.871528	3.385004	0	25
juris	575	0.0730435	0.2604344	0	1
admiss	575	0.0208696	0.1430721	0	1
proced	575	0.0747826	0.2632693	0	1
dfact	576	0.3663194	0.482217	0	1
hrights	575	0.093913	0.2919617	0	1
cc	575	0.0017391	0.0417029	0	1
pp	575	0.0104348	0.1017049	0	1
bwp	575	0.0452174	0.2079615	0	1
nhr	575	0.053913	0.2260427	0	1
estop	575	0.0452174	0.2079615	0	1
cba	575	0.0434783	0.2041087	0	1
discd	575	0.2017391	0.4016479	0	1
discip	574	0.0574913	0.232982	0	1
assign	575	0.173913	0.3793647	0	1
senior	575	0.0347826	0.1833883	0	1
wages	575	0.2052174	0.404212	`	1
urights	575	0.0469565	0.2117299	0	1
ndterm	576	0.0607639	0.2391044	0	1
other	575	0.0695652	0.2546344	0	1
only	574	0.1620209	0.3687914	0	1
wcount	577	4693.236	4825.638	97	41538
wcount2	577	4.53E+07	1.34E+08	9409	1.73E+09
agender	581	0.1893287	0.3921071	0	1

5. RESULTS OF REGRESSION ANALYSIS

In order to investigate the factors affecting time taken at each stage of the grievance process, separate regressions were calculated for each of the eight dependent time period variables (Table 1, Panel B). The list of explanatory variables, and descriptive statistics for each of these variables, is provided in Table 4. Tables 5 through 8 provide the results for each of these regressions. Coefficients that are statistically significant at the 90% level are highlighted. We first discuss the total time required to process a grievance to a final decision. Next we analyze the time required at each stage of the grievance arbitration process. We do not discuss results for time periods beginning at the date of the formal grievance because they are consistent with but less probative than results for time periods beginning with the event giving rise to the grievance, owing to a smaller number of observations.[53]

(a) Event to Final Award

In our overall measure of the time required to process a grievance to a final decision, we find no statistically significant evidence that the changing legal environment of labour arbitration has caused increasing delay. None of the issues falling within expanded arbitral jurisdiction is associated with increased delay. The number of legal issues decided in a given case is not associated with increased delay. While the word count of the final award is associated with increased delay, the coefficient associated with this variable is very small (.00009), indicating that any effects of longer awards on overall delay are also very small. Nor do our data provide any direct support for the "culture of legalism" hypothesis: no procedural issue is associated with increased delay; jurisdictional issues are not associated with delay; the use of counsel is not associated with delay in a statistically significant manner.

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53 The one exception is that jurisdictional issues appear to cause delay in the time from grievance to first hearing, but not in the time from event to first hearing. This result should be treated with caution. The positive coefficient was significant only at the 90% level.

Disciplinary discharge, other discipline cases and pension plan cases are associated with significantly reduced delay, as are to a somewhat lesser extent cases involving wages and work assignments. By contrast, cases involving the interpretation of provisions of the collective agreement falling outside of our substantive issue categories were associated with increased delay. We believe that this indicates that the parties prioritize some issues over others with respect to the speed of disposition. There is no reason to think that collective agreement interpretation issues are systematically more complex or time-consuming to resolve through arbitration. There is, however, reason to think that their speedy resolution may matter less to the parties than the resolution of "bread and butter" issues like wages, benefits, seniority, work assignments and pensions, or of human rights issues, which often involve individual dignity.

The number of decisions by an arbitrator was positively associated with increased time lapse, though the effect was small (coefficient = .019). This suggests that the time from event to final decision will be slightly longer with busy arbitrators.

Consistent with previous studies, we find that the use of tripartite panels causes significant delay, the government sector is associated with increased delay, and the use of statutory expedited arbitration markedly reduces delay. We also found that the use of statutory expedited mediation-arbitration reduces delay.

(b) Event to First Hearing

Contrary to the hypothesis that more legally or factually complex cases would require additional preparation time and thus lead to longer times from event to first hearing, no procedural or substantive issue caused delay at this stage of proceedings; nor did the number of legal issues. While the eventual length of the decision is associated with some increased delay, the coefficient on this variable is very small. The results overall indicate that the subject-matter of arbitration plays little role in overall patterns of timeliness and delay at this stage of proceedings.

Perhaps surprisingly, the use of legal counsel did not increase delay either. This does not necessarily indicate that the use of legal counsel has no relationship to increases in delay in scheduling hearings however. It may be that the alternatives to the use of lawyers

— for example, union staff representatives, employer labour relations representatives, or labour relations consultants — produce no measurable time savings at this stage, because all are more or less equally busy. If this were the case, the choice to use a lawyer would not *per se* impact the length of time to get to a hearing. Yet it could be that the way in which the parties make use of lawyers, and the way in which law firms schedule lawyers' work, still contributed to an increase in the amount of time needed to reach a hearing.

