CHAPTER SEVEN

Did *Weber* Affect the Timeliness of Arbitration?

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In two recent papers, Ontario's then Chief Justice Warren Winkler described the present system of grievance arbitration as one which "can be slow, expensive and detached from the realities of the workplace."[1] He argued that it "has lost its course, has lost its trajectory, has lost its vision," and "is at risk of becoming dysfunctional and irrelevant."[2]

Justice Winkler was calling for a new urgency in response to an old problem. Researchers and commentators have argued since the early 1970s that the system is prone to unnecessary delay.[3] Empirical research on time delay in arbitration shows a steady increase in the average time from initiating a grievance to the rendering of an arbitration award in all Canadian jurisdictions studied.[4] Moreover, studies have shown that

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1. Warren K Winkler, "Arbitration as a Cornerstone of Industrial Justice" (Kingston, ON: Queen's University School of Policy Studies, 2011) [Winkler, "Industrial Justice"].

2 Warren K Winkler, "Labour Arbitration and Conflict Resolution: Back to Our Roots" (Donald Wood Lecture delivered at the Queen's School of Policy Studies, 30 November 2010), online: www.ontariocourts.on.ca/coa/en/ps/speeches/2010-labour-arbitration-conflict-resolution.htm.

3 Howard Goldblatt, *Justice Delayed: The Arbitration Process in Ontario* (Toronto: Labour Council of Metropolitan Toronto, 1974).

4 Goldblatt, *ibid*; Joseph B Rose, "Statutory Expedited Grievance Arbitration: The Case of Ontario" (1986) 41:4 *Arbitration Journal* 30 at 30–35; John Fricke, *An Empirical*

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delay in labour arbitration can harm contract negotiations, cause financial loss to the employer, harm the quality of the arbitration hearing itself as memories of the material events dim with the passage of time, inhibit productivity by generating both employee restiveness and uncertainty among supervisors and impose injustice on employees whose rights under collective agreements are less likely to be fully vindicated as time elapses.[5]

Given the persistence and the stakes of the problem, it is important to understand its root causes. One prominent argument, advanced by Chief Justice Winkler and echoed by others in the labour relations community, is that the expansion of arbitral jurisdiction has fostered delay by increasing both the potential for litigation over the scope of arbitral jurisdiction and the complexity of legal issues with which arbitration must deal.[6] Among the most notable expansions of arbitral jurisdiction was that effected by the Supreme Court of Canada's decision in *Weber v Ontario Hydro*[7]. In *Weber*, the Supreme Court of Canada ruled that arbitrators have exclusive jurisdiction with respect to "disputes which expressly or inferentially arise out of the collective agreement."[8] *Weber*'s definition of arbitral jurisdiction is notoriously ambiguous, giving rise to extensive commentary and repeated litigation over which issues fell within arbitral jurisdiction and which did not. It also effectively gave the Supreme Court's blessing to a considerable expansion of arbitral jurisdiction beyond the four corners of rights and obligations contained in collective agreements. *Weber* and subsequent jurisprudence applying it have found tort actions by employees against employers, issues related to pension plans and benefit and welfare plans not expressly incorporated into collective agreements, and claims of violation of the *Canadian Charter of Rights and Freedoms*, to fall within the exclusive jurisdiction of labour arbitrators. *Weber* thus presented labour arbitration with a host of new

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Study of the Grievance Arbitration Process in Alberta (Edmonton: Alberta Labour, 1976) ; Allen Ponak & Corliss Olson, "Time Delays in Grievance Arbitration" (1992) 47:4 *Industrial Relations* 690; Kenneth W Thornicroft, "Accounting for Delay in Grievance Arbitration" (1993) 44:9 *Labor Law Journal* 543; Gilles Trudeau, "The Internal Grievance Process and Grievance Arbitration in Quebec: An Illustration of the North American Methods of Resolving Disputes Arising from the Application of Collective Agreements" (2002) 44:3 *Managerial Law* 27.

5 Allen Ponak et al, "Using Event History Analysis to Model Delay in Grievance Arbitration" (1996) 50:1 *Industrial and Labor Relations Review* 105.

6 Winkler, "Industrial Justice," above note 1.

7 [1995] 2 SCR 929 [*Weber*].

8 *Ibid* at para 59.

Electronic copy available at: https://ssrn.com/abstract=3024097

and potentially quite complex legal and factual issues that had the potential to increase delay within the system.

To be sure, this is not the only theory that may account for increased delay in Canadian labour arbitration. Others are briefly reviewed in Part A below. But, like most other theories of the problem, the *Weber* delay hypothesis has not been empirically tested. Previous studies have focused on proximate rather than underlying causes of delay. There has been no published quantitative research into the timeliness of labour arbitration procedures in Canada since 2002, and none that could capture the effects of arbitral jurisdiction on delay. In this paper we present results from a comprehensive statistical study attempting to analyse quantitatively the impacts on efficiency and delay in arbitration of the subjects added to arbitral jurisdiction by the Supreme Court's decision in *Weber*. We find that the subject matter jurisdiction added by *Weber* has had little or no impact, and argue that there are good reasons in theory to believe that this finding is correct. The causes of delay in labour arbitration likely lie elsewhere. Whatever the flaws of the *Weber* decision, systemic effects on delay are not among them.

We begin in Part A with a framework of hypotheses with respect to potential causes of delay in labour arbitration. This framework makes clear that the theory of delay consequent upon expanded jurisdiction is simply one of several that could account for increasing delay. It also clarifies the conceptual bases of our research methods. Part B briefly sets out our methods of data collection and analysis. Part C presents a quantitative analysis, for the year 2010, of the incidence of *Weber* issues within Ontario labour arbitration awards and the relationship between decisions on those issues and time elapsed at each stage of the arbitration process. Part D presents our conclusions, along with their policy and research implications.

