The Peter A. Allard School of Law
Allard Research Commons

Faculty Publications | Allard Faculty Publications

1999

Interpreting the Income Tax Act - Part 2: Toward a Pragmatic Approach

David G. Duff
Allard School of Law at the University of British Columbia, duff@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs

Part of the Tax Law Commons

Citation Details

David G Duff, "Interpreting the *Income Tax Act - Part 2: Toward a Pragmatic Approach*" (1999) 47:4 Can Tax J 741.

This Article is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Interpreting the Income Tax Act— Part 2: Toward a Pragmatic Approach

David G. Duff*

PRÉCIS

Les quatre principales doctrines utilisées par les tribunaux canadiens pour interpréter la Loi de l'impôt sur le revenu (l'interprétation stricte, la méthode fondée sur l'objet visé, la règle d'interprétation littérale et l'approche du libellé en contexte complet), de même que les principaux arrêts dans lesquels ces doctrines ont été définies et appliquées, ont été examinées dans la première partie de cet article en deux volets. Bien que la Cour suprême du Canada ait formellement rejeté la règle traditionnelle selon laquelle les lois fiscales devraient être interprétées de façon stricte, elle n'a pas encore adopté une règle d'interprétation unique. Elle a plutôt recours à la méthode fondée sur l'objet visé, à la règle d'interprétation littérale et à l'approche du libellé en contexte complet, selon les cas. En outre, des éléments de la règle de l'interprétation stricte persistent encore dans la règle d'interprétation littérale et dans la présomption résiduelle à l'effet que l'interprétation doit être en faveur du contribuable. Malgré ces faits nouveaux au plan doctrinal, la pratique actuelle d'interprétation de la loi de la cour est implicitement pragmatique, en ce sens qu'elle tient compte de plusieurs facteurs pertinents : le libellé des dispositions en cause, leur objet dans le cadre réglementaire, les intentions du législateur et les effets pratiques des différentes interprétations.

Chacune des doctrines d'interprétation examinées dans la première partie de cet article est évaluée dans la deuxième partie. Une approche explicitement « pragmatique » y est élaborée à titre de solution de rechange. Cette autre approche prend appui sur l'approche du libellé en contexte complet au moyen de l'interprétation du libellé de la Loi « dans son contexte global » eu égard à l'économie générale de la Loi, à l'objet de la Loi, à l'intention du Parlement, ainsi qu'aux effets pratiques des différentes règles d'interprétation.

* Assistant professor, Faculty of Law, University of Toronto. For assistance in the preparation of this article, I am indebted to research assistants Ben Barnes, Glen Loutzenhiser, and Aaron Palmer, and financial support from the Heward Stikeman Fiscal Institute and the Cecil A. Wright Foundation for Legal Scholarship. I am also indebted to Brian Arnold, Neil Brooks, David Dyzenhaus, William Eskridge Jr., Michael Livingston, and Ruth Sullivan, who took the time to read and comment on earlier drafts, and to students in my tax classes who have helped shape my own thinking on the issues discussed in this article.

La première des quatre doctrines examinées est celle de l'interprétation stricte. Sa justification origine d'une conception en grande partie despotique de l'État et de l'imposition qui prévalait au XIXe siècle. Récemment, l'interprétation stricte est devenue moins privilégiée et elle a été remplacée par d'autres doctrines d'interprétation, plus axées sur l'objet et sur le contexte. Dans la mesure où ces autres doctrines traduisent les objectifs de l'imposition contemporaine et le caractère démocratique de l'État moderne, le rejet de l'interprétation stricte par la Cour suprême du Canada dans l'affaire *Stubart Investments Limited c. Sa Majesté la Reine* et dans les causes subséquentes ne devrait pas être regretté.

