THE UNIVERSITY OF ALBERTA

PRELIMINARY OBJECTIONS IN LABOUR ARBITRATION

by

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ABSTRACT

Labour arbitration is the *quid pro quo* for the legislative prohibition of strikes during the life of a collective agreement. This system is based on the premise that labour arbitration will settle disputes and grievances during the life of the collective agreement.

It is the main thrust of this thesis that labour arbitration today is not fulfilling the expectations that were placed upon it. Arbitration today has developed an extensive and technical system of preliminary objections which are precluding the solving of disputes and grievances on their merits. Many grievances are defeated on a technical or preliminary objection rather than on the merits of the dispute.

AWARD: The, undersigned, arbitrators within named, having heard the parties by their several statements under oath and there being wide divergence in their statements aforesaid, we come to the final conclusion that we do not agree on any conclusion, but our agreement is that the arbitrators shall be paid for their services.

Smith v *Holcombe*
99 Mass. 552

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CHAPTER ONE

INTRODUCTION

Arbitration is the substitution of negotiation and adjudication for economic force in resolving disputes between the parties to a collective agreement during the life of a collective agreement. The problems considered in arbitration hearings are the day-to-day affairs of a continuing relationship between the parties. The solution of these problems upon preliminary or technical objections rather than on the merits of the situation is unlikely to sustain a sound relationship between the company and the union in this ongoing association. Although the particular grievance in question may be solved by a preliminary objection, the credibility of this problem solving mechanism may be greatly decreased in the eyes of organized labour. With the continued use of preliminary objections, the use of arbitration may be rejected by labour.

It is unlikely that anyone foresaw the use of preliminary or technical objections when arbitration was injected into the collective bargaining process by legislation. There is no single factor that caused the growth of this device, but the increased resort to the legal profession in arbitration as well as the desire to win may be two relevant factors. In any case the result has been that in many arbitrations the merits of the dispute have been lost in the arguments over arbitrability.

Just as the small town lawyer once explained that he started every case in the same way "by moving to quash the indictment," it has now become a practice to begin every arbitration dispute with a preliminary objection.

This paper will consider preliminary objections in arbitration in the Provinces of Alberta and Ontario. The awards that were researched can be found in the *Labour Arbitration Cases* in Ontario and in the files of the Board of Industrial Relations of Alberta.

It is the thesis of this paper that the use of preliminary objections, as it has developed over the preceeding twenty years, has become more technical and broader in its scope of application. The simple preliminary objection of ten years ago has given way to the sophisticated maze of preliminary objections today.

In spite of the fact that the effectiveness of arbitration may be credited to its informality and simplicity, the increasing number of decisions based on preliminary objections deviates to such a degree from these basic principles that the future of the entire process may be in jeopardy.

The area of preliminary objections is constantly changing and for purposes of this study the law was researched up to the end of 1973.

CHAPTER TWO

POLICY VERSUS INDIVIDUAL GRIEVANCES

I. Introduction

Any study of the preliminary objection of policy or individual grievance requires an introduction to the terms used in this area. The terms employed in this area are many and undefined. The grievance procedures may be headed "employee," "individual," "union," "policy," "company" or "group." In the majority of cases these terms are used in the grievance procedure with no accompanying definition. A problem also arises when the terms that are being argued by counsel for each side do not appear in the grievance procedure. The following comments by three arbitrators illustrate the dilemma facing an arbitrator as a result of poor drafting of a collective agreement relating to the use of, or lack of use of, the terms employed in the area of policy or individual grievances.

> (1) The issue is somewhat complicated by the unhappy use of the term "Policy Grievance" in the notice since that term is not found in either of the collective agreements. Article 9 of each agreement contemplates: (a) Individual grievances; (b) Group grievances; (c) Union or Company grievances.[1]
>
> (2) Such a question would properly be the subject of an "individual" grievance rather than a "policy" grievance, under a collective agreement which distinguished between different types of grievances in this way. While counsel for the union agreed that the present grievance was a "policy" grievance, we are unable to see what sort of effect this characterization of the grievance can have upon its arbitrability, for there is no distinction, in the collective agreement with which we are concerned, between "policy" and "individual" grievance.[2]

(3) I must say that I diligently examined the collective agreement between the parties, and was unable to find therein any reference to the terms "policy grievance", or "individual grievance". The parties, in their pleadings, made much use of these terms, but inasmuch as no proof was placed before me indicating that these types of grievances existed as part of the collective agreement, I cannot give too much weight to those submissions. Obviously, there are collective agreements where different types of complaints are clearly enumerated, and the manner of resolving them are indicated in the agreement. If the parties wish to distinguish between classes of grievances, then they should define them, insert them into the agreement, and clearly indicate how they are to be resolved in the event of a dispute. I do not see that any useful purpose would be served by a further discussion of this matter, since I do not propose to rule on a non-existent factor of the collective agreement. Suffice it to say that the omission within the agreement of any reference to "policy" or "individual" grievance, renders any further discussion upon this point hypothetical and without value with respect to the dispute under discussion.[3]

There is no distinction between the words "individual" and "employee" as they apply to the word grievance. Nor is there any distinction between the words "policy" and "union" as applied to the word grievance. Therefore in this chapter the words "individual" and "employee" will be used interchangeably and the words "policy" and "union" will be used interchangeably. The other type of grievance that will be dealt with is a company grievance which is self-explanatory.

This chapter will illustrate the development of preliminary objections in the area of "policy" and "individual" grievance. It will begin with a look at the statutory requirements for arbitration,[4] and then compare two early approaches to the problem of this preliminary

objection. The chapter will consider the present day attempts to avoid the statutory requirements, and the subsequent introduction of limiting clauses into the grievance procedure in an attempt to further increase the maze of different and confusing procedures which result in an increasing number of arbitration cases being defeated at the preliminary objection stage, rather than being decided on the merits of the grievance. Preliminary objections based on the distinction between the procedures for individual and union grievances are second only to preliminary objections based on the mandatory and directory provisions[5] of grievance and arbitration procedures in volume of cases.

The objection to this development is quite simple--why should the form of the grievance deprive an individual, a company, or a union of the relief to which they are entitled under the statutory provisions for arbitration? Should it make any difference if a grievance is labelled union, policy individual, employee, or company?

Accepting the fact that the purpose of arbitration during the life of a collective agreement is to solve disputes on the merits of the case rather than on a technical irregularity; is there any rationale for the preliminary objections based on the distinction between the labels placed on grievance procedures?

II. Statutory Requirements

a) Statute

The basic problem that must be considered in this section is whether the grievance procedure is in compliance with the arbitration requirements in the Alberta and Ontario Labour Acts. The Ontario Labour Relations Act states:

> 37. (1) 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.[6]

The Alberta Labour Act states:

> 78. (1) Every collective agreement shall contain provisions for final settlement by arbitration or such other method as may be agreed upon by the parties of all differences between the parties or persons
> (a) bound by the collective agreement, or
> (b) on whose behalf it was entered into
> concerning its interpretation, application or operation or any alleged violation thereof, including any question as to whether the differences are arbitrable without stoppage of work or refusal to perform work.[7]

The importance of these clauses become significant in collective agreements where there is no provision for a company grievance, a union grievance, and in some cases, an individual or employee grievance. These arbitration clauses require a procedure for the settling of all differences between the parties to a collective agreement. The Ontario clause only uses the word "parties" while the Alberta clause uses the words "parties" or "persons." The difference may be significant. The "parties" to a collective agreement may be interpreted as the company on one side and the bargaining agent on the other. Weatherhill agreed with this interpretation when he suggested that:

> The parties, as contemplated by the Act, and as set out in the collective agreement before us are the corporation and the union. The employees are bound by, but are not parties to the collective agreement, and bargaining between the employer and individual employees is prohibited by the Act.[8]

The Alberta section would seem to be broader than the Ontario provision in that the word "persons" and the clause "on whose behalf it was entered into" combine to require a procedure for the settling of differences which must include access to arbitration that may be used by the employee. This approach is strengthened by an arbitration award in Alberta[9] under the 1955 Alberta arbitration provisions which stated:

> S73. (5) Every collective agreement entered into after the thirty-first day of March, 1947, shall contain a provision for final settlement without stoppage of work or refusal to perform work of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into concerning its interpretation, application, operation or any alleged violation thereof.
>
> (6) If a collective agreement entered into before or after the commencement of this section does not contain such a provision as is required in subsection (5), it shall be deemed to contain the following terms:
>
> (a) If any differences concerning the interpretation, application, operation, or any alleged violation of this agreement arise between the employer and his employees, the representatives of the employer and of the union shall meet and endeavour to resolve the differences.[10] (Emphasis added)

The words "employees" and "employer" instead of "persons" and "parties" had a profound effect. The case involved the preliminary objection that the union did not have the right to bring a policy grievance. The collective agreement provided that the employee would take up his

grievance directly with the foreman. There was no provision for a union or policy grievance. Thus the arbitrator looked to the statutory provisions for the right to bring a union or policy grievance, since none was set out in the collective agreement. Arbitrator Gill stated:

> ... follows therefore, that there is no such statutory right given to the Union to initiate a policy grievance on the basis of a statutory provision, then where there is no such statutory right given the Union in Alberta under the Alberta Labour Act, the Union cannot initiate a policy grievance.11

He then went on to distinguish *Re Oil Workers, Local 16-341* and *Rinshed Mason Co.*[12] on the basis that the Ontario provision used the word "parties" and thus the union was a party and the statute required a provision for a policy or union grievance. Not so in Alberta, since the union was not an "employee" or an "employer" there was no requirement that the union be allowed to process a grievance to arbitration. Arbitrator Gill faced a dilemma. Section 73(5)[13] required a provision for settling disputes "between the parties to or persons bound by the agreement or on whose behalf it was entered into". This would indicate a provision for union grievances, company grievances and employee grievances. The deemed section[14] required a provision for the settling of differences "between the employer and his employees". Gill chose to rely on the deemed provision, and found there was no statutory requirement for a provision to settle differences between the union and the company. This flaw in the

two sections was corrected in the following year.

> S73. (5) Every collective agreement entered into after this subsection comes into force shall contain a provision for final settlement by arbitration or such other method as may be agreed upon by the parties of all differences between the parties or persons bound by the collective agreement or on whose behalf it was entered into concerning its interpretation, application, operation or any alleged violation thereof including any question as to whether the differences are arbitrable without stoppage of work or refusal to perform work.
>
> (6) Where a collective agreement, whether entered into before or after this subsection comes into force, does not contain a provision as required in subsection (5) it shall be deemed to contain the following provisions:
>
> (a) If any differences concerning the interpretation, application, operation or any alleged violation of this agreement arise or any question as to whether any difference is arbitrable arises between the parties or persons bound by the collective agreement or on whose behalf it was entered into, the representatives of the employer and of the union shall meet and endeavour to resolve the difference.[15] (Emphasis added)

Thus, the two sections were brought into line with the use of the words "parties" or "persons" in both sections. The result of this interpretation is that the Ontario statute does not require access to arbitration for the employee, only for the union and the company. In contrast, the Alberta statute requires access to arbitration for the employee, the union and the company.

What is being discussed in this section is the right of a person, union, or company to bring a grievance and carry it through to arbitration, not the question of whether the wrong procedure has been followed. It is important to understand, as pointed out by Weatherhill that:

> It may be observed here that what is in issue is not the procedure to be followed in bringing a grievance . . . , but rather the substantive right to bring a grievance at all. It is not the case of an employer saying to the union 'you have brought this grievance under the wrong procedure.' Rather it is a case of saying to the Union, 'you cannot bring the grievance at all.'[16]

The question of the limitations that a collective agreement can place on the grievance and arbitration procedures with regard to an individual or policy grievance will be considered later in this chapter.[17] The question considered here is whether there is access to arbitration which complies with the statutory requirements.

b) Union Grievance

The cases and awards in this area divide themselves into two types of preliminary objections. The company submits that the union does not have the right to bring a union or policy grievance, or the union submits that the company does not have the right to bring a company grievance. Unlike many preliminary objections, this one is used by both sides, especially with the increase in the use of the grievance procedure by companies to recover damages for unauthorized slow-downs, walkouts or strikes.

The majority of awards refer to objections by the company that the matter is not arbitrable on the grounds that there is no provision in the collective agreement for the arbitration of grievances by the union (as oppossed to individual). The theory that has followed this line of

awards through to the present day was developed by Judge Fuller. The theory revolves around the statutory requirement for arbitration. In *United Steelworkers Local 2766* and *Canadian Mead-Morrison*,[18] Judge Fuller noted that Section 32[19] of the Ontario Labour Relations Act required that the collective agreement must provide for final and binding settlement of all differences between the parties. The collective agreement was silent as to a provision for arbitration, and Fuller imposed the deemed provisions of the statute. Fuller held that although the collective agreement was silent as to a procedure for the settlement of disputes by arbitration during the life of the collective agreement, this omission was cured by the provisions of Section 32(2).[20] He stated:

> There can be no doubt that the union is a party to the collective agreement. The agreement itself says so. The collective agreement between the parties does not appear to contain any provision for the final and binding settlement by arbitration of differences between the company and the union. Section 32(2) of the Labour Relations Act applies and the board, therefore, finds that the grievances are properly before the board and that they are arbitrable.[21]

There was a strong dissent in this case based on a difference of opinion as to whether there was an arbitration clause in the collective agreement. There was a provision in the collective agreement for access to arbitration by employees, but nothing relating to the union. Dillon, in his dissent, argued that there was a provision for arbitration and thus the deemed provisions imposed by Fuller did not apply.

> From the foregoing it will be abundantly clear, that not only is there a grievance and arbitration clause in this agreement, but the parties contemplated grievance and arbitration, only on the complaint of an employee or employees. Indeed it may well be that the union, in the negotiations leading to the collective agreement, endeavoured to obtain such a clause without success, although there was no evidence before the board to that effect.[22]

What Dillon has overlooked is that even though there is an arbitration clause in the collective agreement, it has not met all the statutory requirements. In order to avoid the provisions of the deemed statutory provisions, it is necessary to meet all the requirements of arbitration. The word "parties" implies union and company; and if these requirements are not met, the deemed provisions will be invoked to fill the gap.

Dillon also questioned whether the statute can override the negotiated provisions of the collective agreement. The distinction here is that you must first meet the basic requirements of the statute--that is--the parties (union and company) must be provided with a procedure by which they can settle differences by arbitration. The second step then becomes a question of whether the parties are then free to impose limitations and restrictions on these basic requirements.[23] Dillon's argument was thus premature on this point; since the collective agreement did not meet the basic requirements.

Dillon's third ground of dissent centered around Section 32(3) of the Act:

> 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 provisions set out in ss.(2) are alleged by either party to be unsuitable, the board may, on the request of either party, modify any such provision so long as it conforms with ss.(1), but until so modified, the arbitration provision in the collective agreement or in ss.(2), as the case may be, shall apply.[24]

Dillon's own words best described his dissent based on the provision of the Act.

> The board referred to in this section is of course, the Labour Relations Board, and not this arbitration board. My colleagues have apparently found the arbitration provisions in this collective agreement either inadequate or unsuitable. The legislature has, however, provided a remedy and a forum in such cases. The remedy is an application to, and the forum is the Labour Relations Board. I am satisfied that no board of arbitration has the right to provide the remedy by substituting the provision set out in s.32(2) of the Act in lieu of a specific arbitration provision contained in the collective agreement. . . .
>
> As I read this provision, it means that if there is no arbitration provision in the collective agreement, the one in ss.(2) shall apply until the Labour Relations Board amends the agreement. However, if there is an arbitration provision in the collective agreement (which is the case here) that provision shall apply until the Labour Relations Board modifies it, if the necessity for the modification is established on application to that board.[25]

On the plain reading of this clause, Dillon has outlined the proper approach, keeping in mind the distinction between a collective agreement with no provision for arbitration and one that has a defective provision for arbitration, but when the case was reviewed on *certiorari* Mr. Justice Wells disagreed.

> The view of the applicant company is that even though there is no provision in the agreement dealing with an alleged violation of the agreement except as to employee or management complaints, the only way in which a coverage of such an event can be established is by application to the Labour Relations Board of the Province of Ontario under ss.(3) of s.32. Because there

is considerable provision for arbitration, although not I think as full a provision as ss.(1) of s.32 contemplates, there is no right at thepresent time to write into the agreement the provision which is set out in ss.(2) of s.32 of the Labour Relations Act. It is argued that the final provisions of ss.(3) which provide that the Board may on the request of either party, modify any such provision so long as it conforms with ss.(1) but until so modified the arbitration provision in the collective agreement or in ss.(2) as the case may be, shall apply is in effect alternative in its meaning and if there is an agreement as to even partial arbitration then the paragraph in ss.(2) is not to be deemed to be contained in the agreement by virtue of the statute.

I am personally unable to follow this argument. It would seem to me that the preamble to ss.(2) disposes of it. This provides that if the collective agreement does not contain such a provision as is mentioned in ss.(1), it shall be deemed to contain the provision which is then set out. That is precisely what I think happened in this case. There is no provision for arbitration of Union complaints even though there is an alleged violation of the agreement contained in them and in my view there being such an omission, the provisions of s. 32(2) then became operative and the collective agreement must be deemed to contain the provision which is set out in the Labour Relations Act. Section 32 in effect goes further than ss.30 and 31 and provides what happens if the provisions of the statute are not observed. In consequence if as I take it to be the provision of s. 32(2) is to be deemed to be contained in the collective bargaining arrangement, there was then ample jurisdiction in the clause which is set out in the statute to submit the matters which the Arbitration Board dealt with to arbitration and in my view as a result of this, the Board had the jurisdiction which the majority of its members though it had.[26]

Weatherhill seems to have been unaware of the above appeal when he commented on this problem many years later. He goes farther than Mr. Justice Wells in distinguishing the deemed provision of the statute from the provision requiring an application to the Labour Relations Board to alter the arbitration provisions of a collective agreement. Weatherhill commented:

> Before leaving the matter a general comment upon the meaning of s.34 of the statute may be helpful. Subsection (1) lays down the absolute requirement for an arbitration provision in a collective bargaining agreement. If the arbitration provision in a collective agreement does not meet that requirement then the statutory provision set out in ss.(2) is imported into the agreement in lieu of the deficient clause and this imported provision may only be modified (but not beyond conformity with ss.(1)) by the Labour Relations Board upon application to it made under ss.(3). An arbitration provision in a collective agreement negotiated by the parties which is deficient because it does not conform with the requirement of ss.(1) is, in effect, no provision because it is not such a provision as required by ss.(1) and it is incapable of amendment and must give way to the statutory provision. On the other hand, if the arbitration provision in the agreement which was signed by the parties conforms with the requirement of ss.(1) but either party wishes some modification of it an application must also be made to the Labour Relations Board under ss.(3).[27]

This clause is still present in the Ontario legislation and its interpretation, right or wrong, is settled by the above two decisions. The Alberta legislation contained a similar provision but this was removed in 1960.[28]

The major principle established by the *Mead-Morrison*[29] case was that the arbitration clause in the collective agreement must meet all of the requirements of the arbitration provision set out in the statute. If the clause in the collective agreement is deficient in any respect, the deficiency will be corrected by the imposition of the provisions of the deemed clause in the statute. This theory has now been accepted as law in arbitration. It has been applied by the following arbitrators; Hanrahan,[30] Laskin,[31] Weatherhill,[32] O'Shea,[33] and Golt.[34] All of these cases involve a preliminary objection by the

company that the grievance is inarbitrable because there is no provision for a union or policy grievance. Even though this theory is well established in labour arbitration, the old arguments still hang on. Sixteen years after the principle was stated, there are still attempts in arbitration proceedings to argue that the provisions of the collective agreement may override the specific provisions of the statutory requirements for an arbitration clause. This argument recently came before arbitrator Golt in an arbitration hearing considering the Federal Labour Code.

> The company submitted a most interesting theory on p.2 of its notes wherein reference was made of the Canada Labour Code, R.S.C. 1970, c. L-1, concerning provisions for final settlement by arbitrations. Section 125(1) reads as follows:
>
> '125(1) Every collective agreement shall contain a provision for final settlement, without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.'
>
> The company submitted that 'where the parties have contracted to restrict this provision to individual grievances, as in this Collective Agreement, the Company contends that the requirements of the law have still been met.' The company then quoted s.125(2) which deals with an application by either party when the provisions of the above section have not been met. In answer to this, I can only say that I have nothing before me to indicate that the parties have contracted to restrict the above provision to individual grievances only, and even if they had, such restriction would be null and void, since it would infringe upon the paramount authority of Parliament to legislate. By no stretch of the imagination can I accept the proposition that an Act of Parliament can be altered by the contracting parties to an agreement to the detriment of those for whom, and on behalf of, the Act was passed. The union is acting validly in its rightful role as the mandatory.[35]

Again the confusion arises between restricting the procedures once you have met the requirements of the statute, and restricting what is required by the statute. The former may be a valid restriction while the latter is null and void. There are situations in which the statutory provisions are met and then the provisions of the collective agreement may be used to channel the grievances into different procedures. If the wrong procedure is followed the grievance may be deemed to be inarbitrable.[36]

(c) Company Grievances

The other side of this preliminary objection is the union claiming a company grievance is inarbitrable on the grounds that there is no provision in the collective agreement for company grievances. These cases follow the same reasoning as the preceeding cases. That is--the statutory arbitration procedures require a procedure for the settling of differences between the "parties" or "persons." The company being a party to the collective agreement and there being no provision for a company grievance, the arbitrator will invoke the deemed provisions of the statute. Weatherhill,[37] following the reasoning in *Mead - Morrison*,[38] went to great lengths[39] to deal with the dissent of Dillon in that case, but failed to comment on the fact that the case had been upheld on appeal.[40]

Weatherhill[41] again faced this preliminary objection three years later and imposed the deemed provisions,[42]

following the *Duplate* case,[43] *Mead - Morrison*[44] and the subsequent appeal.[45] The cases indicate that where the arbitration clause in the collective agreement does not meet the requirements of the statute, the arbitrator has overruled the preliminary objection that there is no provision for a union, employee, or company grievance; and imposed the deemed provisions of the statute to fill the gap.

It is from this basic preliminary objection that the modern day maze of preliminary objections in the area of policy and individual grievances developed. It is necessary to understand the foundation of the statutory requirements before proceeding to the developments that are based on this foundation.

From this point forward the premise is accepted that certain types of procedures for arbitration are required in the collective agreement to provide access to those persons set in the statutory arbitration clause--employers and unions in Ontario, and employers, unions and employees in Alberta.

The emphasis will now be placed on attempts to limit the procedures required by the statute, rather than attempts to argue that these procedures are not required by the statute.

II. Two Views

The earliest attempts, to use the distinction

between a policy grievance and an individual grievance as the basis for a preliminary objection, can be divided into two categories which will be considered in this section.

a) Cross Theory

A set of awards initiated by Judge Cross are submitted as authority for the proposition that discharge, seniority, and rates of pay are subjects that are particular to the individual and cannot be grieved by the union in the form of a policy grievance. Thus, any grievances that are under these subject headings, if brought in the form of a union grievance, will be lost. This view suggests that the union is abrogating the rights of the individual. These types of grievances are personal to the individual and cannot be taken over by the union. This view suggests that any attempt by the union to abrogate these rights of the individuals will result in the inarbitrability of the grievance. It will be necessary to look at this line of cases in some detail. The next step will be to review those cases that are cited for the contrary view,[46] or at least a restricted viewpoint. It will be shown how this technical objection was only the beginning of a more complex system which is an attempt to restrict the statutory requirements for solving differences between the parties.