A. POSSIBLE CAUSES OF INEFFICIENCY AND DELAY IN LABOUR ARBITRATION

Arbitration is a form of private dispute resolution provided through a competitive market. In principle, therefore, the parties should be able to control the process so as to ensure its efficiency. The policy premises of the Canadian labour arbitration system assume that efficiency is in the interests of both parties. Cases involving serious matters of discipline or

discharge have tended to be handled more quickly, suggesting that arbitration can in fact operate more rapidly where the parties want it to do so.[9]

On its face, the apparent persistence and growth of delay in that system therefore presents something of a puzzle. But upon closer examination of labour arbitration as an institution and of the literature on delay, one can identify several types of potential explanations. First, legislation or wider legal culture may impose demands and constraints upon arbitration that lie outside the control of the parties. Second, the stable preferences of one or more of the parties may undermine demand for expeditious dispute resolution. Third, even where both parties have stable general preferences for expeditious dispute resolution, incentive or coordination problems in the short term may prevent them from demanding it effectively. Finally, it is possible that institutional or cultural factors impede or undermine the willingness of arbitrators to supply expeditious dispute resolution. We briefly consider each type of potential explanation in turn.

1) Exogenous Demands and Constraints

Exogenous demands and constraints upon arbitration that result in increasing delay might arise from one or more of four sources.

a) Increased Frequency of Complexity Due to the Expansion of Jurisdiction

First, expansion of arbitral jurisdiction by legislation or court decision might have increased the proportion of cases raising numerous or complex legal or factual issues that must be decided through labour arbitration.[10] In legally and factually complex cases, the goal of timeliness has always existed in tension with the over-riding imperative to provide a forum in which legal and factual issues can be fully and fairly adjudicated. Since the *Weber* decision in 1995, arbitrators in Ontario and elsewhere have been tasked with interpreting and applying a wide variety of laws beyond the terms of collective agreements. As a consequence of *Weber*, arbitrators can be called upon to interpret and apply tort law, the *Charter*, and rights under pension, benefit and welfare plans. The Supreme

9 Ponak et al, above note 5; Ponak & Olson, above note 4; Kenneth W Thornicroft, "Sources of Delay in Grievance Arbitration" (1995) 8:1 *Employee Responsbilities and Rights Journal* 57 [Thornicroft, "Sources of Delay"].

10 Winkler, "Industrial Justice," above note 1; Trudeau, above note 4.

Court of Canada's decision in *Parry Sound (District) Welfare Administration Board v Ontario Public Service Employees Union Local 324*[11] in 2003 confirmed, in addition, that arbitrators have jurisdiction to interpret and apply human rights codes as though they formed part of collective agreements. *Charter*, common law, human rights and pension and benefit claims arguably tend to raise issues of greater factual or legal complexity than do claims raised under terms and conditions negotiated into collective agreements. Such non-collective agreement claims may also raise issues of fact and law that are not as familiar to the arbitrator or party representatives and may therefore require more time to address.

b) Increased Frequency of Lengthy Cases as an Unintended Consequence of Increased Use of Mediation-Arbitration

In Ontario, these effects might be compounded by the unintended consequences of increased use of mediation-arbitration (med-arb). Med-arb might successfully resolve a high proportion of simpler disputes, leaving relatively more cases presenting complex legal or factual issues for arbitration and placing greater demands on arbitration at a system-wide level. It might thus change the composition of the population of cases decided at arbitration and increase delay within that population, despite making resolution of the overall population of disputes referred to arbitration more efficient. It should be noted, however, that this hypothesis is unlikely to account for the full extent of increased delay, as the tendency towards increased delay predates the increased use of med-arb by at least two decades.

c) Increased Litigation of the Scope of Jurisdiction

As both the prior literature and the essays in this volume make clear, *Weber* might have contributed to delay by leaving the scope of arbitral jurisdiction ambiguous, thus increasing the proportion of cases raising jurisdiction issues that must be decided prior to dealing with the merits of a dispute. Overlapping jurisdiction may also produce delay, as arbitration proceedings are deferred pending outcomes in other forums.[12]

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11 2003 SCC 42 [*Parry Sound*].

12 Randi Hammer Abramsky, "The Ontario Law Reform Comission Report on Delay and Multiple Proceedings: A Critique" (1996) 4 *Canadian Labour and Employment Law Journal* 353; Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 *Canadian Labour and Employment Law Journal* 179; Carter, "Looking at *Weber* Five Years Later," above note 5; Craig Flood, "Efficiency

d) Culture of Legalism

Some have argued that a culture of legalism has infected labour arbitration, leading to greater use of tactics such as procedural objections, unnecessarily lengthy presentation of witness evidence, unduly extensive cross-examination of witnesses and a tendency on the part of arbitrators to issue legally rigorous and extensive reasons not necessarily of direct interest to the parties.[13] Consistent with these contentions, previous research has found that the use of lawyers as representatives can increase delay.[14] Furthermore, arbitrators as a group may be caught up in a culture of legalism, producing awards with a level of detail in legal and factual analysis that is out of proportion to the matter under consideration.[15]

2) Demand Factors: Party Preferences

Arbitrators are appointed by agreement of the parties. While they obtain their formal powers to manage the arbitration process from the *Labour Relations Act*, the practical extent of the mandate of an arbitrator to manage the process often also flows from the agreement, or at least the implicit expectations, of the parties. Arbitration is generally *ad hoc* and the continuing work of arbitrators depends upon their continuing acceptability within the labour relations community. In the absence of clearly communicated expectations to the contrary, arbitrators will often default to case management practices that are widely accepted. These in turn are likely to reflect the common and stable preferences of parties within a given geographic or industrial sector.

There is generally nothing to prevent parties from streamlining the entire arbitration process to provide for rapid appointment of arbitrators and scheduling of hearings, limited presentation of oral evidence, compressed time for the presentation of legal argument and short deadlines for rendering arbitral awards. Ontario has provided all collective agreement parties with access to a publicly-operated expedited arbitrator appointment system since 1979, a system which has been shown to

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v. Fairness: Multiple Litigation and Adjudication in Labour and Employment Law" (2000) 8 *Canadian Labour and Employment Law Journal* 383.

13 Winkler, "Industrial Justice," above note 1.

14 Thornicroft, "Sources of Delay," above note 9.

15 Winkler, "Industrial Justice," above note 1.

reduce delay.[16] Privately-developed expedited arbitration systems have reduced case handling times in industries such as garment, rail and longshoring for many years.[17] Such procedures can be expected to reduce delay.[18] Grievance mediation systems have also proven effective at reducing backlogs of cases that can clog arbitration schedules.[19]

There is some evidence that parties are moving to reduce delay in arbitration in Ontario. Earlier studies have shown a shift from three-person arbitration boards to the appointment of single arbitrators, a shift which stands to reduce delay.[20] Furthermore, as noted above, the shift in Ontario from traditional arbitration procedures towards med-arb may also increase rates of pre-hearing settlement.

