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FORMAL vs. FUNCTIONAL APPROACHES TO STATUTORY INTERPRETATION

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An interpretation of any legal text, if it is to successfully carry out the purpose of the text and be relevant to the community in which it operates, must consist of two essential elements. It must actively seek to elaborate an objective for the text; and, it must openly seek to achieve that objective by taking a conscientious measure of the relevant social context. This approach may be called "functional". The alternative to functionalism, at least in a paradigmatic sense, is formalism. A formal approach follows the rules; it searches for meanings in, not results from, legal texts.

The Oxford English Dictionary defines formalism as: "strict or excessive adherence to prescribed forms." Functionalism does not appear in the Oxford. For my purposes functionalism is interchangeable with instrumentalism. Its root is the Latin verb "fungor", meaning to perform, execute or administer.¹ It connotes an active approach to law, one which is sensitive to purposes and to contexts. A functional interpretation is self-consciously policy-executing while a formal approach minimizes the element of choice on the part of the interpreter.

My project today is to make an assessment of the extent to which legal, and in particular statutory, interpretation in Canada adheres to formalism and/or functionalism. At the present time I identify three broad styles of interpreting legal texts in Canada. These will be presented in turn from the most to the least formal. Then I will consider the criticisms of the respective models. Related to this critique will be an assessment of any prospects for change.

The balance between formalism and functionalism in legal interpretation involves more than a simple question of method. It ultimately engages us in a debate about our vision of law and its role in society. Specifically, we cannot avoid premising our approach to interpretation upon a theory of language and communication, nor can we escape the debate about the constitutional separation of powers. Perhaps most important, the balance between formalism and functionalism raises major questions regarding the administration of justice. What resources are we willing to commit to preparing the factual records necessary for a proper functional analysis? In more familiar doctrinal terms, there is the issue of extrinsic evidence and the introduction of a record of legislative facts. Ultimately there is an important question for the community of just how much power we want to give to lawyers and judges and administrators in the making of policy through interpretation. What confidence do we have in the

¹. For a comprehensive analysis of the significance of these concepts in legal theory and legal reasoning, see: Quevedo, "Formalist and Instrumentalist Legal Reasoning and Legal Theory" (1985), 73 Cal. L.R. 119. For a context in which I use the terms with some frequency, see MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986), 36 U. of T. L.J. 343.

policy-making capacities of legal interpreters?

These are all serious questions, questions which have typically been submerged, perhaps inadvertently, perhaps consciously, in debates about methodologies of statutory interpretation. The identified issues may seem like a lot to claim for a debate about interpretation, a subject which we have traditionally thought of as dull and technical. But maybe that is what this paper is ultimately about: the significance of interpretation and the consequences of preferring a formal over a functional method. It is doubtless apparent that this paper will not be able to or even attempt to offer a thesis on all of these fundamental questions. What it will attempt to do is to illustrate the significance of the choice between formal and functional approaches to interpretation, to demonstrate how we have struck the balance between the two in Canada, and to speculate about how we might redefine that balance.

The Choice Demonstrated

There are three prevailing styles of statutory interpretation in use in Canada. They may be considered as the "words and phrases" approach, the "read the text/apply the rules/find the meaning" approach, and the "field sensitive" approach. The "words and phrases" style is largely positivistic, searching for meanings rather than solutions. Moreover, it is heavily influenced by the common law doctrine of stare decisis. It is an elementary reaction by common lawyers to issues of statutory interpretation. Practitioners of the "read the text/apply the rules/find the meaning" take their interpretive responsibility more seriously than do adherents of the "words and phrases" school. They follow a complex of interpretive rules and they take the text seriously. This style of interpretation represents the proficient mainstream of statutory interpretation in Canada. It prevails in scholarly writing about interpretation and may be seen in the most conscientious interpretive opinions. The "field sensitive" style is self-descriptive. It pays more attention to context. To date it finds limited application, essentially being employed by some of our more experienced administrative decisionmakers and, by times, in constitutional interpretation.

(i) "Words and Phrases"

Practitioners of this style like to "look up the answer". After identifying an ambiguity in a particular word or grouping of words in a legal text they go in search of an authoritative interpretation. Typical devotees of the "words and phrases" school do not even believe that the whole text must be seriously studied. An authoritative interpretation almost invariably consists of a judicial opinion "interpreting" the same word or phrase. It is not necessary that the earlier interpretation pertain to a comparable statutory context. For that matter, the "meanings" of words or phrases are often lifted from common law opinions. Frequently used sources include Black's Law Dictionary² and the Words and Phrases³ volume of the Canadian Abridgment. It may not even be treated as

². (West Publishing, 5th ed., 1979)

³. Words and Phrases (Revised) Judicially Considered in Canadian Reports (2d ed., 1984)

significant that the compendium of authoritative interpretations has been developed with respect to other jurisdictions, which is the case with Black's Law Dictionary.⁴

The classic instance in Canadian jurisprudence of the application and subsequent rejection of a "words and phrases" approach may be seen in the "Persons" case. In the 1920's a group of Canadian women raised the question of whether they were eligible as "qualified persons" for appointment to the Senate, within the terms of s.24 of the Constitution Act, 1867. The case against them was that women were not able to hold office in England at the time of Confederation, and therefore the intention of Parliament(U.K.) was to include only men in the words "qualified persons". Early in its reasons for decision the Supreme Court made it clear that their role in deciding the issue was to be exclusively formal. In the words of Chief Justice Anglin:

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.⁵

This type of disclaimer is frequently found in reasons for judgment when a court intends to reach a conclusion contrary to good sense but which the court feels it is "duty-bound" to do lest it be seen to engage in something more political than simply "looking up the answer". In any event, the Supreme Court went on to hold that an 1868 English decision interpreting Lord Brougham's Act, concerning the right of women to vote in the United Kingdom, was "of the highest authority" in determining that women were not meant to be involved in politics, "chiefly out of respect to women, and a sense of decorum, and not from their want of intellect".⁶ In the view of the Supreme Court, the common law incapacity of women to hold public office was clear and: "[I]t would be dangerous to assume that by the use of the ambiguous term 'persons' the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women".⁷ In what has become a landmark in Canadian constitutional jurisprudence, the Privy Council reversed the Supreme Court and expounded the view that the constitution was "a living tree capable of growth and expansion within its natural limits". Lord Sankey also commented:

Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the

⁴. The subtitle of Black's is: "Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern"

⁵. Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276, at 281.

⁶. Chorlton v. Lings (1868), L.R. 4 C.P. 374, at 392.

⁷. Supra, note 5, at 287.

