SULLIVAN ON THE CONSTRUCTION OF STATUTES

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by

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CHAPTER 1

Reading Words in Their Entire Context: An Overview of this Book

§1.1 The modern principle requires legislative texts to be read in their entire context. Most of this book is an attempt to flesh out what that means and what it entails: forming an initial impression of the words to be interpreted, reading legislative texts in light of the conventions relied on in drafting them, identifying permissible context and drawing appropriate inferences from context. However, the book also considers the operation of legislation (when it comes into force and ceases to be in force) and the rules governing the temporal, territorial and personal application of legislation.

§1.2 The purpose of this chapter is to provide an overview of the topics dealt with and their relationship to one another.

THE MODERN PRINCIPLE

§1.3 Chapter 2 is an analysis of Driedger's modern principle: its roots in the common law evolution of statutory interpretation, what the principle entails, how it differs from the plain meaning rule, why that is a good thing, its endorsement by the Supreme Court of Canada in the *Rizzo* case and its partial repudiation by that Court in *Bell ExpressVu*. The key difference between the modern principle and the plain meaning rule is that the former does not depend on a distinction between ambiguous and unambiguous texts. This is an unnecessary distinction that is impossible for courts to draw in a principled way.

INITIAL IMPRESSIONS OF MEANING

§1.4 Chapters 3 to 7 are about forming an initial understanding of the meaning of the text to be interpreted. Words in legislative texts are given either their ordinary meaning or a technical meaning; an important subclass of technical meaning is legal meaning. There is a presumption in favour of the ordinary meaning of the text, which is examined in detail in Chapter 3. That chapter also considers techniques for establishing and proving ordinary meaning, including the role of dictionary meaning. Chapter 4 sets out the circumstances in which words are given a legal or other technical meaning, indicates how such meanings are proven and reviews interpretive issues raised by statutory definitions and by terms such as "may/shall", "and/or" and "deems".

§1.5 Chapter 5 deals with establishing an initial understanding of meaning when the legislation is bilingual or both bilingual and bijural. In bilingual legislation, it is important to read both language versions to identify the shared meaning, which is presumed to be the intended meaning. However, when it comes to private law legal terminology in federal legislation, rather than seeking a shared meaning, it is important to respect the distinct meaning of such terminology in Quebec and in the common law provinces respectively.

§1.6 If the current meaning of a word differs from its original meaning, the courts must determine which meaning to adopt. Modern courts tend to favour a dynamic approach, allowing legislation to adapt to changing circumstances. However, there are circumstances in which original meaning more appropriately prevails. These issues are examined in Chapter 6.

§1.7 Chapter 7 considers the plausible meaning rule. Although it is sometimes permissible to reject or read down the ordinary meaning of a word, in principle the meaning adopted by a court must be plausible from a linguistic point of view. In practice, however, courts sometimes adopt a "strained" interpretation, that is, one that stretches the limits of plausibility.

How to Read Words in Context

§1.8 Having established an initial understanding of the words to be interpreted, the next step is to read them in context. However, before considering what the context is and how it is relevant, Chapters 8 to 12 describe the types of analysis relied on in statutory interpretation. The most important of these is probably textual analysis, dealt with in Chapter 8. In analyzing a legislative text, an interpreter must recognize that a statute is a distinct literary genre, which must be read in light of the conventions of legislative drafting that prevail in the enacting jurisdiction – ideally the conventions that prevailed at the time the legislation was enacted or revised. Part 1 of Chapter 8 reviews current Canadian drafting conventions while Part 2 looks at examples of their application.

§1.9 The words of a legislative text must also be read so as to promote the purpose of the legislation and avoid unintended undesirable consequences. Chapters 9 and 10 deal with purposive and consequential analysis.

§1.10 Textual, purposive and consequential analyses are appropriately brought to bear on every exercise in statutory interpretation.

§1.11 Chapter 11 describes the techniques used by courts to identify and resolve conflicts between legislative provisions. Chapter 12 describes the circumstances under which courts may fix mistakes or fill gaps in a legislative text. It also deals with the response of the courts to citizens' attempts, outside the context of taxation, to attract or avoid the application of legislation.

WHAT COUNTS AS CONTEXT

§1.12 In the first and second editions of this text, Driedger distinguished between the internal "literary" context and the external context, which was classified as factual, social, intellectual, legal and linguistic. The intellectual context referred to admissible extrinsic aids, the linguistic context to dictionaries. This classification is interesting because it is based not only on the type of material looked at but also on the use to which the material is put. The following account of context preserves this dual focus.

§1.13 The **literary context** consists of any legislative text that may be looked at for the purpose of carrying out a textual analysis. This includes the immediate context,[1] the Act as a whole, including its components, and the statute book as a whole. Literary context is based on the notion that statutes are a literary genre, with a distinct structure and purpose and a distinct set of drafting conventions. In this respect, at least, legislation resembles poetry.

§1.14 From a literary perspective, the components of an Act obviously form part of the Act as a whole. Historically, however, from a legal perspective they were considered to be external. The rules regarding their use in interpretation are still evolving and are dealt with separately in Chapter 13. Chapter 14 deals with the Act as a whole and the statute book as a whole.

§1.15 The **legal context** consists of the substantive law that may be looked at for the purpose of inferring legislative intent. It includes constitutional law, common law (along with the *Civil Code* in Quebec), related statute law and international law. On occasion it includes the law of a foreign jurisdiction. Importantly, it includes the presumptions of legislative intent, which continue to function as common law constitutional law.

