

"TIME IS ON MY SIDE": AVOIDING OR ESCAPING TIMELINESS
DISASTERS POST-LEISUREWORLD

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This paper is meant to provide a helpful outline or summary of arguments to make when the Union misses the time limits prescribed for referral of a matter to arbitration. Although the paper looks at case law and legislation from all Canadian common law jurisdictions, the initial focus is on the state of the law in Ontario. As a resident of a region that only considers itself accidentally part of that province I beg pardon from counsel from other regions of the country for this "Ontario-centricness".

The paper addresses the following topics:

1. What was *Leisureworld* and what did the arbitrators and courts say about it.
2. How did we end up with *Leisureworld*.
3. What the legislation in jurisdictions other than Ontario says.
4. How the New Brunswick Court of Appeal applied legislation with the same wording.
5. Arguments to make to avoid the *Leisureworld* obstacles.

1. What was *Leisureworld*

The grievance in *Leisureworld* involved a full-time R.P.N. who worked at a nursing home in Scarborough, Ontario. She was suspended pending an investigation into complaints received about her and the next day she filed a one-line letter of resignation. Ten days later she wrote to her employer to withdraw her resignation. Six days after that, her employer wrote to her saying that her resignation stood. The Union filed a grievance the same day. At a second step meeting on February 16, 1995, the Company denied the grievance and confirmed this in a fax to the Union the next day.

In “Leisureworld I” (49 L.A.C. (4th) 17), the Union requested the appointment of an arbitrator pursuant to section 46 [now 49] of the Ontario Labour Relations Act on May 16, 1995 (the “expedited process”). There is no reference in the case to any communication from the Union between February 16, 1995 and May 16, 1995 regarding its intentions respecting the grievance. The employer raised a preliminary objection to the jurisdiction of the arbitrator to hear the grievance due to the Union’s failure to meet the time limits in section 46(2) and (3) of the Act. The Union agreed that it had missed the time limits in section 46, but argued that the arbitrator still had jurisdiction under section 45(8.3) [now 48(16)] of the Act.

The legislative history of s.48(16) was outlined in the decision. Prior to 1992, the relevant section [Labour Relations Act, R.S.O. 1990, c. L-2, s.45(6)] read as follows:

45(6) *Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under the collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.*

In 1992, under Bill 40, the section was amended to provide:

45(8.3) *An arbitrator or arbitration board may extend the time for any step in the grievance procedure or arbitration procedure under a collective agreement, despite the expiration of time, if he, she or it is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.*

In November 1995, the legislation was amended to provide:

48(16) *Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where an arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.*

The relevant provisions of s. 49 read as follows:

(2) Request for references.- *Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted, or after 30 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.*

(3) Same.- *Despite subsection (2), where a difference between the parties to a collective agreement is a difference respecting discharge from or other termination of employment, a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after 14 days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs,*

but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

In the decision, arbitrator Ken Petryshen considered two opposing cases that had considered the meaning of the Bill 40 legislation. The decisions he considered were by H.R. Jamieson in Ottawa (City), 34 L.A.C. (4th) 88, and Paul Haefling in Re: Reliance Electric (1994), 40 L.A.C. (4th) 247. The City of Ottawa case noted that arbitrators had been divided, pre-Bill 40, about whether section 45 gave jurisdiction to an “expedited” arbitrator under section 46, to extend time limits. Jamieson held that, whatever the controversy pre-Bill 40, the issue had been settled because 45(8.3) was intended to make it clear that section 46 arbitrators had jurisdiction to extend time limits for referral to arbitration. In the Reliance Electric case, Haefling took a different approach. He continued to draw a distinction between s.46 cases and consensual arbitration cases, pointing out that 45(8.3) did not specifically say that s.46 time limits could be relieved against. He held that there was no jurisdiction to extend time limits in “expedited” cases.

Petryshen followed Haefling’s decision, and held that 45(8.3) had not altered the law, and that he did not have jurisdiction.

After receiving Petryshen’s decision, the Union then named a nominee and proceeded via the regular collective agreement route to arbitration. That Board of Arbitration, chaired by Richard Verity, issued its decision on February 28, 1996 (“Leisureworld II”). By that time, Bill 7 had been enacted (on November 5, 1995), and the relevant provision was s.48(16), as set out above.

Before the Board, the Union acknowledged that the time limits language in the collective agreement was mandatory. They also acknowledged that their referral to the Board of Arbitration had been untimely. However, they argued that the Board had jurisdiction to relieve against the time limits, based on s.48(16). The majority of the Board held that it had no power to extend the time. They dismissed the grievance.