Judge Cross developed this theory in an award involving the seniority of an employee that was grieved

by the union under the collective agreement provisions for a union grievance. The agreement provided for two types of grievances--general grievances of the union, and individual grievances initiated by the individual.[47] Judge Cross based his decision on the fact that, in his opinion, the union was abrogating the rights of the individual employee. The decision of Judge Cross reads as follows:

> I have come to the conclusion therefore that Section 27 is designed to permit the Union through its officials to present a grievance which is general in its nature, dealing with some violation or misinterpretation of the contract by the Company and that it is not justified in using this section to abrogate to itself rights with respect to grievances which are expressly conferred upon the employees.
>
> For these reasons, I am of the opinion that the grievances cannot succeed.[48]

This reasoning can only apply if the collective agreements make provision for two types of grievance procedures. It is an open question whether this reasoning would apply if the two provisions were a result of the deemed provisions of the statutory arbitration clause.

One of the reasons that this theory became established was that Judge Cross applied it in four subsequent awards in this "line" of authority.

The second case in which Judge Cross applied this principle involved a policy grievance concerning lay-off. The decision in the award was on the merits of the case, as the company chose to waive its preliminary objection

concerning the form of the grievance. This did not deter Judge Cross from setting out his opinion on the question of individual grievances being brought as policy grievances. He again stated his disapproval of unions taking away the individuals right to decide whether to process the grievance or not by filing it as a union grievance.

> It is to be noted that this grievance is filed as a policy grievance, whereas in reality it is a grievance of the employee. By making it a policy grievance, the union is asking that this board find that the employee should have been given a job in the labour pool when there is no evidence before the board that he was willing to take such a job had it been offered. A condition precedent in exercising seniority rights is the willingness to do the job which is sought, and this becomes peculiarly a matter of preference to be exercised by the individual employee and not something that can be decided for him by the union.
>
> I am aware that the term policy grievance is a somewhat elastic term but at least where an individual's rights are concerned in disciplinary or in seniority cases, I think the grievor is entitled to exercise his rights of grievance or not as he chooses and that the union has not the right to exercise them by the device of a policy grievance.[49]

This may be distinguished on the basis that the seniority provisions relating to "bumping" privileges were very specific in putting the onus on the individual to exercise his rights.[50]

The next award in which Judge Cross expounded his theory concerned a union initiated policy grievance claiming the company was recalling employees contrary to the collective agreement and cancelling their seniority rights when the employees failed to answer such recall. He emphasized the fact that seniority rights depended on the

decision of the individual as to whether or not he is willing to do the job in question. The award stated:

> A preliminary objection was taken by the company on the grounds that the above grievance was not properly the subject of a policy grievance. It has been my view expressed in previous cases (see *Re U.A.W.* and *Massey-Harris-Ferguson Ltd.* (1958). 8 Lab. Arb. Cas. 178. at p. 179) that seniority rights belong to employees to be exercised as the individual may decide, and that the union under the guise of a policy grievance cannot take these rights unto itself. This is particularly true in a grievance where the right to recall to a job is involved and the issue arises whether the grieving employee is able and willing to do the job to which he seeks recall on the basis of seniority. . .
>
> For these reasons, therefore, the board found at the hearing that the complaint set forth in cl.1 of the grievance was properly the subject matter of an individual grievance where all the regular steps of the grievance procedure could be followed and that it was not properly the matter of a policy grievance.[51]

The ratio of this award, as set out in the Editors note,[52] is that seniority rights are personal to a grievor. This is the view that Judge Cross persisted in following, but it is too broad a principle to apply to every seniority grievance. The reservations submitted by the union nominee in his concurring decision suggest the proper approach.

> I am in substantial agreement with the majority of the board. However, I regret that I am unable to subscribe to the view stated as a general principle toward the beginning of the award that a union cannot take unto itself the right of an employee to grieve on a matter of seniority. . . .
>
> I suggest, with respect, that there is no explicit or implicit bar to the processing of a seniority dispute as a policy grievance.[53]

Two years later Judge Cross again faced an individual grievance that was brought as a union grievance. It

was a policy grievance on behalf of one employee with respect to his temporary assignment. Judge Cross attempted to clarify his theory, possibly having in mind the reservations put forward by the union nominee in the previous case. He grafted an exception to his broad principle--that a union could not bring individual grievances under the guise of a policy grievance--could arise where the sum total of a number of individual grievances resulted in a policy on the part of the company.

> A policy grievance under the circumstances suggested here could only arise where a number of incidents had occurred, which would justify an arbitrator finding that as a matter of policy the company was deliberately using temporary re-assignment to circumvent the recall procedures. Where one individual only is affected, it is a personal grievance and not a policy grievance, because it is the individual's seniority rights which he must claim are breached, or the union on his behalf must claim are breached.[54]

The last award[55] of the series, that Judge Cross was involved in, concerned a union grieving on behalf of the seniority rights of an individual after the same grievance by the individual had been lost due to a failure to comply with the time limits of the grievance procedure. Although Judge Cross referred to two of his previous decisions[56] regarding seniority rights as policy grievances, the basis of the decision was that the grievance had already been ruled inarbitrable because it was out of time and this union grievance was an attempt to circumvent the grievance procedure. In effect, it was based on *res*

judicata, and not on the fact that it was an individual grievance brought as a policy grievance.

With the foundation laid by Judge Cross, other arbitrators began to apply his theory.

b) Application of the Cross theory

(i) Ontario

The theory of Judge Cross found favour with Judge Bigelow in an award which is reported in headnote form only. The collective agreement provided for two distinct types of grievance procedures--one for grievances between the company and the employees, and another for grievances between the company and the union. Although the theory of Judge Cross was applied to grievances relating to statutory holidays and pay, the exception was not followed.

> . . . held, by the majority that a grievance involving statutory holidays and pay therefor was strictly a matter for the employees even if it involved several thousand separate grievances, and could not be initiated by the union as a policy grievance.[57]

This decision was quashed on an application for *certiorari*,[58] but the decision of the arbitration board was restored on appeal to the Ontario Court of Appeal on the sole basis that the language of the collective agreement could reasonably bear the interpretation given to it by the majority award of the arbitrators. The mere fact that the Court considered some other interpretation more apt afforded no grounds for relief by way of *certiorari*.

Although some arbitrators put forth the above decision in the Ontario Court of Appeal as support for Judge Cross's theory, the Court of Appeal did not accept or reject his theory. The basis of the restoration of the arbitration board award was that *certiorari* is not available where the Court merely disagreed with the interpretation placed on the collective agreement. The interpretation placed on the collective agreement by the arbitration board was one which the language could reasonably bear. The restoration of the arbitration board's decision by the Court of Appeal did not add any credibility to the theory enunciated in the arbitration award.

Hanrahan narrowed the application of Judge Cross's theory in an award involving a union grievance claiming improper application of wage rates.[60] The collective agreement contained two types of grievance procedures--one for individual grievances, and the other for grievances by the union. The provision for union grievances contained the clause "as distinguished from an employee's grievance." Hanrahan did not allow the grievance as a union grievance on the basis of the above limiting clause that applied to union grievances. He found that the grievance in question could not be distinguished from an employee grievance.

Although Hanrahan adopted the headnote in the *Int'l Nickel* decision, he narrowed the theory by relying on the specific wording in the clause providing for union

grievances. The theory may now be set out as requiring the following conditions to be met:

1.) seniority or rate of pay involved;

2.) a clause restricting the two grievance procedures to certain areas as illustrated in the above case.

For purposes of the development of Judge Cross's theory, this case is important for the fact that it included rates of pay as a grievance that was personal to the grievor and could not be brought as a union grievance. The second point upon which the arbitrator relied in this case will be more fully developed when the second approach to the policy versus individual grievance problem is considered.

Judge Lane expanded the Cross theory to union grievances involving discharge of an employee. This award adds discharge to the list of grievance issues that are personal to the grievor and cannot be abrogated by the union. Judge Lane referred to *U.A.W.* and *Ford Motor Co. of Canada*,[61] and *U.A.W., Local 458* and *Massey-Harris-Ferguson*[62] and reiterated the principle:

> . . . that in cases where the grievor was entitled his individual right to grieve as he chose, and the union has not the right to exercise those rights of the employee by the device of a policy grievance.[63]

This case was heard on an application for *certiorari* before Judge Stewart in May of 1966.[64] The application was dismissed on grounds not relevant for purposes of this study.

Judge Lane also considered this preliminary objection in a situation involving a policy grievance claiming a base rate for certain employees.[65] It is reported in headnote form only; but the award suggests that if a grievance seeks a remedy for individual employees, it cannot be pursued as a policy grievance unless there is specific provision in the grievance procedure allowing the union to process an individual grievance. This approach requires a specific provision to alter the strict Cross theory, that certain grievance issues are personal to the grievor. This approach is, of course, the opposite to that submitted by Hanrahan in the *Coca-Cola* award.[66]

Judge Thomas considered another situation in which the grievance on behalf of a discharged employee was processed by the union.[67] The majority of the board of arbitration held that the union did not have the right to file a policy grievance where an individual's rights are concerned. There is not sufficient information to be clear as to the ratio of the decision. The policy grievance issue may not have been relevant to the decision, if the grievance was out of time. As a result the case is of little value for any purpose, but is cited as authority for the proposition common to these cases.

(ii) Alberta

This theory has also found favour in Alberta. There are two unreported arbitration awards in Alberta that have

adopted the theory enunciated by Judge Cross.

The first award involved a union grievance on behalf of a discharged union president. The collective agreement made a distinction between union grievances and personal grievances, but did not specify what the difference was. Arbitrator Chapman in the majority award stated:

> Accordingly I hold that Mr. Murphy did not at any time file a grievance with respect to his dismissal and though the Union purports to have done so the grievance is not a valid one in that it concerns a subject matter for which only Mr. Murphy personally could have filed a grievance.[68]

Thus, another award in which discharge was held to be a grievance personal to the grievor, and not subject to a union grievance.

The second award in Alberta that adopted the Cross approach concerned a seniority grievance that was brought by the union on behalf of certain individual employees. There were two distinct grievance procedures in the collective agreement. The Arbitrator, Lucas, after reading the authorities;[69] adopted the view that a grievance which is personal to the grievor should be dismissed if it is processed as a policy grievance.

> A reading of the foregoing authorities would seem to indicate that the generally accepted definition of a policy grievance is one involving the impersonal interpretation of the collective agreement without reference to any individual or his right and not directly seeking a remedy for individual employees. These authorities are also clear in holding that a grievance which is properly an individual grievance should be dismissed if it is improperly presented as a policy grievance.[70]

Lucas overruled the preliminary objection in this case on the grounds that the union was deemed to be seeking an impersonal interpretation of the article involved without any reference to any individual or his rights and not directly seeking a remedy for individual employees. In effect, Lucas limited the remedy to an interpretation of the collective agreement--a declaratory judgment.

The preceeding awards are authority for the proposition that an individual grievance involving seniority, rates of pay, or discharge cannot be abrogated by the union under the guise of a union or policy grievance. These awards are the foundation of the preliminary objection based on the distinction between individual and policy grievances. The effect is that the grievance is inarbitrable because of the form in which it was brought. This approach is an extreme position, when it is realized that many of these grievances that are lost due to form involve the discharge of employees.

c) Second View

A second, and more recent, approach to this problem suggests that express wording is required in the grievance procedure to make the individual and the union grievance procedure mutually exclusive. At first glance, this approach would seem to eliminate much of the distinction between different forms of grievances; and consequently would eliminate many of the preliminary objections based on

this distinction. As will be illustrated, this group of awards, which is submitted as the better view, requires express wording to make the procedures mutually exclusive. For a time this approach avoided preliminary objections based on the distinction between two types of grievance procedures. Unfortunately, this restricted the number of preliminary objections only for a short time; as those drafting the grievance procedures went a further step based on this jurisprudence, and began including express wording to provide for mutually exclusive procedures.

The earliest award under this contrary view has already been referred to under the statutory requirements.[71] The award involved a union grievance on behalf of an individual. Judge Fuller attached no significance to this issue, but concentrated on the fact that the collective agreement did not provide for a union grievance and applied Section 32(2) of the Ontario Labour Relations Act.[72] The result was that the union processed an individual grievance on job posting under the guise of a policy grievance. This case was upheld on appeal.[73]

Hanrahan faced a similar problem in a case involving a union grievance on behalf of three temporary employees for the failure to pay them for statutory holidays. The collective agreement did not provide for a union grievance and Hanrahan also imposed Section 32(2).[74] The company questioned whether the union had the right to file

a grievance on behalf of employees who themselves did not feel aggrieved. After reviewing *Fuller* and *U.S. Steel*,[75] Hanrahan expressed the view that the manner and extent to which a grievance may be processed by a union, or a company was a matter for negotiation by the parties, subject to the provision of the Labour Act. He went on to require express language in the collective agreement to make the grievance procedures mutually exclusive.

> Unless specifically dealt with in a collective agreement, however, in my opinion the statutory right of either the union or the company in this respect remains.[76]

Hanrahan again faced the problem when a union grieved the layoff of a particular employee out of line with the seniority provisions of the collective agreement. The agreement provided for individual and union grievances, but Hanrahan confused the statutory requirement issue with the individual versus policy grievance issue and imposed Section 32(2)[77] following *Fuller* and *U.S.Steel*.[78] This evoked an editorial comment criticizing his use of Section 32(2),[79] and his approach to the preliminary objection of an individual grievance being processed as a union grievance.

> (Editor's Note: The interesting point of this award is the decision that the grievance was arbitrable as a policy grievance. This is in direct conflict with the decision in *Re U.A.W. & Massey-Harris-Ferguson Ltd.* (1958), ante, p. 36, in which Cross, C.C.J., held that seniority rights belong to employees to be exercised as the individual may decide, and the union cannot take them to itself under the guise of a policy grievance. This, with respect, seems to be the more reasonable view. In the instant award the chairman quotes the

> judgement of Fuller, C.C.J., in *Re U.S.W. & United Steel Corp. Ltd.* (1956), 7 Lab. Arb. Cas. 174, regarding the provisions of s.32 of the Labour Relations Act, but surely that is relevant only to the situation in which the collective agreement contains no provision for union grievances--an entirely different matter--not to one in which the union grievance is alleged to be misused. With respect the passage quoted seems inapplicable to the facts under review.)[80]

There is no question that Hanrahan confused the issue when he injected the question of Section 32(2).[81] The grievance procedure in this case provided for union grievances and individual grievances and thus complied with the statutory requirements for purposes of this grievance. The real ratio of the decision is that there were no provisions which expressly limited a grievance to one procedure or the other. Hanrahan required specific language to limit either of these grievance procedures. This is the basic difference in the approach taken by those arbitrators who did not follow the Cross theory.

> In Art. 9 of this agreement the parties made provision for a grievance being presented by either the union or the company, 'concerning any question as to interpretation, application, administration or alleged violation of this agreement and may commence at step 2.' There is nothing in that language indicating that the scope of the provision is to be limited because of what has been provided in step 1, having to do with a procedure to be followed by an individual employee who wishes to process a grievance.[82]

Judge Reville, in a later decision, distinguished *U.A.W.* and *Massey-Harris-Ferguson*[83] on the basis that the decision involved certain specific clauses in the collective agreement, and these were not set out in the award. The situation before Judge Reville concerned the right of

the union to grieve individual seniority rights. There were no limitations in the collective agreement with regard to who could bring grievances under each type of grievance procedure. The preliminary objection was dismissed on this basis.

> The parties, however, to this agreement have not seen fit to impose any specific limitation and this board has clearly no power to do so. . . . There is nothing in the agreement which makes these provisions mutually exclusive and consequently this board must hold that the union has concurrent jurisdiction concerning the grievances mentioned in art.6(a) and 6(c).[84]

Judge Reville followed the decision in the preceeding award in a situation in which there was specific language in the collective agreement prohibiting the union from processing a policy grievance claiming unjust discharge. The clause stated:

> . . . grievances directly affecting an employee which such employee could himself institute may not be arbitrated as union grievances. . .
> [T]he company has the absolute right to discharge employees subject only to the right of an employee to lodge a grievance in regard to such discharge.[85]

The significance of the words "directly affecting" will be considered in a subsequent section.[86] Judge Reville found these words sufficient to create mutually exclusive grievance procedures.

Judge Little was the arbitrator in an award involving a union grievance pertaining to the holiday pay of individuals. The company argued the *International Nickel* case[87] in support of the proposition that this grievance

was inarbitrable on the grounds that it should have been filed by the individuals concerned. This case does not stand for the proposition that complaints of violations of the statutory holiday provisions of a collective agreement can only be processed by individuals. The basis of the decision was that the interpretation as stated by the arbitration board was one which the language of the agreement would reasonably bear, and thus *certiorari* would not lie. There is no evidence that the Court of Appeal agreed the interpretation given by the board. Therefore, as a precedent, only the arbitration award should be cited. Judge Little disagreed with the interpretation placed on the *International Nickel*[88] case by the company, but distinguished that case on the basis that the language considered in that collective agreement was entirely different from that before him.

> Furthermore even if the Court's decision could be interpreted as the company says, the language in the agreement there considered is entirely different than that in the agreement under consideration by us. In the former 'two different and mutually exclusive procedures for the only two kinds of difference' are provided while here no such provision is included.[89]

Although it was not necessary for the award, Weatherhill a year later discussed this problem. The case involved a union grievance claiming retroactive effect of recall provisions. The grievance failed on the grounds that there was no collective agreement, but Weatherhill went on to discuss the company submission that this grievance should have been submitted as an individual grievance,

since it involves seniority and thus concerns each worker individually. The clause referring to a union grievance concluded with the following words:

> This clause shall not be used to circumvent an individual's right to submit or refuse to submit an alleged grievance.[90]

Weatherhill found these words sufficient to create mutually exclusive grievance procedures. Thus, a second example of a clause that is sufficient to create a situation analogous to the simple distinction between individual and policy grievances, as set out by Judge Cross. Even with the approach that requires express wording to create mutually exclusive grievance procedures, the insertion of a simple clause to this system fosters preliminary objections.

Barber was faced with an express provision in a situation in which the union initiated a policy grievance alleging improper payment to certain employees. The collective agreement provided for two types of grievances--one for individual employee grievances and one for union policy grievances. The provision for the union policy grievances contained the following clause:

> However, it is expressly understood that the provisions of this paragraph may not be used by the Union to institute a complaint or grievance directly affecting an employee or employees which such employee or employees could themselves institute, and the regular grievance procedure shall not thereby be bypassed.[91]

Barber found this clause sufficient to create exclusive grievance procedures, and the preliminary objection was successful. This case will be considered in a later

section relating to what limitations may be imposed on the statutory arbitration clause requirements.[92]

The question of a union grievance alleging improper posting of vacancies came before Palmer. Palmer was faced with the awards by Judge Cross in this area, and chose not to follow them. Although he refused to adopt the awards drawing the distinction between individual grievances and policy grievances, he did state that express contractual language could alter this.

> Clearly, the distinction in question is one without a great deal of substance. Generally speaking, a union has a real interest in all matters involving rights established by collective agreements to which they are parties; and so to preclude them from arbitrating, breaches of such documents, while allowing what are essentially third parties to do so, strong evidence of the desirability of so doing as well as contractual language is, in our opinion, required.[93]

Weiler expressed the same view a year later in an award involving a union grievance grieving the company's failure to award posted jobs to certain applicants. He refused to follow the Cross theory stating that it was no longer accepted.

> However, it seems safe to say that though some of the concrete decisions in these cases may be justifiable, the general principle that certain kinds of individual claims are inherently or presumptively unsuited for policy grievances is no longer accepted.[94]

The most recent award to deal with this problem concerned a union grievance alleging failure to pay holiday pay. Simmons attempted to set out the principles for dealing with policy and individual grievances. The principles

set out are directly contrary to the approach taken by Cross. Those principles that are relevant to this study are set out below.

> There has been a considerable amount of arbitral jurisprudence concerning the difference between 'policy' and 'individual' grievances.
>
> The following principles have been articulated in this area of labour arbitration.
>
> (1) Individual and policy grievances are not, unless expressly stated in the collective agreement, mutually exclusive. *Re Warehousemen and Miscellaneous Drivers, Local 419*, and *Holland River Gardens Co. Ltd.* (1965), 16 L.A.C. 109 (Little). . . .
>
> (3) A matter may be brought as a policy grievance, if it instantly affects only one employee, but may, if the issue remains unresolved, affect other employees in the future. In *Re U.S.W., Local 2859* and *Babcock & Wilcox (Canada) Ltd.* (1971), 22 L.A.C. 383 (Simmons), the board stated at p. 386:
>
> > We are of the opinion that whenever it can be stated that a difference of understanding exists between the union and company which, while perhaps involving only one employee, by remaining unresolved may affect other employees in a similar manner in the future, then the union could process the grievance notwithstanding a possible overlapping of traditional union or 'general' vis-a-vis 'individual' grievances which we have regarded as such in the past.
>
> (4) Access to the grievance procedure by way of policy grievances can only be restricted by express terms of the collective agreement.
>
> In *Re Babcock and Wilcox, supra*, at p. 385:
>
> > . . . there are collective agreements in which the parties have expressly agreed to restrict the manner in which grievances are to be processed and arbitration boards have given effect to such government. . . . But arbitrators have given effect to such clauses only when there is express language specifically restricting the parties in processing grievances. . . . Thus, restrictions . . . are not to be implied but expressly stated.
>
> And in *Re Weston Bakeries Ltd., supra*, the board stated at pp. 313-4:

> Only if the explicit language of the agreement, as fairly interpreted without any such presumptions, leads to the conclusions that the parties did intend to limit access to arbitration through union policy grievances should arbitration boards give effect to any such limitations.[95]

The arbitrator today must consider these two views when confronted with a preliminary objection relating to the distinction between policy and individual grievances. The more recent group of awards suggesting that express language is required to make the grievance procedures mutually exclusive is the better approach. This view has wider acceptance and is more reasonable considering that grievances are not being examined on their merits due to the simple distinction between policy and individual grievances. This approach releives against the hardship imposed by the Cross view, but it leaves the way open for express language to negate this relief. This is exactly what has happened.

With growing frequency the individual and policy grievance procedures are being interpreted as mutually exclusive as a result of the injection of express clauses into the collective agreement. This has the same effect as the Cross interpretation. Grievances brought under the wrong procedure are inarbitrable due to the form in which they are processed. The preliminary objection that was based on the simple distinction between individual and policy, can now be achieved through the use of an express clause in the collective agreement limiting what grievances may be brought under each

type of grievance procedure.

This opens two areas for consideration. First, if the statutory arbitration clauses require access to the arbitration procedures by certain parties or persons; to what extent can that access be limited by express words in the collective agreement without being in violation of the statute? Do these limiting clauses not, in fact, bar access to arbitration for certain persons or parties? Secondly, if upon examination these grievance procedures may be limited by express contract language, what express clauses have been attempted and which ones have been successful?

IV. Limiting Statutory Requirements

a) Authority

The most surprising feature of research in this area is that the majority of arbitrators assumed that the procedures required by the statutory arbitration clauses may be limited by the collective agreement without any reference to an authority for that proposition. This may be based on the fact that the grievance procedure under the collective agreement is distinct from arbitration procedures as required by the statutes. It has been noted earlier[96] that if the grievance procedure does not provide for union or company access to arbitration, the provisions of the deemed statutory arbitration clause will be invoked. As that section indicates the grievance procedure cannot

limit the substantive provisions of the statutory arbitration requirements--that there be provision for company and union grievances. The question that must be answered here is the more refined one of whether collective bargaining can impose procedural requirements on the grievance procedures which may, in fact, defeat the greivance before it reaches arbitration. For example, if a grievance is brought under the wrong procedure and is defeated on a preliminary objection based on the fact that it was processed under the wrong procedure, have the statutory arbitration requirements been met? The approach taken by arbitrators today may be based on the premise that once you meet the substantive requirements of the statute--provide for union and company (and possibly employee) access to arbitration on matters of interpretation, application, operation, or any alleged violation of the collective agreement and any question as to whether the matter is arbitrable--the door is open for unrestricted procedural requirements in the grievance steps.