The number of decisions by an arbitrator was positively associated with increased time lapse, though the effect was small (coefficient = .028). This suggests that the time from event to first hearing will be slightly longer with busy arbitrators.

The parties appear to prioritize the scheduling of disciplinary cases. This is reflected in large and statistically significant negative coefficients associated with discipline and disciplinary discharge variables. Cases dealing with wage issues also tend to be brought to a hearing more quickly.

At this stage of proceedings, the government sector is associated with increased delay, the use of tripartite panels results in substantially more delay, and the use of statutory expedited arbitration very substantially reduces delay. These results are consistent with those of previous studies, as noted above.

(c) First Hearing to Last Hearing (Hearing Time)

Perhaps surprisingly, the number and nature of legal issues decided at arbitration appears to have little bearing on the time that elapses from the first to the last hearing dates. On the other hand, disputed factual issues are associated with significantly longer times. Cases which call for the application of the *Canadian Charter of Rights and Freedoms* also take significantly more time. Adjudicating disputes raising issues of jurisdiction took less time, all other things being equal. While this may seem counter-intuitive, it must be borne in mind that a jurisdictional objection may result in a case being dismissed without a hearing of the merits of a grievance, shortening the time that would otherwise have been required to dispose of a matter. We find some evidence supportive of this in our data with respect to the number of hearing days, discussed below: all other things being equal, as a group, cases involving issues of jurisdiction take fewer

hearing days to resolve. While we find a statistically significant effect of the length of award (perhaps a proxy for the complexity of matters dealt with at arbitration), it is very small (coefficient = .0003).

The use of counsel by trade unions causes increased time lapse at this stage. The coefficient on the employer counsel variable is also positive and large, but the result is not statistically significant. The sign on interaction of the union and employer counsel variables was negative, suggesting that where both parties use counsel the delay produced by the use of counsel is less. This suggests that there are efficiencies in dealings between counsel that partially offset the effects that the approach taken by lawyers to presenting a case has in prolonging hearing time.

Not surprisingly, we find that the use of agreed statements of fact very significantly reduces time at this stage of the proceedings. Finally, the government sector is associated with increased delay at this stage of proceedings as well.

(d) Final Hearing to Final Award (Award Preparation Time)

There is little evidence of any relationship between substantive or procedural legal issues and delay at this stage of the proceedings. With the exception of issues involving benefit and welfare plans (which are associated with shorter times), none of the relationships between legal issues and time from final hearing to final award were statistically significant. On the other hand, decisions on disputed questions of fact are again associated with longer times. There was a statistically significant positive relationship between the word count of awards and elapsed time, but again it was small (coefficient = .0001).

The number of cases decided by the arbitrator was associated with shorter times, suggesting that busy arbitrators take less time in award preparation, but again the effect was small (coefficient = -.024). Interestingly, female arbitrators appear to have shorter award preparation times. This effect was larger (coefficient = .205).

Perhaps counter-intuitively, at this stage of proceedings, the use of an agreed statement of fact produced longer times to final award. The government sector was associated with longer times from final hearing to final award. The use of a tripartite panel does not cause delay at this stage, suggesting that the delay resulting from the use of such panels occurs in the scheduling of hearings rather than later in

the process. Statutory expedited mediation-arbitration resulted in significantly shorter award preparation times. This is consistent with the conjecture that much of the content of mediation-arbitration awards may often have been negotiated between the parties, thus requiring less writing and analysis from the arbitrator, even if the final award is not described as a consent award.

(e) First Hearing to Final Award

We also analyzed the time lapse between first hearing and final award in order to capture any effects that, while too subtle to show up distinctly during either the hearing or the award production stage, nonetheless influence the time required to dispose of the case once litigation has begun.

As with hearing time and award preparation time, the resolution of a disputed question of fact tended to lengthen the time from first hearing to final award. Again, a longer word count was associated with longer time, but the effect was very small (coefficient = approximately .0003). The only legal issue associated with longer times was the application of the *Charter of Rights and Freedoms*.

The use of statutory expedited mediation-arbitration was associated with significant time savings, while the government sector was associated with longer times.

Finally, we find that use of counsel by both the union and the employer tends to prolong the time from first hearing to final award. As was the case with hearing times, the interaction variable is associated with a reduction in delay at this stage.

(f) Hearing Days

The number of hearing days increases with the presence of a disputed factual issue requiring resolution, and with the presence of a *Charter* issue, but actually decreases in the case of a range of other types of issues, including arbitral jurisdiction, admissibility of evidence, procedural objections, human rights, pension plan, benefits and welfare plan, discipline, work assignment and wages. The effects of a longer award are once again very small. These observations tend to further confirm the inference that the expanded jurisdiction of arbitrators has not caused increased delay by adding complexity to the arbitral mandate.

