Arbitral Collective Agreement Interpretation: The Modern Approach

©2012 E. Wayne Benedict*

*E. Wayne Benedict, LL.M (Candidate), JD (Distinction), B.HRLR (Great Distinction), is an Alberta Barrister and Solicitor with the Calgary firm McGown Johnson. Mr. Benedict was an editor of the *Saskatchewan Law Review* (2004-05) and the *Alberta Law Review* (2005-06), and he was Law Clerk to The Honourable Mr. Justice Kenneth Mackenzie and The Honourable Mr. Justice Allan Thackray of the British Columbia Court of Appeal (2006-07). Mr. Benedict is a Sessional Instructor of Labour Law with the University of Calgary Faculty of Law. Mr. Benedict holds certifications in locomotive operations, building construction, and industrial relations & human resources, and he is former president of the Canadian Union of Transportation Employees, Local 1 and its successor the Canadian Auto Workers, Local 110. Mr. Benedict acts for individual employees and labour unions/professional associations in various negotiations, judicial and administrative dispute resolution forums. This paper was presented at the 30th Annual Labour Arbitration Conference in Calgary, Alberta on 31 May 2012, sponsored by Lancaster House, The University of Calgary's Industrial Relations Research Group, and The University of Saskatchewan.

Rev 4: 9NOV2012

Abstract

This paper discusses the "modern contextual approach" to collective agreement interpretation; namely, "In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties", or the words of a collective agreement are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the collective agreement, the object (purpose) of the collective agreement, and the intention of the parties to the collective agreement. Part II of this paper discusses the modern contextual approach. Part III of this paper discusses terms implied into collective agreements as a matter of law, and as a matter of fact.

It is necessary, in every case, for the arbitrator charged with interpreting a collective agreement provision to undertake the contextual and purposive approach and thereafter to determine if the words are ambiguous (patently or latently). Other principles of interpretation only receive application where there is ambiguity as to the meaning of a provision. Part IV of this paper discusses the concept of ambiguity, and Part V discusses some "other principles of interpretation" that may be applied if ambiguity is identified. Part VI of the paper discusses the principle of "estoppel"—promissory by conduct (past practice)—in the context of labour arbitration.

Table of Contents

Abstract ... 1
Table of Contents ... 2
I. Introduction ... 3
II. The Modern Approach to Interpretation of Written Instruments ... 3
- **i. The words of an Act or contract are to be read in their entire context** ... 11
- **ii. The words of an Act or contract are to be read in their grammatical and ordinary sense** ... 11
- **iii. The words of an Act or contract are to be read harmoniously with the scheme of the Act or contract** ... 12
- **iv. The words of an Act or contract are to be read harmoniously with the object of the Act or contract** ... 13
- **v. The words of an Act or contract are to be read harmoniously with the intention of the legislature or parties to the contract** ... 19

III. Implied Terms ... 20
- **i. The Implication of Terms in a Contract on the Basis of Custom or Usage** ... 21
- **ii. The Implication of Terms in a Contract as a Matter of Law** ... 21
- **iii. The Implication of Terms in a Contract as a Matter of Fact** ... 23

IV. Ambiguity (Patent and/or Latent) ... 23
V. "Other" Principles of Interpretation ... 28
- **i. *Charter* Values** ... 28
- **ii. Extrinsic Evidence as an Interpretative Aid** ... 30
  - **a) Extrinsic Evidence of Past Practice as an Interpretative Aid** ... 30
  - **b) Extrinsic Evidence of Negotiating History as an Interpretative Aid** ... 31
  - **c) Extrinsic Evidence of Statutory (or International Covenant) Context as an Interpretative Aid** ... 33
- **iii. Presumptive Canons of Statutory Interpretation** ... 33

VI. Arbitral (Labour *Vis-à-Vis* Common Law or Equitable) Estoppel ... 35
VII. Conclusion ... 39

I. Introduction

This paper discusses the "modern contextual approach" to collective agreement interpretation; namely, "In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties", or the words of a collective agreement are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the collective agreement, the object (purpose) of the collective agreement, and the intention of the parties to the collective agreement. Part II of this paper discusses the modern contextual approach. Part III of this paper discusses terms implied into collective agreements as a matter of law, and as a matter of fact.

It is necessary, in every case, for the arbitrator charged with interpreting a collective agreement provision to undertake the contextual and purposive approach and thereafter to determine if the words are ambiguous (patently or latently). Other principles of interpretation only receive application where there is ambiguity as to the meaning of a provision. Part IV of this paper discusses the concept of ambiguity, and Part V discusses some "other principles of interpretation" that may be applied if ambiguity is identified. Part VI of the paper discusses the principle of "estoppel"—promissory by conduct (past practice)—in the context of labour arbitration.

II. The Modern Approach to Interpretation of Written Instruments

Labour arbitrators, both grievance arbitrators[1] and interest arbitrators,[2] are regularly called upon to interpret both statutory and collective agreement language in carrying out their functional mandates. In the contractual context, labour arbitrators interpret

---

[1] "[A]rbitration, grievance or rights" means "arbitration of a dispute concerning the interpretation, application or alleged violation of a collective agreement; the standard mechanism under labour relations in Canada for resolving disputes during the term of a collective agreement": Jeffrey Sack & Ethan Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984) 27 ["Sack & Poskanzer"].

[2] "[A]rbitration, interest" means "arbitration to establish the terms of a collective agreement where the parties are unable to do so by negotiation; interest arbitration occurs primarily in the public sector under statutes which remove the right to strike and make arbitration compulsory; however, there is nothing to prevent parties from resolving an impasse in negotiations by voluntarily submitting their differences to arbitration…": Sack & Poskanzer*, ibid.*

collective agreements *per se*, as well as such collateral documents as may expressly or impliedly form part of the collective agreement; such as, letters of understanding, memorandums of agreement, return to work agreements, disability benefits plans, and pension plans. In the statutory context, labour arbitrators interpret their enabling legislation,[3] as well as employment-related statutes incorporated into collective agreements by reference, or implied into collective agreements as a matter of law.[4] Today, according to the Supreme Court of Canada, there is only one principle or approach to the adjudicative interpretation of written instruments; namely, the words of an Act or contract are to be read in their entire context and in their grammatical and

---

[3] In Alberta labour-related administrative tribunals may be empowered pursuant to: *Labour Relations Code*, RSA 2000, c L-1; *Post-Secondary Learning Act*, SA 2003, c P-19.5, ss 87-92 & *Model Provisions Regulation*, Alta Reg 53/2004; *Police Officers Collective Bargaining Act*, RSA 2000, c P-18; *Public Service Employee Relations Act*, RSA 2000, c. P-43; *Regional Health Authority Collective Bargaining Regulation*, Alta Reg 80/2003. Federally, labour-related administrative tribunals may be empowered pursuant to: *Canada Labour Code,* RSC 1985, c L-2, Part I; *Canada Industrial Relations Regulations*, SOR/2002-54; *Public Service Labour Relations Act*, SC 2003, c 22; *British Columbia Grain Handling Operations Act*, SC 1991, c 25, ss 8, 19; *Civil Air Navigation Services Commercialization Act*, SC 1996, c 20, ss 76-78; *Maintenance of Railway Operations Act, 1995*, SC 1995, c 6, ss 13, 35, 57; *Railway Continuation Act, 2007,* SC 2007, c 8; *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp.); *Postal Services Continuation Act*, 1987, SC 1987, c 40; *Prince Rupert Grain Handling Operations Act*, SC 1988, c 1; *Thunder Bay Grain Handling Operations Act*, SC 1991, c 31; *West Coast Ports Operations Act*, 1994, SC 1994, c 1.

[4] *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42, [2003] S.C.J. No. 42 at paras 28, 55 (QL) ["*Parry Sound*"]; *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc*., 2006 SCC 2, [2006] S.C.J. No. 3 at para 24 (QL) ["*Isidore*"]. Alberta examples of employment-related statutes incorporated into collective agreements as a matter of law: *Alberta Union of Provincial Employees v. Alberta (Guay Grievance)*, [2011] A.G.A.A. No. 37 at para 90 (QL) (*Public Service Act*, RSA 2000, c P-42, s 15); Alberta (Solicitor General) v. Alberta Union of Provincial Employees (Jungwirth Grievance), 192 L.A.C. (4th) 97, [2010] A.G.A.A. No. 5 at para 29 (*Employment Standards Code,* RSA 2000, c E-9); *Calgary Board of Education Staff Assn. v. Calgary Board of Education (Peers Grievance)*, 207 L.A.C. (4th) 271, [2011] A.G.A.A. No. 46 at para 55 (QL) (*Employment Standards Code,* RSA 2000, c E-9); *Regent Home Systems, a Division of SRI Homes ULC v. United Steelworkers, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-207 (Statutory Holiday Pay Grievance)*, 210 L.A.C. (4th) 306, [2011] A.G.A.A. No. 33 at para 16 (QL) (*Employment Standards Code,* RSA 2000, c E-9); *Calgary (City) v. Calgary Fire Fighters Assn. (Overpayment of Retroactive Pay Grievance)*, [2009] A.G.A.A. No. 28 at para 8 (QL), judicial review dismissed, 2010 ABQB 226, [2010] A.J. No. 367 (QL) (*Employment Standards Code,* RSA 2000, c E-9, s 12); *Lethbridge (Regional) Police Service v. Lethbridge Police Assn. (Lester Grievance)*, [2011] A.G.A.A. No. 42 (QL) (*Alberta Human Rights Act*, RSA 2000, c A-25.5); *Canada Safeway v. United Food and Commercial Workers Union, Local 401 (Szautner Grievance)*, 181 L.A.C. (4th) 124, [2009] A.G.A.A. No. 1 at para 66 (QL) (*Occupational Health and Safety Act*, RSA 2000, c O-2); *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401 (Pady Shenher Grievance)*, 175 L.A.C. (4th) 266, [2008] A.G.A.A. No. 38 at para 60 (QL) (*Occupational Health and Safety Act*, RSA 2000, c O-2). Note that the *Financial Administration Act*, RSA 2000, c. F-12 is not an employment-related statute and is therefore not incorporated into collective agreements as a matter of law: *Alberta v. Alberta Union of Provincial Employees (Soenen Grievance)*, 190 L.A.C. (4th) 412, [2009] A.G.A.A. No. 65 (QL), judicial review dismissed, 2010 ABQB 760, [2010] A.J. No. 1557 (QL).

ordinary sense harmoniously with the scheme of the Act or contract, the object of the Act or contract, and the intention of the legislature or parties to the contract. "Elmer Driedger's definitive formulation"[5] or "modern approach" has been repeatedly cited by the Supreme Court of Canada as the preferred approach to statutory interpretation across a wide range of interpretive settings.[6] Driedger's "…'modern contextual approach' for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation."[7] The New Brunswick Court of Appeal

---

[5] "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67; restated in Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 and Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths Canada Ltd., 2002) at 1.

