

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

Responsibility and Legislation

**3:30-5:00, Friday May 20, New Chancellor Day Hall, Maxwell Cohen Moot Court
Chair: Professor Stéphane Beaulac, Faculty of Law, University of Montreal, Montreal**

Summary

Chaired by Professor Stéphane Beaulac from University of Montreal Faculty of Law, the Responsibility and Legislation workshop focused on the responsibility of judges to the Parliament as the highest legislature of the country, to the development of the law, and to the participants in the justice system such as the litigants and the witnesses. Justice David Stratas of the Federal Court of Appeal lectured on Gonthier J.'s approach to interpreting the power of administrative tribunals. Professor Finn sought to distinguish between Gonthier J.'s progressive contribution to interpretation of the scope of tribunal powers from his narrow reasoning in judicial review of administrative tribunal decisions. Professor Karen suggested conceptualizing the right to privacy as a facilitator of justice inspired by Gonthier J.'s civilian approach to privacy rights based on human dignity.

A Unique Approach to Interpreting the Scope of Tribunal Powers

Justice David Stratas, Federal Court of Appeal, Ottawa

Stratas J. presented on the two significant contributions Justice Charles Gonthier made to administrative law: the legal reasoning in *Chrysler Canada Ltd. v. Canada* (Competition Tribunal), and *Canada Labour Relations Board v. Quebecair*. The two cases dealt with the interpretation of statutory provisions setting out the powers of administrative tribunals. The application of his approach had the effect of broadening a tribunal's jurisdiction in one case and restricting it in the other. The contribution was its uniqueness from the previous Supreme Court of Canada judgments on the matter.

The issue in the *Chrysler* was whether the Competition Tribunal had the power to conduct proceedings for contempt *ex facie curiae*. The SCC's jurisprudence until *Chrysler* looked for express wording vesting power. Accordingly the Tribunal would not have the power to conduct proceeding for contempt *ex facie curiae*, yet the Tribunal succeeded under Gonthier J.'s novel approach to statutory interpretation. This interpretation was textual, contextual and purposive. Gonthier J. identified the purposes of the *Competition Act* and the *Competition Tribunal Act* and examined the policy issues.

The issue in *Quebecair* was whether the Board had jurisdiction to compel production of documents during an investigation. Following the same methodology, Gonthier J. went beyond the express wording of subsection 118(a) of the *Canada Labour Code* and examined the structure and nature of

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the Board's powers. Accordingly, the mandate given to the Board by the Parliament was limited to the power to compel production of documents during a hearing.

The *Chrysler and Quebecair* judgments made it clear that if Parliament had used express words, those words would be paramount in this methodology. However, if these words were ambiguous, Gonthier J.'s approach allows for resorting to other sources of interpretation. As administrative law is an ever-developing and increasingly complicated area of law, this more efficient and comprehensive statutory interpretation approach will undoubtedly aid in offsetting Parliament's inability to delineate every possible power of administrative tribunals.

The Surprising Formalist: Justice Gonthier's Contribution to Labour and Employment Law

Professor Finn Makela, Faculty of Law, University of Sherbrooke, Sherbrooke

Professor Makela's lecture contrasted Justice Gonthier's formalist reasoning in judicial reviews interpreting the merits of a tribunal's judgment with his non-formalist reasoning in cases concerning jurisdiction of administrative tribunals.

In *Beliveau-St-Jacques*, an alleged victim of workplace sexual harassment filed a civil suit seeking damages from her employer based on both the civil liability regime and the antidiscrimination and anti-harassment clauses of the Quebec *Charter of Human Rights and Freedoms*. Gonthier J. writing for the Supreme Court of Canada found that Quebec's *Act Respecting Industrial Accidents and Occupational Diseases* extinguished the right to all civil remedies for workplace injuries, including punitive damages in cases of intentional and illegal violations of a protected right. Gonthier J.'s legal analysis depended on the words "in addition to" in the provision.

The issue in *Places-des-arts* was whether the employer infringed section 109.1(b) of the *Quebec Labour Code* that prohibited employers from utilizing the services of persons employed by another employer to discharge the duties of employees on strikes. Gonthier J.'s reasoning focused on the word "to utilize" and concluded that the employer only benefited indirectly from the services of the employees as to utilize involved a positive act by the user.

The seeming contradiction between Justice Gonthier's anti-formalist defense of the autonomy of labour tribunals and formalist holdings on the merits of labour cases can be reconciled by understanding that Justice Gonthier sought to protect administrative tribunals from judicial review precisely because judges are bound to use formalist reasoning. Whereas judicial reasoning, by focusing on the process and the rules rather than the outcome and the policies, has developed on formalist lines, labour law has developed on anti-formalist lines to protect workers from their employers. Thus, Justice Gonthier's decisions reflect the tension between formalism and anti-formalism inherent in the judicial process. Once judges are confronted with the decisions of administrative tribunals, they have no choice but to reason formally—to focus exclusively on policy would raise serious questions of legitimacy. So, due to their policy-making nature and expertise, administrative tribunals need to be insulated against formalist judicial review.

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L'impact des nouvelles technologies sur les tribunaux: La dignité, l'éthique judiciaire, et l'apport du droit comparé

Professor Karen Eltis, Faculty of Law (Civil Law section), University of Ottawa, Ottawa

Professor Eltis presented on the impact of new technologies on courts and judicial ethics. She advocated revisiting the conventional construction of fundamental concepts of disclosure, competence and impartiality and the balancing of the competing values of transparency and privacy in the Internet age.

Online court records, *ex parte* email communication (by self-represented litigants), e-mailed draft decisions, government-owned and operated court servers risk endangering litigants and witnesses' right to privacy in the name of transparency and dissuade them from seeking justice. Consequently, access to records may no longer serve the rationale of openness and accountability but rather undermine justice.

Professor Eltis proposed a new approach to interpretation of the right to privacy inspired by Justice Gonthier's dignity-based conception of privacy rights in *Ruffo*. Gonthier J's civilian approach differed from the common law views of privacy and allowed for a reframing of the debate between accessibility and privacy in the Internet context. Accordingly, if the right to privacy is understood as deriving from human dignity, it can be seen as a facilitator of accessibility. Judges are therefore more inclined to use their discretion to protect litigants' and witnesses' privacy, as doing so would be regarded as facilitating access to justice. According to Professor Eltis, this could lead to much-needed increases in public confidence in the judicial system.

Conclusions

Justice Stratas' lecture showed the importance of Justice Gonthier's contextual, textual and purposive legal reasoning to the interpretation of tribunal's jurisdiction to the development of administrative law. Given the Parliament's inability to delineate all the possible powers of administrative tribunals, Gonthier's approach allowed administrative tribunals to respond to the changing needs of society and the constant demands from the justice system.

Recognizing this significant contribution to labour and employment law, Professor Makela's lecture added nuance to this non-formalist depiction of Gonthier J.'s reasoning by contrasting it with a strictly formalist one in judicial review cases. His lecture suggested that an appreciation of administrative tribunal's place in the justice system necessitated immunity of their decisions from judicial review.

Taking a different approach to the evolution of the law and judges' responsibilities towards the law, Professor Eltis focused on the implications of new technologies on the right to privacy and the right to access. She argued that the conventional construction of fundamental concepts underlying the

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idea of “open-court” undermined justice. Giving third parties significant information regarding the private lives of litigants and witnesses reduces the participants’ confidence in and desire to participate in the justice system. While the previous lecturers focused on statutory interpretation, Professor Eltis’s contribution was significant for reminding us of the importance of revisiting the values underlying the justice system to serve the changing needs of society.

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