# Procedural Irregularities in Grievance Arbitration

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> But it is the disconcerting aspect of almost all human endeavors that they start out simply enough in order to meet a felt necessity and then begin to proliferate complications until the new is almost as bad, if not worse, than the old. With arbitration as it still is today, however, its practitioners should be able, with reasonable effort, to halt any trends toward over complication before it goes too far.[1]

Written over fifteen years ago, the lament in the opening sentence may no longer merit the optimism of the second. Indeed, by rendering the process of labour arbitration so formal, complex, lethargic and remote from the worker, our proclivity to complicate may be a primal cause of such traditional supporters of the system as the United Steelworkers and the Teamsters[2] either abandoning or radically altering the process of labour arbitration.[3] As a consequence of this tendency to excess formalism, the most basic of the institutional strengths inherent in the labour arbitration process have been effectively eroded. Although some of the causes of this tendency to complicate the arbitration process are to some extent inevitable, given the sophistication of industrial life, others have been self-inflicted by the participants. The purpose of this article is, having

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[1] Sembower, "Halting the Trend Toward Technicalities in Arbitrations", in *Critical Issues in Labour Arbitration*, (1957, Proceedings of the National Academy of Arbitrators, N.A.A.), 98.

[2] Azoff, *Joint Committees as an Alternate Form of Arbitration under the NLRA*, (1973) 47 Tul.L.Rev. 325. *Note*, May, 1973, Labour Arbitration News.

[3] It is interesting to note that over the same fifteen years labour arbitration appears to have sufficiently developed and matured to be perceived by some commentators as a model of dispute resolution particularly suited for application in a variety of diverse institutional settings far removed from the labour relations sector. So, for example, the collective bargaining model has been touted as a most efficacious methodology for the resolution of conflicts between landlords and tenants, ratepayers and developers, racial groups and consumers and manufacturers: *An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration*, (1973) 7 Suffolk L.Rev. 618; Barber, Christie, Kuyek and Whyte, *Collective Labour Relations Model Applied to Social Welfare Programmes*, (1973) 22 U. of T. L.J. 142; Jones and Boyer, *Improving the Quality of Justice in the Market Place: The Need for Better Consumer Remedies*, (1971) 40 Geo. Wash.L.Rev. 357; Henderson, *Arbitration and Medical Services*, (1973) 23 Arb. J. 14; Jones, *Wanted: A New System for Solving Consumer Grievances*, (1970), 25 Arb. J. 234.

identified what is believed to be one of the major sources (of the self-inflicted variety) of the recent disenchantment with the arbitration mechanism by participants and commentators,[4] to suggest that a particular palliative, already within the grasp of the participants, is available to halt this tendency towards complication. Specifically, I shall examine one segment of the surprisingly large number of preliminary and technical objections of a procedural nature which are being raised before boards of arbitration and which have either seriously delayed or completely prevented a hearing from being held on the merits of a grievance. It will be argued that under the present statutory regime in most Canadian jurisdictions, arbitrators have it within their statutory mandate to relieve against such procedural objections in all but a most circumscribed group of cases.[5]

## The Problem of Procedural Technicalities

A casual perusal of the earlier volumes of the *Labour Arbitration Cases* indicates that issues not going to the merits of the case arose in approximately every fifteenth case. By 1972, the figure was closer to every third case. It is true that some of these non-substantive issues raised questions of the scope of the arbitrator's jurisdiction or authority. Further, it may be that such jurisdictional issues are capable of resolution only by affirmative action by the legislature. Thus it may well be that only through codification can one fully demark the precise scope of an arbitrator's remedial authority.[6]

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[4] Hays, *Labor Arbitration: a Dissenting View* (1966); Cox, *Reflections Upon Labour Arbitration*, (1959) 72 Harv.L.Rev. 1482; Weiler, *The Role of the Labour Arbitrator: Alternative Versions*, (1969) 19 U. of T. L.J. 16; Shulman, *Reason, Contract & Law in Labour Relations*, (1955) 68 Harv.L.Rev. 999; Azoff, *supra*, f.n.2; Kane, *Current Developments in Expedited Arbitration*, (1973) 24 Lab. L.J. 282; Killingsworth, "Arbitration, Then and Now", in *Arbitration at the Quarter-Century Mark* (1972 Proceedings, N.A.A.), 11; Sembower, *supra*, f.n.1.

