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THE O'LEARY SOLUTION TO WEBER

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ROUGH DRAFT

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I INTRODUCTION – “It was twenty years ago today”

This is a curious little paper. I like little papers – but I am not so sure I like them to be curious, at least at this stage of the game, when presenting them in public. But here it is.

First, a few words about what this paper is not. I have not read, as has Brian Etherington, all of the post Weber decisions trying to make sense of Weber¹. I have read a few but not all. This I do because I am not interested, at least for the purposes of this paper, in what I see as the common view of Weber and the problems it presents to the labour law community. Nor in the way many arbitrators and Courts have responded to Weber – for example, by actually dealing with, or deciding not to deal with defamation claims as such.² So, this is not a paper which seeks to make a contribution to the mainstream debate about Weber and its legal legacy.

The idea pursued in this paper is that that debate, as far as I have had to deal with it and as far as I can understand it, is often, in my view, misconceived and unhelpful. I seek another stream into which to divert the Weber debate. I think that alternative stream exists and has been available from the beginning. It can be seen more clearly if we take the time to read the much shorter and “to the point” decision in Weber’s companion, O’Leary³. In this sense standard “Weber discourse” is misconceived. It is in addition unhelpful in that it both adds credence to the stinging critique of Canadian Labour Arbitration’s current state of health set out by Warren Winkler in his 2010 Donald Wood Lecture⁴ and also makes it less likely that we will get “back to our roots” as Winkler rightly wishes we could do.

The basic point, as I hope will become clear, is that the standard view of Weber starts in the wrong place. It is what may be called an “institutional” or “arbitration centric” or “process” view. On this view the place to start thinking about Weber is to see the problem as one of the “jurisdiction” (to deploy what is in my view a really useless term in almost all labour law contexts in which it is invoked) of arbitrators to apply sources of law external to the collective agreement. And of the competing “jurisdiction” of other adjudicators. Or, of the exclusive “jurisdiction” to do so. I think this starts too close to the legal ground and that we need to draw our lens back to see the Weber issue as an instance of a broader, basic, less technical, but also

¹ Weber v Ontario Hydro [1995] 2 SCR 929.

² See the discussion of Innis Christie’s well know decision in ABT Building Products (2000) 45 LAC (4th) 1 infra at p.11-12.

³ New Brunswick v O’Leary [1995] CanLII 109 (SCC)

⁴ “Labour Arbitration and Conflict Resolution: Back to Our Roots” available at <http://irc.queensu.ca/articles/labour-arbitration-and-conflict-resolution-back-our-roots>

more familiar, substantive legal problem. If only we could get it in view. This is the main point of the paper. To get it in view. That is the perhaps “curious” point of this paper.

Now a few additional remarks about the origins of this paper and also a wider point to which it points. It started after I wrote down, very quickly, some remarks after a labour law class in 2010. Those remarks remain at the core of what I wish to say today. The class in which I had these thoughts was not a class in which we were discussing Weber. In fact we were not discussing labour arbitration. We were not even in the collective bargaining part of the course. We were in the common law part of the course. The case we were discussing was the common law case **Douglas v Kinger**⁵ – which, if you have not read it, is a classic. (The facts are terrific – a youngster working on a summer job could not tell if the lawn mower gas tank had any gas in it - so he did the obvious thing - he lit a match to take a look...Don't worry, he did not get hurt. But he did burn down the workplace.) The issue was whether the employer could sue the employee in tort (or contract). The answer was, correctly, no. Now, as you all know, the issue in Weber was, could the employee sue the employer in tort. That is the same legal issue with plaintiff and defendant changing places. And in Weber's companion case, O'Leary, the issue was exactly the same as in Douglas v. Kinger – can an employer sue a negligent employee in tort? And the answer was the same. No. These answers are in my view both correct and so it makes no difference whether the employee is unionized and under a collective agreement (as in O'Leary) or labouring under a common law contract of employment (as in Douglas). The main point of this paper is to explore the implications of all of this for the standard view of how to think about Weber.