Act by a narrow and technical construction...⁸

This judgment is a landmark in Canadian jurisprudence. However it would probably be misleading to suggest that the "living tree" attitude toward legal texts is a prevailing one. Some will say that the approach is limited to constitutional interpretation. Some may even say, and there is a substantial basis in the judgment itself for this, that it is limited to constitutional provisions which do not involve the division of powers. In any case, it is sobering to remember that it was the Privy Council that determined in a constitutional interpretation of great significance for Canada that the power of the federal government to legislate with respect to "regulation of trade and commerce" ought to be given the same meaning as the words "regulations of trade" in the 1706 Act of Union between England and Scotland.⁹

There is some evidence that the "words and phrases" approach is being resisted in the interpretation of ordinary statutes. For example, while early interpretations of industrial relations legislation used the common law doctrine relating to master and servant to deny dependent contractors the protection of the legislation on the ground that they were not "employees",¹⁰ a similar argument has recently been rejected by Alberta courts in response to a claim that dependent contractors were not protected by prohibitions in human rights legislation against discrimination in "employment".¹¹ Happily the Alberta Courts appreciated that, irrespective of what the common law may have considered to be appropriate in the master-servant context, to tell a dependent trucker who has allegedly been refused work because he is Black that his situation falls outside the scope of the legislative scheme is to fail to accomplish the objectives of human rights legislation. When dealing with the interpretation of human rights legislation in another context the Supreme Court of Canada has taken the position that: "[T]he accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature

⁸. Edwards v. Attorney General of Canada, [1930] A.C. 124, at 136.

⁹. Citizens Insurance Company of Canada v. Parsons (1881), 7 App. Cas. 96, at 112.

¹⁰. E.g. Re Lunenburg Sea Products Ltd.; Re Zwicker, [1947] 3 D.L.R. 195 (N.S.C.A.). For a critique of the tendency to apply common law standards to the case of the dependent contractor in the interpretation of labour relations legislation, see Arthurs, "The Dependent Contractor: A Study of the Legal Problems in Countervailing Power" (1965), 16 U. of T.L.J. 89.

For a critique of the use of the doctrine of precedent in the place of a sympathetic reading of a consumer protection statute, see Tancelin, "Exemple d' Application de la regle du precedent et d' interpretation stricte du droit 'statutaire'" (1980), 40 Rev. du B. du Q. 364.

¹¹. Re Cormier and Alberta Human Rights Commission et al. (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.); Re Pannu (1986), 47 Alta L.R. (2d) 56 (C.A.).

and purpose of the enactment".¹²

While one would hope that we have now had enough experience with statutory interpretation to be beyond simply "looking up the answer", there is little room for complacency. It is especially troubling that administrative decisionmakers, charged with the administration of unique statutes, can still be seen to adopt a "words and phrases" approach.¹³ If administrative decisionmakers cannot be counted on to be sensitive to their particular statutory contexts, and to adopt a more functional style than is exemplified in the "words and phrases" approach, there may be little hope for a less formal style to prevail in the judicial forum. Perhaps the most discouraging element to contemplate in terms of the prospects of moving away from a "words and phrases" approach to interpretation is the fact that we continue to form students to be essentially common lawyers. So long as the case method and the concept of precedent maintain their current hold on legal education, we are likely to continue to see lawyers entering the practice of law with the idea that the most reliable analysis of a problem of statutory interpretation lies in a "words and phrases" approach.¹⁴

Those who are inclined to be complacent about the passing of "words and phrases" as a style of interpretation in Canada ought to consider an exchange which took place recently before the Special Senate Committee studying the Meech Lake constitutional accord. The witness before the Committee was former Senator Eugene Forsey, a widely recognized constitutional scholar. Notwithstanding his broad experience with many aspects of Canadian law and society, Mr. Forsey was unwilling to express a view as to the meaning in the constitutional accord of the word "society". This is the exchange which took place in the Committee:

Senator John Stewart: "What will the courts decide the word 'society' means?"

Mr. Forsey: "The meaning of the word society puzzles me. It [the question] would have to be addressed to someone with more knowledge of the law than I possess."

Senator Royce Frith: [After indicating that he had consulted Sanagan's Words

¹². Ontario Human Rights Commission v. Simpson Sears Ltd. (1985), 23 D.L.R. (4th) 321, at 328 (S.C.C.).

¹³. In the Cormier decision, *supra*, note 11, the Alberta Human Rights Commission accepted the restrictive argument that was later rejected by the Court. In a recent decision of the Nova Scotia Municipal Board, a restrictive interpretation of standing to appeal municipal planning decisions was adopted by the Board on the ground that the same words which the Municipal Act employed, i.e. to grant standing to "aggrieved persons", had been interpreted in a nineteenth century English bankruptcy statute to require a pecuniary interest: Re Riverlake Residents' Association, April 30, 1985, unreported. See comment by A. Kaiser, (1985), 9 Dal L.J. 811. A bill was introduced in the 1987 session of the Nova Scotia legislature to extend the definition.

¹⁴. On this topic see Proceedings of the Annual Meeting of the Administrative Law Section of the Canadian Association of Law Teachers, "The Teaching of Legislation in Canadian Law Faculties" (1987), 11 Dal. L.J. forthcoming. Also Calabresi. A Common Law for the Age of Statutes (1983).

and Phrases Judicially Considered¹⁵] "There is nothing in this book between the words 'soap' and 'sodomy'."¹⁶

If the members of the Canadian Senate do not have enough confidence to engage in a discussion regarding possible interpretations of the word "society" in a constitutional accord without reference to books on words and phrases,¹⁷ and if Eugene Forsey has to defer on this question to someone "with more knowledge of the law", we obviously have some way to go before the "words and phrases" style of interpretation can be pronounced to be out of style in Canada. In the meantime we ought to have some serious concerns about our capacity to engage in meaningful legal or political decisionmaking.

(ii) "Read the text/apply the rules/find the meaning"

This style may be considered to be the "proficient mainstream" of statutory interpretation in Canada. It marks a significant advance on the "words and phrases" style in that it takes legislative texts seriously. Indeed it is the "read the text" aspect of this method of interpretation which is its greatest accomplishment. What distinguishes the approach as formal is its adherence to the notion that there are rules of interpretation which can be applied to deduce the meaning of the text or, as it is more commonly expressed, "the intention of the legislature".

The established exemplar of this style is Maxwell on the Interpretation of Statutes.¹⁸ This work deals in rules of interpretation, the primary one being the literal rule. According to Maxwell: "The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced from the language used'".¹⁹ Not all followers of the "read the text/apply the rules/find the meaning" style are as religious in subscribing to the rules of interpretation as is Maxwell's. For example, Professor Cote prefers to speak of principles of interpretation and admits that the results are often contradictory. He also says that interpretation is a rhetorical process, one in which: "Using the arguments drawn from this armoury [of principles of statutory interpretation], lawyer and judge weave together a plea with which to convince

¹⁵. "Sanagan's" refers to The Encyclopedia of Words and Phrases Legal Maxims Canada 1825 to 1978, (3d ed., 1978). Gerald D. Sanagan, Q.C. editor. In the Introduction to Sanagan's, it is said that "The precise use of words requires an exact knowledge of their meaning and connotation."

¹⁶. Globe and Mail, July 4, 1987, p.A-3, col.2. Referring to Committee Proceedings of Tuesday, June 30.

¹⁷.

¹⁸. P. St. J. Langan (ed.) (12th ed, 1969).