The Union applied for judicial review. The Divisional Court on April 17, 1997, on a "correctness" standard of review, held that the Board of Arbitration had been correct in dismissing the grievance due to lack of jurisdiction. It relied on the legislative intent in enacting 48(16) with different language than 45(8.3); a dissent in a post-Bill 7 case [Queensway General Hospital and ONA, (1996), 57 L.A.C. (4th) 194], and the finding that, "It is fundamental that a grievance is different and distinct from arbitration".

The Union successfully applied for leave to appeal to the Court of Appeal. However, the Court of Appeal, in a brief ruling issued December 1, 1997, upheld the Divisional Court decision and the Board's decision, finding that the legislature intended to draw a distinction in section 48(16) between the grievance procedure and the arbitration procedure and further intended not to allow arbitrators to extend mandatory time limits found in the arbitration procedure.

Many Union counsel have since complained that the courts went too far in determining that the grievance process and arbitration process are, of necessity, distinct, in

every bargaining relationship, no matter what the collective agreement language. Some have argued that the courts went too far, because the split in arbitral jurisprudence pre-Bill 40 could have supported a finding applicable only to the Leisureworld collective agreement language.

How did the courts end up where they did?

2. **How did we end up with the “Leisureworld” result?**

Ironically, It could be argued that this problem decision arose because of a prior successful Union argument on a judicial review, and well-meaning NDP amendments to labour legislation.

In 1982, Joseph Samuels in *Re: Canadian Pacific (Royal York Hotel)* (1982), 6 L.A.C. (3rd) 222, was asked by the Union to decline jurisdiction to hear the grievance. The issue was the reduction of hours of work for night maids in the hotel. The Union had initiated arbitration proceedings under the collective agreement by naming its nominee. The employer had requested an extension of time to name its nominee. The parties tried to settle the grievance. When they could not, the employer made a referral to arbitration under the expedited arbitration provision. Mr. Samuels was appointed by the Minister to hear the case. The union argued that, once the collective agreement referral process had been invoked, the employer could not opt out of the regular process by making an expedited arbitration request to the Minister. Mr. Samuels disagreed, and proceeded to hear and

dismiss the grievance.

The union applied for judicial review. The Divisional Court [42 O.R. (2d) 509], held that the arbitrator had no jurisdiction because of the mandatory time limits for an expedited arbitration request. The court held that the arbitrator had been right in deciding that, once the parties had lost the right to “go to arbitration”, they lost their opportunity to apply under the expedited provision. However, he had been wrong in concluding that the parties were not already, “going to arbitration”. Once the collective agreement referral to arbitration process had been invoked, the court held that the parties could no longer rely upon the s.45(6) [then s.44(6)] allowance for an extension of time where the grievance time limits had not been met. Once the parties had made a referral, they were under the arbitration portion of the collective agreement and could not rely on the grievance extension provision. The legislature had expressly allowed extension of time to arbitrators in grievance procedures; but no provision for the extension of time limits set out in the expedited arbitration provision.

There was a division of opinion after the Divisional Court Royal York Hotel ruling. Not all arbitrators followed the Court’s reasoning. Some held that the Court’s decision only restricted the time for reference to “statutory” arbitration. Some held that it applied to all arbitration references.

When the Bill 40 amendments were enacted, many arbitrators held that the s. 45 amendments were intended to address the differing interpretations of the Divisional Court

decision in Royal York [including the Jamieson decision identified above]. They concluded that s.45(8.3) was intended to allow arbitrators to extend time limits in both arbitration and grievance procedures.

Others, however, did not draw this conclusion. In papers given at CBA-O sessions, for example, the only notice paid to the Bill 40 amendment to 45(8.3) was to the effect that:

- 1) the prohibition against allowing the parties to “contract out” of the extension of time was removed, [“Legislative Reform of the Grievance Arbitration Process: A Tale of Two Provinces” (January 28, 1994 *Labour: the Legacy of Labour Law Reform - Bill 40, One Year Later*, Kenneth P. Swan)];
- 2) and, this would have limited effect, as few if any collective agreements specifically state that section 45(6) does not apply [“The Amendments to Sections 42-49 of the Labour Relations Act - The Impact of Reform on Arbitration” (November 30, 1992 *Labour Law Reform: Practical Implications for Practitioners*, co-authored by Judith Allen and Lynn Harnden)].

