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Interpretive Roles of Non-judicial Bodies and Officials

Canadian Institute for the Administration of Justice National Conference -- Legislative Drafting in Perspective

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Overview

- Who interprets the law and how they do it
- Judicial review of decisions involving interpretation
- Judicial reliance on administrative interpretation
- Curial deference and multiple interpretations
- Conclusions for legislative drafting

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Legal Interpretation

- We spend a lot of time discussing *how* to interpret legal texts
- It's also important to know *who* interprets legal texts (mainly laws)
  - Because the rule of law suggests that
    - laws apply equally to everyone according to their terms
    - differential treatment under the law must be provided for in the law itelf
    - it cannot result from different interpretations of what the law means
  - But different interpreters may have different interpretations
    - how are these differences resolved?
    - does the legal system tolerate some degree of difference?
    - how does the way we draft laws affect this?
- To answer these questions, let's start by considering what legal interpretation is ...

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Legal Interpretation

- Laws govern human behaviour by determining what is
  - required
  - prohibited
  - permitted
- To operate effectively, they must be understood
  - behaviour must reflect their meaning
  - many laws are understood and acted upon directly by those they govern
  - but understanding is often mediated
    - legal advisers and officials tell people what they think the law requires/prohibits/permits
    - officials and courts make decisions that apply the law

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Legal Interpretation

- Standard model of how laws operate
  - establish the facts that require a behavioral decision
  - find the text of the law that governs facts
  - establish what the text means
  - compare the meaning of the text to the facts
  - decide what must be done to behave in conformity with the law or to best advantage under it
- But these steps seldom happen in a neat sequence
  - fact-finding is sometimes driven by an understanding of what the text of the law means
  - meaning is coloured by the facts that are presented (plausibility)

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Legal Interpretation

- Example
  - Question: does the "caching" of material by Internet service providers (ISPs) infringe copyright? (*SOCAN*)
  - Step 1: determine what "caching" is
    - ISP subscriber accesses material from an Internet site
    - ISP creates a temporary copy of the material
    - if a subscriber wants to access the material again, it is accessed from the ISP copy (which is usually erased within a short period of time)
    - this speeds up access and reduces transmission costs

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Legal Interpretation

- Step 2: find the text of the applicable law
  - *Copyright Act* defines "copyright" to include the sole right

    3(1)(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication …and to authorize any such acts
  - But, para. 2.4(1)(b) says

    2.4(1)(b) a person whose only act in respect of the communication of a work … to the public consists of providing the means of telecommunication necessary for another person to so communicate the work … does not so communicate that work … to the public;
- Step 3: establish what the text means
  - can we do this in the abstract?
  - do we have to combine this with the next step?
- Step 4: compare the meaning to the facts
  - this will help focus on key words

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Legal Interpretation

- Steps 3-4:
  - *Copyright Act* defines "copyright" to include the sole right

    3(1)(f) in the case of any literary, dramatic, musical or artistic work, *to communicate the work to the public by telecommunication* …and to authorize any such acts
  - But, para. 2.4(1)(b) says

    2.4(1)(b) a person whose *only act* in respect of the communication of a work … to the public consists of *providing the means of telecommunication necessary* for another person to so communicate the work … *does not so communicate* that work … to the public;
- Do we now all agree on whether caching infringes copyright?

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Legal Interpretation

- Some people *do not* agree:
  - Internet service providers think it *does not* infringe copyright
  - Copyright holders, including collective societies, think it *does*
- Who decides which interpretation is right?
  - Copyright Board exercising power to certify tariffs under ss. 68(3) of the *Copyright Act*
  - Minister of Industry who is responsible for the *Act*, including
    - issuing information circulars
    - making regulations under s. 66.91

      66.91 The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard

      (a) in establishing fair and equitable royalties to be paid pursuant to this Act; and

      (b) in rendering its decisions in any matter within its jurisdiction.
  - and last but certainly not least, the Courts

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Judicial review of decisions involving interpretation

- Suzanne Comtois

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Judicial Review of Decisions Involving Legal Interpretation by Administrative Decision-Makers

Presented by
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to the CIAJ Conference on

Legislative Drafting in Perspective

Ottawa, September 10, 2004

OUTLINE

- **INTRODUCTION**
- **Part 1- Who – administrative decision-maker or judge – has the final say on what the text of a law means: evolution of the case law**
- **Part 2- Overview of the pragmatic and functional approach**
- **Part 3- How the shift to the pragmatic and functional approach affects legal drafters**
- **CONCLUSION**

Who – administrative decision-maker or judge – has the final say on what the text of a law means: evolution of the case law

1. The traditional approach: judicial review based on the concepts of *ultra vires*, or jurisdictional question

   -*Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425;

   -*Bell Canada* v. *Office and Professional Employees' International Union*, [1974] R.C.S. 335.