¹⁹. Ibid., at 28.

their audience."²⁰ That is not to say that Professor Cote denies the value of an approach which follows the rules. And there is no question as to the primary purpose of the interpretive exercise, that being to ascertain "the 'true' meaning or effect of the enactment".²¹

There are several significant features of this style of interpretation. The first is that it encourages a rigorous methodology. The emphasis in the works of Professors Cote and Dreidger upon grammatical and logical analysis is already a major contribution when it is considered that they are written for a professional audience who need regular reminding to read the text. Indeed Professor Dreidger makes it clear that his work is concerned about methods rather than about rules or canons of construction.²² The first step in his preferred method is that the Act as a whole is to be read in its entire context. Again, however, the purpose of this rigorous analysis of the text is "to ascertain the intention of Parliament".²³ The second feature of this style of interpretation is a basic belief in the meaning of words. It is only when the ordinary and grammatical sense of the words discloses an ambiguous legislative intent that recourse is had to the legislative purpose or to other interpretive "methods" to resolve the ambiguity.²⁴ What is probably the most formal feature of this style is that it makes very limited reference to what adherents of this method would call extrinsic evidence. The occasions on which such evidence is to be taken into account are very rare.²⁵ Even when Professor Cote develops what he calls the contextual method, its major point of reference is to the internal logic of the statute and to harmony with other statutes, not to an empirical assessment of various competing interpretations.

If all interpreters could be counted on to follow the rigorous analysis of

²⁰. P.-A. Cote, Interpretation des Lois (1982), and The Interpretation of Legislation in Canada (1984, trans.), at 22. (Unless otherwise indicated references are to the English translation of Cote.). For an elaboration of this theme regarding the rhetorical effect of the various rules of interpretation, see: Cote, "Les Regles d' Interpretation des Lois: Des Guides et des Arguments" (1978), 13 R.J.T. 275.

²¹. Ibid., at 18. The other major Canadian work from this school of interpretation on interpretation is Dreidger, Construction of Statutes (2d ed., 1983). Of course there are distinctions of style and of scholarship between these two works. Other major works belonging to this "school" include: Pigeon, Redaction et Interpretation des Lois (2d ed., 1978); Beaupre, Construing Bilingual Legislation in Canada (1981).

²². Ibid., at vii.

²³. Ibid., at 105.

²⁴. This restriction is more evident in the methodology of Professor Dreidger. Professor Cote encourages interpreters to apply "all relevant principles" and "prepare a kind of balance sheet." (at 20).

²⁵. See Dreidger, supra, note ____, at 150-154.

Professors Cote and Dreidger, the formalism of the "read the text/apply the rules/find the meaning" style would at least ensure a consistency of method, if not necessarily of outcome. There are however two major risks. One is that result-oriented judges and lawyers will bend the rules to suit a particular purpose. The second, potentially more insidious, risk is that lawyers will inadvertently misapply the rules but naively believe that they have found the true answer. The first concern was expressed by Professor John Willis in what has become a landmark of Canadian legal scholarship.²⁶ According to Willis statutory interpretation is a matter of trying to guess what meaning a court will attach to a statutory provision. The three approaches of the literal, golden and msichief rules are, in the view of Professor Willis, completely malleable. In his words: "You must not, therefore, be misled into believing that the theoretical acceptance by your court of the approach for which you are contending will automatically result in a decision in your favour. What will they do, and not what will they say, is your concern."²⁷

The second concern about a rule-centred approach is that interpreters will actually believe in the rules to the point that they expect to find the "answer" and that they will follow this answer even if it does not make much sense to do so. An illustration of such an interpretation may be found in a decision of the Nova Scotia Rent Review Commission regarding a claimed exemption from the rent review scheme for a university student residence. The Nova Scotia Rent Review Act²⁸ imposes a ceiling on rental increases for most "residential premises" but excludes a number of types of premises from the application of the statute. Among the exceptions are:

- (i) a university, a college, an institution of learning, a public hospital, mental hospital, tuberculosis hospital, maternity hospital or sanitorium, a municipal home, a jail prison or reformatory;²⁹

Dalhousie University owns a 32-storey apartment complex, in which about half of the apartments are rented on a yearly lease to married students and their families. The other half of the units are rented to single students on a September-to-April basis. These latter units are rented to other parties, including non-students, on a casual basis during summer months. In 1983, after

²⁶. "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1. In Professor Risk's "John Willis - A Tribute" (1985), 9 Dal L.J. 523, it is said that this is probably the best-known piece of Canadian legal scholarship (at 523). I am reasonably confident, based upon my own wanderings through Canadian law libraries, that Volume 16 of the Canadian Bar Review is the most-tattered Canadian legal periodical and, if one can judge from the number of marginal notations and well-worn pages, that Professor Willis' piece on interpretation is the reason for the popularity of the volume.

²⁷. Ibid., at 2.

²⁸. S.N.S. 1975, c.56.

²⁹. Ibid., s.4(h)

the University gave notice of a rental increase substantially in excess of that permitted by the Rent Review Act, the residents, led by law students, sought a determination that the residence was indeed subject to the rent review legislation and that the University could not therefore increase the rent as indicated in the notices. The Rent Review Commission found in favour of the students, invoking two "rules" of interpretation. The first was the "mischief" rule. The Commission recited the standard four-part formulation of Heydon's Case and determined that the "mischief" aimed at by the legislation was "galloping inflation". This slightly inelegant elaboration of the "mischief" aimed at by the legislation might not be a problem in itself except for the fact that the Commission failed to acknowledge that it was dealing with an exception to the legislative scheme and therefore ought to have gone on to at least consider a purpose for the exception. In any case the analysis of that "rule" was dropped and another taken up, this time the ejusdem generis rule, which according to definition means that generic terms which might have a broader meaning are restricted to the genus of things they are associated with in a particular provision. The Commission observed that the other premises excluded from the application of the Act shared a common element, essentially that persons occupying those premises did not have friends or spouses sleeping over. Accordingly, since at least the married students' quarters were occupied by persons other than those "individually confined or assigned" to the premises, it was concluded that Fenwick Place was not a university residence for purposes of the rent review legislation. In the words of the Commission:

Referring specifically to the other exclusions contained within Section 4(h)(i) the Commission finds that occupation within the various places mentioned i.e. tuberculosis hospital, sanatorium, jail, or prison is restricted to persons individually confined or assigned to these places. The spouse of an inmate confined to a prison or the spouse of a patient confined to a tuberculosis hospital or maternity hospital would not be allowed to take up residence; nor would the available space within these places be made available for use by non-inmates or patients. Surely the same reasoning must apply to residents of a University.³⁰

The Commission's interpretation is typical of what can happen when interpreters take themselves too seriously in applying the "rules" and become so focussed on those rules that they forget their policy mandate and forget the social context of their decision. There is a real danger that in the search for objective interpretive analyses the "rules" may become an end in themselves. In this illustration the purposive analysis of the Rent Review Commission is weak; moreover, the Commission's assessment of the relevant context is hardly satisfactory. A better approach, sensitive to the overall purpose of the legislation and of the exception, would recognize that all of the excluded premises are publicly operated and therefore not subject to the same concern that landlords will take advantage of inflationary rental markets to gouge tenants. A university residence, irrespective of sleeping arrangements, seems to fit both the purpose and the genus of the exception. As for the problems of placing the