§1.16 The legal context is relevant to statutory interpretation in primarily two ways. First, it is sometimes the source of legislation, as when common law rules or concepts are codified, legislation from another jurisdiction is relied on as a model or an international law convention is implemented. Second, it supplies the legal norms which inform statutory interpretation. These norms are relevant because they are part of the legal culture in which law makers as well as interpreters operate. They take both a positive and a negative form: courts presume that legislatures want to do the right thing, such as comply with constitutional limits on their jurisdiction or with Canada's international law obligations; they also presume that legislatures want to avoid violating constitutional norms such as rule of law — by expropriating property without compensation, for example, or enacting retroactive legislation.

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[1] The immediate context is as much of the text surrounding a word as is needed to make sense of the word. It is explained in Chapter 2.

§1.17 Chapter 15 deals with the concepts of presumed intent and strict versus liberal construction. It points out that both are ways to ensure that important legal norms are taken into account in the interpretive equation. It then looks at some examples, including strict construction of penal legislation, liberal construction of social welfare legislation and the presumptions of fault.

§1.18 Chapters 16, 17 and 18 deal with the relation between legislation and entrenched constitutional law, common law and international law respectively. While there is a clear hierarchy among these sources of law, the courts prefer to harmonize them when possible. Hence the presumptions of compliance with constitutional and international law and the presumption that the legislature does not intend to change the common law.

§1.19 Chapters 19 to 21 address types of legislation that have attracted special rules because of underlying legal norms: human rights legislation, legislation dealing with aboriginal peoples and fiscal legislation.

§1.20 It is sometimes suggested that the legal norms relied on in statutory interpretation do not form part of the context in which the legislative text must be read, that they are to be taken into account only if the text remains "genuinely" ambiguous after considering the purpose and context. There is no justification for this suggestion, and indeed none is offered by those who make the suggestion. Norms do in fact figure in the preparation and drafting of legislation and they have been part of the common law of statutory interpretation for centuries. To exclude them from consideration in the absence of genuine ambiguity is not only unjustified, but is also based on the false premise that it is possible to draw a bright line between ambiguous and clear texts or between genuine and specious ambiguity. Norms should be considered part of the legal context, although they should receive only as much weight as the circumstances warrant.

§1.21 The **external context** consists of the setting in which legislation was enacted– the social, economic, political realities that inform the legislation and the circumstances specifically addressed by the legislation. It also includes the setting in which the legislation was intended to operate and in fact operates. The key assumption here is that legislation is not an academic exercise. It is a response to circumstances in the real world and it necessarily operates within an evolving set of institutions, material circumstances and cultural assumptions. This context is dealt with in Chapter 22.

§1.22 Extrinsic aids are things outside the legislative text, such as legislative evolution and legislative history that provide direct or indirect evidence of legislative intent. Although few extrinsic aids were admissible when Driedger first formulated the modern principle, they are now generally considered part of the entire context of a legislative text. They are dealt with in Chapter 23.

THE OPERATION AND APPLICATION OF LEGISLATION

§1.23 The operation of legislation refers to the events in the life span of a provision, whether it is part of a statute or a regulation. There are four possible events: enactment, coming into force, re-enactment and repeal. The rules of operation determine the legal significance of these events. The application of legislation refers to the relationship between an enactment and the facts that come within its scope. The rules of application delineate the territory to which the enactment applies, the persons who must obey it and the facts that are subject to its temporal operation. These rules take the form of presumptions of intent that are grounded in legal norms such as territorial sovereignty and rule of law. They could therefore be considered part of the legal context, which was the approach Driedger took. However, the temporal and territorial application rules in particular are more than vehicles for introducing legal norms into the interpretive process. They address complex practical problems that arise in situating legislation in time and space. Because of their complexity, these problems attract a good deal of scholarly analysis and produce a great deal of confusion. Operation and application are therefore dealt with in the final chapters of the book.

§1.24 It would make sense in a book on statutory interpretation to address the issues of operation and application at the outset. However, Driedger structured his editions around the modern principle and it has continued to hold pride of place in subsequent editions.

§1.25 Chapter 24 describes the legal effects of enactment, coming into force, re-enactment and repeal and considers how these events operate in the context of amendment, implied repeal, statute consolidation and revision and codification.

§1.26 Chapter 25 deals with the presumptions against the retroactive and retrospective application of legislation and interference with vested rights. It traces the evolutional of transitional law in Canada and explores the sources of confusion in current Canadian law. Chapter 26 deals with the presumption against the extra-territorial application of legislation. Chapter 27 deals with the presumption of Crown immunity.

CHAPTER 2

Driedger's Modern Principle

ANALYSIS OF THE MODERN PRINCIPLE

§2.1 ***Introduction.*** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has even been applied to interpretation of Quebec's Civil Code.[3]

§2.2 The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account

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1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67. This principle was reproduced in the second edition, published in 1983, without modification at p. 87.

2 [1998] S.C.J. No. 2, at para. 21, [1998] 1 S.C.R. 27, at 41 (S.C.C.). For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

3 See *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257, at para. 20*ff.* (S.C.C.).

the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.

§2.3 The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own — one over which the reader has substantial control. Research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. While these expectations are rooted in linguistic competence and shared linguistic convention, they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read and influences in particular his or her impression of ordinary meaning — what Driedger calls the grammatical and ordinary sense of the words.