   These cases rely on the notion of jurisdictional question defined in the English decision *Anisminic* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.).

Say on what the text of a law means: evolution of the case law – cont'd

2. The modern understanding of judicial review: graduated control based on a "pragmatic and functional approach", which favours the autonomy of the administrative decision-maker

   - *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Control Board of*, [1979] 2 R.C.S. 227 [hereinafter CUPE]

   - *U.E.S., local 298* v. *Bibeault*, [1988] 2 R.C.S. 1048 [hereinafter *Bibeault*] and many subsequent decisions

Say on what the text of a law means: evolution of the case law – cont'd

3. The reasons behind the curial deference adopted by the Supreme Court of Canada

   (1) "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state".[1]

   (2) acceptance of a pluralist conception of legal interpretation

   (3) increased concern for the effectiveness and efficiency of administrative justice via specialization of functions

   "Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work." Wilson J. in *National Corn Growers, supra*, at p. 1336

[1] *National Corn Growers Association* v. *Canada*, [1990] 2 R.C.S. 1324, pp. 1336-1337.

Overview of the framework for judicial review (pragmatic and functional approach)

(1) coexistence of three standards of review :

- the correctness standard
- the Reasonableness standard (an intermediate standard between correctness and patently unreasonable)
- the decision patently unreasonable

Overview of the pragmatic and functional approach – cont'd

(2) The contextual factors taken into account for calibrating the degree of judicial intervention [1] :

(i) the existence or not of privative clauses or a right of appeal;
(ii) the tribunal's relative expertise in the matter at issue;
(iii) the overall intent of the Act and of the provision at issue;
(iv) the nature of the problem: question of law, of fact or of both?

The purpose of the inquiry [2] :

«The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.).»

[1] For a summary of these factors see in particular: *Pushpanathan* v. *Canada (M.C.I.)*, [1998] 1 R.C.S. 982, at paras. 29-38; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 R.C.S. 132, at paras. 46-47.
[2] Id, par. 26

How the shift to the pragmatic and functional approach affects legal drafters

- Plurality of interpreters
- Selective characterization of "expert", especially with regard to questions of law
- Plurality of interpretations
  - Contextual approach
    - Examples of provisions favouring judicial restraint:
      privative clause
      discretion
      expertise (members' qualifications, etc.)
    - Example of provision favouring judicial intervention (or less deference):
      statutory right of appeal

How the shift to the pragmatic and functional approach affects legal drafters — cont'd

- Relativization of the weight given to such provisions

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21)

In other words, the broad policy context of a specialized agency infuses the exercise of statutory interpretation such that application of the enabling statute is no longer a matter of "pure statutory interpretation". When its enabling legislation is in issue, a specialized agency will be better equipped than a court to interpret words in "their entire context" in harmony with the Act, "the object of the Act, and the intention of Parliament".

(*Barrie Public Utilities* v. *Canadian Cable Television Assn*. 2003 1 S.C.R.. 476, at para. 86 Bastarache J.)

CONCLUSION

The challenge: to find a form of drafting that reflects the true nature of the bodies to which powers have been delegated as well as, where necessary, their need for flexibility if they are to achieve the intent of their enabling statute.

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Judicial Reliance on Administrative Interpretation

A different take on "Who is best suited to decide?"

by Ann Chaplin
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with the assistance of Karine Richer, law student

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Introduction

- 1994 paper on judicial review: were courts or tribunals best suited to decide question at issue?
- For questions of law, answer was almost always "courts"
- But answer different where court not reviewing admin. decision, but looking for assistance in their own statutory interpretation

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Points to Cover

- What is an administrative interpretation?
- When will courts rely on an administrative interpretation?
- What factors determine the weight it will be given?
- What effect does judicial reliance have on the administrative interpretation?
- How does judicial reliance on administrative interpretation compare to judicial review of administrative decisions?
- What is the significance of mandating administrative interpretations in a statute?

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What is an administrative interpretation?

- An interpretation by a government officer or employee charged with the administration or enforcement of the legislation
- Examples include:
  - interpretation bulletins,
  - policy guidelines,
  - opinion letters,
  - decisions,
  - enforcement practice,
  - approvals,
  - internal memoranda,
  - "commitments" to the public

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When will courts rely on administrative interpretation?

- When court comes itself to interpret provision
- Examples:
  - appeals of tax or customs assessments;
  - judicial review applications where issue not correctness of decision
    - e.g. jurisdiction; Charter challenges (purpose of statute)

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When will courts rely on administrative interpretation?

- Clear that administrative interpretations have no force of law - generally admitted in document itself
- Some courts give no weight - saying statutory interpretation has been given to the judiciary alone - certainly won't be used in the face of judicial precedents

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When will courts rely on administrative interpretation?

