

Constitutional Inconsistency in Legislation — Interpretation and the Ambiguous Role of Ambiguity

John Mark Keyes & Carol Diamond

THE SUPREME COURT OF Canada has recognized and repeatedly affirmed a rule of legislative interpretation that limits the consideration of the *Canadian Charter of Rights and Freedoms* and other constitutional norms. The rule requires that before a court interpreting legislation can consider them, it must consider other contextual features and conclude that they do not resolve an ambiguity in the legislation. It thus privileges other contextual features of legislation and creates a secondary role for the *Charter* and constitutional norms that cannot come into play without ambiguity. However, the concept of ambiguity is itself ambiguous, and this rule is at odds with the fundamental principle of constitutional supremacy. It also conflicts with a recent development in administrative law recognizing that administrative tribunals exercising discretionary powers involving the interpretation of legislation are entitled to consider the *Charter* and other constitutional norms without a finding of ambiguity. This article exposes these problems and argues that the *Charter* and other constitutional norms should not be excluded at the outset. Rather, they should be considered along with other relevant contextual factors and be given the interpretive weight they deserve. Using the ambiguity threshold to categorically exclude their consideration blunts the role of legislative interpretation in assuring the supremacy of the Constitution.

LA COUR SUPRÊME DU Canada a reconnu et confirmé à plusieurs reprises une règle d'interprétation législative qui limite la prise en compte de la *Charte canadienne des droits et libertés* et d'autres normes constitutionnelles. Avant qu'un tribunal chargé d'interpréter des textes de loi puisse prendre en compte celles-ci, cette règle requiert que le tribunal considère d'autres méthodes contextuelles et arrive à la conclusion que ces autres méthodes ne lèvent pas l'ambiguïté de la législation. Cette approche privilégie donc d'autres méthodes contextuelles de législation et attribue un rôle secondaire à la *Charte* et aux autres normes constitutionnelles, qui ne peuvent donc pas intervenir sans ambiguïté.

Cependant, le concept d'ambiguïté est lui-même ambigu et cette règle va à l'encontre du principe fondamental de suprématie constitutionnelle. Elle entre aussi en conflit avec une évolution récente de la législation administrative. Cette évolution reconnaît que les tribunaux administratifs exerçant des pouvoirs discrétionnaires liés à l'interprétation de la législation sont autorisés à prendre en compte la *Charte* et toutes les autres normes constitutionnelles, sans même trouver d'ambiguïté.

Les auteurs de l'article énoncent ces problèmes et soutiennent que la *Charte* et les autres normes constitutionnelles ne devraient pas être exclues dès le départ, mais plutôt être considérées de concert avec les autres méthodes contextuelles pertinentes et obtenir

le poids interprétatif qu'elles méritent. Selon les auteurs, jouer sur le seuil d'ambiguïté pour exclure catégoriquement la prise en considération de la *Charte* et d'autres normes constitutionnelles atténue le rôle de l'interprétation législative, en garantissant la suprématie de la Constitution.

CONTENTS

Constitutional Inconsistency in Legislation—Interpretation and the Ambiguous Role of Ambiguity

John Mark Keyes & Carol Diamond

Introduction 317

I. Presumptions of Constitutional Consistency 319

II. Ambiguity Threshold in Constitutional Matters 321

III. Origins of the Ambiguity Threshold 323

IV. Why the Ambiguity Threshold? 325

V. Evolution of the Ambiguity Threshold 328

VI. What Counts as Ambiguity? 331

A. General Principles 331

B. Particular Decisions 333

VII. Ambiguity and the Standard of Review 341

Conclusions 351

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INTRODUCTION

The rule of law eschews ambiguity. And yet, ambiguity abounds in legislative texts and its resolution consumes considerable interpretive energy. This is not surprising given the limitations of natural languages as vehicles for communicating the law. But ambiguity is not just a problem to be resolved. It also plays a role in the interpretative process itself. It is a threshold for embarking on particular lines of inquiry in the search for meaning. Without ambiguity, certain matters cannot be considered. These matters include the Constitution. This is startling in a constitutional democracy where the Constitution is the supreme law, prevailing over all other laws. This article addresses this conundrum.

The interpretive implications of the Constitution have received attention from time to time, but far more attention has been focused on its

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remedial dimensions, which are encapsulated in subsection 52(1) of the *Constitution Act, 1982*:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.¹

This fundamental constitutional rule is augmented by section 24 of the *Canadian Charter of Rights and Freedoms*, which provides for applications “to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”² This ground is well-tilled, and captures the attention of most constitutional scholars and practitioners.³ But what about the interpretive dimension of applying constitutional law? To what extent can legislative interpretation be used to avoid a constitutional inconsistency? And is there an interpretive role for constitutional norms beyond serving as a basis for a judicial remedy that turns on invalidity?

These questions implicate two related presumptions that the courts apply in dealing with constitutional questions. One is persuasive in nature (the presumption of validity), and the other is interpretive (the presumption of compliance). However, the interpretive presumption operates only when there is ambiguity in the legislative text. This article begins by considering the presumption of compliance and the application of the ambiguity threshold in relation to constitutional norms, principally those recognized by the *Charter*. It first looks at how the Supreme Court of Canada has addressed the ambiguity threshold in interpretive questions, and then looks at how it has more recently eliminated this threshold in relation to interpretive questions arising in the exercise of administrative discretion. This has produced distinctly different interpretive approaches as between courts and administrative tribunals. It is difficult to justify this inconsistency, and the article concludes that the ambiguity threshold for considering constitutional norms should be eliminated generally in favour of a more principled approach to managing the scope of legislative interpretation.

In every interpretive exercise, the interpreter—whether a court or some other body or person—must select the particular interpretive tools

1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *ibid*.

3 See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book: 2013).

that lead to a compelling conclusion. This involves using those tools that provide a compelling basis for an interpretive result. This article argues that the *Charter* and other constitutional norms should not be excluded at the outset. Rather, they should be considered along with other relevant contextual factors and be given the interpretive weight they deserve. Using the ambiguity threshold to categorically exclude their consideration blunts the role of legislative interpretation in assuring the supremacy of the Constitution.

I. PRESUMPTIONS OF CONSTITUTIONAL CONSISTENCY

There are two presumptions related to the interaction of constitutional and legislative texts,⁴ which are often conflated under the rubric of the presumption of validity in constitutional and administrative law.⁵

The first presumption, which Ruth Sullivan considers properly labelled as the *presumption of validity*, provides that those who contest the validity of legislation have the burden of demonstrating its invalidity. In terms of constitutional law, this means inconsistency with the Constitution,⁶ which explains why the presumption is sometimes labelled as the presumption of constitutionality.⁷ The second presumption, which Sullivan labels the *presumption of compliance*, is interpretive. It provides that, if the text of the legislation is capable of bearing a meaning that is constitutionally valid, then the courts will give it that meaning.⁸ This presumption can result in “reading down” a legislative text to fit its constitutional limits.

The two presumptions frequently work in tandem. Before addressing questions of validity, courts must determine what legislation means, which entails the presumption of compliance. Once they determine what it means, the presumption of validity comes into play if validity is challenged. In addition, the presumption of compliance has been extended to reflect not merely constitutional limits, but also constitutional values,

4 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Lexis Nexis, 2014) at 523ff [Sullivan, *Sullivan on Statutes*].

5 *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24–28, [2013] 3 SCR 810.

6 *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 25, [2000] 1 SCR 783.

7 See *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 104, 82 DLR (4th) 321 [Osborne]; *Schachter v Canada*, [1992] 2 SCR 679 at 719–20, 93 DLR (4th) 1 [Schachter].

8 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 86, [2015] 3 SCR 327 [Moloney].

most notably those associated with the *Charter*.⁹ These values underlie the rights, freedoms, requirements, and limits imposed by the Constitution.¹⁰ For example, human dignity has been characterized as a constitutional value informing the notion of fundamental justice in section 7 of the *Charter*,¹¹ as well as the equality rights guaranteed by section 15.¹² When the interpretive presumption of compliance is applied in relation to these values, it goes beyond preserving the validity of legislation to infuse it with meaning consistent with these values.¹³ This expanded use of the *Charter* is rooted in its earlier application to the development of the common law, but it has been criticized as injecting uncertainty and complexity into the interpretive process, particularly in relation to administrative tribunals.¹⁴ The merits of this expansion, as well as its critiques, are considered below.¹⁵

The distinction between the presumption of validity and the presumption of compliance aligns with the difference between, on the one hand, the constitutional remedies of severance and reading in and, on the other hand, the interpretive exercise of reading legislation to comply with the Constitution. In *Osborne v Canada*, Justice Sopinka noted this distinction saying:

The court is given an express mandate to declare invalid a law which, by virtue of s. 52 of the *Constitution Act*, 1982, is of no force or effect to the extent of its inconsistency with the *Charter*. There is no reason for the court to disguise the exercise of this power in the traditional garb of interpretation.¹⁶

9 See *R v Mabior*, 2012 SCC 47 at para 44ff, [2012] 2 SCR 584 [*Mabior*]. See generally Lorne Sossin & Mark Friedman, “Charter Values and Administrative Justice” (2014) 67 SCLR (2d) 391 at para 33ff.