§2.4 A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

§2.5 A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. In the second edition he wrote:

> It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
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> - the expressed intention — the intention expressed by the enacted words;
> - the implied intention — the intention that may legitimately be implied from the enacted words;
> - the presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and

- the declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.[4]

Presumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Their primary source, however, is the common law.[5] Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for the strict and liberal construction doctrine and the presumptions of legislative intent. These norms are an important part of the context in which legislation is made and read.

§2.6 The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. A serious weakness of the modern principle is its failure to acknowledge and address the dilemma created by hard cases.

§2.7 The modern principle may also be criticized for encouraging the assumption that statutory interpretation consists of resolving doubt about the meaning of words. A significant number of interpretation disputes involve attempts to read down clear, but over-inclusive provisions or to supplement clear, but under-inclusive ones. Other disputes address the relationship between overlapping provisions or between legislation and the common law. Occasionally the issue is whether the drafter has made a mistake or there is a gap in the legislative scheme.

§2.8 ***Relation of the modern principle to the rules of statutory interpretation.*** Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:

- what is the meaning of the legislative text?
- what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

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4 Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 106. [Bullets added.]

5 This is true in Quebec in matters of public law, which is derived from common law sources. In matters of private law, the *Civil Code of Québec* is the primary source of legal norms.

- what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes.

§2.9 At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

§2.10 These several dimensions of statutory interpretation are not accidental or arbitrarily chosen. As Driedger indicated in his initial formulation of the modern principle, they reflect the evolution of statutory interpretation over many centuries.

THE EVOLUTION OF STATUTORY INTERPRETATION

§2.11 ***Equitable construction.*** Historically, common law courts recognized and practised four distinct approaches to statutory interpretation. First, there was the approach known as "equitable construction" which subsequently evolved into "the mischief rule". The definitive exposition of this approach is found in *Heydon's Case*[6] where the Court described the task of interpreting statutes in the following expansive terms:

> ... [T]he office of all the Judges is always to make such construction as shall suppress the mischief [for which the common law did not provide] and advance the remedy [chosen by Parliament to cure the disease of the commonwealth], and to suppress subtle inventions and evasions for continuance of the mischief, *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[7]

In equitable construction, the words of the legislative text are less important than achieving Parliament's actual intentions. Accordingly, legislation is construed so as to promote legislative purpose, cure any over- or under-inclusions in the im-

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6 (1584), 3 Co. Rep. 7a, 76 E.R. 637, discussed *infra*, Chapter 9, at §9.4–9.5.

7 *Ibid.*, at 638 (E.R.).

plementing provisions and suppress attempts by citizens to avoid the intended impact of the legislation. This approach was appropriate in an era when judges were active participants in law-making and texts were difficult to access and apt to be unreliable.[8]

§2.12 ***Natural law rights.*** By the 18th century, with the establishment of Parliament as a separate and primary source of power, there was less room for equitable construction. At the same time, however, judges were strongly influenced by the natural law theory espoused by Locke at the end of the seventeenth century. As Corry explains:

> The Stuart theory of the state was laid low in the revolution of 1688, and a new constitution and a new political theory took its place. The new political theory was fashioned by Locke who found in reason clear proof that men have certain rights which are beyond the reach of all governments.... This theory justified the revolution and became an article of faith in the eighteenth century [when] there grew to full flower that intense attachment of the common law to the liberty and the property of individuals.... Some things were so contrary to reason that Parliament could not be deemed to have intended them unless the words were painfully clear.[9]

This belief in reason and fundamental rights founded upon reason became the basis for the doctrine of strict construction and for a number of presumptions aimed at preserving the life, liberty and property of citizens from state interference.

§2.13 ***The plain meaning rule.*** In the nineteenth and twentieth centuries two doctrines dominated judicial thinking: parliamentary sovereignty and the rule of law. These doctrines paved the way for literal construction and the evolution of both the "plain meaning rule" and the "golden rule". Under the plain meaning rule, a court is obliged to stick to the "literal" meaning of the legislative text in so far as that meaning is clear. As explained by Chief Justice Tindal in the *Sussex Peerage* case:

> My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordi-

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8 For many centuries, legislation was recorded by hand on a Parliamentary scroll, and the clerk who did the recording controlled such matters as headings, marginal notes and punctuation. Before the printing press made accurate reproduction possible and inexpensive, copies of legislation were hard to come by and inevitably contained numerous variations and mistakes.

9 J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), 1 U. of Toronto L. J. 286, at 296-97.

> nary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.[10]

If the words of a legislative text are clear and unambiguous, the court must apply them as written despite any contrary evidence of legislative intent and regardless of consequences.

§2.14 Most proponents of the plain meaning rule emphasize Chief Justice Tindal's suggestion that courts should adhere to the plain meaning of the text because it offers the best evidence of the lawgiver's intent. Another justification for sticking to the plain meaning is rule of law and the need for certainty and predictability. Citizens should be able to rely on the apparent meaning of the legislation that governs them.[11]

§2.15 The uncompromising character of the plain meaning rule was emphasized by Lamer C.J. in *R. v. McIntosh* when he wrote:

> [W]here, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be.... The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.[12]

In *McIntosh*, the majority conceded that their reading of the legislation led to absurd results — results that no rational legislature could have intended. But because the meaning (in their view) was plain, they refused to look at any evidence of legislative intent other than the text itself.

§2.16 ***The golden rule.*** While many courts and judges profess to be strongly committed to the plain meaning rule, this commitment invariably wavers when the consequences of applying the plain meaning are found to be intolerable. In such cases, resort is had to the so-called golden rule, which permits courts to depart from the apparent meaning of a text to avoid absurd consequences. As explained by Lord Wensleydale in *Grey v. Pearson*:

> [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.[13]

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10 *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034.

