A Unique Approach to Interpreting Tribunal Powers: Justice Gonthier and the cases of *Chrysler* and *Québecair*

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A judge is nothing more than a temporary occupant of a chair. Many others, perhaps hundreds, sat in the chair before. Countless others will follow.

Seen in this light, the contributions of a particular judge at a particular time are nothing more than links forged and joined into a chain of law – a chain of law comprised of perhaps countless links. And that chain of law sits alongside so many other fields of human endeavour. Viewed in that light, the contributions of any particular judge are miniscule.

Or are they?

Sometimes the contributions of a particular judge affect a field of law in a particularly central way. Sometimes, in light of new societal developments, the importance of that field of law increases. As a result, some links in the chain of law contributed by the judge must be seen as significant.

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* Justice, Federal Court of Appeal. To the extent that I express any views on issues of substantive law, they should be regarded as my own, tentative, and subject to change based on submissions received in particular cases. I presented this paper at the Justice Gonthier Memorial Conference: Responsibility, Fraternity and Sustainability in Law, May 20-21, 2011, Montréal, Québec.

Justice Charles Gonthier contributed some significant links in the chain of law, particularly in the area of administrative law, a field notorious for its ever-increasing scope, importance and complexity.

In this paper, I would like to examine what I consider to be Justice Gonthier's greatest contribution in the area of administrative law: the reasons for judgment he wrote in two cases concerning the interpretation of statutory provisions that set out administrative tribunals' powers.

A. The contributions of Justice Gonthier

Justice Gonthier's contributions are in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*,[1] and *Canada Labour Relations Board v. Québecair*.[2]

The cases are book-ends: one had the effect of broadening a tribunal's jurisdiction, while the other did not. But both involved the same approach to the interpretation of statutes setting out tribunal powers. In the words of Justice Gonthier in *Québecair*, in reference to both *Chrysler* and *Québecair*, "[w]hile some of the same principles of statutory interpretation apply to both cases, they lead to different results."[3]

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[1] [1992] 2 SCR 394.
[2] [1993] 3 SCR 724.
[3] *Ibid* at 745.

In my view, Justice Gonthier's approach to the interpretation of statutes setting out tribunal powers was quite different from any previously adopted by the Supreme Court of Canada. As we shall see, his approach has been beneficial and has had lasting impact.

(1) The *Chrysler* case

In *Chrysler*, the Competition Tribunal issued an order against Chrysler, requiring it to resume supplying automobile parts to one of its customers. Later, competition officials formed the view that Chrysler was not complying with the order. So a motion was filed in the Competition Tribunal for an order directing Chrysler and others to show cause why they should not be held in contempt.

But did the Tribunal have the power to conduct proceedings for contempt *ex facie curiae*? The legislation that set out the Tribunal's powers did not expressly vest it with that power. By the time that *Chrysler* arrived at the Supreme Court of Canada, the Court had already decided that such express vesting of power was necessary.[4] For good measure, the Supreme Court had already decided that administrative tribunals did not have any inherent jurisdiction.[5]

And, if that was not bad enough for the Tribunal, there was the venerable opinion of "a great many judges and commentators," including the Supreme Court, to the effect that the

[4] *CBC v. Quebec Police Commission*, [1979] 2 SCR 618 at 639.
[5] *Keable v. Canada (AG)*, [1979] 1 SCR 218 at 249-50.

power to conduct an inquiry into a contempt committed *ex facie curiae* and to punish it was one exercised only by the superior courts.[6]

Even worse for the Tribunal in *Chrysler*, the Supreme Court had also previously declared that giving such a power to administrative bodies would be "liable to result in inquiries which may well involve…areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction."[7]

Finally, contempt proceedings threaten the liberty of the person alleged to have committed contempt. One would think that such proceedings would be confined to the superior courts, absent the clearest of statutory language. Again, there was no such language in *Chrysler*.

Given these previous decisions from the highest court in the country, and given these policy considerations, one would think that the Tribunal in *Chrysler* was doomed to fail. But the Supreme Court found that the Tribunal did have the power to conduct proceedings for contempt *ex facie curiae*. The Tribunal succeeded.

The Tribunal succeeded due to what, in my view, was a rather novel approach taken by Justice Gonthier in *Chrysler* to the interpretation of statutes that give powers to administrative tribunals.

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[6] *CBC*, *supra* note 3 at 627-28.
[7] *Ibid* at 638.