TABLE 5
Regression Results for Event to First Hearing and Event to Final Award

	Event to First Hearing (efdur) Generalized gamma regression			*Event to Final Award (eadur) Loglogistic regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.5446673***	.1373517	0.000	**.583792***	.1322155	0.000
health	.1345985	.1223235	0.271	.180735	.1153659	0.117
educ	.1425699	.174359	0.414	.0322816	.1549958	0.835
frep	.192838	.1873045	0.303	.0991864	.1910447	0.604
urep	.1226297	.1615381	0.448	.2010854	.1662556	0.226
furep	-.1656511	.1284671	0.197	-.1648445	.1398916	0.239
tripart	**1.619008***	.3792891	0.000	**1.375118***	.2966958	0.000
pubtri	**-1.3773***	.38513	0.000	**-1.004985***	.3346773	0.003
exped	**-1.144759***	.1761919	0.000	**-.7796332***	.2620868	0.003
sec50	-.1965268	.1403961	0.162	**-.2790461***	.163594	0.088
afact	.0728336	.1269738	0.566	-.0979539	.1092254	0.370
ccount	**.0284522**	.0115671	0.014	**.0189016***	.0113578	0.096
ccount2	**-.0003176***	.0001305	0.015	**-.0002474***	.0001295	0.056
nsubj	.0207629	.223856	0.926	.1184419	.214773	0.581
nsubj2	.0085947	.0397968	0.829	.009316	.0431684	0.829
juris	.0620236	.236348	0.793	-.1778892	.2411803	0.461
admiss	.7625002	.5651308	0.177	.2459203	.3263929	0.451
proced	-.2259509	.2168461	0.297	**-.3947002***	.1809825	0.029
dfact	.0326135	.1114074	0.770	-.009392	.0999116	0.925

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.0427247	.2715706	0.875	-.2031521	.2389554	0.395
cc	0	(omitted)		0	(omitted)	
pp	-.3634728	.3865473	0.347	**-.9372596**	.2995209	0.002
bwp	-.2628679	.2695969	0.330	-.2597693	.2319945	0.263
nhr	-.1475317	.2582274	0.568	-.0724201	.23941	0.762
estop	-.2137122	.2623312	0.415	-.210259	.2945971	0.475
cba	.4545735	.288192	0.115	**.5166088***	.2672921	0.053
discd	**-.9071809***	.187348	0.000	**-.6142832***	.1663575	0.000
discip	**-.5574363***	.2122712	0.009	**-.4583259***	.1782109	0.010
assign	-.2262173	.189997	0.234	**-.2761233***	.1620521	0.088
senior	-.2339456	.2703484	0.387	-.1053009	.2119437	0.619
wages	**-.3404566***	.1799957	0.059	**-.3955488***	.1783907	0.027
urights	-.3417077	.3205102	0.286	-.1772275	.2344825	0.450
ndterm	-.151393	.2138161	0.479	-.2238566	.1924144	0.245
other	-.110641	.2024485	0.585	.0785794	.182338	0.667
only	**-.4910607***	.2070819	0.018	**-.3494188***	.2006629	0.082
wcount	**.0000414***	.0000201	0.040	**.0000947***	.0000184	0.000
wcount2	-7.81e-10	5.58e-10	0.161	**-1.68e-09***	4.62e-10	0.000
agender	.2127036	.1358857	0.118	.1352275	.1259595	0.283
CONSTANT	**5.371993***	.3112198	0.000	**5.400345***	.3398638	0.000
Number of Observations	259			289		
Log Pseudo-Likelihood	-243.71633			-252.37577		
AIC	563.4327			580.7515		

TABLE 6
Regression Results for Grievance to First Hearing and Grievance to Final Award

	Grievance to First Hearing (gfdur) Loglogistic regression			*Grievance to Final Award (gadur) Loglogistic regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.6135371***	.2860838	0.032	.2208581	.2287227	0.334
health	**.4018184***	.1912576	0.036	**.4216898***	.1529707	0.006
educ	.0499697	.2781892	0.857	.0829682	.2493182	0.739
frep	.4888595	.4988285	0.327	.4229262	.4635281	0.362
urep	.6646496	.5110171	0.193	.6914149	.4558357	0.129
furep	-.5988871	.4692665	0.202	-.5537914	.4260445	0.194
tripart	**.7149534**	.2949769	0.015	**.5421343***	.2318945	0.019
pubtri	0	(omitted)		0	(omitted)	
exped	**-1.028315***	.3171598	0.001	**-1.370283***	.3797429	0.000
sec50	.0670737	.3498588	0.848	-.2075843	.3543454	0.558
afact	-.1468672	.2714196	0.588	-.2941922	.1980736	0.137
ccount	.0185941	.0193768	0.337	.0034553	.018904	0.855
ccount2	-.0001332	.0002106	0.527	.00002	.0002075	0.923
nsubj	-.4637951	.3739835	0.215	-.2046716	.3121232	0.512
nsubj2	.0122776	.0585038	0.834	.0339895	.0631713	0.591
juris	**.6268444***	.378319	0.098	.1981921	.2942272	0.501
admiss	.437974	.3269441	0.180	.3719895	.3022474	0.218
proced	.1177617	.3535403	0.739	-.1886454	.2805101	0.501
dfact	-.1548723	.2119128	0.465	-.1685752	.1710248	0.324

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	.3344499	.3903577	0.392	-.0877168	.4014182	0.827
cc	0	(omitted)		0	(omitted)	
pp	.53156	.545261	0.330	.7335692	.9577149	0.444
bwp	-.1970284	.418418	0.638	-.6227453	.4398388	0.157
nhr	.2044165	.3835551	0.594	.1453197	.3079985	0.637
estop	.4215094	.4118349	0.306	.1662031	.328174	0.613
cba	.197782	.391096	0.613	.0646437	.3194269	0.840
discd	-.2939062	.3361456	0.382	-.1762816	.2671601	0.509
discip	-.5257325	.6864452	0.444	-.2858616	.3484133	0.412
assign	.2859518	.3421247	0.403	.1204183	.2446906	0.623
senior	.0889999	.5921139	0.881	-.1527165	.3612836	0.673
wages	.1636644	.3583761	0.648	-.0503581	.2764569	0.855
urights	.018803	.492602	0.970	-.0500725	.3284813	0.879
ndterm	.3221059	.3634714	0.376	.0073019	.301921	0.981
other	.5192148	.3611234	0.150	.2615581	.2932487	0.372
only	.19235	.3151303	0.542	-.2418568	.2816821	0.391
wcount	.0000526	.0000336	0.117	**.0000898***	.000033	0.006
wcount2	-8.91e-10	8.20e-10	0.277	**-1.38e-09***	7.58e-10	0.069
agender	.15997	.1873951	0.393	**.3553768***	.1739572	0.041
CONSTANT	**4.799972***	.5236687	0.000	**5.091831***	.5591659	0.000
Number of Observations	173			190		
Log Pseudo-Likelihood	-198.64288			-206.97123		
AIC	471.2858			487.9425		

TABLE 7
Regression Results for First to Last Hearing Time and First Hearing to Final Award

	First to Last Hearing – Hearing Time (fldur)(ldate) Lognormal Regression			*First Hearing to Final Award – Total Time (fadur)(adate) Generalized Gamma Regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.7892528***	.3213317	0.014	**.5797034***	.1943806	0.003
health	.2817095	.241852	0.244	.1772968	.1580368	0.262
educ	.0320299	.311879	0.918	.1838742	.2063003	0.373
frep	.5721277	.364029	0.116	**.7183159***	.3542759	0.043
urep	**.7119005***	.3280869	0.030	**.6238629***	.2716765	0.022
furep	**-.5050607***	.263127	0.055	**-.7247365***	.2419765	0.003
tripart	-.4794545	.4246831	0.259	.1486983	.6159574	0.809
pubtri	.4566294	.7776786	0.557	.3402946	.7911203	0.667
exped	-.0678663	.3750203	0.856	-.1465303	.3122294	0.639
sec50	.2191282	.4108134	0.594	**-.6850176***	.3615127	0.058
afact	**-.9609099***	.2812066	0.001	-.0510343	.1741359	0.769
ccount	-.0379541	.0236805	0.109	**-.0330022***	.0146851	0.025
ccount2	.0001488	.0002588	0.565	**.0002895***	.0001697	0.088
nsubj	.6400872	.5775739	0.268	.6348001	.4718312	0.178
nsubj2	-.0866784	.1092766	0.428	-.1154162	.1011175	0.254
juris	**-1.005652***	.500835	0.045	-.1478179	.2901671	0.610
admiss	-.1284656	.7308632	0.860	.4775009	.3511288	0.174
proced	-.7470386	.5275058	0.157	-.5248132	.3518386	0.136
dfact	**.718098***	.2779666	0.010	**.4785269***	.1695087	0.005