La deuxième doctrine examinée est celle de l'interprétation axée sur l'objet visé. Une distinction est apportée entre l'intention précise du législateur et les objectifs réglementaires plus généraux. Diverses critiques à l'égard de cette méthode d'interprétation sont analysées dans cette partie, notamment que l'existence d'une intention du législateur et d'objectifs réglementaires est présumée, alors qu'il n'y en a peut-être aucun, qu'elle confère une latitude excessive à des juges non élus, qu'elle entraîne des décisions douteuses et la confusion doctrinale et qu'elle contrevient à la primauté du droit en rendant les dispositions législatives dépendantes de l'intention du législateur ou des objectifs réglementaires non exprimés sous la forme qui fait autorité de dispositions réglementaires. Bien que l'intention du législateur et les objectifs réglementaires soient habituellement déterminables et pertinents à l'interprétation de la loi, toutes les autres critiques constituent des objections valables à l'interprétation fondée sur l'objet visé telle qu'elle a été définie et appliquée dans le cadre de jugements récents en matière de fiscalité rendus par la Cour suprême du Canada. Dans la mesure où l'interprétation axée sur l'objet visé minimise le libellé de la Loi, il semble, compte tenu des décisions rendues dans les affaires *Sa Majesté la Reine c. Bronfman Trust*, *Sa Majesté la Reine c. McClurg* et *Neuman c. Sa Majesté la Reine*, que cette méthode augmente le pouvoir discrétionnaire, favorise la confusion doctrinale et sape la primauté du droit.

La troisième doctrine est la règle de l'interprétation littérale. Cet article remet en question le processus d'interprétation qui est utilisé dans le cadre de cette méthode, l'accent artificiel qu'elle place sur l'ambiguïté et les présomptions qui y sont posées relativement à la compétence institutionnelle des tribunaux et des législateurs. Bien que l'accent mis sur le libellé des textes réglementaires par cette méthode d'interprétation constitue une solution avantageuse par rapport aux lacunes de l'interprétation fondée sur l'objet visé, la règle de l'interprétation littérale va trop loin en ce sens qu'elle ne tient pas compte du rôle que les questions d'ordre téléologique et contextuelle devraient jouer et jouent dans l'interprétation du libellé des lois.

La quatrième doctrine dont il est question est l'approche du libellé en contexte complet, qui est caractérisée par une synthèse positive de la règle de l'interprétation littérale et de l'interprétation fondée sur l'objet visé. À partir de la description de cette méthode par le juge MacGuigan

dans l'affaire *British Columbia Telephone Company v. The Queen*, l'examen porte sur l'étendue appropriée de l'analyse contextuelle. Il y est tenu compte du « contexte interne » du libellé de la loi (le libellé de la disposition en cause, ainsi que les autres dispositions réglementaires et les caractéristiques structurelles, comme les en-têtes et les sous-sections, qui sont pertinentes à l'interprétation du libellé) et du « contexte externe » selon lequel le texte de la loi est compris (la compréhension générale du langage dans lequel la loi est rédigée, les hypothèses pertinentes quant à l'objet du texte et les critères juridiques et culturels de la société dans laquelle la loi est promulguée et interprétée). Les défis que représente l'interprétation de la loi selon les différents contextes juridiques et sociaux y sont aussi examinés. Bien que les divers contextes pertinents à l'interprétation d'une disposition donnée dépendent nécessairement des faits de la cause, il est soutenu dans cet article qu'il est inapproprié d'exclure toute question pertinente de la portée de l'analyse contextuelle.

Après l'analyse des quatre doctrines, les caractéristiques essentielles d'une approche d'interprétation de la loi expressément pragmatique sont énoncées dans l'article, la pertinence des effets pratiques des décisions judiciaires y est expliquée et la manière dont les questions d'ordre corrélatif et d'autres facteurs pertinents sont réunis dans le contexte d'un point précis d'interprétation y est examinée. Tout en mettant l'accent sur l'importance des questions d'ordre textuel, téléologique et corrélatif dans l'interprétation de la loi, cette méthode d'interprétation favorise une méthode ouverte et investigatrice de raisonnement judiciaire d'après laquelle les tribunaux devraient, dans la mesure du possible, tenter d'assurer l'harmonie entre ces divers éléments d'interprétation. Toutefois, lorsqu'il est impossible d'atteindre cette harmonie, l'approche pragmatique préconisée dans cet article est conforme à la pratique traditionnelle des tribunaux britanniques, américains et canadiens puisqu'elle tient davantage compte des questions d'ordre textuel que des questions téléologiques, et davantage de ces dernières que des questions corrélatives.

