

When is a Rule a Rule? American and Canadian Approaches

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A recent decision of the United States Court of Appeals for the Federal Circuit provides an opportunity to contrast how American and Canadian courts respond to the failure of a tribunal to comply with its own procedural rules. *Align Technology Inc. v. International Trade Commission*² vacated and remanded a decision of the International Trade Commission ("Commission") because it was contrary to the Commission's Rules of Practice and Procedure. This article examines the basis for that decision and compares it to recent jurisprudence of Canada's highest court.

The *Align* Consent Order

In 2006, Align filed a complaint with the Commission alleging that OrthoClear was infringing its patents and using its trade secrets. OrthoClear and Align came to a global settlement whereby OrthoClear assigned its complete intellectual property portfolio over to Align. The two companies agreed to enter a Consent Order and jointly file to end the Commissioner's investigation into the issue.³

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² 575 Fed. Appx. 899, 111 USPO 2d (BNA) 1855 (Fed Cir 2014) [*Align*].

³ *Align Technology Inc. v. International Trade Commission*, 111 USPO 2d (BNA) 1855 (Fed Cir 2014) at 4-5.

The Consent Order prohibited OrthoClear from importing particular dental appliances into the United States.⁴ It also prevented OrthoClear from aiding and abetting the sale and importation of infringing products into the United States.⁵

The ALJ's Order Dismissing The Intervenor's Motion

Align suspected that OrthoClear was violating the Consent Order and filed a new complaint with the Commission for a proceeding to enforce the Consent Order.⁶ The Commission began an investigation in the enforcement proceeding.

At the outset, the Commission sought a ruling that the conduct alleged - importation of digital data sets - was within the scope of the Consent Order. The Commission sought this ruling as an "initial determination".⁷

The Administrative Law Judge (ALJ) considered the scope of the Consent Order and sought briefing on the issue. Meanwhile, Intervenor, third-parties who were alleged to have violated the Consent Order by aiding and abetting, filed a motion with the ALJ to terminate the Commission's investigation alleging the conduct was outside of the consent order.⁸

The ALJ determined that the alleged conduct did fall within the Consent Order. However, the ALJ did not issue an "initial determination" as sought by the Commission. Instead, the ALJ issued an Order dismissing the Intervenor's motion to terminate the proceedings and scheduled the matter for trial.

The Commission revised the ALJ's Order and terminated the enforcement proceeding.

⁴ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 5.

⁵ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 5.

⁶ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 5.

⁷ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 6.

⁸ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 7.

The Court of Appeals Overturns the Commission's Review

Align appealed the Commission's termination of the enforcement proceeding. At issue before the Court of Appeals of the Federal Circuit was whether the Commission properly reviewed the ALJ's Order. The Commission's Rules of Practice and Procedure explicitly distinguished between rulings made as "initial determinations" and "orders". The Commission was only permitted to review initial determinations.

The Court of Appeals noted that it must overturn any finding or conclusion that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."⁹ Accordingly, the Court of Appeals held that the Commission could not review the ALJ's Order. This was because the Order was not an "initial determination" which could have been reviewed by the Commission.

The Commission argued that it had discretion to construe the ALJ's Order as an initial determination. However, the Court of Appeals disagreed. The Commission's rules explicitly stated that a denial of a motion to terminate, like the ALJ's Order, had to be issued as a non-reviewable "order".¹⁰

The Court of Appeals observed that the Commission could have achieved its purpose by explicitly "waiving, suspending or amending" its Rules of Practice and Procedure. The Commission had the ability to waive its rules if it found "good and sufficient" reason for doing so.¹¹ However, the Commission had not articulated any reason for reviewing the ALJ's Order. The Court of Appeals determined that there was no evidence that the Commission intended to invoke the waiver rule. The Commission's argument that it had been permitted to review the Order as an initial determination constituted "an improper post hoc rationalization of its behaviour".¹² Instead of waiving its rules, the Commission simply circumvented them.¹³

⁹ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 8.

¹⁰ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 8.

¹¹ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 10.

¹² *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 11.

¹³ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 12.

Alberta Teachers Association – Canada's Rules on Rules

A decision related to Alberta's teachers and access to information seems initially discrete from *Align*. However, *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*¹⁴ provides an authoritative Canadian comparison.

In *Alberta Teachers*, Alberta's Information and Privacy Commissioner performed an inquiry into whether the Alberta Teachers' Association disclosed private information in contravention of the provincial *Personal Information Protection Act*.¹⁵

The applicable section of the Act required that the adjudicator's inquiry be completed within 90 days from the day of a written request, unless certain notification was provided.¹⁶ The adjudicator purported to extend the time for the inquiry after the 90 day period was spent. The request for the inquiry was made in September 2006 and on February 7, 2007, the complainants were notified that their request was being processed. On August 1, 2007, the Commissioner wrote to the parties informing them that the 90-day period would be extended.¹⁷ While the Alberta Teachers Association was notified of the extension, it was not provided with any reason for the extension or why it was issued after the 90 days expired was provided.

The adjudicator ultimately determined that the Alberta Teachers Association had disclosed the complainants' personal information.¹⁸ After the adjudicator's decision was released, the Association sought judicial review of the adjudicator's order. The Association alleged that the adjudicator lost jurisdiction for failing to comply with the 90 day timeline.¹⁹

¹⁴ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*].

