THE CORE PRINCIPLES OF ARBITRAL EXPERTISE: A NEW LENS THROUGH WHICH TO VIEW WEBER V. ONTARIO HYDRO

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Abstract

This thesis considers the substance of a labour arbitrator’s expertise. The author argues that the question is timely in that its answer provides a novel way to approach the position the Supreme Court of Canada has taken with respect to an arbitrator’s rightful jurisdiction, most notably in the over-decade old decision of Weber v. Ontario Hydro, a decision which continues to act as a thorn in arbitrators’ sides.
## Table of Contents

Introduction ........................................................................................................................................... p. 3

Chapter One: The Early American Analysis of Arbitral Expertise .............................................. p. 4

i.)  The Collective Bargaining Agreement and an Arbitrator’s Jurisdiction ................................................. p. 7

ii.)  Core Features of Labour Arbitrators’ Expertise ......................................................................................... p. 10

   1.  Personal Judgment ................................................................................................................... p. 11

   2.  Competence Regarding the Industrial Enterprise and Industrial Relations .............................. p. 14

   3.  Purposive Interpretation of the Collective Agreement ......................................................................... p. 17

   4.  Exercising Creativity ................................................................................................................ p. 20

iii)  Opinions Regarding What Arbitral Expertise Was Not ........................................................................ p. 21

Chapter Two: The Evolution of the Core Principles of Arbitral Expertise ........................................ p. 23

i)  Paul C. Weiler’s Arbitral Roles ......................................................................................................... p. 24

ii)  Laskin and Beatty’s Functional Vision of the Law ............................................................................ p. 28

iii)  Harry Arthurs Derides the Professionalization of Arbitration ....................................................... p. 35

Chapter Three: Re-evaluating Weber Through the Lens of Arbitral Expertise ............................... p. 37

i)  A Brief Survey of the “Weber Debates” ............................................................................................ p. 38

ii)  Examining Weber and its Successors for Their Understanding of Arbitral Expertise ......................... p. 41

iii)  Juxtaposition of the Four Core Principles with the Court’s Articulation of Arbitral Expertise ............. p. 47

Conclusion ................................................................................................................................................ p. 54
**Introduction**

What is the substance of a labour arbitrator’s expertise? That is the central question this paper seeks to address. The question is timely as its answer offers a novel way to approach the position the Supreme Court of Canada (“Court”) has taken with respect to an arbitrator’s rightful jurisdiction, most notably in the over-decade old decision of *Weber v. Ontario Hydro*¹ ("*Weber*"), a decision which continues to be a thorn in arbitrators’ sides. Expertise is a concept taken for granted. By returning to its roots in the labour arbitration context, certain core principles of this concept emerge. The best way to approach the roots of arbitral expertise is to become reacquainted with some of the seminal pieces authored by the foremost labour law scholars in post-war United States and Canada. Juxtaposing the core principles of arbitral expertise with the approach of the Supreme Court of Canada provides a new lens through which to view *Weber*, and one that defuses much of debate around a labour arbitrator’s rightful jurisdiction.

This paper proceeds as follows: Chapter One addresses the early American analysis of the notion of labour arbitrators’ expertise. The review in this chapter of certain seminal works offers critical insight into what it was that an arbitrator offered in terms of a particular expertise in resolving disputes between labour and management. Chapter Two examines the extent to which the core principles of arbitral expertise as articulated by leading American thinkers are shared and embraced by their Canadian counterparts. It also sheds light on the shape arbitral expertise has taken in the Canadian context thanks to the vision of two of Canada’s foremost

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¹ [1995] 2 S.C.R. 929 [*Weber*]
labour law scholars, Bora Laskin and David Beatty. Chapter Two also introduces Harry Arthurs contribution to understandings of arbitral expertise, and what, more importantly, this expertise was not. Chapters One and Two lay the groundwork for the analysis of the Supreme Court of Canada’s articulation of arbitral expertise which is largely the subject of Chapter Three. Weber and two of this seminal case’s successors will be dissected and then juxtaposed with the core principles of arbitral expertise. Chapter Three will also examine a very recent arbitration case in which a labour arbitrator was faced with the application of Weber to a very rare issue. The case demonstrates that, by putting arbitral expertise to work, there was no need to become mired in questions of jurisdiction. Jurisdiction, as this paper contends, is the hallmark of the professionalization of arbitration which comes with a steep price. Arbitrators have become mired in juridical characterizations of disputes – is the issue a negligence claim? a defamation claim? contractual? Similarly, arbitrators have become ever reliant on legal precedent and their stature in the ranks of the arbitral profession at the expense of serving the parties’ interests, all signs of increasing professionalization. And while professionalization and jurisdiction march hand-in-hand, the by-product of this union is a failure to appreciate the process of labour arbitration and what is required to keep this process meaningful to the parties. Returning to the core principles of arbitral expertise sheds light on this unhealthy union and also paves the way to a renewed investment and commitment to the process of arbitration.

Chapter One: The Early American Analysis of Arbitral Expertise

This chapter will address the early American analysis of the notion of labour arbitrators’ expertise. The core principles of this expertise will be drawn out of several seminal pieces authored by these scholars. The four core features of a labour arbitrator’s expertise that can be
distilled from the early seminal works are as follows: personal judgment; competence regarding
the industrial enterprise and industrial relations; purposive interpretation of the collective
agreement; and creativity.

In the early 1950’s leading American academics such as Archibald Cox, a professor at
Harvard Law School, and Harry Shulman, Dean of Yale Law School, began to write critically
about the notion of an arbitrator’s specific expertise. This early evaluation expanded into the
better part of two decades with important contributions from Benjamin Aaron, who held
positions as director of UCLA’s Institute of Industrial Relations as well as Vice President and
President of the National Academy of Arbitrators. Amongst all of the individuals who wrote
critically on a labour arbitrator’s expertise – what special talents, as it were, that a labour
arbitrator exhibited – there was a shared sentiment that the features of such expertise were
straightforward and, critically, contextual. This is not to say that what an arbitrator “did” could
be construed as simple, but merely that the expertise was not shrouded in mystique. This was
made obvious through several of the practical examples in which these scholars grounded their
vision of arbitral expertise. Several of these practical examples will be discussed in greater detail
below.

This chapter will consider these shared sentiments around arbitral expertise. In order to
put these shared sentiments in context, it is first necessary to unpack why expertise was critical
to the arbitrator’s role. In this regard, a few of these scholars focus on the concept of
jurisdiction. An arbitrator, tasked with the job of interpreting and applying the language of the
collective agreement, derived his\textsuperscript{2} jurisdiction from this document. However, as these scholars (correctly) observed, because of gaps, ambiguities and silences in the collective agreement, jurisdiction was an unhelpful tool in delineating the scope of an arbitrators’ duties. In other words, simply assuming that “interpreting and applying” the collective agreement would properly define the arbitrator’s task was unsatisfactory in guiding the arbitrator faced with an issue whose answer could not be traced to the literal text of the collective agreement. For this reason, these scholars pushed on to highlight core features of arbitral expertise, a concept that was much more fluid and coextensive with the arbitrator’s ultimate obligation under the collective agreement – to resolve the dispute between the parties.

In this regard, this chapter will proceed by first examining how a labour arbitrator’s expertise is necessarily bound up with the language of the collective agreement and how the inherent limits of this language counteract the usefulness of the concept of jurisdiction then move into an analysis of the key (and generally agreed upon) core features of arbitral expertise. This section will close with a discussion of what arbitral expertise was \textit{not}. One of these opinions focuses on the proper role of the arbitrator. A theme of this paper, however, is that a pre-occupation with the proper role of the arbitrator is connected with a pre-occupation with the proper scope of an arbitrator’s jurisdiction; both pre-occupations are grounded to a large extent in the literal text of the collective agreement. Both concepts are pre-occupations, therefore, because they divert attention away from the more difficult question of how an arbitrator resolves difficult cases which arise as a result of gaps, ambiguities and silences in the collective agreement.

\textsuperscript{2} Although the male gender will be used throughout this paper, it is representative of both the male and female genders.
agreement. Arbitral expertise fills this void by paying attention to what it was an arbitrator actually did when faced with a difficult case.

i) The Collective Bargaining Agreement and an Arbitrator’s Jurisdiction

One of the seminal pieces written on labour arbitration is Dean Harry Shulman’s paper, “Reason, Contract and Law in Labor Relations,”3 delivered as the Oliver Wendell Holmes Lecture at Harvard Law School on February 9, 1955. In discussing the “difficulties and limitations” of the arbitrator’s role, Shulman contemplates the task put to the arbitrator when the collective agreement gives rise to a pregnant silence critical to the matter in dispute.4 Dean Shulman provides several practical examples where this issue could emerge, even where the collective agreement appears, superficially, to be quite clear on the matter. What was an arbitrator to do when faced with a collective agreement which contained overtime provisions but did not stipulate whether overtime work, if assigned, was mandatory or voluntary?5 In this example, should an arbitrator uphold an employer’s decision to discipline an employee who refused to work overtime?

For Shulman, the concept of jurisdiction – or the notion that the arbitrator should confine himself to the interpretation and application of the collective agreement – was a most unhelpful concept.6 The easy way out for the arbitrator would be to simply declare that the matter was

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3 Harry Shulman, “Reason, Contract and law in Labour Relations” (1955) 68 Harv. L. Rev. 999 [Shulman].
4 Ibid. at 1009
5 Ibid. at 1009
6 Ibid. at 1010, where Professor Shulman reflects on this point as follows: “The obvious alternative is for the arbitrator to refrain from affirmative decision and to remand the dispute to the parties on the ground that it is outside of his jurisdiction. If the validity of the employer’s order is requiring overtime work is beyond the arbitrator’s jurisdiction, he would seem to have no power to restrain the disciplinary action taken by the employer to enforce the order. On the other hand, if he does restrain the disciplinary action, is he not in effect denying
beyond his jurisdiction and to leave the resolution of the issue to the parties. Shulman wasn’t interested in the easy route, however, and pressed on with further practical examples. The well-regarded professor wondered whether an employer, pursuant to a management’s right clause, but in the face of a recognition clause, could contract out work to employees outside of the bargaining unit.\(^7\) Could this employer be justified in contracting out work if the employer provided a good faith business justification for the action? The purpose of giving these examples was twofold: on the one hand, Shulman demonstrated that the concept of jurisdiction was not a constructive tool where an arbitrator was faced with deciding between the parties’ conflicting (and plausible) interpretations of an issue not clearly defined (or not defined at all) in the collective agreement; moreover, Shulman demonstrated that the most difficult task put to arbitrators was devising a solution where the collective agreement was ambiguous at best on the issue and silent at worst. However, it was not open to the arbitrator to shirk his duty to resolve a dispute between the parties where that dispute was in some way connected with the collective agreement.