³⁰. Re: 5599 Fenwick Street, Unreported decision of the Nova Scotia Rent Review Commission, October 31, 1983.

interpretation in its social context, the apparent assumption by the Commission that students in non-married residences do not have friends sleep over could probably stand some further empirical study; indeed it could probably benefit from a minimum of official notice.³¹

Thus it is important to keep up a guard against interpretations which become exercises in applying the rules for their own sake, just as it is worth reminding ourselves never to underestimate the capacity of those making arguments about interpretation to manipulate the rules to suit their particular ends.³² In a sense it is unfair to lodge these criticisms against the "read the text/apply the rules/find the meaning" style and at the same time to identify Professors Dreidger and Cote as models of that style. The principal thrust of their work is to impose a structure and to force interpreters into a method that closes off the opportunity of taking shortcuts. However, to the extent that the rule-based style promises truth and does not require, or normally allow, an assessment of the real-world effects of competing interpretations, the promoters of that formal style must accept responsibility for its failings.

In any event there can be little doubt that this is the predominant style of interpretation in Canadian practice and that it is essentially formal. First, its obvious purpose, as has already been noted, is to impose a structure. And, again, the value of such a structure, especially one with the basic message to read the text ought not to be underestimated in a professional context where many practitioners still prefer the "words and phrases" or the "can't we just look up the answer" approach. Second, as a further measure of the formality of this method, the almost exclusive reference point is the language of the statute itself, although it must be noted that reference is encouraged to legislative antecedents and/or to statutes which are in *pari materia*. Third, while some concession is made to taking account of context, much more attention is paid to the internal than to the external context, with one telling indicator being that more time tends to be devoted to the topic of punctuation in legislative provisions than is devoted to extrinsic evidence or judicial notice. Fourth, while there is some reference to possible ambiguity, the methodology is based upon a bedrock of belief in the grammatical and ordinary meaning of legal texts. Fifth, what ultimately distinguishes this methodology as formal is the emphasis upon "the intention of Parliament". This becomes the touchstone, and the

³¹. An appeal of the Commission's decision was summarily allowed: Re Governors of Dalhousie College and University and Rent Review Commission (1983), 4 D.L.R. (4th) 380 (N.S.S.C., A.D.). In a subsequent decision, the Commission determined that a second married students' residence was not exempted from the legislation, this time on the ground that the building, although owned by the University, was leased to and operated by a cooperative student housing society: Re: 1094 Wellington Street, unreported decision dated Nov. 29, 1984. Again an appeal was summarily allowed: Halifax Student Housing Society v. Rent Review Commission (1985), 66 N.S.R. (2d) 308 (N.S.S.C., A.D.).

³². In this regard see the Avant-Propos of Cote's Interpretation des Lois, supra, note 20, at xvii, where Radbruch is quoted as complaining that lawyers will use rules of interpretation as instruments of torture to make laws talk where they did not wish to say anything.

objective, of the interpretive exercise: to determine the intention of the legislator. This notion that statutory interpretation is directed chiefly toward the execution of a legislative intent is the key feature of a continuing attachment to formalism as the predominant interpretive style in Canada.

(iii) "Field sensitivity"

If we are to move beyond the limits of this predominant formal style in our interpretation of legal texts, there are two critical respects in which we can expect to see change. First we can move toward a more openly purposive analysis, one which recognizes the objectives of a statute or of a particular provision. Armed with this elaboration of purpose, we can then set out to achieve it with a more confident sense of the policy-forming responsibilities of the interpreter and with a more skeptical sense of the objective meaning of language. Second, we can develop a more courageous methodology to be sensitive to and to be informed of the context in which a legal provision will operate.

There are already some indications that this type of interpretive approach is being adopted in Canada. This is occurring primarily in two contexts. First some administrative decisionmakers adopt a functional method of interpretation along the lines suggested here. Second there is a new awareness of the importance of being "field sensitive" in the approach which has been followed, or at least called for by the Supreme Court of Canada, in the interpretation of the Canadian Charter of Rights and Freedoms.

One instance of an administrative tribunal taking a more functional approach is a decision by the Quebec Regie des permis d' alcool dealing with an application by Steinberg Inc. for retail liquor licences at fifty-one outlets in the province of Quebec. The tribunal held a lengthy hearing at which 28 witnesses were heard and 106 exhibits, including sophisticated market studies, were introduced. The decision, ultimately granting forty-two permits and refusing nine, was rendered in 277 pages.³³ Another instance of an openly functional approach by an administrative decision-maker can be seen in a decision of the C.R.T.C. respecting an application by CNCP to be permitted to interconnect with facilities of Bell Canada and B.C. Tel for the purpose of providing long distance public telephone service. There were fifty-two parties appearing or represented at thirty-six days of hearings, which included three days for a pre-hearing conference. The parties included poverty groups, business associations, unions, and competitors of the main participants. The Commission retained an accounting firm and a second group of consultants to prepare two technical economic assessments. It ultimately delivered a 143-page decision.³⁴

There are several things which must be observed regarding the above examples. The first is that they involve huge concentrations of resources. The retail beer and wine market in Quebec and the national market in long-distance telephone service are significant matters, by any measure. Second, the process adopted in both cases is obviously an elaborate and extremely expensive one, not

³³. (1984-85), 5 Rec. des Decisions en Matiere de Permis d'Alcool 1.

³⁴. Telecom Decision 85-19, (1985), 11 C.R.T. 1611.

just in terms of the conduct of the actual hearings but also for the preparation of expert and technical interventions and representations. There are resource issues for both the parties and the administrative decisionmakers. Not all administrative decisionmakers, or, for that matter, courts, have the resources and staff that are available to the two tribunals involved in these elaborate decision-making processes. Third, the statutory mandate for both the Regie and the C.R.T.C. is to act in the "public interest", hence there could be no pretence that these were other than open exercises in making public policy.

There is also evidence of an increasingly functional approach taken by Canadian courts in the adjudication of constitutional matters, particularly in the interpretation of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has made it clear that the dominant approach to the interpretation of the Charter is to be a purposive one³⁵ and it has repeatedly called for more extensive records of legislative facts.³⁶ While there are still many Charter cases which proceed without a satisfactory factual record, we are beginning to see some movement on this point. For example, in an Ontario appeal decision³⁷ involving a challenge to the administration of a roadside A.L.E.R.T. test without permitting the suspect the opportunity to retain and instruct counsel, there were admitted, at the appeal level since no evidence on the constitutional issue had been led at trial, seven volumes of supporting material. These included statistical evidence on the incidence of impaired driving, data on the relationship between impaired driving and the occurrence of accidents, and studies of the success of roadside in reducing the amount of drinking and driving in other jurisdictions. On the basis of this evidence it was concluded that the denial of the opportunity to retain and instruct counsel is a reasonable limit in accordance with s.1 of the Charter. In another constitutional case, dealing with the reasonableness of mandatory retirement, extensive evidence was introduced through affidavits from former university administrators, through reports of Royal Commissions, and through affidavits from economists and psychologists.³⁸ In a third case, the reasonableness of wage controls in the federal public service was dealt with on the basis of the viva voce evidence of four economists.³⁹

³⁵. See e.g. Skapinker v. Law Society of Upper Canada, [1984] 1 S.C.R. 357; Hunter v. Southam, [1984] 2 S.C.R. 145; R. v. Oakes, [1986] 1 S.C.R. 103.