[5] *The Alberta Labour Act*, S.A. 1973, c.33, s.78; *Labour Relations Act*, R.S.B.C. 1960, c.205, s.22, as amended by S.B.C. 1961, c.31, s.17; *Canada Labour Code*, R.S.C. 1970, c.L-1, s.125; *The Labour Relations Act*, S.M. 1972, c.75, s.69; *Industrial Relations Act*, S.N.B. 1971, c.9, s.56; *The Labour Relations Act*, R.S.N. 1952, c.258, s.19, as amended by S.N. 1960, c.58, s.14; *Trade Union Act*, S.N.S. c.19, s.40; *The Labour Relations Act*, R.S.O. 1970, c.232, s.37; *Prince Edward Island Labour Act*, S.P.E.I. 1971, c.35, s.36; *Labour Code*, R.S.Q. 1964, c.141, s.88, as amended by S.Q. 1969, c.47, s.36; S.Q. 1969, c.48, s.28; *The Trade Union Act*, S.S. 1972, c.137, s.25. In the interest of brevity, reference in this note will be directed to the Ontario legislation.

[6] Although it is now well settled that an arbitrator has jurisdiction to award damages (*Imbleau* v. *Laskin, ex parte Polymer Co.*, [1962] S.C.R. 338) and to relieve against a disciplinary sanction in the proper case (*Port Arthur Shipbuilding* v. *Arthurs* (1968), 70 D.L.R. (2d) 693 (S.C.C.); reversed by s.37(8),

However, a large number of the reported cases in which issues not going to the merits of the dispute are raised involve objections to the propriety of the procedure the grievance followed before it was presented at arbitration. These objections include such procedural defects as an alleged breach of the time limits set out in the grievance procedure; allegations of a lack of particularity in the wording of the grievance; and charges that the grievance was brought by way of a policy or union grievance which is properly in the exclusive domain of an employee grievance.

This problem of procedural technicalities inhibiting the arbitration process is worthy of isolated treatment for at least three reasons. In the first place it provides one with a manageable and homogenous group of cases which, because of the consequences that ensue from giving effect to such procedural technicalities, makes it necessary to examine the premises upon which the arbitration model is structured. Secondly, if such objections continue to increase, the institutional strengths of grievance arbitration may be lost. Simply put, arbitration will become more costly, more formal and less expeditious. If arbitrators are required to adjourn hearings to resolve the preliminary objection when the objecting party so demands,[7] the cost and delay will increase proportionately. As a consequence of this the parties may simply abandon the arbitration process and turn to quite different modes of conflict resolution. Finally, the problem merits separate scrutiny because arbitrators have it presently within their statutory mandate (and indeed are required to discharge that mandate) to relieve against procedural defects in all cases except those in which the party objecting to the defect can show some prejudice to himself caused by the procedural irregularity. In short, this particular debilitation of the arbitration process may be removed by those in control of the process without further legislative enactment. By virtue of section 37(1) of the *Ontario Labour Relations Act*,[8] arbitrators are required by the legis-

O.L.R.A.), nevertheless his authority to award effective relief in a promotion case (*Re Falconbridge Nickel Mines*, [1973] 1 O.R. 136), or his authority to give effect to statutory provisions relating to the grievance in issue (*Re Board of Education for the Borough of Etobicoke*, [1973] 1 O.R. 437) are to various degrees open to some debate. Given the judicial response to these questions it may well require a positive response from the Legislature to define the precise scope of an arbitrator's remedial powers. See generally on this issue: Palmer, *The Remedial Authority of the Arbitrator*, (1960) 1 Current Law and Social Problems 125. See also *Re Samuel Cooper*, [1973] 2 O.R. 841.

[7] *Re I.U.E.W., Local 549* v. *Sylvania Electric (Canada) Ltd.* (1972), 24 L.A.C. 361, 368 (Simmons).

[8] R.S.O. 1970, c.232.

lature to ignore such procedural irregularities, absent a finding of prejudice. Section 37(1) provides that:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.[8a]

The key is that there be a settlement "by arbitration of all differences". The section requires a resolution of such matters on a reasoned and rational basis which purports to determine the

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[8a] Some jurisdictions, such as Ontario, have a subsection analogous to s.37(3), which provides that:

> If, in the opinion of the Board any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection 2 is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection 1, but, until so modified, the arbitration provision in the collective agreement or in subsection 2, as the case may be, applies.

In these jurisdictions it might be argued that the Board has exclusive authority to require the arbitration clause to conform to s.37(1) and further, that until so modified, the arbitration clause in the agreement prevails.

However, such an interpretation ignores the express language of s.37(2) of the Act which provides that if the:

> ... agreement does not contain *such* a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision....