11 This justification would be quite compelling were it not for the fact that individuals form different impressions of what a text means and have different intuitions about how "plain" (or incontestable) their particular impression might be.

12 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at para. 34 (S.C.C.).

13 (1857), 6 H.L. Cas. 61, at 106, 10 E.R. 1216, at 1234, discussed *infra*, Chapter 10, at §10.8.

The golden rule is grounded in the supervisory and mediating roles of the courts. Courts supervise the other players in the system by ensuring that those who exercise powers conferred by the legislature do so within the limits of those powers. Courts also complete the act of law-making by mediating between the rule as enacted — which is an abstraction inferred from a string of words — and the facts of the case in so far as they are known. As the Supreme Court of Canada noted in the *Secession Reference*, the judicial mandate in a constitutional democracy involves not only respect for democratic institutions — the most important of which is the legislature — but also adherence to the rule of law and other common law norms.[14] The legitimacy of courts derives in part from their duty to ensure an appropriate observance of, and balance among, these (sometimes conflicting) norms.

§2.17 ***Golden rule as safety net.*** Although the inconsistency between the plain meaning rule and the golden rule is evident, there are few judges who do not rely on one or the other as need arises. There is a point at which even the most committed literalist is prepared to sacrifice "literal" meaning to avoid the unthinkable. For example, on numerous occasions both before and after he wrote the majority judgment in *R. v. McIntosh*, Lamer C.J. was prepared to abandon the plain meaning of a text if it seemed the right thing to do. In *R. v. Paul*, he relied on the following passage from Maxwell[15] to virtually redraft s. 645(4)(c) of the *Criminal Code*:

> 1. Modification of the Language to Meet the Intention
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> Where the language of a statute, in its ordinary and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify.[16]

This willingness to modify meaning or sentence structure in order to avoid absurd results seems to be an unavoidable aspect of interpretation. Although the legislature is sovereign, it is not omniscient; it cannot envisage and provide for,

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14 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at 247 (S.C.C.). For additional discussion of the role of norms in interpretation, see *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at paras. 33-34 (S.C.C.).

15 See P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969), at p. 228.

16 *R. v. Paul*, [1982] S.C.J. No. 32, [1982] 1 S.C.R. 621, at 662 (S.C.C.). See also *Michaud v. Quebec (Attorney General)*, [1996] S.C.J. No. 85, [1996] 3 S.C.R. 3, at 30-31 (S.C.C.), where Lamer C.J. justified adding a third exception to a list of exceptions in s. 187(1)(a) of the *Criminal Code* because "a stark, literal reading" would not promote the purpose of the provision.

or against, every possible application of its general rules. It must rely on official interpreters to mediate between the text and the facts in particular cases so as to ensure an outcome that does not bring the law into disrepute.

§2.18 Each of the approaches described above — equitable construction, presumed intent, the plain meaning rule and the golden rule — emphasizes a particular aspect of interpretation at the expense of the others. Under the modern principle, however, these approaches are to be integrated. Today, as the modern principle indicates, legislative intent, textual meaning and legal norms are all legitimate concerns of interpreters and each has a role to play in every interpretive effort.[17]

§2.19 ***Methodology entailed by the modern principle.*** In practice, the modern principle requires courts to look at the entire context of the text to be interpreted. This point has been acknowledged by the Supreme Court of Canada. The following, from the majority judgment of Bastarache J. in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, is representative:

> This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading.... I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.[18]

If these contextual factors all point to the same interpretation, the work of the court is done. However, in hard cases the contextual factors point in different directions. In such cases, reading the text harmoniously with the scheme and object of the Act and the intention of the legislature requires a balancing act. Ideally, a court will acknowledge the factors that do not support its interpretation, as well as those that do, and will make an effort to indicate why some factors receive more weight than others.

§2.20 If the ordinary meaning of a text seems clear, if its meaning appears to be "plain", then a court is justified in attaching significant weight to this apparent meaning. The clearer it is, the greater the weight it receives. The weight accorded to the text is also affected by factors such as the following:

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17 See *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 34 (S.C.C.): "The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms."

18 [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140, at para. 48 (S.C.C.). See also *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533, at para. 43 (S.C.C.); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] S.C.R. 141, at para. 9*ff.* (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84, at para. 34 (S.C.C.).

- How the text is drafted and in particular how detailed it is, how concrete and precise the language is.
- The audience to which the text is addressed, whether the public in general, a narrow and specialized section of the public or those charged with administering the legislation.
- The importance of certainty and predictability in the context.

If the text is precise and is addressed to a specialized audience that would understand it in a certain way and reasonably rely on that understanding, then the ordinary (or technical) meaning of the text appropriately receives significant weight. However, it does not follow that it should prevail over other considerations — that depends on the weight appropriately afforded to the other considerations.

§2.21 For example, if the legislature's intention seems clear and relevant to the problem at hand, a court is justified in assigning it significant weight even if the clear ordinary (or technical) meaning is at odds with that intention. How much weight depends on:

- where the evidence of legislative intent comes from and how cogent and compelling it is; and
- how directly the intention relates to the circumstances of the dispute to be resolved.

If the evidence of intention comes from a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor appropriately receives considerable weight.

§2.22 Finally, courts are concerned by violations of rationality, coherence, fairness and other legal norms. The weight attaching to this factor depends on considerations such as:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law;
- the seriousness of the violation;
- the circumstances and possible reasons for the violation; and
- the weight of competing norms.