The first authority for the above approach was the affirmation by the Ontario Court of Appeal in *International Nickel*[97] of the decision of Judge Bigelow[98] in which he held that where a collective agreement provided separate procedures for the settling of differences between the company and the union and between the company and the employees, the failure to follow the proper procedure resulted in the dismissal of the grievance. Although not expressly setting out

a rule, the case allowed a procedural limitation to defeat a grievance in spite of the statutory arbitration requirements.

Barber was the first to comment directly on the problem. The arbitration involved a grievance procedure for policy grievances which was limited by the words "may not be used by the union to institute a complaint or grievance directly affecting an employee or employees."[99] It was an attempt to limit the use of union policy grievances. Barber distinguished between what are called the substantive provisions and procedural provisions of the statutory arbitration clause. As long as the substantive requirements have been met, there may be any procedural limitations imposed that are agreed to between the parties at the bargaining table.

> There is nothing in the Labour Relations Act which would prohibit such a limitation. The contract, if interpreted as the employer suggests, still provides for arbitration of all disputes between the parties as is required by s.34 and merely provides that what can be grieved by an individual employee cannot be grieved by the union.
>
> Since there is in our opinion no limitation on the right of the parties to agree to such a limitation, the question before us is to determine whether they have so agreed.[100]

This point of view avoids the fact that the procedural limitations are, in many cases, denying access to the substantive provisions that are given to the parties by statute. It is recognized that this view is based on the idea that arbitrability is a prerequisite to the arbitration

itself. If these procedural limitations are defeating the grievances at the condition precedent stage then, it is suggested that the statutory requirements have not been met and these limitations are void.

The Supreme Court of Canada recognized the existence of procedural limitations in collective agreements in the *Hoar Transport* case.[101] The court affirmed the validity of these procedural limitations in upholding the inarbitrability of the grievance on the basis that the nominees failed to appoint a chairman within the time limits set out in the collective agreement. The substantive right to have access to arbitration was lost as a result of non-compliance with a procedural requirement.

> The board of arbitration is bound by the terms of the collective agreement . . . They create obligations of a basic nature and the parties are obliged to adhere to them. The board of arbitration cannot ignore or dilute the force of these obligations, nor change their purport by means of amendment or substitution. This was the view taken by this court in the recent decision of *Union Carbide Canada Ltd.* v *Weiler* (1968) 70 D.L.R. (2d) 333, [1968] S.C.R. 966, and *Port Arthur Ship Building Co.* v *Arthurs* (1968) 70 D.L.R. (2d) 693, [1968] S.C.R. 85, and these decisions determine the disposition of this appeal.[102]

The *Port Arthur* case is not relevant here as that case did not involve a procedural limitation which precluded arbitration. That case involved the question of a clause setting out a remedy. The *Union Carbide* decision is relevant as it involved a procedural limitation in the form of a time limit, but may be distinguished as the basis of that decision resulted from a specific submission by the

parties to the board of arbitration which limited the scope of possible decision. The submission to the arbitrator by the parties limited their jurisdiction to the questions that were put before that board.

The validity of limiting statutory requirements was also recognized by Laskin in his dissenting opinion in the Ontario Court of Appeal in *Hoar Transport*. Laskin submitted that the parties must only provide for different types of grievance procedures with access to arbitration as required by the statute. The procedures under these types of grievances is a matter for collective bargaining between the parties.

> Subject to other provisions of s.34, e.g., s-ss.(2), (3) and (4), it is left to the parties to a collective agreement to prescribe the terms of arbitration and any antecedent grievance procedure terminating in arbitration.[104]

The suggestion was made in the *Union Carbide* arbitration hearing that the grievance procedure, unlike the arbitration procedure, is not subject to the Labour Act. If this is the correct approach, then it follows that there are no controls on the limitations that can be imposed on the grievance procedures.

> The argument of the employer is that, unlike the arbitration proceeding, the grievance procedure is not under the Labour Relations Act. By reason of s.34 of the Act every collective agreement must contain an arbitration clause providing for the settlement of disputes about the proper interpretation and application of the agreement. By comparison, a grievance procedure is optional to the parties, and is 'under the collective agreement' rather than the Act.[105]

This distinction between the grievance and arbitration procedures overlooks the practical aspect of these limitations. The fact still remains, no matter what the rationale, that the limiting clauses injected into the grievance procedures are preventing unions, employees, and employers from exercising their rights that are guaranteed by the labour legislation.

Brown has also adopted the rationale that grievance procedures are not under the labour legislation, and thus limitations restricting the use of the grievance procedures may be imposed. The award involved a provision for a union policy grievance which contained an express clause limiting its application.

> Any difference arising directly between the Union and the Corporation concerning the interpretation, application, administration, or alleged violation of the provisions of this Agreement may be submitted by either party to the other at Stage 4 of the Grievance Procedure.[106]

Brown stated:

> Section 34 of the Labour Relations Act, R.S.O. 1960, c.202, provides for arbitration of all disputes between parties to a collective agreement, but there is nothing to prevent parties by contract to establish procedures for handling of grievances and separating, for the reason of efficiency in not having a duplication of matters and other cogent reasons particularly relevant to the parties' circumstances, individual and policy (or general) grievances, which in fact these parties have done.[107]

Weiler, a year later, sanctioned the approach that the parties may limit access to arbitration by imposing limitations on the types of grievance procedures to make

them mutually exclusive. He required express wording to limit these procedures, but found no prohibition from imposing these limitations.

> A union begins, under s.34, with a right to grieve itself for any violation of the agreement, even without the consent of an individual who may be directly affected as in *Re U.A.W. Local 252* and *Canadian Trailmobile Ltd.*, (1958), 19 L.A.C. 227 (Adell). However, it can contractually limit this right by appropriate language. No such limitations should be presumed from the alleged inherent 'individual' (as opposed to 'general') nature of such grievances, though. Only if the explicit language of the agreement, as fairly interpreted without any such presumptions, leads to the conclusions that the parties did intend to limit access to arbitration through union policy grievances should arbitration boards give any such limitation.[108]

In support of this approach Weiler relied on *Burlington Board of Education*,[109] *Union Carbide*,[110] and *Hoar Transport*.[111] He drew the analogy between time limits that prevent a grievance from being arbitrated and grievance procedure limiting clauses which channel grievances into either individual or policy grievance procedures.

> First of all, the mandatory language of s.34 has been held by the Supreme Court of Canada in the *Union Carbide Ltd. v Weiler et al.*, 70 D.L.R. (2d) 333, [1968] S.C.R. 966 and *General Truck Drivers Union, Local 938 et al. v Hoar Transport Co. Ltd.*, 4 D.L.R. (3d) 449, [1969] S.C.R. 634, not to prevent the parties agreeing that differences between the parties under the agreement will not be arbitrated unless certain time limits are observed. If failure to follow these procedures can prevent a dispute being arbitrated at all, if the parties have so agreed, then the parties should be able, despite s.34, to agree to channel different disputes to arbitration via different routes--individual or policy grievances.[112]

Weiler also drew support for his position from the Court of Appeal decision upholding the arbitrator's award

in the *International Nickel*[113] case. That award was maintained on the basis that *certiorari* would not lie where the interpretation was one which the language would reasonably bear. Weiler read into this decision the reasoning that the Court of Appeal gave their blessing to the imposition of procedural controls on access to the arbitration process.

> The Court of Appeal, [1962] O.R. 1089, 35 D.L.R. (2d) 371, restored the arbitration award on the ground that only an interpretation which the language could not reasonably bear would amount to an error of law that would justify quashing an award on *certiorari*. The Court of Appeal thus, while not saying it agreed with the arbitration board, held that their interpretation was reasonably defensible. However, it could not have said this if s.34 prevented the parties agreeing to it even in explicit and unambiguous terms. In the same way as for the 'timeliness' cases, we must accept the principle adopted by the Courts that the policy of freedom of collective bargaining is not limited by s.34 of the Act when the parties affirmatively agree to impose procedural controls on access to the arbitration process.[114]

Simmons also faced this problem, and adopted the quote from Weiler in *Milk and Bread Drivers*.[115] Simmons considered that the *International Nickel*[116] case sanctioned the right of the parties to a collective agreement to restrict the procedure under which a grievance may be brought.

> There are collective agreements in which the parties have expressly agreed to restrict the manner in which grievances are to be processed and arbitration boards have given effect to such agreements. This was the effect of *Re Mine, Mill and Smelter Workers, Local 598* and *Int'l Nickel Co.* (1961), 12 L.A.C. 146 (Bigelow) which was upheld by the Ontario Court of Appeal [1962] O.R. 1089, 35 D.L.R. (2d) 371.[117]

b) Summary

Although it is widely accepted that the parties in collective bargaining may use these procedural limitations to deny access to arbitration; hindsight illustrates that the main support for this proposition rests on two Supreme Court of Canada cases[118] which do not directly consider the question, and an Ontario Court of Appeal decision[119] that by its silence is put forth in support of this proposition. It is ironic that such an important pillar of labour relations should be supported on such a weak foundation.

The effect of these procedural limitations in the policy and individual grievance clauses is to deny the right of an individual, union, or company to proceed to arbitration on a difference relating to the interpretation, application, operation, administration or alleged violation of the collective agreement--the very thing that is required to be a part of every collective agreement. If the wrong grievance provision is chosen to institute a grievance--the grievance is lost. In most cases the grievance is lost because the time limits in the grievance procedures cannot be met due to the length of time between the time of filing of the grievance and the final disposition by the arbitration board.

This principle is the underlying basis for all procedural limitations injected into the grievance procedures. This applies, not only in the area of policy and individual

grievances, but also in the area of the steps and time limits in the grievance provisions. To upset this would be to upset over twenty years of labour jurisprudence; but a second look at this problem is required if harmonious relations between employees and employers is to be maintained, and arbitration as an informal system of solving disputes is to survive.

The only solution is to meet the problem head-on and allow the courts to decide if these procedural limitations imposed on the grievance procedures are in fact limiting or denying the right to arbitration that is guaranteed by the labour legislation. It is submitted that the only answer to this question is "yes." From an academic viewpoint this is a simple solution, but it is unlikely that twenty years of labour jurisprudence will be changed by one court decision.

The other option is legislation in the area of grievance procedures which is also very unlikely.

V. Limiting Clauses

a) Types of Clauses

Accepting the principle that the parties may impose procedural limitations that may deny access to arbitration; it is now necessary to examine the types of clauses that have resulted from this principle, along with the effect of these clauses.

There are three basic clauses that represent successful attempts to utilize the above principle to create a more technical grievance procedure and further the use of preliminary objections in this area. These are appearing with increasing frequency in collective agreements. Their function is to make the procedure for union grievances mutually exclusive from the procedures for individual or employee grievances. Thus, the grievance must be brought under the proper procedure or it is lost. The following examples will illustrate:

Type (1)

> Differences between the Company and the Employees.
>
> 7.01 Should any difference arise between the Company and any of the employees from the interpretation, application, administration or alleged violation of the provisions of this Agreement, an earnest effort shall be made to settle such differences without undue delay in the following manner: . . .
>
> Differences between the Company and the Union.
>
> 7.09 Any differences arising between the Union and the Company from the interpretation, application, administration or alleged violation of the provisions of this Agreement, instead of following the procedure hereinbefore set out may be submitted . . .
>
> 7.15 No matter shall be considered by the arbitrators nor shall they render any decision in connection therewith unless and until a majority of them have first decided that such matter constitutes a difference, between the Company and the Union or the employee initiating the matter, arising from the interpretation, application, administration or alleged violation of this Agreement.[120]

This particular clause was one of the earliest attempts to limit the scope of the two procedures. The key is paragraph 7.15 which requires the arbitrator to decide whether

there is a difference under paragraph 7.01 or 7.09. If the grievance has been processed under the wrong provision, the preliminary objection to that effect will be successful and the grievance will be dismissed.

Type (2)

A more refined clause is as follows:

> Any differences arising directly between the union and the Corporation concerning the interpretation, application, administration, or the alleged violation of the provisions of this Agreement may be submitted by either party to the other at Stage 4 of the Grievance Procedure.[121]

Under this clause a finding that the grievance does not arise directly between the Union and the Corporation precludes a union grievance under this clause. This clause is open to interpretation as to what matters arise directly between the Union and the Corporation.

Type (3)

The third and most refined clause reads:

> 8.04 It is agreed that a grievance arising directly between the Corporation and the Union shall be originated under Step No. 2 and the time limits set out with respect to that Step shall appropriately apply. It is understood, however, that the provisions of this Section may not be used with respect to a grievance directly affecting an employee or employees and that the regular grievance procedure shall not be thereby by-passed.[122]

This clause emphasizes the word "directly" and reinforces the mutually exclusive nature of the two grievance provisions by the reference to "by-passing" the individual or regular grievance procedure. The clause is the most frequently used due to its apparent infallibility in creating

mutually exclusive grievance procedures. There are slight variations in the above clauses, but in essence they are the same as those quoted above.

b) Interpretation of the Clauses

Rather than deal with the interpretation of these clauses in each individual case, it will be sufficient to quote some of the reasoning put forth by the arbitrators who have examined these clauses. The basic reasoning in all these cases is similar. The following quotes will illustrate the arguments put forth by the union representatives as well as the problems they face in this area.

One of the hardships of mutually exclusive grievance procedures is that it results in unnecessary duplication of both grievance and arbitration proceedings rather than allowing the union to process a number of individual grievances as a policy grievance. Barber, considering this argument by the union, did not feel that it was any more harmful to the union than to the employer. This view overlooks the question of the priorities that must be considered when a union's ability to process grievances is limited by a small treasury.

> There may be great merit in these observations but the primary task of this board is not to decide on the wisdom of what the parties have done, but rather what they have agreed to in writing. . . .
>
> However, where an interpretation yields unfortunate results for one party in one case but will generally yield results which can reasonably be justified on a number of grounds there is no reason to suspect that the parties have not agreed to such an interpretation.

> While the restriction of policy grievance which would result in some duplication of grievances and some wasted steps in the grievance procedure in a few cases, that result is no more harmful to the union than to the employer.[123]

This approach does no more than increase the already onerous burden of settling disputes during the life of the collective agreement.

The contrary view was expressed by Adell in an award in which the individual did not wish to process the grievance because he had obtained other employment. The union was unable to process the grievance because of a limiting clause which made the two grievance procedures mutually exclusive. Although Adell set out a convincing argument for allowing the union to bring an individual grievance as a policy grievance, he felt he would exceed his jurisdiction in light of the express clause limiting the scope of policy grievances.

> Compelling reasons exist for allowing a union to process a grievance in most situations where it believes the agreement to have been violated and where the employee involved is unwilling or unable to press an individual grievance. The union is the bargaining agent for all employees covered by the agreement, and has a clear interest in preventing further violations and in stopping the development of what might later be held to be an adverse past practice. An employee's reluctance to initiate an individual grievance may stem from fear of employer sanctions or from hope of currying employer favour, or, as was perhaps the case here, from simple lack of concern due to the taking of other employment. In some of these situations the employee's own interest demands that the union be able to press a grievance; in all of them the interest of the entire bargaining unit demands it. Against these considerations there stands only the argument that grievance procedures work better when the grievance load is kept light. The indiscriminate acceptance of this argument

> requires the highly dubious assumption that the weight of a few extra grievances will more gravely impair the administration of a collective agreement than will the effect of denying to the union any opportunity to secure redress of what it thinks are breaches of the agreement.[124]

In spite of this he went on to deny the grievance.

> Despite what we have just said, we would clearly exceed our jurisdiction if we entertained a policy grievance in circumstances in which the parties have said in their collective agreement that no policy grievance may be brought.[125]

The only attempt at a liberal interpretation of the "directly affecting" clauses was expressed by Weatherhill. His approach may be the last hope for relieving against the preliminary objections based on the use of these limiting clauses. Weatherhill made two important points:

1) give a liberal interpretation to the words "directly affecting: so that the union may process individual grievances.

2) impose the "deemed" provisions of the labour legislation as these limiting clauses are barring access to arbitration which is contrary to the statutory requirements.

> In the instant case the grievance may quite reasonably be considered as properly brought by the union. If the corporation's objection is well taken, however, the union must forego its grievance, not because it is not properly a union grievance, but because it happens to 'directly affect' an employee. It is difficult to conceive of a union grievance which would not directly affect some at least of the employees . . . .
>
> The phrase 'directly affecting an employee' is to be read as relating to the distinction between such grievances, arising directly between the parties, and the grievances of individual employees, for which a procedure is provided elsewhere in art. 8. The purpose of the second sentence of art. 8:04 is simply to

> prevent an individual's personal grievance being presented under the guise of a union grievance. In the instant case, we have before us a union grievance proper. If the phrase 'directly affecting an employee' is read in such a way as to deprive the union of its right to present this grievance under art. 8:04, the effect of such a reading is to deprive both the parties of this right to grieve certain matters. We prefer to place a more reasonable interpretation on the agreement, reading art. 8 as a whole, and to rely as well on the maxim that the parties must have intended to comply with the requirements of the governing legislation. If this is not the case, of course, then we must have regard to provisions of s. 34(2) of the Labour Relations Act.[126]

This approach is significant in that it is the only case that suggests that a strict interpretation of this clause may be in violation of the requirements of the statutes. He suggests that either there must be overlapping between the two grievance procedures or the deemed provisions of the statute are invoked. It is suggested that this is the only reasonable interpretation to be given to the words "directly affecting."

It must be noted that the above case is the exception rather than the rule. The majority of arbitrators would distinguish or disagree with the above decision, and find the limiting clause effective to create mutually exclusive grievance procedures and thus foster preliminary objections in this area.

VI. Summary

Preliminary objection began with a simple distinction between individual and policy grievance. The use of preliminary objection increased under Judge Cross's theory, but relief came with a second view which required express

language to create mutually exclusive grievance procedures. The increased use of express limiting clauses again increased the success of the preliminary objection.

The most obvious area for relief from this reintroduction of the preliminary objection lay in the limiting effect these express clauses posed for the statutory requirements of the labour legislation. Unfortunately neither the courts nor the arbitration board adopted this view, and it is accepted in labour arbitration today that these express clauses do not fetter the statutory requirements. The clauses have been very successful in denying the right to grieve where it is processed under the wrong procedure.

The result of all this labour jurisprudence is that over a period of twenty years the situation remains the same relative to the standing of the preliminary objection in this area. The same technical objection can be maintained today with the addition of an express clause in place of the simple distinction between individual and policy.

'Preliminary objection today are defeating more grievances on technicalities than ever before. Relief in this area may be effected by

1) a court decision finding the limiting clauses to be denying access to arbitration that is guaranteed by the labour legislation.

or,

2) a liberal interpretation of express clauses attempting to create mutually exclusive grievance procedures

or,

3) a legislative enactment denying the right to defeat a grievance on technicalities.

None of these seem likely!

VII. Footnotes to Chapter Two

1. *I.B.E.W., Local 348* and *A.G.T.* (1971) 23 L.A.C. 124 at 125 (Owen).

2. *Canadian Business Machine Workers Union and National Cash Register Co. of Canada Ltd.* (1969) 20 L.A.C. 103 at 103 (Golt).

3. *Canadian Telecommunications Union* and *Canadian Pacific Ltd.* (1972) 24 L.A.C. 238 at 240, 241 (Golt).

4. R.S.O. 1970 c.232 s.37(1)(2)
   R.S.A. 1970 c.196 s.78(1)(2)

5. See Chapter Three.

6. R.S.O. 1970 c.232

7. R.S.A. 1970 c.196

8. *C.U.P.E., Local 1090* and *Township of Vaughn* (1969) 20 L.A.C. 392 at 395.

9. *C.I.L., Calgary Works* and *Int'l Chemical Workers, Local 460* (1963) (unreported) (Gill).

10. R.S.A 1955 c.167 as am. 1960 c.54

11. *Supra*, n. 9

12. *Oil Workers Local 16-341* and *Rinshed Mason Co.* (1958) 8 L.A.C. 293 (Hanrahan)

13. R.S.A. 1955 c.167 as am. 1960 c.54

14. R.S.A. 1955 c.167 s.73(6)(a) as am. 1960 c.54

15. R.S.A. 1955 as am. 1960 c.54 1964 c.41

16. *Supra*, n. 8 at 394

17. See IV, Limiting Statutory Requirements

18. (1956) 7 L.A.C. 174

19. R.S.O. 1955 c.194 s.32(2), now
    R.S.O. 1970 c.232 s.37(2)

20. *Supra*, n. 19

21. *Supra*, n. 18 at 175

22. *Supra*, n. 18 at 179.

23. See, IV Limiting Statutory Requirements.

24. R.S.O. 1955 c.194 now
R.S.O. 1970 c.232 s.37(3).

25. *Supra*, n, 18 at 180.

26. *United Steel Corporation Ltd.* v *Fuller et al.* (1958) 12 D.L.R. (2d) 322 at 325, 326 (Ont. H.C.).

27. *U.A.W.*, and *Dall Specialities Ltd.* (1967). 18 L.A.C. 141 at 206.

28. R.S.A. 1955 c.167 s.73(4)(5) as am. 1960 c.41.

29. *Supra*, n. 18.

30. *Supra*, n. 12.

31. *United Brewery Workers, Local 173* and *Canadian Breweries Transport Ltd.* (1963) 14 L.A.C. 220.

32. *U.A.W.*, and *Dall Specialties Ltd.* (1967) 18 L.A.C. 141; *Int'l Ass'n of Machinists and Aerospace Workers, Local 861* and *Erie Iron Works Co. Ltd.* (1970) 21 L.A.C. 320.

33. *Teamsters Int'l Union, Local 990* and *Lakehead Freightways Ltd.* (1969) 20 L.A.C. 109.

34. *Supra*, n. 3.

35. *Supra*, n. 3 at 241, 242.

36. See, IV Limiting Statutory Requirements.

37. *Supra*, n. 27.

38. *Supra*, n. 18.

39. *Supra*, n. 34 at 203-206.

40. *Supra*, n. 26.

41. *U.A.W., Local 27* and *Northern Electric Co. Ltd.* (1970) 21 L.A.C. 305.

42. R.S.O. 1970 c.232 s.37(2).

43. *U.A.W., Local 222* and *Duplate Canada Ltd.* (1967) 18 L.A.C. 197 (Thomas).

44. *Supra*, n. 18.

45. *Supra*, n. 26.

46. See *United Steelworkers* and *Canadian Industries Ltd.*, (1969) 20 L.A.C. 386 at 390 (Palmer); *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* and *Western Bakeries Ltd.*, (1970) 21 L.A.C. 308 at 313.

47. *U.A.W.* and *Ford Motor Company* (1951) 3 L.A.C. 889 at 890.

48. *Supra*, n. 47 at 890.

49. *U.A.W., Local 458* and *Massey-Harris-Ferguson Ltd.* (1958) 8 L.A.C. 178 at 179.

50. *Supra*, n. 49 at 178.

51. *U.A.W., Local 439* and *Massey-Harris-Ferguson Ltd.* (1958) 9 L.A.C. 36 at 37.

52. *Supra*, n. 51 at 36.

53. *Supra*, n. 51 at 39.

54. *U.A.W., Local 112* and *Dehavilland Aircraft of Canada Ltd.*, (1960) 10 L.A.C. 378 at 379, 380.

55. *United Electrical Workers, Local 504* and *Canadian Westinghouse Co. Ltd.* (1961) 11 L.A.C. 280.

56. *Supra*, n. 49; *Supra*, n. 51.