The statutory clause of s.37(2) is necessarily implied in an agreement if that agreement does not contain *such* a clause and not simply if it does not contain *any* clause. This requirement applies equally to arbitrators and the Board alike. Read in this context, it is clear that the jurisdiction given to the Board is not exclusive. It arises in a context or proceeding completely divorced from an actual dispute at arbitration. It arises when one party alleges that the provisions of the agreement or the deemed clause are inadequate or unsuitable. This does not deny the jurisdiction of an arbitrator who, when faced with a clause *in conflict* with the mandate of s.37(1), must also proceed, pursuant to s.37(2), to imply the provision provided by statute as a term of the agreement. In this sense the arbitrator is not simply responding to a request by one party to modify an inappropriate or unsuitable provision since the Board is in a s.37(3) application. Rather the arbitrator is merely applying the doctrine of illegality in contract, and then, pursuant to the mandate of s.37(2), implying the provision set out in the Act. Finally, if the contrary interpretation of s.37(3) were accepted, the reasoning and conclusion advanced by this note would still prevail. In such a case, the Board rather than the arbitrator would have the legislative mandate to remedy these problems of procedural deficiencies. There would still be no requirement for additional legislative action. However, the spectre of the Board besieged with a flood of applications seeking modification of arbitration provisions should demonstrate the logic in adopting an interpretation of s.37(3) giving both the arbitrator and the Board a co-operative jurisdiction of these matters.

merits of the dispute. It would be taking literalism to its extreme and draining the words "settlement by arbitration ... of all differences" of their purpose to argue that a dispute is so settled where an arbitrator denies a claim on the basis of a procedural defect. Arbitration, as a form of adjudication, requires a rational decision based on the presentation of proofs and reasoned arguments. Both as promulgated in section 37 and as universally recognized, the arbitration of disputes necessitates a resolution of those differences after a testing of the competing reasoned arguments and not a resolution on the basis of a coin toss, a roll of the dice or a procedural irregularity.[9] If the statute is interpreted literally, all differences, even those which are in breach of the time limits, even those lacking the particularity required by the agreement or those not following the proper procedure, must be "arbitrated". The section admits of no exceptions.

Such an interpretation is consistent with the facts of industrial life, where it is rare for the parties to provide explicitly for the negation of all grievances which have transgressed some procedural requirement. Usually nothing is said, and for a sound reason. Time limits are provided in collective agreements not to provide a means by which the merits of a dispute can be circumvented but rather to discourage the recipient of the grievance from dragging out in an interminable fashion the matter in issue. As one arbitrator has stated with regard to "directory time limits":

> Directory requirements are those provisions which state what the parties have agreed should be done and include provisions which set out the time within which the events should take place. Since a directory provision does not specify what will flow from a breach of the provision and since no substantive remedy is expressly contemplated, strict compliance is not essential. While directory provisions need not be complied with to the letter they cannot, of course, be totally ignored. Directory provisions with respect to time are usually agreed to by the parties in order to prevent hardship or unfair advantage which may be caused by delays. Such provisions are inserted in collective agreements as an expression by the parties of their common intention that certain things take place without undue delay.[10]

In short, for most collective agreements the insertion of procedural provisions, with or without the use of the imperative, is designed to further, not frustrate, the grievance and arbitration process. Indeed, if full effect is to be given to the plain words and clear purpose of section 37 one must go further and conclude that the parties

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[9] Fuller, *The Forms and Limits of Adjudication* (1959).

[10] *Re U.S.W., Local 6962 and Union Carbide Canada Ltd.* (1968), 19 L.A.C. 412, 418 (O'Shea).

are precluded from contracting out of the legislative policy of resolving all disputes by way of arbitration. Section 37 must be construed to mean that the parties cannot explicitly sanction the breach of a procedural provision with the negation of the grievance.

The argument that section 37(1) of the Act requires the arbitrator to ignore procedural irregularities not causing some prejudice not only accords with the literal interpretation of that section, but, more critically, coincides with the legislative purpose manifest in the Act generally and section 37 itself, and with good industrial relations sense. This interpretation is fortified when one looks at section 103 of the Act. It provides that:

> No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceeding shall be quashed or set aside if no substantial work of miscarriage of justice has occurred.[11]

The intention of the legislature is clear.[12] Proceedings, including arbitrations, are to be resolved in a manner furthering the objects of the Act (which include labour peace) and not on mere technicalities. Only if the irregularity has occasioned a substantial wrong will this policy be ignored.

This conclusion is further strengthened when one considers section 36 of the Act and the strong link between it and section 37. Section 36 provides that:

> Every collective agreement shall provide that there will be no strikes or lockouts so long as the agreement continues to operate.[13]

Although the scope of section 36 is broader than that of section 37, it is clear that each is in the nature of being the *quid pro quo* for the other.[14] That is, although section 37 only requires the arbitration of those matters involving "the interpretation, application, administration or alleged violation of the agreement" (and not all disputes of any kind arising outside of the contract), the legislature has replaced economic coercion in these matters with reasoned adjudication as the sole method of conflict resolution. In return for surrendering the right to strike, labour was compensated with the right to arbitrate all questions arising during the life of the agreement that arose out of that agreement. Although issues may arise which fall outside the scope of the agreement and which are therefore not susceptible to either a strike or arbitration, all those disputes involving the interpretation, application, administration or alleged

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[11] R.S.O. 1970, c.232.

[12] For a different interpretation of the meaning of s.103, see *Union Carbide* v. *Weiler*, [1968] S.C.R. 966, 70 D.L.R. (2d) 333.