Dean Shulman was joined by Professor Cox in an intimate analysis of the language of collective agreements and its impact on arbitrators’ interpretation thereof.\(^8\) Cox’s vision of the collective bargaining agreement as “…an instrument of government, not merely an instrument of exchange”\(^9\) set the agreement apart from other legal documents. Cox was also cognizant that the

\(^7\) Ibid. at 1015
\(^8\) Archibald Cox, “Reflections Upon Labor Arbitration” (1958-1959) 72 Harv. L. Rev. 1482 [Cox].
\(^9\) Ibid. at 1492
context in which collective agreements were negotiated set these contracts apart from other documents.\textsuperscript{10} Similar to Shulman, Cox focused on “The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent...”\textsuperscript{11} As noted above, Shulman grounded his analysis in a discussion of examples, such as the imposition of discipline or discharge where the agreement lacked a firm set of guidelines in this regard.\textsuperscript{12} Cox, like Shulman, found jurisdiction to be an unhelpful concept. For Cox, there were “… at least five areas in which arbitrators regularly base awards upon some foundation other than the language of the contract even though their jurisdiction [was] expressly limited to the adjudication of ‘disputes concerning the interpretation or application of any provisions of this agreement.’”\textsuperscript{13} With respect to the first four of these areas, while it could prove difficult “… to bring these cases within any normal meaning of the word “application” with reference to the application of a specific provision,...” Cox concedes that “…one [could] stretch the word far enough to include any claim ultimately traceable to a provision in the contract.”\textsuperscript{14} Cox counters however that “…there [was] a fifth class of cases in which arbitrators adjudicate substantive rights \textbf{which cannot be traced to any specific provision of the contract}” [emphasis added].\textsuperscript{15}

The types of cases that would fall within this class included the arbitrator faced with the fashioning of a remedy less than discharge, or the arbitrator who must decide whether overtime decisions should be made in conformity with the seniority provisions of a collective agreement

\textsuperscript{10} \textit{Ibid.} at 1491-1492 where he notes that, given the context in which a collective agreement is negotiated, “A collective agreement rarely expresses all the rights and duties falling within its scope. One cannot spell out every detail of life in an industrial establishment, or even that portion which both management and labor regard as matters of mutual concern.”

\textsuperscript{11} \textit{Ibid.} at 1493

\textsuperscript{12} See Shulman, \textit{supra} note 3 at 1015-1016 where Shulman engages in a cross-examination of this issue.

\textsuperscript{13} Cox, \textit{supra} note 8 at 1493.

\textsuperscript{14} Cox, \textit{supra} note 8 at 1498.

\textsuperscript{15} Cox, \textit{supra} note 8 at 1498.
where the agreement is silent on the issue.\textsuperscript{16} Dean Shulman and Professor Cox had, therefore, the same practical examples in mind in voicing their concerns with respect to delineating the rightful scope of an arbitrator’s jurisdiction.

For both men, the gaps in language necessitated that the arbitrator embrace the creativeness of his role,\textsuperscript{17} but this again is a step ahead in the analysis. The examples these scholars provide should give one pause as they are critical in foreshadowing the gathering storm clouds on the horizon with respect to the rightful scope of an arbitrator’s jurisdiction. It is this paper’s contention that returning to a core understanding of arbitral expertise defuses future storms. It can be inferred that both Dean Shulman and Professor Cox regarded the expertise of labour arbitrators as originating in their task to base awards where there were gaps, silences, and ambiguities in the contract. While arbitrators’ jurisdiction was derived from the collective agreement or, in other words, their jurisdiction was confined to the application and interpretation of collective agreements, jurisdiction ‘in practice’ failed to assist the arbitrator faced with ambiguities, gaps and silences in the language of the collective agreement. Expertise, however, was a tool that could fill this void.

The next section will explore other voices that chimed in with opinions around what an arbitrator was to do when deciding a difficult issue where the collective agreement was ambiguous at best and silent at worst.

\textbf{ii) Core Features of Labour Arbitrator’s Expertise}

\textsuperscript{16} Cox, supra note 8 at 1498.

\textsuperscript{17} Cox, supra note 8 at 1493. See also Shulman, supra note 3 at 1016.
Dean Shulman and Professor Cox rightly identified the centrality of the collective agreement in shaping labour arbitrators’ expertise. While an arbitrator’s jurisdiction was derived from this document (the arbitrator was confined to the interpretation and application of the collective agreement), gaps, ambiguities and silences in the collective agreement made jurisdiction a most unhelpful tool. In this regard, arbitral expertise was the tool that could assist arbitrators in the adjudication of substantive rights that could not be traced to language of the collective agreement. Both men also expanded upon the core features of this expertise, but they were not alone in this expansion. They were joined by others who offered critical insight into what it was that the arbitrator offered in terms of a particular expertise in resolving disputes between labour and management. As noted earlier, the four core features of a labour arbitrator’s expertise that will be discussed in turn are as follows: personal judgment; competence regarding the industrial enterprise and industrial relations; purposive interpretation of the collective agreement; and creativity. All of these core factors are, not surprisingly, deeply interwoven.

1. **Personal Judgment**

Even before Dean Shulman and Professor Cox wrote their seminal pieces, there were rumblings amongst interested parties around the value of labour arbitration and the proper role of the arbitrator. In these rumblings, very early understandings of arbitral expertise materialize and perhaps the first shared view was that the personal judgment of the arbitrator was critical in any expertise he brought to the resolution of the private disputes under the operation of a collective bargaining agreement.
During the first annual meeting of the National Academy of Arbitrators held between the years 1948-1954, prominent figures in the labour law community engaged in discussions around such things as the status and expendability of the labour arbitrator. David L. Cole, an arbitrator who held the position of president of the National Academy of Arbitrators in 1951, and Jesse Friedin, a management-side labour lawyer, are two men who planted the seeds for the idea that personal judgment was at the core of an arbitrator’s expertise. In a panel discussion between these two men where they were also joined by a union-side representative, Cole notes that in a world where the collective agreement “…contain[s] no standards or rules by which arbitrators may be guided” and Friedin echoes that where the arbitrator has “…neither statute nor standards furnished by the parties”, the arbitrator is left to turn to his own best judgment. Both Cole and Friedin make this observation in the context of discussing the expendability of the arbitrator or, thought of another way, the process of selectivity by the parties in choosing the arbitrator. In a system of private arbitration, the parties were left to choose the arbitrator. The choice was significant because of the lack of standards or rules within the collective agreement to guide the arbitrator. Given the circumstances, screening the arbitrator for his “general philosophy and capabilities” was imperative.

This impression of the arbitrator’s personal judgment at the core of arbitral expertise was also shared by Dean Shulman. In his address, Dean Shulman posed the following question: what was

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19 Ibid. at 46.
20 Ibid. at 51.
21 Ibid. at 46, 51.
22 Ibid. at 46
the arbitrator to do where both parties presented plausible interpretations of a provision of a collective agreement but where the agreement provided few guides in choosing between the conflicting interpretations.\textsuperscript{23} The answer was not complicated:

Answer in the form of rules or canons of interpretation is neither practical nor helpful. Long experience with statutory interpretation has failed to produce such answer. In the last analysis, what is sought is wise judgment. It is judgment, said Holmes, that the world pays for. And we can only seek to be aware of the kind of care and preparation that is necessary in forming and pronouncing the judgment.\textsuperscript{24}

Shulman echoes Cole and Friedin’s contention that where there is little of anything of practical utility within the collective agreement for the arbitrator to latch onto discerning judgment would serve as the determinative factor.

Shulman appears to emphasize the importance of wise judgment because of his view that the arbitrator played a critical role in the world of industrial self-government. Shulman highlighted that the success of self-government, as the word suggested, was built on the parties’ willingness to commit to this system.\textsuperscript{25} Arbitration was an integral part of this system and, for this reason, it was imperative that the parties were both confident in the arbitrators’ capabilities.\textsuperscript{26} One party might be upset with the result, but so long as both parties were satisfied that the arbitrator had “integrity, independence, and courage so that he is not susceptible to pressure, blandishment, or threat of economic loss” the system of self-government might thrive.\textsuperscript{27} Arguably, integrity, independence, and courage could fall under the umbrella of wise judgment. Ultimately, wise judgment was, however, only possible with another core feature of a labour arbitrator’s expertise.

\textsuperscript{23} Shulman, \textit{supra} note 3 at 1016.
\textsuperscript{24} Shulman, \textit{supra} note 3 at 1016.
\textsuperscript{25} Shulman, \textit{supra} note 3 at 1019.
\textsuperscript{26} Shulman, \textit{supra} note 3 at 1019.
\textsuperscript{27} Shulman, \textit{supra} note 3 at 1019.
– competence regarding the industrial enterprise and industrial relationships, or as some
described it, an almost subterranean understanding of the facts.

2. Competence Regarding the Industrial Enterprise and Industrial Relations

It may seem trite to say that a labour arbitrator’s expertise was bound up with a deep
understanding of industrial practice. However, this principle is perhaps so fundamental to an
understanding of arbitral expertise that it could be overlooked. Jesse Friedin, who, like Shulman,
agreed that arbitration was at the centre of a system of self-government over industrial enterprise,
remarked that the parties, in selecting an arbitrator, were becoming increasingly discretionary in
terms of wanting an arbitrator who was competent “...not in any abstract or scholastic sense, but
in terms of the immediate case.”\(^{28}\) From this, it can be inferred that the parties wanted an
arbitrator who understood the intricate workings of their particular operation.

For others, an arbitrator demonstrated this competence by taking painstaking care in working
through the factual situations which gave rise to the dispute at hand; a failure to take such care
could cause severe prejudice to the parties down the road whose relationship did not end upon
resolution of the dispute unlike in civil litigation.\(^{29}\) If the arbitrator’s role was to interpret and
apply the collective agreement in the broadest and widest sense of these two tasks, it became
obvious quite quickly that a genuine appreciation of context – or sometimes colloquially known
as the law of the shop – was central to the expertise an arbitrator honed.