Yet there is little evidence of widespread change in the way that parties choose or design arbitration proceedings themselves. Privately-administered expedited arbitration systems remain uncommon.[21] While the use of three-person panels has continued to decline in the last two decades, so has the use of Ontario's expedited arbitration system.[22] This suggests that parties either prefer traditional arbitration proceedings, or have trouble agreeing upon or implementing alternatives. Furthermore, if one party is more interested in timeliness than the other, it will likely only agree to use expedited procedures where the more interested party makes negotiating concessions on other matters.

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16 Rose, above note 4; Kevin Banks, Richard Chaykowski & George Slotsve, "Arbitration as Access to Justice: An Update on the Profile of Labour Arbitration Cases in Ontario" (Presentation delivered at the 2011 Industrial Relations Conference "Building and Maintaining Healthy Workplace Relationships," 16–17 June 2011) [unpublished].

17 Mark Thompson, "Expedited Arbitration: Promise and Performance" in William Kaplan, Jeffery Sack & Morley Gunderson, eds, (1992) 1 *Labour Arbitration Year Book* (Toronto: Lancaster House, 1992) 41; David C McPhillips, Peter R Sheen & Wayne Moore, "Expedited Arbitration: A New Experience for British Columbia" in William Kaplan et al, eds, (1996-1997) 1 *Labour Arbitration Year Book* (Toronto: Lancaster House, 1996) 29.

18 Rose, above note 4; Thompson, above note 17.

19 Elizabeth Rae Butt, "Grievance Mediation: The Ontario Experience" in *School of Industrial Relations Research Essay Series No 14* (Kingston, ON: Industrial Relations Centre Queen's University, 1988); Mitchell S Birken, *Grievance Mediation: The Impact of the Process and Outcomes on the Interests of the Parties* (Kingston, ON: IRC Press, 2000).

20 Ponak & Olson, above note 4; Thornicroft, "Sources of Delay," above note 9.

21 Thompson, above note 17; Winkler, "Industrial Justice," above note 1.

22 Banks, Chaykowski & Slotsve, above note 16.

Having first considered why one party or both parties might have stable preferences for processes associated with delay, we next turn to consider how short-run incentives or coordination problems may impede agreement on expeditious processes.

a) Greater Value Placed on Perceived Fairness or Correctness

Parties may attach greater value to the fairness or perceived fairness of arbitration proceedings, or the substantive correctness of the decision, than to timeliness. In one study, employers ranked quality of arbitral awards as a greater concern than timeliness.[23] Unions may seek to minimize the risk that grievors will perceive the process to be unfair, if grievors tend to place greater weight on procedural fairness than on substantive outcome in deciding whether they are satisfied with grievance processes.[24] Unions may also take a cautious approach to procedural formalities in order to minimize the risk of the legal costs and political problems associated with a duty of fair representation complaint by a dissatisfied grievor, even though expedited arbitration procedures generally do not violate legal duties of fair representation.[25]

b) Minimizing the Risk of Unpredictable Outcomes

For the same reason, unions may take a cautious approach to arbitrator selection. Employers may seek to minimize downside risks as well. Previous analysts have hypothesized that the tendency of collective agreement parties to prefer a small number of the busiest and most experienced arbitrators may reflect an effort to minimize risk of an unpredictable and negative outcome.[26] For similar reasons, a party or both parties may hire a preferred lawyer as a representative despite the potential for delay in scheduling a hearing in order to accommodate his or her schedule.[27]

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23 Arthur Eliot Berkeley, "The Most Serious Faults in Labor-Management Arbitration Today and What Can Be Done to Remedy Them" (1989) 40:11 *Labor Law Journal* 728.

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

25 Clarence R Deitsch & David A Dilts, "Case Characteristics Affecting the Method of Grievance Dispute Settlement" (1988) 1:2 *Employee Responsibilities and Rights Journal* 113; Thompson, above note 15; Donald D Carter, "Grievance Arbitration and the Charter: The Emerging Issues" (1989) 44:2 *Industrial Relations* 337.

26 Trudeau, above note 4.

27 Ponak et al, above note 5.

c) Allowing Time for Public Sector Decision-Making Processes

Earlier research suggests that the presence of public sector employers and unions is associated with greater delay.[28] One possible explanation for this may be that public sector actors may place less emphasis on speed and may have more cumbersome decision-making processes for grievance resolution.

d) Allowing Time for Healing

In some cases, delaying the resolution of a dispute may benefit one or both parties by allowing time to repair personal relationships in a non-adversarial forum, to find alternative job opportunities in order to separate antagonists, or to enable persons suffering from illnesses such as addiction to seek treatment sufficient to obtain a favourable prognosis. Increased awareness of such problems may have led to increased delay across the system.

3) Incentive or Coordination Problems

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

a) Lack of Information

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

b) Transaction costs

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

28 Ponak & Olson, above note 4; Thornicroft, "Sources of Delay," above note 9.

c) Up-Front Costs

Third, moving to a system in which arbitration cases are dealt with expeditiously may require clearing a backlog of earlier cases. If the backlog of cases is sufficiently large, one or more of the parties may be unwilling or unable to allocate sufficient resources to do so.

d) Agency Problems

Fourth, the incentives of agents may be misaligned — those dealing with arbitration of grievances may not have incentives to resolve grievances expeditiously. This may be the case, for example, where the remuneration or career advancement of counsel does not depend upon timely resolution of a particular case or set of cases, where timely resolution of disputes may simply increase counsel's workload but not his or her remuneration, where counsel's future income is not significantly dependent upon the particular client in question, or where the client does not sufficiently monitor and emphasize timeliness in awarding further work. There may also be agency problems between the union and the grievor. The grievor may care very much about timely resolution, but the union (like counsel) may have a full slate and large backlog of grievances, with no particular incentive to expedite most grievances.

e) Risk of Defection

Fifth, particular kinds of cases will often present parties with reasons for tactical delay. For example, an employer with a relatively weak case but internal political problems with a likely remedy may seek to delay resolution. Alternatively, an employer might choose delaying tactics in order to raise costs for a union and weaken its position within the overall bargaining relationship. For termination grievances where the employee is likely to be reinstated, the employer may have a strong incentive to delay in order to avoid that outcome. A union may advance a grievance for internal political reasons, despite its weakness as a legal claim, and choose to delay resolution in the hopes of reaching a negotiated settlement or at least delaying political fallout resulting from the likely dismissal of the grievance. In each situation, short-term incentives may trump longer-term interests in expeditious dispute resolution.