³⁶. Skapinker, *ibid.*, at 67; Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

³⁷. R. v. Seo (1986), 54 O.R.(2d) 293.

³⁸. Re McKinney and Board of Governors of the University of Guelph, (1986), 32 D.L.R. (4th) 65 (Ont. H.Ct.).

³⁹. Public Service Alliance of Canada v. The Queen (1984), 11 D.L.R. (4th) 337 (Fed. Ct. T.D.); rev'd (1984), 11 D.L.R. (4th) 387 (Fed C.A.). On appeal, one member of the Court of Appeal expressed "serious reservations" about this approach (at 395, per Marceau J.). See S.C.C. decision of April 1987 for treatment of this question. For a complete treatment of this question of extrinsic evidence see the work of my colleague W.H. Charles who is presenting a

There can be little doubt that a trend toward the development of extensive records of legislative facts raises serious concerns regarding the financial and intellectual resources required for this genre of proof. However a field-sensitive approach does not necessarily require the expense and the trouble of extensive evidentiary records in every case. Instead there may well be a place for more extensive use of the doctrine of official or judicial notice. As Mr. Justice Estey has said in another context:

There are of course limits placed by common sense, if nothing else, on what experts may assist the court in determining. ..Testimony on the trite is superfluous as is the demonstration of the obvious. Courts do not need a parade of watch repairers to advise them on the purpose for which people wear watches.⁴⁰

In both the administrative law and the constitutional contexts, there are examples of functional decisionmaking where reliance is placed upon the expertise of decisionmakers or where notice is taken of facts within the knowledge of the tribunal. In the administrative law area there has developed a body of jurisprudence which explicitly recognizes the expertise of front-line decisionmakers and which presumes that administrative interpretations of law are to prevail unless it can be shown that they are patently unreasonable.⁴¹ For example, labour arbitrators are presumed to know something of "the law of the shop".⁴² In other fields public utilities regulators, compensation tribunals, social assistance decisionmakers and industrial relations boards are held to less stringent standards of proof than we would expect of a court of law, precisely because these decisionmakers are given credit for having some field-sense about the area in which they work.

When we turn from official to judicial notice, it is interesting to note in the domain of constitutional interpretation that Canadian courts are showing some

paper on the subject at this conference and who has a chapter forthcoming in Charles et al., The Charter of Rights and Evidence Law, to be published by Butterworths.

⁴⁰. Rubis v. Gray Rocks Inn Limited, [1982] 1 S.C.R. 452, at 477.

⁴¹. The leading case in this line of jurisprudence is Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227. For a review of this development, see MacLauchlan, supra, note 1.

⁴². The phrase was first coined by Archibald Cox, "Reflections Upon Labor Arbitration" (1959), 72 Harv. L. Rev. 1482. See also D. Beatty, "The Role of the Arbitrator: A Liberal Version" (1984), 34 U. of T. L.J. 136; and, P. Weiller, Reconcilable Differences (1980).

In a forthcoming article entitled, R.A. Macdonald postulates that implicit and inferential norms are common, perhaps inevitable, in even the most highly institutionalized normative systems. These norms result from interaction between decisionmakers and "clients" as well as through the interpretation over time of explicit norms. "On the Administration of Statutes" Forthcoming, Queen's L.J.

inclination to relax traditional restrictions upon the use of notice. For example, LaForest J. has stated:

I do not accept that in dealing with broad social and economic facts...the Court is bound to rely solely on those presented by counsel....The admonition..to present evidence in Charter cases does not remove from the courts the power, where it deems it expedient, to take judicial notice of broad social and economic facts and to take the necessary steps to inform itself about them.⁴³

In following through on this approach LaForest J. has taken judicial notice of religious days of rest⁴⁴ and, in another case, of the difficulty of administering an educational system if all of the burden of enforcement lies on the educational authorities.⁴⁵ It remains to be seen how far this development of the concept of judicial notice will be extended. For the moment however it can be taken as a sign that courts are recognizing the potential of interpretation and that they are prepared to take a more field-sensitive approach rather than make "bad" constitutional law.

While it can be demonstrated that there are some instances in Canadian interpretation of a more functional approach, the "field-sensitive" style is not by any means about to take over the mainstream. The mainstream continues to be dominated intellectually by the middle approach of "read the text/apply the rules/find the meaning". In practice, the "words and phrases" style is probably more prevalent than one would like to believe. It is clear there are some powerful forces resisting a shift to a more "field sensitive" approach. Some of these are conventional. Some are disciplinary. Some are pragmatic. It is now timely to focus more directly on a critique of these respective styles and to consider the prospects for and the advisability of change.

The Critique of the Respective Styles

There are only two of the above styles which can be taken seriously on the level of principle. These are the "read the text/apply the rules/find the meaning" and the "field sensitive" styles. The "words and phrases" style has one major advantage: it's easy. In the same vein however, its major shortcoming is that it does not take the text seriously. In the end it is not about interpretation at all. It accords more value to the common law concept of stare decisis than it does to the relevant legal text. It accords no value to context.

To return to the other two styles, their respective critiques can be shortly stated. The "read the text/apply the rules/find the meaning" style places an unwarranted confidence in the existence of objective meaning. It is premised upon there being a "true" answer to problems of interpretation. The primary expression of this faith may be seen in the search for legislative intent. At least as

⁴³. Edwards Books and Art Limited v. The Queen, [1986] 2 S.C.R. 713, at 802.

⁴⁴. Ibid.

⁴⁵. Jones v. The Queen, [1986] 2 S.C.R. 284, at 300.

important as a "belief" in legislative intent is a belief in the capacity of language and written texts to communicate a clear message. As for the "field sensitive" approach, its major hitch is also occurs on the level of belief: we may not be prepared to concede that judges and administrators make public policy when they interpret texts. What's more, even if we were prepared to make that concession on the level of belief, there are major consequences in terms of resources needed for this functional interpretive exercise.