Dans la mesure où, dans le cadre de ses décisions comportant une interprétation de la Loi de l'impôt sur le revenu, la Cour suprême du Canada examine déjà les questions d'ordre textuel, téléologique et corrélatif, l'approche pragmatique préconisée dans cet article ne constitue pas tant une dérogation de la pratique d'interprétation de la loi actuelle de la Cour qu'une description plus satisfaisante de cette pratique que celle contenue dans diverses doctrines auxquelles la Cour se reporte présentement. Toutefois, dans la mesure où ces doctrines façonnent tant le processus d'interprétation de la loi que le contenu des décisions, l'approche pragmatique proposée permet une méthode d'interprétation de la loi plus ouverte, plus raisonnée et mieux équilibrée d'interprétation de la loi que chacune des autres méthodes possibles.

ABSTRACT

Part 1 of this two-part article reviewed the four main doctrines to which Canadian courts have referred in interpreting the Income Tax Act (strict

construction, purposive interpretation, the plain meaning rule, and the words-in-total-context approach) and examined leading cases in which these doctrines have been defined and applied. Although the Supreme Court of Canada has formally rejected the traditional rule according to which tax statutes should be strictly construed, it has yet to adopt a single interpretive doctrine; instead, it variously employs purposive interpretation, the plain meaning rule, and the words-in-total-context approach. As well, aspects of strict construction arguably remain in the literalism of the plain meaning rule and the residual presumption in favour of the taxpayer. Notwithstanding these doctrinal developments, the court's actual practice of statutory interpretation is implicitly pragmatic in that it takes into account a variety of relevant factors: the text of the provisions at issue, their purpose within the statutory scheme, the intentions of the legislature, and the practical consequences of different interpretations.

Part 2 of the article evaluates each of the interpretive doctrines examined in part 1 and develops, as an alternative, an explicitly "pragmatic" approach. This alternative approach builds on the words-in-total-context doctrine by interpreting the words of the Act "in their entire context," having regard to the scheme of the Act, the purposes of the Act, the intentions of Parliament, and the practical consequences of different interpretations.

The first of the four doctrines discussed is strict construction. Its justification is traced to a largely despotic conception of the state and taxation, which prevailed in the 19th century. More recently, the strict construction approach has fallen into disfavour and has been replaced by other doctrines of interpretation with a more purposive and contextual focus. To the extent that these other doctrines better reflect the purposes of modern taxation and the democratic character of the modern state, the rejection of strict construction by the Supreme Court of Canada, in *Stubart Investments Limited v. The Queen* and subsequent decisions, should not be mourned.

The second doctrine examined is purposive interpretation. A distinction is drawn between specific legislative intentions and more general statutory purposes, and various criticisms are discussed which have been levelled against this interpretive approach: that it presumes the existence of legislative intentions and statutory purposes where none may exist, that it confers excessive discretion upon unelected judges, that it produces questionable judgments and doctrinal confusion, and that it contradicts the rule of law by making legal rules dependent on legislative intentions and statutory purposes not expressed in the authoritative form of statutory provisions. Although legislative intentions and statutory purposes are generally determinable and relevant to statutory interpretation, all of the other criticisms are valid objections to purposive interpretation as it has been defined and applied in recent tax cases decided by the Supreme Court of Canada. To the extent that purposive interpretation downplays the words of the Act, the decisions in *The Queen v. Bronfman Trust*, *The Queen v. McClurg*, and *Neuman v. The Queen* suggest that it

enhances judicial discretion, promotes doctrinal confusion, and undermines the rule of law.

The third doctrine considered is the plain meaning rule. This article challenges its account of the interpretive process, its artificial emphasis on ambiguity, and its assumptions regarding the institutional competence of courts and legislatures. Although the emphasis of this interpretive approach on the words of the statutory text is a salutary response to the defects of purposive interpretation, the plain meaning rule goes too far by ignoring the role that purposive and contextual considerations should and necessarily do play in the interpretation of statutory words.

The fourth doctrine discussed is the words-in-total-context approach, which is characterized as a positive synthesis of the plain meaning rule and purposive interpretation. Beginning with MacGuigan JA's description of this approach in *British Columbia Telephone Company v. The Queen*, the discussion focuses on the appropriate scope of contextual analysis, considering the "internal context" of the statutory text (the words of the provision at issue, as well as other statutory provisions and structural features, such as headings and subdivisions, that are relevant to the interpretation of these words), the "external context" by which the statutory text is understood (the common understanding of the language in which the statute is written, background assumptions as to the purpose and subject-matter of the text, and the legal and cultural norms of the society in which the statute is enacted and interpreted), and the challenges to statutory interpretation arising from changed legal and social contexts. While the various contexts that are relevant to the interpretation of a particular provision necessarily depend on the facts of the given case, this article argues that it is inappropriate to exclude any relevant consideration from the scope of contextual analysis.