Resisting incentives to delay in such a case is a form of cooperation that depends on trust that the other party will similarly do so. Some important aspects of expedited procedures, such as early disclosure, the negotiation of agreed statements of fact or the willingness to use arbitrator

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

3) Supply of Expeditious Dispute Resolution

One study found some arbitrators to be associated with greater delay in a statistically significant way.[29] Recent research suggests, however, that procrastination is unlikely to be widespread among arbitrators, and that as a group arbitrators are less prone to procrastination than the general population.[30] On the other hand, it might be hypothesized that leading arbitrators are often too busy to write awards in a timely manner, while less experienced but more available arbitrators often lack the skills and experience required by the parties. As a result, there might effectively be a shortage in the supply of expeditious dispute resolution.

B. RESEARCH METHODOLOGY

This paper reports results from a comprehensive statistical study of efficiency and delay in Ontario, Canada's largest jurisdiction. This is the first published study to attempt to quantify the impacts on efficiency and delay of subject matters added to the scope of arbitral jurisdiction. To do this, we have compiled a unique database to which we apply a range of statistical analyses.

29 Thornicroft, *ibid*.

30 Allen Ponak, Daphne G Taras & Piers Steel, "Personality and Time Delay Among Arbitrators" in Paul D Staudohar & Mark I Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50: Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators, Philadelphia, Pennsylvania, May 26-29 2010* (Arlington, VA: BNA, 2011).

1) The Database

The database for our analysis contains the main characteristics of every publicly reported arbitration decision in Ontario in 2010. Arbitrators are required by law in Ontario to file their awards with the Ontario Ministry of Labour. The Ministry makes those awards publicly available. They are also published in Quicklaw's Ontario Labour Arbitration Awards (OLAA) database. This provides access to a complete census of awards, in keyword searchable full text format.

Using a coding frame for the arbitration decisions piloted in initial research conducted in the spring and summer of 2011, detailed information regarding the characteristics of the arbitration decisions was recorded using the decision as the unit of observation. For each decision, the database includes the date intervals at each of the following three stages of the arbitration process:

1) event giving rise to the grievance and/or the initiation of the grievance to the commencement of hearings;
2) the commencement of hearings to the close of hearings; and
3) the close of hearings to the rendering of an award.

This information formed the basis for the construction of the dependent time variables utilized in the analysis, including: Event to First Hearing Time; Grievance to First Hearing Time; Hearing Days; Hearing Time; and Award Time (refer to Appendix Table 1, Panel B for definitions of these variables).

The database also included detailed information about the characteristics of the case and the parties involved, including the following ten data:

1) the arbitrator;
2) the type of arbitration board (sole arbitrator or three person panel);
3) the gender of the arbitrator;
4) the gender of the grievor;
5) whether the employer is in the government, health, education or private sector;
6) whether the award was issued under expedited arbitration or med-arb provisions of the *Ontario Labour Relations Act*;
7) whether the parties used an agreed statement of fact;
8) whether the arbitrator decided a contested issue of fact;
9) whether the employer or union was represented by counsel; and

10) award outcomes (grievance dismissed or upheld).

The database also included the procedural and substantive subject matters decided in the award, which formed the basis of case subject matter variables that are a main focus of this analysis. Each subject was constructed as a dichotomous variable (coded 1 if a subject of the case and 0 if not). A detailed list of the subjects is provided in Appendix Table 1, Panel B.

In *Weber*, the Supreme Court of Canada held that arbitrators have jurisdiction to decide any dispute that in its essential character arises expressly or inferentially out of the interpretation, application, administration or alleged violation of a collective agreement. In subsequent jurisprudence applying *Weber*, the scope of arbitral jurisdiction was extended beyond disputes concerning legal rights and obligations contained in the collective agreement. Arbitrators have assumed jurisdiction to interpret and apply legal rights and obligations created outside of the collective agreement and not incorporated into the collective agreement, where necessary to resolve disputes with a sufficient factual nexus to subject matters governed by collective agreements. Such external sources of law include most notably tort law, the *Charter*, and pension and benefit plans not incorporated into a collective agreement but which nonetheless specifically provide for the payment of benefits in certain circumstances. The Supreme Court itself acknowledged that arbitrators may lack expertise in matters such as tort law or the *Charter*, and said that the answer to such concerns was judicial review.[31] This answer might assist in ensuring the correctness of outcomes, but fails to respond to the concern that adding unfamiliar and potentially contentious issues to the docket of the arbitration system might increase delay. The ambiguity of the nexus to the collective agreement also, in the eyes of many commentators, increased the likelihood of litigation over the scope of arbitral jurisdiction itself.

To examine the effects of *Weber* jurisdiction on delay, we examined four subject matter variables. Specifically, we examined whether or not pension plans, benefit or welfare plans, *Charter* and tort issues were addressed in the arbitration cases and, if so, what effects they had on delay. In order to further assess the potential impact of *Weber*, we also constructed a combined *Weber* variable (refer to Appendix Table 1, Panel C for the definition) that captures whether any of these four subjects are addressed in a given case. We do note that while arbitral jurisdiction

31 *Weber*, above note 7, at para 55.

to decide tort claims must be founded on *Weber*'s interpretation of the *Labour Relations Act*, the same is not true of all cases related to the other "*Weber* subjects" identified above. We do not, however, attempt to quantify the number of cases in which arbitrators took jurisdiction based on *Weber*. This is for a number of reasons. Given the ambiguity of *Weber* jurisdiction, and the fact that it may not be raised as an issue for decision and therefore not discussed in all cases in which jurisdiction must be legally founded on *Weber*, this would be a complex task. We therefore first seek to identify the prevalence of subject matters with respect to which *Weber* increases the likelihood that arbitrators will take jurisdiction, and to analyze what effects, if any, deciding such issues has on delay. In this way we can identify whether *Weber* is likely to have any impact on delay. If we found that deciding such issues causes delay, we might then undertake a qualitative review of such cases to try to quantify more precisely the prevalence of decisions that expressly, or by necessary implication, were based upon *Weber* jurisdiction. As we indicated in the introduction, it turned out that we did not find such effects and therefore did not need to undertake further qualitative review of these awards.