But I take the time here to point out to that subset of my fellow labour law teachers who have resisted the basic premise of the Labour Law Casebook, to which Bernie made such an enormous contribution, that we really do need to teach all of labour law – all 3 regimes, all at once. And that we really did make the right choice in the 1980s to go for an “integrated” approach to the teaching of labour law. Otherwise we will fail to grasp a lot of important and basic ideas which all labour lawyers need to have taken on board. This little paper is, in my view, another “proof” of that thesis. Recently I have come to the conclusion, in other not so little papers, that the same is true of any possibility of a grasp of the legal and constitutional concept of freedom of association. We need to see that we need to start with the common law of freedom of association. Only then can we appreciate what the Wagner Act Model really did from a legal point of view. Only when we see precisely how it redistributed the pre-existing common law distribution of right and freedoms which had constituted our freedom in the past can we understand that model and what it was meant to do, and did. And then we are in a position to understand our Charter cases which are arguments about what the legislature cannot, or must, or can be free to choose to do or not do, to that common law distribution of rights and freedoms. Further, and one final legal

⁵2008 ONCA 452 (CanLII)

domino, by starting with the common law we can legally comprehend the role of international labour law – when and how does international law tell the court how to interpret the charter as to when the legislature cannot or must alter the common law complex of rights/duties and freedoms which constitute our freedom of association? Otherwise we are lost – as we are at the moment. Very lost.

So, the claim here is that when the Weber band began to play 20 years ago it marched off in the wrong direction because it started from the wrong spot. Does this matter at this stage of the game? Is it too late to revisit our starting point? Is the standard view too well “baked in”? Well, do ideas ever matter? Yes. And we know that the law can change radically, many times, in 20 years, as our freedom of association cases make very clear. So, let’s see if it should this time.

II The Problem with the Received View of Weber

The reaction of the arbitration community, and much of the labour relations community in Canada, to the Supreme Court of Canada’s decision in **Weber** was one of amazement, disbelief, and, at least in private, apoplexy. Twenty years and much jurisprudential confusion later, it seems that it still is. That is why we are having this very conference. The idea, commonly held, that **Weber** holds that arbitrators under collective agreements are not only to interpret and apply other workplace laws, such as human rights codes or the employment standards laws but, further, to hear tort, constitutional (ie Charter) and other claims if they arise in the workplace context has left many scratching their heads if not gasping for breath. On this view, for example, **Weber** holds that an employer or employee cannot sue an employee or employer in the Courts for defamation but rather must pursue that defamation case before an arbitrator. If it is true that arbitrators are to hear defamation law suits then the case certainly marks a very unfortunate turn of legal events and is a legitimate source of consternation, if not apoplexy.

Some, who are very well placed to do so, have tried to patiently explain to the world all that is wrong with **Weber** on this view of what the case stands for.⁶ But, as explained above, this paper

⁶ See for example, Richard MacDowell, “Labour Arbitration – The New Labour Court?”, 8 CLELJ 121; Bernard Adell, “Jurisdictional Overlap Between Arbitration and Other Forms: An Update,” 8 CLELJ 179, p. 179; Donald D. Carter, “Looking at Weber Five Years Later: Is it Time for a New Approach?” 8 CLELJ 231; Brian Etherington, “Promises, Promises: Notes on Diversity and Access to Justice”, 26:1 Queens L.J. (43) at pp. 60-62; Michel Picher, “Gilmer in the U.S. and Weber in Canada: Workplace Arbitration Exalted – And Assaulted”, Labour Arbitration Year Book, 1999 (Toronto: Lancaster House) [Picher]; Ray Brown and Brian Etherington: “Weber v. Ontario Hydro: A Denial of Access to Justice for the Organized Employee?” (1996) 4 CLELJ 183; Various authors, “The Scope of Rights Arbitration after Weber v. Ontario Hydro” (1999), 7 CLELJ 249; M. Picher, “Defining the Scope of Arbitration: The Impact of Weber An Arbitrator’s Perspective”, Labour Arbitration Yearbook 1999-2000 Vol. 1(Lancaster House, 2000). See also the excellent discussion of the defamation problem in Tunley and Smeenk,