\(^{28}\) Cole, supra note 18 at 51-52.
\(^{29}\) Shulman, supra note 3 at 1017-1018; See also Lon Fuller, “Collective Bargaining and the Arbitrator” (1963) Wis.
L. Rev. 3 at 18 [Fuller], where it is noted that “...intelligent interpretation of collective agreements requires an
understanding of a complex and changing body of industrial practice. This understanding is not as a practical
matter accessible to courts through ordinary procedures of proof.”
Archibald Cox provides an excellent example pertaining to the necessity of competence regarding the industrial enterprise. Cox discusses a case in which a clerical error relating to the grievor’s seniority date was carried forward for five years in the company’s seniority listings. The date was even the basis upon which other grievances were adjudicated. When the company attempted to correct the date and the employee grieved, the arbitrator held that “[T]here must come a time when past errors which have not been challenged or corrected by either party, or by individual employees, must be accepted as the agreed understanding and no longer subject to change.” The Supreme Court of New York vacated the award, finding that the arbitrator had failed to understand the plain words of the collective agreement. Cox correctly observed that “The arbitrator recognized that every contract must be interpreted and applied through an industrial jurisprudence. The judge felt bound to the written word, although courts have exercised greater liberality for centuries in applying the Statute of Frauds. In my opinion the judge made a serious error.” The serious error arose because the judge lacked what the arbitrator had: a competency regarding the intricate operation of the industrial enterprise and industrial relations. In order for this enterprise and the relations between the parties within this enterprise to function smoothly, the arbitrator understood the broader implications of the facts at hand – something the judge clearly lacked.

31 Ibid. at 887-888.
32 Cox, supra note 8 at 1495.
33 Cox, supra note 8 at 1495.
This feature of arbitral expertise was also captured by Benjamin Aaron in an address he delivered before the National Academy of Arbitrators.\textsuperscript{34} In this address, Aaron decried the professionalization of arbitration, an issue that will be touched on in greater detail below. In the course of addressing this topic, Aaron places competence of the industrial enterprise at the heart of arbitral expertise:

\begin{quote}
I have referred to the practice of arbitration as a calling or an avocation, also a craft. Technical skill is an important part of the craft, but there is another element that sometimes rises to the level of art. It consists, for permanent umpires, of mastering even the most minute and complex details of an enterprise or industry, or to use a phrase of George Taylor’s, “getting into its bloodstream,” and of building a sense of a rapport and confidence between the umpire and the parties, based in part on their belief that he or she understands their special kinds of problems. \textit{For all of us, whether permanent umpires or ad hoc arbitrators, it consists of a knowledge of and sensitivity to the institutional framework within which a given dispute occurs}, and the ability to interpret and apply the ubiquitously ambiguous terms of collective bargaining agreements against the background of the web or rules and practices that constitutes the “industrial jurisprudence” of an enterprise or industry.\textsuperscript{35} [emphasis added]
\end{quote}

This passage captures the special competence which functions as another pillar of arbitral expertise. The job of labour arbitration could not be done well or completely without this heightened awareness of the intricate functions of the enterprise coupled with a knowledge of the “industrial jurisprudence” indigenous to the particular industry.

It could be argued that this special competence conflicts with the first principle of judgment – if an arbitrator can rely on good judgment to make the best decisions why did competence serve as another core feature of arbitral expertise? The answer lies in Shulman and Cox’s musings around the relationship between the arbitrator and the document from which he derived his


\textsuperscript{35} \textit{Ibid.} at 157-158.
jurisdiction – the collective agreement. Even though the arbitrator was chosen to resolve a dispute between the parties because of his judgment, the collective agreement was the backdrop for this judgment and was the backdrop shaping the relations between the parties and regulating the entire industrial enterprise. The backdrop necessitated, therefore, this special competence regarding the industrial enterprise and the industrial relations at stake. It was in bridging judgment with competence that the next core feature of arbitral expertise emerges: the ability to purposively interpret the collective agreement.

3. Purposive Interpretation of the Collective Agreement

Once again, turning to Dean Shulman and Professor Cox provides guidance with respect to the third core principle of arbitral expertise. The first two principles – personal judgment and competence regarding the industrial enterprise and industrial relations – are merged under this third principle, or the purposive interpretation of the collective agreement.

Professor Cox touches on this notion of practicality of interpretation in his discussion of the similarities and differences between a collective agreement and statutes.\textsuperscript{36} A collective agreement was in some ways like a statute because “...it regulate[d] diverse affairs of many people with conflicting interests over a substantial period of time...”\textsuperscript{37} Cox, however, underscored a critical difference between statutes and collective agreements. Whereas the underlying policy or purpose of a statute could often be unearthed, this was an exercise fraught with difficulty when hoisted upon a collective agreement, primarily because the two parties who

\textsuperscript{36} Cox, supra note 8 at 1503.

\textsuperscript{37} Cox, supra note 8 at 1503.
formed the agreement most likely had competing goals. In that regard, unlike a judge tasked with interpreting a statute who could turn to legislative intent as an aid in this interpretation, the same route was generally not available to the arbitrator. The only alternative open to the arbitrator struggling with tricky interpretations was to ground the interpretation of the collective agreement phrase in issue to the practical problem at hand. Indeed, Professor Cox felt so strongly about this that he noted that it would be an “...obvious mistake to read the words without attention to the [practical] problem.” While a unified underlying objective for the entire agreement could not be pinpointed thus precluding arbitrators from such a powerful tool of interpretation, arbitrators could draw out meaningful interpretations of the specific clauses so long as the interpretation was made with a very focused view to the practical problem at hand.

An example is helpful in demonstrating this core principle in practice. Professor Cox discusses the fact that arbitrators often apply substantive doctrines, nowhere to be found in the agreement, in order to make practical sense of the language in the agreement. Cox sheds light on this point as follows:

Suppose that a contract fixes a seven-day limit upon the appeal of grievances from the foreman’s ruling and that the employee and shop steward wait ten days to appeal in reliance upon the personnel director’s specific assurance that the company will not invoke the time limit. Surely there are only a few stern literalists who would deny the grievance without examining the merits if the company’s attorney subsequently invokes the time limit as a bar to arbitration. The customary disposition would be to ignore the time limit upon grounds of

38 Cox, supra note 8 at 1505.
39 Cox, supra note 8 at 1504.
40 Cox, supra note 8 at 1494.
waiver or estoppel. These doctrines are based upon notions of justice. They have no foundation in the terms of the contract.41

The language in collective agreements involving time limits wouldn’t seem to serve as the usual “tricky language” suspect, but as this example demonstrates, even the most straightforward language in the agreement could serve as a point of difficult interpretation for the arbitrator. Unfortunately, as already discussed, simply turning to the parties’ intent behind the language of the clause was not generally a useful tool. Instead, the arbitrator was left to turn his mind to the practical consequences of the solution he devised. By drawing upon doctrines external to the contract (e.g. estoppel, waiver, justice) in order to achieve a practical solution, the arbitrator avoided a purely literal (and entirely useless) interpretation of the clause.

Dean Shulman is more explicit and straightforward in articulating this principle. The arbitrator’s expertise, in short, revolved around “Practicality of interpretation in its day-to-day applications...”42 Expanding further, Professor Shulman states “The interpretation, no matter how right in the abstract, is self-defeating and harmful to both sides if its day-to-day application provides further occasion for controversy and irritation.”43 Using his best judgment and intimate knowledge of the industrial enterprise with which he was dealing, it can be surmised that an arbitrator could be well-positioned to develop his expertise in practicality of interpretation of collective agreements.

Both Dean Shulman and Professor Cox highlight that expertise is bound up with practically and purposively approaching the dispute placed before the arbitrator. A purposive approach is

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41 Cox, supra note 8 at 1495.
42 Shulman, supra note 3 at 1018.
43 Shulman, supra note 3 at 1018.
one that is context-driven made possible by the arbitrator’s sound judgment and thorough understanding of the enterprise and relations in which the dispute is rooted. Operating within the confines of the language of the collective agreement did not mean to these two men, and for many others who followed, restricting the practicality of an arbitrator’s approach. This purposive and practicality of approach to the interpretation of collective agreement language leads into the fourth, and final core principle of arbitral expertise – bold creativity.

4. Exercising Creativity

While none of the four core principles of expertise operate in isolation from each other, this is perhaps most true of the fourth core principle. Developing an expertise in creativity sounds like a contradiction in terms, but several of the foundational thinkers in labour law refer both indirectly and directly to creativity. The necessity of this fourth core principle makes sense, however, when the first three principles are taken in sum.

For Benjamin Aaron, the fact that the arbitral role was a creative role can be deduced from his view that arbitration was a craft.44 Aaron shuddered at the idea of “..grouping arbitrators with lawyers, physicians, veterinarians, chiropractors, barbers, cosmetologists, seeing-eye dog trainers, funeral directors and embalmers, structural pest-control operators, and members of other licensed professions or occupations”45 and this was because arbitration was a craft that could, for Aaron, rise “...to the level of art.”46 Archibald Cox was similarly adamant that arbitration

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44 Aaron, supra note 34 at 158.
45 Aaron, supra note 34 at 158.
46 Aaron, supra note 34 at 158.
was an art and the task of the arbitrator was to be creative, a fact, Cox argued, that should not be ignored by the courts.\textsuperscript{47} On one occasion, Professor Cox observed that

\begin{quote}
[The courts] should recognize that grievance arbitration would be a constricted, dying institution if it were limited to the definition of terms. They should allow the arbitrator to exercise the creative role his function demands, always confining him within the scope of the contract.\textsuperscript{38}
\end{quote}

Confined within the contract but free to creatively interpret and apply the language of the collective agreement, it becomes obvious that this creativity is only meaningful against the backdrop of the first three core principles. Armed with wise judgment, a competence regarding the industrial relations in play, as well as an ability to purposively interpret the collective agreement, an arbitrator would be, in essence, free to exercise his creativity. Indeed, a failure to do so would stymie the development and evolution of arbitral expertise.

\textit{iii) Opinions Regarding What Arbitral Expertise was Not}

A few concluding remarks will be offered with respect to opinions around what arbitral expertise was \textit{not}. While some of these opinions are helpful and contribute to a deeper understanding of arbitral expertise, others contradict the four core principles including Lon Fuller’s position with respect to the proper role of the arbitrator. Lon Fuller, a long-time law professor at Harvard University, took particular issue with Harry Shulman’s characterization of the proper role of the arbitrator.\textsuperscript{49} Moreover, Fuller disparaged the arbitrator who took on the additional role of mediator. In order to demonstrate his point, Fuller posed the following question:

\textsuperscript{47} Cox, \textit{supra} note 8 at 1512.
\textsuperscript{48} Cox, \textit{supra} note 8 at 1512.
\textsuperscript{49} Fuller, \textit{supra} note 29.
The parties to an arbitration expect the arbitrator to decide the dispute, not according to what pleases the parties, but by what accords with the contract. Yet as a mediator he must explore the parties’ interests and seek to find out what would please them. He cannot be a good mediator unless he does. But if he has then to surrender his role as mediator to resume that of adjudicator, can his award ever be fully free from the suspicion that it was influenced by a desire to please one or both of the parties?  