57. *Mine, Mill and Smelter Workers, Local 598* and *Int'l Nickel Co.* (1961) 12 L.A.C. 146 at 146.

58. *Sudbury Mine Workers, Local 598* and *Int'l Nickel Co.*, (1962) 32 D.L.R. (2d) 494 (Ont. H.C.).

59. *Sudbury Mine Mill and Smelter Worker's Union, Local 598*, and *Int'l Nickel Co. of Canada Ltd.*, (1962) 35 D.L.R. (2d) 371 (Ont. C.A.).

60. *Int'l Union of Soft Drink Workers* and *Coca-Cola Ltd.* (1964) 15 L.A.C. 16.

61. *Supra*, n. 47.

62. *Supra*, n. 49.

63. *Oil, Chemical and Atomic Workers, Local 9-593* and *British American Oil Co. Ltd.* (1956) 15 L.A.C. 408 at 411.

64. apparently unreported

65. *Int'l Union of Electrical Radio and Machine Workers* and *Maloney Electric Co. of Canada Ltd.* (1965) 16 L.A.C. 214.

66. *Supra*, n. 60.

67. *United Mine Workers of America, Int'l Union of District 50, Local 14162* and *Barton Tubes Ltd.* (1966) 17 L.A.C. 357.

68. *Labatt's Alberta Brewery Ltd.* and *Brewery, Beverage and Soft Drink Workers, Local Union #250* (1969), (unreported) (Chapman).

69. *United Ass'n of Plumbers and Pipefitters, Local 800* and *Komsack and Price Ltd.* (1966) 16 L.A.C. 410 (Little);
Int'l Union of Electrical, Radio and Machine Workers and *Maloney Electric Co. of Canada Ltd.* (1965) 16 L.A.C. 214 (Lane);
United Mine Workers of America and *Barton Tubes Ltd.* (1966) 17 L.A.C. 357 (Thomas);
Sudbury Mine, Mill and Smelter Workers Union, Local 598 and *Int'l Nickel Co. of Canada Ltd.* (1965) 55 D.L.R. (2d) 371 (Ont. C.A.);
Regina v *Lane et al.*, 66 C.L.L.C. 14, 137 (Ont. H.C.);
Hoogendoorn v *Greening Metal Products and Screening Equipment Co. et al.* [1968] S.C.R.30;
Bradley et al. and *Ottawa Professional Fire Fighters Ass'n et al.* [1967] 2 O.R. 311 (Ont. C.A.);
Int'l Union of District 50, U.M.W.A. and *Canadian Industries Ltd.* (1968) 20 L.A.C. 17 (Curtis).

70. *Fiberglass Canada Ltd.* and *Oil Chemical and Atomic Workers Int'l Union, Local 9-728* (1970) (unreported) (Lucas).

71. *Supra*, n. 63.

72. R.S.O. 1955, c.194 presently R.O.S. 1970, c.232 s.37(2).

73. *United Steel Corporation Ltd.*, v *Fuller et al.* (1958) 12 D.L.R. (2d) 322 (Ont. H.C.).

74. R.S.O. 1955 c.194 presently R.S.O. 1970 c.232 s.37(2).

75. *Supra*, n. 73.

76. *Supra*, n. 12 at 296.

77. R.S.O. 1955 c.194 presently R.S.O. 1970 c.232 s.37(2).

78. *Supra*, n. 73.

79. R.S.O. 1955 c.194 presently R.S.O. 1970 c.232 s.37(2).

80. *United Electrical Workers, Local 523* and *Reliance Electric and Engineering Ltd.* (1958) 9 L.A.C. 251 at 252.

81. R.S.O. 1955 c.194 presently R.S.O. 1970 c.232 s.37(2).

82. *Supra*, n. 80 at 253.

83. *Supra*, n. 51.

84. *United Electrical Workers, Local 521* and *Canada Wire and Cable Co. Ltd.* (1961) 12 L.A.C. 76 at 78.

85. *Int'l Longshoreman's Ass'n Local 1879* and *Hamilton Terminal Operators Ltd.* (1962) 12 L.A.C. 235 at 235.

86. See V, Limiting Clauses.

87. *Supra*, n. 59.

88. *Supra*, n. 59.

89. *Warehousemen and Miscellaneous Drivers, Local 419* and *Holland River Gardens Co. Ltd.* (1965) 16 L.A.C. 109 at 119.

90. *Int'l Chemical Workers, Local 412* and *Penick Canada Ltd.* (1966) 17 L.A.C. 296 at 301.

91. *C.U.P.E. Local 1011* and *Burlington Board of Education* (1967) 18 L.A.C. 347 at 348.

92. See IV, Limiting Statutory Requirements.

93. *United Steelworkers* and *C.I.L.* (1969) 20 L.A.C. 386 at 390.

94. *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* and *Weston Bakeries Ltd.* (1970) 21 L.A.C. 308 at 313.

95. *Int'l Union of Electrical Workers, Local 549* and *Sylvania Electric (Canada) Ltd.* (1972) 24 L.A.C. 361 at 365,366.

96. See, II Statutory Requirements.

97. *Supra*, n. 59.

98. *Supra*, n. 57.

99. *Supra*, n. 91.

100. *Supra*, n. 91 at 350.

101. *General Truck Drivers Union, Local 938 et al.* and *Hoar Transport Co. Ltd.* (1969) 4 D.L.R. (3d) 449 (S.C.C.) affirming (1968) 67 D.L.R. (2d) 484 (Ont. C.A.) reversing (1967) 64 D.L.R. (2d) 400 dismissing an application for *certiorari*.

102. *Supra*, n. 101 at 450, 451.

103. (1968) 67 D.L.R. (2d) 484.

104. *Supra*, n. 103 at 490.

105. *United Steelworkers of America, Local 6962* and *Union Carbide Canada Ltd.* (1967) 18 L.A.C. 74 at 79.

106. *C.U.P.E., Local 6* and *City of Sudbury* (1970) 21 L.A.C. 118 at 121.

107. *Supra*, n. 106 at 122.

108. *Supra*, n. 94 at 313, 314.

109. *Supra*, n. 91.

110. *Union Carbide Ltd.* and *Weiler et al.*, (1968) 70 D.L.R. (2d) 333.

111. *Supra*, n. 101.

112. *Supra*, n. 94 at 311, 312.

113. *Supra*, n. 59.

114. *Supra*, n. 94 at 312.

115. *Supra*, n. 94.

116. *Supra*, n. 59.

117. *United Steelworkers, Local 2859* and *Babcox and Wilcox (Canada) Ltd.* (1971) 22 L.A.C. 383 at 385.

118. *Supra*, n. 101, 110.

119. *Supra*, n. 59.

120. *Supra*, n. 59 at 373.

121. *Supra*, n. 106 at 121.

122. *Supra*, n. 8 at 392.

123. *Supra*, n. 91 at 351.

124. *U.A.W., Local 252* and *Canadian Trailmobile Ltd.* (1968) 19 L.A.C. 227 at 230.

125. *Supra*, n. 124 at 230.

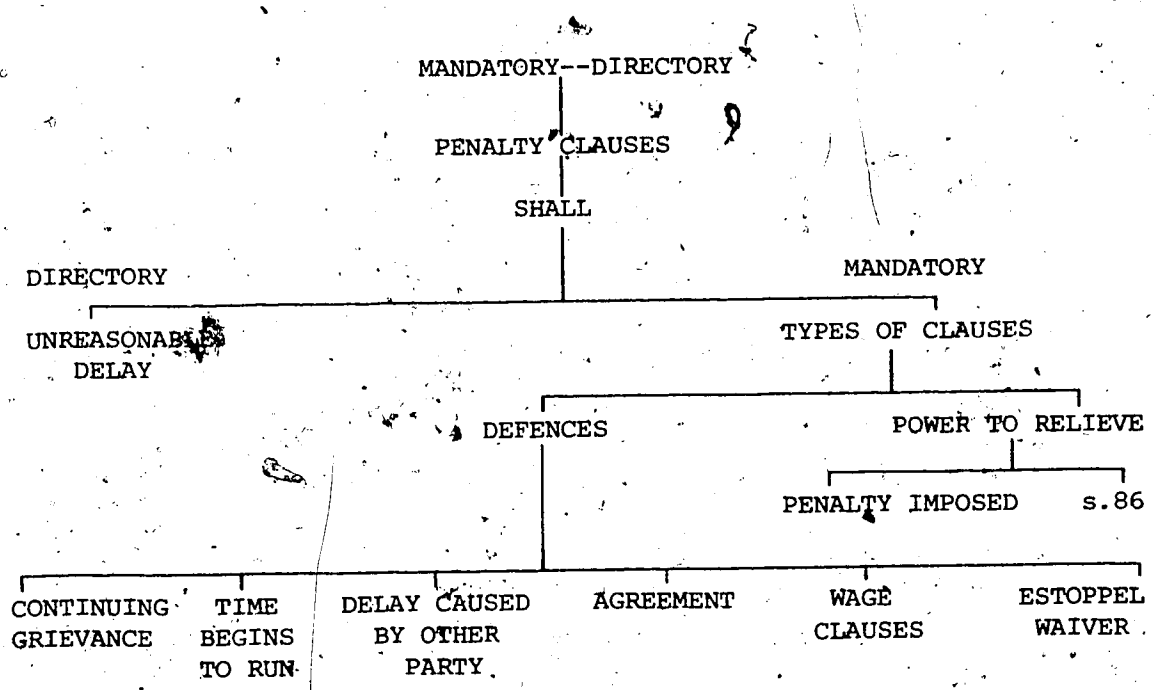
126. *Supra*, n. 8 at 396.

CHAPTER THREE

MANDATORY AND DIRECTORY CLAUSES

I. Background

The preliminary objection based on mandatory or directory clauses is by far the most widely used technical objection in arbitration today. It is parallel to the development of policy versus individual grievance objection in that they both began with a simple distinction, and have become more complicated with the injection of new clauses and more refined approaches to the problem. This area involves more court pronouncements than any other area of technical objections. This may be one of the reasons that the approach today involves so many variables. It is necessary at this point to diagram the study in this area in order to allow this confusing area to exhibit some order.



This chapter will outline the major decisions in this area setting out the jurisprudence of both the courts and the arbitrators to establish the basis for this objection. It will be necessary to look in detail at the interpretation of "penalty" and "sanction" clauses, and the interpretation of the word "shall" in order to determine into which category the particular clauses fall--directory or mandatory. The chapter will then divide itself into a study of these two categories with the major emphasis on the mandatory category. This technical objection has broadened in the types of situations and clauses to which it applies. It will also be shown how attempts to relieve against this technical objection have failed. The chapter will conclude with a look at the possible defences to this preliminary objection which reflect limited relief from the mandatory--directory preliminary objection.

The first reference in labour arbitration to mandatory or directory was made by Laskin in 1955.[1] The company claimed inarbitrability on the basis that the union had not submitted an intention to arbitrate by giving the name of their nominee within the seven days as required by the collective agreement. The clause in question contained a time limit in which the nominee must be appointed, but it did not include what is known as a "cut-off," "sanction" or "penalty" clause. These three terms are all synonymous with a clause which stipulates that failure to observe the time limits is fatal to further processing of the grievance. This clause

will be discussed in detail later.[2] The significance of this clause is that it sets out a sanction or penalty for non-compliance with certain requirements of the grievance and arbitration procedures. There may be more than one sanction clause in a collective agreement, each referring to different procedures in the collective agreement. In this particular case there was no sanction or cut-off clause referring to the section under consideration by Laskin. Basically, an arbitrator will search for a sanction clause in a situation such as this; and if there is one the procedures will be mandatory, if not it will be directory. The few lines set out below from the instant case are the basis for later developments in this area.

> Article XVIII, which prescribes the stages of the grievance procedure anterior to arbitration, stipulates time limits and also stipulates that failure to observe them strictly is fatal to further processing, whether by the Union or by the Company. There is no such 'cut off' provision in Article XIX. . . .
>
> Since there are no clear cut-off provisions in Article XIX, this Board is disposed to regard the time stipulation as directory only rather than mandatory, but subject to a qualification against unreasonable delay. It would, of course, be open to the parties to extend any time or otherwise mutually to agree on a course of action which might not be available to either one on its unilateral insistence. In this case, the grievance was properly referred to arbitration. It was then incumbent on the Union as well as on the Company to nominate a member of the Board of Arbitration.[3]

One of the earliest and most quoted cases in this area involved a company grievance claiming damages from the union for an unlawful work stoppage. This case represents a turning point in the development of this doctrine as the cases cited by Judge Reville, in support of the distinction

between mandatory and directory clauses, did not use the word mandatory or directory. Although Judge Reville set out the principle of mandatory clauses, he did not set out any tests for coming to the conclusion that the procedures were mandatory.

> . . . There remains the question of the preliminary objection raised by Mr. Arnold that this board is deprived of jurisdiction by reason of the failure of the company to follow the grievance procedure set forth in the collective agreement. There is a wealth of authority to establish that where a mandatory grievance procedure is set forth in a collective agreement, the grieving party must follow it meticulously, unless the other party has waived one or more of the requirements set forth in that procedure, and that in the absence of such waiver, the grievance is not arbitrable and the arbitrator is thereby debarred of jurisdiction to entertain it. *Re U.E.W.* and *Canadian Raybestos Co. Ltd.* (1951), 3 L.A.C. 849; *Re United Steelworkers* and *R. D. Werner Co. Ltd.* (1957), 8 L.A.C. 45; *Re U.A.W.* and *Massey-Ferguson Co. Ltd.* (1959), 9 L.A.C. 269; *Re Teamsters, Chauffeurs, Warehousemen and Helpers* and *Overland Express Ltd.* July 20, 1960, unreported (Fuller, C. C. J., chairman).[4]

The cases cited by Judge Reville can be grouped with other earlier cases[5] that consider whether a grievance is arbitrable when the time limits have not been complied with, without regard to whether the procedures are mandatory or directory. This older line of cases relied on the fact that the board was bound by the terms of the collective agreement; and did not have any power to add to, subtract from, alter modify or amend any part of the collective agreement or make any decision inconsistent therewith.

Reville again set out his position later in the same year in a case reported in headnote form only.

> In this case the board unanimously followed the older line of awards holding that where the grievance procedure in a collective agreement contains mandatory provisions, those provisions must be followed scrupulously and to the letter by a party seeking to take advantage of them and if either of the parties fails to follow such mandatory provisions, then the grievance is not arbitrable and a board of arbitration set up to consider such grievance is deprived of jurisdiction to entertain it.[6]

Arthurs, in an arbitration involving late filing and a sanction clause, set out his position on the mandatory-directory preliminary objection.

> It should be noted that the agreement explicitly provides 'that no grievance shall be considered' which is out of time or otherwise irregular. This provision, no doubt, is designed to effectuate the 'mutual desire of the Authority and the Union that the complaints of employees shall be adjusted as quickly as possible.' Such a provision is said to be 'mandatory,' meaning that the parties have specified the consequence of non-compliance. In this respect, the collective agreement is unlike many others which provide only a 'directory' time limit, non-observance of which carries no specific penalty.[7]

Although Arthurs accepted this approach, he went on to relieve against non-compliance under section 86,[8] a procedure which has since been overruled.[9]

The *Page Hersey*[10] decision was also cited by Arthurs later in the same year in an award in which he dismissed the preliminary objection on the basis that the clause was only directory. Arthurs set out the distinction between mandatory and directory clauses.

> Mandatory time limits are those found in agreements which expressly provide for the consequences of non-compliance. Typical of mandatory provisions are such phrases as 'no grievance shall be considered unless the procedure specified has been followed' or 'in the event that either party fails to follow the

> procedure specified, the grievance shall be deemed to have been abandoned.' Directory time limits, on the other hand, do not specify any particular consequence for non-compliance.[11]

Kennedy followed the *Page-Hersey*[12] award and the *Barlin-Scott*[13] award later in the same year.[14]

Palmer, when facing this preliminary objection, considered the law in this area well established.

> The law in this area is quite clear: if a collective agreement provides mandatory procedures for the processing of disputes, these procedures must be followed and there is no conflict with s.34(1) of the *Labour Relations Act*, R.S.O. 1960, c. 202, in so doing: *Re U.A.W., Local 439*, and *Massey-Ferguson Ltd.* (1959) 9 L.A.C. 269 (H. E. Fuller, C.C.J., chairman), and *Re U.S.W., Local 6231*, and *Barlin-Scott Mfg. Co. Ltd.* (1963), 14 L.A.C. 241n (R. W. Reville, C.C.J., chairman).[15]

Weiler, in the *Union Carbide* award, after reviewing the *Barlin-Scott*[16] award; set out an extensive examination of mandatory and directory clauses.

> Mandatory requirements are those where the agreement expressly provides for the sanction to be applied to a breach of the section. Directory requirements merely state what the party is supposed to do without specifying any penalty for a failure to adhere to the direction. In the latter type of case arbitrators have generally taken the position that they can use their general remedial power to impose reasonable penalties for a breach, depending on the magnitude of the breach by the union and the severity of the harm, if any, resulting to the union's position. In this case, I think it is obvious that the standard of reasonability would not countenance the barring of an individual employee's grievance by reason of a one-day delay in a notice delivered by his union representative. On the other hand, the usual attitude taken by arbitrators to breaches of mandatory requirements is that they must be applied to the letter, because of the arbitrator's obligation to interpret the agreement and not in any way to amend, modify or change any of its provisions.[17]

This award was appealled[18] and a further appeal to the Ontario Court of Appeal was dismissed.[19] An appeal to the Supreme Court of Canada[20] was successful on grounds not relevant to this survey.

O'Shea considered this problem in an award involving the same collective agreement as that considered by the Supreme Court of Canada above. He also conducted an extensive examination of the principles relating to mandatory and directory clauses. His words are among the most quoted when this problem confronts arbitrators today. Keeping in mind that it is the purpose of this section to introduce the distinction between these two types of clauses to the reader before indulging in the fine distinctions of this preliminary objection, it is necessary to quote the authorities at some length. O'Shea provides an excellent explanation of this distinction.

> Procedural requirements that certain things be done within specified times may be either 'mandatory' or 'directory'. A mandatory provision is one where the agreement expressly provides for a sanction to be applied in the event of a breach of the provision. Where a substantive remedy is specified in the event of a breach of such a provision, it is imperative that the provision be complied with to the letter, otherwise the result which the parties have agreed to must be applied. An example of a mandatory provision would be the situation where the parties provide that if a union fails to advance a grievance to the next stage of the grievance procedure within a specified time the company's reply to the preceding stage shall be deemed to be a final and binding disposition of the grievance. An arbitrator has no power, in such event, to weigh the harshness of the result in order to justify giving relief against what might be a minor variance from the time limitations which the parties have agreed to. An arbitrator's function is to interpret the intention of the parties as expressed in the collective

> agreement and this function is not fulfilled when an arbitrator gratuitously modifies the provisions of the agreement in order to obtain a result which in his opinion is equitable.
>
> However that may be, in interpreting and giving effect to the intention of the parties as expressed in the collective agreement, it may be found that certain procedural requirements are merely 'directory' rather than 'mandatory.' 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 compiled 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.[21]

O'Shea also agreed with the tests set out by Weiler in the *Union Carbide*[22] award, but pointed out that Weiler's mistake was in the application of the tests.

> In passing, we might comment that the arbitration award under review by the Court in the *Union Carbide* case sets out certain tests for determining whether a provision in a collective agreement is mandatory or directory and we generally agree with the tests therein enumerated. However, having established the test for ascertaining whether the agreement 'expressly provides for the sanction to be applied to a breach of the section,' the learned arbitrator, in our opinion, failed to follow that test in finding that the time limitations with which he was concerned were mandatory. It appears to us that if the tests were applied, the time limitations are directory rather than mandatory.[23]

In *Hoar Transport*,[24] another Weiler decision went to the Supreme Court of Canada. Although the Supreme Court did not use the words mandatory or directory as the

Ontario Court of Appeal had, the time limits and the sanction clause were the basis of the decision. The decision in the Ontario High Court and in the Ontario Court of Appeal involved the question of whether the procedures were mandatory or directory.

Brown also faced the question of whether time limits were mandatory or directory.[25] He adopted the words of O'Shea in the *Union Carbide*[26] award.

> For a discussion of mandatory and directory provisions in collective agreements, see *Re U.S.W., Local 6962*, and *Union Carbide Canada Ltd.* (1968), 19 L.A.C. 412 (O'Shea).[27]

The distinction between mandatory and directory was also recognized in the Ontario Court of Appeal by Mr. Justice Aylesworth.[28] The case involved the interpretation of a clause requiring reasons for dismissal instead of the usual time limits problem.

Simmons, in a recent award in Ontario,[29] adopted the test set out by O'Shea in the *Union Carbide*[30] award. This doctrine has also been recognized in the Manitoba Court of Appeal[31] by Mr. Justice Hall in affirming the decision of Mr. Justice Hunt in the Manitoba Queen's Bench.[32]

Mandatory and directory as a preliminary objection has been recognized in Alberta. Muir adopted *Page-Hersey*[33] in an award involving a preliminary objection claiming that the grievance was inarbitrable due to the mandatory time limits.[34]

Melnyk cited the Court of Appeal decision in the *Union Carbide* case[35] for the proposition that if a provision is mandatory a board of arbitration does not have jurisdiction to modify or waive its operation.[36]

The most thorough review in Alberta was completed by Neuman where the preliminary objection was that the grievance procedure was mandatory and failure to follow it resulted in the inarbitrability of the grievance.[37] Neuman cited with approval *Union Carbide*,[38] *Union Carbide* v *Weiler*[39] and *Page-Hersey*.[40] These decisions illustrate the basis for this distinction as well as the wide spread acceptance by arbitrators of the validity of this distinction as the basis for a preliminary objection. The preceding section has provided sufficient understanding of the preliminary objection of mandatory clauses to create a foundation from which a detailed study can progress.

II. Sanction Clauses

The surest way to have the clause in question deemed to be a mandatory provision is to include in the grievance procedure a penalty or sanction clause applying to the clause. There are a wide variety of sanction clauses, but they are all directed to the same end--if the grievance procedure is not followed to the letter the grievance is inarbitrable. The following are some typical examples.

(1) If a grievance has not been settled after the above

procedure has been exhausted either party, in writing, may request that the grievance be submitted to arbitration, providing that if either party has failed to submit the grievance to arbitration within 30 days after the final disposition in Clause 19, Step 4, such grievance shall be outlawed.[41] (Emphasis added)

(2) (E) In the event that either party fails to abide by any of the time limits provided for in this section, the grievance shall be forfeited in favour of the other party.[42] (Emphasis added)

(3) Art. 11(a). It is the mutual desire of the authority and the Union that the complaints of employees shall be adjusted as quickly as possible, and it is understood that an employee has no grievance until he has first given to his immediate superior an opportunity to adjust his complaint. In discussing his complaint the employee may be accompanied by his Steward, if he so wishes.