If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor should receive significant weight and may in a given case out-weigh a clear ordinary (or technical) meaning. Conversely, if there are equally important norms that point in a different direction, the factor appropriately receives less weight.

The Relationship Between the Modern Principle and the Plain Meaning Rule

§2.23 ***The plain meaning rule.*** The plain meaning rule (also referred to as textualism or the textualist approach) means different things to different people, but its proponents generally agree on the following propositions:

1. Upon reading a legislative text it is possible to determine the meaning of the text and whether it is plain or ambiguous.
2. If a text has a plain meaning, extra-textual[19] evidence of legislative intent is inadmissible to contradict that meaning. The plain meaning constitutes definitive evidence of legislative intent and it is impermissible to rely on other factors to contradict it. Furthermore, other factors may not be relied on to "create" ambiguity — that is, cast doubt on the meaning of a text that is otherwise plain.
3. If a text is ambiguous, interpretation is required. In interpretation, extra-textual factors may be relied on to resolve the ambiguity.

Judges often rely on the plain meaning rule without formally invoking it or acknowledging its role in their analysis. When judges refuse to look at evidence of legislative intent on the grounds that the text is clear, they effectively rely on the plain meaning rule. When judges say that the headings of an enactment or its legislative evolution may be used to resolve ambiguity but not to create it, they are relying on the plain meaning rule.

§2.24 For many years after the initial edition of Driedger's *Construction of Statutes*, Canadian courts struggled with the relationship between the modern principle and the plain meaning rule. In cases involving the *Income Tax Act*, the modern principle was often understood to be consistent with, or even synonymous with, the plain meaning rule.[20] In the context of penal legislation, especially the *Criminal Code*, a similar misconception sometimes prevailed.[21] In other contexts, however, the courts found it easier to acknowledge that the approach to interpretation embodied in the modern principle is inconsistent with and effectively repudiates the plain meaning rule.[22]

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19 The variable reference of "extra-textual" is considered below at §2.26-2.30.

20 See, for example, *Canada v. Antosko*, [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312 (S.C.C.); *Friesen v. Canada*, [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103 (S.C.C.); *Alberta (Treasury Branches) v. Canada (Minister of National Revenue – M.N.R.)*, [1996] S.C.J. No. 45, [1996] 1 S.C.R. 963 (S.C.C.).

21 See *R. v. McIntosh*, [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at para. 34 (S.C.C.).

22 See, for example, *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] S.C.J. No. 111, [1996] 3 S.C.R. 727 (S.C.C.). In the criminal law context, compare *R. v. McIntosh*, [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686 (S.C.C.) to *Michaud v. Quebec (Attorney General)*, [1996] S.C.J. No. 85, [1996] 3 S.C.R. 3 (S.C.C.), and see *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652 (S.C.C.).

§2.25 ***Problems with the plain meaning rule.*** While the modern principle is far from perfect, it is superior to the textualist approach embodied in the plain meaning rule for two important reasons. First, it does not permit courts to manipulate the context in which the legislative text is considered, which is a recurring practice of courts when applying the plain meaning rule. Second, it does not require courts to distinguish between what is and is not ambiguous, a distinction which courts are not equipped to draw in any principled or consistent way. Texts are not either plain or ambiguous. They are more or less plain, more or less ambiguous. This is a fact about language that may be ignored, but cannot be changed.

§2.26 The problems with the textualist approach are well-illustrated in the case law of the Supreme Court of Canada in the 1990s. Under both the modern principle and the plain meaning rule, a court often begins its interpretive exercise by identifying the particular words whose meaning is in dispute. Once those words have been identified, if the court is taking a textualist approach, the next thing it must do is decide how much of the context should be looked at in determining whether the meaning is clear or ambiguous. Sometimes the doubtful word or phrase is looked at in isolation; sometimes it is considered in light of the subsection or section in which it appears; in other cases, the Act as a whole is considered.

§2.27 In *R. v. McCraw*,[23] for example, the issue was whether a threat to rape a person was contrary to s. 264.1 of the *Criminal Code*. Under this section, it was an offence to utter a "threat to cause death or serious bodily harm to any person". The defendant argued that the words "serious bodily harm" must exclude psychological harm, in part because the phrase was coupled with "death". Cory J. wrote:

> The appellant urged that serious bodily harm is *ejusdem generis* with death. I cannot accept that contention. The principle of *ejusdem generis* has no application to this case. It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words "serious bodily harm" are not in any way ambiguous.[24]

Here the text to be interpreted consisted of the noun phrase "serious bodily harm". Everything outside those words, from the rest of the sentence to the Act as a whole, as well as purpose and consequences, was effectively out of bounds in making the initial determination of meaning. These extraneous matters could come into play only if the text turned out to be ambiguous. The basis on which Cory J. concluded that the phrase "serious bodily harm" is in no way ambiguous is far from clear.

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23 [1991] S.C.J. No. 69, [1991] 3 S.C.R. 72 (S.C.C.).

24 *Ibid.*, at para. 18.

