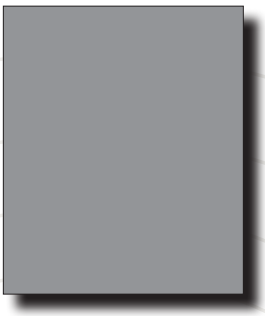
THE MODERN METHOD-IS IT THE TRADITIONAL APPROACH IN A NEW DRESS?



FRANK MOLNAR
JACQUELINE KLYM

I. Introduction

The collective agreement is the lifeblood of labour relations, and the heart of all conflict between management and unions. Its application and interpretation is of fundamental importance to both parties. However, no matter how certain the parties are about their agreement, or how clearly the parties believe the language is, grievances always arise and arbitrators are always appointed.

Historically, arbitrators have interpreted collective agreements by trying to discern the intentions of the parties at the time of formation (what I will call the "Historical Approach"). They look at the ordinary meaning of the words and try to determine what the parties thought they actually agreed to at the time of execution. The difficulty in this process becomes easily apparent. It requires an independent party to try to discern some common meaning to the article when those who wrote the clause cannot agree on its interpretation and application.

David C. Elliott suggests that his new approach counters this difficulty. He suggests that his process of interpretation offers arbitrators a means to figure out the meaning of a collective agreement without having to put themselves inside the heads of both management and unions.

From a management perspective, Arbitrator Elliott's new method may offer arbitrators a standardized procedure to discern meaning from the language of the collective agreement. However, a review of his decisions suggests that practically it does very little to ease the difficulties faced by arbitrators in these circumstances. His method still requires the arbitrator to decipher meaning from the words and phrases used by the parties. It still requires the arbitrator to try to figure out what the parties meant at the time of agreement. It just offers arbitrators a standardized step-by-step procedure for doing so.

II. The "Historical" Approach

Brown and Beatty describe the Historical Approach as follows:
It has often been stated that the fundamental object in construing the terms of the collective agreement is to discover the intention of the parties.

…but the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.

(Brown & Beatty, Canadian Labour Arbitration, 3rd ed (looseleaf) at 4:2100)

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

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The Historical Approach requires arbitrators to first view the words used in the article in question in its "normal or ordinary meaning" unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement. Then, if an arbitrator cannot determine the meaning of the words on this account, he or she can look to other materials, such as the remainder of the collective agreement, prior agreements, extrinsic evidence, etc., to put the phrase in context and assist in the interpretation.

In principle this seems like a straightforward mission for arbitrators: to discern the intentions of the parties. However, as noted by Arbitrator Elliott, arbitrators have had difficulty applying this approach to particular cases. He notes that not all facts offer the arbitrator the ability to discern the intentions, and sometimes the wording itself is completely different from what the parties "intended". Arbitrator Elliott asked, what is an arbitrator to do then? It was as a means to diminish these difficulties that Arbitrator Elliott adopted the "Modern Interpretation".

III. The "Modern" Approach

Arbitrator Elliott explains that the modern interpretation method still encompasses many of the well-recognized interpretation conventions but directs interpreters to:

1. to consider the entire context of the collective agreement;
2. to read the words of a collective agreement;
    - in their entire context; and
    - in their grammatical and ordinary meaning;
3. to read the words of a collective agreement harmoniously
    - with the scheme of the agreement
    - with the object of the agreement, and
    - with the intention of the parties.

It is a three-stage process. It requires arbitrators to first review the whole agreement and the exact words and phrases in the particular agreement, and then to look to guides of interpretation and other extrinsic evidence to ensure it is a reasonable interpretation.

IV. Application of the "Modern Approach"

Arbitrator Elliott has applied the "Modern Approach" in five cases to date. Each case dealt with different clauses in different parties' collective agreements. However, a review of all of them reveals how Arbitrator Elliott has practically applied his new theory.

a) ***International Union of Operating Engineers, Local 955 v. U.F.C.W., Local 401 (Mackenzie Grievance)***, [2003] A.G.A.A. No. 48.