The search for legislative intent continues to be the touchstone of the "read the text/apply the rules/find the meaning" style.⁴⁶ The durability of this notion is nothing short of surprising in light of the eloquent and, as yet, unanswered critique which was levelled at the fallacy of legislative intent over fifty years ago by the American Legal Realists.⁴⁷ According to Professor Radin, legislative intent is a "transparent and absurd fiction"⁴⁸, a "queerly amorphous piece of slag."⁴⁹ In Canada we have two landmarks in our legal literature from the 1930's which join the American Legal Realists in calling into question the interpretive adherence to legislative intent.⁵⁰ John Willis discouraged his readers from being misled by "pious judicial references" to the will of the legislature, dismissing it as "at most only a harmless, if bombastic, way of referring to the social policy behind the Act."⁵¹ Professor Corry was no less critical than was Willis of the prevailing formalism of the day, saying

⁴⁶. It is commonplace for judicial interpretations of legal texts to be expressed in terms of what the Legislator, or Parliament, intended. This tends to be the case whether the ultimate approach is restrictive [e.g. Canadian Broadcasting Corporation v. Le Syndicat des Employes de Production du Quebec et de l'Acadie, [1984] 2 S.C.R. 412, at 437, per Beetz J.] or liberal [e.g. British Columbia Development Corporation v. Friedmann [1984] 2 S.C.R. 447, at 472, per Dickson J.(as he then was)]. The habit of expressing interpretations in terms of Parliamentary intent is so pervasive that even when courts were first asked to interpret the Canadian Charter of Rights and Freedoms, the reasoning tended to fall back on familiar forms such as: "[I]t must be taken that Parliament was aware of the basic principles of law existing and applied in this country." Re Potma and the Queen (1982), 67 C.C.C. (2d) 19, at 26 (Ont. H.C.), per Eberle J.

⁴⁷. Radin, "Statutory Interpretation" (1930), 43 Harvard L.R. 863; and, "Realism in Statutory Interpretation and Elsewhere" (1934), 23 Cal. L.R. 156. Another Realist critic of the concept of legislative intention was F.E. Horack, "In the Name of Legislative Intention" (1931), 38 W. Virg. L.Q. 119. See a review of this scholarship in MacCallum, "Legislative Intent" (1966), 75 Yale L.J. 754.

⁴⁸. "Statutory Interpretation", ibid., at 870.

⁴⁹. Ibid., at 872.

⁵⁰. Willis, supra, note 21; Corry, "Administrative Law and the Interpretation of Statutes" (1935), 1 U. of T.L.J. 286.

⁵¹. "Statute Interpretation in a Nutshell", supra, note 21, at 3.

simply: "The intention of the legislature cannot be found".⁵² The elements of the critique are not complicated. First, how is it ever possible to speak of a single intention of a collegial body, made up of perhaps several hundred members? Second, legislators have a multiplicity of motives for supporting a particular initiative, motives which need not correspond at all to specific provisions of an enactment or, for that matter, to the legislative initiative as a whole. In large legislative bodies, particularly where there is a strict adherence to party solidarity and where doing the business of the legislature requires the cutting of many 'deals', it is fallacious to speak of a legislative intention.⁵³

The debate about the merits of or even about the existence of a legislative intention is an elementary one. While some legal interpreters continue to subscribe to there being a subjective intention of the legislature,⁵⁴ the concept serves its major function as an expression of the proper role of the interpreter. For example, Professor Dickerson says:

Even if there were no actual legislative intent, judicial deference to the constitutional separation of powers would require the courts to act as if there were, because the concept is necessary to put courts in an appropriately deferential frame of mind.⁵⁵

For my part, I find little doctrinal or constitutional comfort in references, rhetorical or otherwise, to legislative intent. At best it is a sort of decorative literature that we leave lying about in the anterooms of statutory interpretation. At worst it is an elaborate exercise in self-deception which leads interpreters, including lawyers, administrators and judges, to deny and/or ignore their inevitable public policy roles.

Beyond the debate about legislative intent, there is a more consequential question. That is to what extent is it possible to attribute meaning to or to draw meaning from any legal text. In particular, the question is whether any objectively correct interpretation can be developed from an analysis of the text itself. There is now a formidable array of philosophers and jurisprudential writers who have either qualified their support for or completely denied the validity of such an underlying theory of interpretation. Even Professor Hart, champion of analytic positivists and promoter of the concept of a "hard core" of meaning in legal rules, concedes that there will still be points of indeterminacy. Elements of choice inevitably arise in the interpretation of

⁵². "Administrative Law and the Interpretation of Statutes" (1935), U. of T. L.J. 286, at 291.

⁵³. For a full review of the points made by the Realists, see: R. Dickerson, The Interpretation of Statutes (1975), at 67-87.

⁵⁴. Professor Cote says that the ultimate aim of interpretation is to discover "the true, subjective intention of the author of the law" but in a footnote says that the debate as to whether subjective intent exists or is purely fictitious "is of little importance." Supra, note ____, at 226.

⁵⁵. Supra, note 54, at 78-79.

statutory texts because of inherent limits upon the precision of language, because of inability to foresee all circumstances arising under a particular rule, and because of legislative indecisiveness as to the aim of a particular rule.⁵⁶ Without entering into a full-fledged philosophical debate⁵⁷ on this question, it is safe to say that even the most modest sceptical views constitute a serious attack upon the underlying assumptions of the "read the text/apply the rules/find the meaning" school. One such modest sceptical view is that of Professor Corry who observed:

Words can always set limits. But within the limits, which are always surprisingly wide, the judge remains a legislator.⁵⁸

According to Professor Corry, there is much in statutory texts which passes as having a plain literal meaning but which is really ambiguous. In these "deep - and widespread - forests of ambiguity" the interpreter must follow the compass of the purpose of the statute and, "[w]here that fails, as it sometimes will, he can only trust himself."⁵⁹ A review of the administration of statutes in Canada a half-century after Professor Corry's article was published has led Dean R.A. Macdonald to conclude that:

[T]here can be no such thing as an ahistorical or non-contextual literal meaning. A literal interpretation is no more than a stylized teleological argument in which the range of factors deemed relevant to the discovery of context is artificially constrained.⁶⁰

This observation goes to the heart of the critique of the "read the text/apply the rules/find the meaning" approach. This style of interpretation is premised upon an artificially constrained theory of language and communication and an artificially constrained information base regarding the relevant context. This

⁵⁶. Hart, The Concept of Law (1961), at 125.

⁵⁷. This paper touches upon issues which are dealt with in a sophisticated body of philosophical scholarship about language and interpretation such as is exemplified by the work of L. Wittgenstein, e.g. Philosophical Investigations, (G.E.M. Anscombe, trans., 2d ed., 1967); H. Gadamer, Truth and Method (2d ed., 1965)(1975 trans.); G. Gottlieb, The Logic of Choice (1968). The treatment given the issues in these, and other, philosophical works is eminently more satisfying for readers who wish to pursue this fundamental jurisprudential debate.

⁵⁸. Supra, note ___, at 292 (Corry).

⁵⁹. Ibid., at 292-93. To similar effect see R. Dworkin, Law's Empire, (1986) where it is said that an interpreter "must rely on his own judgment in answering [political questions arising in the course of statutory interpretation], of course, not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes." (at 313-14).

⁶⁰. R.A. Macdonald, "On the Administration of Statutes" Manuscript of article to appear in forthcoming issue of Queen's L.J., at 14.

style does not take sufficient account of the open-textured character of language.⁶¹ And, by elaborating and promoting "rules" of interpretation, it denies the inevitable indeterminacy which is involved in making rule-based decisions. The very basis for the "read the text/apply the rules/find the meaning" approach is, ostensibly, that it produces results which are valid in some objective sense. This is an assumption which is very difficult to sustain either in practice or in principle.