(b) Should any misunderstanding or controversy arise between the Authority and the Union as to the compliance of either party with any of its obligations hereunder, or should there be any grievance involving the terms of this Agreement by any employee or group of employees, or the Union, the same shall be handled in the following manner, provided however, that no grievance shall be considered, the alleged circumstances of which originated or occurred more than Five (5) working days prior to its presentation as a written grievance in accordance with the procedure set out herein:[43] (Emphasis added)

(4) (d) That no matter shall be submitted to or accepted by a Board of Arbitration which has not been properly processed through all the previous steps of the grievance procedure as set out in the Collective Agreement.[44] (Emphasis added)

(5) 6.8. If at any time during the above mentioned steps the grievance has not been processed by the grievor, his representatives, or agents in accordance with the time limit as prescribed, the grievance shall be deemed to have been withdrawn, except in the event a driver on highway operations is away from his home terminal and thus unavailable to proceed with the steps of the Grievance Procedure within the time limits prescribed, such time limits shall be extended so as to permit his processing the grievance in accordance with the above steps upon his return to his home community.[45] (Emphasis added)

(6) 4.06. Should a grievance not be taken to the succeeding step within the time limits set out in this Article, or agreed upon in writing, then the grievance shall be deemed abandoned. Should the Company fail to answer a grievance within the time limits set out in this Article, or agreed upon in writing, then it may be further processed.46 (Emphasis added)

There are two points to note from the above examples. First, each clause uses different language in its attempt to create an inarbitrable grievance--"deemed abandoned," "deemed withdrawn," "shall be outlawed," "shall be forfeited." Each of the prhases used in the above sanction clauses is sufficient to have thes provisions recognized as sanction clauses. Secondly, and more important, the above examples illustrate a broad sanction clause and a narrow one. A sanction clause may refer to one step in the grievance procedure[47] or it may refer to all the steps in the grievance procedure.[48] Similarly the sanction clause may refer to one time limit in the grievance procedure[49] or all of the time limits in the grievance procedure.[50] This becomes important in this area when it is realized that unless the sanction clause refers to the specific clause that is alleged not to have been complied with; the preliminary objection of a mandatory clause is not applicable. Thus the trend has been to either put broad sanction clauses in the grievance procedure or to put more than one sanction clause in the grievance procedure so that all steps and time limits clauses in the grievance procedure will be subject to this mandatory objection.

The examples of sanction or penalty clause are absolute in that there is no discretion as to whether the grievance is arbitrable. These must be distinguished from attempted sanction clauses that are not absolute, which require some positive action by the company in order to become absolute. Some examples will illustrate this difference.

(1) (d) It shall be optional to the Company to consider any grievance, the alleged circumstances of which originated or occurred more than ninety (90) working days prior to its presentation.[51] (Empahsis added)

(2) 7.01 The Company may reserve the right to refuse to consider a grievance, the alleged circumstances of which occurred more than seven (7) calendar days prior to the presentation of the grievance in writing.[52] (Emphasis added)

These two clauses present some concern as to whether they are sufficient to create mandatory provisions. While they provide that the company may refuse to consider a grievance under certain circumstances, they do not specifically oust the jurisdiction of a board of arbitration.

Shime, interpreting the type (2) clause, did not find the wording sufficient to create a mandatory provision.

> A mandatory requirement is one that provides a penalty or expressly deprives the arbitration board of jurisdiction upon failure to scrupulously adhere to the provisions of the agreement. See *Re U.S.W., Local 62311*, and *Barlin-Scott Mfg. Co. Ltd.* (1963), 14 L.A.C. 241 (Reville, Co.Ct.J.). We find that art. 6.01 is not mandatory.[53]

This interpretation was upheld by Mr. Justice Lacourciere in the decision of the Ontario High Court.

> The language of art. 6.01 appears to be procedural rather than substantive, giving to the company the

right to refuse to consider a stale grievance. . . .

> Thus the present case is distinguishable from *Union Carbide* where there was a positive requirement for performance of certain steps within certain periods of time if the grievance was to go forward at all, i.e. a condition precedent rather than a right of refusal such as is given here.[54]

Thus in this type of clause the onus is on the company to exercise their option to create an absolute penalty clause which is required for a mandatory provision. Once the significance of this type of optional clause is realized it will probably disappear.

This section illustrates the most successful means of creating a mandatory provision that must be followed meticulously. There is one other way to create a mandatory provision. The use of the word "shall" within a provision may be significant.

III. Shall

a) Ontario

In the absence of a sanction or penalty clause it is questionable whether a grievance procedure will be interpreted as mandatory. There have been attempts to interpret the grievance clauses as mandatory in the absence of a penalty clause by relying on the use of the word "shall."

Hanrahan interpreted the word "shall" in a case involving an employee grievance alleging unjust discharge. The collective agreement did not contain a sanction clause, but did contain "shall" in the following clause:

> The employee alone, or the employee and the department steward, if the employee so chooses, shall within five working days of the origin of the grievance, submit the grievance in writing to the employee's foreman or supervisor . . .[55]

Hanrahan considered the definition of "shall" as found in *Black's Law Dictionary* and in the Interpretation Act[56] of Ontario, but in spite of these he found the clause to be merely directory. In *Black's Law Dictionary*, 4th ed., the word 'shall' is defined:

> 'As used in statutes, contracts, or the like, this word is generally imperative or mandatory . . . But it may be construed as merely permissive or directory, (as equivalent to 'may') to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. . . .'

> Pointing to the uncertainty that afflicts the force of the word 'shall' when standing alone in a time limitation provision is the action taken by the Ontario Legislature in deeming it necessary in the Interpretation Act, R.S.O. 1969, c. 191, s.30, to enact that when used the word 'shall' is to be construed as imperative. That action, of course, removes its inherent indeterminacy when it appears in provincial statutes.[57]

The dissent in this award by Robinson illustrates the division of opinion as to the effect of "shall" in the absence of a penalty clause. It is an open question as to whether the use of "shall" is sufficient to create a mandatory provision.

The following references appear to be applicable:

> The Interpretation Act, R.S.O. 1960, c. 191, c.30(34) states: 'shall' shall be construed as imperative. I cannot agree with the submission made by counsel for the union (and accepted by the chairman of the board) that lacking a penalty provision for failure to observe a procedural provision wherein the word 'shall' appears,

> that it becomes directory rather than mandatory and is subject only to a qualification against unreasonable delay. The decision of the chairman concurred in by the union nominee and the board gives no authority for the above proposition, and the references I have given above are directly contradictory.[58]

O'Shea considered this problem in the following year. The provision of the collective agreement contained "shall," but did not contain a sanction clause.

> 11:03 A joint statement, or separate statements, by the Company and the Union covering the grievance or dispute and outlining the matter to be settled by the Arbitration Board shall be submitted to all members of the Board within three (3) days after their appointment.[59] (Emphasis added)

O'Shea put no significance on "shall," and merely relied on the fact that there was no sanction clause.

> If a substantive remedy for non-compliance had been expressly provided for, then there would be no doubt as to the intention of the parties. In this case, however, no remedy was expressly provided. We are, therefore, of opinion that the parties intended the time limits to be directory only. . . .[60]

The real basis of the decision may be that the clause in question was ambiguous.[61]

Shime followed the decision of Hanrahan in the *City of Hamilton* award[62] in a situation concerning the question of whether the time for appointment of nominees was mandatory or directory. There was no sanction clause in this agreement and the clause under consideration read as follows:

> 6.02 The party wishing to submit the matter of arbitration shall, within 30 days following the failure to reach a settlement at stage (III) outlined in Clause 5, notify the other party, in writing, of its intention to submit the matter to arbitration, setting out the issues to be arbitrated.[63] (Emphasis added)

Shime considered that the use of "shall" was not sufficient to create a mandatory provision. He felt that a penalty clause was required to convert a directory provision into a mandatory one.

> We are also of the opinion that the use of the word 'shall' in clause 6.02 does not render this procedure mandatory. The learned arbitrator in *Re C.U.P.E., Local 167* and *City of Hamilton, supra*, faced with the use of the word 'shall' found it to be permissive or directory, and its use in that case, absent a penalty clause, did not render the arbitration procedure mandatory. . . .
>
> A directory requirement is one that states a procedure without providing a penalty or depriving the arbitration board of jurisdiction upon failure to adhere to the provisions in the agreement.[64]

Thus, another award in which the use of "shall" was not sufficient to create a mandatory provision.

This question recently came before the Ontario Court of Appeal where it was asked to determine whether the following provision was mandatory or directory.

> 14(3) Where a deputy minister dismisses a public servant for cause, the deputy minister shall, (a) deliver to the public servant a notice of the dismissal setting forth the reasons therefor and advising him of his right to a hearing by the Public Service Grievance Board; . . .[65] (Emphasis added)

This provision is S14(3) of the Ontario Regulation[66] passed pursuant to the Public Service Act.[67] The appellant was claiming that this particular provision which the Deputy Minister failed to observe was mandatory and not merely directory, thus resulting in the notice of dismissal being nugatory. There was no sanction clause involved, but the court considered the following provision.

> 29. A person who has received a notice under subsection 3 of section 14 and who believes he is being dismissed unjustly may, within twenty-one days of the receipt of the notice, apply to the Board for a hearing by delivering to the Chairman of the Board an application for a hearing including his grievance.[68]

Although the court put some significance on section 29, the clause was held to be mandatory in spite of the lack of a penalty clause.

> Reading these two particular sections of the Regulation and considering the Act and the Regulation as a whole piece of legislation, we are not left in doubt as to the proper interpretation of s. 14(3)(a). We think the direction therein laid upon the Deputy Minister to set forth the reasons for the dismissal of the public servant is in its nature mandatory and that failure to comply with it renders nugatory the dismissal.[69]

There is some question as to whether this decision stands for the principle that the use of "shall" creates a mandatory clause in the absence of a penalty provision. It must also be noted that the provision in this case is a statutory one which brings into account the Interpretation Act[70] and the general principles of interpreting statutes. If this case is not subsequently distinguished on its facts, it is strong authority for the proposition that the use of "shall" is sufficient, even in the absence of a sanction clause, to create a mandatory provision.

Reville adopted the approach taken in the above *Valade* case in spite of strong authority to the contrary. Reville faced a clause in the collective agreement that required particulars of any grievance to be given to the other side in the notice to arbitrate.

> The party desiring to submit a matter to arbitration shall deliver to the other party a notice of intention to arbitrate. This notice shall state the matter at issue and shall state in what respect the agreement has been violated or misinterpreted by reference to the specific clause or clauses relied upon. The notice shall also stipulate the nature of the relief or remedy sought.[71] (Emphasis added)

The company submitted that this clause was mandatory and since the union had not provided particulars, the grievance was inarbitrable. Although Reville recognized that a number of recent arbitration awards had found "shall" alone not sufficient to create a mandatory clause, he found otherwise.

> On its face, the use throughout of the imperative 'shall' in s.1 of sch.A would indicate that, at least grammatically, the section is mandatory. Were it not so, the permissive 'may' would have been used. However, a number of recent arbitration awards have cast doubt on this conclusion. Thus, in *Re C.U.P.E., Local 167*, and *City of Hamilton* (1967), 18 L.A.C. 96 (Hanrahan); *Re U.S.W., Local 6962*, and *Union Carbide Canada Ltd.* (1968), 19 L.A.C. 412 (O'Shea); *Re Tobacco Workers Int'l Union, Local 338*, and *Imperial Tobacco Co. (Ontario) Ltd.* (1969), 20 L.A.C. 310 (Shime); and *Re U.S.W.* and *Automatic Screw Machine Co., Automotive Hardware Ltd.* (1970), 21 L.A.C. 255 (Shime), where similar provisions of the clause before this board were considered, couched as that one is in the imperative, the learned arbitrators found the provisions to be directory rather than mandatory because the provisions contained no penalty for their breach. The ratio *decidendi* of these decisions, therefore, was that this omission transformed an otherwise mandatory provision into a permissive one, because if the parties had intended otherwise, they would have insisted, by means of a penalty, on its strict observance.[72]

He found the *Valade* case enunciated the principle set out in the above cited cases without the requirement of a sanction clause, and found the situations in the two cases analogous. The fact that the Court in the *Valade* decision considered section 29 of the Regulation did not detract from the principle set out.

> . . . regardless of the effect which s.27 of the Regulations may have had on the decision of the Court of Appeal in the *Valade* case, it is clear that there is no penalty imposed by the provisions of s.14(3)(a) and consequently the Court would appear to be with the principle enunciated in the arbitration cases cited above.
>
> In addition, the question which the Court posed for itself in the *Valade* case could well be adapted, at least by analogy, to the instant case, and this board could well ask itself the question, that if the provisions of s.1 of sch.A of this collective agreement are deemed to be directory, then how can the party who must defend the grievance, do so properly, if he does not have adequate information as to the precise grievance it must defend. This case is a classic example of the dilemma which the defending party must face if s.1 of sch.A is not deemed to be mandatory.[73]

As the above *Brockville Chemical*[74] award and the *Valade*[75] case indicate, a penalty clause may no longer be necessary to convert a directory clause into a mandatory clause. These cases indicate that the use of "shall" is sufficient to create mandatory clauses. It should be pointed out that the ratio of these decisions may rely on the particular circumstances of each case, and not for the broad proposition that "shall" is sufficient to create a mandatory clause. The mandatory nature of the clauses in question may stem from its interrelation with other clauses in the agreement, and the clause would be meaningless if interpreted as other than mandatory in these specific situation. Both of the above interpretations rely on the fact that justice would be denied if the clause was other than mandatory.

b) Alberta

In Alberta recently, a similar approach was taken

to the use of "shall" in the absence of a penalty clause. The clause related to the time limits within which a grievance must be referred to the other party. The basis of the award, unlike many others, was not previous awards; but on a clause that is common to most collective agreements and most labour legislation--a simple clause that states an arbitrator shall not change, modify or alter the terms of a collective agreement. The award by Neuman reads as follows:

> In the instant case it appears clear that there is no substantive remedy specified in the Collective Agreement in the event of a breach of the grievance procedure requirements. To that extent it might then be determined that the procedure was in fact merely directory. I am not, however, persuaded to this view. I note the express words of the grievance procedure, namely, 'such difference . . . shall be promptly submitted in writing to the secretary . . . and ' . . . then on or before a further five days have elapsed from the expiration of the aforesaid fifteen day time period, the grievance shall be referred. . . .' In my view, even in the absence of a sanction, the use of the word 'shall' in those circumstances makes those stipulations in the Collective Agreement mandatory. To read those words as meaning 'may' and not 'shall' would clearly in my view represent a change, modification or alteration of the terms of the agreement which is expressly prohibited by 17.5.[76]

There is no question that this decision states "shall" is sufficient to create a mandatory clause. If the previous two cases do in fact support this broad proposition, then again arbitration is moving toward more technicalities. It will now only require the use of "shall," which is common to most grievance procedures, to create mandatory provisions instead of the requirement of a sanction or cut-off clause. Thus arbitratio will experience more clauses in which the grievor must follow the provisions meticulously

or face inarbitrability. This is another illustration of the trend in arbitration today towards increasing the use of preliminary objections rather than avoiding the technicalities in order to get down to the business of settling grievances on their merits.

IV. Directory

In the event that there is no sanction clause and shall is not interpreted as mandatory, the provisions in question will be deemed to be directory and be inarbitrable only as a result of unreasonable delay. This section will set out the basis for this approach before an attempt is made to study the technicalities of mandatory clauses in all their forms.

There is no objection to a time limit being subject to unreasonable delay. It is submitted that all clauses should be deemed directory and thus subject to the unreasonable delay rule rather than the situation in which each provision must be followed meticulously under a mandatory clause.

The basis for the restriction of unreasonable delay was a compromise between the union's position that there was no time limit for filing a grievance, and the company's position that time limits must be strictly followed with regard to the filing of a grievance.

Some quotes from Professor Laskin, as he then was,

will illustrate this principle.

> Neither the Agreement under which this grievance was filed nor the preceding Agreement contains any time limitation for the filing of grievances. Is there, then, any basis on which a grievance can justly be declared 'stale' or 'out of time,' and thus subject to rejection without consideration of its merits? And if there is such a basis of rejection, is this case within its limits? In considering this problem it is safe to start with the proposition, abstract though it may be, that a grievance about any alleged violation of a Collective Agreement should be brought within a reasonable time after the alleged violation has occurred.[77]
>
> . . . this Board is persuaded that the proper construction of the time stipulations in Article XIX is to read them as if they were followed by some such words as 'or within a reasonable time thereafter.' Such a construction is nothing new in contract interpretation, and a well known example is the equitable rule governing time stipulations in contracts for the sale of land.[78]

Laskin's view has been followed by Judge Thomas,[79] Arthurs,[80] Weatherhill,[81] Hanrahan,[82] O'Shea,[83] Palmer,[84] Shime[85] and Simmons.[86] Thus, this principle is well established in labour arbitration.

> A directory requirement is one that states a procedure without providing a penalty or depriving the arbitration board of jurisdiction upon failure to adhere to the provisions in the agreement provided there is not unreasonable delay . . .[87]

The problem is this rule is falling into disuse as the use of mandatory clauses increases, substituting strict compliance for unreasonable delay.

V. Types of Clauses

Returning now to the mandatory side of the diagram, one of the criticisms of the mandatory objection is that its scope is being constantly broadened. As the preceeding

sections have illustrated, the original use of this preliminary objection was limited to the time limit for bringing the grievance to the attention of the other party. This is by far the preliminary objection that is put forth most frequently, but it would seem that a trend has developed to apply the mandatory preliminary objection to most of the clauses in the grievance procedure.

The following examples will illustrate the trend toward applying the preliminary objection of mandatory clauses to a broader scope of clauses.

This objection has been successfully used to apply to a clause which set the time limit in which the nominees must appoint a chairman. The mandatory provisions may now be applied to the nominees of the parties as well as the parties themselves.

> Article 6.8 provides that if at any time during the carrying out of the steps laid down in art 6.7 'the grievance has not been processed by the grievor, his representatives, or agents in accordance with the time limit as prescribed, the grievance shall be deemed to have been withdrawn.' Bullock was well out of time when he wrote to the Minister of Labour for the Province of Ontario requesting the appointment of a chairman. . . .
>
> The board of arbitration is bound by the terms of the collective agreement. Article 6.7 and 6.8 are integral provisions of the agreement. They create obligations of a basic nature and the parties to the agreement are obliged to adhere to them.[88]

This preliminary objection has also been applied a clause which set out the time limit within which a board of arbitration must hear a grievance. Arthurs found the

clause, but in the event a subsequent [illegible]
sanction clause the time limits in which the board must sit would be deemed mandatory.

Shime[90] and Professor Laskin,[91] as he then was, considered this preliminary objection in two arbitrations where the time limits for the appointment of nominees had not been complied with, as it was argued these clauses were mandatory. Both arbitrators found the clauses to be directory. Professor Laskin found the provision to be directory on the basis that there was no sanction clause applying to the clause in question. Shime found that the clause in question had been waived by the parties.

This preliminary objection has been successfully applied to clauses that require particulars to be set out.[92] Thus, if the particulars are not set out as required by the collective agreement, the grievance may be lost. The following clause was held to be mandatory.

> The party desiring to submit a matter to arbitration shall deliver to the other party a notice of intention to arbitrate. This notice shall state the matter at issue and shall state in what respect the agreement has been violated or misinterpreted by reference to the specific clause or clauses relied upon. The notice shall also stipulate the nature of the relief or remedy sought.[93]

The New Brunswick Supreme Court recently gave a decision[94] involving the rendering of a decision by an arbitrator outside of the time limits provided by the collective agreement. The clause in the collective agreement read:

ceedings within fifteen (15) days after the chairman is appointed. It shall hear and determine the differences or allegations and render decision within one month.[95]

Although the case was decided on other grounds, Mr. Justice Limerick went on to discuss this problem. It was his view that at the end of the thirty days the arbitrator no longer had jurisdiction and the decision rendered after that time was a nullity. In effect, he found the clause to be mandatory.

> The chairman's decision was not handed down within the time limited by the agreement and it is therefore a nullity as having been handed down after he ceased to be an arbitrator or, alternatively, the time having been extended indefinitely there is still time for the other two members to hand down a majority decision. In this latter event, there is as yet no decision of the board of arbitration.[96]

If it had been a directory clause, it would only be subject to unreasonable delay.

These few examples illustrate the attempts to broaden the use of mandatory clause in order to defeat grievances on technicalities. It is suggested that there may be no limit to the application of mandatory provisions to the clauses in the grievance and arbitration procedures of a collective agreement will continue until all are under the cloak of mandatory requirements.

VI. Attempts to Relieve

Once a clause is deemed to be mandatory and the requirements must be meticulously followed; can there be any relief from a failure to follow these provisions, or is

inarbitrability the only result?

There have been two attempts to mitigate against the rigours of mandatory clauses. One involves the use of Section 103 of the Ontario Labour Relations Act[97] which formerly was Section 86.[98]

> 103. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.[99]

Alberta has a similar provision in Section 110(2),[100] but this has never been applied by arbitrators in Alberta to relieve against mandatory provisions.

> 110(2) No proceedings under this Part shall be deemed invalid by reason of any defect of form or any technical irregularity.[101]

This may be because arbitration boards in Alberta are not statutory boards[102] due to the words "or such other method" in Section 78(1).[103]

The second attempt to relieve against mandatory provisions involves the imposition of a penalty in place of inarbitrability, if the mandatory clause was not followed to the letter. Both of these attempts to mitigate were decided by the Supreme Court of Canada in the same case.[104]

a) Section 86

Arthurs[105] was the first arbitrator to impose section 86[106] in a situation concerning non-compliance with the required grievance procedure. Up to this time there were no reported cases in which non-compliance with

mandatory provisions had been relieved against. Also, section 86 had never been put before an arbitration board in an attempt to relieve against mandatory provisions.

Arthurs found on the basis of the *Rivando*[107] decision, which is one in a long series distinguishing between statutory and non-statutory arbitration boards, that the grievance procedure was a proceeding under the Labour Act to bring it under the protection of section 86. This is based on the fact that under the Ontario Act the arbitration boards are statutory. He also considered the application of section 86 to relieve against mandatory provisions--an interpretation which was consistent with a fair approach to labour arbitration.

> These awards demonstrate a necessary and intimate relationship between the jurisprudence developed in the interpretation of the Labour Relations Act and decisions of boards of labour arbitration, which can best be explained by holding arbitration proceedings to be 'proceedings under the Act.' We therefore hold that s.86 applies to labour arbitration proceedings:
>
> (a) on the basis of the decision of the Ontario Court of Appeal in the *Rivando* case;
> (b) on the basis that non-compliance with an arbitration award is an offence against 6.29 of the Act;
> (c) on the basis of a need to explain the integration of Labour Relations Act and arbitration jurisprudence. . . . Given the absence of any authoritative contrary pronouncement, we feel justified in adopting that interpretation of the section which we feel to be most consistent with the fair and effective conduct of labour arbitration matters.[108]

Later in the same year the question of Section 86 again came before Arthurs[109] on a preliminary objection raised by the union. Arthurs distinguished the similar

section in the Industrial Relations and Disputes Investigation Act[110] on the basis that arbitration proceedings under the Federal Act did not create a statutory board due to the addition of the words "or otherwise" in the Federal arbitration clause.[111] He went on to find the clause in question to be directory and not mandatory.

In the same year Judge Thomas chose not to follow the reasoning of Arthurs on the basis that although the arbitration provision may be under the Labour Act, the grievance procedure was distinct from arbitration procedure and not under the Act.

> Grievance procedure is not part of the Labour Relations Act as is illustrated by the arbitration clause imposed under certain conditions by s.34(2) of the statute. The grievance procedure provides for certain steps to be taken *after exhausting any grievance procedure* established by the agreement. It is a self-imposed contractual obligation (as distinct, for example, from the Rules of Practice passed under the authority of a statute) by which the parties themselves recognize the importance of adjusting complaints as quickly as possible (see art.4.03 and for the principle involved see *Re United Steelworkers and Webster Air Equipment Co., Ltd.* (1952), 3 L.A.C. 1058).[112]

Kennedy was required to rule on the scope of section 86 in the following year, and refused to follow the reasoning of Arthurs. Kennedy also drew the distinction between the arbitration procedures and the grievance procedures holding that the grievance procedure was not a proceeding under the Labour Act within the meaning of section 86. Kennedy also adopted the dissent by Robinette in the *Toronto Parking Authority*[113] award with regard to

Arthurs basis for his decision, but also adopted the approach that section 86 is directed solely to the Courts.