¹⁵ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 2, [2011] 3 SCR 654.

¹⁶ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 2, [2011] 3 SCR 654.

¹⁷ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 8, [2011] 3 SCR 654.

¹⁸ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 8, [2011] 3 SCR 654.

¹⁹ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 9, [2011] 3 SCR 654.

The Chambers Judge and Court of Appeal held that the adjudicator's order should be quashed. The Supreme Court of Canada overturned the Court of Appeal decision and reinstated the adjudicator's decision.

The Commissioner (or her delegate the adjudicator) had not complied with the statutory timeline for completing the inquiry. Nonetheless, the Supreme Court held that there was "a reasonable basis ... for the adjudicator's implied decision" to extend time for the inquiry after the time for doing so had expired.²⁰ Extending the time for conduct of the inquiry after the 90 days had passed did not terminate the process.²¹

The Supreme Court's willingness to accept the adjudicator's implied decision relates to the standard of review applied. The Supreme Court held that an administrative decision maker's interpretation of its own statutes or those closely connected with its function should be presumed to be a question of statutory interpretation subject to deference on judicial review.²² In Canada, defence to a tribunal's decision-making does not disappear just because a decision is an implied decision.²³ This presumption of deference is a rebuttable presumption.²⁴

It is notable that in Canada, there may exist a limited category of issues which are of central importance to the legal system as a whole and not within a tribunal's expertise, which could theoretically be shown less deference by the reviewing court.²⁵ It is clear that the decision in *Alberta Teachers* did not invoke such issues. It is also unlikely that the decision in *Align*, had the case been decided in Canada, would have been held to be of central importance to the legal system or not been deferred to.

²⁰ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 56, [2011] 3 SCR 654.

²¹ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 72, [2011] 3 SCR 654.

²² *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 34, [2011] 3 SCR 654.

²³ *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 63, [2013] 2 SCR 559.

²⁴ *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para 72, [2013] 3 SCR 895.

²⁵ *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42 at para 42. Other categories of decisions exist that may warrant more strict review by Canada's courts on a correctness standard, although comprehensive discussion of these categories is beyond the scope of this article.

Align and Alberta Teachers: A Comparison

In both *Align* and *Alberta Teachers*, the expectations of the litigants was likely that that the tribunals would comply with their own procedural rules. In the United States, these expectations were met. In Canada, they were not.

A few distinctions are apparent between the decisions in *Align* and *Alberta Teachers*:

- First, Canadian courts are generally more willing to show more deference to tribunal decision-making. In *Align*, the procedural error warranted the vacation of the tribunal's decision, which was remanded for further consideration. The Court of Appeals held that the tribunal did not have discretion to alter its rules: it is "a familiar rule of administrative law that an agency must abide by its own regulations."²⁶ In *Alberta Teachers*, the first determination made by the Supreme Court was regarding the level of deference that the courts owed to the tribunal. The Supreme Court held that it was appropriate to show deference to the adjudicator.
- Second, American courts are more willing to require compliance with express procedures for altering tribunal procedures. In *Align*, the Court of Appeals condemned the tribunal for failing to expressly waive its rules pursuant to the rules themselves. In *Alberta Teachers*, the Supreme Court permitted an implied decision, not found in the statute itself, to waive statutory requirements.
- Third, American courts are less willing to accept post hoc explanations for tribunal decision-making. In *Align*, the Court of Appeals expressed concerns about post hoc justifications of tribunal decision-making that could result from a lack of reasons for waiving procedural requirements.²⁷ In contrast, the Supreme Court appears to support post hoc justifications for tribunal conduct: "If there exists a reasonable basis on which the decision maker *could* have decided as it did, the court must not interfere."²⁸

²⁶ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 8.

²⁷ *Align Technology Inc. v. International Trade Commission*, 111 USPQ 2d (BNA) 1855 (Fed Cir 2014) at 11.

²⁸ *Alberta Teachers Association v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at para 53, [2011] 3 SCR. Although the Supreme Court does speak about the importance of reasons that are provided by a tribunal; in para. 54, it holds: "[w]hen there is no duty to give reasons ... or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review".

Align and *Alberta Teachers* may be distinguishable on the basis that the parties objected about procedural non-compliance at different stages of proceedings, implicating issues of waiver. In *Align*, the Commission's decision to review the ALJ's Order was immediately attacked by *Align*. However, in *Alberta Teachers*, the Alberta Teachers' Association delayed its challenge to the adjudicator granting herself an extension of time, and instead waited until after an unfavourable decision was issued in the inquiry. The Supreme Court condemned this approach, saying:

"The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons."²⁹

However, it is unlikely that this distinction alone is what resulted in the overturning of the Commission's decision but restoration of the decision of the Privacy Commissioner adjudicator. Rather, it appears that Canadian courts are fundamentally more deferential to tribunals on issues of process in Canada. That is, if a tribunal in the United States acts contrary to its own rules, judicial intervention and criticism is more likely. The basis for this distinction may be the subject of further commentary by the authors but explanations may include reference to politics and the functions of each country's administrative state.

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[a cautionary note](#)

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²⁹ Thus, the Supreme Court wants a party to raise its objection at the time it first arises before the tribunal. The question of whether immediately seeking judicial review of the adjudicator's decision is appropriate is another issue.