This decision introduced the "Modern Approach". It was a policy grievance that questioned whether the employer was entitled to terminate employees on notice, but without cause. The employer relied on the discharge and termination provisions in the collective agreement. These provisions provided that a regular employee who had completed one or more years of service who was terminated for reasons other than voluntary resignation, just cause, or disability would be entitled to a specified sum of pay in lieu of notice. The union relied on the management rights clause to suggest that the employer was only allowed to discipline or discharge an employee for just cause.

In applying his test, Arbitrator Elliott stated that the proper interpretive approach required him to consider:

(a) the legislative structure within which collective agreements exist;
(b) current judicial and arbitral views, recognizing in each case the context within which those

views are expressed; and
(c) the context of the Collective Agreement in issue in this arbitration and the provisions as a whole and how they interact.

In first examining the legislative structure, Arbitrator Elliott acknowledged that the *Labour Relations Code* establishes that the collective agreement governs the relationship between unions and employers. As such, he held that that the *Code* was created to curb the common law rights of employees. In this context, he then examined the modern views in the jurisprudence and noted that cases had continually emphasized the importance of employment and the rights of employees gained through collective agreements.

With these principles in mind, he then looked at the particular wording and phrases used in the articles relied on by both parties and used similar articles in the Collective Agreement to attain meaning. For example, he looked at the management rights' clause and recognized that it controlled management's ability to hire, promote, and direct the workforce, but that the article did not mention an ability to terminate without cause. He then compared this clause with another article relating to probationary employees. The probationary clause clearly stated that an employee governed by the probationary period would not have any recourse to the grievance procedure.

Within this context, Arbitrator Elliott ruled in favour of the union and allowed the grievance.

b) **C.E.P.U., Local 777 and Imperial Oil Strathcona Refinery,** [2004] A.G.A.A. No. 44.

The grievance in this case centered on the interpretation of a call-out article and the payment of a premium for overtime shifts. The article in question provided that "when an employee is scheduled, and the work continues into their normal day or shift", the overtime payment would be based on hours actually worked. The question arose as to whether this wording referred to scheduled overtime or to the employee's normal work schedule.

In applying his interpretation in this context, Arbitrator Elliott did not first consider the *Labour Relations Code*, as he had in the *MacKenzie Grievance*. Rather, he set the matter in context by first considering the "Purpose Article" set out at the outset of the collective agreement, which stated that the collective agreement was meant to "define and promote a harmonious relationship between the employer and its unionized employees". He then, similar to the *MacKenzie Grievance*, looked at the entire collective agreement and whether there were any other articles that assisted in the interpretation. He focused on sub-articles and the phrases and words. He found that within the two sub-articles, the parties had used different words, so he reasoned that they must have intended to impart different meanings. Following this, he focused on what he termed "other information", like reasoning from previous grievances and past practice, to determine whether "it threw light on the text" in question to help discern the meaning. Within the context of all this evidence, he then concluded that the employer's interpretation was correct and dismissed the grievance.

c) ***Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 252 and Weston Bakeries Limited,*** [2004] A.G.A.A. No. 20.

The union filed two grievances alleging that the employer had incorrectly interpreted the COLA clause of the collective agreement. The conflict arose over the interpretation of the phrase "year-over-year percentage change". The employer

argued that this phrase inherently considered averaging the difference that occurred over the year. The union argued that the phrase did not include the word "average" and therefore the employer should be required to compare the differences between one month in the year previous to the same month in the current year to determine the percentage change.

Arbitrator Elliott again considered the preamble to the collective agreement as a starting point to establish "the entire context" of the agreement. He then focused on a publication from Statistics Canada which explained the need for a Consumer Price Index to measure inflation. He then broke down the words and phrases used in the clause in question and applied dictionary definitions to determine their meaning. However, he declined to consider evidence of past practice and declined to hear evidence on the negotiations that occurred regarding the clause on the basis that it had been acknowledged that "while the parties obviously agreed on the words of the Collective Agreement, they had not, during negotiations, applied their minds to how in fact the words would be applied to calculate the COLA adjustment". Arbitrator Elliott dismissed the grievance stating that while both parties' method of calculation could be used, "I am satisfied the Company made a correct choice".

d) ***C.E.P.U., Local 728 and Owens – Corning Canada Inc.***, [2004] A.G.A.A. No. 69

The grievance involved interpretation of the leave of absence article under the collective agreement. The company questioned whether it was entitled to recover from the union the overtime coverage costs it incurred to cover employees absent on approved union leave.