takes a different and, it is hoped, more positive approach. The basic argument, only briefly developed here, is also I think bolder. It challenges the conventional interpretation of **Weber**. In short, **Weber** does not say what people think it says. It says something quite different and as a result is actually a helpful and non threatening decision. Furthermore, when seen in this light **Weber** is simply a modern playing out of a very old labour problem, one which has long antecedents in the common law of the contract of employment. This is the problem of the relationship, in the most common sort of case, of tort and contract.

But that puts the matter too abstractly. To be more specific we can put this point in terms of the following example: if a unionized employee (negligently) hits the plant wall with a fork lift, isn't there something odd about an employer suing an employee in tort for the resulting damage? A warning. Or one day suspension. Or some other form of discipline. But a law suit? On the view taken here it is vital to see that this discomfort does not arise from any technical aspect of the matter concerning an arbitrator's "exclusive" jurisdiction under our statutory schemes. It is rather, a substantive matter, not a procedural one. That substantive issue is simply the very common matter of what the collective agreement actually says – both explicitly and implicitly.

And a central point in this brief paper is that this point is equally strong at common law. Indeed, as we shall see, this issue has been the subject of long debate at common law. Even at common law the thought occurs - maybe the employer can dismiss, or even, now, perhaps, discipline the fork lift driver – but to sue an employee in tort, that seems very odd.

It is odd, but why? Well, as is suggested below, for the same sort of reasons that have led the Court to hold that it would be odd if a third party suffering damages because of an employee's negligence can sue the employee, and not just the employer.⁷ Or to complete the trio of issues actually in play here – for the same sort of reasons that say that a third party who is injured by the employee's negligence **can** sue the employer.⁸

At the heart of the instinct in these cases is a sound idea – that the work contract, whether individual or collective, has something to say about, that it speaks to and alters, the normal set of tort rights, responsibilities, and remedies which apply between strangers. Seen this way **Weber** is not telling arbitrators to hear defamations law suits – nor to tack on a negligence claim to the discipline handed out from the employer to the fork lift driver in our example. Rather, **Weber** is instructing arbitrators that they are responsible for workplace disputes and that when a union official criticizes the employer's safety record, or when an employee says some very unfortunate things about the boss, what would otherwise be a defamation case between two strangers has to

"Defamation in a Labour & Employment Context" available at http://www.mccarthy.ca/pubs/Toronto_L&E_OCT2007_web.pdf

⁷ London Drugs Ltd. v. Kuehne & Nagel International Limited, 1992 CanLII 41 (SCC)

⁸ As in the standard vicarious liability case. The law is here dealing with 3 sides of a triangle here. Employer-Employee-3rd Party. And it must, and does, get the sides to line up.

be seen and dealt with very differently. In short, it has to be dealt with within the web of terms and understandings, explicit and implicit, which are appropriate and have been developed to deal with workplace issues. The parties to these disputes are not strangers and they live in a world governed by a large and complex set of understandings, rules, and now detailed arbitral jurisprudence. So these cases are not to be seen as “mere” tort cases anymore – these are discipline issues, administration of the collective agreement issues, and not simply a tort issue. Not best thought of as a tort issue at all perhaps. As such the **Weber** issue is simply part of one of the most complex aspects of our law – the relationship of contract and tort. The general answer has to be and is - contract trumps tort. What **Weber** is doing is reminding us of this truth.