We also sought to measure the effects that *Weber* might have had on delay within the system by increasing litigation over the scope of jurisdiction. There are many potential jurisdiction issues in addition to whether the dispute bears a sufficient nexus to the collective agreement under the *Weber* test. This makes it likely that many, if not most, jurisdiction issues are not *Weber*-related. Our coding frame did not distinguish *Weber* jurisdictional issues from other such issues. Because we did find statistically significant effects of deciding matters of jurisdiction on delay (one of our control variables — see Appendix Table 1), we undertook a qualitative review of all awards coded as deciding a jurisdiction issue to identify any that decided *Weber*-related ones.

Interim and consent awards were identified so that they could be excluded from the population of final awards subject to analysis.

1) Statistical Methods

We begin our analysis with a descriptive profile of the distribution of arbitration cases by subject. This permits us to assess the overall incidence of issues. We then examine *Weber* issues and elapsed time at each stage of the arbitration process in order to determine, at a descriptive level, whether cases that address *Weber* issues are associated with longer times.

In the second stage of the analysis, using multivariate regression analysis, we examine the relationship between each of the time variables identified above and the type and number of legal issues associated with *Weber* jurisdiction and decided in arbitral awards. Our approach is to estimate formal hazard models where the dependent variable of interest is the duration of a process, or the time to exit from a state; in this analysis, the variable is the elapsed time between the close of arbitration hearings to the rendering of an award.[32] The duration distribution function represents the probability of exit from the state after a specified amount of time has elapsed. An alternative representation is the probability of survival in a given state to a given point in time. The basic building block in duration modelling is the exit rate or hazard function at some given point in time. For example, in discrete terms, the hazard function is the probability that a grievance for which the hearing has been concluded for "x" days will have an award rendered in the near future (short time interval of length x + y days). The survival function, or the duration density, can be completely described in terms of the hazard function.

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

The hazard rate can also be allowed to depend on observed characteristics of the grievance process. It is useful to distinguish between two classes of covariates.[33] The first class of covariates are termed time-invariant covariates, where the values of the covariates do not depend on the period of duration in a state; for example, the gender of the grievor. In the case of time-invariant characteristics, the duration in a state does not influence the value of the covariate since it does not change with time–therefore one would treat these covariates as exogenous to the duration process.

On the other hand, for time-varying covariates, for example, arbitrator case load, the level of the covariate depends on the duration in the state in question. There are various parametric and non-parametric

32 John D Kalbfleisch & Ross L Prentice, *The Statistical Analysis of Failure Time Data,* 2d ed (Hoboken, NJ: Wiley & Sons, Inc, 2002).

33 Mario A Cleves et al, *An Introduction to Survival Analysis Using Stata*, 2d ed (College Station, TX: Stata Press, 2008).

specifications to introduce covariates into duration and survival analysis.[34] For example, an oft-used mechanism is the proportional hazard specification, which adjusts the conventional hazard specification by assuming that a baseline hazard is proportional to a covariate function, where the covariates are thought to influence the duration in a state and the exit rate. The specific mechanism(s) to introduce covariates is an empirical issue and will be determined when we analyze the data.[35]

In our analysis, we first estimated each model as a Cox proportional hazard and tested the proportional-hazards assumption using the Schoenfeld residuals. If the model Cox proportional hazard was rejected, we then estimated an accelerated failure time (ATF) model for each of the following distributions: exponential, loglogistic, weibull, lognormal, and gamma. We chose the preferred distribution based on a Likelihood Ratio test in cases where the distributions were nested, and based on the Akaike's information criteria[36] in cases where the distributions were not nested. We also estimate each AFT model as a frailty model (a model with unobservable heterogeneity), using both gamma and inverse-gamma distributions. In all cases the frailty models were rejected based on a likelihood ratio test.

Our statistical analysis enables us to determine whether litigating jurisdictional or particular substantive legal issues, and whether the number of legal issues litigated, increases the likelihood of delay at each stage of the arbitration process in a given case.

C. DOES *WEBER*'S EXPANSION OF JURISDICTION CAUSE DELAY?

Our analysis demonstrates that *Weber*-related issues were neither frequent nor likely to be a cause of delay in the year under study. This strongly suggests that *Weber*'s expansion of jurisdiction has had no system-wide effects on delay in labour arbitration in Ontario.

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34 Marc Nerlove & S James Press, *Univariate and Multivariate Log-Linear and Logistic Models* (Santa Monica, CA: Rand Corporation, 1973).

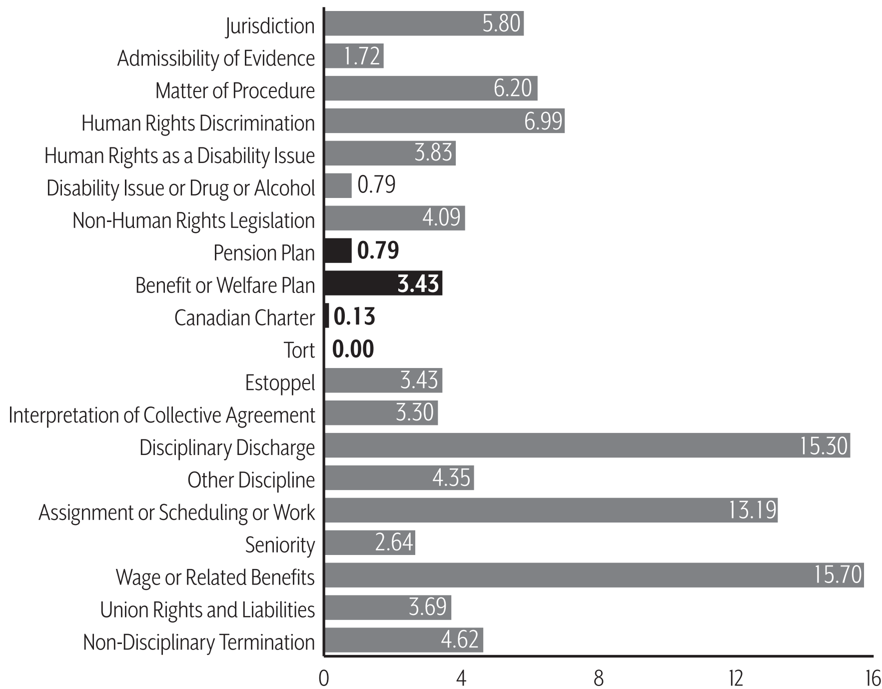
35 Nicholas M Kiefer, "Economic Duration Data and Hazard Functions" (1988) 26:2 *Journal of Economic Literature* 646.