Arbitral expertise was not, at least in Professor Fuller’s mind, the ability to take on the dual role of arbitrator/mediator. This position, or the one which ties arbitral expertise to the proper role of the arbitrator, will resurface in this paper; however, it is this paper’s contention that this position fails to undermine the core features of arbitral expertise and operates on the periphery of discussions around the core features of labour arbitrators’ expertise. Scholars (Fuller included) who tie arbitral expertise to a proper role for the arbitrator (primarily the adjudicative role) stunt the full development and evolution of the core principles of arbitral expertise. As will be discussed in more detail below, confining the arbitrator to a proper role works hand-in-hand with a literal interpretation of the collective agreement and also with a pre-occupation of an arbitrator’s rightful jurisdiction.

There were other opinions as to what arbitral expertise was not. The first was that an arbitrator’s expertise was not bound up with his ability to interpret external laws.  

50 Fuller, supra note 29 at 26.
51 Aaron, supra note 34 at 156.
52 Aaron, supra note 34 at 155.
Chapter Two: The Evolution of the Core Principles of Arbitral Expertise

This chapter examines the extent to which the core principles of arbitral expertise as articulated by leading American thinkers are shared and/or embraced by their Canadian counterparts. This chapter examines the opinions of four men in particular: Bora Laskin, Paul Weiler, Harry Arthurs and David Beatty. All four men contributed in significant ways to the formulation and conception of the proper role of the arbitrator in the Canadian context. While the most time will be spent considering Laskin’s, Weiler’s and Beatty’s positions, a few concluding remarks will be made with respect to Professor Harry Arthurs’ (foreshadowing) comments on the increasing professionalization of the arbitral profession made before an audience of his peers.\

The “dialogue” that existed between Laskin, Weiler and Beatty around their conception of the labour arbitrator’s role and duties begins to shed light on the particular shape that arbitral expertise took in the Canadian context and the extent to which this expertise embraced the four core principles of arbitral expertise discussed in Chapter One. It is the contention of this chapter that all three men embrace the core principles, however while Paul Weiler inevitably stunts the development of this expertise by binding such expertise to an “appropriate” role for the labour arbitrator, both Bora Laskin and David Beatty plant the seeds for the fruition of arbitral expertise by marrying the core principles of this expertise to their vision of (the functional role of) the law.

This chapter proceeds by first flushing out Paul Weiler’s take on the appropriate role for the arbitrator and how, by necessary implication, this role was tied to the labour arbitrator’s

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expertise. Weiler’s pre-occupation with the appropriate role of the arbitrator mirrors Lon Fuller’s discussion above. The chapter will then move on to discuss features of both Bora Laskin’s and David Beatty’s vision of the law and how such vision was also, by necessary implication, tied to arbitral expertise. While these two men did not have identical visions, they both viewed the law as a vehicle to serve specific ends. It is through such vision that the core principles of arbitral expertise – personal judgment; competence regarding the industrial enterprise and industrial relations; purposive interpretation of the collective agreement; and creativity – took root in the Canadian context and continue to develop and thrive today. In other words, the history of the evolution of arbitral expertise in the Canadian context is not limited to arbitrators confining themselves to Weiler’s appropriate role but instead is largely linked to Laskin’s (and Beatty’s) vision of the law.

i) Paul C. Weiler’s Arbitral Roles

In 1969, Paul Weiler published the *Task Force on Labour Relations Study No. 6: Labour Arbitration and Industrial Change*\(^{54}\) in which he devoted an entire chapter to the role of the labour arbitrator in the Canadian context. His explicit goal was to “...formulate abstract models in order to illuminate the institutional logic of the distinctive value judgments which lie at the roots of the different theories...”\(^{55}\) Weiler contemplated three models in this chapter: the arbitrator as mediator; the arbitrator as industrial policy maker; and the arbitrator as adjudicator. Before discussing Weiler’s favoured model – arbitrator as adjudicator – Weiler rejects the models of arbitrator as mediator and arbitrator as industrial policy maker. Weiler’s conception

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\(^{55}\) Ibid. at 53.
of the arbitrator as mediator tied arbitration to the ongoing negotiation of terms of the collective agreement and envisaged the arbitrator as a mediator who could “...use private sources of information to get at the “real” facts that define the labour relations substance of the grievance (rather than the “artificial” case which filters through in the adversary context where the “cards are not on the table”). Implicit in this statement is the second core principle – competence regarding industrial relations. By later rejecting the role of arbitrator as mediator it becomes clear that Weiler does not fully embrace all of the core features of arbitral expertise.

According to Weiler, the role of arbitrator as industrial policy maker emerged in Canada as a result of the role of mediator being “...overtaken and outmoded by events,” namely the fact that arbitration had become a requirement by law in Canada where a collective agreement had been brought into effect. The demise of ‘voluntary’ arbitration in the wake of a whole host of new socio-legal conditions subsequently gave rise to the role of arbitrator as industrial policy maker, a role in which the arbitrator had “...larger responsibilities to the ‘public interest’ of the society of which collective bargaining is an integral part.” This model also conceived of the arbitrator as grounding his decisions on a “functional relationship” to what the arbitrator viewed as the “appropriate goals of the industrial society in whose government he is participating.” Again, by later rejecting this model and the role it conceived of for the arbitrator, there is an apparent rejection of tying arbitral expertise to a firm competence of the industrial enterprise and industrial relations.

56 Ibid. at 54.
57 Ibid. at 56.
58 Ibid. at 59.
59 Ibid. at 61-62.
60 Ibid. at 63.
The adjudicative role was the role that reigned supreme for Weiler, a model which conceived the role of the arbitrator to be similar to that of a judge. Interestingly, notwithstanding any similarities that Weiler drew between Anglo-Canadian judging and arbitration, he noted that “...the type of arbitral creativity which is perfectly compatible with the adjudication role is a far cry from that usually associated with Anglo-Canadian judging.”\(^{61}\) Weiler does, therefore, on some levels embrace aspects of the core features of arbitral expertise, creativity being one. However, as will become fully obvious below Weiler stunts the full development of the core principles of expertise in his acceptance of the adjudicative model at the expense of the mediator and industrial policy making model.

Weiler considered arbitral expertise directly. Not surprisingly, he believed that arbitral expertise was interconnected to the role of arbitrator as adjudicator. The following is Weiler’s articulation of arbitral expertise:

I do not believe that arbitrators are expert labour-relations consultants who, through long experience with the parties, can solve their problems for them without reference to the agreement. Even if the parties wanted such paternalistic help (which is doubtful), arbitrators are generally ad hoc appointees and either members of the lower judiciary, law teachers, or members of some governmental agencies. They are thus not equipped for the role suggested by such as Douglas or Shulman. Rather they are experts in interpreting and applying, in an intelligent fashion, a collective agreement. By reason of long experience with this particular function, they become familiar with the labour relations “jargon” in the agreement, they underlying industrial reality, the type-problems for which different provisions are designed, and the types of inferences which should be drawn from statements in evidence.\(^{62}\)

Nestled within this passage are elements of the core features of arbitral expertise, most notably Weiler’s contention that arbitrators are “...experts in interpreting and applying, in an intelligent


fashion, a collective agreement” because of their familiarity with “‘jargon’ in the agreement.”
This statement echoes the third core principle, or purposive interpretation of a collective agreement. But just as notable is Weiler’s rejection of Shulman – or the notion that arbitrators, through experience and familiarity with the parties, can act on their own best judgment in devising a solution for the parties.63  

By accepting the adjudicative model and dismissing the other two models, Weiler was able to sidestep the more fundamental question of the deeper relationship between the law and arbitration, a question both Laskin and Beatty confronted head on. Weiler viewed the adjudicator role as superior to the other two roles insofar as in his role as adjudicator the arbitrator would necessarily avoid making decisions on areas which were beyond his role to contemplate.64  These areas included subcontracting and other “analogous areas” which did “...not have the mutually intended and established content...” to allow an arbitrator to step in and limit unilateral change.65  More to the point, in his role as adjudicator, the arbitrator could not stray into making decisions on the limitation of management decisions “...in the ‘unwritten’ area of the agreement in ‘neutral’ premises, such as the recognition clause, the union security, seniority, or wage provisions, on in the very fact of the agreement itself.”66  By staking this stance and rejecting the mediator and industrial policy making role, Weiler, by natural extension, did not create fertile ground from which the core principles of arbitral expertise could take root

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63 This should be contasted with Shulman’s statement above at p. 13.  
64 Weiler, supra note 54 at 82-83.  
65 Weiler, supra note 54 at 83.  
66 Weiler, supra note 54 at 83, and see also 76-77: For Weiler, this did not mean that arbitrators were precluded from meaningfully interpreting and applying the collective agreement. Indeed, Weiler embraced some of the creativity that an arbitrator would have to exercise in finding particular solutions to disputes that arose around the general provisions of the collective agreement. In this regard, as it has been discussed, elements of the core principles of arbitral expertise make an appearance in Weiler’s work.
and evolve. In some ways, the articulation of the abstract roles for arbitrators served merely as a conduit for Weiler to impose his own vision of the law as serving the interest of capital over labour. Furthermore, confining the arbitrator to the role of adjudicator (a role that did indeed involve a pared-down version of expertise) precluded the arbitrator from being able to achieve his full creative potential, something only possible when all the core principles of arbitral expertise were allowed to take root and flourish, including wise judgment.

Notwithstanding Weiler’s premonitions that the adjudicative model, with all its trappings, was the appropriate model for arbitration (something akin to Lon Fuller’s musings), a recurring theme throughout this paper is that such a preoccupation fails to undermine the core features of arbitral expertise. As the next section will demonstrate, other leading Canadian labour law thinkers embraced a functional vision of the law. Through such vision the core principles of arbitral expertise took root in the Canadian context and continue to develop and thrive today.