> Moreover, reading s.86 as a whole, I agree with Mr. Isbister's contention that this section is directed solely to the Courts. Arbitration boards do not quash or set aside proceedings. The whole purpose of the section is to require the Courts on motions by way of *certiorari*, or otherwise when they are considering proceedings under the Act (e.g., hearings before and decisions of the Labour Relations Board) not to quash such proceedings because of a defect of form or a technical irregularity.
>
> In short, my view is that s.86 has no application in the present situation and does not empower a board of arbitration to ignore the plain and emphatic language of the written contract. Arbitrators must proceed according to law and they are not entitled to modify or expand legislative enactment: *Russell on Arbitrations*, 17th ed., p. 137.[114]

O'Shea considered this problem in the year after the *Toronto Parking Authority*[115] award.

In spite of Arthurs position relating to section 86, O'Shea[116] adopted Weiler's liberal interpretation of what are "proceedings" under that section in the *Union Carbide* award.[117] O'Shea included those steps in the grievance procedure which may have the effect of barring access to arbitration as encompassed within the word "proceedings." Unfortunately this is not the accepted view, and in light of the fact that O'Shea stated section 86 was directed towards the Courts is little more than *obiter*.

> We concur in that portion of Professor Weiler's award in the *Union Carbide* case, *supra*, wherein he states (at p.80) that
>
> > The phrase in s.86, 'any proceedings under this Act', should thus be read as including any agreed-to steps which have the effect of barring access

> to the arbitration process required by s.34 of the statute. This does not incorporate into 'proceedings' under s.86 the grievance procedure as such, and as a whole, but only that part which the parties choose to include in the arbitration process by making its proper fulfilment a condition precedent to arbitration.[118]

In the subsequent appeal of *Union Carbide* to the Supreme Court of Canada Mr. Justice Judson considered the question of the scope of section 86. His decision effectively settled the power of arbitration boards to use this provision to relieve against mandatory provisions.

> Section 86 is directed solely to the Courts. The whole purpose of the section is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act, for example, hearings before and decisions of the Labour Relations Board, not to quash such proceedings because of defect of form or technical irregularity. Section 86 does not enable a board of arbitration, as the majority thought in this case, to ignore the plain and emphatic language of the written contract.[119]

Even though it has now been established that section 86 does not allow an arbitration board to relieve against "technical irregularities" to avoid the use of preliminary objections, it is questionable what value section 86 has as it may be used by the Courts.

b) Application of Section 86

(i) Proceedings

The application of this provision by the Courts may be subject to two uncertainties. The first question relates to the meaning of the word "proceedings" within the section. In Ontario, the arbitration procedures are within the scope

of section 86 since arbitration is a statutory proceeding under the Labour Relations Act.[120] Thus arbitration procedures come under the word "proceedings" in section 86.

In Alberta, arbitration may or may not be a "proceeding" within the meaning of section 110(2) of the Alberta Labour Act[121] due to the nature of the statutory arbitration clause in Alberta.[122] Unless the arbitration board is set up pursuant to the deemed arbitration provisions,[123] the arbitration board would be a non-statutory board and thus the arbitration procedures would not be "proceedings" within the meaning of section 110(2). It is clear by the foregoing which arbitration clauses will be encompassed within the meaning of "proceedings," but it is an open question as to whether "proceedings" are broad enough to cover the pre-arbitration procedures--the grievance procedure steps.

It was Arthurs'[124] opinion that section 86 was sufficiently broad to encompass the grievance procedure as well as the arbitration procedures. This approach is supported by the fact that most preliminary objections arise during the grievance procedures. This approach assumes that section 86 is directed to preliminary objections.

> Indeed, it is difficult to envisage any 'defect of form' or 'technical irregularity' upon which s.86 can operate except one which occurs during pre-arbitration proceedings, unless--as Mr. Isbister suggests--such matters as the execution of the award are the intended object of the section. Suffice it to say that s.86 would be robbed of its most important function if it did not operate at the time when most

> 'defects of form' and 'technical irregularities' are likely to occur--pre-arbitration,--and were left to cover only the few (if any) procedural steps which we associate in common experience with the hearing itself or the execution of the award. Such an interpretation of s.86 would be perverse and we cannot accept it.[125]

Weiler in the *Union Carbide*[126] award placed a more restrictive interpretation on the scope of section 86. Weiler applied section 86 only to those parts of the grievance procedure which may bar access to the arbitration process through the use of a preliminary objection.

> In the second place, the parties have purported to put the grievance procedure into an even more intimate relationship with the statutory arbitration requirement. They have made the fulfilment of the various steps in the grievance procedure a mandatory condition precedent to the right to arbitrate a dispute. The importance of this is accentuated by s.33 of the Act, which takes away the right of the individual employees to exercise economic pressure for enforcing their rights under the agreement, leaving them only the remedy of arbitration. The most basic rule of statutory provisions must all be read in relation to each other. The phrase in s.86, 'any proceedings under this Act,' should thus be read as including any agreed-to steps which have the effect of barring access to the arbitration process required by s.34 of the statute. This does not incorporate into 'proceedings' under s.86 the grievance procedure as such, and as a whole, but only that part which the parties choose to include in the arbitration process by making its proper fulfilment a condition precedent to arbitration.[127]

There is not a consensus on this question as illustrated by O'Shea in the *Civic Employees Union* #43[128] award. It was O'Shea's position that the arbitration procedures and the grievance procedures are separate and distinct and that section 86 does not apply to the grievance procedures or arbitration.

> In the *Toronto Parking Authority* case, Professor Arthurs, for the majority, held (at p.47) 'That grievance procedure and arbitration itself are so closely intertwined in fact is strong reason for finding them one in law.' Professor Arthurs also found that arbitration is a 'proceeding' under the Labour Relations Act and therefore an arbitration board could relieve against defects of form and technical irregularities pursuant to the provisions of s.86 of the Act. With this view, we respectfully disagree. While the grievance procedure is usually preliminary to the arbitration procedure it is separate and distinct from it. While an arbitration procedure is mandatory by virtue of s.34 of the Act, a grievance procedure is not. The parties may elect to arbitrate each and every dispute without attempting to resolve it by means of a grievance procedure. If a dispute is resolved under a grievance procedure, there is nothing to arbitrate.[129]

As illustrated by the above conflicting approaches, there is no consensus as to the relationship between the grievance procedures and arbitration, or whether one or both fall within the scope of section 86. The better view is that taken by Weiler in the above quote. If it is assumed that the purpose of section 86 is to relieve against preliminary objections, and most of those preliminary objections arise out of the grievance procedure; then those steps of the grievance procedure which may bar access to arbitration through the use of preliminary objections plus the arbitration procedures should fall within the ambit of "proceedings" under section 86.

(ii) Technical Irregularity

The second uncertainty under section 86 is the definition of "technical irregularity." Even assuming that section 86 applies to the clauses in the grievance procedures and the arbitration procedures, there still remains

the question of the interpretation of "technical irregularity."

There has been very little guidance as to what interpretation is to be placed on "technical irregularity," and the jurisprudence that is available is of a conflicting nature.

It was Arthurs' position that a telephone conversation instead of a written grievance, as required by the collective agreement, was a "technical irregularity" for which he could give relief under section 86.

> We would define 'technical irregularities' as breaches of those rules of procedure which are intended to produce the orderly dispatch of business, but do not affect either the substantive rights of the parties, or the operation of the rules of natural justice. This definition would clearly embrace both the giving of oral rather than written notice, and the failure of personal presentation. Neither of these matters affected the parties' substantive rights, or prejudiced the full and adequate preparation or presentation of their case. . . .
>
> In conclusion, then, we hold the absence of writing to be a 'defect of form,' and we hold each matter complained of to be a 'technical irregularity,' within the meaning of s.86. Accordingly, the proceedings which initiated arbitration are not invalid.[130]

In contrast to the above, Mr. Justice Spence of the Supreme Court of Canada in a dissenting opinion stated that the failure of the union nominee to comply with the time limits for the appointment of a chairman by the Minister of Labour was not a "technical irregularity."

> I am also of the opinion that s.86 of the Labour Relations Act, R.S.O. 1960, c.202, does not permit the board of arbitration to ignore the exact provisions of the collective agreement and that the failure to

> comply with such provisions is no mere 'technical irregularity.' Indeed, counsel for the appellant declined to urge such a submission on this Court.131

This same strict approach was taken by Mr. Justice Aylesworth in the same case at the Court of Appeal level. It was Mr. Justice Aylesworth's opinion that the parties had entered into a collective agreement and were bound by its terms--breach of a time limit was not a "technical irregularity."

> With respect, I cannot agree that having regard to the provisions of the agreement comprising art. 6 'grievance procedure and arbitration' and to the facts of the case, those provisions can be considered 'directory only' or in the nature of a 'penalty' or that the failure to comply with the time limits therein imposed was merely a 'technical irregularity.' These provisions are an integral, substantive part of the agreement vital to its orderly operation. To dismiss the failure here of observation thereof as a 'technical irregularity' is to destroy the very intent, operation and effect of the procedure negotiated between the parties with respect to grievances. By statute as well as by the sanctity of contract, the company, the Union and the employee are bound thereby.132

The above two approaches to "technical irregularities" would not provide the relief required in the area of mandatory provisions. The only approach that would allow relief from the rigours of mandatory provisions was set out by Weiler wherein he adopted Arthurs' definition of "technical irregularity"; but, in effect, extended it by applying it to the breach of a mandatory time limit by one day.

> Accepting Professor Arthurs' definition of 'technical irregularities' as breaches of those rules of procedure which are intended to produce the orderly dispatch of business, but do not affect the substantive rights of the parties, or the operation of the rules of natural justice, it is obvious that a one-day delay in indicating an intention to arbitrate has neither of these results.133

These are the only cases which provide guidelines for the interpretation of the words "technical irregularity.". With this limited jurisprudence it would seem that these sections even when used by the courts dealing with arbitration decisions would afford little relief from the types of mandatory clauses that are resulting in inarbitrability of grievances in the majority of cases. Without a favourable reevaluation by the courts as to the application of this provision to arbitration provisions, this attempt to relieve against mandatory provisions is, for all practical purposes, lost.

c) Imposition of a Penalty

The second attempt to relieve against mandatory provisions was an attempt to impose a financial penalty instead of finding the grievance inarbitrable on the basis of the failure to comply with the mandatory provisions of a grievance procedure. Professor Weiler considered a situation in which the company raised the preliminary objection that the union had failed to adhere to the time limit for notifying the company of its intention to arbitrate.[134] Weiler found that the time limits were mandatory; but rather than apply the sanction of inarbitrability, he adopted an intermediate approach by imposing a monetary sanction on the grievor and held the grievance to be arbitrable. Weiler took a middle position between Arthurs' decision with regard to Section 86 in *Toronto Parking Authority*[135] and the imposition of the ultimate penalty of inarbitrability.

> The difficulty with Professor Arthur's final conclusion is that he had effectively taken away all sanction for the procedural rules. . . .
>
> However, I believe there is an intermediate alternative, which allows the arbitrator to vindicate the employer's rights under his general power to fashion remedies. . . .
>
> In a case such as this, the grievor is claiming monetary relief, as well as a decision that the employer erred in failing to respect his seniority rights. The monetary relief which he claims is to be computed until the date of the implementation of any holding in his favour. Because it is likely that there is a direct relationship between procedural delays and the undue length of the period for which damages are awarded, an appropriate remedy is apparent. Hence, I would formulate the prima facie rule that, where this is feasible, and where no sufficient justification is given for the delay, the party at fault be penalised the monetary benefits of his successful grievance for the length of the delay. This reasoning is supported by the decision in *Re U.A.W.* and *Hawker Siddeley Canada Ltd.* (1964), 15 L.A.C. 262 (D.C. Thomas, C.C.J.), an analogous case.[136]

Weiler has thus imposed a monetary sanction on the grievor, but his new principle would only be applicable in situations in which there was a monetary claim. The final determination of this award was delivered by Mr. Justice Judson of the Supreme Court of Canada:

> My opinion is that the majority decision was erroneous for the following reasons:
>
> (a) The grievance was not timely and the board of arbitration had no power to extend the time.
> (b) The board of arbitration had no power to go beyond the question submitted in the joint statement.[137]

It is unfortunate that this case involved a joint statement submitted to the arbitration board by the parties. It is submitted that the decision in the Supreme Court of Canada rests heavily on the fact that the arbitration board went beyond the question submitted to it in the joint statement.

In the absence of a joint statement the Supreme Court might have been able to face squarely the principle of imposing a penalty on the party not complying with the mandatory provisions rather than finding that the arbitration board had no jurisdiction to hear the grievance. The joint statement read as follows:

> Is the grievance timely? and
> Should the Board decide in the affirmative then to determine if Article 9, Section 2-4 of the Collective Agreement was violated as alleged by the Grievor?[138]

The reasoning of the Court relied heavily on the joint statement.

> The joint statement makes it clear that the decision on the merits is only to be made if there is a preliminary finding that the grievance was timely. Once the board found that the grievance was out of time, this should have been the end of the matter. By assuming to relieve against the time limit and imposing a penalty as a condition for the exercise of this power, the board amended, modified or changed the provisions of the collective agreement in spite of the express provision contained in art.XI, s.4.[139]

Unfortunately even if this decision did rely heavily upon the joint statement, the fact remains that Weiler imposed the powers under Section 86[140] and it is settled that he could not exercise the powers under that section as an arbitrator. Further, it would appear that a time limit does not come within the meaning of the words "technical irregularity."

O'Shea has also commented on the power of arbitrators to relieve against the rigours of the mandatory provisions of a collective agreement.[141] It was his considered opinion that effect must be given to the intent

expressed, and that to impose conditions on the parties that are not clearly expressed in the collective agreement is to exceed jurisdiction.

> If the parties have formulated a method of properly regulating their relationship and if they abide by the terms of the collective agreement their relationship will be harmonious. If, however, the parties have failed to establish proper rules and the situation is not specifically cured by operation of the relevant provisions of the Labour Relations Act, it is not the function of an arbitration board nor is it within the board's jurisdiction to impose upon the parties conditions with respect to matters that have not been dealt with by the parties or to alter the mandatory provisions of the collective agreement.
>
> The fact that an arbitration board might not be in favour of what is expressed in a collective agreement does not give the board authority to change what the parties have clearly expressed. While the function of determining what the intention of the parties was from the words used by them often creates difficult problems for arbitration boards, if the parties have expressed themselves in a collective agreement in a clear and unambiguous manner, effect must be given to the intent expressed. While the board might be of opinion that a certain provision is oppressive to one of the parties it should be recognized that such a provision might have been agreed to in order to gain an advantage elsewhere. To relieve against an oppressive provision, where the intention of the parties is clear and unambiguous, could create an unfair advantage for that party since that party would have the benefit of provisions obtained through collective bargaining and in addition would not have to abide by those conditions to which the party agreed to be bound in order to obtain the advantageous provisions. . . .[142]

O'Shea went on to suggest that a defect of form or "technical irregularity" (the words from Section 86) may be cured only where authority for such a finding is found in the collective agreement.

> We do not wish to infer that a board of arbitration is never able to relieve against such defects. Where a defect of form or technical irregularity has occurred, a board of arbitration in interpreting the provisions

> of a specific collective agreement may determine that the collective agreement is open to the interpretation that the board is empowered to find, for example, that since there had been substantial compliance by the offending party or that an appropriate equitable adjustment could be made in favour of the party who would otherwise be adversely affected, that in the exercise of its discretion the board should relieve against the defect. However, this authority must be found in the collective agreement itself. In the instant case no such power is found, but on the contrary, the unambiguous intention expressed by the parties precludes such relief.143

d) Summary

Thus, it can be seen that both attempts to relieve against the rigours of mandatory clauses have been unsuccessful. The attempt to use Section 86 and the attempt to impose a penalty have not been successful. Arbitration today remains encompassed by mandatory clauses which must be followed meticulously to avoid dismissal of the grievance on a preliminary objection.

The best approach for relief from mandatory provision lies in a legislative enactment. A legislative enactment similar to Section 86 would allow arbitrators to relieve against meticulous observance of mandatory provisions. The enactment would have to be directed specifically to both arbitrators and the courts. It would have to encompass clauses and provisions of the grievance procedures and arbitration procedures. The third and most important requirement of a legislative enactment would be its applicability to the types of clauses that are causing the greatest problems--specifically--time limits and steps

in the grievance and arbitration procedures. A provision similar to the one suggested above is found in a very limited number of collective agreements. It usually states that no technical objection shall be used by either party to invalidate the arbitration proceedings. Arbitrators faced with this clause usually find it sufficient to relieve against the preliminary objections of mandatory clauses. With the state of the law in this area, and the lack of legislative enactment, the only solution may be an attempt by labour to negotiate such a clause into the collective agreement. This, of course, would depend on the relative bargaining positions of the two parties; but beyond this obvious problem it would seem that the priority for such a clause is far down the list of negotiable items. In light of this, it is suggested that the problem of mandatory clauses will remain.

VII. Defences

A study of the mandatory-directory problem would not be complete without reference to possible defences to this preliminary objection. The application of these defences are limited in scope, but the following sub-sections will discuss the valid defences to mandatory clauses. These defences will not be considered in great detail as they are not germane to the thesis, but are an integral part of this preliminary objection.

a) Continuing Grievance

The most successful and most commonly used [illegible]

is "continuing grievance."[144] If the grievance is of a continuing nature; for example, the wrong wage rate or the issuance of a cheque in the allegedly wrong amount, the mandatory provision will not apply if it relates to the time limits within which the grievor must notify the company of the grievance. The rationale of this defence is that time limits become meaningless if the alleged grievance reoccurs every hour, day or week. If the mandatory provisions defeated the grievance in the first instance, the grievor would have the right to bring it again.

One of the most cited cases in this area is reported in headnote form only. The principle set out by Hanrahan reads as follows:

> A provision in a collective agreement that a grievance must be presented within a specified time from the time when the grievance first arose, and the rule that such provisions must be strictly adhered to, cannot be applied in the strictest sense to a continuing or repeated violation. In the latter case, a grievance is launched on time if it is launched within the prescribed time from the last violation complained of.[145]

This principle has been recognized by Johnston,[146] Weatherhill,[147] Palmer,[148] Arrell,[149] Curtis,[150] Weiler,[151] Lucas,[152] and Reville.[153]

The one dilemma facing an arbitrator when the defence of "continuing grievance" is raised is whether or not the particular situation under consideration falls within the definition of "continuing grievance." There is no firm definition of "continuing grievance" or "continuing violation" to be found in the reported cases, but

Reville has attempted to put some parameters on the use of the term.

> Some principles emerge from a consideration of both the Canadian and American awards above cited, which appear to be as follows: (1) the grievance to be a continuing one, must involve repetitive breaches of the collective agreement and not be simply a single and isolated breach of the collective agreement. The damage complained of must be of a recurring kind and nature. Continuing grievances are usually (though not always) repeated violations of the collective agreements, involving the non-payment of money or benefits to individual employees or to the union, or conversely, the inflicting of damage on a recurring basis on the company by employees and the union withholding their services illegally.154

The critical point to note is that "continuing grievance" as a defence may be an ever expanding category which will allow greater use of this defence as the situations dictate. As there is no clear definition, it is clear that the scope of this defence may be broadened as new situations confront arbitrators in the future.

b) Time Begins to Run

The use of this defence is restricted to a very few mandatory clauses. This defence is based on the reasoning that a mandatory provision may not defeat a grievance if there is a question as to when the time limits set out in the mandatory provision commences. The point at which time commences to run for purposes of a mandatory provision varies depending on the type of violation involved. A few examples will illustrate that this defence relies on the particular facts of each situation and its application is severely limited. Weatherhill stated his view of this

defence as follows:

> In my view, the strict time limits expressed in the agreement ought not to apply in situations where the circumstances on which a grievance might be based are not known to the aggrieved party. In the instant case, when the officials of the union were apprised of the situation, they appear to have taken timely action.[155]

Palmer has also recognized this principle.

> In interpreting such a clause, it has been held that the five days begin to run at the time the alleged insufficient pay is given to employees: *Re U.A.W., Local 222* and *Houdaille-Hershey Ltd.* (1955), 6 L.A.C. 27 (E. Cross, C.C.J., chairman); or, more precisely, at the time when the grievors become or reasonably should become aware of the facts giving rise to the grievance: *Re United Packinghouse Workers, Local 302,* and *Marven's Ltd.* (1963), 14 L.A.C. 250 (A. J. Cormier, C.C.J., chairman).[156]

c) Wages

One defence that has a specific basis in the collective agreement relates to claims for wages or other monetary complaints. Some collective agreements provide specific provisions to exempt these claims from the mandatory provisions, or at least extend the time limits.

Example 1

> 23.06 Any complaint other than Monetary not submitted within ten (10) working days of the events which gave rise to such complaint shall not be considered as subject to the grievance procedure or to arbitration. Monetary complaints related to errors in wages will not be subject to the grievance procedure or to arbitration. Monetary complaints related to errors in wages will not be subject to this ten (10) day limit. Complaints and adjustments may be made at any time up to a maximum period of twelve (12) months from date of error.[157]

Example 2

> No grievance shall be considered where the circumstances giving rise to it occurred or originated more than five full working days before the filing of the

> grievance, save and except the grievance with respect to the employee's amount of wages in which event this period shall be extended to ten full working days.158

This extension of the time limit may afford no added protection, as a claim for wages may be a continuing grievance and thus not subject to the mandatory provision. It would afford protection in a situation in which the monetary claim was not a continuing one, and thus subject to the rigours of the mandatory provisions.

d) Agreement Ambiguous

If the provisions of the mandatory clause are ambiguous, and as a result the grievance is not brought within the time limits; or the steps are not followed properly due to this ambiguity, the company or union cannot rely on mandatory provisions as a preliminary objection.

This principle was applied by Reville:

> The majority of the board held that this provision was ambiguous in that it was not clear whether the party to whom notice was given was obliged to appoint his arbitrator within five days from the receipt of notice or within five days from the expiry of the 48 hours notice required to be given. If the former period governed the company was perhaps out of time, while if the second period governed the company was clearly within time. The board was therefore unable to say that there had been default in following the procedure and the preliminary objection was dismissed.159

A similar principle was applied by O'Shea in a situation in which he found the mandatory provision "virtually impossible of performance to the letter." The relevant part of the award is set out below, but it is submitted that O'Shea may be relieving against a mandatory

provision in the same way that Weiler did in *Union Carbide*.[160]

> In light of the time that it takes to advise the parties of the fact that the board has been constituted and the time that it would take for the parties to attempt to agree to a joint statement, the provision for a joint statement to be submitted within three days is virtually impossible of performance to the letter.
>
> In view of these problems, can it be reasonably said that the parties intended that the provisions of art. 11.03 be mandatory requiring strict compliance? It may well be that the company, in retrospect, might take the position that it was always its intentions that the three days be strictly complied with. However, can it reasonably be said that the union, at the time it entered into the collective agreement, likewise intended that the time provisions were imperative?[161]

e) Delay Caused by Other Party

If the failure to comply strictly with the provisions of the mandatory clause is caused by the objecting party, the arbitrator may relieve against the mandatory provisions. Hanrahan, facing this problem, stated:

> The next point to be determined is whether in view of the provisions in this agreement can any excuse be accepted for failure to bring this grievance within the time specified . . .
>
> The break that occurred in the sequence required to carry to a formal lodging of a grievance, if necessary, we are convinced resulted through no fault of his. He accepted information given him by one in managerial authority, that later proved to be incorrect . . .
>
> It would seem quite repugnant to the general intent of these seniority provisions, perhaps more clearly indicated in art. 18.02 that permits a lapse of three months from the time the condition became known to the employee (although included in this agreement to deal with a grievance lodged at the first stage) if in these circumstances, being stopped by fault of the company's representative, he could not now be heard. For these reasons we find this matter arbitrable. . .[162]

Crispo has also recognized this principle.