36 *See* Hirotugo Akaike, "Information Theory and an Extension of the Maximum Likelihood Principle" in BN Petrov & F Csaki, eds, *2nd International Symposium on Information Theory* (Budapest: Akadémia Kiadó,, 1973) 267; Hirotugo Akaike, "A New Look at Statistical Model Identification," online: (1974) 19:6 *IEEE Transactions on Automatic Control* 716 http://ieeexplore.ieee.org; Hirotugo Akaike, "Likelihood of a Model and Information Criteria" (1981) 16 *Journal of Econometrics* 3.

1) The Frequency and Incidence of *Weber* Issues

The four substantive areas related to *Weber* jurisdiction accounted, collectively, for only approximately 4.3 percent of all arbitration cases in 2010. Among the four main subject areas related to *Weber* jurisdiction, those with the greatest case frequency were benefit or welfare plans (3.4 percent of cases), followed by pension plans (0.8 percent); the *Charter* was associated with only 0.1 percent of cases and no cases were associated with tort law.

FIGURE 1: DISTRIBUTION OF CASES BY SUBJECT



These small percentages stand in contrast to the continuing prevalence of traditional subjects of labour arbitration. The distribution of arbitration cases, by subject, is presented in Figure 1. In descending order, the subjects most frequently dealt with at arbitration were wages or related benefits (15.7 percent), disciplinary discharge (15.3 percent of cases), the assignment or scheduling of work (13.2 percent), human rights or other discrimination (7 percent) and matters of procedure (6.2 percent).

Arbitrators decided issues of jurisdiction in 5.8 percent of cases. As discussed above, our coding frame did not distinguish *Weber* jurisdictional

issues from other such issues. Accordingly, we reviewed each case in which a jurisdictional issue arose to identify the nature of the issue. That review found no case in which an arbitrator was called upon to determine whether he or she had jurisdiction to decide a matter on the basis of *Weber*'s recognition of exclusive arbitral jurisdiction to decide disputes arising expressly or inferentially from a collective agreement.

2) *Weber* Issues and Elapsed Time at Each Stage of the Arbitration Process

In this section we consider whether or not *Weber* issues are associated with increased time lapses in each of the three periods under study: (a) event or grievance to first hearing, (b) hearings and (c) completion of hearings to award.

a) Time Lapse at Each State of the Arbitration Process

We begin by considering the average time lapse at each stage of the arbitration process, shown in Figure 2, below. The most striking feature of this profile is that the time between event and arbitration far exceeds the time required for the arbitration process from first hearing to the rendering of an award. This finding is consistent with previous studies.[37] Across all cases, the average time from the event to first hearing is 307 days (see Figure 2). By contrast, hearing time averages 86 days, award time averages 46 days and total time for the arbitration process (hearing time plus award time) averages about 136 days.

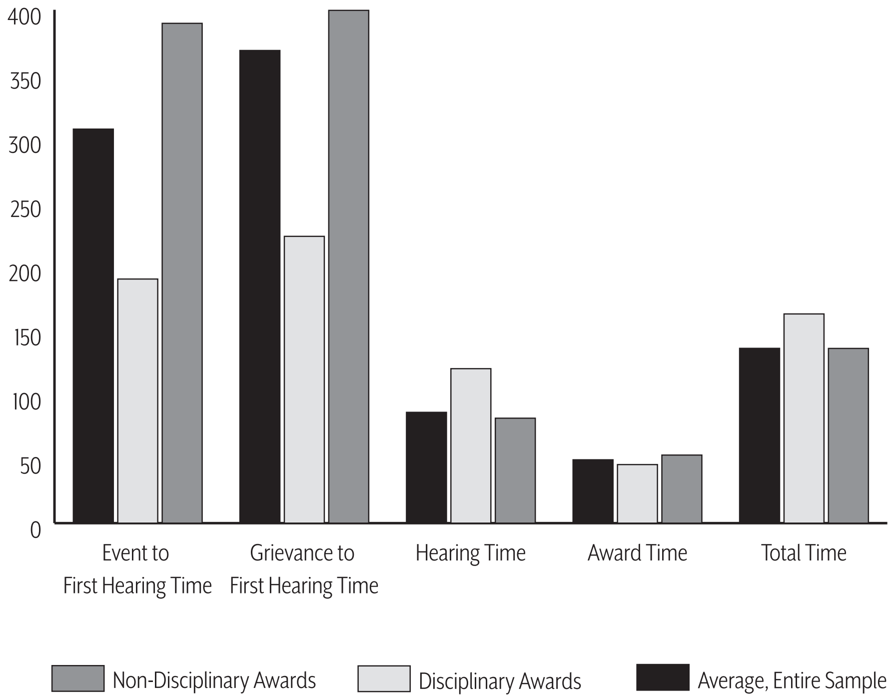
b) Time Lapse at Each Stage of the Arbitration Process: *Weber* Issues versus Traditional Labour Arbitration Issues

In order to provide a more nuanced perspective on time lapse and subject matter, for each stage of the arbitration process we examined the average time, and the proportion of cases completed over various time intervals, by detailed subject. This detailed assessment by case subject matter permits us to consider the time lapses in cases associated with *Weber* jurisdiction subjects in relation to the times associated with subjects that fall squarely within the historic scope of labour arbitration, and still constitute the bulk of the labour arbitration case load.

The proportions of cases completed at various intervals, by key subject, are provided in Table 1. Note that the table includes only two of the

37 Ponak et al, above note 5.

FIGURE 2: TIME LAPSE, DISCIPLINE AND NON-DISCIPLINE



four areas under *Weber* jurisdiction–pension plans and benefit/welfare plans–because there were too few cases in the sample that addressed the *Charter* and no cases that addressed tort law issues.

i) Time to First Hearing

One might hypothesize that the legal or factual complexity of *Weber*-related issues would increase preparation time and therefore lead to delay in scheduling hearings. However, times from grievance to first hearing for *Weber*-related subjects fall within the range of times for other more traditional subjects of arbitration.