10 *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 36, [2015] 1 SCR 613 [*Loyola*].

11 See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 512, 24 DLR (4th) 536.

12 See *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 4, 170 DLR (4th) 1.

13 See Sullivan, *Sullivan on Statutes*, *supra* note 4 at 528.

14 See Matthew Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014) 67 SCLR (2d) 361.

15 See 330–33, below “Evolution of the Ambiguity Threshold”.

16 *Supra* note 7 at para 104; See also *Schachter*, *supra* note 7 at 719–20:

Where s. 52 of the *Constitution Act*, 1982 is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person’s *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

This course of action has been described as “reading down as an interpretive technique”, but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presump-

But what exactly is the difference between interpreting legislation to conform to the Constitution and providing a constitutional remedy that shapes it to fit the Constitution? And when do courts choose one over the other?

The next part of this article explores these questions in terms of a threshold the courts, particularly the Supreme Court, have recognized as a prerequisite to applying the interpretive presumption of compliance. This threshold requires that “ambiguity” be found in a legislative text before the presumption can be applied or indeed, before constitutional “values” can be considered at all in the interpretation of the text. But the circumstances in which courts will invoke this threshold are a matter of debate, and in fact, the Supreme Court recently held that the threshold does not generally apply at all in relation to the interpretation of legislation by administrative tribunals in the exercise of discretionary powers.¹⁷

II. AMBIGUITY THRESHOLD IN CONSTITUTIONAL MATTERS

The ambiguity threshold has gained considerable prominence in recent years as a feature of the interpretation of legislative texts in relation to the Constitution. It limits the application of the presumption of compliance to texts that are *capable* of bearing an interpretation that is consistent with the Constitution. This feature can be traced back to its invocation in a case on the division of powers. In *R v McKay*, the Supreme Court stated that:

[I]f an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, *is capable of receiving a meaning* according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the

tion of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

17 See *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]; *R v Clarke*, 2014 SCC 28 at para 16, [2014] 1 SCR 612 [*Clarke*] discussed at 343–53, below “Ambiguity and the Standard of Review.”

statute being *intra vires* and the other will have the contrary result the former is to be adopted.¹⁸

This means constitutional limits on legislative powers cannot be taken into account when the text unambiguously expresses its meaning. This approach is generally associated with the plain meaning rule of interpretation, which requires some *ambiguity* as a threshold for embarking on an interpretive exercise.

The ambiguity threshold for considering constitutional norms in the interpretation of legislation continues to be applied in relation to the division of powers.¹⁹ It has also been applied in a number of Supreme Court cases involving the *Charter*,²⁰ as well as beyond the realm of constitutional law to interpretive presumptions of conformity to the common law and international law,²¹ presumptions in favour of Indigenous peoples,²² recourse to the strict construction of penal statutes²³ and tax legislation,²⁴ and the use of extrinsic aids to interpretation.²⁵

Sullivan has criticized this ambiguity threshold as an unwarranted barrier to integrating fundamental constitutional values in the interpretive process.²⁶ If, as Elmer Driedger's now widely recognized Modern Principle of Interpretation says, courts must always take into account a wide range of contextual factors, then why should the Constitution be subordinated

18 *McKay et al v The Queen*, [1965] SCR 798 at 803–804, 53 DLR (2d) 532 [McKay] [emphasis added].

19 See *Moloney*, *supra* note 8 at para 23 (dealing with the presumption against conflicting federal and provincial legislation).

20 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62, [2002] 2 SCR 559 [*Bell ExpressVu*]; *R v Rodgers*, 2006 SCC 15 at paras 18–20, [2006] 1 SCR 554 [*Rodgers*]; *R v Gomboc*, 2010 SCC 55 at para 87, [2010] 3 SCR 211 [*Gomboc*]; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 253, [2011] 2 SCR 3 [*Fraser*]; *R v Boudreault*, 2012 SCC 56 at para 85, [2012] 3 SCR 157 [*Boudreault*]; *Clarke*, *supra* note 17 at para 16; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 67, [2014] 3 SCR 431; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 20, [2015] 3 SCR 300 [*Wilson*].

21 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 60, [2014] 3 SCR 176.

22 *Musqueam First Nation v British Columbia (Assessor of Area #09)*, 2012 BCCA 178 at para 50, 320 BCAC 159.

23 See also *R v McIntosh*, [1995] 1 SCR 686 at para 29, 95 CCC (3d) 481.

24 *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 23, [2006] 1 SCR 715.

25 *Bell ExpressVu*, *supra* note 20 at para 29, citing *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743 at para 14, 171 DLR (4th) 733. See also *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at para 95, [2012] 3 SCR 660.

26 Sullivan, *Sullivan on Statutes*, *supra* note 4 at 20–25, 531.

in this way and excluded from consideration unless the other factors yield “ambiguity?”

Another criticism of the ambiguity threshold relates to its application to the consideration of some matters, like the *Charter*, but not to others, including legislative purposes, which the Supreme Court has said must always be considered as part of the context.²⁷ The *Charter* and other constitutional norms have a bearing on establishing purposes. Why then are they excluded in the absence of ambiguity?

The subordination of the *Charter* in legislative interpretation also runs counter to a recent development in administrative law and the standard of review. In *Doré v Barreau du Québec*, the Supreme Court recognized that *Charter* values should be integrated into administrative decision-making that entails discretion, and that their involvement in these decisions did not itself warrant a departure from the normal reasonableness standard of review.²⁸ This decision raises questions about how *Charter* values are to be integrated into legislative interpretation by administrative tribunals. Are they supposed to apply the ambiguity threshold that the courts apply? The Ontario Court of Appeal has recently rejected this suggestion in *Taylor-Baptiste v Ontario Public Service Employees Union*,²⁹ citing the Supreme Court’s decision in *R v Clarke* that “only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values.”³⁰ But how is this exception to be reconciled with the resulting incongruity of administrative tribunals having broader authority to consider *Charter* values than courts? This question is explored in some detail below,³¹ but before doing so, it is necessary to appreciate the origins, purposes, and evolution of the ambiguity threshold.

III. ORIGINS OF THE AMBIGUITY THRESHOLD

The ambiguity threshold for applying interpretive presumptions is not confined to considerations relating to the Constitution. It is rooted in a more general approach to legislative interpretation most famously recognized in the *Sussex Peerage Case*, where Chief Justice Tindal said:

²⁷ See *Bell ExpressVu*, *supra* note 20 at para 30.

²⁸ *Doré*, *supra* note 17 at para 24.

²⁹ *Taylor-Baptiste et al v Ontario Public Service Employees Union et al*, 2015 ONCA 495 at para 55, 126 OR (3d), leave to appeal to SCC dismissed, 36647 (9 June 2016) [*Taylor-Baptiste CA*].

³⁰ *Clarke*, *supra* note 17 at para 16.

³¹ Discussed at 343–53, below “Ambiguity and the Standard of Review.”

My Lords, the only rule of construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the lawgiver.³²

According to this approach, the first task in applying legislation is to consider whether its words are “precise and unambiguous.” If they are, the application of the legislation is straightforward and entails no further consideration of the meaning of its words. If the words are not “precise and unambiguous,” further consideration of their meaning is needed.

Driedger, in both the first and second editions of *Construction of Statutes*, recognized that this threshold gives rise to three problems.³³

The first is that words “*in themselves*” are incapable of having meaning:

A dictionary may give many definitions of a word, but it cannot have meaning until it is connected with other words or things so as to express an idea.³⁴

The second problem is determining when words are “*precise and unambiguous*”:

There are limits to the meaning of words in the sense that some things are clearly included and some things are clearly not; but the boundaries are rarely if ever precise. And what is clear and unambiguous to one might not be to another.³⁵

Finally, the third problem is determining the “*grammatical and ordinary*” or the “*natural and ordinary sense*” of words:

The two expressions obviously mean the same thing, namely, the application of the rules of grammar, giving the words their ordinary meaning. A meaning may be said to be ordinary if it is found in the dictionary. But there may be many meanings...And there may be different ordinary meanings of a word for different subject-matters.³⁶

32 *Sussex Peerage Case* (1844), 11 Cl & Fin 85 at para 143, 8 ER 1034 (UK).

33 Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths & Co. Canada: Scarborough, 1974) at 2–9 [Driedger, *Construction of Statutes*]. See also Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 2–28 [Driedger, *Construction of Statutes*, 2nd ed].

34 Driedger, *Construction of Statutes*, *supra* note 33 at 3.

35 *Ibid* at 5.

36 *Ibid* at 6.