To this point, the "read the text/apply the rules/find the meaning" style has not fared very well in this critique. But if it is so unsatisfactory, why do we continue to adhere to this style as our mainstream interpretive methodology? Is there nothing to be said in its favour? Ironically, its most positive aspect is its formalism. The structure which is imposed by this style is its greatest contribution. First, it forces (or at least encourages) interpreters to read the text. Second, it encourages interpreters to read associated texts, either historical antecedents of the text in question or texts which are in pari materia. This exercise accomplishes two important objectives. It draws the reader into a serious analysis of the text as a whole, encouraging a search for at least internal consistency. And, as the reader goes further into a comprehensive reading of the text in question as well as of related texts, it seems inevitable that some greater appreciation for the societal context will be gained.

In the context of a legal culture where we look for quick, and preferably "true", answers,⁶² any methodology which encourages interpreters of legal texts to at least read the text should be seen as a major contribution, and progress has to be recognized for what it is. The mainstream method still suffers the critique that it is too self-referential, artificially constrained, synchronic as opposed to diachronic in its analysis.⁶³ This approach is similar in its objectives to that of structuralist scholarship. The isolation of structuralist analysis from its historical and social context earned its practitioners the designation of bricoleurs. It is a label which fits rather aptly the work of the "read the text/apply the rules/find the meaning" school. And that is not meant to be insulting of this style. While it would not be a compliment to be called a

⁶¹. To be fair, it must be said that Professor Cote acknowledges the limitations of a literal method of interpretation and that he identifies the open texture of language and the importance of context as factors to be considered, supra, note ____, at 212-215. However I fear that the overwhelming effect of this work is to encourage a rigorous, rule-oriented approach, and that "rules" such as "if the statute is clear, it is not subject to interpretation" or "if the text is clear, look no further" tend to be more accessible to lawyers who pick up this work in a problem-solving mode than will be the impact of footnote references to philosophical works expressing reservations about such methodologies.

⁶². On this see R.A. Samek, The Legal; Point of View (1974)

⁶³. These are terms derived from the analysis of the work of structuralist philosophers. See e.g. P. Pettit, The Concept of Structuralism (1977). For a recent review of this scholarship and its applications to law, see D. Kennedy, "Critical Theory, Structuralism and Contemporary Legal Scholarship" (1986), 21 New Eng. L.R. 209, at 248ff.

"bricoleur" in an interpretive community where everyone had the capacity of a Wittgenstein, the state of the art in Canada is far more rudimentary. Indeed, were it not for the contributions of some key practitioners of the rule-centered approach, we could be more aptly described as chiffoniers in our approach to statutory interpretation, particularly as exemplified by the "words and phrases" style. And if, in the practice of interpretation, we have gone from being chiffoniers to bricoleurs in less than a generation credit must be given where it is due.

This critique of the rule-based, text-exclusive mainstream assumes that we can be more relevant, less artificially constrained, in our analysis. However this assumption may be the soft underbelly of a more functional approach. If we are going to be more "field sensitive" in interpreting legal texts, we must have the capacity to inform ourselves of the societal impact of various interpretations, and we need the will first to inform ourselves and then to make the necessary choices. If interpretation is to become a more openly policy-forming exercise, there are some obvious concerns about the cost and procedural formality of conventional adjudication. There will also be concerns about the ideological biases of the lawyers and judges who will be left to marshal the relevant legislative facts and to ultimately make the necessary public policy choices. Among the most basic issues will be concerns for accessibility. The ordinary courts are already beyond the means of many would-be litigants.⁶⁴ There is no point in making the process more relevant if in doing so we make it less accessible.

We have now arrived at the heart of the matter. A "field sensitive" style of interpretation would be more intellectually satisfying and more honest. But can we afford it? So long as our stereotypical forum for adjudication is an appellate court, or even a superior court of first instance, the case for moving to a more functional approach is a weak one. There are serious grounds whether the system has the capacity to support the kind of policy-making exercise implied by a "field sensitive" approach. While it is the case that there has already been some movement in constitutional adjudication, it remains to be seen how well the system measures up to the strain. It is probably just as well to not extend the practice of introducing and interpreting sophisticated social fact records from constitutional to statutory interpretation, at least not until we have a better sense of where the practice will take us in the constitutional context.⁶⁵

⁶⁴. See the Zuber Report (1987). See story in Globe and Mail, July 18, 1987.

⁶⁵. While no principled basis for drawing a distinction between constitutional and other interpretation has been clearly articulated, there have been indications that such a distinction will be drawn. E.g. in Interruption of Private Communications Reference (1984), 56 N.R. 43, Dickson J. (dissenting) noted the increasing use of extrinsic evidence for constitutional purposes and stated: "[E]xtrinsic evidence is not receivable as an aid to the construction of a statute." (at 52, emphasis in original). In R. v. Lyons (1984), 56 N.R. 6, Estey J. accepted the same evidence (Hansard, Parliamentary Committee Minutes, Quimet Report) that was rejected by Dickson J. in the Private Communications Reference. In R. v. Edwards Books, supra, note 43, LaForest J. gives a reason for being

But to resist the conversion of conventional adjudication into a broad social-fact-finding exercise is not necessarily to deny the potential for any move toward a more "field sensitive" style of interpretation. There are two interim steps which present realistic possibilities for change. The first is that we can move to a more functional style of interpretation in non-court forums such as in the case of administrative decisionmakers. The second opportunity for change is through the use of official and judicial notice. Administrative decisionmakers are not constrained by the same rules respecting admissibility of evidence as prevail in the ordinary courts.⁶⁶ Moreover, they are closer to the "field" to which we want them to be sensitive. Many are chosen because they have previous experience in their particular fields. All of them acquire on-the-job experience, dealing on a regular basis with cases of a similar nature and arising from the same context. Accordingly they start out being less isolated, they learn as they go, and they have more flexibility if they need to be better informed. Finally, the procedure in these forums ought to be less expensive for the parties. All things considered, it may well be appropriate to recognize a different set of "rules" of interpretation for administrative decisionmakers than pertains to conventional adjudication, a set of rules which permits a more open quest for a functional interpretation.

As for judicial and/or official notice, if reliance upon such "evidence" is to be extended to the interpretation of statutes, it will encounter resistance from the doctrine developed in ordinary civil cases which has long insisted on notoriety and absence of controversy.⁶⁷ These strict standards have been relaxed in the constitutional context.⁶⁸ The best argument in favour of being explicit about notice of legislative facts is that it is "in the nature of things" that

more careful about the basis of social and economic facts in constitutional cases: "But as Marshall C.J. long ago reminded us, it is a Constitution we are interpreting. It is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been presented by counsel." (at 803) From this I infer that it is first the difficulty of amending the constitution and the consequent responsibility of the courts to "get it right" and second the high profile of constitutional adjudication that constitutes the reason to be more careful in constitutional cases.

⁶⁶. For an argument that a different set of rules with respect to evidence should apply in administrative contexts, see K.C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942), 55 Harv. L.R. 364.