It is noteworthy that times from event to first hearing for benefit and welfare plan issues were considerably longer than for other subjects shown in Table 1. Given the relatively short average time from grievance to hearing for benefit and welfare plan issues, the most likely explanation for the long delay from event to first hearing is that such issues are ongoing rather than discrete events that either may be raised as grievances following a long period during which they were not brought to the atten-

tion of the union, or were the subject of informal resolution discussions between the union and employer.

There is thus little basis in average times to first hearing upon which to conclude that *Weber* jurisdiction leads to delay. However, there is some evidence suggesting that the time interval from event to first hearing is governed by party prioritization of access to arbitration to a far greater extent than by the requirements to prepare for arbitration. The average time lapse from event to first hearing for discipline cases is roughly half (at 190 days) that of non-disciplinary cases (at 389 days). This is despite the fact that such cases show the longest average hearing time and a relatively low proportion of cases completed in 90 days or less (at 58 percent for discharge cases). It is logical to expect that longer hearings require greater preparation. This finding is consistent with earlier studies.[38] The much faster time to hearing, despite the greater length of hearings in disciplinary discharge cases, suggests that party prioritization exerts significantly greater influence over delay prior to hearings than does the complexity of the matter to be heard.

ii) Hearing Time

The two subject matter areas related to *Weber* jurisdiction with respect to which there were more than one decision observed — pension plans and benefit/welfare plans — had relatively low average hearing times at 54 and 103 days, respectively, with 80 percent and 72 percent respectively of cases completed in 90 days or less.

iii) Award Time

Benefit/welfare plan issues and jurisdiction issues had an average award time of about 60 days and 54 days respectively, which was lower than the award time for cases dealing with the interpretation of collective agreements (at 97 days) or work assignment or scheduling cases (at 88 days).

On the other hand, *Weber* jurisdiction cases dealing with pension plans had by far the highest average award time, at 403 days. However, given the small number of observations (fuve cases), this result may not be generalizable. Two of the five pension cases awards were rendered in thirty days or less, indicating that the long average time was due to a mere three decisions. It is possible that these decisions would be outliers in a larger sample population.

38 *Ibid.*

TABLE 1 TIME DURATION OF FINAL AWARDS

	Subject Matter			
	Pension Plan	**Benefit/ Welfare Plan**	**Wages and Related Benefits**	**Jurisdiction**
Hearing Time				
Average	54.20	103.60	52.75	83.47
% with hearing time of 30 days or less	80.00	72.00	75.70	71.88
% with hearing time of 60 days or less	80.00	72.00	79.44	75.00
% with hearing time of 90 days or less	80.00	72.00	82.24	81.25
% with hearing time of 120 days or less	80.00	72.00	82.24	81.25
Number of Observations	5	25	107	32
Award Time				
Average	403.40	60.20	45.19	53.56
% with award time of 30 days or less	40.00	48.00	60.75	50.00
% with award time of 60 days or less	40.00	64.00	80.37	65.63
% with award time of 90 days or less	40.00	72.00	85.98	81.25
Number of Observations	5	25	107	32
Event to First Hearing Time				
Average	345.00	577.71	382.41	500.75
% completed within 30 day	0.00	0.00	0.00	0.00
% completed within 60 days	0.00	0.00	2.27	0.00
% completed within 90 days	0.00	7.14	6.82	8.3
% completed within 180 days	0.00	21.43	22.73	8.3
% completed within 270 days	0.00	35.71	45.45	16.67
% completed within 360 days	100.00	50.00	56.82	33.33
% completed within 540 days	100.00	57.14	77.27	50.00
% completed within 700 days	100.00	71.43	86.36	83.33
Number of Observations	1	14	44	12
Grievance to First Hearing Time				
Average	452.00	287.25	376.05	546.81
% completed within 30 day	0.00	0.00	5.00	0.00
% completed within 60 days	0.00	0.00	7.50	9.5
% completed within 90 days	0.00	12.50	17.50	14.29
% completed within 180 days	50.00	50.00	30.00	19.05
% completed within 270 days	50.00	62.50	47.50	28.57
% completed within 360 days	50.00	87.50	57.50	42.86
% completed within 540 days	50.00	87.50	77.50	71.43
% completed within 700 days	50.00	87.50	82.50	80.95
Number of Observations	2	8	40	21

	Subject		
	Interpret. of Coll. Agt.	**Discharge for Discipline**	**Work Assign./ Sched.**
Hearing Time			
Average	96.61	140.44	88.08
% with hearing time of 30 days or less	52.17	45.45	65.11
% with hearing time of 60 days or less	52.17	54.55	69.77
% with hearing time of 90 days or less	65.22	57.58	79.07
% with hearing time of 120 days or less	69.57	65.66	79.07
Number of Observations	23	99	86
Award Time			
Average	89.09	47.73	57.01
% with award time of 30 days or less	39.13	44.55	50.00
% with award time of 60 days or less	60.87	66.34	74.42
% with award time of 90 days or less	69.57	83.17	84.88
Number of Observations	23	101	86
Event to First Hearing Time			
Average	453.3	177.56	363.69
% completed within 30 day	0.00	1.17	0.00
% completed within 60 days	0.00	10.23	0.00
% completed within 90 days	0.00	19.32	3.44
% completed within 180 days	0.00	67.05	13.79
% completed within 270 days	20.00	84.09	41.38
% completed within 360 days	50.00	93.18	58.62
% completed within 540 days	80.00	97.73	79.31
% completed within 700 days	90.00	98.86	96.55
Number of Observations	10	88	29
Grievance to First Hearing Time			
Average	284.75	183.56	316.41
% completed within 30 day	0.00	5.56	0.00
% completed within 60 days	8.33	16.67	11.76
% completed within 90 days	16.67	22.22	17.65
% completed within 180 days	50.00	72.22	23.53
% completed within 270 days	58.33	77.78	47.06
% completed within 360 days	66.67	83.33	70.59
% completed within 540 days	91.67	100.00	88.24
% completed within 700 days	100.00	100.00	94.12
Number of Observations	12	18	34

3) Results of Regression Analysis

We employ regression methods to investigate more rigorously the question of whether there are time delays in *Weber*-related cases. Following the statistical methods outlined above, we estimated regressions for each of the following dependent variables:

1) event to first hearing time;
2) hearing time;
3) award time; and
4) hearing days.