> Where one step in the grievance procedure involved a meeting between the parties, and where the party seeking arbitration has done all in its power to arrange such a meeting but without success, the other party cannot rely on the omission of that step in the grievance procedure in objecting to the jurisdiction of the board of arbitration to hear the grievance.[163]

The simple principles of natural justice dictate that there must be relief in the above situations.

f) Waiver and Estoppel

Waiver and estoppel may be defences to mandatory provisions. Many arbitrators confuse the two terms as there is a fine distinction between them. The use of these terms in arbitration constitutes a study in itself--there being different classifications within the terms waiver and estoppel. The legal effect of waiver and estoppel is basically the same. Waiver is the intentional relinquishment of a known right while estoppel is the failure to assert a known right.

If the objecting party is guilty of either waiver or estoppel, the arbitrator may relieve against the mandatory provisions.

VIII. Footnotes to Chapter Three

1. *United Electrical, Radio and Machine Workers, Local 504* and *Canadian Westinghouse Co. Ltd.* (1955) 5 L.A.C. 2126.

2. See II, Sanction Clause.

3. *Supra*, n. 1 at 2128.

4. *United Electrical Workers, Local 523* and *Page-Hersey Tubes Ltd.* (1964) 14 L.A.C. 106 at 107.

5. *United Steelworkers of America* and *Webster Air Equipment Company Ltd.* (1952) 3 L.A.C. 1057 (Clarke J.); *United Electrical Workers, Local 504* and *Canadian Westinghouse Company Ltd.* (1962) 12 L.A.C. 120 (Hanrahan).

6. *United Steelworkers, Local 6231* and *Barlin-Scott Manufacturing Company Ltd.* (1964) 14 L.A.C. 241 at 241.

7. *Toronto Civic Employees' Union 43* and *Toronto Parking Authority* (1966) 17 L.A.C. 37 at 42.

8. R.S.O. 1960 c.202.

9. See VI a), Section 86

10. *Supra*, n. 4.

11. *Int'l Longshoremen's Ass'n, Local 1879* and *Hamilton Terminal Operators Ltd.* (1966) 17 L.A.C. 181 at 184, 185.

12. *Supra*, n. 4.

13. *Supra*, n. 6.

14. *Northern Electric Employee's Ass'n* and *Northern Electric Company Ltd.* (1967) 17 L.A.C. 367.

15. *Teamsters Union, Local 880* and *C & W Asphalt Paving Company* (1967) 18 L.A.C. 156 at 158.

16. *Supra*, n. 6.

17. *U.S.W. of America, Local 6962* and *Union Carbide Ltd.* (1967) 18 L.A.C. 74 at 76, 77.

18. Apparently unreported.

19. *Regina* v *Weiler et al.*, Ex parte *Union Carbide Canada Ltd.* (1967) 65 D.L.R. (2d) 417.

20. *Union Carbide Canada Ltd.* v *Weiler et. al.* (1968) 70 D.L.R. (2d) 333.

21. *United Steelworkers, Local 6962* and *Union Carbide Canada Ltd.* (1968) 19 L.A.C. 412.

22. *Supra*, n. 17.

23. *Supra*, n. 21 at 422.

24. *General Truck Drivers Union, Local 938 et al. Hoar Transport Company Ltd.* (1969) 4 D.L.R. (3d) 449, affirming (1967) 67 D.L.R. (2d) 484; (Ont. C.A.), reversing (1967) 64 D.L.R. (2d) 400 (Ont. H.C.).

25. *U.S.A.* and *Construction Products Inc., Canadian Division* (1970) 22 L.A.C. 125.

26. *Supra*, n. 21.

27. *Supra*, n. 21 at 128.

28. *Re Valade* and *Eberlee* (1971) 24 D.L.R. (3d) 38.

29. *Int'l Union of Electrical Workers, Local 549* and *Sylvania Electric (Canada) Ltd.* (1972) 24 L.A.C. 361.

30. *Supra*, n. 21.

31. *Powell Equipment Ltd.* v *U.S.A., Local 4087* [1972] 1 W.W.R. 603.

32. *Powell Equipment Ltd. U.S.A., Local 4087* [1972] 5 W.W.R. 365.

33. *Supra*, n. 4.

34. *Bakery and Confectionary Workers Int'l Union of America, Local 276, Edmonton* and *McGavin Toastmaster* (1970) (unreported).

35. *Supra*, n. 19.

36. *Int'l Brotherhood of Electrical Workers, Local 424* and *Johnston Bros. Electrical Co.* (1972) (unreported).

37. *The County of Pointearth #18* and *the Castor A.T.A., Local 47* (1973) (unreported).

38. *Supra*, n. 21.

39. *Supra*, n. 20.

40. *Supra*, n. 4.

41. *Int'l Union, U.A.W.* and *Massey-Harris Company Ltd.* (1952) 3 L.A.C. 1016 at 1017 (Fuller).

42. *Supra*, n. 4 at 108.

43. *Supra*, n. 7 at 38.

44. *Civic Employees' Union 43* and *City of Toronto* (1967) 19 L.A.C. 9 at 14 (O'Shea).

45. *General Truck Drivers Union, Local 938 et al.* v *Hoar Transport Company Ltd.* (1967) 67 D.L.R. (2d) 484 at 487 (Ont. C.A.).

46. *Supra*, n. 32.

47. *Supra*, n. 7 at 38.

48. *Supra*, n. 44.

49. *Supra*, n. 41.

50. *Supra*, n. 14 at 108.

51. *Supra*, n. 14 at 368.

52. *U.S.A.* and *Automatic Screw Machine Co., Automatic Hardware Ltd.* (1970) 21 L.A.C. 255 at 258 (Shime).

53. *Supra*, n. 52 at 259.

54. *Automatic Screw Machine Products Ltd.* and *United Steelworkers of America* (1971) 19 D.L.R. (3d) 267 at 273.

55. *C.U.P.E., Local 167* and *City of Hamilton* (1967) 18 L.A.C. 96 at 96.

56. R.S.O. 1960 c.191 s.30.

57. *Supra*, n. 55 at 98, 99.

58. *Supra*, n. 55 at 103, 104.

59. *Supra*, n. 21 at 412, 413.

60. *Supra*, n. 21 at 419.

61. See VII, Defences d) Agreement Ambiguous

62. *Supra*, n. 55.

63. *Tobacco Workers Int'l Union, Local 338* and *Imperial Tobacco Co. (Ontario) Ltd.* (1969) 20 L.A.C. 310 at 311.

64. *Supra*, n. 63 at 313, 314.

65. *Supra*, n. 28 at 39.

66. O. Reg. 190/62.

67. 1961-62 Ontario Statutes c.750, now R.S.O. 1970 c.386.

68. *Supra*, n. 28 at 39.

69. *Supra*, n. 28 at 40.

70. R.S.O. 1970 c. 225.

71. *Int'l Chemical Workers, Local 721* and *Brockville Chemical Industries Ltd.* (1972) 24 L.A.C. 423 at 427.

72. *Supra*, n. 71 at 428.

73. *Supra*, n. 71 at 429, 430.

74. *Supra*, n. 71.

75. *Supra*, n. 28.

76. *Supra*, n. 37.

77. *United Electrical, Radio and Machine Workers of America* and *Canadian General Electric Co.* (1952) 3 L.A.C. 980 at 982.

78. *Supra*, n. 1 at 2129.

79. *U.A.W.* and *Hawker Siddeley Canada Ltd.* (1964) 15 L.A.C. 262.

80. *Supra*, n. 11; *Oil, Chemical and Atomic Workers, Local 9-762* and *Dow Chemical of Canada Ltd.* (1966) 18 L.A.C. 50.

81. *U.A.W.* and *Daal Specialties Ltd.* (1967) 18 L.A.C. 141; *U.A.W., Local 80* and *Honeywell Controls Ltd.* (1971) 22 L.A.C. 310.

82. *Supra*, n. 55.

83. *Supra*, n. 21.

84. *U.S.W.* and *C.I.L.* (1969) 20 L.A.C. 386.

85. *Supra*, n. 52.

86. *Supra*, n. 29.

87. *Supra*, n. 52 at 259.

88. *Supra*, n. 24 at 450, 451.

89. *Supra*, n. 11 at 184.

90. *Supra*, n. 63.

91. *Supra*, n. 1.

92. *Supra*, n. 28; *Supra*, n. 71.

93. *Supra*, n. 71 at 427.

94. *Northern Carelton Hospital* and *C.U.P.E., Local 1160* (1972) 26 D.L.R. (3d) 247.

95. *Supra*, n. 94 at 249.

96. *Supra*, n. 94 at 250.

97. R.S.O. 1970 c.232.

98. R.S.O. 1960 c.202.

99. R.S.O. 1970 c.232.

100. R.S.A. 1970 c.196.

101. R.S.A. 1970 c.196.

102. *Re Ewaschuk: Western Plywood (Alberta) Ltd.* v *Int'l Woodworkers of America, Local 1-207* (1964) 44 D.L.R. (2d) 700 (Alta. S.C.).

103. R.S.A. 1970 c.196.

104. *Supra*, n. 20.

105. *Supra*, n. 7.

106. R.S.O. 1960 c.202.

107. *Int'l Nickel Co. of Canada* v *Rivando* [1956] O.R. 379.

108. *Supra*, n. 7 at 45, 52.

109. *Supra*, n. 11.

110. R.S.C. 1952 c.152 s.51.

111. For examples of this distinction see:

Atlantic Sugar Refineries Ltd. and *Confectionary Workers Int'l Union of America, Local 443* (1960) 27 D.L.R. (2d) 310 (N.B.C.A.);
Howe Sound Co. v *Int'l Union of Mine Mill and Smelter Workers (Canada, Local 663* (1962) 33 D.L.R. (2d) 1 (S.C.C.);
Oil, Chemical and Atomic Workers Int'l Union, Local 9-14 v *Polymer Corp. Ltd.* (1966) 55 D.L.R. (2d) 198 (Ont. H.C.);
Regina v *Board of Arbitration, Ex parte Cumberland Railway Co.* (1968) 67 D.L.R. (2d) 135 (N.S.S.C. Appeal Division);
Regina v *Petursson et al, Ex parte Canadian Co-operative Implements Ltd.* (1969) 12 D.L.R. (3d) 509 (Man. Q.B.);
Int'l Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 742 v *Crown Zellerback Canada Ltd.* (1971) 21 D.L.R. (3d) 665 (B.C.S.C.).

112. *Brotherhood of Painters, Decorators and Paper-Hangers, Local 205* and *Canada Decorating and Painting Co. Ltd.* (1966) 17 L.A.C. 325 at 328.

113. *Supra*, n. 7 at 57, 58.

114. *Northern Electric Employees' Ass'n* and *Northern Electric Company Ltd.* (1967) 17 L.A.C. 367 at 378.

115. *Supra*, n. 7.

116. *Supra*, n. 44 at 15, 19, 20.

117. *Supra*, n. 17.

118. *Supra*, n. 44 at 20.

119. *Supra*, n. 20 at 336.

120. R.S.O. 1970 c. 232.

121. R.S.A. 1970 c. 196.

122. R.S.A. 1970 c. 196 s.78(1).

123. R.S.A. 1970 c. 196 s.78(2).

124. *Supra*, n. 7.

125. *Supra*, n. 7 at 47.

126. *Supra*, n. 17.

127. *Supra*, n. 17 at 81.

128. *Supra*, n. 44.

129. *Supra*, n. 44 at 16, 17.

130. *Supra*, n. 7 at 52, 54.

131. *General Truck Drivers Union, Local 938 et al.* v *Hoar Transport Co. Ltd.* (1969) 4 D.L.R. (3d) 449 at 451 (S.C.C.).

132. *Supra*, n. 45 at 488.

133. *Supra*, n. 17 at 81.

134. *Supra*, n. 17.

135. *Supra*, n. 7.

136. *Supra*, n. 17 at 82, 83.

137. *Supra*, n. 20 at 335.

138. *Supra*, n. 20 at 334.

139. *Supra*, n. 20 at 335.

140. R.S.O. 1960 c.202.

141. *Supra*, n. 44.

142. *Supra*, n. 44 at 16.

143. *Supra*, n. 44 at 19.

144. *U.E.W.* and *C.G.E. Co. (Davenport Workers)* (1952) 3 L.A.C. 980 (Laskin);
U.A.W. in *re Massey-Harris Co. Ltd.* (1952) 3 L.A.C. 1016 (Fuller, J.);
Retail Wholesale and Department Store Union, Local 461 and *Canada Bread Co. Ltd.* (1964) 14 L.A.C. 296 (Hanrahan);
U.A.W. and *Hawker Siddeley Canada Ltd.* (1964) 15 L.A.C. 262 (Thomas);
U.S.W., Local 6702 and *A. Schonbek & Co. Ltd.* (1966) 18 L.A.C. 30 (Lande);

C.U.P.E., Local 24 and *Town of Pembroke* (1967) 18 L.A.C. 125 (Johnston);
United Automobile Workers and *Daal Specialists Ltd.* (1967) 18 L.A.C. 141 (Weatherhill);
Teamsters Union, Local 880 and *C & W Asphalt Paving Co.* (1967) 18 L.A.C. 156 (Palmer);
United Steelworkers, Local 6962 and *Union Carbide Canada Ltd.* (1967) 18 L.A.C. 241 (Arrell);
U.A.W., Local 673 and *York Gears Ltd.* (1968) 19 L.A.C. 252 (Weatherhill);
U.A.W., Local 510 and *United Aircraft of Canada Ltd.* (1970) 21 L.A.C. 64 (Curtis);
United Steelworkers and *Triangle Conduit & Cable Canada (1968) Ltd.* 21 L.A.C. 332 (Weiler);
Misericordia Hospital and *Registered Staff Nurses Ass'n of the Misericordia Hospital* (1970) unreported (Lucas)(Alberta);
U.A.W. and *Lustro Steel Co.* (1971) 22 L.A.C. 294 (Weatherhill);
Int'l Brotherhood of Electrical Workers, Local 424, and *Devonian Electrical Services Ltd.* (1972) 23 L.A.C. 374 (Lucas);
Dominion Glass Co. Ltd. and *United Glass and Ceramic Workers, Local 246* (1972) 1 L.A.C. (2d) 151 (Reville).

145. *Retail, Wholesale and Dept. Store Union, Local 461* and *Canada Bread Co. Ltd.* (1963) 14 L.A.C. 296 at 296.

146. *C.U.P.E., Local 24* and *Town of Pembroke* (1967) 18 L.A.C. 125 at 129.

147. *U.A.W.* and *Daal Specialists Ltd.* (1967) 18 L.A.C. 141 at 146, 147;
U.A.W., Local 673 and *York Gears Ltd.* (1968) 19 L.A.C. 252 at 254.

148. *Supra,* n. 15 at 159, 160.

149. *United Steelworkers, Local 6962* and *Union Carbide Canada Ltd.* (1967) 18 L.A.C. 241 at 244.

150. *U.A.W., Local 510* and *United Aircraft of Canada Ltd.* (1970) 21 L.A.C. 64 at 71, 72.

151. *United Steelworkers* and *Triangle Conduit and Cable Canada (1968) Ltd.* (1970) 21 L.A.C. 332 at 333, 336, 337.

152. *Misericordia Hospital* and *Registered Staff Nurses Ass'n of the Misericordia Hospital* (1970) (unreported) (Alta.).

153. *Int'l Brotherhood of Electrical Workers, Local 424* and *Devonian Electrical Services Ltd.* (1972) 23 L.A.C. 374 at 375.

154. *Dominion Glass Co. Ltd.* and *United Glass and Ceramic Workers, Local 246* (1972) 1 L.A.C. (2d) 151 at 153.

155. *U.A.W.* and *Daal Specialties Ltd.* (1967) 18 L.A.C. 141 at 146.

156. *Supra*, n. 15 at 159.

157. *Supra*, n. 29 at 362, 363.

158. *Supra*, n. 155 at 145.

159. *Brewery and Soft Drink Workers, Local 291 Doron's Brewery Ltd.* (1963) 14 L.A.C. 126 at 126.

160. *Supra*, n. 17.

161. *Supra*, n. 21 at 419.

162. *United Electrical Workers, Local 504 Canadian Westinghouse Co. Ltd.* (1961) 12 L.A.C. 120 at 123, 124.

163. *Labourers Union, Local 183* and *Bandiera and Sons Ltd.* (1963) 14 L.A.C. 297 at 297.

CHAPTER FOUR

RES JUDICATA

I. Introduction

Res judicata as a preliminary objection, has been adopted from the courts. It is another example of a technical objection that has been adopted from the judicial sphere and applied to arbitration. The principle is, that if in an arbitration award the question of the construction of a particular document has been decided, each party to the action is subsequently denied the right of re-litigating the same question of construction of that particular document.

As with other preliminary objections, there have been attempts to expand the scope of *res judicata* as a preliminary objection. This chapter will look at attempts--some successful and some unsuccessful--to have the scope of *res judicata* broadened in labour arbitration to apply to such things as:--settlements during the grievance procedure, abandonment of a grievance, similar grievances, previous decisions of arbitration boards, and decisions of labour relations boards. The preliminary objection of *res judicata* is one of the most unsettled of all preliminary objections.

II. Settlement During the Grievance Procedure

Settlement of a grievance during the grievance

procedure is merely a consensual settlement and should not be taken as preventing any subsequent grievance that is taken to arbitration concerning the same issue or clause of the collective agreement.

Because of the many factors that may influence the settlement of a grievance during the grievance procedure, other than the merits of the dispute, the proper approach is to treat a settlement during the grievance procedure as not preventing the matter from going to arbitration at a later date, unless the parties have specifically provided in their settlement that it is binding on both parties and is a bar to the matter going to arbitration. The clearest statement of this approach was made by Little in a case reported in headnote form only.

> The mere settlement of a grievance during the grievance procedure prior to arbitration does not by itself bind either party as to the interpretation of the terms of the collective agreement involved in such a grievance. If the parties intend the settlement of a grievance to be of the same category as an arbitrator's decision, namely that it is to be final and binding on the parties as long as the wording of the agreement is unchanged, such intention must be clearly expressed in the minutes of settlement.[1]

Reville has also adopted the approach outlined by Little.[2] Reville found there was no settlement in which the parties agreed that the settlement of the earlier grievance was the interpretation to be placed on the clause in question. He went on to consider the case on its merits.

It is submitted that the above approach is the only proper one having regard to the factors that enter

into a settlement during the grievance procedure. There would seem to be no cases to the contrary.

III. Abandonment of the Grievance

The question is whether the abandonment of a grievance by either party prevents that issue from being raised in any subsequent arbitration proceedings. This must be distinguished from the many cases that deny the grievor the right to bring a second grievance arising out of the "same" incident. For purposes of this study, bringing a second grievance arising out of the "same" incident is referred to as a "similar grievance" as distinguished from an "abandoned grievance" and will be considered under the heading Similar Grievance. The situation under consideration in this section involves the abandonment of a grievance arising out of "one" incident barring the same grievance from being processed to arbitration arising out of a "new" incident, but involving the same question. Does the abandonment of a grievance arising out of one fact situation bar that matter being arbitrated subsequently in new circumstances?

The first question to be determined is whether the grievance was abandoned. If it is not clear from the evidence that the grievance was abandoned, the arbitrator must find that there was an intention to abandon the grievance. This may be influenced by the provisions of the collective agreement as some agreements include a

sanction clause,[3] that "deems" the grievance to be abandoned if certain conditions are not complied with. In most cases the question of whether there was an intention to abandon will depend on the time delay in bringing the grievance, if it is not subject to any mandatory provisions.

The arbitrator should be reluctant to find that a grievance has been abandoned unless the delay is excessive. Each case will stand or fall on its own particular set of facts. It is for the arbitrator to impute to one party or the other, the intention to abandon the grievance and this should not be done without the clearest possible evidence of such an intention.

Clark, in an award concerning the preliminary objection of abandonment, gave a liberal interpretation to abandonment of the grievance.

> As to the matter of abandonment of the grievance by the Union, I believe this issue is clouded by the unnecessary and unwarranted delay by the Union in bringing this matter to a head. An examination of the exhibits filed shows that from July until December no steps were taken to dispose of the grievance, and, while it may have been partially due to the fact that the Union's original nominee to the Board was unavailable, the delay of almost a year must have caused the grievor much anxiety and uncertainty as to his future, which could readily have been remedied by closer attention to the procedure provided by the Agreement. The fact that an arbitrator was named in July is, however, probably sufficient compliance with the provisions of the Agreement to conclude that there was no intention to abandon and in the absence of a plain intention to so abandon, I find that such grievance had not been abandoned.[4]

Once the grievance is found to have been abandoned,

the question whether the issue is *res judicata* is open to speculation. Although many cases speak of abandonment of a grievance, it is in the context of bringing the same grievance a second time, arising out of the "same" incident rather than a subsequent incident.

The most common fact situation which gives rise to this type of preliminary objection involves a union on different occasions bringing a grievance for violation of a clause in the collective agreement, but never processing any of these grievances to arbitration.

Robinson, in *Falconbridge Nickel Mines*[5] found that an abandoned issue was *res judicata*. The same grievance had been brought forth on different occasions resulting from different incidents, but none had been processed to arbitration.

> It appeared that many grievances of this nature had been filed and in every case the company had maintained that there was only one article of the agreement which applied, namely art. 10.16, and that it had complied with this Article. It further appeared that in none of these cases had the union proceeded to arbitration and consequently the company considered that the union had abandoned the grievances as art. 7:12 requires the party desiring to take advantage of the grievance procedure to take the required steps within the time limits laid down 'or the matter shall be deemed to have been abandoned.'
>
> It is my opinion that the Ciaschi grievance covered the same ground as previous grievances which had in fact been abandoned, that the union was at a loss as to how to successfully arbitrate such complaints due to the wording of art. 10.16, that in consequence the union endeavoured through collective bargaining to have the company change the wording of art. 10.16 but failed to do so and that the processing of the Ciaschi grievance, once it was filed, had a sort of nuisance value which was used by the union to apply pressure upon

> the company in the hope that it would agree to change the wording of art. 10.16 or perhaps agree to an amended application of it. Consequently I consider that the company was justified in taking the position it did at Stage 3 of the Ciaschi grievance particularly when the union failed to go to arbitration in respect to any one of the many grievances filed previously with respect to the same subject matter, that is temporary promotions.[6]

Robinson in his closing lines is saying that the abandonment of the grievance at the grievance stage is *res judicata* a subsequent grievance, if it remains in the grievance stage, but he makes no comment with regard to an abandonment during arbitration.

The proper approach to the preliminary objection of *res judicata* under this heading is the same as that involving grievances which are settled during the grievance procedure.

Whether the grievance is abandoned at the grievance procedure stage or the arbitration stage there may be factors entering into the decision to abandon that are not related to the merits. The mere abandonment of a grievance should not decide the issues between the parties for purposes of any subsequent arbitration on the same issue. Administration of a collective agreement must be based on positive decisions and not mere abandonments. There is no relationship between the abandonment of a grievance and a decision on the merits of the complaint. Unless there is some positive evidence that the abandonment of a grievance was to be *res judicata* the issue between the parties, the

door to process that grievance to arbitration arising out of a subsequent incident should be open.

IV. Similar Grievance

Unlike the cases considered under the Abandonment of the Grievance, these cases consider the situations in which a second grievance is brought arising out of the same incident as the first grievance. In most cases it is an attempt to bring the grievance to the arbitration stage because the first one has been defeated, usually on some technicality. These cases are not, in the true sense of the word, *res judicata* situations; but some arbitrators refer to them as such.