However, after pointing out these problems, Driedger simply concluded by reiterating the rule expounded in the *Sussex Peerage Case*:

Assuming the words when read in the context of the whole Act, and in their grammatical and ordinary sense, are clear and unambiguous, then, as stated in the *Sussex Peerage Case* nothing remains but to expound them in that sense, for “the words themselves do, in such case, best declare the intention of the lawgiver.”³⁷

Thus, it is not surprising that Sullivan, in the third edition of *Construction of Statutes*, attempted to resolve this contradiction by asserting that the ambiguity threshold—or, as she put it, the two-stage approach—should be rejected:

Today, in every case, the meaning that emerges from the reading of the words in their immediate context must be considered in light of a larger context and tested against other sources of legislative meaning. The purpose of the legislation must be taken into account, even where the meaning appears to be clear, and so must the consequences. At the end of the day, a court may decide to go with its first impression, the meaning that emerged simply from reading the text. But no modern court would consider it appropriate to adopt that meaning, however “plain”, without first going through the work of interpretation.³⁸

This was not, however, the end of the ambiguity threshold. In fact, in subsequent editions, Sullivan noted the persistence of cases continuing to apply this threshold, particularly in the Supreme Court.³⁹

IV. WHY THE AMBIGUITY THRESHOLD?

Two justifications can be advanced for the ambiguity threshold.

The first is that it brings certainty to the law and promotes democratic accountability.⁴⁰ It assumes that linguistic certainty is widely recognizable. If an unambiguous meaning arises from a legislative text, one on which most people would agree, then it should be accepted without further debate as the meaning intended by those who enacted the legislation. People

³⁷ *Ibid* at 9–10.

³⁸ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto Butterworths, 1994) at 3–4.

³⁹ Sullivan, *Sullivan on Statutes*, *supra* note 4 at 16–25.

⁴⁰ *Ibid* at 12.

affected by the legislation should be able to rely on the meaning they, and most others, attach to the legislation.

The second justification is to simplify interpretive processes. The ambiguity threshold reduces the scope of an interpretive exercise by excluding the consideration of matters that might otherwise have to be examined. This is a significant consideration given the potential complexity of these exercises. The “rules of interpretation” are many and complex. They have been developed by the courts over the course of centuries and reflect our development from a medieval autocratic monarchy to a modern constitutional democracy.

We have become acutely aware of the potential complexity of legislative interpretation in teaching law students on a well-worn path most notably trodden by Driedger. The challenge for students is to figure out where to focus their attention when reading legislation, to spot the interpretive issues that demand attention when applying legislation to a fact-pattern, and not spend time on those that do not require attention. The panoply of interpretive rules provides students with a seemingly limitless and sometimes contradictory set of tools to generate issues and arguments. In the real world of legal advice and litigation, there is no time to consider them all, particularly as the legal profession focuses increasingly on generating efficiencies and reducing costs.

These considerations may explain why Driedger’s *Construction of Statutes* pointed out the frailties of the ambiguity threshold, yet continued to teach it. His book “grew out of a series of lectures given as part of the Legislation Training Programme offered by the University of Ottawa.”⁴¹ Unlike other legal texts addressing particular areas of law, it aimed to describe a methodology that could be applied across all areas of law affected by legislation:

Construction of statutes therefore involves, first, a correct reading of the statute and then, if any of these difficulties [ambiguity, obscurity, and disharmony] should arise, finding the solution that would most likely be found by a court should the statute come before it. The questions with which this work is concerned, therefore, are: How does one read a statute, resolve an ambiguity, clarify an obscurity and remove disharmony?

It is my belief that the comprehension of legislation involves far more the application of principles of language, logic and common sense than it does of rules of law. I do not consider that the common law lawyer’s

41 Driedger, *Construction of Statutes*, *supra* note 33 at vii.

technique of extracting legal principles from judicial decisions and then applying them to new situations is valid for statutory construction, and modern judges seem to be relying more and more on language and logic than on precedent.⁴²

These passages demonstrate a teacher's passion to bring order to the unruly world of statutory interpretation by enunciating clear principles to guide students and the many others who would read his book. His invocation of "language, logic and common sense" laid the foundation for his Modern Principle of Interpretation:

[T]he 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.⁴³

But his attention to resolving difficulties—ambiguity, obscurity, and disharmony—was equally important and turned on a distinction between *interpretation* and *construction*, which Driedger explained as follows:

The term "construction" is used in this work rather than the term "interpretation". All statutes must be "construed", and only when there is some ambiguity, obscurity or inconsistency in a statute is the term "interpret" fitting.⁴⁴

Thus, Driedger on the one hand continued to pay attention to the traditional judicial preoccupation with resolving interpretive problems, but he broadened his subject to include "construction" as a process that must always be undertaken and might be characterized as a precursor to interpretation.

This narrower conception of interpretation resonates with the ambiguity threshold for the interpretation of legislative texts. It is also acknowledged in Pierre-André Côté's work as "the unusual effort required to elucidate a specific obscure passage."⁴⁵ However, Côté characterizes this conception as superficial, telling us "little about the nature of this process that we call the interpretation of legislation."⁴⁶ He goes on to describe "the official theory of statutory interpretation," which turns on the notion of communicating pre-determined legislative intent and proposes an

⁴² *Ibid.*

⁴³ *Ibid* at 67.

⁴⁴ *Ibid* at ix.

⁴⁵ Pierre-André Côté, *The Interpretation of Legislation*, 4th ed (Toronto: Carswell, 2011) at 3.

⁴⁶ *Ibid.*

alternative theory of interpretive creativity subject to constraints. These theories, like Driedger's Modern Principle, attempt to broaden the methodology for understanding legislative meaning, while at the same time bringing structure, if not order, to this enterprise and the closely related activity of applying that meaning in real life.

V. EVOLUTION OF THE AMBIGUITY THRESHOLD

The ambiguity threshold enunciated in the *Sussex Peerage Case* has evolved considerably since its original articulation, particularly in the wake of Driedger's *Construction of Statutes* and his formulation of the Modern Principle, which was elevated to near canonical status by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*⁴⁷ This principle has since been cited with ritual regularity by Canadian courts dealing with interpretive questions, and has been most recently recognized in the *Model Interpretation Act* of the Uniform Law Conference of Canada.⁴⁸

Writing for the Court, Justice Iacobucci relied on the Modern Principle as the basis for rejecting the "plain meaning" of the provisions in that case, and embarking on a wide-ranging review of the relevant contextual considerations, including the legislative purposes, the consequences of competing interpretations, related provisions, and parliamentary debates. However, it was not long before the Court revisited this sweeping openness to contextual considerations.

In *Bell ExpressVu*, the Court reaffirmed its allegiance to the Modern Principle as requiring a robust consideration of contextual matters in all cases.⁴⁹ However, the Supreme Court's recognition of contextual considerations was also limited by its retention of ambiguity as a threshold for embarking on some forms of interpretive analysis:

Other 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.⁵⁰

⁴⁷ [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

⁴⁸ See Peter Pagan et al, "Model Interpretation Act and Report" (Report of the Working Group with Model Act and Commentaries delivered at the Uniform Law Conference of Canada, Yellowknife, August 2015) at 8, online: <www.ulcc.ca/images/stories/2015_pdf_en/2015ulcco010.pdf>.

⁴⁹ *Bell ExpressVu*, *supra* note 20 at para 27.

⁵⁰ *Ibid* at para 28.

This reference to ambiguity did not originate in *Bell ExpressVu*, but echoed earlier cases predating *Rizzo*, notably *Symes v Canada*.⁵¹ Thus, like Driedger himself, the Supreme Court has been unable to shake off the ambiguity threshold and instead continues to recognize it as a constraint on legislative interpretation. In fact, it has articulated an additional reason to justify the threshold in relation to *Charter* considerations. This reason is based on the distinction between constitutional interpretation and the constitutional remedies mentioned at the outset of this article. It is rooted in the separation of powers and the distinctive roles of legislatures and courts. It was first expressed in *Symes*⁵² and elaborated further in *Bell ExpressVu*:

...if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret *this* sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.⁵³

But does this rationale based on section 1 of the *Charter* bear up under scrutiny? Why can *Charter* guarantees not be taken as a whole rather than being divided into two parts? This is essentially what happens with constitutional guarantees that incorporate their own balancing of broader societal interests, notably section 7 of the *Charter*—permitting a rights in-

51 *Symes v Canada*, [1993] 4 SCR 695 at 752, 110 DLR (4th) 470.

52 *Ibid* at 756.

53 *Bell ExpressVu*, *supra* note 20 at para 66 [emphasis in the original]. See also *Charlebois v St. John (City)*, 2005 SCC 74 at para 24, [2005] 3 SCR 563 [*Charlebois*] and *Rodgers*, *supra* note 20 at paras 18–19.

fringement “in accordance with the principles of fundamental justice”⁵⁴—and section 35 of the *Constitution Act, 1982*—recognizing derogations from Aboriginal and treaty rights “in the pursuit of substantial and compelling public objectives.”⁵⁵ Interpretation may then arrive at a result that infringes a right or freedom, but does so in a way that conforms to section 1. With over 30 years of judicial experience in applying section 1, there is now considerable jurisprudence to be applied to legislative interpretation. Thus, section 1 and the justificatory opportunities it affords legislatures would still operate, albeit within a framework of interpretation.

One objection to this approach may lie in the shifting burdens that the courts have recognized in applying the *Charter*. The burden of demonstrating a rights violation rests on the person asserting the violation.⁵⁶ This is consistent with the general presumption of validity. But when a rights violation is demonstrated, the burden of proving a section 1 justification shifts to the person (usually the government) asserting the justification.⁵⁷ The section 1 burden requires something more than interpretive arguments to discharge it. It depends on social facts and an assessment of the impact that legislation has or may have. Employing it in the absence of such proof risks lessening the burden and invites courts to make assumptions about things they are not expert in.

More broadly based objections to the use of *Charter* values as an interpretive tool have also been raised on the basis that they are nebulous and risk needlessly complicating interpretive questions.⁵⁸ These concerns have also been recognized by other scholars, but they have suggested ways of managing this complexity rather than rejecting the application of *Charter* values.⁵⁹ This approach recognizes that *Charter* values are rooted in our legal and constitutional system as the product of hundreds of years of legal evolution. They are no more complex than the legal system itself. If interpretive processes can handle a vast array of other contextual features, why should features of the legal system itself not be considered as well?

54 *Charter*, *supra* note 2, s 7.

55 *Mitchell v MNR*, 2001 SCC 33 at para 11, [2001] 1 SCR 911.

56 See *R v Collins*, [1987] 1 SCR 265 at paras 21–22, 333 DLR (4th) 197.

57 *Ibid.*

58 Horner, *supra* note 14 at 367.

59 See Angela Cameron & Paul Daly, “Furthering Substantive Equality Through Administrative Law: Charter Values in Education” (2013) 63 SCLR (2d) 196; Sossin & Friedman, *supra* note 9.

It has also been argued that *Charter* values should not be used to expand the reach of the *Charter* as a constraint on government action.⁶⁰ There is some force to this argument if these values are applied as absolute requirements to which all other indicators of meaning must yield. But there are more nuanced ways to use them, and indeed *Charter* rights and freedoms themselves, as interpretive tools. They can afford a basis for questioning textual or purposive indicators of meaning that lean in a different direction. The answer to these questions may not change the interpretive conclusions, but at least the legislator is given credit for considering the Constitution.

Yet another difficulty with the objections to using *Charter* values is the ambiguity threshold that the Supreme Court has recognized for its consideration in legislative interpretation. But why should this threshold make any difference? Is ambiguity a licence from the legislature authorizing a different or broader form of interpretation? Much depends on what ambiguity is, which is where this article turns next.

VI. WHAT COUNTS AS AMBIGUITY?

A. General Principles

In many cases, the Court has considered *Charter* values without any discussion of the ambiguity threshold, presumably because the ambiguity is obvious. Very general words such as “reasonable” and “indecenty” are readily accepted as ambiguous, even after a contextual analysis, to warrant interpretive recourse to a wide range of contextual considerations.⁶¹ Similar conclusions can be drawn from the absence of a discussion of ambiguity in cases involving the application of international law values and principles.⁶²

Not surprisingly, definitive statements about the ambiguity threshold appear in cases where it is invoked to refuse to consider matters such as *Charter* values. The leading case on the nature of the ambiguity threshold is *Bell ExpressVu*. It was argued that *Charter* values relating to freedom of expression should be considered in the interpretation of paragraph 9(1)(c) of the *Radiocommunication Act*:

⁶⁰ Sossin & Friedman, *supra* note 9 at 425.

⁶¹ See *R v LaBaye*, 2005 SCC 80, 3 SCR 728 and *Canadian Foundation for Children, Youth and Law v Canada*, 2004 SCC 4, [2004] 1 SCR 76.

⁶² See *Bo10 v Canada*, 2015 SCC 58 at para 47ff, [2015] 3 SCR 704.

9.(1) No person shall...

- (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;⁶³

The interpretive issue was whether programming signals emanating from a satellite television distributor based in the United States were caught by this prohibition. In other words, did the “encrypted subscription programming signal” include all such signals received in Canada or only those transmitted by undertakings in Canada?

Despite the multitude of conflicting decisions of courts across Canada, the Supreme Court concluded there was no ambiguity to warrant considering the *Charter*. It addressed the concept of ambiguity in quite pragmatic terms:

What, then, in law is an ambiguity? To answer, an ambiguity must be “real”. The words of the provision must be “reasonably capable of more than one meaning”. 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* 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”, to which I would add, “including other principles of interpretation”.

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”.⁶⁴

63 RSC 1985, c. R-2.

64 *Bell ExpressVu*, *supra* note 20 at paras 29–30 [emphasis in the original] [footnotes omitted].

This passage ties ambiguity to the notion of plausibility: what words are “reasonably capable” of meaning. This in turn requires an analysis of the “entire context” as well as the purposes of the legislation in question. Thus, some interpretive analysis is necessary to determine whether there is ambiguity to warrant extending this analysis into a consideration of *Charter* matters. This is analogous to two-stage analyses of legal issues found, for example, in preliminary inquiries in criminal proceedings and motions to strike pleadings in civil proceedings.

Another dimension of ambiguity appears in the Supreme Court’s decision in *Montréal (City) v 2952-1366 Québec Inc*, recognizing that context may reveal ambiguity:

Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.⁶⁵

This highlights another contrast in the interpretive treatment of *Charter* values. In *R v Clarke*, the Supreme Court re-affirmed the need for “ambiguity” to consider them⁶⁶ and went on to suggest that these values cannot be used “to create ambiguity when none exists.”⁶⁷ They are thus not part of the “context.” Courts are required to look at other related legislative provisions, but not the Constitution. In a constitutional democracy, this is rather startling.

B. Particular Decisions

When one turns to particular court decisions about ambiguity, they reveal even more startling results. The concept of ambiguity is seemingly expansive in some cases, but restricted in others. There have also been disagreements within the Supreme Court about the existence of ambiguity.

⁶⁵ *Montréal (Ville) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 10, [2005] 3 SCR 141. (This passage has also been more recently relied on in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 42–43, [2013] 3 SCR 895 [McLean]. See also *Martell v Halifax (Regional Municipality)* 2015 NSCA 101 at para 32, 392 DLR (4th) 321).

⁶⁶ *Supra* note 17 at para 15 where the Court emphasized the word “disputed” in a statement it made two years earlier in *Mabior*, *supra* note 9 that “Charter values are always relevant to the interpretation of a *disputed* provision of the *Criminal Code*.” Thus “disputed” was to be understood as “ambiguous”.

⁶⁷ *Clarke*, *supra* note 17 at para 1. See also *Wilson*, *supra* note 20 at para 25.

Let us begin with the foundational *McKay* decision. It concerned a municipal by-law regulating signage in residential neighbourhoods. The Supreme Court characterized the by-law as follows:

In framing those portions of the by-law with which we are concerned the Council has not enumerated the classes of signs the display of which on residential property is prohibited. It has taken the permissible course of forbidding the display of all signs except those few described in regulation 6.14(e). It results from this that the words of prohibition are extremely wide.⁶⁸

It then found that the Ontario legislature had no power to authorize the making of a by-law prohibiting the posting of federal election signs,⁶⁹ and agreed with the conclusion of the trial judge “that on its proper construction bylaw number 11737 does not prohibit the display of the sign displayed by the appellants during the period mentioned in the charge against them.”⁷⁰ However, as the Court noted above, the by-law prohibited all uses except those specifically mentioned. The signs mentioned in the by-law did not include election signs. How then could the by-law be interpreted to except federal election signs from the prohibition? The decision provides no explanation. Thus, this decision, which is cited as the exemplar of the interpretive presumption of compliance, appears instead to be remedial rather than interpretive, carving out what would today be called a constitutional exemption.⁷¹

68 *McKay*, *supra* note 18 at 802. The by-law said:

Section 9.3.1.—USE: No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses:

Section 9.3.1.7.—SIGNS: Signs in accordance with the regulations in section 6.14(e).

Section 6.14(e)—SIGNS: Residential—one non-illuminated real estate sign not exceeding four square feet in area, advertising the sale, rental or lease of any building, structure or lot and/or one non-illuminated trespassing, safety or caution sign not exceeding one square foot in area, and/or one sign indicating the name and profession of a physician shall be permitted. Bulletin boards advertising sub-divisions in which lots are for sale and/or advertising building projects.

In the case of an apartment not more than one bulletin board not exceeding twelve square feet in area shall be permitted, provided that all such signs are located on the lot to which they relate.

69 *Ibid* at 806.

70 *Ibid* at 807.

71 See *R v Ferguson*, 2008 SCC 6 at paras 41–48, [2008] 1 SCR 96. See also *Carter v Canada*, 2016 SCC 4, [2016] 1 SCR 13.

Let us turn next to look at *Bell ExpressVu*. It involved the words “encrypted subscription programming signal” in paragraph 9(1)(c) of the *Radiocommunication Act*, which were found to unambiguously convey a comprehensive meaning, unencumbered by considerations of national boundaries.⁷² This conclusion followed a detailed consideration of both the “grammatical and ordinary sense” of the legislative text (including the particular provision in issue as well as related provisions) and the “broader context” (notably, two related Acts—the *Broadcasting Act* and the *Copyright Act*). Having disposed of any ambiguity through this interpretive analysis, the Court declined to consider *Charter* values arguments.⁷³ The Court also refused to answer the constitutional question put by the respondents about the consistency of paragraph 9(1)(c) with the guarantee of freedom of expression in paragraph 2(b) of the *Charter*. This refusal was based in part on absence of a *Charter* record permitting the Court to answer the question.⁷⁴

In *Bell ExpressVu*, the decision to decline to consider *Charter* values is quite defensible, given the strength of the other interpretive arguments and the absence of a record on which to apply the *Charter*. What then was the purpose of stating the ambiguity threshold as a general interpretive matter? The purpose of protecting the role of the legislature is unconvincing. Was it also meant to pre-empt similar *Charter* arguments in other cases, raised at a late stage in appellate proceedings without any factual record, to avoid wasting the Court’s time?

The Court in *Bell ExpressVu* did a good deal of interpretive work to conclude that the provision was not ambiguous so as to allow consideration of the *Charter*. This is not always the case. *R v Rodgers*⁷⁵ involved *Criminal Code* provisions authorizing the taking of DNA samples. Section 487.055(1) said “a provincial court judge may, on *ex parte* application in Form 5.05, authorize...the taking [of samples] from a person...”⁷⁶ The Court of Appeal focused on the permissive aspect of the provision (“may...authorize”) and read in a requirement to observe section 7 principles of fundamental jus-

72 *Bell ExpressVu*, *supra* note 20 at para 55.

73 *Ibid* at para 60ff.

74 *Ibid*. This concern has also been more recently echoed in *Martin v Alberta (Workers’ Compensation Board)* 2014 SCC 25 at para 53, [2014] 1 SCR 546. See also *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3 (discussing judicial discretion to allow constitutional arguments in the absence of notice to the Attorney General).

75 See *Rodgers*, *supra* note 20.

76 *Criminal Code*, RSC 1985, c C-46, s 487.005(1) at it appeared on 18 May 2005.

tice in granting an authorization, including requiring notice to the subject of the application in some circumstances.⁷⁷

Writing for the majority of the Supreme Court, Justice Charron concluded that the provision was not ambiguous as to the *ex parte* aspect of the application:

There is no ambiguity here. The clear language of s. 487.055(1) indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice. While the Court of Appeal was correct in stating that the judge who exercises a discretion pursuant to a constitutionally valid enactment must do so in a manner which is consistent with the *Charter* principles, that is a separate question from the question of statutory interpretation. By interpreting the provision so as to accord with its view of minimal constitutional norms, the Court of Appeal effectively trumped the constitutional analysis, rewrote the legislation, and deprived the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights.⁷⁸

The Court here was not prepared to expand the discretionary aspect of the provision conveyed by the word “may” to include discretion relating to the *ex parte* aspect of the proceeding. It instead concluded that no such discretion was intended, and proceeded to assess whether the provision as such violated sections 7 and 8 of the *Charter*. However, the word “may” is one of the most frequently contested words in statutory interpretation, second only to “shall.”⁷⁹ Yet, the decision contains no discussion of its context or meaning here. In contrast to *Bell ExpressVu*, the basis for the conclusion of no ambiguity is exceedingly thin.

It should also be noted that the majority decision in *Rodgers* did not involve the application of section 1 of the *Charter*. The issue was solely whether sections 7 and 8 had been violated. Yet, the rationale for the ambiguity threshold given in *Bell ExpressVu* turned on the protection of the legislature’s right to justify legislative measures under section 1. What then is the rationale for its invocation in *Rodgers*? Is it another example of judicial impatience with arguments a court sees as wasting its time in a case where it sees no rights violation in the first place? Or is it more fundamentally an indicator of judicial restraint in the application of the *Charter*?

⁷⁷ See *R v Jackpine*, 237 DLR (4th) 122, 184 OAC 354 (ONCA).

⁷⁸ *Ibid* at para 20.

⁷⁹ See Sullivan, *Sullivan on Statutes*, *supra* note 4 at 81–91.

Conclusions of ambiguity also appear questionable when members of the same court disagree on the existence of ambiguity. In most cases the Supreme Court has been unanimous about whether a provision is ambiguous, but the Court has been split, most notably in *Charlebois v St. John*⁸⁰ and two more recent cases: *R v Gomboc*⁸¹ and *Ontario v Fraser*.⁸²

Charlebois involved the interpretation of the definition of “institution” in section 1 of the *Official Languages Act* of New Brunswick, which constituted a legislative response to that province’s obligations under the *Charter* relating to its official languages. Section 1 provided:

“[I]nstitution” means an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature...⁸³

The case involved the application of section 22 of the *Act*, which required “institutions” involved in civil litigation to use the language chosen by the other party. The section applied to “institutions,” and so the interpretive issue was whether the words included municipalities.

Justice Charron, for the majority, concluded that they did not, based on a purposive and contextual analysis of the scheme and structure of the *Act*.⁸⁴ She considered that this analysis resolved any ambiguity about the application of the definition to municipalities and, citing *Bell ExpressVu*, she held that *Charter* values had “no role to play” in resolving the interpretative issues.⁸⁵

Justice Bastarache, writing for the dissenting members of the Court, disagreed with the conclusion that ambiguity was resolved by non-*Charter* contextual features, and went on to assert that it was essential to consider the linguistic *Charter* rights:

One major factor to be considered in the present appeal is the proposition that the Legislature’s intention is to implement the rights defined in the *Charter* as interpreted by the Court of Appeal in 2001, and that it wants to extend the minimum constitutional protections in the spirit of s. 16(3) of the *Charter*. The Court must therefore favour the extension of rights and

80 *Charlebois*, *supra* note 53 at para 24.

81 *Gomboc*, *supra* note 20.

82 *Fraser*, *supra* note 20.

83 *Official Languages Act*, SNB 2002, c O-0.5 [emphasis added].

84 *Charlebois*, *supra* note 53 at para 21.

85 *Ibid* at paras 23–24.

obligations and acknowledge that general obligations must be limited, for specific institutions, only where such limitations are clearly spelled out, as in s. 4, or implicitly spelled out, as in the case where there is a conflict between general and specific provision, as for ss. 27 to 29 and 36.⁸⁶

This disagreement illustrates the difficulty in the sharp distinction in contextual features that underlies the ambiguity threshold. Purposes are recognized as a feature that must always be considered. Yet, for the majority in *Charlebois*, values relating to the language rights guaranteed by the *Charter* cannot be considered even when the purposes of the legislation being interpreted are to advance language rights.

Disagreements on ambiguity have continued to arise in the Supreme Court since *Charlebois*.

*R v Gomboc*⁸⁷ involved a regulation authorizing utility companies to disclose “customer information” to the police:

10(3) Customer information may be disclosed without the customer’s consent to the following specified persons or for any of the following purposes:...

(f) to a peace officer for the purpose of investigating an offence if the disclosure is not contrary to the express request of the customer;⁸⁸

“Customer information” was defined as:

1(e)...information that is not available to the public and that

- (i) is uniquely associated with a customer,
- (ii) could be used to identify a customer, or
- (iii) is provided by a customer to an owner;⁸⁹

The regulation was invoked to support the disclosure of electricity consumption data in the face of a challenge that an accused’s section 8 *Charter* right to be secure against unreasonable search and seizure had been violated. Three members of the Court found that there was no ambiguity in the *Regulation* and declined to use *Charter* values to interpret “customer information”:

I see no room for interpretive creativity in this case because I see no ambiguity in the language of the provisions. “[C]ustomer information” is de-

86 *Ibid* at para 50.

87 *Gomboc*, *supra* note 20.

88 *Code of Conduct Regulation*, Alta Reg 160/2003, s 10(3)(f).

89 *Ibid*, s 1(e).

defined as information that is “uniquely associated with a customer”. DRA information is information relating to the electrical flow and consumption of electricity in a specific home, something that is obviously “uniquely associated with a customer”.⁹⁰

In contrast, two other members of the Court found that the regulation did not authorize the disclosure of information in this case:

The Crown argues also that there was legislative authorization for the search, by virtue of the *Regulation*. We do not agree. The *Regulation* permits the disclosure of “customer information”. It may be that “customer information” includes routinely collected consumption rates, thus permitting disclosure of energy usage without a warrant. However, the *Regulation* does not authorize the utility company to operate as an agent for the police for the purpose of spying on consumers. The DRA data that concerns us here was not pre-existing information in an Enmax subscriber’s file. Rather, the police enlisted the company to install the device in order to gather new information about the respondent for the purpose of pursuing an ongoing criminal investigation of which he was the target.⁹¹

This conclusion was based in part on constitutional values.⁹²

A second more recent Supreme Court case, *Ontario v Fraser*, involved labour relations legislation for farm workers.⁹³ The principal issue was whether the legislation was consistent with the right to freedom of association guaranteed by section 2(b) of the *Charter*. This issue in turn depended on whether section 5 of the *Agricultural Employees Protection Act*⁹⁴ required employers to consider employee representations in good faith. If it did, the legislation would withstand the *Charter* challenge.

The relevant provisions of section 5 read as follows:

5. (1) The employer shall give an employees’ association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer...

(5) The employees’ association may make the representations orally or in writing.

90 *Gomboc*, *supra* note 20 at para 89, Abella, Binnie and LeBel JJ.

91 *Ibid* at para 146, McLachlin CJC and Fish J.

92 *Ibid* at para 147.

93 *Fraser*, *supra* note 20.

94 SO 2002, c 16.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.⁹⁵

The majority found these provisions ambiguous as to the requirement to consider employee representations in good faith. They went on to review three considerations, including *Charter* values (human dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy), in concluding that these provisions imposed a duty on agricultural workers to consider employee representations in good faith.⁹⁶

In contrast, the two other members of the Court (Justices Rothstein and Charron) concurred in the result, but took issue with both the characterization of the *Charter* rights in issue, as well as their application to the interpretation of the legislation. They invoked the requirement for ambiguity as expressed in *Bell ExpressVu* and challenged the use of *Charter* values to interpret not only the legislation in question, but more fundamentally the *Charter* itself:

A duty to bargain in good faith may achieve those ends. However, either the *Charter* requires something or it does not. The Chief Justice and LeBel J. say that a “value-oriented approach...has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century”. That may be so, however this value-oriented approach is a means by which courts interpret the *Charter*—a process, as I will now explain, that must begin with the words of the *Charter* itself and must be bound by the normal constraints of legal reasoning and analysis. As Mr. Justice Robert J. Sharpe and Professor Kent Roach say, “[t]he task of *Charter* interpretation has structure and discipline. The first source is obvious—the language of the *Charter* itself”. The role of the Court is to determine what the *Charter* requires and what it does not and then apply the requirements it finds to the case before it. It is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense.⁹⁷

95 *Ibid.*, s 5.

96 *Fraser*, *supra* note 20 at paras 101–102.

97 *Ibid.* at paras 251–52 [footnotes omitted].

Justices Rothstein and Charron then concluded that, “[o]n a plain reading,” the *Act* provided only the protections imposed in the Court’s previous decision in *Dunmore v Ontario*,⁹⁸ and that it did not provide any right to collective bargaining.⁹⁹

These cases where the Supreme Court was divided on the existence of ambiguity, and others like them,¹⁰⁰ do little to instill confidence in the ambiguity threshold as a test for deciding whether to consider the *Charter* as a matter of legislative interpretation. Judicial disagreement on meaning is one thing. But disagreement on whether there is ambiguity at all is a damning critique of lawyers and lower courts that find to the contrary. A more respectful characterization of “ambiguity” is as a label for a conclusion that, after a certain amount of interpretive work has been done, more is still needed to arrive at the meaning of a legislative text. Ambiguity signifies that there is still more work to be done, giving consideration to the Constitution, including its underlying values; a finding of no ambiguity means that the interpretive work is done and there is no need to consider the matter any further. Thus, disagreement about ambiguity is really about a particular meaning and what qualifies as a cogent basis for concluding it is correct. But what is it about the *Charter*, and indeed other considerations that are subject to the ambiguity threshold, that warrants their exclusion from this first level of interpretive analysis, particularly when there is disagreement about the sufficiency of that analysis?

VII. AMBIGUITY AND THE STANDARD OF REVIEW

Many of the cases discussed above arose in the context of prosecutions for offences and the application of legislation by trial judges in the first instance. But this is not the only way in which interpretive questions involving the *Charter* can arise. They are often enmeshed in the exercise of administrative discretion.¹⁰¹ For example, *Bell ExpressVu*, *Gomboc*, and *Fraser* involved legislation that is also interpreted and applied in administrative law settings: telecommunications and utility regulation, and labour

⁹⁸ *Dunmore v Ontario*, 2001 SCC 94, [2001] 3 SCR 1016.

⁹⁹ *Fraser*, *supra* note 20 at para 277.

¹⁰⁰ See e.g. *Boudreault*, *supra* note 20, where the Court split on the meaning of “care and control” in the impaired driving provisions of the *Criminal Code*, yet Cromwell J at para 86 asserted that “no one has suggested that [“care and control”] are in any way ambiguous”.

¹⁰¹ See *infra* note 127 and the accompanying text for a discussion of the relationship between legislative interpretation and the exercise of administrative discretion.

relations. The legislation in these cases is interpreted by administrative tribunals whose decisions are subject to judicial review. What happens when interpretive questions move from a court prosecution or direct challenge to the constitutionality of legislation to judicial review of administrative interpretations?

The starting point for exploring this question is *Slaight Communications v Davidson*, where the Supreme Court considered the remedial scope of a decision of a labour adjudicator.¹⁰² The decision turned on the interpretation of legislative provisions authorizing the adjudicator to grant remedies for a complaint, specifically to make an order to pay compensation, to reinstate an employee, and “do any other like thing that is equitable to require the employer to do.”¹⁰³ The remedies in this case required an employer to provide an employee with a letter of recommendation and prohibited the employer from answering requests for further information about the employee. The employer objected that this contravened his freedom of expression under paragraph 2(b) of the *Charter*.

On judicial review, the Court looked at the adjudicator’s decision first in terms of the administrative law standard of reasonableness, and then in terms of the *Charter*. The majority found that the orders met the reasonableness test. They also found that the *Charter* applied to the adjudicator’s orders, and that the orders infringed the employer’s freedom of expression. However, Chief Justice Dickson, writing for the majority, applied section 1 of the *Charter* through the lens of the *Oakes* test to conclude that they were justifiable. He went on to observe that “[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases.”¹⁰⁴

Justice Lamer dissented in part. Although he agreed that there was statutory authority to require the employer to provide a letter of recommendation, he considered that there was no such authority for the second part of the order prohibiting the employer from answering requests for information.¹⁰⁵ He also took a different approach to the *Charter* issue. His starting point was the interpretive presumption of compliance:

102 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*].

103 *Canada Labour Code*, RSC 1970, c L-1, s 61.5(9).

104 *Slaight Communications*, *supra* note 102 at 1049.

105 *Ibid* at 1075ff.

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.¹⁰⁶

He recognized that the discretionary element of an administrative power opens the door to the application of the *Charter*, just as ambiguity does generally in the interpretation of legislation. Thus, Justice Lamer engrafted on to the initial interpretation of the enabling legislation a further interpretive step, taking the *Charter* into account. This approach appears to have paved the way for the Court's subsequent decision over 20 years later in *Doré v Barreau du Québec*.¹⁰⁷

Doré dealt with the application of the *Charter* in relation to the power of the Barreau du Québec to discipline one of its members for conduct infringing article 2.03 of the *Code of ethics of advocates*. This article stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity."¹⁰⁸ The Supreme Court's decision addressed questions about how the *Charter* applied to administrative decision-making, particularly section 1, which was arguably designed for legislation rather than administrative decisions. It also expanded on the reforms to the standard of review brought by the *Dunsmuir* decision.¹⁰⁹

Writing for the Court, Justice Abella embraced "a richer conception of administrative law, under which discretion is exercised 'in light of constitutional guarantees and the values they reflect.'"¹¹⁰ She also held it "unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values."¹¹¹

¹⁰⁶ *Ibid* at 1078.

¹⁰⁷ *Doré*, *supra* note 17.

¹⁰⁸ RRQ 1981, c B-1, r 1, art 2.03, as repealed by *Regulation to amend the Code of ethics of advocates*, OC 351-2004, 7 April 2004, (2004) GOQ II, 1272, s 7.

¹⁰⁹ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

¹¹⁰ *Doré*, *supra* note 17 at para 35, citing *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 152, [2006] 1 SCR 256.

¹¹¹ *Ibid*.

She then elaborated on this approach as balancing *Charter* values with “statutory objectives” by first considering what these objectives are, and then asking how the *Charter* value “will best be protected in view of the statutory objectives.”¹¹² Finally, she situated this approach within the more recent reforms to judicial review generally:

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, “[t]he issue becomes one of proportionality”, and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.¹¹³

Doré unleashed a torrent of critical academic comment,¹¹⁴ much of which involves concerns about the complexity and indeterminacy of injecting *Charter* values into the exercise of discretionary powers.¹¹⁵ It has also been argued that *Doré* allows circumvention of the rigours of litigating *Charter* rights and freedoms, and effectively expands their scope.¹¹⁶ These concerns resonate with the justifications for the ambiguity threshold for considering constitutional matters in legislative interpretation,¹¹⁷ particularly given the comments in *Bell ExpressVu* about the absence of a proper record on which to consider the *Charter*.¹¹⁸ However, other commentators have suggested that, although the application of *Charter* values in tribunal interpretation will take additional effort and resources, it is manageable and justified so that “the promise of the *Charter* to protect those affected by the exercise of public authority can at last be meaningfully fulfilled giving full expression

112 *Ibid* at paras 55–56.

113 *Ibid* at para 57 [footnotes omitted].

114 See Gerald Heckman, “Developments in Administrative Law: The 2014–2015 Term” (2016) 72 SCLR (2d) 1 at 45ff.

115 See e.g. Christopher D Bredt & Ewa Krajewska, “*Doré*: All that Glitters Is Not Gold” (2014) 67 SCLR 339 at para 55; Horner, *supra* note 14 at para 70ff; Heckman, *supra* note 114 at 50.

116 See Horner, *supra* note 14 at para 49ff.

117 Further discussion of this topic can be found at 327–30, above “Why the Ambiguity Threshold”.

118 *Bell ExpressVu*, *supra* note 20.

to the *Charter*.”¹¹⁹ It is also worth noting that the costs of litigating the application of *Charter* rights and freedoms are considerable.¹²⁰ It is generally much less expensive to litigate interpretive questions. Thus, *Doré* could also be seen as a way of bringing the *Charter* within the reach of parties of more modest means appearing before tribunals.

Gerald Heckman has suggested that the Supreme Court’s subsequent majority decision in *Loyola High School v Quebec*¹²¹ responds to the concerns about *Doré* by clarifying that discretionary powers are to be exercised, taking into account both *Charter* values and *Charter* guarantees (rights and freedoms), but limiting this consideration to cases where only the latter are engaged.¹²² However, the following passage from *Loyola* is not altogether clear:

...[W]here a discretionary administrative decision engages the protections enumerated in the *Charter*—both the *Charter*’s guarantees and the foundational values they reflect—the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.¹²³

It is possible to read this and subsequent references to *Charter* “protections” as meaning values coupled with guarantees. But, the Ontario Court of Appeal in *Taylor-Baptiste v Ontario Public Service Employees Union* appears to have read “protections” disjunctively as either values or guarantees.¹²⁴ Thus, it is not altogether clear that the majority decision in *Loyola* has the limiting effect that Heckman argues. In addition, the concurring minority judgment in *Loyola* creates further uncertainty by seeming to reject the *Doré* approach in favour of a return to a more traditional *Charter* analysis.¹²⁵

Doré and *Loyola* involved little discussion of the legislation in question, namely article 2.03 of the *Code of Ethics* (in *Doré*), and section 22 of a regu-

119 See Sossin & Friedman, *supra* note 9 at 430.

120 See e.g. *Dish Network LLC v Rex*, 2011 BCSC 1105 at para 149, 350 DLR (4th) 213 (estimating litigation costs ranging from \$604,000 to \$804,000 to pursue *Charter* issues similar to those raised in *Bell ExpressVu*).

121 *Loyola*, *supra* note 10.

122 Heckman, *supra* note 114 at 67.

123 *Loyola*, *supra* note 10 at para 4.

124 *Taylor-Baptiste CA*, *supra* note 29 at para 57, n 14 (citing *Loyola*, *supra* note 10).

125 Heckman, *supra* note 114 at 60.

lation under the Quebec *Education Act* (in *Loyola*).¹²⁶ This is not surprising given the breadth of their terms and the discretion involved. Thus, the decisions focused on balancing the objectives of the legislation against the *Charter* protections. But, very often, the exercise of discretionary powers does involve a significant element of legislative interpretation. How does the *Doré* approach play out there?

Both before and after *Doré*, the Supreme Court has sharply distinguished the application of the *Charter* in reviewing the exercise of administrative discretion from its application to interpretive questions. As noted above in the discussion of *Rodgers*, the Court has acknowledged that discretionary powers can be narrowed by *Charter* protections, but that when it comes to interpreting legislation, the ambiguity threshold must be met first.¹²⁷ In *R v Clarke*, Justice Abella reiterated this view, but also drew a link between discretion and interpretive ambiguity:

Only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values. Instead, administrative law decision-makers “must act consistently with the values underlying the grant of discretion, including *Charter* values”. The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage *Charter* values, it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme.¹²⁸

This passage resonates with comments of Justice L’Heureux-Dubé in *Baker v Canada (Minister of Citizenship and Immigration)*, who also emphasized the pervasiveness of interpretive discretion:

It is, however, inaccurate to speak of a rigid dichotomy of “discretionary” or “non-discretionary” decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.¹²⁹

126 *Regulation respecting the application of the Act respecting private education*, CQLR, c E-9.1, r 1, s 22.

127 *Rodgers*, *supra* note 20.

128 *Clarke*, *supra* note 17 at para 16 [footnotes omitted].

129 [1999] 2 SCR 817 at para 54, 174 DLR (4th) 193, L’Heureux-Dubé J.

The link drawn here between interpretation and discretion goes to the heart of the matter. And the normalization of reasonableness as the standard of review for tribunal interpretations of their “home statutes” underscores this link.¹³⁰

Doré and *Loyola* do not deal with decisions that attract the correctness standard. Presumably, the interpretation of legislation will still attract the ambiguity threshold if it is subject to this standard. This is more likely to occur with legislation other than the home statute, or when other factors for determining the standard of review point away from any significant discretion. For example, in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, the Supreme Court applied correctness because the legislation (the *Copyright Act*) was also applied by courts quite independently of the tribunal (the Canadian Radio-television Telecommunications Commission).¹³¹

The result of *Doré* and *Loyola* is that tribunals possessing discretionary powers are required to apply *Charter* values to interpretive questions without any ambiguity threshold, while courts must decline to consider them if they do not find ambiguity. This contrast is evident in the recent decision in the Ontario Court of Appeal in *Taylor-Baptiste v Ontario Public Service Employees Union*.¹³²

Taylor-Baptiste concerns a decision of the Human Rights Tribunal of Ontario about a complaint of discrimination and harassment under section 5 of the *Human Rights Code (Code)*:

5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity,

¹³⁰ See McLean, *supra* note 65 at paras 42–43.

¹³¹ *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paras 13–24, [2012] 2 SCR 283 [*Rogers Communications*]. See also *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at para 35, [2015] 3 SCR 615; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 51, [2015] 2 SCR 3.

¹³² *Taylor-Baptiste CA*, *supra* note 29 at para 55, leave to appeal to the SCC refused, 36647 (9 June 2016).

gender expression, age, record of offences, marital status, family status or disability.¹³³

The complaint arose from blog posts by a government employee about his supervisor (the complainant). The Tribunal ruled that the posts did not fall within the scope of section 5 because they did not arise “with respect to employment,” or “in the workplace.”¹³⁴ This restrictive interpretation was based on finding ambiguity in the legislation, and took into account freedom of expression guaranteed by paragraph 2(b) and freedom of association guaranteed by paragraph 2(d) of the *Charter*.¹³⁵ It also incorporated a conclusion that union activities are not encompassed by the phrases mentioned above. The Tribunal’s interpretation essentially privileged the *Charter* values underlying the freedoms expressed in paragraphs 2(b) and (d), over the objectives of the *Code*. Little consideration was given to the meaning of the phrases themselves or their context within the *Code*.

The complainant applied for judicial review in the Divisional Court. It dismissed the application finding that the decision fell within the bounds of reasonableness.¹³⁶ An appeal to the Court of Appeal focused exclusively on subsection 5(1), asserting that the phrase “with respect to employment” was not ambiguous, and that the *Charter* should not have been considered in its interpretation. The Court of Appeal dismissed the appeal, first considering the question of whether there was any ambiguity, and then determining whether the Tribunal was entitled to consider the *Charter* in the absence of ambiguity. Finally, it considered whether the Tribunal had properly applied the *Charter* in accordance with the framework established in *Doré*.

On the existence of ambiguity, Justice Brown stated:

I agree with the Divisional Court that it was difficult to see any ambiguity on the face of the language of s. 5(1) of the Code and that the issue the Tribunal faced more accurately should be characterized as “deciding as a question of mixed fact and law in the particular circumstances of this case, whether the blog posts were within or outside of s. 5(1) of the Code”: at paras. 29 and 38. That issue did not require the Tribunal to resolve an

¹³³ RSO 1990, c H.19, s 5 [OHRC].