Each regression included each of the *Weber* subject variables (i.e., pension plan; benefit or welfare plan; and *Charter*) that are the main focus of the analysis, as well as a complete set of control variables (refer to Appendix Table 1, Panel C for a list of these variables).

The regression results for the disaggregated *Weber* issue variables are presented for each of the dependent variables in Panels A through D of Table 2. In addition, the results for the combined *Weber* variable are presented in Panel E. Overall, we find that the *Weber* issue variables are not statistically significant. Therefore, we find no empirical evidence to support a conclusion that there are meaningful impacts of the extension of arbitral jurisdiction arising from *Weber* on delay and, hence, on efficiency in labour arbitration.

The results suggest that *Weber* cases do not markedly differ from other cases dealing with jurisdictional issues. This would therefore also suggest that there are no significant impacts on delay of the extension of arbitral jurisdiction arising from *Weber*. We would caution, however, that these results are based upon a relatively small population of *Weber* jurisdiction issues, which makes it difficult to draw generalizable inferences from these observations.

TABLE 2 WEBER VARIABLE REGRESSION RESULTS

	Coefficient	Robust Standard Error	Z	P > |z|	95 % Confidence Interval	
Panel A: Event to First Hearing Time						
Pension Plan	.4450	.4162	1.07	.285	–.370657	1.260757
Benefit or Welfare Plan	–.3859	.2865	–1.35	.178	–.9475191	.1756382
Charter	.	.	.	.	.	.
Logistic regression; Number of observations = 336						
Panel B: Hearing Time						
Pension Plan	–.7984	.8838	-.90	.366	–2.53054	.9337593
Benefit or Welfare Plan	–.7741	.5800	-1.33	.182	–1.910827	.3625798
Charter	1.7237	1.0928	1.58	.115	–.4182048	3.865562
Lognormal regression; Number of observations = 482						
Panel C: Award Time						
Pension Plan	1.0769	1.1037	.98	.329	–1.086249	3.239982
Benefit or Welfare Plan	–.5309	.4035	–1.32	.188	–1.321824	.2599981
Charter	.9506	.7094	1.34	.180	–.4397474	2.340867
Lognormal regression; Number of observations = 484						
Panel D: Hearing Days						
Pension Plan	–.2174	.1329	–1.64	.102	–.4778954	.0430855
Benefit or Welfare Plan	–.2025	.1019	–1.99	.047	–.4022951	-.0026889
Charter	1.0280	.6730	1.53	.127	-.2911211	2.346943
Generalized Gamma regression; Number of observations = 503						
Panel E: Event to First Hearing Time						
Weber	–.1670	.2774	–.60	.547	–.7106936	.3766729
Generalized Gamma regression; Number of observations = 336						

D. CONCLUSIONS

Taken together, the results of the regression analysis and the qualitative examination of the *Weber* cases support the conclusion that there are no statistically significant impacts of the extension of arbitral jurisdiction arising from *Weber* on delay and efficiency in labour arbitration. The total number of cases raising issues within new jurisdiction is relatively small in relation to the total number of legal issues decided. When *Weber* issues do

arise, they do not appear to cause delay. We conclude that *Weber* issues are unlikely to have a significant impact on efficiency and delay within Ontario's labour arbitration system. These results point to the need to investigate the importance of other potential explanations for delay in labour arbitration in future research.

APPENDIX TABLE 1: VARIABLE DEFINITIONS

Panel A: Duration Variables		
Duration Variable	**Variable Definition**	**Code Value**
Event to First Hearing Time	Days (duration) between event and first hearing dates	Number
Grievance to First Hearing Time	Days (duration) between grievance and first hearing dates	Number
Hearing Days	Number of hearing days	Number
Hearing Time	Days (duration) between first hearing and last hearing dates	Number
Award Time	Days (duration) between last hearing and award dates	Number

Panel B: Subject Variables	
Subject Variable Definition	**Code Value**
Jurisdiction	0 "No" 1 "Yes"
Admissibility of Evidence	0 "No" 1 "Yes"
Matter of Procedure	0 "No" 1 "Yes"
Human Rights or Other Discrimination	0 "No" 1 "Yes"
Human Rights is a Disability Issue	0 "No" 1 "Yes"
Disability Issue is Drug or Alcohol Dependence	0 "No" 1 "Yes"
Non-Human Rights Legislation	0 "No" 1 "Yes"
Pension Plan	0 "No" 1 "Yes"
Benefit or Welfare Plan (whether insured or not)	0 "No" 1 "Yes"
Canadian Charter	0 "No" 1 "Yes"
Tort	0 "No" 1 "Yes"
Estoppel	0 "No" 1 "Yes"
Interpret. of Collective Agreement	0 "No" 1 "Yes"
Discharge for Discipline	0 "No" 1 "Yes"
Other Discipline (Non-Discharge)	0 "No" 1 "Yes"
Assignment or Scheduling of Work	0 "No" 1 "Yes"
Seniority	0 "No" 1 "Yes"
Wages or Related Benefits	0 "No" 1 "Yes"
Union Rights and Liabilities	0 "No" 1 "Yes"
Non-Disciplinary Termination	0 "No" 1 "Yes"

Panel C: Weber Variable		
Weber	= Pension Plan + Benefit or Welfare Plan + Canadian Charter + Tort	Number
Total number of Cases = 649		

Panel C: Regression Control Variables	
Variable Definition	**Code Value**
Award Dealt with ONLY subjects NOT LISTED	0 "No" 1 "Yes"
Award ALSO dealt with other issues	0 "No" 1 "Yes"
Industry of Firm/Employer	0 "Government" 1 "Health" 2 "Education" 3 "Other"
Sole arbitrator or tripartite	0 "Sole Arbitrator" 1 "Tripartite Board"
Award issued under the expedited arbitration provisions	0 "No" 1 "Yes"
Total number of Subjects Dealt With in the Award Number	Number
Did the parties provide the Arbitrator with an agreed statement of fact?	0 "No" 1 "Yes"
Total Number of grievances in Award Number	Number
Employer Represented by Legal Counsel	0 "No" 1 "Yes" 2 "Unknown"
Union Represented by Legal Counsel	0 "No" 1 "Yes" 2 "Unknown"
Total Word Count	Number