**ii) Laskin’s and Beatty’s Functional Vision of the Law**

Bora Laskin and David Beatty did not share identical visions of the law, but parallels can be drawn with respect to their functional uses of the law. Moreover, the parallels in their vision of the law were inextricably bound up with the core principles of arbitral expertise. This vision led the men to simultaneously embrace the core principles of arbitral expertise and to also lay the foundation for these principles to take root in the Canadian context.
For Laskin, the law was “primarily a system of duties, involving the proper recognition of the interests of others."\(^{67}\) Because the common law had failed, through such concepts as liberty and contract, to properly recognize the interests of others, Laskin envisaged a law of collective bargaining that would properly recognize such interests, and more particularly, give “...proper recognition to the interests of labour in its relation to capital...”\(^{68}\) Marrying his functional view of the law with the vision of law as a system of duties to reign in self-interested behaviour, it has been noted that “Almost single-handed and almost always working from first principles and without the aid of precedent, [Laskin] began the task of developing an industrial jurisprudence, ‘a common law of the shop,’ to deal effectively and equitably with the conflicting interests which are at play in the places in which people work.”\(^{69}\) It is in this jurisprudence that one can find Laskin breathing life into the four core principles of expertise. This becomes more clear by briefly reviewing some of Laskin’s earliest awards on the remedial authority of the arbitrator. The principles for which these cases stand align with the core principles of arbitral expertise.

In one of Laskin’s earliest arbitration decisions,\(^{70}\) he was faced with the issue as to whether the company was obligated to pay for a portion or all of the time spent by union representatives during working hours partaking in the grievance procedure. This issue had been left undetermined in the collective agreement. Tuning into the interests of labour and capital alike

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\(^{69}\) Ibid. at 694.

\(^{70}\) McQuay-Norris Manufacturing Company of Canada Limited(1947), 1 L.A.C. 81.
and wholly sensitive to the labour relations issues at stake, Laskin, working from first principles, articulated his duty as follows:

As I see my duty in this case, it is to find a basis of decision which will conduce to orderly collective bargaining and which can consistently with that objective find support in the facts of this case as revealed by the evidence, and in accepted principles and practices prevailing in similar situations in organized industry.

The first of the three core principles of arbitral expertise are, similarly, embraced in such reasoning. Using his own best judgment, with a competence of the labour relations issues at stake, Laskin set out to provide the parties with a practical interpretation of the collective agreement, one that would support “…orderly collective bargaining.” This was ultimately why Laskin gave due thought to the interests of both parties in formulating a solution. The union may have been correct in arguing that obstacles which prevented the smooth operation of the grievance process should be avoided, however this did not deter Laskin from placing some of the responsibility for the administration of the collective agreement on the union’s shoulders. The result of the case is, therefore, not surprising. While the company was ordered to pay for all working time union committee men spent participating in the grievance procedure, the union was put on notice that should the committee men fail to act expediently, the company would be within its rights to file a grievance.

\[71\text{ Ibid at 85: Laskin states as follows: “The servicing of grievances under a collective agreement is, as the late Mr. Justice Gillanders pointed out in United Steelworkers of America, Local 2853 v. Welland-Vale Manufacturing Company Limited, (1943) 3 D.L.R. 786, part of the process of collective bargaining. As such it can hardly be said to be something which is either of not concern to the Union or of no concern to the employer; certainly it is concern to both but also, and especially, to the employees who constitute the employer’s working force, and it is designed to be a contribution to the efficient operation of the enterprise owned and managed by the employer. If this makes plausible the argument that the whole cost of collective bargaining ought to be attributed to the management of the enterprise, it is an argument which must be offset by the necessity of fixing the Union with a proper share of responsibility for the smooth functioning of the production programme of the enterprise under the collective agreement governing its operations.”}\]

\[72\text{ Ibid. at 85.}\]
A year later, Laskin was faced again with a challenge to his remedial authority, although this time in a much more direct fashion. In *Northern Pigment Company Limited*, the union processed through a grievance to arbitration alleging that seven employees had been improperly laid off as a result of their greater plant-wide seniority than employees who had remained in service. The union based its grievance in a term of the collective agreement which dealt with indefinite lay-offs. The Board of Arbitration held that the Company had not acted inappropriately with respect to six of the seven men who had been laid off. However, they found that the seventh man was indeed qualified to do work and, as a result of his seniority, should not have been laid off. The interesting challenge came by way of the company who asserted that the “…Board ha[d] merely declaratory powers and cannot give substantive relief.” Laskin outright denied this contention and, in turn, stated that the “…Board would be shirking its duty under the Collective Agreement, if it stopped short of enforcing compliance therewith through appropriate sanctions” thus opening the door for the fashioning of a remedy that involved awarding the grievor the job of kiln operator if he so elected.

The awarding of substantive relief and the fashioning of remedies in order to provide a binding decision is a theme that runs throughout Laskin’s early awards. In this regard, the seminal case on this point is Laskin’s decision in *Polymer*, a case that was affirmed by the

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73 (1948), 1 L.A.C. 216.
74 *ibid.* at para. 1. The precise wording of the collective agreement section issue was as follows: For the purpose of indefinite lay-offs to reduce the working forces and for the purposes of the returning to work of men so laid off, plant-wide seniority shall be the governing factor just so long as the employees thus retained or recalled, are qualified and willing to do the work which is available.
75 *ibid.* at para. 16
76 *ibid.* at para. 16.
77 See e.g. *Amalgamated Electric Corporation* (1950), 2 L.A.C. 597 at paras. 12-13, 18.
Supreme Court of Canada.\textsuperscript{78} The *Polymer* set of cases dealt with an arbitrator’s ability to award damages upon a finding of a breach of the collective agreement. In Laskin’s award, he confirmed an arbitrator’s power to award a remedy notwithstanding a collective agreement’s silence on the issue.

Often working from first principles in these uncharted territories, Laskin breathed life into the four core principles of arbitral expertise. But again, it was his vision of the law as a restraint on self-interest and to ensure equity between the interests of labour and capital which more profoundly impacted the development of arbitral expertise in the Canadian context. In *Falconbridge Nickel Mines Ltd.*\textsuperscript{79}, this vision becomes obvious but so too does the fact that the four core principles of arbitral expertise required such vision to ensure longevity. In other words, Laskin married expertise with vision and it his model, and not some constricted abstract model such as the adjudicative model, which serves as the benchmark in the Canadian context.

In *Falconbridge Nickel Mines Ltd.*, Laskin was faced with determining the legitimacy of the company’s actions to contract out work pursuant to the collective agreement. The grievance alleged that three employees were denied a collective agreement right to work as trackmen. The work in dispute had been contracted out to a general contractor subsequent to the company issuing a work order. The work lasted five to six weeks. The grieving employees had been employed with the company in the position of trackmen for a period of years. There was no question that the employees were experienced and could do the work. The position of the company was, in short, that they were unfettered both by “practice and construction of the

\textsuperscript{78} (1959) 10 L.A.C. 51, aff’d 26 D.L.R. (2d) 609 (Ont. H.C.); 28 D.L.R. (2d) 81 (Ont. C.A.); 33 D.L.R. (2d) 124 (S.C.C.).

\textsuperscript{79} (1958), 8 L.A.C. 276.
collective agreement” to contract out the work.\footnote{Ibid. at para. 6.} The collective agreement did not expressly prohibit contracting out work.

In this case, Laskin rejected the reserved rights theory, accepting instead the notion that “…one party to a collective agreement cannot be permitted unilaterally either to modify it or to nullify it, save with the consent of the other.”\footnote{Ibid. at para. 15} This did not mean that unilateral action was never permitted, but only that it be “…compatible with the integrity and preservation of the bargaining unit.”\footnote{Ibid. at para. 16} In coming to such a conclusion, one that indeed personifies Laskin’s vision of the law, Laskin also offered insight into the then growing trend of courts reviewing authority of arbitration board decisions. Highlighting his acceptance of the fourth of the core principles of arbitral expertise, Laskin noted that this reviewing authority was “…not likely to stultify the necessary creativeness of boards in their day to day administration of adjudication of grievance disputes.”\footnote{Ibid. at para. 19} While a discussion of the reviewing authority of the courts is beyond the scope of this section, it’s clear that Laskin’s vision of the law infused his acceptance of the core principles of arbitral expertise.

David Beatty is a Canadian labour law scholar who, like Bora Laskin, married his vision of the law with the core principles of arbitral expertise. In his article, “The Role of the Arbitrator: A Liberal Version,”\footnote{David Beatty, “The Role of the Arbitrator: A Liberal Version” (1984) 34 U. Toronto L. J. 136} Beatty, like Laskin, adopts a functional view of the law. Like Laskin, Beatty was not content with a “rigidly positivistic perception of the law,”\footnote{Ibid. at 143.} a perception that was evident in the reserved-rights treatment of management rights. Beatty, however, viewed
law as a tool to serve liberal-democratic objectives. For Beatty, embracing a liberal democratic vision of the law and the principles of justice at the centre of such a vision, led him, like Laskin, to contend that arbitrators operating within such a vision were perfectly suited to resolve disputes involving management’s discretion, a heated topic as the subject matter of such a dispute arguably fell outside of the strict confines of the text of the agreement.

Beatty argued that a liberal democratic view of the law lent itself to a purposeful interpretation of the collective agreement, an approach that allowed arbitrators to resolve disputes concerning management rights:

In theory, the resolution of disputes concerning the exercise of management’s discretion conforms precisely to the purposeful method of interpretation to which the forms and structure of adjudication are so well suited. The resolution of disputes about how managerial discretion is exercised is entirely amenable to a process of presenting proofs and reasoned argument because essentially it draws on and applies standards from the most basic, least contentious principles of justice in liberal theories of law (formal equality, relevant reasons, detrimental reliance, etc.). And as I shall describe, the practice of collective bargaining confirms that hypothesis. Both the experience of arbitrators in developing principles by which to assess how management exercises its discretion and the parties’ inclusion of those same and related principles in some of the most fundamental written terms of the agreement (for example, discharge and promotions) provide strong support for the viability of the arbitral process in resolving such disputes. The doctrines of fairness developed by arbitrators and the parties’ own utilization of them provides empirical evidence which effectively counters the claim that arbitral review of the exercise of managerial prerogatives entails an inappropriate policy-making role – a reorganization of the enterprise in which management is conducted by and subordinated to the arbitration process.86

While Laskin and Beatty did not share identical visions of the law, Beatty, most likely influenced by Laskin, paved the way through such a vision for the core principles of arbitral expertise to take root in the Canadian context. This is most obvious in Beatty’s commitment to a purposeful

86 Ibid. at 145.
interpretation of the collective agreement, the third core principle of arbitral expertise. Furthermore, underlying Beatty’s contention that arbitrators (embedded within this liberal democratic view of the law) were free to develop doctrines such as fairness is Beatty’s commitment to all four of the core principles of arbitral expertise.