- Characterized as "persuasive opinion" "in case of doubt"
- Prerequisite expressed as "ambiguity"in the legislative instrument - the law must be unclear
- However, courts "appear quite willing to see an ambiguity in the statute" when they want to rely on an admin. interpretation

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When will courts rely on administrative interpretation?

- Two reasons for reliance: "authority" and "stability"
  - "authority" derives from expertise, familiarity, sometimes from authorship
  - "stability" has a "fairness" component - the public should be able to rely on legislation being applied consistently

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Factors going to weight: Authority

- Day-to-day experience of administering legislation
- specialization and focus
- pertinent expertise
- involvement in drafting legislation

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Factors going to weight: Stability

- Has interpretation "stood the test of time"?
- Fairness overtones:
  1. Who is relying on admin. interp. before the court?
  2. Has the administrators' policy changed without notice or explanation?
  3. Extent of (established or presumed) reliance by public on interpretation

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What effect does judicial reliance have on administrative interpretation?

- Not supposed to be binding
- Not even supposed to be precedential
- Law prohibits fettering of statutory discretion by binding policy statements
- In Canadian law "legitimate expectation" doctrine limited to procedural rights only

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Effect on administrative interpretation (cont.)

- In contrast, the courts seem to use the "legitimate expectation" created by the administrative interpretation as one of the reasons for relying on it when they come to interpret the legislation.
- Emphasis on "stability" reverses concern to preserve administrative decision-makers from doctrine of *stare decisis*

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How does judicial "reliance" compare to judicial "deference"?

- In judicial review, factors governing standard of review (whether the court will determine for itself if decision is "correct" or defer to administrator's view) are similar, but applied differently:
- Where admin. interp. relied on, policy function, expertise assumed; nature of question hardly considered - stability valued

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What about statutorily mandated administrative interpretations?

- Income tax bulletins are most commonly referred to admin. interpretation - not referred to anywhere in Income Tax Act
- examples of express power to issue administrative interpretations:
  - s. 37 Veterans Review and Appeal Board Act;
  - s.27 Canadian Human Rights Act;
  - s.124.1 Competition Act

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Effect of mandated administrative interpretations

- Binding on parties to interpretation decision
- Some can be analogized to regulations
- Others may bind the admin. authority and the courts:
  - establishes a *stare decisis* rule
- Judicially reviewable as "decisions" -
  - but in some cases only if the interpretation itself is reviewed, not administrative decisions based on it.

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Judicial Reliance on Administrative Interpretation: Conclusion

- So who is best suited to decide depends on the circumstances under which the decision is made and how it comes before the court!
- Different values are enunciated in these cases: stability and authority of administrative decision-making.
- Is it possible these are also relevant to the standard of judicial review?

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Curial deference and multiple interpretations

- Tom Cromwell

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Curial Deference and Multiple Interpretations: Implications for Legislative Drafting

Presented by
The Honourable Justice Thomas A. Cromwell
Nova Scotia Court of Appeal
at CIAJ's Conference
Legislative Drafting in Perspective
Ottawa, September 10, 2004

The Approach to Judicial Review

- determining the applicable standard of review requires application of the "pragmatic and functional" approach which in turn requires the assessment of four contextual factors in light of each issue before the tribunal whose decision is being reviewed
- curial deference to administrative decision-makers creates the possibility of more than one "authoritative" interpretation of the same legislative text

Some Practical Implications of the Law on Curial Deference

- limited ability of courts to address the practical problems created by conflicting interpretations of the same text
- determination of the applicable standard of review under the pragmatic and functional approach is contentious and time-consuming
- depending on the procedural context and the timing, a judicial interpretation of a text may effectively bind a tribunal even though deference would normally be shown by the court

Limited Ability of Courts to Address the Practical Problems of Tribunal Inconsistency

- ".. a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of ... tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would ... constitute a serious undermining of those principles.": Domtar Inc. v. Commission d'appel en matière de lésions professionnnelles et autres, [1993] 2 S.C.R. 746 at para 93
- tribunal responses also limited:
  - must not interfere with the freedom of decision-makers to decide according to their consciences and opinions
  - concerns about fairness to the parties

  (see e.g. Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221)

Limited Ability of Courts and Tribunals to Address the Practical Problems of Tribunal Inconsistency (2)

- May there be legislative solutions?

  - procedures for resolving conflict on questions of law within the tribunal

  - legislated rules of *stare decisis* ?

Contentious and Time-consuming Nature of the Pragmatic and Functional Approach

- determination of the standard of judicial review is to be determined according to the pragmatic and functional approach
- this requires consideration of 4 groups of contextual factors
- applies to the specific issue or question before the tribunal
- the analysis is intricate and the results hard to predict

Contentious and Time-consuming Nature of the Pragmatic and Functional Approach

- Possible legislative solutions:

  - a statutory standard of judicial review clause?