In his analysis, Arbitrator Elliott considered the following (in this order):
a) the preamble of the agreement;
b) other articles that used similar words to those considered in the leave of absence article;
c) evidence of collective bargaining negotiations and proposals;
d) formatting and numbering system of the collective agreement and the parties' reasoning for adding sub-articles to some terms and not to others; and
e) past practice and negotiating history.

Arbitrator Elliott relied on what the article in question actually said (with a focus on the meaning of the words that actually appeared in the clause), and inherently what it did not say. He reasoned that the article did not contemplate the employer recovering this amount of money because it did not specifically dictate such. He further relied on the fact that other areas of the collective agreement did speak to reimbursement. He therefore upheld the union's grievance and declared the employer in contravention of the overtime coverage costs under the collective agreement.

e) ***The Alberta Union of Provincial Employees and The Governors of the University of Calgary,*** [2005] A.G.A.A. No. 6

The union brought a policy grievance alleging that the employer had breached the terms of the collective agreement by changing its job reviews and promotion procedures. The university had changed its job descriptions in a number of areas and the affected employees questioned whether as a result of the new description they received a "promotion" (as defined in the collective agreement), which would entitle them to a pay increment.

In this case, Arbitrator Elliott considered numerous articles of the collective agreement including management rights, the articles in question regarding job reviews and promotions, and particular definitions defined within the

agreement. He then considered the historical evolution of the clauses in questions, evidence of negotiations between the parties, and any other extrinsic evidence that shed light on the issue including past collective agreement language.

Like in the previous cases, Arbitrator Elliott decided the issue based on the specific words and phrases used in the article in question. He noted that the collective agreement provides different definitions for "promotions" and "job reviews" and therefore the parties could not have meant the same thing in both. As such, he held that a successful job review was not a promotion and dismissed the grievance.

V. Implications for Management

From a management perspective, the reasoning in the above cases introduces a systematic formula of analysis. It arguably offers arbitrators a guide-map by which to consider all the evidence placed before them. In theory, this should lead to more consistent decisions that reflect a reasoned approach. However, in practice it appears that Arbitrator Elliott is taking into account the same concepts arbitrators considered in the "Historical Approach".

All the decisions presented above appear to consider the same components in the same order:

a) Consider the legislative framework (ie: the *Labour Relations Code*) and the Preamble of the particular collective agreement to obtain the entire context

b) Consider other articles of the collective agreement for similar or dissimilar language;

c) Dissect the particular words and phrases of the clause, including a consideration of formatting or inclusion of sub-articles;

d) Consider past practices, past grievances, and evidence in negotiations

From management's perspective, Component (d) may be the most problematic. It is a commonly accepted principle in the jurisprudence an arbitrator will only consider extrinsic evidence once he or she is satisfied that there is ambiguity (Palmer, Collective Agreement Arbitration in Canada, 3rd ed. (Toronto: Butterworths, 1991 at p. 74). Arbitrator Elliott does not apply the same analysis in his method. Rather, consideration of past practice, past grievances and evidence of negotiations forms part of the analysis in every case. He suggests this is an integral component of interpretation since it places the words and phrases in context. He does note in cases like *University of Calgary,* that sometimes such evidence does not play a role in his decision, however such an assertion is somewhat superficial. However, once the arbitrator has received this evidence, there is always a concern that it played a role in the decision even when the arbitrator states that it had been given no weight. Arbitrator Elliott has substantially lowered the test for receiving extrinsic evidence, such as past practice and negotiating history. If he is going to accept this evidence as a matter of course, in the absence of an established ambiguity, then the parties will incur of the cost of having to deal with this evidence at the hearing. In many cases, this will lengthen the hearing.

From a management perspective, the consequences of this broader rule of evidence for individual arbitrations really depend upon whether such evidence favours your position. However, on a wider scale, it reflects the importance of arbitrators either uniformly adopting the "Modern Approach" or uniformly rejecting it. To do otherwise, and allow arbitrators to choose which method should apply, would create different rules of evidence depending on the interpretation approach.