[13] R.S.O. 1970, c.232.

[14] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

violation of the agreement must be arbitrated. In preferring arbitration to strikes as a way of resolving problems of contract interpretation, the legislature is clearly stressing industrial peace in a manner which derogates from the parties' ability to contract freely. (The American Congress, by comparison, made the opposite choice).[15] It would hardly be in the interest of industrial peace, a policy clearly enunciated in section 36, for the legislature to allow the parties to deny the employees access to arbitration because of a mere procedural irregularity. As a condition precedent to achieving a viable relationship and to ensuring industrial peace, mutual differences and felt grievances must be confronted in a rational and forthright manner. If fundamental complaints of either party over their respective rights and obligations in the agreement are not peacefully resolved, an attitude will develop that one must effect a resolution by industrial coercion regardless of its legality. The policy of industrial peace in section 36 can only be effected if section 37 is given a full and unyielding interpretation, denying the parties the opportunity to circumvent, limit, restrict or subordinate the mechanism contained therein. The duty to arbitrate, to resolve disputes on their merits, must be made to embrace all disputes arising during the term of the agreement and which are founded in that agreement.

This assertion is premised upon the same argument as that cited by those who, in observing the narrower scope given to the duty to arbitrate than the correlative negation of the right to strike, have argued that the latter prohibition should not extend to matters not covered by the agreement.[16] That is, it is said that to the extent that a dispute is not expressly covered by the agreement and therefore not within the scope of the duty to arbitrate, the employees should be free to resolve the matter by collective coercion. As in the United States, the employer would then be induced to negotiate a more extensive arbitration clause in exchange for the union voluntarily surrendering the right to strike. In the result, issues which had been determined by the unilateral employer action would be the subject of joint resolution, or, failing this, of independent third

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[15] Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, (1964) 112 U.Pa.L.Rev. 467. See also Cox, *supra*, f.n.4.

[16] It is interesting to note that although Professor Weiler is one of those who argues forcefully for the logic behind this proposition in the context of making arbitration an exact *quid pro quo* to the right to strike, he is not prepared to follow the same philosophy in the context of denying the parties the right to limit the arbitration procedure by procedural restrictions or otherwise: Weiler, *supra*, f.n.4, and *Re Weston Bakeries* (1970), 21 L.A.C. 308, 310 (Weiler).

party determination. Thus, by defining the perimeters of sections 36 and 37 to be coextensive it is envisaged that issues which presently remain unresolved or soluble solely at the employer's discretion, and which thereby might undermine an otherwise stable collective bargaining regime, would be capable of joint or third party resolution. Alternatively, this same result might be achieved by redrafting the duty to arbitrate to embrace all disputes arising during the agreement pertaining to the work environment and working conditions. However, it will suffice here to acknowledge that issues now denied a forum of third party resolution owing to some procedural irregularity would by a more purposeful interpretation of section 37 be brought within the ambit of joint or third party determination.

To adopt any other interpretation is to deny the uniqueness of a collective bargaining regime. As is generally recognized, this is a relationship fundamentally different from that known historically in the commercial contract setting. The agreement governs the affairs of a tripartite relationship: employer, employee and union. Further, in sheer numbers, it can control the working lives of thousands of persons. It regulates an enormously wide range of problems which daily impinge upon a worker's life: wages, working hours, working conditions, health, safety, lay-offs, promotions, discipline, pensions, work assignments, etc. More critically, it is a relationship which by law must endure for a minimum period of one year and which usually lasts for the duration of the enterprises's existence. It is by the nature of the statutory regime a mutually dependent relationship. Inevitably the parties must co-exist, must compromise, must agree. In a sense it is in many of its aspects an enforced or compulsory relationship. As such, it is courting unlawful conflict to allow grievances and complaints to build up over two or three years if no avenue of resolving these complaints is available in the interim. If the employee's complaint remains unresolved owing to an arbitrator's refusal (or inability) to weigh the merits and relieve against the time limits, the policy of industrial peace as enacted in section 36 will be made a shambles. At a minimum the opportunity to develop a mature collective relationship will be undermined. Thus it becomes critical to resolve, not deflect, all legitimate issues of dispute. "[A]ll differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement" must be resolved by arbitration, even if the parties may have provided otherwise. To cite but one arbitrator on this matter:

> Unlike courts where the litigants "part company" at the termination of the process, disputants in arbitration proceedings continue to "live together" and festering discontent which does not find its outlet in arbitration is inimical to maintaining both a proper working and collective bargaining relationship. The necessity to quell contained discontent is one of the reasons that matters of labour relations are dealt with by arbitration proceedings which can and tend to be procedurally non-technical.
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> That approach to procedural issues was expressed by the Supreme Court of Canada in *Re Galloway Lumber Co. Ltd. and B.C. Labour Relations Bd.*, 48 D.L.R. (2d) 587 at 595, [1965] S.C.R. 222, 51 W.W.R. 90, by Spence,J., where he stated: "I am of the opinion that in the matter of labour relations and arbitration thereon to take a narrow, technical and pedantic view of the procedure is to defeat the purpose for which the statute was enacted".[17]