**iii) Harry Arthurs Derides Professionalization of Arbitration**

In 1977, while Dean of Osgoode Hall Law School, Harry Arthurs presented a rousing paper to the National Academy of Arbitrators titled “Arbitration: Process or Profession?” Themes which Arthurs picks up on in this paper are reminiscent of several of Benjamin Aaron’s comments reflected upon earlier. Arthurs opens his paper with the grim message that both the National Academy and the profession of arbitration were in “a time of trouble.” And while the trouble stemmed from the usual suspects of cost, delay, and complexity, Arthurs devoted the bulk of the paper to pointing the finger inward at the profession itself, personified by the National Academy, and the over-professionalization of arbitration at the expense of process. Arthurs cautioned his peers, “We have all tried to improve the process by being better professionals. Yet, ironically, professionalism in arbitration – represented in its highest form in this Academy – may have acted as a catalyst in triggering fundamental, irreversible, and undesirable changes in the process.” Arthurs message, not unlike Aaron’s, was that the expertise of an arbitrator was bound up with *what the arbitrator did* as opposed to *what affiliation the arbitrator belonged to.*

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87 Arthurs, *supra* note 53.
88 Arthurs, *supra* note 53 at 222.
89 Arthurs, *supra* note 53 at 225.
The over-professionalization of arbitration was leading, moreover, to an alteration of the relationship between the arbitrator and the parties, in some ways reducing the autonomy of the parties due in large part to arbitrators’ over-reliance on “industrial law” as opposed to “industrial-relations values.” Arthurs argued that the result of this shift was that “...the industrial relations community is less and less the producer of its own rules, more and more the consumer of those devised and dispensed by arbitrators. And arbitrators are less and less the servants of the parties and more and more the oracles of a brooding legal omnipresence.” The crux of the matter in Arthurs’ opinion could be found in the arbitrators’ preferences and the “informal agenda” of the National Academy. While Arthurs, unlike Aaron, was not dealing explicitly with the issue of arbitral expertise (or more particularly what this expertise was not) it is readily apparent that Arthurs was dismayed at the prospect that his peers (and the National Academy) equated expertise with increasing professionalization. Arthurs does not supply an explicit answer to his growing concern. It is, however, apparent that the simple answer would

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90 Arthurs, supra note 53 at 226.
91 Arthurs, supra note 53 at 227.
92 Arthurs, supra note 53 at 227.
93 An interesting contrast to Arthurs’ musings before the National Academy is a paper he presented several years later at Dalhousie Law School at the Wickwire Lecture in November of 1994 (See Harry Arthurs, “A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion (1995) 18 Dalhousie L.J. 295). The paper is interesting not because Arthurs offers further insight into the professionalization of arbitrators but instead because Arthurs points the finger at the entire legal profession and legal expertise more generally. Arthurs takes the position that the legal profession was not sustainable as a collective whole because of the need for lawyers to develop an expertise, or specific knowledge. The idea that “lawyers can and should know everything” (at 301) is rejected by Arthurs. Arthurs notes that “There are intellectual limits to what each of us is able to know, and more importantly, there are practical limits as to what any of us needs to know and can afford to know. Attempts to make us all omnicompetent are doomed. Until we admit and act on this fact, we will continue to make false claims about what we know, continue to offer bad advice to clients and society, and worst of all, continue to delude ourselves about our own capacities and contributions. In short, we will implode intellectually” (301). The fall out, however, of lawyers having to know more and gain an expertise was a stratification of the profession along untenable knowledge fault lines.
see arbitrators making the process of arbitration, or a commitment to the industrial relations community, a priority over the trend of rising professionalization of arbitration.

**Chapter III: Re-evaluating *Weber* through the Lens of Arbitral Expertise**

The first two chapters of this paper provide the framework for what will be, in effect, a re-evaluation of the “*Weber*-debates” through a new lens. While much of the debate amongst academics and practitioners alike in the wake of *Weber v. Ontario Hydro* revolved around the Court’s alleged troubling treatment of arbitrator’s jurisdiction, little attention has been paid in these disputes to the Court’s treatment of arbitral expertise. Comparing and contrasting the Court’s articulation of arbitral expertise with the four core principles of arbitral expertise and their evolution in the Canadian context adds new fire to the debate. Of course, there is nothing novel in the observation that the Court considered the expertise of the tribunal at the centre of the judicial review action; what is novel is the contention that re-evaluating the Court’s articulation of arbitral expertise in light of the evolution of the core principles of arbitral expertise in the Canadian context provides an answer to what *Weber* means for labour arbitrators. Critically, most of the debate, some of which will be touched on below, has centred on what impact *Weber* has had on arbitrators’ jurisdiction. The further contention of this paper is that debates bogged down in arbitrators’ proper jurisdiction are indicative of the continued trend of increasing professionalization of arbitrators. The answer to this conundrum, as will be fully discussed below, lies in Ben Aaron’s and Harry Arthurs’ sentiment that arbitration is a process not to be sacrificed at the expense of expanding the profession.

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94 *Supra*, note 1.
This chapter will proceed first with a brief survey of some of the “Weber debates” that have circled since the Court released its decision in June of 1995. This will be followed by an examination of Weber and its successors’ treatment of arbitral expertise. Finally, the chapter will close by juxtaposing the four key principles of arbitral expertise – principles that have, should, and will continue to thrive in the Canadian context under the Laskin/Beatty vision of the law – with the Court’s articulation of arbitral expertise. This juxtaposition will make clear that the Court, while not always entirely cogent or expansive, arguably places its faith in arbitral expertise to handle the myriad of ever-dynamic issues that will inevitably be placed before labour arbitrators. Moreover, the final section of the chapter will once again, in the Aaron and Arthurs tradition, call on arbitrators (and the labour bar more generally) to examine the growth of professionalization amongst arbitrators at the expense of a commitment to process.

i) A Brief Survey of the “Weber Debates”

In 1995, the Court came down with its much-anticipated decision in Weber. Mr Weber, the plaintiff in the case, was an employee of Ontario Hydro. He was granted an extended leave of absence because of ailing back problems and was paid sick benefits by Ontario Hydro during this time. Ontario Hydro, suspicious that Mr. Weber may have been malingering, hired private investigators to inquire into Mr. Weber’s situation. In the course of the investigation, information came to light to suggest that Mr. Weber was, indeed, malingering and it was on the basis of this information that Ontario Hydro suspended Mr. Weber for abuse of sick leave. Mr. Weber responded by filing a grievance against Ontario Hydro through his union as well as commencing a court action based on tort and breach of Charter rights. While the grievance was
settled, the court action, initially dismissed by a motion’s court judge for lack of jurisdiction, was appealed all the way to the Supreme Court of Canada. Because the Court favoured the exclusive jurisdiction model whereby differences between the parties that arise out of a collective agreement are dealt with exclusively at arbitration, the tort action was dismissed. The Court found that the language of the collective agreement was broad enough to cover the tort issue in this case. The Court furthermore dismissed Mr. Weber’s Charter claims holding that the arbitrators powers and duties extended to handling Charter claims.

As a result of this decision, a wave of debates was spawned amongst scholars and practitioners alike. Very briefly, there are a few general themes that can be picked up on in the Weber debates. Primarily, the debates centre around jurisdiction and arbitrability. Some critics have, however, implicated the limits of arbitral expertise specifically in their critiques. The sentiment expressed is doubt concerning arbitral expertise to manage issues that arise outside of the four corners of the grievance and/or collective agreement. The fear is that while arbitrators “…can legitimately lay claim to labour relations expertise” arbitrators “…can find themselves in unfamiliar territory, where the expertise they have has little bearing on the matter which they are asked to determine.” The critiques of Weber that allude to arbitral expertise are, however, more generally connected to an overarching concern that Weber inappropriately expands the jurisdiction of the arbitrator, or those issues to which an arbitration can lay claim.

95 See Weber, supra note 1 at para. 35. The motion’s court judge dismissed the action on the basis that it was outside the court’s jurisdiction as the matter arose out of the collective agreement. The motion’s court judge further ruled that the matter was private and thus the Charter did not apply.
97 Ibid. at 71-72.
Interestingly, often without an abundance of analysis, “…policy reasons that have stood the test of time”\textsuperscript{99} are offered as the rationale in defense of the jurisdiction critique.

Other critics have provided more analysis when it has come to critiquing \textit{Weber} for the Court’s failure to appreciate the limits of an arbitrator’s rightful jurisdiction. One very vocal critic is the esteemed Canadian arbitrator, Michel Picher. In a piece titled “Defining the Scope of Arbitration: The Impact of \textit{Weber} – An Arbitrator’s Perspective,”\textsuperscript{100} offers the following:

…the line of jurisdictional fence-plotting has been made extremely wobbly and unpredictable for judges and arbitrators attempting to apply \textit{Weber} because of the ambiguity of the Court’s two-fold test for vesting exclusive arbitral jurisdiction: the nature of the dispute and the ambit of the collective agreement. As is becoming painfully evident, courts and arbitrators are frequently at a loss to define those disputes which arise “inferentially” from the collective agreement. Bearing in mind that legislators in their wisdom have long required that collective agreements be in writing, and that arbitrators have generally been sensitive not to imply unduly rights and obligations not reduced to writing, absent some clear indication in the language or scheme of the collective agreement itself, the new concept of matters arising “inferentially” from the collective agreement creates an unprecedented standard upon whose application honest adjudicators will inevitably differ, and in relation to which employers and unions may exercise less contractual control and predictability.\textsuperscript{101}

Leaving aside for the moment Picher’s contention that it has become “painfully evident” that arbitrators and courts alike in the post-\textit{Weber} world are struggling to determine which disputes can be said to have arisen from the agreement by inference, the more interesting point is that

\textsuperscript{99} Surdykowski, \textit{supra} note 96 at 72.
\textsuperscript{101} \textit{Ibid.} at 115.
arbitral expertise is alluded to in the above-noted passage, but the core principles are not. This is apparent in an arbitrator’s ability to remain “…sensitive not to imply unduly rights and obligations not reduced to writing” into the agreement. In other words, an arbitrator’s expertise is confined to a near-literal application and interpretation of the rights and obligations which have been reduced to writing in the collective agreement.