It is true that there are pragmatic considerations here – the employer has insurance for damage to the workplace and the employee does not. But these considerations are best understood as informing and reflected in the terms and norms which have long governed all but the most unusual workplaces, and long restrained human resource professionals in most circumstances from breaking the “rules of the game” and seeking to do and run around them via tort (or now constitutional) law. If we keep our eyes on the contractual reality arbitrators will never hear tort or constitutional claims “straight up”. They will hear them as they always have – as part of reasonable contract administration within a thick set of workplace contractual norms. What would have been a straight up negligence case between strangers is now part of a process of progressive discipline. Because that is what the parties have agreed to do.

This paper also makes the following claim: that this line of thought has been available since the very day that **Weber** was decided. This is because of the much briefer decision in **Weber’s** companion, **O’Leary**, which was issued on the same day. **O’Leary** is just our fork lift example. In my view **O’Leary** holds the key to a much simpler view of **Weber**.

In what follows I first examine, in Part III, the decision in **O’Leary**. In Part IV I take a brief look at the old, and it seems forgotten, but still ongoing common law debate about our issue. Part IV reminds us that current and recent cases on “third parties” in what looks at first blush to be general contract law actually turn out to part of this puzzle. Part V draws these considerations with a view to letting us see **Weber** as we should. **Weber**, it turns out, is not so much a technical statutory case about arbitrators exclusive “jurisdiction” which says some very alarming things about arbitrators hearing common law suits for defamation. It is, rather, better seen as primarily a substantive case about the content of collective agreements. As such it makes a lot of sense and tells arbitrators to get on with the job they have been doing all along.

III O’Leary

If **O’Leary** had not come along it would have to have been invented. But because **O’Leary** did come along we can dispense with my fork lift example and deal with real facts which were in the court’s words:

O’Leary was employed by the Province of New Brunswick as a traffic counter operator. His work required him to travel throughout the province. The Province alleges that O’Leary drove its leased vehicle with a flat tire, necessitating repairs amounting to \$2,815.54. The Province brought an action against O’Leary for this amount.⁹

The New Brunswick courts rejected O’Leary’s motion to strike the claim on the basis that it arose out of a collective agreement and thus within an arbitrator’s “exclusive jurisdiction”. The courts below held that the negligence claim did not fall under the collective agreement. The essence of the decision of our Supreme Court is to, correctly, reject this argument. The court did so by actually reading the agreement and noting two separate terms of the agreement which were called into play – the general power to discipline and, on the facts of this particular agreement, an express term under which employees are responsible for “the safety and dependability of the employer’s property and equipment”. Thus, even though “negligence” was not explicitly mentioned in the collective agreement, it was dealt with “impliedly”.

The case is brief and the reasoning bare – it relies upon **Weber** to carry that freight. Yet because it is so starkly decided this case gives us our best window on **Weber**. There is nothing in the language of the decision, nor its logic, which permits the conclusion that what the court is doing here is instructing the arbitrator to hear the common law negligence case filed by the employer. Just the opposite. The key to the decision is that the contract governs. The logic, which is very basic, very legal, and very correct is: this is the sort of event and resulting claim which the contract has addressed, in this case perhaps even more explicitly than others. The employer was seeking to do an end run around those contractual provisions, as if the parties were strangers, by suing in tort and in a common law court. That is, there is not merely the procedural point here (who gets to hear the employer’s case?) there is a substantive point (no matter who decides, what rules are in play?).¹⁰ And here there are very powerful rules in play which transmogrify what would otherwise have been a straightforward tort claim (a non-employee of New Brunswick negligently damages the province’s truck) into a very different sort of case. The most important of these rules in most employment contexts will be the rules regarding discipline. Under those rules what happens to Mr.

⁹ Supra n. 3 at para 1.

¹⁰ It is true that these two issues overlap – but we can analytically separate them. – as we must when we look next at the common law. See below.