## Judicial Response to Procedural Irregularities

With three exceptions,[18] arbitrators have not yet recognized, let alone responded to, this line of reasoning. Instead, they have reacted to two decisions of the Supreme Court of Canada,[19] which have heretofore been read as prohibiting arbitrators from evading such procedural provisions. To circumvent these decisions, they have resorted to a distinction between those procedural provisions which are mandatory and must be followed on pain of rendering the grievance invalid and those which are directory only, the breach of which does not prevent the matter from being resolved on its merits. These latter provisions are seen as mere guides to which the parties should strive to adhere. Notwithstanding its laudable objective of reducing the deleterious impact these decisions would have on labour arbitration, this line of reasoning suffers from the obvious defect of failing to meet the issue directly and in a forthright manner. Further, the distinction between mandatory and directory provisions has been drawn along sharply divergent lines by different arbitrators without ever acknowledging the fiction in which they are often engaged in ascribing to the parties the intention to make these provisions mandatory or directory. To catalogue these divergent opinions on the effect to be given to a procedural irregularity is to illustrate how rather less important is the language chosen by the

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[17] *Re Imperial Tobacco* (1969), 20 L.A.C. 310, 313 (Shime).

[18] *Re Weston Bakeries, supra*, f.n.16; *Re Township of Vaughan* (1969), 20 L.A.C. 392 (Weatherill); *Re United Brewery Workers and Canadian Breweries Transport Ltd.* (1963), 14 L.A.C. 220 (Laskin).

[19] *Union Carbide Canada Ltd.* v. *Weiler* (1968), 70 D.L.R. (2d) 333 (S.C.C.); *General Truck Drivers Union Local 938* v. *Hoar Transport* (1969), 4 D.L.R. (3d) 449 (S.C.C.).

parties than the one chosen to interpret it. For example, some arbitrators and courts have taken the view that only those provisions which "provide(s) a penalty or expressly deprive(s) the arbitration board of jurisdiction upon failure to scrupulously adhere to the provisions of the agreement" are mandatory.[20] Other boards have asserted that in the proper context and circumstances, the presence in a procedural provision of the word "shall" may make such a provision mandatory, and if breached deny an arbitrator jurisdiction to hear the matter.[21] Still other arbitrators and courts appear to ascertain the nature of the provision according to the factual consequences of the breach to the parties concerned.[22] Still others have held that the presence of the word "shall", even when accompanied by time limits set in bold type, does not render the provision mandatory.[23] In short, whether a provision is mandatory, whether a procedural irregularity will negate a grievance, depends more upon who is selected as the arbitrator than the intention of the parties. What is of greater concern, however, is that these distinctions ignore the more fundamental issue, namely whether section 37(1) precludes the parties from derogating from the statutory policy of resolving "all differences by arbitration" even if a clause is mandatory.

It should also be noted that in addition to real differences between arbitrators on what linguistic formulation is required to render a provision mandatory, very difficult questions of interpretation can make the determination of the nature of a procedural

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[20] *Re U.S.W. and Automatic Screw Machine Co. Automotive Hardware* (1970), 21 L.A.C. 255, 258 (Shime); *Re United Glass & Ceramic Workers and Dominion Glass Co.* (1972), 1 L.A.C. (2d) 151 (Reville); application for judicial review to quash the award granted: [1973] 2 O.R. 573, 34 D.L.R. (3d) 629; leave to appeal granted: [1973] 2 O.R. 763; appeal allowed: [1974] 1 O.R. 336.

[21] *Re U.S.W. Local 6962 and Union Carbide* (1969), 20 L.A.C. 74 (Adell); *Re I.C.W.U., Local 721 and Brockville Chemical Ltd.* (1972), 24 L.A.C. 423 (Reville); aff'd 73 C.L.L.C. 14,180; *Re U.S.W. and Construction Products Inc.* (1970), 22 L.A.C. 125 (Brown); *Re Valade and Eberlee*, [1972] 1 O.R. 682.

[22] *Re Lincoln County Roman Catholic Separate School Board and Buchler*, [1972] 1 O.R. 854; *Re Municipality of Metropolitan Toronto and Toronto Civic Employees Union, Local* 43 (1973), 3 L.A.C. (2d) 126 (Schiff). The grievance giving rise to this latter award (a discharge case), which is scheduled to be reviewed by the Ontario Division Court on the time limit issue subsequent to the writing of this note, will have resulted in a delay of over one year without the aggrieved employee even having had a hearing of his case, let alone a resolution.