[6] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para 26 (QL) ["*Bell ExpressVu*"], citing: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 57; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 ["*Rizzo Shoes*"]; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 at para. 26; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 33, *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 27 ["*Chieu*"]. See also: *Euro-Excellence Inc. v. Kraft Canada Inc*., 2007 SCC 37, [2007] S.C.J. No. 37 at para 1 (QL); *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] S.C.J. No. 4 at para 37 (QL); *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] S.C.J. No. 28 at para 80 (QL); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] S.C.J. No. 56 at para 10 (QL) ["*Canada Trustco*"]; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] S.C.J. No. 26 at paras 37-38 (QL) ["*Bristol-Myers*"]; *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727 at paras 25-26 (QL) ["*Lethbridge College*"]; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] S.C.J. No. 51 at para 19 (QL); *Barrie Public Utilities v. Canadian Cable Television Assn*., 2003 SCC 28, [2003] S.C.J. No. 27 at para 20 (QL); *Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71, [2002] S.C.J. No. 71 at para 67 (QL); *Sarvanis v. Canada*, 2002 SCC 28, [2002] S.C.J. No. 27 at para 24 (QL); *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] S.C.J. No. 58 at para 36 (QL); *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56, [2001] S.C.J. No. 55 at para 28 (QL); *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] S.C.J. No. 35 at para 32 (QL); *Alberta (Treasury Branches) v. Canada (Minister of National Revenue - M.N.R.)*, [1996] 1 S.C.R. 963, [1996] S.C.J. No. 45 at para 14 (QL); *R. v. McIntosh*, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16 at para 21 (QL); *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131 at para 85 (QL); *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, [1988] S.C.J. No. 22 at para 74 (QL).

[7] *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101 at para 41 (QL), per L'Heureux-Dubé J (dissenting). Followed in: *Midnight Marine Ltd. v. Oppenheim*, 2010 NLCA 64, [2010] N.J. No. 323 at paras 33-34 (QL); *Robichaud, Williamson, Theriault and Johnstone v. Pharmacie Acadienne de Beresford Ltée*, 2008 NBCA 12, [2008] N.B.J. No. 45 at paras 18-22 (QL); *Shelanu Inc. v. Print Three Franchising Corporation Print Three Franchising Corporation v. Shelanu Inc. et al*., 64 O.R. (3d) 533, [2003] O.J. No. 1919 at para 45 (QL) (CA); *Beaulieu v. New Brunswick*, 2003 NBCA 92, [2003] N.B.J. No. 458 at paras 12-13 (QL); *Mississauga (City) v. Erin Mills Corp*., 169 O.A.C. 266, [2003] O.J. No. 638 at paras 27, 30 (QL) (SCJ), aff'd 188 O.A.C. 133, [2004] O.J. No. 2690 (QL) (CA); *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30, [2002] N.B.J. No. 117 at para 10 (QL) ["*Irving Pulp*"]; *Courtney v. Royal and Sun Alliance Insurance Co*.,

has "accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts."[8] Arbitrator F.C. Smith has written that "[c]ollective agreements are contracts. The law regarding the interpretation of contracts is similar to that utilized in the interpretation of statutes."[9] In 2010 the Alberta Court of Appeal referred to "*Driedger*'s classic unifying principle of statutory construction quoted in both statute and contract and myriad topics (including administrative law) by the Supreme Court and other Courts."[10]

In *Parry Sound*,[11] the Supreme Court of Canada cited "the modern approach to statutory interpretation [to] support… the proposition that … an arbitrator has the power to enforce the substantive rights and obligations of human rights and other employment-related statutes that are…part of the collective agreement."[12] Labour arbitrators should also apply "the modern approach to statutory interpretation" when interpreting "human rights and other employment-related statutes that are…part of the collective agreement"; and it follows that the same interpretive principles apply to other (non-statutory) collective agreement language.

The unanimous Supreme Court of Canada has directed that "It is necessary, in every case, for the court[13] charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger."[14] This "preferred approach recognizes the important role that context must inevitably play when a court construes…written words."[15] "Other principles of interpretation…only receive

---

2001 NBCA 53, [2001] N.B.J. No. 180 at paras 25-27 (QL); *Manitoba (Hydro Electric Board) v. John Inglis Co*., 142 Man.R. (2d) 1, [1999] M.J. No. 506 at para 48 (QL) (CA).

[8] *Irving Pulp, ibid* at para 10.

[9] *Purolator Courier Ltd. v. Canada Council of Teamsters, Local Union 395*, [2005] C.L.A.D. No. 492 at paras 79, 92(QL) ["*Purolator*"].

[10] *Sussman v. College of Alberta Psychologists*, 2010 ABCA 300, [2010] A.J. No. 1157 at para 20 (QL); emphasis added.

[11] *Parry Sound, supra* note 4.

[12] *Ibid* at para 41.

[13] "[An administrative] tribunal [including labour arbitrators] will be a court of competent jurisdiction [for the purposes of granting a *Charter* s 24 remedy] if its constituent legislation gives it power over the parties, the issue in litigation and power to grant the remedy which is sought under the *Charter*": *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59 at para 63 (QL) ["*Weber*"]; emphasis added. *A fortiori* labour arbitrators are "courts" in the context of the Supreme of Canada's Court's statutory/contractual interpretation jurisprudence.

[14] *Bell ExpressVu, supra* note 6 at para 30; emphasis added.

[15] *Ibid* at para 27.

application where there is ambiguity as to the meaning of a provision."[16] Ambiguity, and "other principles of interpretation" are discussed in Parts III and IV respectively below.

In relation to adjudicative collective agreement interpretation, Driedger's modern contextual approach has been both judicially and arbitrally recognized in Alberta and other Canadian jurisdictions. For example, Arbitrator F.C. Smith looked to "the 'Modern Approach' rules for the interpretation of statutes and contracts",[17] and noted that that "[t]his approach was used by Arbitrator Elliott in the *Owens-Corning Canada* case." Arbitrator Elliott wrote in *Owens-Corning*:[18]

> **9** I use as my approach to the interpretation of collective agreements the same approach that the Supreme Court of Canada has adopted for the interpretation of legislation. In this award I refer to this approach as the modern method of interpretation. In my view, the modern method of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern method of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> **10** The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by this statement:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> **11** Using this method, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional "intention of the parties" where none existed, but recognizes their intention if an intention can be determined from the language used in the collective agreement. The modern method also looks into the entire context of the agreement to determine the meaning to be given to words in dispute. …

In *Strathcona Refinery*[19] Arbitrator Elliott added:

> Once an interpretation is settled upon, it should be tested by asking these questions:
>
> 1) is the interpretation plausible - is it reasonable?
> 2) is the interpretation effective - does it answer the question within the bounds of the collective agreement?
> 3) is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

---

[16] *Ibid* at para 28.

[17] *Purolator, supra* note 9 at para 92, citing the unanimous Supreme Court of Canada in *Lethbridge College*, *supra* note 6 at paras 25-26.

[18] *Communication, Energy and Paperworkers Union of Canada, Local 728 v. Owens-Corning Canada Inc.*, [2004] A.G.A.A. No. 69 (QL) ["*Owens-Corning*"]; see also *Communication, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery*, 130 L.A.C. (4th) 239, [2004] A.G.A.A. No. 44 at paras. 40-41, 47 (QL) ["*Strathcona Refinery*"].

[19] *Strathcona Refinery, ibid* at para. 47.

While Arbitrator Elliott's 2004 decisions in *Owens-Corning* and *Strathcona Refinery* are often cited in relation to the modern method of collective agreement interpretation, as noted by Arbitrator Tettensor in the 1996 decision of *AGT*,[20] Arbitrator Elliott had articulated his "modern approach" as early as 1991:

> **51** This Board was referred to the decision of Arbitrator Elliott in United Food and Commercial Workers Local 401 and Canada Safeway Limited for principles to be applied in the interpretation of a collective agreement. Arbitrator Elliott considers principles from various authorities and concludes that the best expression of the modern approach to interpretation is (from p.14):
>
> > "In the construction of Collective Agreements, their words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the agreement, its object, and the intention of the parties."
>
> **52** We think this principle should be applied in the interpretation of the terms of the Letter of Application and Settlement Agreement in this case.[21]

In *Real Canadian Superstore*,[22] Arbitrator Power wrote: "I acknowledge … that the plain meaning rule has been supplanted by an approach mandating that, as Arbitrator Elliott said in his paraphrase of the Supreme Court of Canada's *Re Rizzo* decision, words in a collective agreement must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties."[23] Phillips J. cited *Strathcona Refinery* with approval in *Fire Fighters*,[24] which was affirmed by the Alberta Court of Appeal:

> **50** … interpreting the provisions of the [Calgary Firefighters Supplementary Pension Plan] at issue in this case is no different from the interpretation of statutes, private contracts and other authoritative directives. The method of interpretation to be used by the Court is that which has been adopted by the Supreme Court of Canada in *Re Rizzo*.[25] The principle [is] called the "modern principle of interpretation,"…

Phillips J. cited the following passage from Brown & Beatty:[26]

---

[20] *AGT Limited and International Brotherhood of Electrical Workers, Local 348 (Foss Grievance)*, [1996] C.L.A.D. No. 3 (QL) ["*AGT*"].

[21] *Ibid* at paras 51-52, citing United Food and Commercial Workers Local 401 and Canada Safeway Limited (Wage Schedules), (Elliott, 1991) unreported.

[22] *Real Canadian Superstore v. United Food and Commercial Workers, Local 401*, 92 C.L.A.S. 24, [2007] A.G.A.A. No. 70 at para 15 (QL) ["*Real Canadian Superstore*"].

[23] *Ibid*. at para. 15.

[24] *Calgary (City) v. International Assn. of Fire Fighters (Local 255)*, 2006 ABQB 133, [2006] A.J. No. 266 (QL), affirmed 2008 ABCA 77, [2008] A.J. No. 190 (QL) ["*Fire Fighters*"].

[25] *Rizzo Shoes, supra* note 6 at para 21.

[26] Donald J.M. Brown, David M. Beatty & Christine E. Deacon, *Canadian Labour Arbitration* 3th looseleaf ed. (Aurora: Canada Law Book, March 2006) ["Brown & Beatty"].

> …the task of interpreting a collective agreement is no different that that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. And generally speaking, arbitrators view and approach their function in much the same way.[27]

In *Westfair Foods 2008*[28] Wilson J., dismissing a judicial review application of Arbitrator Power's decision,[29] observed with approval that "the Arbitrator recognized the modern approach to the interpretation of collective agreements."[30] In *Mantei's Transport*,[31] Arbitrator Tettensor "agreed that the 'Modern Approach' should be applied in the interpretation of the terms of this Collective Agreement."[32] In *Alberta Teachers' Assn*,[33] Brooker J. wrote: "Article 11.1 [of the collective agreement] must be interpreted in the context of the Agreement as a whole, in a manner that avoids conflicts or internal inconsistencies and seeks to reconcile the provisions of the Agreement with each other [and it] must also be given its plain and ordinary meaning interpreted in harmony with the scheme and object of the Agreement and the intentions of the parties." Brooker J.'s decision was affirmed by the Alberta Court of Appeal.[34] In *Teamsters 987*,[35] Arbitrator Ponak wrote: "I…accept the modern method of contract interpretation set out in *Owens-Corning* which I endorsed in *TransAlta*."[36] In *SUN Local 10*,[37] Arbitrator Pelton wrote: "As regards the interpretation of the Collective Bargaining Agreement we will do so having regard to what Arbitrator Elliott described as the modern approach to the interpretation of collective Agreements."[38] In *Tri-Krete*,[39] Arbitrator Monteith wrote:

---

[27] *Ibid* at para 4:2000.
[28] *United Food and Commercial Workers, Local 401 v. Westfair Foods Ltd. (c.o.b. The Real Canadian Superstore)*, 2008 ABQB 353, [2008] A.J. No. 634 (QL) ["*Westfair Foods 2008*"].
[29] *Real Canadian Superstore v. United Food and Commercial Workers, Local 401*, [2007] A.G.A.A. No. 70 (QL).
[30] *Ibid* at para 26.
[31] *Petro Chem Driver's and Maintenance Assn. Inc. v. Mantei's Transport Ltd*., [2010] C.L.A.D. No. 36 (QL) ["*Mantei's Transport*"].
[32] *Ibid* at para 29.
[33] *Alberta Teachers' Assn. v. Calgary Roman Catholic School District No. 1*, 2010 ABQB 828, [2010] A.J. No. 1575 at para 35 (QL) ["*Alberta Teachers' Assn*"].
[34] *Alberta Teachers' Assn. v. Calgary Roman Catholic Separate School District No. 1*, 2012 ABCA 45, [2012] A.J. No. 122 (QL).
[35] *Macdonald's Consolidated, a Division of Canada Safeway v. Miscellaneous Employees Teamsters Local Union 987 (Policy Grievance)*, [2010] A.G.A.A. No. 22 (QL) ["*Teamsters 987*"].
[36] *Ibid* at para 20, citing *Transalta Utilities Corp. v. International Brotherhood of Electrical Workers, Local 254 (Policy Grievance)*, [2010] A.G.A.A. No. 12 at para 17 (QL) ["*Transalta*"].
[37] *Saskatchewan Union of Nurses Local 10 v. Sun Country Health Region (c.o.b. Arcola Health Centre) (Collective Bargaining Agreement Grievance)*, [2012] S.L.A.A. No. 2 (QL) ["*SUN Local 10*"].
[38] *Ibid* at para 69. See also *Saskatchewan Union of Nurses v. Regina Qu'Appelle Health Region (Schoenhofen Grievance)*, 208 L.A.C. (4th) 346, [2011] S.L.A.A. No. 12 at para 129 (QL).

> An arbitrator's task respecting the interpretation of a collective agreement is to determine the true intention of the parties from the language agreed to by the parties. The modern approach to interpretation is a contextual one where the words of an agreement are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the agreement.[40]

In *Coca-Cola*,[41] Arbitrator Sims wrote: "The rules of interpretation are usefully summarized in the decision of Arbitrator Elliott in the *Owen-Corning* case, where he adapted the Supreme Court of Canada's more modern approach to interpretation to the collective agreement situation."[42] In *SAIT*,[43] Phillips J. dismissed the judicial review of a decision of Arbitrator Wallace,[44] where the Association had argued that Arbitrator Wallace's decision "was consistent with the modern approach to the interpretation of collective agreements, which is to read the provisions in question in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties."[45] In *Catholic School*,[46] Arbitrator Tettensor wrote: "when the words of Article 8.2(g) are read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties, the interpretation applied by the District when calculating the HSA of new teachers has been correct."[47]

In *Chieu*,[48] the unanimous Supreme Court of Canada noted that "[w]hile the interpretive factors enumerated by Driedger need not be applied in a formulaic fashion, they provide a useful framework through which to approach…interpretation. However, …these interpretive factors are closely related and interdependent. They therefore need

---

[39] *Tri-Krete Ltd. v. Labourers' International Union of North America, Local 506 (Nazarian Grievance)*, [2010] O.L.A.A. No. 387 (QL) ["*Tri-Krete*"].
[40] *Ibid* at para 12.
[41] *Coca-Cola Bottling Co. v. Miscellaneous Employees, Teamsters Local 987 (Floater Days Grievance),* [2011] A.G.A.A. No. 24 (QL) ["*Coca-Cola*"].
[42] *Ibid* at para 14.
[43] *Southern Alberta Institute of Technology (Board of Governors) v. SAIT Academic Faculty Assn*., 2011 ABQB 392, [2011] A.J. No. 953 (QL) ["*SAIT*"].
[44] *SAIT Academic Faculty Assn. v. Southern Alberta Institute of Technology (Kearney Grievance)*, [2010] A.G.A.A. No. 31 (QL).
[45] *SAIT, supra* note 43 at para 31.
[46] *Alberta Teachers' Assn. v. Calgary Roman Catholic School District No. 1(Personal Spending Account Grievance)*, [2011] A.G.A.A. No. 38 (QL) ["*Catholic School*"].
[47] *Ibid* at para 138.
[48] *Chieu, supra* note 6.

not be canvassed separately in every case."[49] The five closely related and interdependent factors are briefly discussed below.

i. The words of an Act or contract are to be read in their entire context

In 2008, the Alberta Court of Appeal wrote: "First principles require that the Arbitrator interpret the salient provisions in the context of the Agreement as a whole and in a manner that avoids conflicts or internal inconsistencies within the Collective Agreement. The parties are presumed to have drafted an agreement that avoids such inconsistencies. It follows that the interpretation which accords with that end reflects the parties' true intent."[50] According to the Supreme Court of Canada, "The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."[51] "[T]he meaning of words depends in part on the context in which they are used. The overall context of an enactment includes, *inter alia*, the other provisions of the statute, the related statutes and the other rules of the legal system."[52] In collective agreement interpretation, the meaning of words under consideration depends in part on the context in which they are used in the sentence in which they are found, in the provision in which they are found, in light of other provisions of the collective agreement, in light of the collective agreement overall, and in light of applicable employment-related statutes.[53]

ii. The words of an Act or contract are to be read in their grammatical and ordinary sense

In 2011 the Alberta Court of Appeal wrote: "the proper approach to interpreting collective agreements is to ascertain the purpose of the provision being interpreted either from its words or from its context in the collective agreement. Having ascertained the provision's purpose, one interprets the plain and ordinary meaning of the provision to see

[49] *Ibid* at para 28.
[50] *United Food and Commercial Workers' Union, Local 401 v. Real Canadian Superstore*, 2008 ABCA 210, [2008] A.J. No. 588 at para 15 (QL) ["*UFCW*"]; emphasis added.
[51] *Canada Trustco, supra* note 6 at para 10.
[52] *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351, [1999] S.C.J. No. 56 at para 33 (QL).
[53] See *supra* notes 2 and 3 above.

if it undermines the purpose of the provision previously ascertained."[54] In 2011 the Supreme Court of Canada restated the following principle:

> When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant [not determinative] role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[55]

The Supreme Court then added: "The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute."[56] In collective agreement interpretation, the words under consideration, if clear, will dominate [but are not determinative]; if not, they yield to an interpretation that best meets the overriding purpose of the collective agreement. The plain and ordinary meaning of the words under consideration are only one of the five closely related and interdependent factors comprising the modern contextual interpretative approach, none of which are determinative on their own.

iii. The words of an Act or contract are to be read harmoniously with the scheme of the Act or contract

In 2011 the Alberta Court of Appeal wrote:

> **13** What the Supreme Court of Canada calls the "cardinal" principle of interpretation …is that a contract must be read and interpreted as a whole, fitting all its parts together, and trying hard to bring them into harmony. See … *BG Checo Int v. BC Hydro etc* [1993] 1 SCR 12, 23-24, 147 NR 81 (para 9). …
>
> **15** … A contract must be interpreted in a positive and purposive manner, trying to make it work. The parties' purpose here was to make a workable commercial deal between oilfield servicing companies. The court must presume that these business people intended that the contract work in substance and frankly, beyond the nominal or technical. The court must not be too quick to find gaps or flaws in a commercial contract's wiring which prevent power from reaching all its operative parts. The parties are presumed not to have been wasting ink on an academic exercise. Therefore, where one possible interpretation will allow the contract to function and meet the commercial objective in view, and the other scarcely will, the former is to be chosen…
>
> **16** In particular, the court must read a contract with an eye to finding and understanding the scheme or arrangement which the contract uses. If there is real doubt as to the meaning of a

---

[54] *United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital)*, 2011 ABCA 247, [2011] A.J. No. 903 at para 75 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 457 (QL); emphasis added.
[55] *Canada Trustco, supra* note 6 at para 10.
[56] *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] S.C.J. No. 1 at para 21 (QL).

> phrase or clause in that contract, the court must prefer the meaning which advances that overall scheme.[57]

Black's[58] defines "scheme" as "A systemic plan; a connected or orderly arrangement, esp. of related concepts <legislative scheme>."[59] The "scheme" of an Act or contract (including a collective agreement), in the context of the modern contextual interpretative approach, is the "method"[60] or "mechanism"[61] or "means"[62] to deliver, or "the legislative [or contractual] planning puzzle governing"[63] the subject matter addressed under the legislation or contract intended to be, an orderly "arrangement"[64] for achieving the purposes or objectives of the legislation or contract. "When analysing the legislative scheme, the Court tries to discover how the provisions or parts of different acts and regulations work together to give effect to a plausible and coherent plan."[65]

In collective agreement interpretation, when analysing the collective agreement scheme, the arbitrator tries to discover how the provisions or parts of the collective agreement work together as a whole[66] to give effect to a plausible and coherent plan.

iv. The words of an Act or contract are to be read harmoniously with the object of the Act or contract

The object (or purpose) of a statute may be deduced, in part, from its preamble or legislative Hansard,[67] and statutory objectives are often judicially pronounced. For

---

[57] *Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, [2011] A.J. No. 1410 at paras 13, 14-15 (QL); emphasis added.
[58] Bryan A. Garner, ed. *Black's Law Dictionary*, 7th ed (St. Paul: West Group, 1999) ["*Black's*"].
[59] *Ibid* at 1346.
[60] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75 at para 363 (QL), per La Forest J. (dissenting in part).
[61] *Rizzo Shoes*, *supra* note 6 at para 36. See also *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] S.C.J. No. 13 at para 40 (QL); *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, [1992] S.C.J. No. 13 at para 65 (QL).
[62] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, [1997] S.C.J. No. 76 at para 55 (QL), per Lamer C.J. and Iacobucci J (dissenting).
[63] *Love v. Flagstaff (County) Subdivision and Development Appeal Board*, 2002 ABCA 292, [2002] A.J. No. 1516 at para 22 (QL).
[64] *Keller v. Bighorn (Municipal District, No. 8)*, 2010 ABQB 362, [2010] A.J. No. 606 at para 1 (QL); *Watson v. Schellenberger*, 2002 ABQB 655, [2002] A.J. No. 879 at para 36 (QL).
[65] *Bristol-Myers, supra* note 6 at para 128, per Bastarache J (dissenting).
[66] Including collateral documents as may expressly or impliedly form part of the collective agreement; such as, letters of understanding, memorandums of agreement, return to work agreements, disability benefits plans, and pension plans, as well as employment-related statutes incorporated into collective agreements by reference, or implied into collective agreements as a matter of law; see *supra* notes 3 and 4 above.

example, the Alberta Court of Appeal has discussed the objective of the Alberta *Employment Standards Code*[68] as follows:

> **10** What then is the purpose of the subject legislation? The Code contains a detailed preamble setting forth its legislative objectives. In particular, those objectives stress the importance of employment legislation encouraging the "fair and equitable resolution of matters arising over terms and conditions of employment". Further and most important for purposes of this appeal, the preamble expressly recognizes the salutary effect of open communication between employer and employee and the vital need for each to understand their respective rights and obligations. To this end, the Legislature added the following to the preamble:
>
>> Realizing that the employee-employer relationship is based on a common interest in the success of the employing organization, best recognized through open and honest communication between affected parties;
>>
>> Recognizing that employees and employers are best able to manage their affairs when statutory rights and responsibilities are clearly established and understood ...[69]

Considering the Ontario employment standards legislation in effect in 1992,[70] the Supreme Court of Canada has stated:

> …The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination. To quote Conant Co. Ct. J. in *Pickup, supra*, at p. 274, "the general intention of this legislation [i.e. the Act] is the protection of employees, and to that end it institutes reasonable, fair and uniform minimum standards." The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. As stated by Swinton, *supra*, at p. 363:
>
>> ... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[71]

---

[67] Official reports of legislative or parliamentary debates; derives from "Hansard (han-sərd). The official reports of debates in the British Parliament…: *Black's, supra* note 58 at 721. "[U]ntil recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the 'intent' of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of <u>Hansard evidence</u>, it <u>should be admitted as</u> <u>relevant to</u> both the background and <u>the purpose of legislation</u>": *Rizzo Shoes, supra* note 6 at para 35, citing *R. v. Morgentaler*, [1993] 3 S.C.R. 463, [1993] S.C.J. No. 95 at para 28 (QL); emphasis added. See also *Reference re: Firearms Act (Can.)*, 2000 SCC 31, [2000] S.C.J. No. 31 at para 17 (QL)

[68] *Employment Standards Code*, RSA 2000, c E-9.

[69] *Vrana v. Procor Ltd*., 2004 ABCA 126, [2004] A.J. No. 439 at para 10 (QL). See also *Smith v. Hostess Frito-Lay Co*., 155 A.R. 254, [1994] A.J. No. 483 at paras 5-7 (QL) (CA).

[70] *Employment Standards Act*, RSO 1980, c 137.

[71] *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 at para 31 (QL).

"One of the stated goals of the Alberta *Labour Relations Code* is the encouragement of 'fair and equitable resolution of matters arising in respect of terms and conditions of employment'."[72] Further, "the preamble to the [*Labour Relations*] *Code* indicates that it endeavours to facilitate 'mutually effective relationship[s] between employees and employers', including 'fair and equitable resolution of matters' with 'open and honest communication between affected parties', all through a statutory collective bargaining regime."[73] The Alberta Court of Appeal writes:

> …the jurisprudence directs that we should guard against undermining the purpose of the legislature in enacting labour relations legislation. As was noted in *Weber*…: 'The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks'."[74]

"Because the field of labour relations is sensitive and volatile, there is a need to provide swift and binding decisions by experts who are alive to the issues unique to labour disputes. [One of the purposes of the Alberta *Labour Relations Code* is a] speedy and informed resolution of labour issues, such as interpretation of collective agreements, [which] is needed to maintain and promote peace in industrial relations, benefitting the parties involved as well as society as a whole."[75] "The importance of dispute resolution is evidenced in the Alberta [*Labour Relations*] *Code* in a number of sections, including s. 135, which requires that every collective agreement have a method for solving disputes

---

[72] *Amalgamated Transit Union, Local 583 v. Calgary*, 2007 ABCA 121, [2007] A.J. No. 374 at para 44 (QL), leave to appeal to SCC refused, [2007] S.C.C.A. No. 294 (QL), citing *Labour Relations Code*, RSA 2000, c L-1, Preamble.

[73] *Alberta Union of Provincial Employees v. Alberta (Provincial Health Authorities)*, 2006 ABCA 356, [2006] A.J. No. 1480 at para 16 (QL), leave to appeal to SCC refused, [2007] S.C.C.A. No. 41 (QL). See also *International Assn. of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc*., 2007 ABCA 319, [2007] A.J. No. 1129 at para 38 (QL), leave to appeal to SCC refused, [2007] S.C.C.A. No. 595 (QL).

[74] *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120, [2007] A.J. No. 373 at para 24 (QL), leave to appeal to SCC refused, [2007] S.C.C.A. No. 280 (QL), citing *Weber, supra* note 13 at para 41.

[75] *Health Sciences Assn. of Alberta v. David Thompson Health Region*, 2004 ABCA 185, [2004] A.J. No. 584 at para 16 (QL), citing *Parry Sound, supra* note 4 at para 36 ("the whole purpose of a system of grievance arbitration is to secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer. This is a basic requirement for peace in industrial relations which is important to the parties and to society as a whole"), and *Foothills Provincial General Hospital v. United Nurses of Alberta, Local 115*, 1998 ABCA 358, [1998] A.J. No. 1261 (QL), leave to appeal to SCC refused, [1999] S.C.C.A. No. 31 (QL).

between parties bound by a collective agreement."[76] A "purpose of the legislation [is] to have arbitrators expeditiously and efficaciously resolve workplace disputes."[77] The Alberta *Labour Relations Code* is of "fundamental importance [to the] prompt and final resolution of workplace disputes and [courts have recognized] the role that labour arbitration boards play in achieving that goal"[78] or objective.

"[T]he object of the [*Alberta Human Rights Act*[79]] in its entirety is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices."[80] Some legislation expressly states its purpose (or objective). An Alberta example is the *Personal Information Protection Act*:[81] "The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable."[82]

A labour arbitrator deducing the purpose or objective of her enabling legislation,[83] or legislation expressly (by reference) or implicitly incorporated as a matter of fact, or implicitly incorporated as a mater of law,[84] into the collective agreement under consideration may rely on the statute's preamble, legislative Hansard, and/or jurisprudence to do so. However, a labour arbitrator deducing the purpose or objective of the collective agreement "in its entirety" (as opposed to a specific provision thereof) is a different matter.

A "collective agreement" is statutorily defined in Alberta as "an agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents

---

[76] *United Nurses of Alberta, Local 115 v. Calgary Health Authority*, 2004 ABCA 7, [2004] A.J. No. 8 at para 20 (QL).
[77] *United Nurses of Alberta, Local 33 v. Capital Health Authority*, 2004 ABCA 401, [2004] A.J. No. 1471 at para 24 (QL), leave to appeal to SCC refused, [2005] S.C.C.A. No. 73 (QL)
[78] *Mistahia Health Region v. United Nurses of Alberta, Local 64*, 2003 ABCA 361, [2003] A.J. No. 1491 at para 17 (QL)
[79] *Alberta Human Rights Act*, RSA 2000, c A-25.5.
[80] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29 at para 112 (QL)
[81] *Personal Information Protection Act*, SA 2003, c. P-6.5.
[82] *Ibid*, s 3. See *United Food and Commercial Workers, Local 401 v. Alberta (Attorney General)*, 2012 ABCA 130, [2012] A.J. No. 427 at para 5 (QL).
[83] See *supra* note 3.
[84] See *supra* note 4.

containing one or more agreements."[85] Federally it is "an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters."[86] A collective agreement entered into by a "government" employer is a "law" for the purpose of *Charter*[87] analyses, and "the exercise of a general power under provision of a Collective Agreement entered into by a Government agency would be invalid if exercised in a manner contrary to the *Charter*."[88] In *McKinney* [89] Wilson J. described the collective agreement as "the law of the workplace": "What we are dealing with in these appeals is, broadly speaking, 'the law of the workplace'—law … determined … by the joint efforts of the union and the employer in the case of unionized establishments—but binding law nonetheless."[90] At least several years earlier than *McKinney*, a "collective agreement" was arbitrally recognized as "the law of the workplace."[91] As discussed above,[92] "the application of statutory provisions or the general law in so far that law forms part of the law of the workplace to be dealt with through arbitration" may also form part of the collective agreement.[93] For example, in *Ottawa Police*,[94] Arbitrator Lynk wrote: "the rights and obligations of the *Human Rights Code* have also been imported into collective agreements governed by labour relations statutes that do not contain an express grant-of-jurisdiction provision"; thus agreeing with the Association's argument that "The

---

[85] *Labour Relations Code*, RSA 2000, c L-1, s 1(f).
[86] *Canada Labour Code,* RSC 1985, c L-2, s 3(1), "collective agreement".
[87] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c 11 [the "*Charter*"].
[88] *Alberta Union of Provincial Employees v. Alberta*, 2002 ABCA 202, [2002] A.J. No. 1086 at para 20 (QL), citing *Lavigne v. Ontario Public Service Employees Union Francis Edmund Mervyn Lavigne v Ontario Public Service Employees Union and Ontario Council of Regents for Colleges of Applied Arts and Technology*, [1991] 2 S.C.R. 211, [1991] S.C.J. No. 52 at para 212 (QL): "the collective agreement is law. It was entered into by a government agency pursuant to powers granted to that agency by statute in furtherance of government policy."
[89] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122 (QL) ["*McKinney*"].
[90] *Ibid* at para 288 per Wilson J. (Dissenting on other grounds)
[91] *Del Rey Electric Ltd. v. International Woodworkers of America, Local 1-357 (Fischer Grievance)*, [1982] B.C.C.A.A.A. No. 119 at para 20 (QL). Cited in *P.G.Q. Enterprises Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-424*, [2000] B.C.C.A.A.A. No. 444 at para 43 (QL).
[92] See *supra* note 4.
[93] *Calgary (City) v. Canadian Union of Public Employees, Local 38 (Corporate Travel Plan Grievance)*, [2004] A.G.A.A. No. 8 at para 72 (QL). See also *Telus v. Telecommunications Workers Union (Grievance re Employee Share Purchase Plan)*, 201 L.A.C. (4th) 15, [2010] C.L.A.D. No. 347 at para 38 (QL); *Global Calgary v. Communication, Energy and Paperworkers Union of Canada, L88-M*, [2007] C.L.A.D. No. 390 at para 39 (QL).
[94] *Ottawa Police Assn. v. Ottawa Police Services Board (Carriere Grievance)*, 160 L.A.C. (4th) 118, [2007] O.L.A.A. No. 220 at para 20 (QL) ["*Ottawa Police*"]

overriding importance of human rights as a central component in Canadian law generally, and the law of the workplace in particular, mean that collective agreements are implicitly endowed with these human rights obligations by implication, and labour arbitrators have sufficient jurisdiction to apply these rights when reading a collective agreement."[95]

Knowing what a collective agreement is, what then is the purpose or objective of the collective agreement "in its entirety" (as opposed to a specific provision thereof) in the context of Driedger's modern contextual approach to collective agreement interpretation? The purpose or objective of the collective agreement is generally to codify the procedural and substantive rights and obligations (the law of the workplace) of the parties to it (trade unions and employers) and third-parties bound by it (the bargaining unit employees). The existence of the collective agreement presupposes the mandatory inclusion of mid-contract dispute resolution mechanisms[96]—normally grievance arbitration—and statutory prohibitions against strike and/or lockout during its currency.[97] Therefore, a collateral purpose or objective of the collective agreement is to prevent labour strife—to facilitate labour peace—and to preserve the ongoing relationship between employers and their employees, as represented by their unions.

Collective agreements and labour arbitrators are *sui generis*. Thus, the unanimous Supreme Court of Canada recently wrote:

> **44** Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.
>
> **45** On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates—and well equipped by their expertise—to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized. …
>
> **47** The broad mandate of arbitrators flows as well from their distinctive role in fostering peace in industrial relations …

---

[95] *Ibid* at para 9; emphasis added.
[96] See eg *Labour Relations Code*, RSA 2000, c L-1, ss 135-6 ; *Canada Labour Code,* RSC 1985, c L-2, s 57.
[97] See eg *Labour Relations Code*, RSA 2000, c L-1, ss 71-2, 73(a), 74(a) ; *Canada Labour Code,* RSC 1985, c L-2, s 88.1.

> **48** Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise—and they inevitably will—the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.
>
> **49** Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.[98]

v. The words of an Act or contract are to be read harmoniously with the intention of the legislature or parties to the contract

One of the closely related and interdependent interpretive factors of Driedger's modern contextual approach to collective agreement interpretation is drafter intention—the "intention" of the legislature (the legislators collectively) in the case of statutes; the intention of the employer and trade union collectively in the case of collective agreements. The Alberta Court of Appeal has written: "The object in construing an agreement is to ascertain the intention of the parties. The meaning of a word is seldom absolute, but rather is influenced by the context of the agreement in which it is found."[99]

However, deducing the intention of a body comprised of dozens or hundreds of individuals (a legislature), or the combined intention of two entities (employer and trade union) comprised of multiple negotiator agents (the individuals comprising their respective collective bargaining committees), is little more than "legal fiction." "[L]ike 'the intention of the legislature,' 'the intention of the parties' to which the law of contract gives effect is something of a legal fiction, in the sense that it is determined on the basis of an objective analysis of the words and conduct of the parties, not by reference to their subjective intention or understanding."[100] Recall that Arbitrator Elliott wrote in *Owens-Corning*:[101]

> **9** I use as my approach to the interpretation of collective agreements the same approach that the Supreme Court of Canada has adopted for the interpretation of legislation. In this award I refer to this approach as the modern method of interpretation. In my view, the modern method of interpretation is a superior statement, as a guide to interpretation, than the rule stated in

---

[98] *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] S.C.J. No. 59 (QL); emphasis added.

[99] *United Nurses of Alberta, Local 121R v. Calgary Health Region (Rockyview Hospital)*, 2007 ABCA 341, [2007] A.J. No. 1213 at para 28 (QL) ["*Rockyview Hospital*"].

[100] *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2006] F.C.J. No. 339 at para 91 (QL), per Evans JA (dissenting).

[101] *Owens-Corning*, *supra* note 18.

> Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern method of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> **10** The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by this statement:
>
>> In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> **11** Using this method, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional "intention of the parties" where none existed, but recognizes their intention if an intention can be determined from the language used in the collective agreement. The modern method also looks into the entire context of the agreement to determine the meaning to be given to words in dispute. …[102]

Therefore, under Driedger's modern contextual approach to collective agreement interpretation, it is not correct to limit "[t]he object in construing an agreement … to ascertain[ing] the intention of the parties"; rather, the approach "avoids creating a fictional 'intention of the parties' where none existed, but recognizes their intention if an intention can be determined from the language used in the collective agreement."

III. Implied Terms

In applying Driedger's modern contextual approach to collective agreement interpretation, interpreters may discover implied terms in the instrument under consideration. Terms may be implied into contracts by three means: "custom or usage", as a matter of law, or as a matter of fact.[103] Implied terms are to be distinguished from collateral documents "incorporated by reference" into an instrument. Implied terms, including collateral documents or statutes implied by law or fact, do not expressly appear in the written instrument under consideration; on the other hand, collateral documents may be expressly incorporated by reference into an instrument under consideration.

---

[102] *Ibid* at paras 9-11; emphasis added.
[103] See *Bhasin (c.o.b. Bhasin & Associates) v. Hrynew*, 2011 ABQB 637, [2011] A.J. No. 1223 at paras 159-126 (QL) ["*Bhasin*"] for discussion of contractual terms implied as a matter of law vs. as a matter of fact.

i. The Implication of Terms in a Contract on the Basis of Custom or Usage

The Supreme Court of Canada has written that "the implication of terms in a contract on the basis of custom or usage is a well recognized category of implication that has been particularly important with respect to commercial contracts."[104] Although at least one arbitration decision recognizes the principle of implication by "custom or usage",[105] in practice grievance arbitrators generally imply terms into collective agreements as a matter of law, or as a matter of fact.

ii. The Implication of Terms in a Contract as a Matter of Law

The Supreme Court of Canada has distinguished "the implication of a term as a legal incident of a particular class or kind of contract, without regard to the presumed intention of the parties, …from the implication of a term to fill a gap in a particular contract on the basis of presumed intention, in accordance with the business efficacy and 'officious bystander' tests…";[106] the former being a term implied as a matter of law, the latter being a term implied as a matter of fact. A term implied as a matter of law "does not depend on presumed intention [of the parties to the instrument; rather, it is] the <u>implication of terms as legal incidents of a particular class or kind of contract</u>, the nature and content of which have to be largely determined by implication."[107]

For example, in the Canadian employment law context, the common law implies into every indefinite-term individual contract of employment that is silent in relation to how it may be terminated a term implied as a matter of law requiring that the employer give the employee "reasonable notice" of termination. Iacobucci J., writing for the majority in *Machtinger*,[108] "characterize[d] the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly

---

[104] *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, [1987] S.C.J. No. 29 at para 51 (QL) ["*C.P. Hotels*"].
[105] *County of Athabasca No. 12 v Alberta Teachers' Association, Athabasca Local*, 19 L.A.C. (2d) 1, [1978] A.G.A.A. No. 3 at para 27 (QL).
[106] *C.P. Hotels, supra* note 104 at para 42.
[107] *Ibid* at para 53.
[108] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 (QL) ["*Machtinger*"].

specifies some other period of notice, whether expressly or impliedly."[109] McLachlin J.'s concurring reasons more clearly expressed the principles of implied terms:

> **45** So the real issue is this: in the absence in a contract of employment of a legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period, and in particular, to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?
>
> **46** This question cannot be answered without examining the legal principles governing the implication of terms. The intention of the contracting parties is relevant to the determination of some implied terms, but not all. Intention is relevant to terms implied as a matter of fact, where the question is what the parties would have stipulated had their attention been drawn at the time of contracting to the matter at issue. Intention is not, however, relevant to terms implied as a matter of law. As to the distinction between types of implied terms see Treitel, *The Law of Contract* (7th ed. 1987), at pp. 158-165 (dividing them into three groups: terms implied in fact; terms implied in law; and terms implied as a matter of custom or usage), and *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.[110]

In the Canadian labour law context, all collective agreements contain terms implied into them as a matter of law;[111] specifically:

> …the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract."[112]

However, "if a rule is incompatible with the collective labour relations scheme, it cannot be incorporated and must be disregarded… If the rule is found to be compatible and if it is a supplementary or mandatory norm…the arbitrator will have jurisdiction to apply it."[113] Therefore, "the common law principle of termination only on reasonable notice" discussed above is a creature of the general law relating to individual contracts of employment so is "incompatible with the collective labour relations scheme" and "cannot be incorporated" as a matter of law into collective agreements.

---

[109] *Ibid* at para 20.
[110] *Ibid* at paras 45-46; emphasis added.
[111] See *supra* note 4.
[112] *Parry Sound, supra* note 4 at para 28.
[113] *Isidore, supra* note 4 at para 24.

iii. The Implication of Terms in a Contract as a Matter of Fact

Terms may also be implied "under the other category of implication based on presumed intention—the implication of a term as necessary to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term which the parties would say, if questioned, that they had obviously assumed."[114] These are terms implied by "necessary implication", or as a matter of fact. The Alberta Court of Appeal has provided the following guidance:

> …it has always been a rule that a Court should be cautious in implying terms into a written contract in order to give it business efficacy. In G. *Ford Homes Ltd. v. Draft Masonary (York) Co. Ltd*. (1984) 43 O.R. (2d) 401 Cory J.A. of the Ontario Court of Appeal said at p. 403:
>
>> When may a term be implied in a contact? A court faced with that question must first take cognizance of some important time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.[115]

IV. Ambiguity (Patent and/or Latent)

As mentioned above, the unanimous Supreme Court of Canada has directed that "It is necessary, in every case, for the court[116] charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger."[117] "Other principles of interpretation…only receive application where there is ambiguity as to the meaning of a provision."[118] For example, in *CEP 707*,[119] the Alberta Court of Appeal wrote:

---

[114] *C.P. Hotels, supra* note 104 at para 52.
[115] *Sullivan v. Newsome*, 78 A.R. 297, 52 Alta. L.R. (2d) 304, [1987] A.J. No. 438 (QL) (CA), leave to appeal to SCC refused, [1988] S.C.C.A. No. 68 (QL). See also *Catre Industries Ltd. v. Alberta*, 99 A.R. 321, [1989] A.J. No. 903 (QL) (CA), leave to appeal to SCC refused, [1989] S.C.C.A. No. 447 (QL); *Gainers Inc. v. Pocklington Financial Corp*., 2000 ABCA 151, [2000] A.J. No. 626 at para 18 (QL); *Apex Corp. v. Ceco Developments Ltd*., 2008 ABCA 125, [2008] A.J. No. 325 at para 31 (QL), leave to appeal to SCC refised, [2008] S.C.C.A. No. 264 (QL); *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72, [2010] A.J. No. 243 at para 118 (QL).
[116] See *supra* note 13 and accompanying text; *viz*. that labour arbitrators are "courts" in the context of the Supreme of Canada's Court's statutory/contractual interpretation jurisprudence.
[117] *Bell ExpressVu, supra* note 6 at para 30; emphasis added.
[118] *Ibid* at para 28; emphasis added.

> **24** The [Arbitral] Board referred to a number of rules of construction to be applied as aids in interpreting the [Collective] Agreement, including:
>
> (i) A collective agreement is to be read and construed as a whole.
> (ii) Words under construction should be read in the context of the sentence, section, and agreement as a whole.
> (iii) Clear words are to be given their ordinary meaning, but
>
> - plain meaning may be departed from where it would result in an absurdity or be inconsistent with the rest of the agreement, and
>
> - extrinsic evidence is admissible as an aid to interpretation where an ambiguity is identified.
>
> **25** The Board took a contextual purposive approach to the interpretation of Article 5.08(b) and reviewed other relevant provisions of the Agreement. That approach could reasonably lead to the finding made by the Board that there was an ambiguity as certain other provisions of the Agreement contemplated temporary shift changes to fill vacancies. …

Bell ExpressVu[120] provides some guidance in relation to the principle of ambiguity:

> **29** What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each **equally** in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> **30** For this reason, ambiguity cannot reside in the mere fact that several courts—or, for that matter, several doctrinal writers—have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).[121]

The Court noted "circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but **equally** plausible, interpretations."[122] In *Senos,* Graesser J. wrote: "When determining whether there is an ambiguity, the court must consider whether there are two or more **reasonable** interpretations that are possible. If a

---

[119] *Communications, Energy and Paperworkers Union Local 707 v. Suncor Energy* Inc., 2011 ABCA 90, [2011] A.J. No. 297 at paras 24-25 (QL) ["*CEP 707*"].
[120] *Bell ExpressVu, supra* note 6.
[121] *Ibid* at paras 29-30; emphasis added.
[122] *Ibid* at para 62; emphasis added.

competing interpretation is absurd, or unreasonable, the fact that a different interpretation is **possible** does not provide the necessary ambiguity to allow for parol evidence."[123]

A labour arbitrator charged with interpreting a provision of a statute or collective agreement must "in every case" undertake the contextual and purposive approach set out by Driedger. Then, and only if application of the modern contextual approach does not resolve the interpretive task (including implying terms), does one turn to determine whether the words are ambiguous. Finally, and only if the arbitrator determines an ambiguity to be present, the arbitrator can resort to other principles of interpretation, including external interpretive aids. Ambiguity will be found only if upon application of the contextual and purposive approach there are two or more **reasonable and equally plausible** interpretations that are possible. Ambiguity may be patent or latent. In *Inland Cement*,[124] the Alberta Court of Appeal agreed with the following statement:

> An ambiguity whether patent or latent implies at least two meanings of one word or phrase. A patent ambiguity is an ambiguity on its face; a latent ambiguity does not become one until evidence shows it to be so. The evidence here sought to be adduced is not intended to point out a latent ambiguity or to clear up an ambiguity either patent or latent; it is tendered to show that words unambiguous in meaning were not intended to apply to a particular factual situation. Contracting parties must live with the words they have used if those words are clear and no mistake or other vitiating element is involved.[125]

Black's[126] defines "patent ambiguity" as: "[a]n ambiguity that clearly appears on the face of a document, arising from the language itself."[127] *Black's* defines "latent ambiguity" as: "[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed."[128] As noted above, "other principles of interpretation", a few of which are discussed below, are only to be applied after ambiguity is held to be present following application of the contextual and purposive approach set out by Driedger; including use of extrinsic evidence as an interpretative aid. However, extrinsic evidence is admissible in order to determine whether a latent ambiguity exists. For example, in *National Corn*

---

[123] *Senos v. Pacesetter Performance Drilling Ltd.,* 2010 ABQB 533, [2010] A.J. No. 946 at para 44 (QL) ["*Senos*"].
[124] *Inland Cement Industries Ltd. v United Cement, Lime and Gypsum Workers, Local 359*, 27 A.R. 135, [1981] A.J. No. 723 (QL) ["*Inland Cement*"].
[125] *Ibid* at para 15.
[126] *Black's, supra* note 58.
[127] *Ibid* at 80.
[128] *Ibid*.

Growers,[129] the Supreme Court of Canada was reviewing an administrative decision of the Canadian Import Tribunal that had been the subject of a judicial review.[130] In the course of interpreting *Special Import Measures Act*,[131] s 42, the Tribunal had considered the General Agreement on Tariffs and Trade, an international agreement extrinsic to the statute under consideration. Gonthier J. wrote for the majority of the court: "it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation… As a latent ambiguity must arise out of matters external to the text to be interpreted, such an international agreement may be used, as I have just suggested, at the preliminary stage of determining if an ambiguity exists."[132]

Three years later, in the context of a judicial review of a grievance arbitration award, Sopinka J. wrote for a unanimous court[133] in *United Brotherhood*:[134]

> **47** The arbitrator in this case was of the opinion that he was entitled to rely on the Harris report if the terms of the agreement were not clear and unambiguous. In my view, this was not an unreasonable approach. He was not required to attempt to apply the rules of evidence as to what constitutes ambiguity, but merely to reasonably conclude that the collective agreement was unclear. In this regard, the following statement by Gonthier J. in the *National Corn Growers* case is instructive, at p. 1371
>
>> The first comment I wish to make is that I share the appellants' view that in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.
>
> That passage was referring to the interpretation of statutory provisions which implemented an international agreement, but I see no reason why it should not be equally applicable to the interpretation of an agreement such as a collective agreement.

---

[129] *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, [1990] S.C.J. No. 110 (QL) ["*National Corn Growers*"].

[130] See generally E. Wayne Benedict, "Special Chambers Judicial Review Applications in Alberta, 2012" (Paper delivered at Legal Education Society of Alberta Special Chambers Applications Course, Edmonton, 22 February 2012 and Calgary, 28 February 2012), online: JD Supra <http://www.jdsupra.com/post/fileServer.aspx?fName=a81c4201-cd91-4047-9795-86c15be63855.pdf>.

[131] *Special Import Measures Act*, S.C. 1984, c 25, s 42.

[132] *National Corn Growers, supra* note 129 at para 75.

[133] Corry J . was "in substantial agreement with the excellent reasons of Mr. Justice Sopinka [and he] would have differed only on the approach that should be taken by courts reviewing decisions of arbitrators acting in the field of labour relations": *Ibid* at para 56.

[134] *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, [1993] S.C.J. No. 56 (QL) ["*United Brotherhood*"].

> **48** Gonthier J. went on to observe in *National Corn Growers* that such extrinsic evidence could be referred to before determining that there existed ambiguity on the face of the agreement for the purpose of determining if there was latent ambiguity. …

In short, "[i]n the case of latent ambiguity, the [labour] arbitrator can rely on extrinsic evidence not only to resolve the ambiguity, but to disclose it."[135] Keeping the above principles in mind, the statements of the Court of Appeal in *UFCW 401*[136] should be noted:

> **12** … Section 143(2)(a) of the *Labour Relations Code*, R.S.A. 2000, c. L-1 grants an arbitrator the power to "accept any oral or written evidence that [the arbitrator] considers proper, whether admissible in a court of law or not" and s. 143(2)(b) provides that an arbitrator "is not bound by the law of evidence applicable to judicial proceedings". These sections of the *Code* arguably gave the arbitrator here the broad discretion to rely on the prior collective agreements to interpret the current one even in the absence of ambiguity.
>
> **13** But it does not follow that the arbitrator was required to rely on the prior collective agreements in the absence of ambiguity. This remained a discretionary decision. What use is to be made of evidence admitted by an arbitrator lies at the heart of what the Legislature entrusts labour arbitrators to decide. Indeed, as noted by the Supreme Court of Canada in *United Brotherhood*...[137] "... the use of extrinsic evidence to interpret a collective agreement is very much in the core area of an arbitrator's function."[138]

SAIT,[139] provides an example of the above principles applied, wherein Phillips J. wrote: "The Arbitration Board concluded that the meanings of ss. 16.01 and 39.02 of the Collective Agreement were not ambiguous but capable of interpretation, that there was as a result no need to resort to evidence of past practice in interpreting those provisions, and that in any event the evidence of past practice would not have been helpful. … The decision… is reasonable."[140] It should also be noted that "the fact that the [Arbitral] Board selected one of two possible interpretations of an ambiguous term in the collective agreement does not violate the prohibition against amending the agreement...[141] The

---

[135] *Amalgamated Transit Union Local 1374 v. Greyhound Canada Transportation Corp*., 2009 ABQB 166, [2009] A.J. No. 276 at para 17 (QL) ["*Greyhound*"].
[136] *United Food and Commercial Workers' Union, Local 401 v Canada Safeway Ltd.*, 2007 ABCA 331, [2007] A.J. No. 1179 (QL) ["*UFCW 401*"].
[137] *United Brotherhood, supra* note 134 at para 46.
[138] *Ibid* at paras 12-13; emphasis added.
[139] *SAIT*, *supra* note 43.
[140] *Ibid* at para 52.
[141] A contractual prohibition as contained expressly within the collective agreement, or a statutory prohibition as in, for example, *Labour Relations Code*, RSA 2000, c L-1, s 136(i), which is an implied term of any collective agreement silent on the point.

result is an illumination of the original intentions of the parties, not an amendment or alteration of the agreement."[142]

V. "Other" Principles of Interpretation

After the labour arbitrator charged with interpreting a provision of a statute or collective agreement has undertaken the contextual and purposive approach set out by Driedger, and after the application of the modern contextual approach has not resolved the interpretive task, and after the labour arbitrator has determined that the words are ambiguous (patently or latently), only then should the arbitrator resort to external interpretive aids, including the following "other principles of interpretation."

i. *Charter* Values

Recall that according to the Supreme Court of Canada, "[o]ther principles of interpretation—such as the strict construction of penal statutes and the "*Charter* values" presumption—only receive application where there is ambiguity as to the meaning of a provision."[143] The unanimous Court reiterated: "to the extent this Court has recognized a 'Charter values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations."[144] Therefore, the interpretation of ambiguous statutory language (or collective agreement language, if a party to it is a "government" employer[145]) can be aided by the "*Charter* values" presumption—the presumption that the legislature (in the case of statutory interpretation) or the parties (in the case of collective agreement interpretation) are presumed to intend[146] that the provision under consideration would be consistent with the values embodied in the *Charter*. However, the Court continued:

---

[142] *United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital)*, 2011 ABCA 247, [2011] A.J. No. 903 at para 27 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 457 (QL).

[143] *Bell ExpressVu, supra* note 6 at para 28.

[144] *Ibid* at para 62.

[145] See *supra* notes 13 and 88, and accompanying text.

[146] "Parliament and legislatures are presumed to intend to comply with the *Charter*. ... Any ambiguity in the [legislation] should be resolved accordingly": *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] S.C.J. No. 20 at para 104 (QL) ["*Fraser*"].

> **64** These cases[147] recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:
>
> > [T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place.[148]

Labour Arbitrators in Alberta are expressly empowered to consider and decide all questions of constitutional law, including the *Charter*.[149] Federally, "Administrative tribunals [including labour arbitrators] which have jurisdiction—whether explicit or implied—to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law."[150]

In *Shell Canada*,[151] Clackson J. wrote:

> **22** As to the argument respecting *Charter* values, all parties are agreed that *Bell Express Vu* … has settled how one considers *Charter* values in a statutory interpretation context. Where a statute is ambiguous, in the sense that it is reasonable to conclude that the legislator may have intended one of two or more meanings, the meaning which comports with the law, the *Charter* and the values identified by the *Charter* is the meaning which, all other things being equal, is to be preferred. …
>
> **25** The precondition to the use of *Charter* values as an interpretive aid is genuine ambiguity. This case does not feature ambiguity. … Clearly the determination of whether ambiguity existed in its home statute language is a question which one would expect the legislator to have left to the Board. On a standard of reasonableness , as I have said, I cannot say that the Board's implicit conclusion that the word "settled" was not ambiguous, because of its 1991 decision was an unreasonable decision.

---

[147] *Hills v Canada (Attorney General)*, [1988] 1 S.C.R. 513 at 558; *Slaight Communications Inc. v Davidson*, [1989] 1 S.C.R. 1038 at 1078; *R v Zundel*, [1992] 2 S.C.R. 731 at 771; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 660; *Canada (Attorney General) v Mossop*, [1993] 1 S.C.R. 554 at 581-82; *R v Lucas*, [1998] 1 S.C.R. 439, at para 66; *R v Mills*, [1999] 3 S.C.R. 668 at paras 22, 56; *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para 33; *Willick v. Willick*, [1994] 3 S.C.R. 670 at 679-80.

[148] *Bell ExpressVu, supra* note 6 at para 64.

[149] *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, Schedule 1, pursuant to *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3.

[150] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 at para 3 (QL).

[151] *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1325 v. Shell Canada Energy*, 2008 ABQB 204, [2008] A.J. No. 341 (QL) ["*Shell Canada*"]

> **26** Therefore the *Charter* values had no place in the Board's decision on this review.[152]

ii. Extrinsic Evidence as an Interpretative Aid

In *United Brotherhood*,[153] Sopinka J. wrote:

> **42** The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.
>
> **43** One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term. ...[154]

The interpretation of ambiguous collective agreement language may be aided by the use of extrinsic evidence. The two most common forms of extrinsic evidence utilized in the labour arbitration context are extrinsic evidence of past practice, and extrinsic evidence of negotiations history. Extrinsic evidence of statutory or contractual context may also be utilized as an interpretative aid of ambiguous collective agreement language.

a) Extrinsic Evidence of Past Practice as an Interpretative Aid

The interpretation of ambiguous collective agreement language may be aided by the use of extrinsic evidence of past practice. It should be noted, however, that "[w]hile extrinsic evidence is admissible in labour arbitration cases at the discretion of an arbitrator in Alberta, Courts are reluctant to favour past practice evidence over the written words of an agreement where the language is not ambiguous, because the agreement is seen as a more fitting representation of the common intentions of the parties."[155]

The foundation case for the use of extrinsic evidence of past practice as an interpretative aid is Arbitrator Weiler's 1967 decision in *John Bertram & Sons*,[156] where he writes:

---

[152] *Ibid* at paras 22, 25-6.
[153] *United Brotherhood, supra* note 134.
[154] *Ibid* at paras 42-43.
[155] *Greyhound, supra* note 135 at para 24. See also *SAIT, supra* note 43 at para 48.
[156] *John Bertram & Sons Co. v. International Association of Machininsts, Local 1740 (Greenwood Grievance)*, 18 L.A.C. 362, [1967] O.L.A.A. No. 2 (QL) ["*John Bertram & Sons*"].

> **12** …If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process. It does so by forcing higher management or union officials to prohibit (without their clearance) the settling of grievances in a sensible fashion, and a spirit of mutual accommodation, for fear of setting precedents which may plague either side in unforeseen ways in future arbitration decisions. A party should not be forced unnecessarily to run the risk of losing by its conduct its opportunity to have a neutral interpretation of the terms of the agreement which it bargained for.
>
> **13** Hence it would seem preferable to place strict limitations on the use of past practice in [this] sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.[157]

b) Extrinsic Evidence of Negotiating History as an Interpretative Aid

The interpretation of ambiguous collective agreement language may be aided by the use of extrinsic evidence of negotiation history. However, to be useful "evidence of … negotiation history must not only be relevant, but most importantly, to be relied upon it ought to be unequivocal."[158] That is, is should clearly and unequivocally evidence a common understanding between the parties to the collective agreement—the union and the employer—that the language under consideration had a mutually agree-to meaning during its negotiation that supports one of the party's interpretation proffered before the labour arbitrator. Unlike the "legal fiction" of "the intention of the legislature" or "the intention of the parties" discussed above,[159] "common understanding" in the context of extrinsic evidence of negotiating history is a finding of fact based on the evidence

---

[157] *Ibid* at paras 12-13. See Brown & Beatty, *supra* note 26 at para 3:4430. See also *SAIT*, *supra* note 43 at paras 28, 46-52.

[158] Brown & Beatty, *supra* note 26 at para 3:4420; footnotes omitted. See also *Coca-Cola, supra* note 41 at para 17; *Alberta Union of Provincial Employees v. University of Lethbridge (Calculation of Pay Grievance)*, [2011] A.G.A.A. No. 59 at para 17 (QL): "The Authorities are clear that negotiating history is only relevant and admissible to the extent that it shows shared purpose, not unilateral purpose."

[159] See *supra* notes 100-102 and accompanying text.

adduced by the parties. As most evidence of negotiating history pertains to what the party giving evidence understood that the language meant when it was negotiated, extrinsic evidence of negotiating history will rarely clearly and unequivocally result in a finding of a "common understanding" between the parties. For example, in *Boilermakers*,[160] Arbitrator Wallace wrote: "We conclude that the extrinsic evidence of negotiations is not admissible to interpret the Manning Agreement, on two bases. First, it does not establish a shared intention on the parts of Union and Employer. Second, there is in any case no ambiguity, patent or latent, in the wording of the Manning Agreement that it might be used to resolve."[161]

However, in *Catholic School* Arbitrator Tettensor wrote "It is well accepted that where a provision in a collective agreement is ambiguous, extrinsic evidence of negotiating history and past practice is admissible to resolve the ambiguity [and t]he extrinsic evidence introduced here…may be considered"[162] and found "the evidence relating to the negotiating history is of assistance in the interpretation of Article 8.2(g)"[163] of the collective agreement; although as noted above, the extrinsic evidence was not required as the application of Driedger's modern contextual approach resulted in an interpretation of the contested language.[164] In *Northern Lights*,[165] Arbitrator Wallace found the words under consideration "perhaps patently ambiguous"[166] or "[i]f the words are not patently ambiguous, they are latently so",[167] and he wrote: "Although the evidence of the parties' negotiating history is scant, it does support the interpretation advanced by the District"[168] and "[t]he evidence of negotiating history, limited as it is, is

---

[160] *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union (United Cement, Lime and Gypsum Workers' Division), Local D359 v. Lehigh Inland Cement Ltd. (Temporary Discontinuance Grievance)*, [2010] A.G.A.A. No. 8 (QL) ["*Boilermakers*"].
[161] *Ibid* at para 62.
[162] *Catholic School, supra* note 46 at para 122.
[163] *Ibid* at para 130.
[164] See *Catholic School, supra* note 46 and accompanying text.
[165] *Alberta Teachers Assn. v. Northern Lights School Division No. 69 (Johnson Grievance)*, [2011] A.G.A.A. No. 11 (QL) ["*Northern Lights*"].
[166] *Ibid* at para 32.
[167] *Ibid* at para 33.
[168] *Ibid* at para 42.

supportive of the practice that intuitively seems fairest and to make the most labour relations sense in the circumstances."[169]

c) Extrinsic Evidence of Statutory (or International Covenant) Context as an Interpretative Aid

The interpretation of ambiguous contractual language can be aided by extrinsic evidence of statutory context. For example, in *Westfair Foods 2009* Binder J. dismissed a judicial review application where the Alberta Labour Relations "Board found there were two plausible interpretations [of the collective agreement language at issue], and looked to the factual matrix, being the [Alberta *Labour Relations*] *Code*, in order to resolve the ambiguity."[170] Conversely, the interpretation of ambiguous statutory language may be aided by extrinsic evidence of international agreements, such as trade agreements,[171] treaties, or other international instruments.[172]

iii. Presumptive Canons of Statutory Interpretation

As noted by the New Brunswick Court of Appeal, "It must be remembered that the presumptive canons of statutory interpretation are residual in scope. That is to say, they do not displace the court's obligation to apply Elmer Driedger's formulation of the modern and overarching principle of statutory interpretation."[173] However, the interpretation of ambiguous statutory language can be aided by the conventional presumptive cannons of statutory interpretation, of which there are many. Some examples include: "the presumption against implicit alteration of the common law";[174]

---

[169] *Ibid* at para 45. See also *Calgary (City) v. Amalgamated Transit Union, Local 583 (Community Shuttle Service Grievance)*, [2009] A.G.A.A. No. 20 at para 87 (QL).
[170] *Westfair Foods Ltd. v. United Food and Commercial Workers' Union, Local 401*, 2009 ABQB 721, [2009] A.J. No. 1389 at para 17 (QL) ["*Westfair Foods 2009*"], upholding 169 C.L.R.B.R. (2d) 229, [2009] A.L.R.B.D. No. 35 (QL).
[171] See *supra* notes 129-132 and accompanying text wherein the Supreme Court of Canada upheld the Canadian Import Tribunal's interpretation of a section of the *Special Import Measures Act* in the context of the General Agreement on Tariffs and Trade, an international agreement extrinsic to the statute under consideration.
[172] First, "*Charter* rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments" (*Fraser, supra* note 146 at para 92); second, "Parliament and legislatures are presumed to intend to comply with the *Charter* [and a]ny ambiguity in the [legislation] should be resolved accordingly" (*Fraser, supra* note 146 at para 104).
[173] *Beaulieu v. New Brunswick*, 2003 NBCA 92, [2003] N.B.J. No. 458 at para 12 (QL).
[174] *Ibid* at para 11.

"the presumption that legislation does not intend to interfere with existing rights";[175] "the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*";[176] "the presumption that legislation is internally consistent and coherent";[177] the "presumption that [a] term of art is used in its correct legal sense";[178] the "legislative presumption against tautology";[179] the "presumption that legislators do not intend results that depart from *reasonable* standards";[180] the presumption of conformity to international law;[181] "the presumption against interference with vested rights [and] the presumption against retroactive legislation";[182] the presumption that "the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same patterns of expression have the same meaning, and different patterns have different meanings";[183] the "presumption … that laws should be read in a way that gives them effect";[184] "the presumption against absurdity";[185] "the presumption that a statute which infringes

---

[175] *Ibid.*
[176] See Part V.i. *supra*. See also *R. v. Tse*, 2012 SCC 16, [2012] S.C.J. No. 16 at para 20 (QL); *Barrie Public Utilities v. Canadian Cable Television Assn*., 2003 SCC 28, [2003] S.C.J. No. 27 at para 99 (QL), per Bastarache J. (dissenting); *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 at para 66 (QL); *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para 33 (QL); *R. v. Jones*, [1994] 2 S.C.R. 229, [1994] S.C.J. No. 42 at para 73 (QL).
[177] *R. v. L.T.H*., 2008 SCC 49, [2008] 2 S.C.R. 739 at para 47 (QL).
[178] *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101 at para 45 (QL).
[179] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para 38 (QL): "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose", quoting Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5 ed. (Markham, Ont.: LexisNexis, 2008) at 210. See also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at para 45 (QL); *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 at para 178 (QL), per Bastarache J. (dissenting); *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para 73 (QL).
[180] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 131 (QL), per Binnie J. (dissenting).
[181] *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para 53 (QL). See also *R. v. Cook*, [1998] 2 S.C.R. 597, [1998] S.C.J. No. 68 at para 129 (QL), per L'Heureux-Dubé J. (dissenting).
[182] *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at para 31 (QL).
[183] *Marche v. Halifax Insurance Co*., 2005 SCC 6, [2005] 1 S.C.R. 47 at para 95 (QL), per Bastarache J. (dissenting).
[184] *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, [1997] S.C.J. No. 66 at para 53 (QL).
[185] *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, [1997] S.C.J. No. 41 at para 88 (QL), per L'Heureux-Dubé J. (dissenting).

individual rights and freedoms … should be strictly construed";[186] the "presumption that the legislature does not intend to make a substantial alteration of law beyond that which it explicitly declares [and the] presumption that a legislature does not intend to take away private property rights unless it does so explicitly";[187] "[t]he presumption against retrospective construction";[188] and "the presumption that express language must be found to demonstrate that a legislative body intended to authorize an act otherwise unlawful at common law."[189]

VI. Arbitral (Labour *Vis-à-Vis* Common Law or Equitable) Estoppel

The principle of estoppel is not a principle of statutory or contractual interpretation. Traditionally, estoppel is an equitable or common law principle of various forms,[190] the most often seen in labour arbitration being promissory estoppel. "The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position."[191]

Sometimes parties to labour arbitration attempt to adduce extrinsic evidence of past practice as an aid to interpretation of ambiguous statutory or contractual language under consideration, as discussed above.[192] Often, the party proffering such evidence of "past practice" will concomitantly argue that the past practice amounts to a "promise or assurance" by the other party's "conduct" which was intended to affect the party's legal relationship and to be acted on; and that the representee, in reliance on the representation, acted on the representation, or in some way changed its position, to its determent—detrimental reliance. In such circumstances, the party proffering the evidence of past

[186] *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114 at para 83 (QL), per L'Heureux-Dubé J. (dissenting).
[187] *Hongkong Bank of Canada v. Wheeler Holdings Ltd*., [1993] 1 S.C.R. 167, [1993] S.C.J. No. 5 at para 16 (QL).
[188] *Angus v. Sun Alliance Insurance Co*., [1988] 2 S.C.R. 256, [1988] S.C.J. No. 75 at para 21 (QL).
[189] *Reference re: Judicature Act (Alberta)*, s. 27(1), [1984] 2 S.C.R. 697.
[190] For example: estoppel by deed or contract, estoppel *in pais*, estoppel by acquiescence, promissory estoppel, estoppel by election, *res judicata* (cause of action estoppel and issue estoppel).
[191] *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, [1991] S.C.J. No. 43 (QL); emphasis added.
[192] See Part V.ii.a. *supra*.

practice is doing so, not in the hopes that it will assist the decision-maker in interpreting ambiguous language; but rather, in the hopes that the decision-maker will declare the other party estopped (prevented) from insisting on its strict legal rights. In *John Bertram & Sons*[193] Arbitrator Weiler wrote about the two very different uses of past practice evidence:

> **9** The question we must ask then is as follows: if a company decision to change working conditions in breach of the agreement is communicated to the union, and the union, while protesting, takes no official action because its application in the first instance has no harmful effect on any employee, is the union then precluded from grieving when the application of the new policy in the second instance does in fact harm an employee in the bargaining unit?
>
> **10** This question comes within the larger issue of the scope to be given to "past practice" in the interpretation and application of collective agreements. In effect the company has argued that the events described above constituted a precedent wherein the agreement was applied according to the meaning contended for by the company. Thus the arbitration board is bound to adopt the same meaning here. In order to evaluate this argument we must consider the reasons for, or purposes of, the use of "past practice".
>
> **11** There are two main bases for [the] relevance [of past practice evidence]. The earlier situation may involve a representation, by one party (express or tacit), which is relied on by the other. The latter may change his position in such a way that it would not be harmed if the other were to change its position about the meaning of the agreement. The effect of such conduct is variously described as "promissory estoppel" or "waiver", and precludes repudiation of the representation if, and to the extent that, the party which has relied on it would suffer harm from steps taken prior to repudiation. The fairness of such a general doctrine is obvious but, as we have seen earlier, it is not applicable here. First, the union made no representation to the effect it agreed with the company's decision and, on the contrary, explicitly rejected it. Second, the company's position has not been changed to its detriment since any monetary award would relate only to Miss Greenwood about whose claim the company was given timely notice.
>
> **12** A second use of "past practice" [as an aid to interpret ambiguous language] is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. …[194]

The foundation decision in Alberta relating to the application of promissory estoppel in the context of labour arbitration is *Smoky River Coal*[195] in which the Alberta Court of Appeal demanded of labour arbitrators strict compliance with the common law elements of promissory estoppel as applied by the courts. The Court wrote:

> **10** Much of the argument before us was directed towards the question of whether the doctrine could be employed only as a "shield" rather than a "sword", or only invoked by a defendant. I do not find the sword-shield distinction helpful here, nor is the doctrine's availability to be decided by the happenstance of who sues whom. Nevertheless, when the doctrine of promissory estoppel

---

[193] *John Bertram & Sons, supra* note 156.
[194] *Ibid* at paras 9-12.
[195] *Smoky River Coal Ltd. v. United Steelworkers of America, Local 7621*, 38 Alta. L.R. (2d) 193, 18 D.L.R. (4th) 742, [1985] A.J. No. 827 (QL) [“*Smoky River Coal*”]

> is applicable. "It only prevents a party from insisting on his strict legal rights …So an employer might be precluded from relying on the terms of an agreement where he had given an assurance that he would not do so. What is necessary to raise promissory estoppel is …:
>
> > "... if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before." …
>
> **14** …What is necessary is an assurance that pre-existing rights will not be relied upon -- it is not enough that the subject "relate to" some pre-existing legal relationship. …". I am not persuaded … that the doctrine might be given a different definition in labour relations cases …
>
> **17** Moreover, the essence of the doctrine of promissory estoppel is that it is inequitable for the promissor to stand on his rights. …It is only "inequitable for a promissor to stand on his strict legal rights where the promisee has altered his position in reliance on the promise". …

On 14 April 2011, the Alberta Court of Appeal dismissed an application by the International Assn. of Fire Fighters, Local 255 for leave to have the Alberta Court of Appeal reconsider its 1985 decision in *Smoky River Coal*.[196] Just over seven months later, on 2 December 2011, the unanimous Supreme Court of Canada released its decision in *Nor-Man*.[197] The Court wrote:

> **5** Labour arbitrators are not legally bound to apply equitable and common law principles—including estoppel—in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> **6** To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance. …
>
> **19** Both arbitrators were alive to the foundational principles of estoppel. Essentially, they both found that the union was fixed with knowledge -- constructive, if not actual -- of the employer's mistaken application of the disputed clauses throughout the relevant time; that the union's silence amounted to acquiescence in the employer's practice; that this sufficiently fulfilled the intention requirement of estoppel; that the employer could reasonably rely on the union's acquiescence; that the employer's reliance was to its detriment; and that all of this had the effect of altering the legal relations between the parties. …
>
> **25** The Court of Appeal then concluded that the arbitrator had misconstrued the doctrine of promissory estoppel. It held that promissory estoppel, as a matter of law, requires a finding that the promisor intended to affect its legal relations with the promisee. …
>
> **31** Prevailing case law clearly establishes that arbitral awards under a collective agreement are subject, as a general rule, to the reasonableness standard of review.

---

[196] *International Assn. of Fire Fighters, Local 255 (Calgary Fire Fighters Assn.) v. Calgary (City)*, 2011 ABCA 121, [2011] A.J. No. 415 (QL) ["*Calgary Fire Fighters*"].
[197] *Nor-Man*, *supra* note 98.

> **32** Stated narrowly, the issue on this appeal is whether the arbitrator's imposition of an estoppel brings his award within an exception to that general rule. Stated more broadly, the issue is whether arbitral awards that apply common law or equitable remedies are for that reason subject to judicial review for correctness. …
>
> **38** With respect, I see the matter differently. Our concern here is with an estoppel imposed as a remedy by an arbitrator seized of a grievance in virtue of a collective agreement. No aspect of this remedy transforms it into a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" within the meaning of *Dunsmuir* (para. 60). It therefore cannot be said to fall within that established category of question—nor any other—subject to review for correctness pursuant to *Dunsmuir*. …
>
> **44** Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.
>
> **45** On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates—and well equipped by their expertise—to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized. …
>
> **49** Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.
>
> **50** These are the governing principles of labour arbitration in Canada. Their purpose and underlying rationale have long been well understood by arbitrators and academics alike. …the doctrine of estoppel must be applied differently in a grievance arbitration than in a court of law…
>
> **51** Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines. Within this domain, arbitral awards command judicial deference.
>
> **52** But the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.
>
> **53** … "at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (para. 68 (emphasis added)).

In light of the Supreme Court of Canada's decision in *Nor-Man, Smoky River Coal* is no longer good law. Where "estoppel" is imposed as a remedy by a labour arbitrator seized of a grievance in virtue of a collective agreement, the doctrine of estoppel may be applied

differently than in a court of law—"arbitral estoppel" *vis-à-vis* equitable or legal estoppel. Labour arbitrators have the right to craft labour specific remedial doctrines in a manner that flexes common law or equitable principles to reasonably respond to the distinctive nature of labour relations, and the exigencies of the employer-employee relationship. Labour arbitrators "may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized"; and recent Supreme Court of Canada jurisprudence has markedly narrowed the scope of judicial review of labour arbitrators' administrative decisions[198]

VII. Conclusion

It is necessary, in every case, for the arbitrator charged with interpreting a collective agreement provision to undertake Driedger's modern contextual approach; namely, "In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties", or the words of a collective agreement are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the collective agreement, the object (purpose) of the collective agreement, and the intention of the parties to the collective agreement. Part II of this paper discussed the modern contextual approach. Part III of this paper discussed terms implied into collective agreements as a matter of law, and as a matter of fact.

Only then should the arbitrator determine if the words are ambiguous (patently or latently). Other principles of interpretation only receive application where there is ambiguity as to the meaning of a provision. Part III of this paper discussed the concept of ambiguity, and Part IV discussed some "other principles of interpretation" that may be applied if ambiguity is identified; including, *Charter* values; extrinsic evidence of past practice as an interpretative aid; extrinsic evidence of negotiating history as an

---

[198] *Ibid*. See *also Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62 (QL).

interpretative aid; extrinsic evidence of statutory (or international covenant) context as an interpretative aid; and presumptive canons of statutory interpretation.

Part V of the paper discussed the principle of “estoppel”—promissory by conduct (past practice)—in the context of labour arbitration.