Fuller commenting on this problem stated:

> It would nullify the purpose of the whole grievance procedure to say that any grievance which was processed through the four steps of grievance procedure and then not submitted to arbitration, in accordance with Section 21, could thereupon be resubmitted and again processed.[7]

Hanrahan,[8] when confronted with this problem, held that the second grievance was essentially identical to the first and thus was not subject to arbitration.

McAndrew[9] denied the arbitrability of a second grievance which was identical to the first, save for minor differences in wording, on the basis that the grievance in the first instance was abandoned and union could not bring a second grievance arising out of the same issue.

The most quoted award in this area was written by Reville.

> The authorities are legion that a board of arbitration has no jurisdiction to consider or, alternatively, that the grievor and his or her union representatives are barred and estopped from processing a grievance which is identical to a former grievance filed by the grievor and either withdrawn, abandoned or settled, or determined by a board of arbitration. Some of these cases proceed on the basis of estoppel and others on the principle of *res judicata*, but regardless of the approach taken, the authorities are overwhelming that a board of arbitration has no jurisdiction to entertain such a second grievance (see *Re United Electrical Workers, Local 525*, and *Ferranti-Packard Electric Ltd.* (1962), 12 L.A.C. 216, and *Re United Steelworkers, Local 2251*, and *Algoma Steel Corp. Ltd.* (1964) 14 L.A.C. 315). There is also substantial authority to support the proposition that an arbitration board has no jurisdiction to determine a grievance which, though not identical in wording and form to a former grievance lodged by the same grievor, is identical in substance (see *U.A.W., Local 456*, and *Mueller, Ltd.* (1961), 12 L.A.C. 131 (noted only), and *Re U.A.W., Local 1285*, and *American Motors (Canada) Ltd.* (1964), 14 L.A.C. 422). In the former award, the arbitrator had this to say (page 15 of award)
>
> > This grievance is filed as exhibit 2. Though the wording is different in the two grievances, they are essentially the same.
>
> (and at pp. 17-8 of the award):
>
> > The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fide efforts to be made by both the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and or the union actually or impliedly accept the decision of management they should not be allowed to have second thoughts on the matter and re-process essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had accepted by the individual grievor or the union representing him, and management could be plagued and harassed in what would be a plain abuse of the grievance procedure.[10]

It is submitted that the above quote refers only to those situations in which the second grievance arises out of the same incident and not a subsequent one. The principle is established, no matter what the rationale, that a second grievance arising out of the same incident will not be entertained by a board of arbitration. The reason for the original grievance not proceeding is irrelevant. The original grievance may have been abandoned or withdrawn. The original grievance may not have been settled or determined to the satisfaction of the originating party. The grievance may have been defeated on a preliminary objection. All these factors are irrelevant. The boards will look at the second grievance; and if it is identical or similar to the first grievance, and arising out of the same incident; the board will not consider it. The one exception to this may be a continuing grievance, but in that case it is technically not arising out of the same issue.[11]

V. Previous Decision

The closest analogy of *res judicata* in the courts to arbitration is on the question of previous decisions. If there is a previous arbitration decision on an issue between two parties and the same issue comes up in a subsequent arbitration hearing, is that board bound by the previous decision on that issue? There is no answer. In spite of the numerous cases in this area, as well as an article on the problem by Weatherhill[12] reported in the

Labour Arbitration Cases, there is no consensus of opinion as to the approach to be taken. There is even a division as to the basic terms to be applied to this problem. There is still a question whether the term applied to the binding effect of previous decisions should be *res judicata* or *stare decisis*. Weatherhill submits in this article that

> . . . the doctrine of *stare decisis* has no application in labour arbitration cases. First, there has been no legislative direction that it should apply. This is fitting, for arbitration in labour cases fills an 'administrative' as well as a 'judicial' role. The legislature has supported the application of *stare decisis* in superior courts: although the express provision that the rule apply has been replaced, it appears from the wording of the Judicature Act that Courts must follow the rule.
>
> > If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to the Court of Appeal (Judicature Act, R.S.O. 1950, c. 190, s.32(1).)
>
> The same result is not to be implied from the use of the word 'binding' in s.32(4) of the Labour Relations Act, for decisions of arbitrators are there said to be binding, not on future arbitrators, but upon the parties only.
>
> Secondly, in the view of some arbitrators, arbitration involves not merely the determination of rights with respect to some incident in the past, but also the taking into account of the future relationship between the parties. In so far, then, as arbitration is an administrative and not simply a judicial process, *stare decisis* should not apply: *Thibault* v *C.L.R.B.* (1957), 7 D.L.R. (2d) 526. The purpose of this award is not the establishment of general legal principles, but rather the achievement of an appropriate solution to an immediate practical problem between the parties.[13]

There is also an editorial note on this problem.

> (Editors's Note: The problem of the binding effect of earlier awards is constantly arising and in addition to the case cited in the instant award, reference may be made to a recent award of a board headed

> by Professor Bora Laskin in *Re Int'l Electrical Workers & Canadian General Electric*, (1959)., 9 Lab. Arb. Cas. 342, which came to the opposite conclusion. It is submitted that the situation is perhaps made more difficult by the use of inaccurate terminology. Whereas the term *stare decisis* is properly applied to earlier awards on similar points between different parties it would seem that an award between the same parties under the same or an earlier agreement should be considered rather as *res judicata* than *stare decisis*. Where labour arbitrations are decided by boards appointed *ad hoc* it does not seem reasonable to apply the doctrine of *stare decisis* as properly understood. However, it would seem reasonable to hold that where a board has decided a particular issue between two particular parties under an agreement, when the same issue comes again for arbitration between the same two parties under an unchanged agreement the matter should be treated as *res judicata* unless, as stated in this award, the board considers that the earlier award is totally unacceptable and clearly wrong.[14]

In spite of these pronouncements on the terminology, editors[15] and arbitrators[16] continue to use the term *stare decisis*. There is no basis for the application of *stare decisis* to arbitration awards, and it must be assumed that the use of that term is merely a lack of understanding of the concept.

(i) One View

One series of cases supports the view that a board of arbitration is bound by the decision of a previous arbitration board between the same parties on the same or similar issue without reference to the merits of the previous decision. Miller supported this principle on the following reasoning:

> Since that award was made, the Collective Agreement has been renewed without change in the clause in question. Under those circumstances the Board are of the opinion that the interpretation placed on the clause by the Anderson Board should be followed.

> Had the Company been dissatisfied with it they should not have entered into a new Agreement with the clause in the same form.[17]

Cowan applied this principle stating:

> It must not be assumed that this Board adopts the reasoning in the Starr case or would reach the same conclusion as in the Starr case; but the fact is that there is an Award of a Board of Arbitration on practically the same set of facts and circumstances, and this was a final and binding Award on both parties. Under these circumstances, this Board does not make any comment on the merits of the grievances but leaves the matter to be dealt with in accordance with the Award of the previous Board.[18]

Lane adopted this approach after experiencing problems when, in an earlier case, he did not adopt the decision of the previous board. One bad experience was enough.

> However, I am faced here with a decision which has been made under this contract which finds differently from what I would find. The decision was a decision made by an arbitrator on grievance 1627, apparently unreported. There the learned arbitrator held that the defence of past practice was a valid one. To quote him, he says: 'It appears that historically watchmen and firemen have been paid as stated in the disposition of the grievance by management and it has never been the practice to do otherwise.' On this basis he dismisses the grievance, and this case is brought forward as a defence to me.
>
> The whole matter came before me in *Re U.A.W. & Chrysler Corp.* (1954), 5 Lab. Arb. Cas. 1668. At that time, I disagreed with a decision by a former arbitrator and substituted my own ruling in the case I heard for his decision. It created a most unfortunate situation under the terms of that contract as it created considerable confusion in the application of the terms of that contract. As a result of that case, I made some considerable investigation into the law on the subject, and I came to the conclusion that, irrespective of what an arbitrator may think that the proper ruling may be on the merits of an individual case as between the same parties during the term of the same agreement, he is <u>bound to follow even a wrong decision of a former arbitrator</u>.[19] (Empahsis added)

Even though he considered the earlier decision clearly wrong, Lane felt he must follow it to avoid confusion and discredit the arbitration procedures.

Robinson, following the decision of a previous board, relied on the provisions of the collective agreement as to the binding effect of the arbitration award. This is similar to those found in present day labour Acts.[20] The question of whether this type of clause makes these awards *res judicata* subsequent arbitration boards was considered by Weatherhill in his article.[21] As suggested by his article there is no reason for this type of clause making a decision *res judicata*.

Arthurs[22] also followed a previous boards decision without deciding what his decision would have been if the point had come before him for the first time.

Reville adopted this approach and set out the principles of *res judicata* that must be met in order to be bound by a previous award. It is one of the few cases in this area where the principles are enunciated.

> The principle of the doctrine of *res judicata* is that a right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. It has been held that to be a conclusive bar to the second action, the first action must meet three conditions. 1. It must have been

> between the same parties or their privies. The term 'parties' includes not only those named on the record, but also those who had an opportunity to attend the proceedings. 2. The matter in dispute must be identical in both proceedings, though it is not necessary that it should be the only point in issue in either, nor that the cause of action should be the same. 3. There is an estoppel on the determination of a right which must, it would seem, have been brought for the same object.[23]

Palmer has also adopted this approach in a case reported in headnote form only.

> A grievance was brought by the union claiming the company had failed to give overtime work to an employee in the department where it occurred, contrary to provisions in the collective agreement. The union also supported its contention with reference to a previous arbitration board decision dealing with similar facts. The previous case covered the same points as the present arbitration, and the majority of the present board (applying the doctrine of *res judicata*), held, the interpretation placed by the previous board on the articles in question was absolutely binding on the parties during the existence of the present labour relations legislation and also, to hold otherwise 'would foster an unhealthy re-litigation of arbitration awards under the same collective agreement.'[24]

This is one approach to the problem of *res judicata*. It is the wrong approach. It supports the view that a wrong decision should be followed even though it may be perpetuating a wrong principle or a wrong interpretation. Even the courts will look at the merits of the previous case and distinguish or in some cases overrule it. The purpose of *res judicata* is to avoid re-litigating issues between the same parties, but it should not be used to foster wrong decisions.

(ii) Second View

The second approach that is equally unacceptable

suggests that previous decisions have no binding effect--no *res judicata* principle in labour arbitration. This approach surely will create unlimited re-litigating between the parties since an arbitration board will never face a binding decision. Lane, in adopting this approach, relied on the theory that arbitration awards seldom involved the same parties as one employee could not be bound by a decision regarding another employee.

> It seemed to me then that the only persons concerned in any decision are the persons directly involved as parties and that any question of finality would be only between them, somewhat in the nature of what lawyers might term to be estoppel and might in Court be termed to be a plea of *res adjudicata*. My feeling, then, was that any grievance was in effect a proceeding by a named individual against the Company, and insofar as the named individual was concerned and the Company the decision of any arbitrator was final, but that where there was another individual concerned in another proceeding that other individual was not in any sense prejudiced by the decision which had been given in the former proceeding, basically because the individual involved in the second proceeding had not been a party to the proceeding on the first occasion. It is true that this reasoning was somewhat complicated by the fact that the Union is involved in any proceeding and that the Union is a party with the Company to the Agreement, but at the same time the Union merely is representative of the workers as individuals and, therefore, in my thinking at that time could hardly have been considered as the basic party to the proceeding which would bring into effect the doctrine above referred to.[25]

Laskin also suggested this approach when he stated:

> This board cannot and would not argue against the desirability of uniformity in decision. This, however, is impossible with *ad hoc* boards of co-ordinate jurisdiction, unless we adapt to this field the old maxim of equity that 'prior in time is prior in right.' Yet it strains belief to allege that the first look at a problem is necessarily the correct look. Of course, if the desirable policy is that it is better that a matter be finally settled than that it be settled right, one need have no qualms on whether the

> first decision can stand critical examination. Good arguments can be made for adoption of such a policy, but in the absence of agreement by the parties to that end, the choice is left to the board called upon to take the second look. There is no hierarchy of tribunals in labour arbitration, no ultimate appellate board whose decisions are binding on boards of first instance. Application of a principle of *stare decisis* is thus excluded save by self-denial of its independence of judgment by a second arbitration board faced with a decision on the point before it made by a preceding board. . . .
>
> Better it is to face squarely the issue whether one believes in uniformity for its own sake (coupled with the ingenuous suggestion that error can be corrected at the bargaining table in the next round of negotiations) or whether one would act with the same freedom and independence as did the earlier board, subject only (as it was subject) to argument and persuasion based on citation of alleged authorities which now include (for the second board) a decision on the very point in question. This board has no hesitation in adopting the second stated alternative.[26]

This second line adopts the other extreme and suggests that there are no binding decisions. It is suggested that the above two approaches should be rejected and a middle approach should be adopted which avoids continuous re-litigating, but also insures that previous wrong decisions will not be promoted.

(iii) Better View

The basic approach of the third set of awards is that the previous decision on a similar issue between the same parties is binding, unless it is wrong. This is a simple but effective approach of maintaining a proper perspective when facing an objection of *res judicata*.

Rayner in a recent award which considered this problem set out the following example:

> Although a board of arbitration is not, in my opinion, bound by an award of an earlier board dealing with the same provisions of the collective agreement, the second board should only diverge from the results reached by the first board if they are clearly convinced that the first board was in error in reaching its conclusion.[27]

Twelve years earlier Anderson stated the principle thus:

> It appears to this board that once an interpretation has been given by a board of arbitration and later a grievance comes before another board of arbitration, the facts being the same and the wording remaining the same as that before the earlier board, the later board should not upset a ruling of the earlier board unless it was definitely of the view that the decision of the first board was clearly wrong, and not merely that the second board, if it has the matter before it for the first time, would have come to a different conclusion.[28]

Laskin,[29] Fuller,[30] and Roach[31] have also adopted this approach. This approach allows the merits of each case to be considered--the previous award and the present situation. This approach also involves the question of onus. It would seem that since the arbitration board should follow the previous award unless it is wrong, there is an onus to show that this previous award was wrong. That onus should fall upon the party who contests the validity of the previous award.[32] Under this approach it becomes a question of the extent to which the earlier award persuades the arbitration board, since it is open to that board not to agree with the previous decision if they consider it a wrong decision.

VI. Labour Relations Board Decisions

The question of decisions of a Labour Relations Board being *res judicata* an arbitration board is one that is open to speculation. This question may arise on a number of issues that are determined by a Labour Relations Board, but there are few cases in this area. It is accepted that there is a close relationship between Labour Relations Boards and arbitration boards. Although they may be governed under the same legislation, there is no legislative enactment concerning the question of *res judicata* between the two bodies.

As in the case of previous decisions,[33] the decision of a Labour Relations Board should be followed unless it can be shown that the decision is wrong. An arbitrator should not accept the fact that a Labour Relations Board has held that a collective agreement exists between two parties as binding upon it. The parties to the arbitration should be given an opportunity to adduce evidence on this issue to determine if the Board's decision was correct. The privative clause in the Labour Acts does not alter this approach.[34] To approach the Board's decision as binding can only lead to the fostering of incorrect decisions in certain situations. The onus of proving that the Labour Relations Board's decision should not be followed falls on the party suggesting such.

Little accepted the certification order of the

Ontario Labour Relations Board, but went on to conclude that certain words within the order were ambiguous,

> The board must accordingly conclude that the words 'all office employees' in art. 1.1 are ambiguous and it must determine, from the words and actions of the parties themselves, the meaning of these words.
>
> In our view, the parties have continuously and repeatedly by their words and actions since prior to certification until now made it abundantly clear that the term 'all office employees' does not include the female night cleaning staff. This is apparent to us for the following reasons.[35]

Weatherhill adopted the decision of the Ontario Labour Relations Board to the effect that on a given date a union had relinquished its jurisdiction and went out of existence. He stated:

> The parties to the proceedings before this board agreed that the findings made by the Ontario Labour Relations Board should be accepted as constituting the facts on which this matter should be determined. . . .
>
> It was the finding of the Ontario Labour Relations Board, uncontested in the proceedings before us, that that union did not exist at any time material to this grievance. We have no alternative but to conclude that this non-entity had no status to file the grievance before us nor to proceed to arbitration.[36]

It is to be noted that the parties agreed to adopt the decision of the Board and that it is open to the parties to contest the validity of such a decision at the arbitration proceedings.

There are two awards relating to the acceptance of a Labour Relations Board decision that a collective agreement is in existence between two parties. Hanrahan

concurred with the ruling of the Labour Relations Board after considering its decision on the merits.[37] Pugh, in an Alberta award, held that the ruling of the Board of Industrial Relations was binding, without reference to the merits of the Board's decision.

> Throughout all of these proceedings, this board has held to the view that it is bound by and must give effect to the decision of the Board of Industrial Relations made pursuant to its statutory authority. This board, therefore, considers it to be settled that the employer is bound by the collective agreement and in particular by art. II-A thereof already quoted.[38]

It is submitted that this is not a proper approach, and is not supported by authority. It would be a different situation if the arbitration board had considered the ruling of the Board of Industrial Relations and agreed with it.

VII. Summary

The doctrine of *res judicata* is a necessary part of arbitration proceeding to establish some degree of finality in arbitration awards. The problem, as illustrated above, is in the application of *res judicata* to the various situation confronting arbitrators. As with the other areas of preliminary objections discussed in this work, the best suggestion for reform and uniformity lies in a legislative enactment. It is becoming more and more evident that the provisions of the various Labour Acts relating to arbitration are not a sufficient code within themselves. The grievance procedures is the area in which most of these

problems of application arise, but the Labour Acts are silent in the area of grievance procedure. The answer can be stated simply, but its drafting and implementation are an impossible task--a complete code of arbitration within the Labour Acts plus rules of practice and procedure relating to collective agreement grievance procedures. It is unlikely that the legislatures will ever move into the above noted area, and thus the application of *res judicata* to arbitration and grievance procedures will continue to develop from award to award until some direction emerges dominant through acceptance by a number of arbitrators.

VIII. Footnotes to Chapter Four

1. *United Cement, Lime & Gypsum Workers, Local 387* and *Lake Ontario Portland Cement Co. Ltd.* (1963) 14 L.A.C. 37 at 38.

2. *United Packinghouse Workers, Local 114* and *Canada Packers Ltd.* (1966) 17 L.A.C. 60 at 61, 62.

3. *Infra*, Sanction Clauses.

4. *Technical Associates Lodge 1922, International Association of Machinists* and *A. V. Roe Canada Ltd.* (1954) 5 L.A.C. 1759 at 1761.

5. *Sudbury Mine, Mill and Smelter Workers, Local 598,* and *Falconbridge Nickel Mines Ltd.* (1960) 11 L.A.C. 51.

6. *Supra*, n. 5 at 62, 63.

7. *U.A.W.* and *Massey-Harris Co. Ltd.* (1952) 3 L.A.C. 1016 at 1018.

8. *United Electrical Workers, Local 525* and *Ferranti-Packard Electric Ltd.* (1962) 12 L.A.C. 216.

9. *United Steel Workers, Local 2251* and *Algoma Steel Corporation Ltd.* (1964) 14 L.A.C. 315.

10. *C.U.P.E., Local 207* and *the City of Sudbury* (1965) 15 L.A.C. 403 at 403, 404.

11. *Infra*, Continuing Grievance.

12. The Binding Force of Arbitration Awards (1958) 8 L.A.C. 323.

13. *Supra*, n. 12 at 324.

14. *United Steelworkers* and *Steel Co. of Canada Ltd.* (1959) 10 L.A.C. 169 at 170 (Anderson).

15. *U.A.W.* and *L. A. Young Industries Ltd.* (1958) 8 L.A.C. 196 (Lane);
International Union of Electrical Workers and *Canadian General Electric Co. Ltd.* (1959) 9 L.A.C. 342 (Lane).

16. *United Electrical Workers, Local 512* and *Standard Coil Products (Canada) Ltd.* (1971) 22 L.A.C. at 381 (Weiler);
United Steelworkers and *Canadian Industries Ltd.* (1969) 20 L.A.C. 386 at 391 (Palmer).

17. *United Electrical, Radio and Machine Workers of America* and *the Canadian Raybestos Co. Ltd. (Peterborough)* (1952) 3 L.A.C. 1065 at 1066.

18. *United Electricdl, Radio and Machine Workers of America* and *Canadian General Electric Co. Ltd. (Peterborough)* (1952) 3 L.A.C. 1136 at 1137.

19. *U.A.W.* and *L. A. Young Industries Ltd.* (1958) 8 L.A.C. 196 at 197 (emphasis added).

20. See R.S.A. 1970 c.196 as am. s.78(11); R.S.O. 1970 c.232 as am. s.37(9).

21. *Supra*, n. 12.

22. *Amalgamated Meat Cutters, Local 125L* and *Wickett and Craig Ltd.* (1963) 13 L.A.C. 367.

23. *International Chemical Workers Union, Local 725* and *Union Gas Co. of Canada Ltd.* (1967) 18 L.A.C. 285 at 285.

24. *Oil Chemical and Atomic Worker's International Union, Local 9-640* and *Domtar Chemical Ltd.* (1969) 20 L.A.C. 107 at 107.

25. *U.A.W., Local 195* and *Chrysler Corporation Ltd.* (1955) 5 L.A.C. 1984 at 1990.

26. *International Unition of Electrical Workers* and *Canadian General Electric Co. Ltd.* (1959) 9 L.A.C. 342 at 346, 347.

27. *Rio Algom Mines Ltd.* and *United Steelworkers* (1972) 1 L.A.C. (2d) 244 at 246.

28. *Supra*, n. 14 at 176, 177.

29. *Int'l. Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink* and *Distillery Workers of America Local 278C* and *Brewers' Warehousing Company Limited* (1954) 5 L.A.C. 1797.

30. *United Electrical Workers, Local 504* and *Canadian Westinghouse Co. Ltd.* (1957) 7 L.A.C. 94.

31. *United Electrical Workers, Local 541* and *Canadian General Electric Co. Ltd.* (1966) 17 L.A.C. 401.

32. *Amalgamated Meat Cutters, Local 125L* and *Wickett and Craig Ltd.* (1963) 13 L.A.C. 363 (Arthurs).

33. See *Infra*, (d) Previous Decision

34. R.S.A. 1970 c.196 s.71(2)
R.S.O. 1970 c.232 s.97.

35. *Int'l. Chemical Workers, Local 513* and *Consumers' Gas Co.* (1964) 14 L.A.C. 326 at 332.

36. *Goldstein Food Mart Ltd.* and *Retail Clerks Int'l. Union, Local 486* (1972) 1 L.A.C. (2d) 59 at 61, 62, 63.

37. *United Carpenters and Joiners, Local 1946* and *Hans Steffny Carpenter Contractor* (1964) 14 L.A.C. 396.

38. *Henuset Bros. Ltd.* and *Int'l. Union of Operating Engineers, Local 955* (1972) 1 L.A.C. (2d) 223 at 225, 226.

CONCLUSION

This thesis has concerned itself with the development of the major areas of preliminary objections. There are other areas of preliminary objections, but these are rarely used and usually unsuccessful. These preliminary objections have been developed and refined during twenty years of labour arbitration. Preliminary objections have stood the test of time and have emerged as a dynamic feature of labour arbitration. It is conceivable that at the time of reading this thesis many of the positions put forth in this paper may have changed as a result of recent decisions. It can only be hoped that this thesis will offer some guidance to those who wish to tread on the murky waters of labour arbitration. Whether layman or lawyer it is the people involved in labour arbitration that will assist this part of collective agreement administration to remain a vialbe alternative.

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