⁶⁷. Schiff, Evidence in the Litigation Process (1978), vol.2, at 653ff.

⁶⁸. See supra, notes 43 to 45. Also Strayer, The Canadian Constitution and the Courts (1983), at 252-256. In the United States, there has been a recent proposal by K.C. Davis, who is generally given credit for coining the phrase "legislative facts", that the Supreme Court of the United States establish a research bureau, similar in nature to the Congressional Research Service. "Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court" (1986), 71 Minn. L.R. 1.

interpreters will have recourse to their own assumptions about such matters, whether they do so explicitly or not. K.C. Davis recognized as long ago as 1942:

It is conventional wisdom today to observe that judges not only are charged to find out what the law is, but must regularly make new law when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule. The very nature of the judicial process necessitates that judges be guided, as legislators are, by considerations of expediency and public policy. They must, in the nature of things, act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific.⁶⁹

It cannot be avoided, nor should it be, that in the course of interpreting legislative texts judges and administrators will rely upon their own sense of the relevant context and upon their own assumptions about the way in which various interpretations will "function". Accordingly the prevailing formalism in interpretation which pretends not to take such factors into account, indeed which denies that it would even be appropriate to do so, should give way to a modest element of functionalism which would add little or nothing to the cost of the process.

There will be some predictable claims regarding disadvantages of such an extension of judicial/official notice. The first will be that the parties will not have the opportunity to "test" the "validity" of the legislative facts in question. However it is not so much a matter of testing such "facts" as it is of having notice that the interpreter is concerned about a particular contextual aspect. If counsel were to quickly adapt to this new openness to the presentation of legislative facts, they would anticipate policy issues and openly address them in their pleadings. Moreover broad issues of social and legislative fact are hardly susceptible of proof or disproof in any event.⁷⁰ Judges and administrators will ultimately act according to their own world view. Just the same there is an advantage in being more frank about the relevance of such policy factors, since parties would at least have an opportunity to try to alter that world view. The likelihood of the decisionmaker "getting it right" is greater if argument is presented in an open fashion. The second predictable claim is that this type of openly political exercise will undermine public confidence in the courts and administrative decisionmakers. This one is difficult to take seriously. This is not the nineteenth century. It is already over half a century since the Legal Realists developed their still-unanswered critique. If courts can strike down Sunday-closing legislation, after it has been in force for eighty years, and interpret soliciting laws in a manner which effectively renders them unenforceable, and hold the entire body of legislation in a Province to be

⁶⁹. *Supra*, note 68, at 402.

⁷⁰. This question is more nuanced than I am presenting it here, both as regards the prospects for having a rational debate about social and economic facts and as regards the prospects of an interpreter "getting it wrong". See Peggy C. Davis, " 'There is a Book Out...' An Analysis of Judicial Absorption of Legislative Facts" (1987), 100 Harv. L.R. 1539.

unconstitutional but temporarily valid, surely it is a little late in the day to claim that Courts do not make public policy when they exercise their judicial function. And surely we underestimate the Canadian community if we contend that they will not stand for a plain recognition of the fact of judicial lawmaking.

On some "legislative facts" it will be difficult to find a consensus. But surely even people who dissent from the "noticed" view of the facts will be happier with the process if interpreters are frank about the underlying assumptions. Take the example of the decision by the Benchers of the Law Society of British Columbia in 1948 to refuse membership to an otherwise qualified applicant who had been a member of the Communist party.⁷¹ The Benchers stated clearly that they intended to "form their judgment fairly and honestly on the facts of this case in the light of their knowledge of Canadian affairs, of everyday affairs and matters of general information."⁷² The Benchers went on to state as the basis for their judgment that:

The history of the Communists in Canada, in Britain and in the United States during the last 3 or 4 years has shown that the doctrines of Communists are dictated from abroad and involve traitorous conspiracies and attempts against those countries.⁷³

It is highly unlikely that the Benchers of a Province of Canada would make that same statement today. But it is helpful in looking back at their decision to know exactly what assumptions were operating as they decided that being a member of the Communist party was a disability for prospective members of the Bar. So far from the explicit recognition of legislative facts being a problem for the administration of justice by undermining public confidence in the rationality and objectivity of an interpretation, it could be a catalyst to encourage debate about the underlying assumptions. If legislative provisions with respect to the division of marital property are being interpreted restrictively because the interpreters feel a generous interpretation would encourage family breakdown, that should be part of the public record so that interested parties can react. If human rights legislation respecting sexual orientation is being treated conservatively lest homosexuality be encouraged, that too should be in the public domain, to give an opportunity for popular reaction. All things considered there is great potential in the expansion of the practice of judicial/official notice to make interpretation into a more participatory and democratic exercise.

⁷¹. Re Legal Professions Act, Re Martin, [1949] 1 D.L.R. 105.

⁷². Ibid., at 107

⁷³. Ibid., at 111. See also the decision of the British Columbia Court of Appeal affirming the Benchers: Martin v. Law Society of British Columbia, [1950] 3 D.L.R. 173 in which O'Halloran J.A. allowed: "Communists and their sympathizers have been astute to find their way into so-called peace, youth, cultural, student, welfare and various other societies and organizations, and there skilfully indoctrinate the young, the impressionable, and the irresponsible, with theories designed to weaken and destroy the foundations of our free society." (at 177).

Conclusion

The thesis of this paper is that we have been unduly modest about our capacities to carry on an interpretive discourse in Canada. In our modesty we have adopted a mainstream style of interpretation which is so focussed on rules and so restrained in its willingness to relate interpretation to the relevant context that as interpreters we perform as bricoleurs. The resulting formalism of our mainstream "read the text/apply the rules/find the meaning" style of interpretation is, even according to the account of its principal practitioners, likely to lead to inconsistent results. In any event, it stops well short of a discourse which is consciously policy-forming or field sensitive.

However "field sensitive" we might be prepared to be in a world of unlimited resources and extraordinary good judgment and reason on the part of lawyers and judges, there are limits to what we should be prepared to do in the context of our existing system to transform interpretation into a more functional exercise. The major concerns are pragmatic, essentially related to cost and expertise. We must be careful not to invite a pseudo-scientific analysis of every question of public policy to the point where hardly anyone can afford to have an authoritative interpretation of the law. Nor should we presume as lawyers that everything on which we could find agreement in a functional new world would reflect a broad societal consensus. On the other hand, if assumptions about the relevant context are operative in reaching a particular interpretive choice, we should be prepared to act upon and to articulate those assumptions.

The bottom line of this paper is to propose a modest functional adjustment to what is presently an overwhelmingly formal process of statutory interpretation. The modest adjustment consists of two essential elements. First there must more frequent resort to judicial/official notice and second administrative decisionmakers must be encouraged to invoke their own sense of the field with greater frequency and to experiment with innovative methods of better informing themselves about their particular context. In the end this paper points out features of formalism that are less than intellectually satisfying and it questions some major underlying assumptions. But we may still decide, for pragmatic reasons, to live with a significant degree of formalism in our interpretive metier. We may simply have to recognize that there are limits to how functional we can be.