§2.28 Compare Cory J.'s approach in *McCraw* to Lamer C.J.'s in *R. v. McIntosh*.[25] In the latter case, the doubtful words were "everyone who is unlawfully assaulted" in s. 34(2) of the *Criminal Code*. The subsection was one of a series of provisions establishing the defence of self-defence. The issue was whether a defendant who provoked the attack from which he then had to defend himself could take advantage of s. 34(2) or had to meet the more onerous requirements of s. 35, expressly dealing with self-defence from a provoked assault. Historically s. 34(2) had been limited to unprovoked assaults. Speaking for the majority, Lamer C.J. began his analysis with the following observation:

> As a preliminary comment, I would observe that ss. 34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 (as discussed below) is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, 'Well, it seems to me these sections of the *Criminal Code* are unbelievably confusing.' I agree with this observation.[26]

Yet despite the excessive detail and unbelievable confusion, Lamer C.J. found s. 34(2) to be clear:

> Section 34(2) is clear, and I fail to see how anyone could conclude that it is, on its face, ambiguous in any way. Therefore, *taking s. 34(2) in isolation*, it is clearly available to an initial aggressor.[27]
>
> [Author's emphasis]

Here the words to be interpreted are considered in the context of the subsection in which they appear but everything else is excluded.[28]

§2.29 In *Ontario v. Canadian Pacific Ltd.*,[29] the context to be taken into account once again is different. One of the issues in the case was how to interpret the words "for any use" in s. 13(1) of Ontario's *Environmental Protection Act*. Lamer C.J. wrote:

> [T]he first task of a court construing a statutory provision is to consider the meaning of its words *in the context of the statute as a whole*. If the meaning of

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25 [1995] S.C.J. No. 16, 1 S.C.R. 686 (S.C.C.).

26 *Ibid.*, at para. 16.

27 *Ibid.*, at para. 19.

28 The *McIntosh* case illustrates the danger of assuming that every statutory interpretation dispute is about the meaning of words. Here, as Lamer C.J. himself acknowledges, the problem was the unclear relationship among the provisions dealing with self-defence. See §2.7 above.

29 [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.).

> the words when they are considered in this context is clear, there is no need for further interpretation.[30]
>
> ...
>
> Although the word "use" is somewhat ambiguous when considered on its own, the expression "for any use ..." has, in my view, an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other subsections of s. 13(1).[31]
>
> [Author's emphasis]

As Lamer C.J. acknowledges in this passage, one's impression of what a text means and whether it is plain depends on the context in which it is considered. Words isolated from the provision in which they appear may create a different impression when they are read in the context of the complete provision or the Act as a whole; and this impression may change if the context is enlarged to include legislative history or other sources of law. Yet in applying the plain meaning rule, the courts regularly adjust this context, usually without acknowledging the significance of such adjustments on intuitions about meaning.

§2.30 Sometimes the plain meaning of a text is determined having regard to the legislature's purpose, but in other cases purpose can be considered only if the text is first determined to be ambiguous. Sometimes the consequences to which a particular interpretation would lead are relevant in assessing its plainness, but sometimes not. Compare the following pronouncements on the role of purpose, each from a Supreme Court of Canada judgment decided in the 1990s and purporting to apply the modern principle.

> In approaching the interpretation of any statutory provision, it is prudent to keep in mind the simple but fundamental instruction ... affirmed by this Court in *Hirsh v. Protestant Board of School Commissioners*:
>
> > ... it is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment. [32]
>
> [T]he object and purpose of a provision need only be resorted to when the statutory language admits of some doubt or ambiguity.[33]
>
> When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose.[34]

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30 *Ibid.*, at para. 11.

31 *Ibid.*, at para. 16.

32 *R. v. Adams*, [1995] S.C.J. No. 105, [1995] 4 S.C.R. 707, at para. 23 (S.C.C.).

33 *Friesen v. Canada*, [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103, at 137 (S.C.C.).

34 P. Hogg and J. Magee, *Principles of Canadian Income Tax Law* (Toronto: Carswell, 1995), cited in *Friesen v. Canada*, [1995] S.C.J. No. 71, [1995] 3 S.C.R. 103, at 137 (S.C.C.); *Alberta*

> [W]hen there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose... [In this case] neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament."[35]

This last passage captures the incoherence of efforts to rely on both the plain meaning rule and Driedger's modern principle. It appears to say that purpose is irrelevant if the meaning is clear, but purpose is essential in determining the meaning. Both statements cannot be true.

§2.31 ***The plain meaning rule is incompatible with the modern principle: Rizzo.*** The incompatibility between the modern principle and the plain meaning rule was definitively established by the Supreme Court of Canada in what has become the leading case on statutory interpretation, *Re Rizzo & Rizzo Shoes Ltd.*[36] The issue in *Rizzo* was whether employees who lost their job because their employer was put into bankruptcy by a creditor were entitled to termination and severance pay under Ontario's *Employment Standards Act*. The provisions establishing these entitlements seemed to make termination by the employer a condition precedent:

> 40(1) *No employer shall terminate* the employment of an employee ... unless the employer gives [notice] ....
>
> (7) Where the employment of an employee is terminated contrary to this section, the employer shall pay termination pay....
>
> 40a (1a) *Where, ... fifty or more employees have their employment terminated by an employer* in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business ... the employer shall pay severance pay ....
>
> [Author's emphasis]

The Court of Appeal relied on the plain meaning of the italicized words to conclude that the *Employment Standards Act* entitled employees to termination and severance pay only if their jobs were terminated by their employer rather than lost due to involuntary bankruptcy. The Supreme Court of Canada rejected this interpretation. It declared that relying on what appears to be the plain meaning

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(Treasury Branches) v. Canada (Minister of National Revenue – M.N.R.), [1996] S.C.J. No. 45, [1996] 1 S.C.R. 963, at 976 (S.C.C.); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] S.C.J. No. 25, [1997] 1 S.C.R. 411, at 441-42 (S.C.C.).