Justice Gonthier began his reasons for judgment by acknowledging the earlier authorities and confirming that the Tribunal could only have jurisdiction if its statute clearly said so.[8] Before examining the statute, he concluded with this statement of the law:

> Barring constitutional considerations, if a statute, *read in context* and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect.[9] [emphasis added]

Those three somewhat vague words – "read in context" – signalled a new approach to the statutory interpretation of tribunal powers.

The plain wording of the *Competition Act*, read in isolation, created a great riddle. Parliament set out express wording in the Act, giving the Tribunal some supervisory power in the form of an ability to rescind or vary its orders upon request from the Director of Investigation and Research or the person against whom the order has been made. But it did not include express wording in the Act to ensure compliance with the orders of the Tribunal. Was this intentional? Justice Gonthier answered the riddle through his method of reading the statute "in context."

This was a revolutionary approach for its time. Justice Gonthier did not limit his examination to whether there were express words giving the Tribunal the power to punish for contempt. He adopted a far more nuanced approach, sifting through the statutes governing the Tribunal, looking for subtler clues regarding Parliament's intention.

[8] *Chrysler*, *supra* note 1 at 402-05.
[9] *Ibid* at 405.

Indeed, as we shall see, in trying to discern the significance of a particular feature of the Tribunal, he even went outside of the statute and examined the "normal" powers given to other federal tribunals.

He identified the purposes of the statutes that governed the Tribunal, namely the *Competition Act*[10] and the *Competition Tribunal Act*,[11] and the role of the Tribunal in carrying out those purposes.[12] He also examined the purposes of the regulatory framework in those statutes, and the regulatory framework itself, in order to ascertain the functions of the Tribunal and how it carried out those functions.[13]

Justice Gonthier also considered the Tribunal's expertise in light of the functions assigned to it by Parliament. He did so in addressing the submission that criminal prosecutions under the Act were available for contravening or failing to comply with orders of the Tribunal. In his view, such proceedings would take place in criminal court where the expertise of the Tribunal would not be present.[14] This mattered: "[g]iven the complexity of orders…, monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness."[15]

[10] RSC 1985, c. C-34.
[11] RSC 1985, c. 19 (2nd Supp).
[12] *Chrysler*, *supra* note 1 at 406-07.
[13] *Chrysler*, *supra* note 1 at 406-07.
[14] *Ibid* at 407-408.
[15] *Ibid* at 408.

From this nuanced examination of function, statutory purpose and expertise of the Tribunal, Justice Gonthier concluded that Parliament intended the Tribunal to oversee the subject-matters of orders and that Parliament was "strongly concerned" with compliance.[16]

Another subtle legislative clue before Justice Gonthier was section 8 of the *Competition Tribunal Act*:[17]

- Subsection 8(1) gave the Tribunal the power to hear and determine all applications under Part VIII of the *Competition Act* and "any matters related thereto." Examining the French and English versions of the subsection, he concluded that "any matters related thereto" had to concern matters other than the hearing and determination of applications.[18] S

- Subsection 8(2) gave many powers to the Tribunal, such as the power to call witnesses and to demand production of documents, for the purposes of "enforcement" and "other matters necessary or proper for the due exercise of its jurisdiction."[19]

- Subsection 8(3) required that a judicial member of the Tribunal concur in a finding of contempt. Justice Gonthier noted that the express reference to

[16] *Ibid* at 408.
[17] *Supra* note 11.
[18] *Chrysler*, *supra* note 1 at 410.
[19] *Ibid* at 411.

> contempt in that subsection was indicative of nothing, as the Tribunal did have the power over contempt *in facie*. However, the requirement of judicial concurrence was significant to him. Mindful of other tribunals' statutes, he viewed that requirement as unique, and thus "indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinary exercise."[20]

Finally, Justice Gonthier examined the policy issues that might bear upon the issue. This was revolutionary in the administrative law context. After all, as explained above, before *Chrysler*, to determine whether a tribunal had a particular power, the better view was that one did not need to go beyond looking for express wording vesting the power. If there were no such express wording, the power was simply not there.

In his view, recognizing a power in the Tribunal to punish for contempt committed *ex facie curiae* did not give the Tribunal a broad and dangerous jurisdiction,[21] nor was it somehow contrary to the superior courts' normal jurisdiction over such matters. To assuage such concerns, he again looked at aspects of the function and the expertise of the Tribunal, and its relationship with the court system. On the Tribunal's function, he observed that the very issues that prompted the making of the order would inform the issue whether contempt was present.[22] On the issue of expertise, he held that "the Tribunal is in fact better suited than a superior court to decide these matters."[23] Finally,

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[20] *Ibid* at 412.
[21] See the text to note 6 and the concern mentioned in the *CBC* case.
[22] *Chrysler*, *supra* note 1 at 414.
[23] *Ibid* at 414.

he noted that any decisions on issues of contempt would be "subject to full review by the Federal Court of Appeal."[24]

(2) The *Québecair* case

In this case, a pilots' union applied to the Canada Labour Relations Board for a declaration that certain airlines constituted a single employer, or alternatively, that there had been a sale of a business. Before the hearing of the application, the Board informally requested from the employers certain documents and information.

