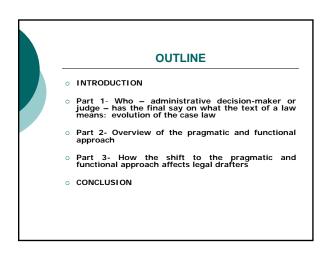


Judicial Review of Decisions Involving
Legal Interpretation by Administrative
Decision-Makers

Presented by
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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

- 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

say on what the text of a law means: evolution of the case

law - cont'd

- 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-

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 purpose of the iniquity j [Δ]: A "The central inquity 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? (*Pasicarde, v. Saskatchewan (Workers' Compensation Board), 1997.1.2 S.C.R. 890, at para. 18, per Sophika.1).»

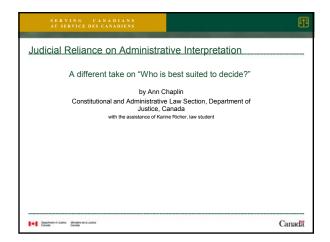
111 For a summary of these factors see in particular: Peologonathan v. Canada (M.C.), [1998] 1 R.C.S. 982, at paras. 29-38. Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2011] 2 R.C.S. 132, at paras. 46-47.

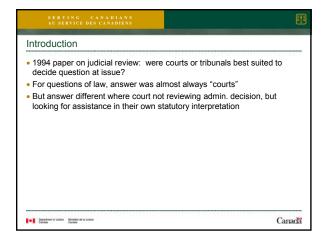
How the shift to the pragmatic and functional approach affects legal drafters

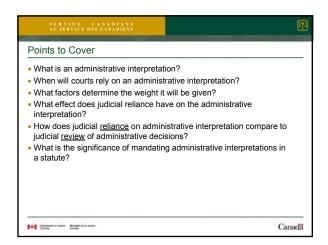
- Plurality of interpreters Selective characterization of "expert", especially with regard to questions of law
- Plurality of interpretations
 - Contextual approach
 - Examples of provisions favouring judicial restraint: privative clause discretion
 - aiscretion
 expertise (members' qualifications, etc.)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

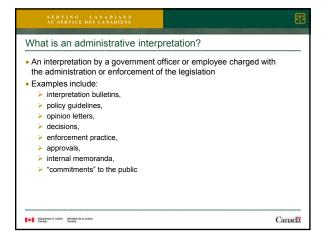
How the shift to the pragmatic and functional approach affects legal drafters—cont'd - Relativization of the weight given to such provisions Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and decentric context and in their grammatical and decentric context and the intention of Parliament. (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87, cited in Bell Expressiv Limited Partnership v. Rex. [2002] 2.5.C.R. 559, 2002 SCC 42, at para. 25; REZOS BIZZO SEDIOS LIG. [1998] 1.5.C.R. 221, at para. 25; REZOS BIZZO SEDIOS LIG. [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZO SEDIOS LIG. [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS LIG. [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS LIG. [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS SEDIOS [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS SEDIOS [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS SEDIOS [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS SEDIOS [1998] 1.5.C.R. 221, at para. 26; REZOS BIZZOS SEDIOS SEDIOS [1998] 1.5.C.R. 241, and the intention of Parliament*.

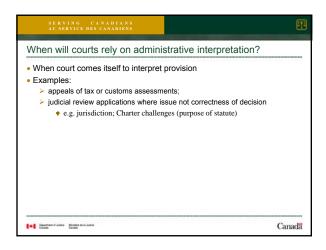
CONCLUSION The challenge: to find a form of drafting that reflects the true nature of the bodies to which powers have been delegated as well as, where necessary, their need for flexibility if they are to achieve the intent of their enabling statute.

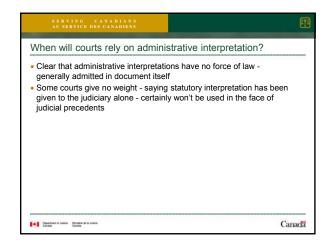




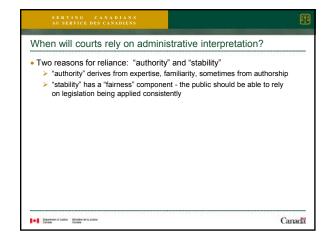




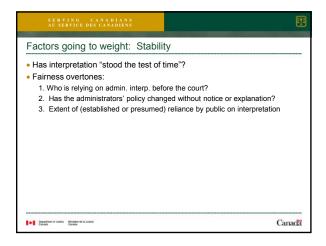


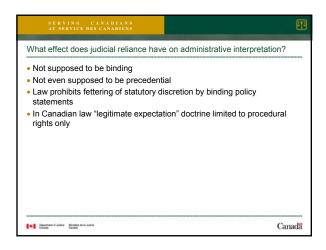


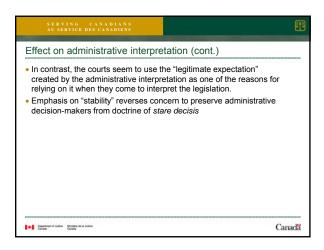


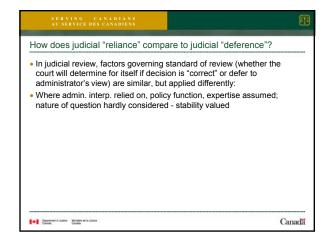


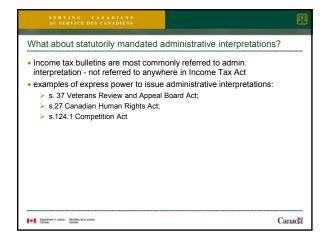




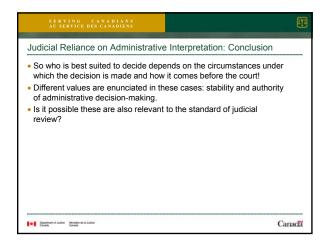


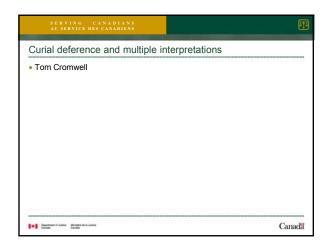


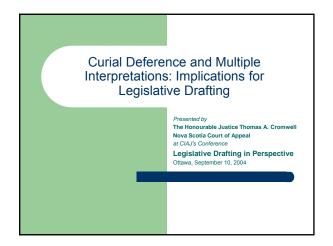












The Approach to Judicial Review determining the applicable standard of review requires application of the "pragmatic and functional" approach which in turn requires the assessment of four contextual factors in light of each issue before the tribunal whose decision is being reviewed curial deference to 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 Imited 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 professionnelles 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.": lacobucci, 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 util 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 -