35 *Alberta (Treasury Branches) v. Canada (Minister of National Revenue – M.N.R.)*, [1996] S.C.J. No. 45, [1996] 1 S.C.R. 963, at 976-77 (S.C.C.).

36 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 (S.C.C.).

of a legislative text is an unacceptable approach because it is incomplete. Iacobucci J. wrote:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.[37]

Iacobucci J. then turned to Driedger's modern principle, which he characterized as best encapsulating the approach on which he preferred to rely. His approval of Driedger was based on the latter's recognition "that statutory interpretation cannot be founded on the wording of the legislation alone."[38] He also relied on s. 10 of the Ontario *Interpretation Act*[39] which directs that every Act receive the interpretation that best ensures the attainment of its objects. He concluded with the following criticism of the Court of Appeal's approach:

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.[40]

§2.32 Iacobucci J. analyzed the purpose of the Act as a whole and the particular provisions to be interpreted; he also considered the consequences that would flow from adopting the plain meaning, pointing out that "...[i]t is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences."[41] He affirmed that "the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court."[42] Finally, he noted that benefit-conferring legislation such as the *ESA* attracts a liberal interpretation, such that any doubt arising from difficulties of language should be resolved in favour of the claimant. He concluded with the following appeal to reason and fairness:

> In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and

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37 *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at para. 20 (S.C.C.).
38 *Ibid.*, at para. 21.
39 Now s. 64 of Ontario's *Legislation Act*.
40 *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at para. 23 (S.C.C.).
41 *Ibid.*, at para. 27.
42 *Ibid.*, at para. 31.

> those who have been terminated for some other reason would be arbitrary and inequitable.[43]

The Supreme Court of Canada's approach in the *Rizzo* case is exactly what is called for by the modern principle. Even though the language of ss. 40 and 40a of the *Employment Standards Act* seemed clear, even though it expressly made termination "by the employer" a condition precedent of entitlement to termination or severance pay, the Court nonetheless looked at the entire context, including the purpose and scheme of the Act, relevant legal norms, and the consequences of adopting one interpretation as opposed to another.[44]

§2.33 *Backsliding into ambiguity: Bell ExpressVu.* After the *Rizzo* case, one would have expected the question of whether a text is ambiguous to have no bearing on the question of what a court should look at in resolving the statutory interpretation problem. In every case, the entire context is to be taken into account. Yet the courts frequently backslide, especially when it comes to reliance on legal norms and extrinsic aids. In *Re Canada 3000 Inc.*,[45] for example, dealing with s. 56 of the *Civil Air Navigation Services Commercialization Act*, the Court refused to factor in respect for private rights, a well-established common law norm, because the words to be interpreted no longer seemed ambiguous once the textual and purposive analyses were complete. Binnie J. wrote:

> The Ontario motions judge applied a narrow approach to the Detention Remedy on the basis that it invades what would otherwise be the proprietary rights of the legal titleholders.... However, only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". ... [46]

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43 *Ibid.*, at para. 41.

44 The import of Driedger's modern principle is well captured by Nova Scotia's version of the all-statutes-are-remedial provision found in all Canadian Interpretation Acts. See s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

45 [2006] S.C.J. No. 24, [2006] 1 S.C.R. 865 (S.C.C.).

46 *Ibid.*, at para. 84.

In *Charlebois v. Saint John (City)*,[47] the majority of the court refused to presume compliance with Charter values in interpreting a provision of New Brunswick's *Official Languages Act*. Charron J. wrote:

> In this case, it is particularly important to keep in mind the proper limits of *Charter* values as an interpretative tool....
>
> ... In this respect, Daigle J.A. [in the court below] properly instructed himself and rightly found ... that the contextual and purposive analysis of the *OLA* "removed all ambiguity surrounding the meaning of the word 'institution'".[48] Absent any remaining ambiguity, *Charter* values have no role to play.[49]

In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*,[50] the Supreme Court of Canada refused to look at extrinsic material on the grounds that the language to be interpreted was not ambiguous.

§2.34 Each of these exclusions relies on the following passage from *Bell ExpressVu Limited Partnership v. Rex* where, again speaking for the Supreme Court of Canada and purporting to apply the modern principle, Iacobucci J. wrote:

> The preferred approach [the modern principle] recognizes the important role that context must inevitably play when a court construes the written words of a statute....
>
> Other principles of interpretation – such as the strict construction of penal statutes and the "Charter values" presumption – only receive application where there is ambiguity as to the meaning of a provision....
>
> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" .... The words of the provision must be "reasonably capable of more than one meaning" .... By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)* is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids"[51] (emphasis added), to which I would add, "including other principles of interpretation"....

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47 [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 (S.C.C.).

48 *Charlebois v. Saint John (City)*, [2004] N.B.J. No. 237, 275 N.B.R. (2d) 203, at para. 58 (N.B.C.A.).

49 *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at paras. 23-24 (S.C.C.).

50 [2012] S.C.J. No. 71, 2012 SCC 71, at para. 92 (S.C.C.). See also *B010 v. Canada (Citizenship and Immigration)*, [2013] F.C.J. No. 322, 2013 FCA 87, at para. 92 (Fed. C.A.).

51 [1998] S.C.J. No. 87, [1999] 1 S.C.R. 743, para. 14 (S.C.C.).

> For this reason, ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision.... It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning".[52]

The Court here effectively repudiates the modern principle as applied in the *Rizzo* case and returns Canadian statutory interpretation to the manipulable plain meaning rule: once the meaning of a legislative text has been clearly established to the satisfaction of the court on the basis of *some* contextual factors, other contextual factors are to be ignored.