A further consideration for management counsel in these cases is the importance of placing this

type of evidence before the arbitrator. In theory, the adoption of the "Modern Approach" requires counsel to be informed of the type of evidence this interpretation method considers, for if they are not, they are face a disadvantage in proving their case. However, practically, this may not mean many changes for labour arbitration counsel. For example, in *Weston Bakeries*, counsel themselves provided expert reports on the meaning of COLA clauses, dictionary definitions, case law and evidence of past-practice at the outset of the hearing.

A further reflection on Arbitrator Elliott's method is that it seems that in application, the "Modern Approach" does little to change the focus of arbitrations. From the outset, Arbitrator Elliott asserts his method is meant to replace the attempts by arbitrators to discern the intentions of the parties. However, arguably, in the above cases, by dissecting the phrases and words used by the parties and by looking at phrases used in other areas of the collective agreement, Arbitrator Elliott undertakes the same analysis, even if it is done unintentionally. As one example, in the *MacKenzie Grievance*, he held that the employer did not include words or phrases in the management rights' clause that entitled it to dismiss without clause. Therefore, he reasoned that the employer did not retain this right under the collective agreement. Implicit in this reasoning is the assertion that if the employer had "intended" to retain this right, it would have done so by including language to the same effect.

This case, in particular, illustrates that regardless of how hard Arbitrator Elliott attempts to avoid it, the inclination of arbitrators to try to give meaning to the parties' intentions not only seeps into the analysis, but is the foundation of the analysis.

As a final thought, it appears that sometimes, even in applying a well-reasoned, step-by-step approach like the "Modern Approach", uncertainty and ambiguity can still prevail. For example, in *Weston Bakeries, supra,* although Arbitrator Elliott reasons through all the steps of his interpretation method, he acknowledges that in the end, the differing interpretations offered by both parties are both possible. However, he appears reluctant to hold that the words themselves are "ambiguous" (which would allow the parties, under the Historical Method to assert evidence of negotiations and past practice). Rather he states, "a better characterization is that the words…carry uncertainty in the manner in which they are to be applied". From the standpoint of the parties in this case, this does not make any sense. Arguably, the essence of ambiguity is an inability to discern a meaning, and if it is not possible to figure out the manner in which the parties were meant to apply the words, then they are ambiguous. However, a reason for Arbitrator Elliott's unwillingness to find ambiguity may stem from the fact that such a finding would cast a shadow on this new approach. It would show that even after a lengthy, reasoned analysis, an arbitrator could still have difficulty interpreting a collective agreement.

VI. Conclusions

Collective bargaining is a flawed process.

Frequently, the parties never considered the fact situation that gave rise to the arbitration hearing. Frequently, there was never a "meeting of the minds" on the language in issue. It is not uncommon for the parties to agree on language at the table in order to get a deal on the premise that "we'll figure it out later" or on the premise that each side believes that the language leaves room to argue the correctness of their interpretation. Frequently, the same words are not used in the collective agreement to express the same idea, because the collective agreement is negotiated piece meal over time.

Collective agreements are not drafted with the precision of a statute. Rather, they are

built through compromise. As a result, the collective agreement is not well suited for the strict application of the rules of statutory interpretation. While the fact that the legislative draftsman chose to use a different words in a statute to express similar ideas may have great significance. Unfortunately, there may be no very good reason at all, why the negotiators chose to use different words in their document to express the same idea (other than fatigue and the overwhelming desire to get a deal). Accordingly, a method of interpretation that places too much emphasis on the statutory rules of interpretation could very well lead to an arbitrator arriving at an interpretation that is contrary to the parties' intentions. Furthermore, the lower standard for accepting evidence of past practice and history of negotiations is a concern and has the potential for bogging down the hearing process and adding to the expense of arbitration hearings.

At the end of the day, the fate of Arbitrator Elliott's Modern Method will be determined by other arbitrators and by whether it gains their acceptance. ▲

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FX 780 428 9329

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FX 403 264 7084

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