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.6833677	.5448208	0.210	-.3580106	.3553009	0.314
cc	**2.013128***	1.029518	0.051	**1.678235***	.9713465	0.084
pp	-.9063508	.823903	0.271	.3179605	1.193158	0.790
bwp	**-1.038171***	.5139388	0.043	**-.7679718***	.3656309	0.036
nhr	-.2347691	.5356152	0.661	-.5495212	.396653	0.166
estop	.093942	.5273888	0.859	.3246066	.3437751	0.345
cba	.4734019	.5441128	0.384	.3210335	.3312225	0.332
discd	-.0927113	.4294511	0.829	-.3236741	.2585669	0.211
discip	-.3455206	.5188306	0.505	-.1186256	.3419788	0.729
assign	-.4131933	.398203	0.299	-.1270238	.2235949	0.570
senior	-.6197363	.6115212	0.311	-.2906245	.3252005	0.371
wages	**-.8808779***	.4073414	0.031	**-.4543342***	.2387224	0.057
urights	.1667883	.5411856	0.758	.1772767	.3613376	0.624
ndterm	-.5554483	.5232267	0.288	-.3193951	.3271793	0.329
other	.5142532	.5404196	0.341	.1639256	.3392288	0.629
only	-.5186153	.4454552	0.244	**-.4621125***	.2599129	0.075
wcount	**.0003285***	.0000436	0.000	**.0002629***	.0000351	0.000
wcount2	**-6.40e-09***	1.19e-09	0.000	**-5.42e-09***	1.26e-09	0.000
agender	**-.5411169***	.2510781	0.031	**-.3333833***	.1599084	0.037
CONSTANT	.3262724	.6474695	0.614	**2.015491***	.6587437	0.002
Number of Observations	487			488		
Log Pseudo-Likelihood	-1009.7515			-813.57133		
AIC	2097.503			1707.143		

TABLE 8
Regression Results for Final Hearing to Final Award and Hearing Days

	Final Hearing to Final Award – Award Time (ladur)(adate) Generalized Gamma Regression			*Hearing Days (ndays)(ldate) Generalized Gamma Regression*		
Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
gov	**.3312499***	.1547408	0.032	**.1408479***	.047444	0.003
health	.0630612	.1255455	0.615	.054082	.0359881	0.133
educ	.1355364	.1558031	0.384	**.1065397***	.0404635	0.008
frep	.3997437	.2949381	0.175	.0437777	.0533918	0.412
urep	.3129063	.2312829	0.176	.0389004	.0601963	0.518
furep	**-.4536643***	.1977725	0.022	-.0321317	.0496442	0.517
tripart	.335979	.5765828	0.560	.1092451	.0742794	0.141
pubtri	.3808548	.7098992	0.592	**-.1982398***	.1180337	0.093
exped	-.1306436	.3007245	0.664	.0397439	.0478344	0.406
sec50	**-.9167097***	.3060811	0.003	.0369859	.0501534	0.461
afact	**.2822277***	.1339538	0.035	**-.166312***	.0379779	0.000
ccount	**-.0243259***	.0111504	0.029	-.0034878	.0034028	0.305
ccount2	**.0002911***	.0001292	0.024	.0000138	.0000376	0.713
nsubj	.3034405	.411362	0.461	.0949673	.1152513	0.410
nsubj2	-.0484104	.0878024	0.581	.0104602	.024284	0.667
juris	.1199849	.2515129	0.633	**-.2198872***	.0854669	0.010
admiss	-.0232129	.4360948	0.958	**-.4477006***	.1961076	0.022
proced	-.5059089	.3118422	0.105	**-.2517229***	.0951159	0.008
dfact	**.3259059***	.1328653	0.014	**.1339808***	.0388015	0.001

Variable	*Coefficient*	*Robust Std Error*	*P>|z|*	*Coefficient*	*Robust Std Error*	*P>|z|*
hrights	-.0667895	.3015374	0.825	**-.2979273***	.1070784	0.005
cc	1.673814	1.032228	0.105	**.8843422***	.3487108	0.011
pp	.3385897	1.689915	0.841	**-.2192395***	.1242407	0.078
bwp	**-.6500781***	.354564	0.067	**-.1953321***	.0964462	0.043
nhr	-.5584061	.3671066	0.128	**-.210195***	.1258284	0.095
estop	.20397	.3676256	0.579	-.0471527	.0939047	0.616
cba	.1098039	.3397182	0.747	.0221396	.1038781	0.831
discd	-.3408992	.2319177	0.142	-.0429833	.0892732	0.630
discip	-.1313492	.284438	0.644	**-.2475719***	.1127434	0.028
assign	-.0119143	.2251777	0.958	**-.2101365***	.0793592	0.008
senior	-.0912859	.2950203	0.757	-.0607835	.1003491	0.545
wages	-.1974621	.2222237	0.374	**-.2061396***	.0773787	0.008
urights	.2588326	.29876	0.386	-.163546	.1007174	0.104
ndterm	-.05875	.3019747	0.846	**-.1787502***	.0995356	0.073
other	.0101646	.2742043	0.970	.0595439	.0853351	0.485
only	-.3981872	.2430302	0.101	**-.2349769***	.0839597	0.005
wcount	**.0001825***	.0000346	0.000	**.0000468***	.0000102	0.000
wcount2	**-3.63e-09***	1.35e-09	0.007	**-8.25e-10***	4.04e-10	0.041
agender	**-.2050394***	.1198036	0.087	-.054829	.0379208	0.148
CONSTANT	**2.09855***	.5814875	0.000	**.692694***	.1146269	0.000
Number of Observations	489			509		
Log Pseudo-Likelihood	-712.86501			-219.93364		
AIC	1505.73			519.8673		

6. DISCUSSION

Returning to our theorization of the possible causes of delay, we consider whether increasing delay appears to be due to (a) the exogenous demands of expanded jurisdiction or a culture of legalism; (b) party preferences; (c) short supply of arbitrators willing and able to provide expeditious dispute resolution; or (d) coordination, cost, and incentive problems.