When the employers refused, the Board made an order compelling them to produce the documents and information. The employers applied for judicial review and succeeded in the Federal Court of Appeal, which set aside the Board's order on the basis that the Board had no jurisdiction to make the order. The Supreme Court granted leave to appeal.

Just sixteen months after *Chrysler*, Justice Gonthier released his decision. He found that the Board did not have the jurisdiction to make the order.

For present purposes, the noteworthy thing is that, unsurprisingly, Justice Gonthier followed substantially the same methodology he did in *Chrysler*. He started with the wording of subsection 118(a) of the *Canada Labour Code*[25] which set out the Board's

[24] *Ibid* at 414.
[25] RSC 1985, c. L-2.

powers to make orders compelling parties to produce documents and information. He noted that in its express wording, wording that he considered "limited," subsection 118(a) did not give a power to compel documents and information *per se*, but only provided for that to happen in a "proceeding" that had "witnesses."[26]

But Justice Gonthier went well beyond the express words of subsection 118(a). Instead, he went further and looked at the "structure and nature of the [entire] provision [section 118]", and found that to the extent that the Board had such powers, they were only as part of an entire process at a hearing, a process quite different from the informal pre-hearing setting with which this case was concerned.[27] He also examined the Board's ability under the *Code* to delegate its powers, noted that the power of "compulsion" could not be delegated, and concluded that this underscored the severity of the power – something incompatible with its use in the sort of informal context of this case.[28] Briefly, he also examined the history of the provision.[29]

Going beyond the express wording of subsection 118(a) and the other subsections of section 118 of the *Code*, he examined the nature of the power granted by subsection 118(a) and compared it with the sorts of powers exercised by other bodies. Specifically, he noted that the power of compulsion in subsection 118(a) was "coercive," and defiance of that power could result in imprisonment, a power "reserved uniquely for courts of

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[26] *Supra* note 2 at 735.
[27] *Ibid* at 735-36.
[28] *Ibid* at 739.
[29] *Ibid* at 740.

law."[30] For that reason, in his view, "special attention [had to be] given for this reason alone to any limits which are placed on the exercise of that power by the words of the provision granting it – in other words, the express limiting words in subsection 118(a) had to be given the weight that they deserved.[31]

Further confirming his view that subsection 118(a) did not support the Board's power was his view of the Board's overall jurisdiction. Examining the Board's overall jurisdiction, he appreciated that the Board's request for documents and information was an informal one that did not relate to the formal administrative role of the Board under the *Code*.[32]

In the end, Justice Gonthier rejected the submission that the administrative mandate of the Board required that the power in subsection 118(a) of the Code be interpreted "in a generous fashion." In his view, restricting the power to compel the production of documents and information to the context of a formal hearing would amount to nothing more than an "inconvenience," not an impairment of the Board's mandate.[33]

[30] *Ibid* at 737-39.
[31] *Ibid* at 737.
[32] *Ibid* at 737.
[33] *Ibid* at 742-43.

(3) Summary

Justice Gonthier's approach to the interpretation of provisions setting out tribunal powers is not just an "express wording" or "plain meaning" approach. It can be seen from the foregoing that his approach is an assiduous and careful one, like the detective trying to follow up every possible subtle lead. Colloquially put, with only a bit of exaggeration, he seemed to shake the statute before him to bits and then examine every bit to see if any significance were to be drawn.

But his approach was not just microscopic. He viewed the mandate given to each tribunal by Parliament and examined the overall purpose and function of the tribunal. He saw each tribunal as sitting within a larger structure. He saw the sorts of powers Parliament typically gave to other tribunals and the existence of full review by a supervising court as being potentially relevant.

But in the end, as *Québecair* demonstrated, express wording, or the plain meaning of the statutory words used, if very clear, could be determinative. Even then, though, the approach followed by Justice Gonthier in *Québecair* shows that one should still look beyond the statutory words, clear as they seem, in order to verify that the statutory words in fact are determinative.

B. Assessing Justice Gonthier's contributions in *Chrysler* and *Québecair*

(a) Justice Gonthier's approach respected Parliamentary supremacy

In looking to sources of statutory interpretation beyond the clear and express wording chosen by Parliament, did Justice Gonthier engage in improper or inappropriate legislating?