O’Leary at arbitration will depend on whether he had done this sort of thing before, his general disciplinary record, and all of the familiar arbitral considerations. This does not mean that Mr. O’Leary receives a “get out of jail free” card. Far from it. Mr. O’Leary is far more exposed than he ordinary New Brunswicker. This is because, unlike the ordinary citizen of New Brunswick, Mr. O’Leary might, depending on all of the familiar considerations, lose his job for damaging the truck. Furthermore, and as the Court notes, there is nothing preventing an arbitrator from making Mr. O’Leary pay for the damage. But that would be a remedy constructed against a very different background and set of rules than would govern a “normal” negligence at common law. As the Court put it in **Weber**:

This does not mean that the arbitrator will consider separate “cases” of tort, contract or *Charter*. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the *Charter*.¹¹

This point about Weber being both a procedural and a substantive case is very important. It is true that these two issues overlap but we can analytically separate them, as we must when we look next at the common law. There the substantive point stands alone. But this is one way of stating the traditional view of **Weber** – it sees the case only as a procedural case about “jurisdiction”. It misses the much more important substantive point.¹²

IV Weber and O’Leary “at Common Law”

The issue at the heart of **Weber** – the relationship between the contract of employment (or collective agreement) and otherwise applicable law has a long history at common law. Employers have tried to do to employees under an individual contract of employment what New Brunswick in O’Leary tried to do to its unionized worker for some time. And it has always been controversial. The issue can come up in three basic ways:

1. Where an injured third party sues the employer as vicariously liable for the employee’s negligence. (Standard vicarious liability).
2. When an employer directly sues an employee for losses caused by the employee’s negligence. (Or seeks indemnity/subrogation after a vicarious liability finding). (This is Douglas and O’Leary.)
3. When a third party sues a negligent employee directly, instead of, or in addition to, suing the employer. (This is London Drugs – and the stevedoring cases.)

¹¹ Supra n. 1 at para. 56.

¹² This point may be understandable in light of the structure of the Weber litigation. There the main issue was the exclusion of the courts, not the issue of how an arbitrator should approach the issue.

There is no real need to distinguish these circumstances for they resolve to the same basic issue – the impact of contract, and specifically the contract of employment, on otherwise straightforward negligence liability.

So let us focus on case number 2. (Although it is interesting and important to note that all the cases get to the same result, and for the same reason). While it is possible to trace this very interesting debate back to the very controversial decision of the House of Lords in **Lister v Romford Ice and Cold Storage**¹³, and then to a well-known and terrific dissent by Seaton JA in **D H Overmeyer v Wallace Transfer Ltd.**¹⁴, we are now blessed in Ontario with a comprehensive and thoughtful 2008 Court of Appeal decision in **Douglas v Kinger**¹⁵ which reviews all of this and comes to a sound way of thinking about the issue.

What characterizes these cases is the instinct the plaintiff employer or third party was trespassing, in a way most employers simply did not do, upon a basic understanding about limits upon employee liability. But getting this right has taken some time. **Douglas v Kinger** does by and large correctly articulate the reasons behind the instinct. And for the purposes of this paper we can add that in an important sense, **Douglas v Kinger** is a common law version of **Weber**.

The facts of the case are, as briefly noted above, quaint. The 13 year old employee was employed to do chores at the employer's cottage. He negligently started a fire which caused \$285,000 damage. The employer, in a subrogated claim brought by his insurer, sued the employee for the loss. It was held that the employer could not recover in either tort or contract. This is the right result and it is, I argue, simply the result in **Weber** and **O'Leary**, with the procedural point about arbitrator's jurisdiction not involved at all. Although the judgement is overtly written in tort terms it is clear that it could have been written, and in real terms was written, in contract law terms – for the issue is the relationship between the two and in order to have “law and order” here the story must be the same from the two sides of this coin, albeit expressed in slightly different legal terminology. Although expressed in the language of tort law and tests of foreseeability and proximity, the essence of the decision is more plainly expressed in contract law. The reason the employer cannot sue is that the contract says so. To let the employer sue would violate the parties' reliance interests and reasonable expectations. The instinct that this employer, unlike the vast majority of employers, is attempting an end run around something is here made clear – the something that is trying to be avoided is the contract.