  - "In my opinion, it would be very helpful if legislatures were to indicate explicitly which standard of review they wish to have applied to which tribunals and in which circumstances. ... In recognizing that a spectrum of standards of review exists, our Court has opened the door to legislatures to state explicitly which standard they wish to apply to a particular tribunal, and on which range of issues.": Iacobucci, J. "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27 Queen's L. J. 859 at 877

A Judicial Interpretation May Limit the Tribunal's Interpretation Depending on the Procedural Context and Timing

- different decision-makers may have to interpret the same legislative text in different procedural contexts:

  - more than one tribunal may need to interpret the same statute and the standards of judicial review of those tribunals on that issue may be different (e.g. in one case there is statutory appeal on a question of law and in the other the tribunal has full privative protection)

  - courts may have to interpret provisions other than in the context of judicial review and therefore without regard to deference

A Judicial Interpretation May Limit the Tribunal's Interpretation Depending on the Procedural Context and Timing(2)

- This gives rise to two related questions:

  - Is the court's interpretation binding on the tribunal?

    . if so, is this not inconsistent with the policy of judicial deference: effectively the power of the tribunal to arrive at some other reasonable interpretation has been effectively taken away?

  - Does the doctrine of *stare decisis* need some refinement?

    . Is there room for a doctrine of "provisional precedent" - i.e., the court's interpretation of provisions with respect to which deference would be shown would only be binding until the tribunal selected its preferred interpretation from among the reasonable interpretations? See Kenneth Bamberger, "Provisional Precedent: Protecting Flexibility in Administrative Policy Making" (2002), 77 N.Y.U. L.R. 1272 at 1310 -

- Could legislative provisions be of assistance?

Conclusions for legislative drafting

- Provisions that affect non-judicial interpretation:
  - Discretion / policy functions
  - Decision-makers' competencies
  - Appeal provisions
  - Privative clauses
  - Power to issue interpretations
  - Regulation-making powers
  - Statements about standard of review

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Conclusions for legislative drafting

- What's the final answer to the copyright / caching question?
  - In *SOCAN*, the Federal Court decided it was a question of *law,* reviewable on the standard of *correctness*
    - the decision had broad implications, not confined to particular parties
    - the Copyright Board erred on the meaning of "necessary"
      - the fact that caching speeds up transmission and reduces the ISP's costs does not make it "necessary"
    - this decision was different from other decisions involving the "application" of the Act, which were subject to the standard of *reasonableness*

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Conclusions for legislative drafting

- What's the final answer to the copyright / caching question?
  - On June 30, 2004, the Supreme Court of Canada agreed that the standard of review was *correctness*:

    49 There is neither a preclusive clause nor a statutory right of appeal from decisions of the Copyright Board. While the Chair of the Board must be a current or retired judge, the Board may hold a hearing without any legally trained member present. The *Copyright Act* is an act of general application which usually is dealt with before courts rather than tribunals. The questions at issue in this appeal are legal questions. For example, the Board's ruling that an infringement of copyright does not occur in Canada when the place of transmission from which the communication originates is outside Canada addresses a point of general legal significance far beyond the working out of the details of an appropriate royalty tariff, which lies within the core of the Board's mandate.
  - But it also decided that the Copyright Board's interpretation *was correct*
    - caching included in "providing the means necessary for another person to so communicate"

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Cases

- *AUPE v. Lethbridge Community College* [2004] SCC 28
- *Barrie Public Utilities v. CRTC* [2003] SCC 28
- *Barry v. Canada* (1997), 221 NR 237 (FCA)
- *Brown v.Alberta Dental Ass'n* [2002] AJ No. 142 (CA)
- *Canada v. PSAC* [1991] 1 SCR 614
- *Canada v. Southam* [1997] 1 SCR 748
- *Cartaway Resources (Re)* [2004] SCC 26
- *Dr. Q v. College of Physicians and Surgeons of BC* [2003] 1 SCR 226
- *Giant Grosmount Petroleums v. Gulf Canada* [2001] AJ No. 864 (CA)
- *Law Society of New Brunswick v. Ryan* [2003] 1 SCR 247
- *Macdonnell v. Quebec* [2002] 3 SCR 661
- *Pezim v. BC* [1994] 2 SCR 557
- *Pushpanathan v. Canada* [1998] 1 SCR 982
- *R. v. McIntosh* [1995] 1 SCR 686
- *SOCAN (Society of Composers, Authors and Music Publishers)* [2002] FCA 166; [2004] SCC 45
- *Szmuilowicz (Re)* (1995), 24 O.R. (3d) 204 (DivCt)
- *Toronto v. CUPE* [2003] SCC 63
- *UES Local 298 v. Bibeault* [1988] 2 SCR 1048
- *United Taxi Drivers' v. Calgary* [2004] SCC 19

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