(a) Exogenous Change in the Legal Environment – Expanded Jurisdiction and the Culture of Legalism

Our findings generally run contrary to arguments that the expanded jurisdiction of arbitrators has increased delay. We found no evidence that the number or type of jurisdictional or substantive legal issues in the labour arbitration system increased the length of time required to complete any stage of the arbitration process. The only subject consistently resulting in longer times was the *Charter of Rights and Freedoms*. But it arose very infrequently and could not account for any increase in delay throughout the system. This indicates that the novelty or complexity of additions to arbitral jurisdiction has not increased delay. Our results in this regard are consistent with the descriptive findings of Curran.[54]

Our results provide only modest support for the theory that a culture of legalism is increasing delay. We found no significant evidence that deciding procedural, evidentiary or jurisdictional issues at arbitration causes delay. The length of arbitral awards had no substantial effect on delay. On the other hand, we do find that the use of lawyers prolongs the time from first hearing to final award. This suggests that the way lawyers present cases takes longer than the way non-lawyers present cases, or that the submissions of lawyers take arbitrators longer to deal with in writing decisions, or both. But it should be borne in mind that most delay by far occurs prior to the hearing. A culture of legalism cannot account for this on its own.

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54 Curran, *supra* note 7. *Our* overall findings suggest that Curran's observation that human rights issues were associated with delay at the decision preparation stage may not indicate causation. Curran observed an association between *Employment Standards Act* issues and increased prehearing and total times over the course of his sampling period; we did not identify *Employment Standards Act* issues in our coding frame and therefore cannot confirm or contradict his observations.

(b) Party Preferences

We also conclude that the preferences of the parties probably do not account for much of the observed delay in the arbitration process. Our data do not include direct observations of party preferences. But they do permit inferences about those preferences and their likely effects on delay. First, we observe that any preference for procedural formality at the hearing could account only for a relatively small fraction of total delay, since most of it occurs prior to the hearing. Second, even if there is a widespread preference among parties for a small set of experienced arbitrators (based on concerns about control over the process or to ensure correct outcomes, as discussed above), that preference probably did not operate in the 2010 environment as a constraint on timeliness. In that year, the parties often chose arbitrators who were not among the busiest. Many arbitrators who are not among the busiest are available on relatively short notice. This has been the case for a long time, and was almost certainly the case in 2010. If the availability of the arbitrator were a determinant of the length of prehearing time, decisions to use busy arbitrators would therefore have resulted in significant delay relative to cases in which other arbitrators were selected. But the availaibility of the arbitrator had only a small effect on time to first hearing. The primary cause of delay, the one that operates as a binding constraint on timeliness, must therefore lie somewhere else.

Third, even if public-sector employers and unions required more time for decision-making with respect to grievances, it is unlikely in our view that this would explain the current delays, under which the median case takes over a year to complete. It is more likely that the additional delay present in the public sector reflects higher tolerance for delay or greater accumulated backlogs resulting from resource constraints rather than party preferences for it. We also note that some successful expedited arbitration systems have been implemented in the broader public sector.[55]

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55 S Stewart, "The OPSEU and MCSS Protocol – Expediting Dispute Resolution" (2012) [unpublished]; Christopher M Dassios, "Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitrations in the Ontario Electricity Industry" in Paul D Staudohar & Mark I Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators* (Arlington: BNA Books, 2011).

Fourth, we would make the same observation in response to the argument that parties often prefer delay in order to permit time for healing of workers or relationships. There is no association between the types of cases in which such healing would be beneficial (cases involving unjust discipline or human rights cases, for example) and additional delay.

Finally, we acknowledge that the growing preference for mediation-arbitration may be contributing to delays, for the reasons described above. But failed mediations do not likely account for median wait times of close to a year before the start of hearings. Moreover, at least during the time considered in our study, mediation-arbitration was probably used in only a relatively small fraction of cases. Curran finds that mediation-arbitration was used in only about 20% of cases in 2012.[56] Moreover, the tendency towards increased delay predates the growing use of med-arb by at least two decades. We think that most of the explanation of that tendency still lies elsewhere.

