

Extract from the 5<sup>th</sup> edition of *BENNION ON STATUTORY INTERPRETATION*

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## Appendix A

### Court technique

As explained in Code s 2, the interpreter's duty is to arrive at the *legal meaning* of the enactment under inquiry. The following account details the steps to be gone through. It is presented from the advocate's viewpoint, but largely reflects the judicial function also. Further assistance may be gained from the checklist in Appendix B. The reader may also find it helpful to visit [www.francisbennion.com/2007/004.htm](http://www.francisbennion.com/2007/004.htm). This gives details of the author's NESSSI method of statutory interpretation, which is based on suggestions given in the present work. An article by Kay Goodall 'Teaching Statutory Interpretation: Citings of NESSSI in Scotland' (171 *Justice of the Peace* 604) can be accessed at [www.francisbennion.com/nfb/2007/005.htm](http://www.francisbennion.com/nfb/2007/005.htm)

The following assumes, which will not always be the case, that the advocate chooses to make use of the optional techniques of selective comminution<sup>1</sup> and interstitial articulation.<sup>2</sup> Where this is not done, the account needs to be read with appropriate adaptations. The following takes no account of the compatible construction rule laid down by Human Rights Act 1998 s 3.<sup>3</sup>

#### *Before going into court*

1. Determine, by reference to the facts of your case, the date, territory and application of the law to be applied.<sup>4</sup>
2. Obtain the relevant statutory text or texts, including the texts containing any amending, repealing, Commencement or transitional provisions.<sup>5</sup>
3. Identify the enactment which is the *unit of inquiry* in relation to your problem of statutory interpretation.<sup>6</sup> There may be two or more enactments which have to be read together.
4. Ascertain the relevant juridical factual outline, that is the factual outline laid down by the enactment which is the unit of inquiry or (where that has been the subject of judicial processing) the narrower factual outline laid down by the court.<sup>7</sup>
5. Ascertain the relevant legal thrust of the enactment.<sup>8</sup>
6. Relate the juridical factual outline to the relevant facts of the instant case.
7. Frame the crucial question of law.
8. Determine the *opposing constructions* of the enactment under inquiry.<sup>9</sup>

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<sup>1</sup> See Code s 139.

<sup>2</sup> See Code s 178.

<sup>3</sup> See Code s 421.

<sup>4</sup> As to the temporal, territorial and personal operation of Acts see Code s 30.

<sup>5</sup> The statutory texts are described in Code Pts II and III. As to commencement, amendments, repeals etc see Code Pt IV.

<sup>6</sup> For the enactment as the unit of inquiry see Code s 137.

<sup>7</sup> As to this see Code s 143.

<sup>8</sup> See Code s 144.

<sup>9</sup> As to the opposing constructions see Code s 149.

9. Decide whether there is a *real doubt* as to which of the opposing constructions embodies Parliament's intention.<sup>10</sup> If there is no real doubt that a particular construction of the enactment embodies the legislator's intention, that construction is to be followed. Otherwise it is necessary to proceed further.
10. Diagnose the cause of the doubt.<sup>11</sup>
11. If necessary, work out a *selective comminution* of the enactment under enquiry.<sup>12</sup>
12. Check the selective comminution (if one has been prepared) against the relevant facts of the instant case.
13. Work out an *interstitial articulation* for each of the opposing constructions.<sup>13</sup>
14. Identify the relevant *interpretative criteria*.<sup>14</sup>
15. Assemble from the relevant interpretative criteria, by applying the criteria to the text of the enactment and the relevant facts of your case, the *interpretative factors* that bear on the point of interpretation in question.<sup>15</sup>
16. Devise the arguments that support the factors which are in your favour and undermine those of your opponent.<sup>16</sup>

*In court*

17. Hand copies of the selective comminution (if prepared) to the court and your opponent, making clear that it consists only of the actual wording of the enactment subject to any necessary 'carpentry'. It may usefully be embodied in a skeleton argument.<sup>17</sup>
18. Explain the point of interpretation to the court by reference to the numbered clauses of the comminution.
19. Hand copies of the two articulations to the court and your opponent, making clear that they consist of the actual wording of the enactment elaborated as might have been done by the drafter if it had been desired to determine the point at issue by express words.
20. Present the arguments to the court, which, after hearing your opponent, will determine which of the opposing constructions (as articulated) is supported by the heavier weight of interpretative factors.<sup>18</sup>

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<sup>10</sup> For the concept of 'real doubt' see Code s 3.

<sup>11</sup> Causes of doubt are dealt with in Code s 150.

<sup>12</sup> For selective comminution see Code s 139.

<sup>13</sup> Interstitial articulation is described in Code ss 177 to 179.

<sup>14</sup> The concept of the interpretative criterion is explained in Code s 180.

<sup>15</sup> The nature of interpretative factors is explained in Code s 183.

<sup>16</sup> The weighing of interpretative factors is explained in Code s 186.

<sup>17</sup> For the skeleton argument see Code s 206.

<sup>18</sup> For a worked example see Code s 190.