Some scholars have expressed concern that Weber (and its successors) present an obstacle to the private nature of grievance arbitration. While the validity of these concerns are also worth debating, the central contention of this paper is that arguments that Weber opened the floodgates thus expanding arbitrators’ jurisdiction can be addressed by paying more attention to the Court’s pronouncement on arbitral expertise. In this regard, the next section will address Weber and its successors for their understanding of arbitral expertise.

ii) Examining Weber and its Successors for Their Understanding of Arbitral Expertise

This section will explore Weber as well as two of its successors, Parry Sound (District) Social Services Administrative Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.) (“Parry Sound”) and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General) (“Quebec”), for their treatment of the issue of arbitral expertise.

Looking at the Court’s opinion in Weber as well as Parry Sound

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105 While this paper will not discuss Weber’s primary predecessor in any detail, it is important to briefly mention the case of St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704. The Court in Weber relied on this case for the principle that a party cannot sue on a collective agreement in court. The facts of the case are relatively straightforward. St. Anne Nackawic sued for damages relating to losses
and \textit{Quebec} (decisions in which the Court attempted to clarify the scope of \textit{Weber}) provides a more fulsome etching of the Court’s understanding of arbitral expertise.

The frustration for many arbitrators and the labour bar at large, as has been touched on already, is the Court’s inability to fully grasp arbitral jurisdiction. In short, the Court committed a serious error when it accepted Ontario Hydro’s argument that the proper place to settle Mr. Weber’s tort and \textit{Charter} claims was in the arbitral forum. McLachlin J, as she then was, writing for the Majority, held that “The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.”\textsuperscript{106} Herein lies the two-fold test for which \textit{Weber} became infamous. What has been largely overlooked, however, is the Court’s treatment of arbitral expertise.

In \textit{Weber} the Court broached the subject of arbitral expertise in the context of its analysis of the three views on the effect of final and binding arbitration clauses in labour legislation. In its discussion of the view of “exclusive jurisdiction” (or the view that “…if the differences between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute”\textsuperscript{107}) the Court took note of the appellant Weber’s argument that “…jurisdiction over [tort] claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims

\textsuperscript{106} \textit{Weber}, supra note 1 at para. 52.
\textsuperscript{107} \textit{Weber}, supra note 1 at para. 50.
raise.”

It is useful to relay McLachlin J.’s response to such concerns that tort and Charter claims were beyond an arbitrator’s expertise:

The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance.109

Part of the arbitrator’s expertise alluded to in this passage is his ability to deal in a quick and efficient way with the entirety of the dispute placed before him. Moreover, McLachlin J.’s answer is more interesting for what is not said than what is said. In other words, McLachlin J. does not agree with the contention that arbitrators lack the expertise necessary to handle common law or Charter claims. While the suggestion that any “error” can be dealt with through judicial review actions is unsatisfactory reasoning, it is important to point out that the Court in Weber opens the door to an acceptance that arbitrators can indeed masterfully work through the myriad of diverse disputes placed before them because of their expertise including where these disputes relate to common law and Charter issues.

Because the analysis of arbitral expertise in Weber is thin, it is helpful to examine some of Weber’s successors for their contribution with respect to the Court’s articulation of labour arbitrators’ expertise. In Parry Sound, we see the Court engage in a more extensive discussion of arbitral expertise. Parry Sound involved the termination of a probationary employee who had recently returned from maternity leave. While the grievance filed by the employee simply alleged that the company had acted unfairly and in bad faith, the union argued that the

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108 Weber, supra note 1 at para. 55.
109 Weber, supra note 1 at para. 55.
substantive rights and obligations of the *Human Rights Code*\(^{110}\) were incorporated into the collective agreement and had been violated through the company’s dismissal of the employee. The issue to be determined in *Parry Sound* then was whether or not the substantive rights and obligations of the *Human Rights Code* were incorporated into each collective agreement over which the Board had jurisdiction (arguably a distant variant of the issue before the Court in *Weber*). The Court ultimately held that it was within arbitrators’ jurisdiction to enforce the substantive rights and duties of human rights legislation.

In holding that the arbitrator had the power to interpret and apply the substantive rights and obligations of the *Human Rights Code*, the Majority delved into an analysis of the various policy considerations which weighed on their decision, some of which directly revolved around their notion of arbitral expertise.\(^{111}\) The Court was challenged to compare arbitral expertise with the expertise of other tribunals (e.g. human rights tribunals) and concluded that any greater expertise other tribunals have over arbitrators was “... outweighed by the significant benefits associated with the availability of an accessible and informal forum for the prompt resolution of allegations of human rights violations in the workplace.”\(^{112}\) Moreover, while the Court makes a number of boilerplate statements with respect to the notion of arbitral expertise (arbitrators are adept in providing “speedy decisions”; arbitrators are “sensitive to the workplace environment”\(^{113}\)), the Court acknowledges that “...expertise is not static, but rather, is something that develops as a tribunal grapples with issues on a repeated basis.”\(^{114}\) Such a statement proves

\(^{110}\) R.S.O. 1990, Chapter H.19.

\(^{111}\) *Parry Sound*, supra note 104 at paras. 53-54.

\(^{112}\) *Parry Sound*, supra note 104 at para. 53.

\(^{113}\) *Parry Sound*, supra note 104 at para. 50.

\(^{114}\) *Parry Sound*, supra note 104 at para. 53.
that the Court has made a serious attempt to grasp the notion of arbitral expertise. While the Court does not allude to any of the four core principles of arbitral expertise, such a statement is an acknowledgement that arbitrators’ expertise is a living and thriving entity.

In *Quebec*, the issue of arbitral expertise is touched on only tangentially by the Majority. However, the Dissent offers a fruitful analysis. In *Quebec*, another ruling of the Court decided in the shadow of *Weber*, the Court was faced with question as to whether the Quebec Human Rights Tribunal (“Tribunal”) should be barred from hearing a complaint of discrimination that had been referred to it on the grounds that the labour arbitrator had exclusive jurisdiction of the issue. *Quebec* forced an issue, therefore, left undecided by *Parry Sound*. In *Parry Sound*, the issue was whether or not the substantive rights and obligations of the *Human Rights Code* were incorporated into collective agreements. The Court in *Parry Sound* did not have to determine whether other statutory tribunals vested with jurisdiction over, for example, human rights claims ousted an arbitrator’s jurisdiction or whether the arbitrator maintained exclusive jurisdiction over these claims.

The origins of *Quebec* were rooted in a complaint filed by a minority group of young teachers before the Tribunal alleging that the school board and teacher’s union had entered into an agreement that discriminated against the group’s interests. The Majority in *Quebec* held that the Tribunal should not be barred from hearing a complaint of discrimination referred to it on the ground that the labour arbitrator has exclusive jurisdiction over the dispute. Highlighting that *Weber* did not “...stand for the proposition that labour arbitrators always have exclusive
jurisdiction in employer-union disputes,”¹¹⁵ and viewing the case in its “factual matrix,”¹¹⁶ the Majority concluded that this was a case that could be dealt with by the Tribunal and could not be said to be exclusively the arbitrator’s to handle.

While the Majority in Quebec does not deal with the issue of arbitral expertise, the dissenting judges offer useful insight. Holding that the referral of human rights’ disputes to an arbitrator was the “logical choice,”¹¹⁷ the dissenting judges make a series of interesting comments with respect to the nature of arbitral expertise as understood vis-a-vis other tribunals (e.g. human rights tribunals) which also have certain expertise.¹¹⁸ In the Quebec case, it was clear to the dissenting judges that arbitral expertise, given the facts at hand, trumped the expertise of other tribunals, primarily because the issue in Quebec required an understanding of the issue in the context of the entire agreement, and not just in the context of a narrow clause of the collective agreement.¹¹⁹ Whether the dissenting judges are right or wrong is beside the point. What does, however, matter is that the judges give ample credit to the value of arbitral expertise. Writing for the Dissent, Justice Bastarache states the following: “...I would also note that decisions of the Human Rights Tribunal and of arbitrators are all subject to judicial review, and that it is therefore not so much their legal expertise that should concern us here as their expertise in assessing facts...”¹²⁰ One can see a glimmering of the second core principle of arbitral expertise in this statement – the arbitrators’ ability to grasp at an almost subterranean appreciation of the facts. Like in Weber, the Court doesn’t hesitate to point to the availability of

¹¹⁵ Quebec, supra note 103 at para. 11.
¹¹⁶ Quebec, supra note 103 at para. 23.
¹¹⁷ Quebec, supra note 103 at para. 69.
¹¹⁸ Quebec, supra note 103 at para. 72.
¹¹⁹ Quebec, supra note 103 at para. 69.
¹²⁰ Quebec, supra note 103 at para. 69.
judicial review to “fix” the legal mistakes of an arbitrator (a statement that is troubling but perhaps predictable).

The message to take away from Quebec, as well as Weber and Parry Sound is that the Court is prepared to give arbitral expertise credit where credit is due. This observation opens up a new lens through which Weber can be viewed. The task now is to tie this observation to the Weber debates discussed above as well as to the core principles of arbitral expertise reflected upon in Chapters 1 and 2. This is the challenge put to task in the following section.

iii) Juxtaposition of the Four Core Principles with the Court’s Articulation of Arbitral Expertise

By way of summary, the general thrust of the Weber debates of most concern to this paper is that the Court in Weber inappropriately expanded the jurisdiction of arbitrators. In this regard, some critics have pointed out that the Court’s holding offends arbitral jurisdiction as arbitrators are now obligated to decide on issues outside of expertise shaped by “…policy reasons that have stood the test of time…”121 Other lines of criticism have focused on the Court’s construction of a new concept of the dispute that arises “inferentially” from the collective agreement.122 What is missing from this line of attack on Weber, but also missing more generally from the stream of ‘chatter’ which ensued amongst the labour bar in the wake of Weber and its successors, is a serious consideration of the Court’s treatment of arbitral expertise.

The Court in Weber opens the door to an acceptance that arbitrators have the expertise to work through the myriad of diverse disputes that are placed before them. As the Court in Quebec clarified, “…Weber does not stand for the proposition that labour arbitrators always have

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121 Surdykowski, supra note 96 at 72.
122 Picher, supra note 100 at 115.
exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.”¹²³ Where matters do not fall under legislation (e.g. human rights matters) – disputes that raise, as in Weber, common law or tort issues – this should not lead to a “jurisdiction crisis” for the arbitrator.¹²⁴ In short, the Court gives credit to arbitral expertise where credit is due. In Parry Sound, the Court emphasizes that “…expertise is not static, but rather, is something that develops as a tribunal grapples with issues on a repeated basis.”¹²⁵ The Court’s articulation of arbitral expertise also invites a re-analysis of the meaning of arbitral expertise in the Canadian context.

The history of arbitral expertise in the Canadian context has been the evolution of this expertise through the bridging of the four core principles with the Laskin/Beatty vision of the law. Expertise has not been statically tied to a correct role for the arbitrator, but has instead been about the continual development and evolution of the four core principles made possible through Laskin’s vision that law is designed to curb self-interest and to ensure parity between the competing interests of capital and labour. In this way, personal judgment, competence regarding the industrial enterprise and industrial relations, the ability to purposively interpret the collective agreement, and finally, creativity are tools of the arbitral trade fostered under such a vision. Arbitration is a craft; as craftsmen and craftswomen, arbitrators have the expertise to manoeuvre through those cases which raise common law or tort issues.

¹²³ Quebec, supra note 103 at para. 11.
¹²⁴ This begs the question: have we forgotten Laskin’s decision in Polymer underscoring the arbitrator’s task, in the face of labour legislation across the country, to provide a final and binding settlement to disputes between the parties that arise under the collective agreement?
¹²⁵ Parry Sound, supra note 104 para. 53.
Turning to a very recent arbitration decision of a well regarded Canadian arbitrator, Paula Knopf, who was faced with applying Weber in the context of a preliminary objection to the arbitrability of a grievance on the grounds that the subject matter of the grievance exceeded the Board’s jurisdiction, sheds light on the observations made above. In Conestoga College v. Ontario Public Service Employees, Local 237 (Hofer Grievance)\textsuperscript{126} (“Conestoga”), a rare employer grievance was filed in which the College alleged that one of its employees had violated the Professional Development Leave provisions of the collective agreement. The employer sought a declaration that there had been a breach of the collective agreement and to be reimbursed by the employee in the amount of $70,324.27 which was the amount the employee had received while on leave.

The facts of the Conestoga case are relatively straightforward. Mr. Hofer had applied for a leave of absence pursuant to the collective agreement for three stated purposes, one of which was to pursue the executive-style MBA program offered by the University of Windsor. The leave of absence was granted, commencing in January of 2007. Mr. Hofer received both partial salary as well as tuition assistance while on leave. However, in early 2008, it came to the College’s attention that Mr. Hofer had not enrolled in the executive-style MBA program but had instead enrolled in a MBA-certificate program that was not comparable to the executive-style program. In response to the College’ grievance demanding a declaration and a monetary award of compensation, the union raised the preliminary objection that the Board lacked the jurisdiction on the grounds that the College had failed to allege any violation of the collective agreement by the union. Moreover, the union argued that the matter was not arbitrable as the collective

\textsuperscript{126} [2009] OLAA No. 143 [Conestoga]
agreement did not provide grounds upon which to base an individual remedy against Mr. Hofer. The thrust of the College’s argument was threefold. To begin, the matter was arbitrable as the grievance, in its essential nature, was about a violation of an article of the collective agreement – the ‘over-payment’ of monies to an employee on leave. Moreover, the College argued that the *Colleges Collective Bargaining Act*\(^{127}\) ("Act") mandated that the Board provide a solution to any dispute that arose under the collective agreement which would be binding upon any employee impacted by such a decision. Finally, and most importantly, the College pointed to the developing case law which held that it was within the Board’s jurisdiction to award an individual remedy to the College against an employee in light of the language of the *Act*.

This is precisely the type of case that worries the *Weber* critics. The facts of the case are contentious; in short, the College is using the grievance process to “sue” one of it’s employees for breach of contract. Arbitrator Knopf, as chair of the Board, puts arbitral expertise into motion. The issue of the Board’s jurisdiction in this case (as in the vast majority of cases) was raised at the outset as a preliminary objection; the merits of the case could only be determined if the preliminary objection was denied, as it was in this case. Implicitly operating under a Laskin/Beatty functional view of the law, Arbitrator Knopf acknowledges that “Employer grievances are rare events and they rarely find their way to arbitration” and furthermore “It is also unusual for employers to be arguing for a ‘broad and liberal’ interpretation of a grievance of for a Union to be presenting preliminary objectives,”\(^{128}\) but the rarity of the events does not dissuade Arbitrator Knopf from (rightly) determining that the issue before the Board was an

\(^{127}\) R.S.O. 1990, Chapter c. 15.

\(^{128}\) *Conestoga,* supra, note 126 at para. 15.
arbitrable “difference” arising under a provision of the collective agreement.\textsuperscript{129} This was perhaps the easier question for Arbitrator Knopf and the Board to determine. The more difficult – and the one requiring the application of arbitral expertise – was whether it was within the Board’s jurisdiction under the collective agreement and the governing legislation to make a remedial order against Mr. Hofer.

Again, because jurisdiction is a preliminary objective, the Board had only to determine whether issuing damages against an individual employee was within the Board’s authority. Whether this order would actually be made could only be determined upon a full hearing on the merits. While the Professional Development Leave provisions of the collective agreement were silent on the issue of the Board’s authority to award damages, Arbitration Knopf employed a purposive interpretation of the collective agreement by utilizing the tools available to the Board (e.g. the language of the Act which made clear that a board of arbitration must issue a “final and binding” decision\textsuperscript{130}) in order to determine the arbitrability of the grievance.

It was open to the Board in this case to become mired in arguments around jurisdiction. The Union argued that “…not every allegation of wrong-doing is subject to arbitration” and that the “…alleged facts reveal no allegations of a breach of the Collective Agreement…”\textsuperscript{131} Citing supporting case law (without becoming too reliant on such case law) as well as Weber, the Board ultimately concluded as follows:

The question of whether Mr. Hofer is entitled to the monies he received under the auspices of Article 20 can only be resolved by interpreting and applying Article 20 to the relevant facts in this case. Therefore, this

\textsuperscript{129} Conestoga, supra, note 126 at para. 17.
\textsuperscript{130} Conestoga, supra note 126 at para. 18.
\textsuperscript{131} Conestoga, supra note 126 at para. 12.
College grievance arises under the Collective Agreement, must be determined in accordance with the Collective Agreement and accordingly falls exclusively within the adjudicative and remedial authority of a board of arbitration. That authority includes the right to make declarations regarding the interpretation of the Collective Agreement and the right to make remedial orders against the individual employee who is bound by its provisions and affected by the conclusions that are reached.132

Deciding in this fashion, instead falling into the trap of the “juridical” characterization of the issue, is the hallmark of arbitral expertise - viewing the issue through the “eyes” of the arbitrator at work in her craft.

It’s possible that the Court in New Brunswick v. O’Leary (“O’Leary”)133, the companion case to Weber, delivered a message similar to Arbitrator’s Knopf’s message in Conestoga. In O’Leary, the appellant, Mr. O’Leary, was a traffic counter operation with the Province of New Brunswick (“Province”). His role required that he travel throughout the province. The Province sued Mr. O’Leary as a result of alleged damage he caused to one of the Province’s vehicles. Mr. O’Leary took the position that it was not within the Court’s jurisdiction to handle the claim because the subject matter was dealt with in the collective agreement. Furthermore, the governing labour relations legislation provided that adjudicators appointed under the legislation were vested with exclusive jurisdiction to provide a final and binding determination to the dispute.

Mr. O’Leary was unsuccessful at striking out the statement of claim on the basis that the Court lacked jurisdiction. He appealed the motion court’s decision, but the Court of Appeal agreed with the lower court. The Supreme Court of Canada, however, disagreed with both lower

132 Conestoga, supra note 126 at para. 21.
courts. Relying on the reasoning in Weber, the Court concluded that “…it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.” [emphasis added]. The essence of the dispute in this case involved the preservation of the Province’s property and the Court was clear that altering the juridical characterization of the dispute did not lift it out of the collective agreement. A pre-occupation with the juridical characterization of disputes between labour and management is akin to a pre-occupation of attempts to foolproof an arbitrator’s jurisdiction. What is perhaps less obvious is that it is also a natural outgrowth of the professionalization of arbitration.

The fear that the Court has misconstrued or damaged the boundaries around arbitrator’s jurisdiction is Weber needs to be re-evaluated for the reasons discussed above but also because it reveals how far the professionalization of arbitration has come at the expense of process. In the Canadian context, the labour arbitrator is a creature of statute and, as such, his jurisdiction is limited to fulfilling the terms of the applicable governing legislation. However, these terms are wide and generally mandate that the arbitrator, as in the Conestoga case, provide a final binding solution to a dispute that has arisen under the terms of the collective agreement. A pre-occupation with jurisdiction is, primarily, a pre-occupation with the professionalization of arbitration. Whether long-held policy reasons are cited, or a wayward Court who fails to understand the murky concept of jurisdiction, jurisdiction is, at its core, about staking territorial lines around the issues which belong to arbitrators making arbitrators like any other professional, or as Ben Aaron would suggest, closer to “…lawyers, physicians, veterinarians, chiropractors,

134 Ibid. at para. 6.
135 Ibid. at para. 7.
barbers, cosmetologists, seeing-eye dog trainers, funeral directors and embalmers, structural pest-control operators, and members of other licensed professions or occupations.”

It is also about a ever-increasing trend by arbitrators to root awards in legal precedent, as well as the desire to become established in rank and stature within the profession. In short, it is about the preservation of the profession. Harry Arthurs would caution that such a pre-occupation with professionalization occurs at the expense of focusing on the process of arbitration. It has been the contention of this paper that turning the gaze on labour arbitrators’ expertise – to the core principles of this expertise – shifts the focus back to process and what it is the arbitrator is doing when he is engaged at work in his craft.

**Conclusion**

This paper opened with a question: what is the substance of a labour arbitrator’s expertise? Critics may say that reducing this expertise to four very nebulous core principles – a contradiction in terms – contributes nothing to our understanding of expertise. Maybe these critics would suggest that an arbitrator’s rightful jurisdiction precedes any discussion of an arbitrator’s expertise. This paper contends, however, that debates about jurisdiction probably benefit the continual professionalization of arbitration, or the construction of territorial lines around arbitrators’ work in order to assert the presence of a profession. Professionalization, as Harry Arthurs warned correctly over three decades ago, has its price, and for arbitration, that price is full engagement in the process. This process is, really, what the core principles of arbitral expertise – principles which have thrived in the Canadian context thanks to the

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136 Aaron, *supra* note 34 at 158.
Laskin/Beatty vision of the law – are all about. And in this regard, re-examining the Court’s articulation of arbitral expertise in *Weber* and its successors should give one pause because the Court appears to give expertise credit where credit is due. This paper opened with question, but will, alas, close with another: are arbitrators likewise willing to place their faith in expertise even if it means parting with a professional stamp of approval?
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