Notwithstanding these preliminary opinions, the Divisional Court and Court of Appeal in the Leisureworld case later found that Bill 40 had expanded the scope of arbitral discretion to extend time limits; and that Bill 7 then removed this expansion of the scope.

3. **So what, I don't practice in Ontario**

To be entirely candid, Leisureworld is largely or solely a problem for Ontario Union practitioners. However, Unions in all Canadian common law jurisdictions have had to address time limits issues.

When you look at the relevant legislation in jurisdictions other than Ontario, only the New Brunswick legislation has the same wording as the post-November 1995 Ontario Labour Relations Act.

The federal Code provides at section 60(1.1):

The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

This amendment became law on January 1, 1999. Since that time, arbitrators have been able to consider the factors in exercising their discretion to extend against even mandatory time limit language in collective agreements.

The Alberta Labour Relations Code, R.S.A. 2000 c. L-1 does not contain a provision that expressly grants jurisdiction to an arbitrator or arbitration board to relieve from time limits. If a collective agreement specifically incorporates the time requirements set out in the Code, then a party may be deemed to have abandoned their claim or defence to a

grievance if they are beyond the legislated time limits (Canbra Foods and UFCW Local 401, (2000), unreported decision of A. Ponak).

The Labour Relations Code, R.S.B.C. 1996, c.244, section 89, provides that a board or arbitrator has the power to:

- 89(e). Relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement;
- (f) Dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the grievance.

This language has been interpreted to allow an arbitrator discretion to extend time limits missed at any stage, provided that there is no detriment and there are reasonable grounds for the extension.

The Manitoba Labour Relations Act, section 121(2)(e), provides that an arbitrator or Board has the power:

“To relieve, on just and equitable terms, against breaches of time limits or other procedural requirements set out in the collective agreement”.

This language has been held by arbitrators, the Court of Queen's Bench and the Court of Appeal to afford discretion to extend even from mandatory time limits language. (See, eg. CPU v. McMillan Bathurst (1986), 47 Man. R. (2d) 273, affirmed on appeal (1987) 49

Man. R. (2d) 82.

In the Nova Scotia Trade Union Act, S.N.S. 1972 c.19, as amended, section 7:

“No proceedings under this Act including arbitration or other procedures in accordance with section 40 and arbitration in accordance with section 103, are invalid by reason of any defect in form or technical irregularity”;

has consistently been held as a complete answer in responding to an employer’s claims that there is no discretion to relieve against time limits.

As a result, parties to collective agreements in jurisdictions other than Ontario, Alberta and New Brunswick, generally do not face a statutory mandatory time limit but are required to meet the standards of reasonableness and no prejudice to the opposing party in order to overcome collective agreement time limits.

4. **OK, now what about New Brunswick**

The New Brunswick legislation contains wording almost the same as Ontario’s new, Bill 7 language. The Industrial Relations Act at section 73 (3.1) provides:

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are

reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

Employers' counsel in New Brunswick relied on the reasoning in Leisureworld and the similar language, to argue that in New Brunswick there was no discretion to extend time limits for all referrals to arbitration, where the collective agreement language was mandatory. Happily, however, the New Brunswick Court of Appeal in a decision dated November 24, 1999, rejected that reasoning. Drapeau, J.A., in Pepsi-Cola Beverages v. Dollar et al and United Food and Commercial Workers, Local 1288P, stated: "A request for referral of a grievance to arbitration is not necessarily, as a matter of law, a step in the arbitration procedure. It may, depending on the terms of the collective agreement between the parties, be a step in the grievance procedure contemplated by s.73(3.1) of the Act". Thus, where there is no division between clauses, or where reference to arbitration and grievance process are made in the same clause or article, the referral to arbitration may properly be characterized as a part of the grievance process and therefore fall under 73(3.1).

The language in the Pepsi-Cola case read as follows:

Article VI: Grievance Procedure and Arbitration

.....

STEP 3: Failing the reply in Step 2 or if such reply is unsatisfactory, within five (5) working days of the date of decision of the Manager was or

should have been given, the Unit Chairperson of the union may submit the grievance to the Human Resources Manager who shall give his written decision on the grievance within five (5) working days of receipt by him of the grievance. In the event that the grievance is not satisfactorily resolved at this step, the grievance **may be referred to a Single Arbitrator.** (emphasis added).

This language does not differ significantly from the Leisureworld language. However, it is suggested that the reasoning could be applied to distinguish Leisureworld where the collective agreement language is not on all fours with the Leisureworld language.

5. How to overcome time limit barriers, statutory or otherwise

What follows is a list of “arguments that have worked” or that may work.