[23] *Re International Longshoremen's Assoc., Local 1879 and Hamilton Terminal Operators Ltd.* (1966), 17 L.A.C. 181 (Arthurs); *Re C.U.P.E., Local 167 and City of Hamilton* (1967), 18 L.A.C. 96 (Hanrahan); *Re Tobacco Workers, Local 338 and Imperial Tobacco Ltd.* (1969), 20 L.A.C. 310 (Shime); *Re I.U.E.W., Local 549 and Sylvania Electric* (1972), 24 L.A.C. 361 (Simmons).

provision even more uncertain. In the *Hoar Transport* decision itself the arbitrator was faced with a clause by which a grievance would be nullified if the time limits were exceeded by the grievor, his agent or his representative. Where the union nominee to the board of arbitration failed to ask for the appointment of a chairman by the Minister of Labour within the time prescribed by the agreement, the arbitrator found the nominee was not "the agent or representative" of the grievor. The Supreme Court disagreed, found the provision to be mandatory and barred the grievance.

That the plain language, the underlying policy of section 37 and good industrial sense inexorably lead one to the conclusion that the parties cannot by their own agreement prevent an arbitrator from deciding a case on its merits is clear even to some of those who themselves have refused to adhere to it.[24] That is so because it is said this conclusion is foreclosed by the two decisions of the Supreme Court of Canada in *Union Carbide* and *Hoar Transport*[25] noted earlier, and by an earlier Ontario Court of Appeal decision.[26] However, upon a closer examination of the cases, it becomes clear that none of these judgments denies or even considers this interpretation. The Courts did not address themselves to the issue of whether section 37(1) would prohibit an arbitrator from denying a grievance for reasons other than on the merits. Only in the *Inco* decision of the Ontario High Court did Gale,J. (as he then was) in a somewhat ambiguous passage appear to lend support to this interpretation of section 37.[27] With this exception (reversed by the Court of Appeal

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[24] *Re Weston Bakeries, supra,* f.n.16.

[25] *Union Carbide* v. *Weiler* and *General Truck Drivers* v. *Hoar Transport, supra,* f.n.19.

[26] *Re Sudbury Mine, Mill & Smelter Workers Union, Local 598 and International Nickel Co. of Canada,* [1962] O.R. 415, 32 D.L.R. (2d) 494 (H.Ct.); [1962] O.R. 1089, 35 D.L.R. (2d) 371 (C.A.).

[27] *Re International Nickel,* [1962] O.R. 415, 419, where Gale,J. states that:

> I agree with Mr. Sopha that if there has been abdication by the union of its ordinary right to bring a matter such as this to arbitration then it must be found, if at all, in clear and explicit language. In this agreement such language is entirely lacking.
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> It strikes me, too, that having regard to the provisions of s.34(2) if Articles 7.01 and 7.09 are substantially different than that which is set out in the subsection then the latter must prevail and certainly if it does, the arbitration of this dispute under Article 11.13 is proper.

It would appear from the concluding words of the first paragraph that Mr Justice Gale would allow, by negative inference, for an occasion or occasions when clear language could be found to deny a union some of the rights contained in s.37(1). However, in the second paragraph, by asserting that clauses providing something less than that provided for in s.37(2) by the

on a different point of law) the effect of section 37 on grievance and arbitration clauses has not been raised. Indeed the *Inco* decision itself, cited by one arbitrator[28] as the strongest authority precluding an arbitrator from relieving against procedural irregularities, was not even referred to in the two decisions rendered by the Supreme Court of Canada. It is simply reading too much into the cases to conclude that the Courts have held for the primacy of freedom to contract over the goal of industrial peace and allowed the parties to restrict the scope of section 37(1).

What concerned the Supreme Court in *Union Carbide* and *Hoar Transport* was rather whether an arbitrator had the inherent jurisdiction to relieve against breaches of terms of the agreement. Clearly, in the face of the common language of many agreements stating that a board has no power "to make a decision inconsistent with the terms of this agreement or to vary, modify or alter any provisions of this agreement", it may well be that arbitrators cannot, without some statutory authority, so amend the agreement. However, that is not to deny that the legislature may require that relief be given to a breach of a procedural clause in the agreement. In *Union Carbide* the Court merely found that in ignoring the time limit which had been breached, the arbitrator exceeded his jurisdiction by "amending, modifying, varying and altering" the terms of the agreement in contravention of the mandate given him by the parties. The Court, to use its own language, asked itself the wrong question. It should have asked, notwithstanding the time limits and the limitation on the arbitrator's jurisdiction in the agreement, whether he might relieve against the procedural irregularity and give effect to the policy embraced in section 37(1). In *Hoar Transport* the Court was able to find that the union nominee was the representative of the grievor and that the time limits had been exceeded. Thus it merely cited its *Union Carbide* decision in declaring that the arbitrator had exceeded his jurisdiction.[29] Finally, the Court of Appeal in *Inco* simply found that the interpretation of the arbitrator which gave effect to the procedural

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Legislature are replaced by the latter would appear to admit of no derogation from the mandatory settlement of all disputes by arbitration as set out in ss.37(1) and (2).