¹³⁴ *Taylor-Baptiste v Ontario Public Service Employees Union*, 2012 HRTO 1393; *Taylor-Baptiste v Ontario Public Service Employees Union*, 2013 HRTO 180, [*Taylor-Baptiste* 2013].

¹³⁵ *Taylor-Baptiste* 2013, *supra* note 134 at para 25.

¹³⁶ *Taylor-Baptiste v OPSEU*, 2014 ONSC 2169, 240 ACWS (3d) 707.

ambiguity in the statutory language, but rather to interpret and apply the Code to the specific circumstances of the case.¹³⁷

But does this issue involve nothing more than an inquiry into the facts? Is there really no ambiguity? The phrase “in respect of” is used extensively in legislation, and its interpretation has been the subject of countless court decisions.¹³⁸ Its ordinary meaning is potentially vast, yet the decisions of the Tribunal, the Divisional Court, and the Court of Appeal are bereft of any analysis of its meaning in this context. The Tribunal decisions were instead pitched in terms of the general purposes of the *Code*, the *Charter* freedoms invoked by the respondent and policy arguments about applying the *Code* to activities relating to union activity.¹³⁹ There was no consideration of the wording or other provisions of the *Code*, including the statements in the preamble recognizing “the dignity and worth of every person,” and “the creation of a climate of understanding and mutual respect for the dignity and worth of each person.”¹⁴⁰

In turn, the Court of Appeal minimized the interpretive aspect of the Tribunal’s decision, and categorized it as a matter of application with little in the way of reasoning. As discussed above, this distinction is nebulous at best, and breaks down on close analysis.¹⁴¹

The second part of the Court’s decision considered whether the Tribunal was entitled to consider the *Charter* in the absence of ambiguity. On this issue, Justice Brown concluded:

The Divisional Court observed, at para. 38 of its reasons, that “the Charter rights of Dvorak and OPSEU are ultimately just a factor that was considered, amongst others, in deciding as a question of mixed fact and law in the particular circumstances of this case, whether the blog posts were within or outside of s. 5(1) of the Code.” That court then addressed the appellants’ submission about the Tribunal’s ability to take into account Charter rights, concluding that the Doré case stands for “the broad principle that administrative bodies are empowered, and indeed required, to consider Charter values within their scope of expertise.” The Divisional

137 *Taylor-Baptiste CA*, *supra* note 29 at para 45.

138 See Sullivan, *Sullivan on Statutes*, *supra* note 4 at 103–4.

139 *Taylor-Baptiste 2013*, *supra* note 134 at paras 37ff.

140 OHRC, *supra* note 133.

141 Driedger, *Construction of Statutes*, *supra* note 33 at ix. See also Driedger, *Construction of Statutes*, 2nd ed, *supra* note 33 at 2-28; John Mark Keyes, “Judicial Review of Delegated Legislation: What Ever Happened to the Standard of Review?” (2015) 28:3 Can J Admin L & Prac 357 at 380ff.

Court observed that interpreting the meaning of the words “with respect to employment” in s. 5(1) of the Code engaged the core of the Tribunal’s expertise: Divisional Court Reasons, at para. 40.

I agree with that analysis.¹⁴²

The Court of Appeal thus reviewed an interpretive analysis that it could not itself have embarked on as a matter of first instance, because the ambiguity threshold had not been met. The Court found that there was nothing unreasonable in the Tribunal’s application of the *Charter*.

This decision highlights the incongruity of the differing interpretive approaches to the *Charter*, invoking the Supreme Court’s decision in *Clarke*. It is difficult to make sense of it on two levels.

First, there clearly was some interpretive work to be done in considering the language and context of the *Code*. Apart from the *Charter* values invoked, what interpretive basis is there for reading union activity out of the phrase “with respect to employment?” It may be that legislative intent to do so can be found in the recognition that employment disciplinary proceedings encompass human rights matters and exclude proceedings under the *Code*, but clear legislative language is generally required to do this.¹⁴³ But, there is little in the Tribunal decision to provide a basis for this conclusion in the *Code*. Instead, it turned largely on the impact of the *Charter*, filling an interpretive vacuum and lending support to the criticism that the consideration of *Charter* values in tribunal decisions amounts to an unwarranted expansion of *Charter* rights and freedoms, as opposed to supplementing the interpretive process.

Second, the result is that the Tribunal was authorized to apply the *Charter* in the absence of ambiguity, and that it did so in a way that the reviewing court found reasonable. But why does a court not have the same discretion to interpret and apply legislation? Could it be because administrative tribunals generally have more limited remedial powers in relation to the *Charter*?¹⁴⁴ Or that the effects of their interpretive conclusions are generally narrower and are less likely to be incursions on the legislative functions? These features clearly distinguish tribunal decisions from those of the courts, but it is difficult to see why they should justify allowing them to consider the *Charter* when the courts cannot. Different interpretive approaches undermine the unity of meaning that legislative texts are

¹⁴² *Taylor-Baptiste* CA, *supra* note 29 at paras 50–51 [footnotes omitted].

¹⁴³ See *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667.

¹⁴⁴ See *R v Conway* 2010 SCC 22, [2010] 1 SCR 765.

supposed to have, as the Supreme Court has clearly recognized in applying the correctness standard for judicial review of the interpretation of legislative texts that are interpreted in both administrative and judicial fora.¹⁴⁵

CONCLUSIONS

The exclusion of *Charter* and other constitutional considerations from judicial processes for interpreting legislation is a serious matter. The Supreme Court has consistently advanced the ambiguity threshold as a screen for these considerations and justified it in the name of protecting the *Charter*, and respecting the role of legislative bodies. But ambiguity is an elusive concept and its role in protecting the *Charter* or the balance of power between the judiciary and the legislature is far from clear. It is difficult to see any ambiguity in the seminal case of *McKay*, and yet the Court said it was interpreting the legislation to fit the Constitution. Also, it is often difficult to understand why courts conclude there is no ambiguity, particularly in the face of conflicting judicial opinions or legislative language that has been fraught with controversy, including conflicts among the judges of the Supreme Court itself.

The ambiguity threshold can perhaps be defended on a more traditional and more generalized basis as a label for a conclusion about whether more interpretive work needs to be done to arrive at the meaning of a legislative text. A conclusion of ambiguity signifies that there is more to be done, including giving consideration to the Constitution and its underlying values. When a court decides there is no ambiguity, it is saying its work is done. The invocation of ambiguity to limit an interpretive exercise reflects the fact that it cannot go on forever. There must be a way of limiting its scope, particularly given concerns about the costs of litigation and access to justice. But it is surely ironic that the same concerns are arguably responsible for inducing litigants to advance *Charter* values in the interpretive process as a lower cost alternative to direct challenges to validity.

145 See e.g. *Rogers Communications*, *supra* note 131 at para 14:

It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

Why do these concerns as they may relate to the *Charter* and other constitutional laws have to be managed through a rule that divides the world of interpretive techniques into two groups, one of which has priority over the other? What is the basis for saying that textual and purposive analytical techniques must always be considered, but the *Charter* and a variety of other matters can only be considered if the primary techniques fail to produce a convincing answer? The Supreme Court has opened wide the door of context to introduce a panoply of factors and considerations into legislative interpretation without having to pass through the threshold of ambiguity. In fact, the Court has recognized that they may be used to determine the existence of ambiguity and the need to resolve it. Why should the interpretive discretion that presumably governs the use of these other techniques not be relied on in managing the interpretive use of the *Charter* or other constitutional laws?

The division of interpretive techniques is particularly difficult to understand given the relationship between contextual elements and purposes. Contextual elements are intimately connected to purposes, providing indications of what these purposes are. The presumption of compliance is essentially a presumption about legislative purposes reflecting the overwhelming respect Canadian legislators have shown for the Constitution. How can it be said that the Constitution is only secondarily relevant to determining what these purposes are?

A final argument for dispensing with the ambiguity threshold is found in the Supreme Court's recent recognition that administrative decision-makers need not bother with ambiguity when considering interpretive questions related to the exercise of their discretionary powers. Judicial deference toward administrative tribunal interpretation now extends to recognizing their flexibility to consider the *Charter* without recourse to ambiguity. Why should the courts not have the same flexibility in their own interpretive processes? These processes apply to the same body of legislation, enacted by the same legislators. They should be consistent.

Considering the *Charter* and other constitutional laws as part of the interpretive process from the outset does not mean they will necessarily alter conclusions about what the legislature meant. If the other indicators of intent are powerful enough to demonstrate a meaning that conflicts with the Constitution or constitutional values, then the courts will give it that meaning and provide a remedy. Using the ambiguity threshold to categorically exclude their consideration blunts the role of legislative interpretation in assuring the supremacy of the Constitution. Recourse

to the constitutional texts and values to shape the meaning of legislation does not prevent legislatures from articulating a contrary meaning. They should be considered along with other relevant contextual factors and given the interpretive weight they deserve. Constitutional supremacy deserves nothing less.