(c) Supply of Expeditious Dispute Resolution Services

We find no evidence that limited supply of experienced arbitrators is a primary cause of increased delay. If this were the case, the use of busy arbitrators would be associated with much more delay at the prehearing stage than it is. It may be that if, as discussed below, coordination, cost and incentive conditions facing the parties were different, a preference for the most experienced and busy arbitrators would then become more of a constraint on timeliness. But in 2010 this appears not to have been the case.

(d) Coordination, Cost and Incentive Problems

All of this suggests that the determinants of increased delay in arbitration lie not in the changed legal environment, the preferences of parties with respect to procedures or representation, or the supply of arbitration services but rather in incentive, cost or coordination problems facing the parties, most particularly in prompt scheduling

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56 Curran, *supra* note 7.

of first hearings. Our data do not permit us to identify those problems with precision. Nonetheless, it is possible to offer some reasonable conjecture about the likely relative importance of various sources of incentive or coordination problems.

First, we doubt that lack of information about more efficient arbitration systems constitutes a binding constraint for many employers and unions. Privately-created expedited arbitration systems have existed for many years in Canada. At least for larger unions and for larger employers with access to sophisticated human resource professionals, information about these systems has been available for some time.

We also doubt that the transaction costs and risks of defection described above constitute a binding constraint, at least for larger employers and unions who repeatedly deal with each other in grievance and arbitration proceedings. Such employers and unions negotiate complex collective agreements covering a range of issues with far greater cost implications than the associated arbitration procedures. They are often in a long-term relationship. The incentives and costs involved in building and maintaining expedited arbitration systems would seem to be well within their capacity to manage through bargained arrangements. In any event, the increase in delay is not primarily due to failure to adopt expedited arbitration hearing procedures (though doing so may be part of the solution, as discussed below). Rather, it is most significantly due to the length of time required to get to a hearing within regular arbitration processes.

This leaves up-front costs, accumulated backlogs, and incentive problems affecting the parties' agents as the most likely primary and systemic factors contributing to delay in arbitration in Ontario.[57] This suggests that the root causes of delay in labour arbitration may be the habituation of parties to delay, their resource constraints, and the incentive structures of employer and union representatives facing backlogs. This may be the most critical diagnosis — the condition

57 It is worth noting that tactical delay may play a role here. But there are limits to how much tactical delay is possible when the calendars of party representatives are in fact open. Legal counsel have professional obligations not to misrepresent such matters. Non-legal representatives often deal with each other on a recurring basis and need the trust of their counterparts to effectively represent their client or employer, which again constrains the scope for purely tactical delay.

that creates symptoms of increasing delay notwithstanding any other factors that might otherwise cause them. It may be that if backlogs and agency problems were removed, the changed legal environment (including the range of new legal issues and elements of a culture of legalism), tactical delay, or the busy schedules of arbitrators would then operate as binding constraints on further improvements in the efficiency of the system. But until that time arrives, it will probably be impossible to know whether this would be the case.

We cannot discount the possibility that the changed legal environment — whether expanded arbitral jurisdiction or a culture of legalism — contributed to backlogs in the first place, by increasing the number of grievances and legal issues litigated per unionized employee, thus creating pressure on the resources of unions and employers. On such a theory, it would not be changes in the quality but rather in the quantity of legal issues at a systemic level that lie at the root of delay. To figure out whether this was the case, we would need to study how the volume of legal issues raised at arbitration evolved in relation to the relevant population of unionized employees over time. A full inquiry into this question lies outside the scope of our data.

7. CONCLUSIONS

A labour arbitration system in which the median case takes about one year to reach a final decision and 25% of cases remain unresolved after over 600 days is not serving as well as it should the important public policy goals that led to its establishment and that have since been added to its mandate. Delays in the system should be a matter of public concern. Our research suggests that some lines of further enquiry and public policy response are likely to be more promising than others.

First, we find no evidence indicating that returning to more limited arbitral jurisdiction would improve efficiency at this point in time. Our research demonstrates that the type of legal or factual issue at play does not have an impact on the efficiency of the system. Moreover, human rights and other statutory rights issues were added to the jurisdiction of arbitrators because collective agreements must be interpreted and applied consistently with such legislation. It makes more sense to have arbitrators rule on such interpretations than to

suspend arbitration proceedings pending such rulings by statutory tribunals. While it is more debatable whether other additions to arbitral jurisdiction under the *Weber*[58] decision were a salutary development, our earlier research indicates that they have not been a factor in increased delay at arbitration.[59]

Rather, this paper points to the primary importance of doing more work to identify and address possible resource constraints and incentive problems that may be creating backlogs at prehearing stages. It would be valuable to know how often bottlenecks occur in pre-arbitration grievance steps and how often they occur at the point of scheduling an arbitration hearing (we suspect but cannot prove that it is more often the latter). Once this is known, unions and employers could be encouraged or assisted in addressing resource constraints that may be producing such bottlenecks, and to align incentive structures with solutions. Possible measures could include assisting parties, perhaps through information resources and mediation services, to put temporary or permanent expedited dispute settlement systems in place to help clear backlogs and prevent their recurrence. Changes to incentive structures might include moving towards instructing and remunerating representatives in ways that allow for and encourage the prehearing preparation and cooperation necessary to make such expedited systems work. Such preparation and cooperation should focus on possibilities for settlement, and in the event that settlement is not possible, on expedited and proportional presentation of evidence. We will say a little more about this below.