This line of reasoning by which a clause restricting the right to settle differences through arbitration is deemed inconsistent with s.37(1), resulting in the invocation and application of the clause contained in s.37(2) under which the grievance is arbitrable, is also to be found in *Re Township of Vaughan, supra*, f.n.18.

[28] *Re Weston Bakeries, supra*, f.n.16 (Weiler).

[29] For similar reasoning in Manitoba see *Re Powell Equipment and U.S.W.* (1971), 22 D.L.R. (3d) 692 (Man. C.A.).

provisions of the agreement was one which the language could reasonably bear. That interpretation was not therefore susceptible of review by a court. The Court of Appeal similarly failed to address itself to the argument that section 37 required the resolution by arbitration of all disputes.

That on this issue the legislature has subordinated the policy of free bargaining to the goal of industrial peace appears obvious. The Ontario Labour Relations Board has implicitly recoguized this in a recent decision in which it overrode an explicit provision in an agreement to the effect that the parties could not make use of the grievance procedure on differences arising out of an insurance plan mentioned in the collective agreement. The Board appended to the contract under section 37(2) a grievance and arbitration provision for this very insurance programme. The Board there made explicit reference to the requirement in section 37(1) that "all differences" be resolved by arbitration.[30] Thus the Board concluded that section 37 precludes attempts to exclude substantive issues covered in the agreement from arbitration. It should follow that arbitrators should adopt the same approach when confronted with clauses which deny access to their forum if the grievance fails to comply with the procedural technicalities contained in the agreement. That is, a limitation on the scope of the arbitration process by way of time limits (absent an element of prejudice) is not materially or rationally different than a limitation on the scope of arbitration by way of delineation of substantive issues which are not, by agreement, susceptible of arbitration.

One cannot distinguish between procedural and substantive limitations with respect to their subversion of the policy underlying section 37. Both by definition circumscribe what disputes may be resolved on their merits by an impartial third party. Both derogate from the ambit given the arbitration process by the legislature. The denial of an employee's grievance against an unjust discharge owing to the employee's failing to file his grievance within a two minute time period is as effective as precluding all matters of discipline from being arbitrated. In short, a distinction between substantive and procedural limitations, never entirely clear in most contexts, becomes even less so as the procedural limitation becomes more stringent. For example, is a procedural time limit of one second a procedural or substantive limitation?

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[30] *U.A.W. Local 1285* v. *American Motors (Canada) Ltd.*, [1973] O.L.R.B. Rep. 211 (April). As with the *Metropolitan Toronto* award, this decision has been scheduled for review by the Ontario courts subsequent to the writing of this note.

To argue that in the case of procedural limitations the grievor has it within his power by adhering to such requirements to ensure the issue will be resolved on its merits is to observe the obvious and ignore the relevant. (At least this is so as long as the procedural limitations themselves are reasonable, which does not appear to be a condition precedent to being a valid limitation.) That is, the more fundamental question is whether it must (or may) follow that such procedural transgressions necessarily entail a denial of the claim. To ask such a question is to answer it. In short, the two types of limitations are inextricably interwoven in purpose and effect. That they embrace different means, that one is potentially less severe and is capable of being avoided, is of no consequence to the issue of whether the parties can by agreement provide for something less than that set out in the Act.

The legislature frequently subordinates freedom of contract to other social policies in labour relations as well as in other contract arenas.[31] Thus the *Labour Relations Act* provides that by virtue of the certification and bargaining process an employer must enter negotiations with one not of his own choosing and endeavour to effect a collective agreement;[32] that the parties must include certain provisions in its terms;[33] and that certain terms are prohibited from being included in the agreement.[34] Further, in section 36 the legislature has denied the parties the freedom to use economic force during the term of the agreement. In a recent dcision[35] the Nova Scotia Supreme Court concluded that the parties could not in the face of a similar provision (section 19) in the *Nova Scotia Trade Union Act* contract out of the statutory policy and provide for a limited right to strike during the agreement. An arbitrator had given effect to a limited right to strike provision set out by the parties in their agreement as justifying a subsequent walkout and thus allowed the grievance of the employees who had been disciplined for striking. Mr Justice Bissett found that the limited strike clause agreed to by the parties:

> ... violate[d] the provisions of s.19(1) of the Trade Union Act and that the arbitrator could not therefore base his decision, as he did, in any fundamental way on such [a clause].[36]

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[31] See, *e.g.*, Kessler, *Forces Shaping the Insurance Contract*, (1954) Ins.L.J. 151.

[32] *Ontario Labour Relations Act*, s.14, *supra*, f.n.5.