And interestingly the Court in Douglas adds, completing the parallel to **Weber**:

¹³ [1957] AC 555.

¹⁴ (1975) 65 DLR (3d) 717 (BCCA).

¹⁵ Supra n. 5

In addition, while employees are implicitly, if not explicitly, expected to exercise reasonable care in their employment, there are other means to encourage that care without burdening the employee with an impossible financial judgment. While the appellant argued that a finding of liability against the respondent will promote responsibility in all workers, I am not persuaded that is so. Discipline and dismissal are often cited as more useful tools to promote deterrence without the need to impose financial responsibility. Thus, a policy that supports good industrial relations weighs against the imposition of a duty of care.¹⁶

That is the point that this short paper is after, expressed in very economical terms.

So where does that leave us? Pretty much where we should be and where we started, if only we had noticed.

But we do face a certain number of problems. Among these are the fact that “Weber discourse” has expanded itself so that it is now seen as critical to issues beyond the sorts of issues raised in Weber and O’Leary – and Kinger. So a large number of cases in which Weber is invoked are now cases about competing statutory regimes.¹⁷ Insofar as Weber and O’Leary are relevant they are for the same reasons – that is important that whoever hears the case, and however we decide that, not do an end run around the collective agreement or the arbitration process in way which gets the substantive law of the relationship between the parties wrong – as, in my view so tragically happened in the **Central Okanogan School Board** case¹⁸.

V An example of my thinking in practice?

Now a word about a wonderful arbitration decision¹⁹ written by my mentor Innis Christie. In that carefully reasoned decision Innis was confronted with the classic Weber issue put to him in the standard manner. Did he have “jurisdiction” to decide a defamation case? He answered this question with a considered “yes”. He then went on ‘it seems’ to do just that – to apply the law of defamation and decide that case on that basis. But I say ‘it seems’ and I put that in scare quotes for a reason. As I read the case what Innis actually does is to act as a labour arbitrator dealing with things said by the employer about an employee (alleging, to use a general way of putting it, misuse of sick leave – as in Weber) in the context of the reasonable administration of the

¹⁶ Ibid. at para 60.

¹⁷ For example: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 SCR 185, 2004 SCC 39

¹⁸ *Central Okanogan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC)

¹⁹ *ABT Building Products* supra n. 2

collective agreement and treating the matter in a sensible way given that complex context with all its understandings and necessary way of doing business – including full and frank discussion of disciplinary matters, the necessity of management making disciplinary judgement calls, but also of the unreasonableness of some of the employer’s conduct on the facts (making unusual public allegations before fully investigating and so on) all leading to an apology from the employer. As in *Kinger* the legal language is on the surface not contract but defamation law (in *Kinger* it was negligence law). But what carries the day is the substantive point about the way those general parts of our law are modified by contract law and also the statutory regime of which arbitration of collective agreement disputes are an integral part. That is, as I read ABT it is a case of reasonable contract administration. This is, I think, what the court meant in *Weber*:

“This does not mean that the arbitrator will consider separate "cases" of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.²⁰”

This is because in order to follow this instruction one has to read the collective agreement in context and determine what the contract and the regime for enforcement of collective agreements via arbitration have done to redefine your general tort rights and remedies (as in *O’Leary*), or your Charter Rights (to free speech for example), or your privacy rights have been rearranged.