The answer must be no. It is evident, especially in *Québecair*, that the clear and express wording chosen by Parliament is paramount in his methodology. Resort to other sources is done only to resolve ambiguity in Parliament's words (*Chrysler*) or to verify the meaning suggested by Parliament's clear and express wording (*Québecair*). The purpose of Justice Gonthier's methodology was to divine Parliament's meaning and to implement it – not to change it or supplement it.

(b) Justice Gonthier's approach helped administrative justice

In my view, there would have been adverse implications for administrative justice in Canada if the sort of strict, express wording, plain meaning approach that existed before *Chrysler* and *Québecair*, discussed above,[34] continued.

[34] *Supra* notes 4-5.

Much has changed since those earlier, pre-*Chrysler* and pre- *Québecair* cases were decided. Many of the mandates of administrative tribunals have become massive and complex. Today, factual situations, practical problems and legal situations that they have to regulate and adjudicate upon are diverse. More and more fields of human endeavour are regulated in the administrative justice system rather than the court system, and this trend will likely intensify.

In light of this, is it possible for Parliament and the legislatures to use express and clear language in every tribunal's statute, language that delineates every possible power that the tribunal has and specifies all of the circumstances and manners in which the powers are to be used? Even if possible, one could foresee legislative gaps and omissions that would leave tribunals powerless to deal with certain circumstances that lie within their general mandates.

Such an approach might also transform areas of administrative justice into nothing more than a playground for lawyers. One could foresee lawyers arguing statutory interpretation points on basic issues like tribunal powers, armed with the only tool useful for such an approach – a dictionary. Wording would be parsed, technical arguments would erupt, and, in the end, would Parliament's purposes in establishing a particular administrative regime be met?

(c) Justice Gonthier's approach was ahead of its time

Justice Gonthier's pioneering interpretive approach in *Chrysler* and *Québecair* seems similar to the interpretive approach adopted by the Supreme Court over a decade later in *Canada Trustco Mortgage Co. v. Canada*.[35] In fact, the following passage from *Canada Trustco* could suffice as a very concise, good description of Justice Gonthier's approach:

> …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[36]

Canada Trustco also emphasized that the particular taxation statute it was considering,[37] the *Income Tax Act*, "remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation."[38] That is often true of statutory provisions setting out tribunal powers.

Later administrative law cases have followed the spirit of Justice Gonthier's approach, eschewing a strict, plain meaning approach to the interpretation of statutory provisions setting out tribunal powers. For example, through a method of interpretation not unlike

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[35] [2005] 2 SCR 601, 2005 SCC 54.
[36] *Ibid* at para. 10. See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.
[37] RSC 1985, c. 1 (5th Supp.).
[38] *Canada Trustco*, *supra* note 35 at para. 13.

that adopted by Justice Gonthier, the Supreme Court in *Canadian Liberty Net* found substantial "implied" jurisdiction in a statutory body, the Federal Court.[39]

(d) Justice Gonthier's approach assumes even greater significance today

Justice Gonthier's views on how statutory provisions setting out tribunal powers should be interpreted assume greater significance today.

Before *Dunsmuir*,[40] tribunal interpretations of statutes were frequently subject to correctness review: courts could intervene and set out their own interpretations and those interpretations would govern.

Dunsmuir and subsequent cases, however, have created a presumptive rule that tribunal interpretations of statutes with which they are familiar will be subject to deferential reasonableness review.[41]

Under deferential reasonableness review, the proper approach for the reviewing court is to assess whether the tribunal's interpretation fits within a range of acceptable and defensible interpretations.[42] The reviewing court is not to come up with its own interpretation and then see whether the tribunal's interpretation fits with it. In the post-

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[39] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626.
[40] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[41] *Ibid* at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 28; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 34.
[42] *Dunsmuir*, *supra* note 40 at para. 47.

Dunsmuir era, that must now be seen for what it is – a requirement that the tribunal interpretation accord with the judicial interpretation, or, in other words, correctness review.

This means that for practical purposes, *Dunsmuir* has created a transfer of responsibility. In most cases, courts should only be playing a subsidiary role in the interpretation of statutes that set out tribunal powers. Tribunals now must play the primary role.

And to the extent that tribunals exercising that primary role need guidance on how to interpret the existence and scope of their powers, where are they to look?

In my view, they must look to the seminal, sensible and savvy contributions of Justice Gonthier – contributions that stand out nearly two decades later as links, marvellously forged, that form part of our ever-growing, complex chain of law.