Third, more work should be done on the effects of mediation-arbitration on timeliness. While Curran's (2017) research indicates an association between med-arb and longer times at arbitration, we suspect that mediation-arbitration has an overall beneficial impact on delay by removing cases from the arbitration system through settlement, and thus reducing backlogs. If backlogs are at the root of the problem, the overall net effect of med-arb may be very beneficial.

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58 *Supra* note 17.

59 Kevin Banks, Richard P Chaykowski & George A Slotsve, "Did Weber Affect the Timeliness of Arbitration?" in Elizabeth Shilton & Karen Schucher, eds, *One Law for All? Weber v. Ontario Hydro and Canadian Labour Law: Essays in Memory of Bernie Adell* (Toronto: Irwin Law, 2017) 201.

Finally, our research indicates the potential value of promoting more efficient hearing procedures. While our research, like earlier studies, indicates that prehearing delays are the main problem, we take note of Curran's (2017) research indicating that hearing times have increased 30% over the period 1994 to 2012, suggesting that there may be significant room for improved efficiency at this stage. Such improvement might also make arbitrators and lawyers who are in demand by the parties more available (since hearings would require less of their time), which in turn might prevent backlogs from persisting or recurring once parties have made themselves more available for earlier hearings.

Further work is needed to determine why the overall length of hearings has increased. But our research and that of Curran (2017) indicate that resolving disputes of fact and hearing witness testimony are significant factors that contribute to prolonging hearings. Both are of course often necessary to a fair and full disposition of a dispute. Nonetheless, as Justice Winkler suggests, there may be more efficient ways of presenting evidence.[60] These might include preparing oral or written statements of material facts and only calling and examining witnesses as necessary, and in Justice Winkler's words, in a manner which is "proportional," that is, which reflects the complexity, monetary value, and importance of the dispute.[61] More research into which "proportional" practices are best — that is, both fair and efficient — would be of assistance. Ministries of Labour could then make available, to the parties and to arbitrators, information and training on expedited or proportional presentation of cases. More generally, labour ministries could support the creation of a culture of proportionality with respect to the presentation of evidence and argument that would inform party representatives and arbitrators of what is expected of them in the conduct of hearings. We might then expect the practices of parties in remunerating and instructing their representatives and in conveying their expectations regarding procedures to arbitrators to follow suit, allowing for and incentivizing both the preparation and the hearing administration necessary to ensure an efficient and fair disposition of rights arbitration cases.

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60 Winkler, *supra* note 3.

61 *Ibid.*

APPENDIX
TABLE 1
Pairwise Correlations in Time, Across Stages

		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Event to First Hearing	**Correlation**	1							
	Significant Level								
	Number of Observations	268							
Event to Final Award	**Correlation**	**0.8463**	1						
	Significant Level	0							
	Number of Observations	268	299						
Grievance to First Hearing	**Correlation**	**0.9607**	0.7526	1					
	Significant Level	0	0						
	Number of Observations	95	95	180					

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		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Grievance to Final Award	**Correlation**	0.7733	**0.9766**	**0.8158**	1				
	Significant Level	0	0	0					
	Number of Observations	95	103	177	198				
First to Last Hearing Duration	**Correlation**	0.122	0.6119	0.0832	0.5756	1			
	Significant Level	0.0473	0	0.2684	0				
	Number of Observations	265	265	179	176	506			
First Hearing to Award Duration	**Correlation**	0.1332	0.6406	0.1398	0.6868	0.9113	1		
	Significant Level	0.0292	0	0.0634	0	0			
	Number of Observations	268	268	177	177	503	507		

		Event to First Hearing	*Event to Final Award*	*Grievance to First Hearing*	*Grievance to Final Award*	*First to Last Hearing Duration*	*First Hearing to Award Duration*	*Last Hearing to Award Duration*	*Number of Days*
Last Hearing to Award Duration	**Correlation**	0.0973	0.3979	0.1499	0.484	0.1852	0.5735	1	
	Significant Level	0.114	0	0.047	0	0	0		
	Number of Observations	265	266	176	176	503	503	507	
Number of Days	**Correlation**	0.0283	0.4215	0.0257	0.4511	0.7718	0.73	0.2067	1
	Significant Level	0.6441	0	0.7322	0	0	0	0	
	Number of Observations	268	275	180	183	505	506	506	529