A perfect example of the point I am after comes from paragraphs 129-132 of ABT where Innis quotes Tom Berger:

The only Canadian case cited by counsel for the Employer, *Fisher v. Rankin*, [1972], 4 W.W.R. 705 (B.C.S.C.), is an even better example of how qualified privilege should operate in an employment context, more particularly a unionized one. It involved allegedly otherwise defamatory statements in the report of a joint union-management committee made in the course of grievance proceedings. Berger J. elaborated his reasons for concluding that such proceedings were the subject of qualified privilege at pp. 713-714;

The provisions of the collective agreement relating to the resolution of grievances are founded on the premise that there will be frank explanation by management of the reasons for the disciplinary action it has taken, and an opportunity for the union to put the case for the employee concerned. To hold that what is said at a meeting of the Joint Standing Committee may subject those present to a suit for defamation would nullify the whole proceeding.

²⁰ *Supra* n.13

The company and the union had a collective agreement. That collective agreement was required by law to include a provision for the resolution of grievances. ... No system for resolving grievances provided for under s. 22 of the Act would function at all if the reasons for discharge were not put before the union as the representative of the employees. I think that to deny to the company's representatives the defence of qualified privilege would have a chilling effect upon their willingness to state fairly and frankly the reasons for an employee's discharge.

I think that society has an interest in seeing that the machinery established under s. 22 of The Labour Relations Act functions effectively: ... The union's interest is clear. It is the employee's bargaining agent. The union in a sense acts as the advocate for the disciplined member. That duty is, rightly, cast upon it by the judgment in *Fisher v. Pemberton et al.* (1969), 72 W.W.R. 575, 7 D.L.R. (3d) 521 (B.C.). It cannot adequately represent him unless it knows the case it has to meet. The union also has an interest, as the representative of all the employees, in knowing the grounds upon which the company has acted. To offer only one illustration, it has an interest in seeing that an objectionable precedent for disciplinary action is not set. The reasons for allowing qualified privilege to be asserted as a defence seem to me to be compelling.

Innis continued:

“I find that the Employer here, having by-passed its own arrangements for checking on the validity of the Grievor's medical certificate, compounded its failure to respect established processes by not going through the Union in attempting to deal with what it thought would be a difficult labour relations incident. In communicating its concerns to the Union, statements about the Grievor in the same terms as those made to the meetings clearly would have attracted qualified privilege. So too might have statements to other employees as the situation unfolded, but in my opinion the highly unusual process adopted by the Employer on August 7, 1998, of going straight to the employees as a group about a matter in which the Union was supposed to represent them did not attract qualified privilege.”

This, in my view, is all just “normal” arbitration thinking about reasonable contract administration – which places the constraint of contextual reasonableness on both sides – expressed with a layering of defamation terms. I think it is clear that it is the contextual contractual demands which are actually running the show and decide the case. This is exactly what happened in *Kinger*. It is the instruction to us all contained in *O’Leary*. It is remarkable that the common law can provide illumination in this regard. But so can arbitrators like Innis.

VI CONCLUSION – “Back to our roots”

This may strike many, perhaps all, as naïve. It seems to put a lot of faith in arbitrators to bring very basic ideas to bear. And that labour arbitration cases are not, at least often, “rocket science”. It may also strike others as being out of touch with the complexities of modern labour arbitration. But it may be that the view expressed here is just one way of seeing the truth in Winkler’s remark that “labour arbitration as we know it...has lost its course ...its trajectory...its vision”.²¹ His remedy is stated in his last paragraph:

We have to get back to the basics, reformulate, and recalibrate the system to get it back on track. The changes can be made so that we return to the notion of a decision on the merits and not on some esoteric technicality—to a process that is timely, and that is affordable.²²

On the view taken here the standard reaction to Weber was made available, perhaps inevitable, by the course of the developments Winkler describes and deplors. Only from within that reality would we read Weber as a recipe for more and worse of the same. If, on the other hand, we do not accept that reality as inevitable or desirable, we can read Weber – with the help of O’Leary (and Kinger) as an invitation, or perhaps even an instruction, from the Court to labour arbitrators to get back to their “knitting”. And their roots. And maybe that is what good arbitrators such as Innis were really up to all along. But we need the insights, and courage, of those roots to see it that way.

²¹ Supra n.

²² Ibid at p.10