[33] *E.g.*, a recognition clause (s.35) or a minimum term of one year (s.44(1)); *Ontario Labour Relations Act, supra*, f.n.5.

[34] *E.g.*, certain union security clauses are prohibited unless certain conditions exist: *Ontario Labour Relations Act*, s.38, *supra*, f.n.5.

[35] *Re Otis Elevator Co. Ltd.* (1971), 22 D.L.R. (3d) 709 (N.S. S.C.).

[36] *Ibid.*, 712.

In the same way, an arbitrator should not deny a grievance on the basis of a breach of a procedural clause in the agreement in the face of equally mandatory language contained in section 37(1). Given the strong nexus between sections 36 and 37 it should follow even more forcefully that a prohibition to contract out of one should be met with a prohibition to contract out of the other whether by substantive or procedural limitations. The argument[37] that the negation of freedom of contract in favour of industrial peace is institutionally unsound and substantively unwise is simply inapplicable to the Canadian environment, where the institution enacting the policy is the legislature and where the legislature has at the same time as denying the right to strike imposed the correlative obligation to arbitrate. Very simply, section 37(1), like section 36, is mandatory and should require an arbitrator to ignore a merely procedural breach of the contract. Since strikes during the life of the agreement are prohibited, one should restrict the freedom to contract by enforcing the obligation to arbitrate. To the extent that the union's freedom to strike has been eliminated, its right to arbitration should be ensured. Thus when faced with procedural provisions, the breach of which would otherwise deny the board's jurisdiction, the arbitrator must give effect to section 37 and resolve the differences on their merits.[38]

**Prejudice to a Party**

The conclusion that section 37(1) admits of no limitation to the right and obligation to arbitrate issues involving the interpretation, application, administration or alleged violation of the agreement must be qualified in one important respect. It will still be open for the party who objects to a breach of a procedural limitation to argue that the grievance should be denied because the irregularity has prejudiced his ability to properly respond to the grievance. For example, in the case of time limitations the grievance might be denied for unreasonable and prejudicial delay under the equitable doctrine of laches. It is to be noted, however, that this is a limitation denying a claim for delay and not a

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[37] *Supra,* f.n.15.

[38] The arbitrator's ability to resort to statutory provisions to resolve cases of conflict between the statute and the agreement would now appear to be beyond dispute. See *Re Board of Education for the Borough of Etobicoke,* [1973] 1 O.R. 437; see also Weiler, *The Arbitrator, The Collective Agreement and the Law,* (1972) 10 Osgoode Hall L.J. 141.

limitation on the arbitrator's jurisdiction.[39] It is now well settled that this doctrine does apply to labour arbitrations[40] and provides a gloss on section 37(1). It is simply inconsistent with the provisions of statutory policy (as can be discerned from the concluding words of section 103), industrial relations and common sense to allow one, under the language of section 37, to assert a right to arbitration where, by one's delay, one has prevented the other party from effectively marshalling a defense.

Can it be said that in providing for such procedural conditions as time limits the parties are defining what shall be deemed to be prejudicial? Such an argument followed to its conclusion simply succumbs to logic. The denial of all grievances for a breach of a twenty-four hour time limit in the grievance procedure is a denial for reasons other than prejudice. Prejudice is by definition a matter which can only be demonstrated ex post facto. It should be obvious that the mere assertion that prejudice will be occasioned if a grievance is not filed within a particular time limit or in a particular form is not proof that prejudice will or has occurred.

Thus a breach of any procedural provision should not render a dispute inarbitrable unless the party complaining of the breach can demonstrate some prejudicial effect to himself from relieving against such a breach. All questions involving a dispute on the meaning of a substantive provision would, subject to that one limitation, be required to be submitted to the arbitrator for resolution on the merits. In sum, the legislative policy of industrial peace seen in sections 36 and 37 of the Act would be given its full and proper scope by arbitrators. It would be a bitter irony if, as a result of arbitrators failing to give effect to this mandate, the process of labour arbitration found itself set in a more rigid and formalistic mould than the judicial process it was designed to supplant. To interpret section 37 and collective agreements in any other fashion would be to deny the historical and pragmatic basis upon which the grievance and arbitration process is premised.

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[39] *Re Ottawa Newspaper Guild Local 205 and Ottawa Citizen* (1965), 55 D.L.R. (2d) 26 (Ont.). See also *Re Saanich Firefighters Union Local 967 and District of Saanich* (1971), 22 D.L.R. (3d) 577 (B.C.); and *A.-G. Can.* v. *Granell* (1956), 17 D.L.R. (2d) 141 (Ont.).

[40] *Re Ottawa Newspaper Guild Local 205 and Ottawa Citizen, supra,* f.n.39; *Re Algoma Steel and U.S.W. Local 4509* (1973), 2 L.A.C. (2d) 230, 250 (Andrews).

[41] (1874), L.R. 5 P.C. 221, 239, 240.