§2.35 The account of ambiguity in the *Bell ExpressVu* case is particularly distressing. One might have thought the fact that several courts or scholars have reached different conclusions concerning the meaning of a legislative text (in the absence of evidence of incompetence or a vested interest) is indeed evidence of ambiguity. In the view of the court, however, if an interpreter reaches a linguistic conclusion that differs from its own, that interpreter either is not a competent language user or has not properly applied the modern principle. While this might be true in some cases, it cannot be assumed. An appreciation of the complexities and variables involved in the communication of meaning through texts makes it highly plausible that two competent speakers of a language, acting in good faith and taking into account a shared set of contextual factors, could reach different conclusions as to the meaning of a text simply because other significant contextual factors are not shared.[53]

§2.36 ***Rhetorical use of textualist language.*** Judges sometimes use textualist language for primarily rhetorical effect. In such cases, the court may declare that the language to be interpreted has a plain meaning, which therefore prevails over other considerations. Here are two examples from recent judgments of the Supreme Court of Canada:

> ... 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

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52 [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, paras. 27-30 (S.C.C.). In the final paragraph, Iacobucci J. quotes John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at pp. 4-5. The reference is odd. Clearly any case that makes it to the Supreme Court of Canada on a point of statutory interpretation has induced two people to spend a great deal of money backing opposing interpretations.

53 This point is developed in R. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999), 30 Ottawa L. Rev. 175-227 at 177. For discussion of the pervasive ambiguity of language and the complex process by which meaning is derived from a text, see Chapter 3 at §3.10-3.14. See also W. Farnsworth, D.F. Guzior and A. Malani, "Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation", ssrn, 1441860.

> 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.[54]
>
> ... The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity.... However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.[55]

In both cases, the text to be interpreted was considered in its full context, having regard to its purpose. The point of these declarations is not to preclude examination of — and possible reliance on — purposes or consequences or extrinsic aids, but rather to emphasize that the meaning of the text, because it is plain, should receive significant weight and *in the circumstances of this case* outweighs other considerations which are less compelling. The italicized words are important. In another case, clear meaning might give way to a more important contextual factor.

CONCLUSION

§2.37 Texts are not either plain or ambiguous; rather they are more or less plain and more or less ambiguous. The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, "common sense" and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.

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54 *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56, [2005] 2 S.C.R. 601, at para. 10 (S.C.C.).

55 *R. v. D.A.I.*, [2012] S.C.J. No. 5, [2012] 1 S.C.R. 149, at para. 26 (S.C.C.). See also *R. v. Clarke*, [2013] O.J. No. 94, 2013 ONCA 7, at para. 18 (Ont. C.A.), where the Ontario Court of Appeal — relying on the passage quoted from *R. v. D.A.I.* — wrote: "... the starting rule of statutory interpretation is to examine the plain words Parliament used.... If those words have a clear meaning and do not give rise to any ambiguity — that is, they are not reasonably capable of more than one meaning — the court should give effect to those words." This is a straightforward return to the plain meaning rule.

> Had Parliament wanted to declare that "other counsel" means only unpaid persons, it would have said so by using distinctive terms....[26]

§8.21 ***Presumption of orderly and meaningful arrangement.*** It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.

§8.22 Reliance on this presumption is illustrated in the dissenting judgment of La Forest J. in *R. v. Finta*.[27] One of the issues facing the Court in *Finta* was whether s. 7(3.71) of the *Criminal Code* created an offence or merely extended the territorial jurisdiction of Canadian courts. The section provided that

> Notwithstanding anything in this Act or any other Act, every person who ... commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada would constitute an offence ..., shall be deemed to commit that act or omission in Canada....

La Forest J. concluded that the section did not create an offence, but merely overcame the effect of s. 6(2) limiting the jurisdiction of Canadian courts to acts or omissions in Canada. He wrote:

> Parliament's intention to confine itself to a rule governing the application of offences is also evident from the position of s. 7(3.71) in the *Code*. It appears, I repeat, in Part I of the *Code*, which is appropriately titled "General". No offence is created in that Part. It deals, as its name implies, with interpretive matters, application, enforcement, defences and other general provisions. Offences are dealt with in other parts of the *Code*, and are usually entitled as such, among others "Part II. Offences Against Public Order", "Part VIII. Offences Against the Person and Reputation", "Part IX. Offences Against Rights of Property", and so on. One should assume some minimal level of ordering in an Act of Parliament. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.[28]

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26 *Ibid.*, at paras. 64-65. See also *R. v. Bouvier*, [2011] S.J. No. 463, 2011 SKCA 87, at para. 21 (Sask. C.A.); *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 75 (Alta. C.A.), *per* Ritter J.A.: "If the Legislature intended retaliation to have the same meaning as discrimination, it chose a strange way of expressing that intention. It would have been sufficient to merely list previous complaints as a prohibited ground of discrimination rather than setting up a separate subsection within the legislation to deal with the issue."

27 [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 (S.C.C.).

28 *R. v. Finta*, [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 at para. 35 (S.C.C.). See the dissenting judgment of L'Heureux-Dubé J. in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919, at paras. 201-204 (S.C.C.), where she relied on this presumption to conclude that the term "tribunal" in s. 23 of *Quebec's Charter of Human Rights and Freedoms* was limited to tribunals exercising penal jurisdiction. She wrote, at para. 202-203: