Judicial Review of Interpretations by Administrative Tribunals of their Home Legislation: What's Ambiguity Got To Do With It?

By Ruth Sullivan[1]

The primary question to be addressed in this session is how a reviewing court properly determines whether a tribunal's interpretation of its home statute is unreasonable? At the end of the day, I'm afraid I don't have a very helpful answer to this question. My hope is to provide you with some food for thought.

I was asked to begin my presentation by noting what Driedger understood by the modern principle, how my own understanding of that principle differs from his and how faithfully the SCC applies the principle.

I was asked to then consider the role of ambiguity in judicial review when the standard of review is reasonableness. The question is whether a finding of unreasonableness should ensue if the reviewing court -- at the end of its interpretive exercise –reaches a conclusion that differs from the tribunal's and finds the legislation to be clear rather than ambiguous.

I would say no to the second question.

I have two claims that I hope to promote today.

> First, in my view, nothing in statutory interpretation should turn on a court's conclusion that a given provision is or is not ambiguous.
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> Second, in my view, the methodology endorsed by the reviewing court in the Allen case has the effect of requiring correctness rather than reasonableness.

Before turning to my assigned tasks, I want to begin with some comments on the Bell ExpressVu case, which I think most courts would consider to be one of the leading case on statutory interpretation. I find this unfortunate because – to my mind – it features some of the most ill-conceived paragraphs in Canadian case law. I refer to paragraphs 27 to 30 in which the court says

> 1. the modern principle requires legislative provisions to be interpreted in context,
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> 2. "other principles of interpretation such as the presumptions of legislative intent" can only be applied if the text proves to be ambiguous after it is interpreted in context,
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> 3. a text is not ambiguous unless it is consistent with "two equally plausible" interpretations, and
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> 4. the fact that several courts or doctrinal writers reach different interpretations is not evidence of ambiguity.

One problem with these paragraphs is that they assume the presumptions of legislative intent are not part of the context in which legislation is to be interpreted. However, for our purposes today, the more important problems with these paragraphs are

- first the court's supposition that it can tell with reasonable certainty whether an interpretation is or is not ambiguous and

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- second the court's refusal to accept divergent interpretations by courts and academic commentators as evidence of ambiguity.

I understand the first supposition. We all necessarily trust our own linguistic intuitions and interpretive inferences and we assume they are shared by others -- in the absence of evidence to the contrary. Such a supposition is essential for efficient communication.

What I don't understand is the court's disregard of the evidence to the contrary – its indifference to the fact that the linguistic intuitions and interpretive inferences of at least some other interpreters of the provision at issue in the case led them to adopt a different interpretation. Why is that fact irrelevant?

It seems to me that one of the following statements must be true:

> The legislation is ambiguous OR
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> The judges who reached a conclusion that differs from the SCC's judgment (including any dissenting judges in that court) are less competent language users or less competent interpreters of legislation.

In my view, the second statement is problematic. Linguistic intuitions and drawing inferences are not particularly legal skills and there is no reason to suppose that the members of the SCC are necessarily better at it than the members of – say – the B.C. Court of Appeal. It seems to me the only thing the Supreme Court of Canada can fairly say in *Bell ExpressVu* is that the interpretation it adopted is the better one. There is no need to introduce the concept of ambiguity.

Regardless of whether the text is ambiguous, the better interpretation – not necessarily the only interpretation, but the better one – is the one it has adopted. Because this interpretation has been adopted by the SCC, it is correct. It follows that other interpretations are incorrect. It does not follow that the interpretation preferred by other judges is unreasonable. It may be, but that is not necessarily the case.

I would like to point out that Bell ExpressVu was not an appeal from a judicial review of an administrative tribunal's interpretation. It was an appeal from the interpretation adopted by BC's superior court and court of appeal so issues of administrative expertise and deference did not arise. The case is relevant only if ambiguity is relevant to determining whether an interpretation is reasonable.

After that long detour I would like to I turn to the first question I was asked to address -- what was Driedger's understanding of the modern principle?

This is not a difficult question. Driedger's introduces chapter 1 of the 2nd edition of The Construction of Statutes with the following words:

"The notion has long prevailed that three different rules or approaches may be applied in ascertaining the meaning of a statute." These are (in chronological order)

- The purposive approach or the mischief rule
- The literal approach or the plain meaning rule
- The consequential approach or the golden rule

He describes these three approaches in the first three chapters. Then, in chapter 4, he explains that the modern principle integrates these approaches. According to the modern principle, the words to be interpreted must be read in their entire context and in their grammatical and ordinary sense (literal

approach), harmoniously with the scheme and purpose of the Act (purposive approach) and the intention of Parliament (consequential approach???).

So what has happened to consequential analysis? Why has it morphed into the intention of Parliament?

The answer lies in Driedger's conservative view of the judicial role and his unwillingness to acknowledge that courts must sometimes legislate in the course of interpreting.

In his account of the consequential approach, Driedger sharply distinguished between what he called objective and subjective absurdity. Objective absurdity refers to disharmony between the ordinary meaning of the provision to be interpreted and the purpose or scheme of the Act, Parliament's intention or other law. Subjective absurdity refers to consequences that the court considers unreasonable or unjust or otherwise unacceptable on policy grounds.

Here is what Driedger says about subjective absurdity:

> "Only when there is an ambiguity, obscurity or inconsistency that cannot be resolved by objective standards is it permissible to resort to subjective standards of reasonableness in order to avoid unreasonable consequences. … [It] is not legitimate to use consequences as an excuse to place an unreasonable construction on words that can have only one reasonable grammatical construction."

To summarize, on Driedger's understanding of the modern principle, even if the meaning of the provision at first glance appears to be clear, the court must still go through the interpretive exercise – it must consider the entire context However, it can consider subjective policy considerations only if the provision turns out to be persistently ambiguous.

I use the expression "persistently ambiguous" to refer to legislation that is or becomes ambiguous and is still after the application of the preferred principles and techniques, making it necessary to fall back on less satisfactory principles and techniques.

I hope you noticed the parallelism between Driedger's approach to subjective absurdity and Iacobucci"s approach to presumed intent. In each case, it is permissible to look at the dubious interpretive aids only if the preferred ones do not resolve any genuine ambiguity.

Driedger's understanding is grounded in a number of assumptions that I would guess are accepted by many courts today.

1. For the most part, legislatures enact complete or fully realized rules, and the role of the court is to discover the rules and apply them to the facts of the case.

2. Courts would violate the separation of powers doctrine if they let their subjective views on policy or justice or reasonableness affect their interpretation except in the case of legislation that is persistently ambiguous.

3. Competent language users and interpreters will arrive at the same interpretive outcome, which is the only reasonable one. Unless the legislation to be interpreted is ambiguous,

4. By properly applying the rules of language use and interpretation, a court is in a position to assert on an objective basis that a text is or is not ambiguous, that a given interpretation is or is not plausible.

I myself would reject every one of these assumptions.

First the separation of powers. We all know that the SCC formally embraces the intentionalist theory of statutory interpretation which is the theory most consistent with separation of powers doctrine: the role of the legislature is to make law; the role of the court is to discover the intended law and apply it.

Nonetheless I think it is completely accurate to say that the interpretive practice of the SCC is in fact pragmatic rather than intentionalist. This is not obvious perhaps because the court's reliance on the modern principle as formulated by Driedger tends to disguise its pragmatism. The court uses the rhetoric of intentionalism to justify what is in fact a pragmatic practice.

In my view, and I mean no disrespect, its commitment to Driedger's modern principle is explained in part at least by the fact that the principle does very little to constrain the considerable discretion exercised by courts and tribunals when interpreting legislation.

A pragmatic account of interpretation, my version of it at least, acknowledges that very often legislative provisions turn out to be incomplete in relation to the facts that are before the courts and therefore courts engaged in interpretation must complete the rule in the course of applying it. This involves the court in law making, not just law application, and undermines a strict separation of powers doctrine.

On my pragmatic version of the modern principle, an interpretation is sound if it completes an incomplete rule in an appropriate way having regard to whatever is relevant:

- The ordinary meaning of the legislative text: the clearer and more precise the text, the greater the weight ordinary meaning receives
- Legislative intent, including purpose and scheme and admissible extrinsic aids: the more cogent and compelling the evidence of legislative intent, the greater the weight it receives
- Relevant norms and policies: the more important the norms and policies, the more intensely they are engaged, and the less competition from other norms or policies, the greater the weight they receive.

If everyone agrees that all relevant considerations point in the same direction, identifying the appropriate outcome is not a challenge. But many cases which make it to the courts allow for disagreement.

These are not matters of fact, they are matters of judgment that depend on the most important context that interpreters bring to the text, namely the content of their brains. And not everyone's brain contains the same stuff, which is why not everyone has the same linguistic intuitions and draws the same inferences.

It is not accurate to characterize some considerations relied on in interpretation as objective – for example, whether a text may reasonably bear a particular meaning – while characterizing others as subjective – such as whether the consequences of an interpretation are reasonable.

They are all subjective because the way they play out in the interpretive exercise depends to a significant degree on the variable knowledge, assumptions, values and intuitions that interpreters bring to a text.

If this is true, and most linguists would insist that it is, then it is false to suppose that in the absence of ambiguity competent interpreters and language users will arrive at the same interpretation. Different reasonable outcomes are possible because different interpreters bring different personal and professional contexts to the text.

So what implications does this have for standard of review? I think the chief implication is for the methodology adopted by the reviewing court. If a reviewing court is to show deference, it cannot first

carry out its own interpretive exercise, come up with its own interpretation and then conclude that the interpretation resulting from this exercise is the only reasonable one unless the legislation is ambiguous.

The reason for this is simple: there is never ambiguity at the END of the interpretive exercise. Both Driedger and the court in Bell ExpressVu refer to ambiguity that persists after the application of some but not all interpretive principles and techniques. If legislation is persistently ambiguous, it is permissible to rely on the principles and techniques of last resort to resolve that ambiguity. But at the end of the day the ambiguity is resolved.

If reviewing courts are serious about showing deference, it seems to me a different approach is needed. What might a methodology of deference look like?

First, it would not begin with the court conducting its own interpretive exercise. If the standard is not correctness, there is no need for the court to determine the correct interpretation. The only question would be whether the interpretation adopted by the administrative tribunal is justifiable.

Second, in answering that question, the reviewing court would take into account the professional context that the tribunal brings to the court.

The idea here is that the expertise of administrative tribunals can be thought of as a distinct context consisting of the knowledge it has acquired and the norms and policies it has developed in the course of administering its home legislation. This context is appropriately drawn on by the tribunal in completing the provisions of its home legislation and also in ensuring the legislation is applied dynamically in response to evolving circumstances.

I would argue that if deference is to be shown, this context appropriately informs judicial review of the tribunal's interpretations.

Let's look at some examples of how this might work, starting with the Allen case.

The issue in Allen was how to interpret the second occurrence of "benefit" in subsection 75(1) of Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*:

> 75. (1) Where a worker who is eligible for benefits as a result of an injury that occurred after December 31, 1983 reaches the age of 65, an amount equal to the amount of a benefit that the worker demonstrates to the commission, that he or she has lost as a result of an injury for which he or she is receiving compensation under this Act,… shall be paid to him or her by the commission.

In the Allen case the tribunal read down the provision to be interpreted and offered several grounds for doing so which the reviewing court dismissed out of hand because it did not find them persuasive.

But the question should not be "Am I persuaded by the tribunal's reasoning to adopt its interpretation?" Rather it should be "Can the interpretation adopted by the tribunal be justified having regard the relevant considerations – ordinary meaning, legislative intent, relevant norms and policies?"

In my view, the reviewing court in Allen substituted its own linguistic intuitions and its own assessment of the relevance and weight of various contextual factors for that of the tribunal. The court does not explain why the tribunal's intuitions and assessments are unreasonable.