1. In the Leisureworld jurisdiction

- a) argue about what the actual intention of the legislature was in enacting Bill 7: On second reading of Bill 7, on October 18, 1995, Minister of Labour Elizabeth Witmer said about the Bill;

But I should reiterate one point. With the exception of the proposals that I have talked about today – that is, the changes to the purpose clause and also to the introduce democracy into the workplace and also our proposal to deal with the communication and the provision of information to the workers before they make decisions – the pre-Bill 40 Labour Relations Act will remain almost unchanged from where it was prior to January 1, 1993. (1630)

Thus, it could be argued that the legislature cannot have intended to restrict

arbitrators' discretion, if it was intended that the legislation would remain unchanged.

b) Limit the application of Leisureworld to collective agreements identical to the collective agreement in that case, and apply the N.B.C.A. reasoning to your language. Where there is no clear demarcation between the two processes, some arbitrators have held that Leisureworld does not govern. [see, Shime in Ajax Precisions and USWA, 85 L.A.C.(4th) 280.

c) Closely examine what collective agreement obligation is tied to the time limit; is it the actual referral to arbitration, or the notification to the other party that you intend to arbitrate? What document were you required to generate and can you argue that you generated the right paper within the required time. [see, Albertyn in Wexford and CUPE Local 3791 (unreported, October 23, 2000).

d) Rely on section 123 of the OLRA [similar to section 7 of N.S.T.U.A., above] for the principle that defects in form or technical irregularity do not invalidate the process. This can likely be more successfully applied to a missed time limit where there was a failure to communicate in writing or failure of receipt by the other party due to no fault of the Union.

e) Make a policy argument about the application of Leisureworld, and argue that the NBCA decision ought to be preferred. The problem with Leisureworld is that it does not illuminate precisely how time lines are to be determined; how parties to the arbitration

process might have certainty that they have met time lines successfully; nor how a traditional court-based litigation approach to time can practically apply to a labour relations situation. Specifically, the legislature does not have codified rules of procedure, and has not codified service (eg. by requiring personal service, affidavits of service, filing with central registries)

f) A second policy argument arises out of the irresistible temptation to employers to evade grievances by evading service of documents; or evasion of resolution of workplace disputes and the contradiction inherent in a "Purpose" clause that seeks, "To promote the expeditious resolution of workplace disputes", where the shop-floor issues never get resolved due to procedural wrangling over time limits.

2. In all jurisdictions

g) Rely on the administrative pattern of the parties re: the time limits and argue that an estoppel has been created by the employer's previous practice or by their action in this case. [see, eg. McLaren in Tecumseh (Town) and Teamsters Local 880, September 27, 2001 unreported decision, and Newman in Natrel and Teamsters Local 647, 83 L.A.C. (4th) 55].

h) Examine whether or not the collective agreement specifically contracts out of the legislative discretion to extend time limits (eg. if the section numbers are not there, the discretion remains: R.P. Gorman in CUPE Local 4272 and Town of Sackville, January 29, 2001 (unreported)).

- i) Decide whether the employer may have waived their right to argue timeliness by failing to raise it at an early stage or by agreeing to a consensually-appointed arbitrator. [H.D. Brown in Leon's Furniture and CAW Local 1000, 93 L.A.C. (4th) 229, November 15, 2000].

- j) Consider the distinction between statutory vs. consensual appointments identified in the legislation (and, in cases such as Queensway General Hospital and ONA, 57 L.A.C. (4th) 194, Kaplan).

- k) Make the argument that the matter is one of a continuing nature and that the time limits therefore only apply to date for determination of damages flowing from breach.

- l) If the parties have agreed to extend time lines, you can argue that the agreement to extend "buys" you another set of the same number of days provided by the clause, not just one or two days if the parties have not agreed to a set number of days (Hunter in Canadian Red Cross and SEIU Local 210 (February 16, 2000, unreported).

- m) The factors traditionally recognized as determining whether or not to exercise arbitral discretion, including: the nature of the grievance; when the delay occurred; whether the grievor was personally responsible for the delay; the length of the delay; and whether the employer could reasonably have assumed the grievance to have been abandoned, and is therefore prejudiced by the delay.

Conclusion

The time limits arguments are almost universally raised by employers when they are concerned that they don't have a decent case on the merits.

Grievance issues that don't get addressed on their merits and are left to fester on the shop floor can turn into representation issues for bargaining agents.

I hope that this paper has provided a good outline of arguments to advance, to allow grievances to be heard, and eliminate these potential problems.