Here is an example:

> It was submitted by the Commission that an ambiguity arises in s. 75(1) from the use of the word "benefit"; that is, the lost benefit referred to there can reasonably be interpreted as the benefit paid by the Commission in lieu of the worker's pension.

This submission is rejected because in the opinion of the reviewing court, s. 75(1) is clear:

> the meaning of the word "benefit" must be discerned from the context in which it is used in each instance. It is possible that any such use could be ambiguous or unclear. In s. 75(1), however, there is no lack of clarity

This bald pronouncement disregards the fact that the tribunal brings a particular professional context to the provision which led it to see an ambiguity which is not apparent to the court. But if the courts are serious about deference, the courts must have a reason to reject the tribunal's proposed interpretation other than I don't agree; the provision seems clear to me.

The reviewing court in the Allen case used the methodology of correctness. It conducted its own interpretive exercise and came up with its own interpretation, which it judged to be correct and therefore the only reasonable interpretation. This is not deference.

I would also like to comment on the Mowat case, which has received a lot of attention from commentators on the standard of review. The issue in Mowat was whether a complainant could claim compensation for legal costs under subsection 53(2) of the *Canadian Human Rights Act*,

53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate: … (c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and (d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.	53(2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut [. . .] ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire : … *c*) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte; *d*) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte.

The tribunal relied on what is arguably the ordinary meaning of the words "any expenses incurred by the victim as a result of the discriminatory practice" to conclude that compensation could indeed be ordered for legal costs.

However, the SCC relied on drafting conventions and legislative history to infer that Parliament intended a narrower meaning, one that excluded costs. The SCC's interpretation is a persuasive account of what

was probably intended when the provisions were drafted and enacted. And it is by definition the correct interpretation. But it doesn't follow that it is the only reasonable one.

Here is what the tribunal had to say:

> [27] The predominance of authority from the Federal Court (*Thwaites*, *Stevenson and Brooks*) is that the Tribunal has the power to award legal costs under s. 53(2) of the *Act*.…

Three of five federal court judges had reached the same conclusion as the tribunal. Why is that not evidence that the interpretation is reasonable?

> [29] … I also rely on the policy considerations set out in the Tribunal's decisions in *Nkwazi*and *Brooks* …. [A]bsent the power in the Tribunal to award legal costs where a complaint of a discriminatory practice is substantiated, such a finding would amount to no more than a pyrrhic victory for the complainant. A result of this nature would frustrate the remedial provisions and purpose of the *Act*.

To decline to read down the scope of a provision because the ordinary meaning promotes a recognized purpose of the legislation whereas the narrower one would tend to defeat it strikes me as reasonable: it appeals to a relevant consideration – the purpose of the Act.

The crucial issue here is the weight tribunal attaches to that consideration as opposed to other relevant considerations that were brought to its attention. Is it the role of the reviewing court to be second guessing that weighing exercise when the standard of review is reasonableness. I'm not so sure.

In the Allen case, the court refers to a point made by former Justice Robertson who has written extensively and with great erudition on the standard of review. In a paper entitled "Assessing the Reasonableness of a Tribunal's Interpretation of its Home Statute: 'The Concept of Statutory Ambiguity", he wrote:

> As a starting point, once it is acknowledged that judges are bound by the rules and principles governing statutory interpretation, it should follow that tribunals are equally bound when it comes to the task of statutory interpretation.

I would counter with the following assertion:

> Judges and tribunals are bound but they are not constrained in a useful way. In practice the rules and principles often point in different directions and when they do there is no objective or principled way to establish the superiority of one interpretation over another.
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> When the standard is correctness, the reviewing court gets to carry out its own interpretive exercise and its conclusion is by definition correct.
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> When the standard is reasonableness, the task is to assess the tribunal's interpretive exercise having regard to its expertise, which includes its professional context.

This brings me to my conclusion. I would suggest – quite unhelpfully I admit -- that an interpretation is unreasonable if it cannot be justified approaching the issue from the professional context of the tribunal and having regard to the fact that a tribunal may reasonably assign different weight to meaning, legislative intent, legal norms and administrative norms and policies.