Following the analysis of the four doctrines, the article outlines the essential features of an explicitly pragmatic approach to statutory interpretation, explains the relevance of practical consequences to judicial decisions, and considers the manner in which consequential considerations and other relevant factors are properly brought together in the context of a particular interpretive issue. Emphasizing the significance of textual, purposive, and consequential considerations to statutory interpretation, this interpretive approach favours an open and inquiring method of judicial reasoning by which the court should endeavour, where possible, to fashion a mutual harmony among these various interpretive elements. Where this harmony is ultimately unachievable, however, the pragmatic approach advocated here follows the traditional practice of English, US, and Canadian courts by generally weighing textual considerations more heavily than purposive considerations and purposive considerations more heavily than consequential considerations.

To the extent that Supreme Court of Canada decisions interpreting the Income Tax Act already examine textual, purposive, and consequential considerations, the pragmatic approach advocated here is not so much a departure from the court's actual practice of statutory interpretation as a

more satisfactory account of that practice than is provided by the various doctrines to which the court now refers. To the extent that these doctrines shape both the process of statutory interpretation and the substance of the decisions themselves, however, the proposed pragmatic approach promises a more open, reasoned, and balanced method of statutory interpretation than each of the alternatives otherwise available.

INTRODUCTION

Part 1 of this two-part article introduced the four main doctrines to which Canadian courts have referred in interpreting the Income Tax Act[1]—strict construction, purposive interpretation, the plain meaning rule, and the words-in-total-context approach—reviewing their origins and their application in Canadian income tax cases. While the Supreme Court of Canada has formally rejected the traditional rule according to which tax statutes should be strictly construed, it has yet to adopt a single interpretive doctrine. Instead, it variously employs purposive interpretation, the plain meaning rule, and the words-in-total-context approach. At the same time, aspects of strict construction arguably remain in the literalism of the plain meaning rule and the residual presumption in favour of the taxpayer. Notwithstanding these doctrinal developments, the court's actual practice of statutory interpretation is implicitly pragmatic, in that it takes into account a variety of relevant factors: the text of the provisions at issue, the scheme of the Act, the purpose of the provisions within that scheme, the intentions of the legislature, and the practical consequences of different interpretations.

Part 2 of the article evaluates each of the interpretive doctrines examined in part 1, outlines the essential features of an explicitly pragmatic approach to statutory interpretation, and advances an argument for this pragmatic approach as an alternative to the interpretive doctrines currently employed. Building upon the doctrinal analysis of part 1, part 2 examines arguments for and against each interpretive doctrine, referring to various tax cases discussed in part 1 to illustrate the relevant argument. To the extent that interpretive doctrines influence both the manner in which cases are decided and the outcomes of the decisions themselves, the pragmatic approach advocated here promises a more open, reasoned, and balanced method of statutory interpretation than each of the alternatives otherwise available.

STRICT CONSTRUCTION

Although the merits and demerits of the traditional rule that tax statutes should be construed strictly have been discussed on numerous occasions,[2]

---

[1] RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

[2] See, for example, John Willis, "Statute Interpretation in a Nutshell" (January 1938), 16 *The Canadian Bar Review* 1-27, at 25-27; W. Friedmann, "Statute Law and Its Interpretation

(The footnote is continued on the next page.)

it is useful to reconsider these arguments in light of contemporary uses of and attitudes toward taxation. As courts and commentators have noted,[3] it is changes in these uses and attitudes that led to the decline of strict construction and the emergence of more purposive and contextual approaches to interpreting the Act. In this respect, the selection of a particular interpretive doctrine necessarily reflects an implicit judgment with respect to competing values at stake in the taxation of income itself.

In weighing these competing values, strict construction tended to ignore the social purposes of taxation while emphasizing the extent to which taxation interferes with individual liberty, the need for certainty in the application of tax statutes, and the relative ease with which Parliament can amend a tax statute to correct any deficiency. With respect to the purposes of taxation, strict construction was based on a largely despotic conception of the state, according to which, as John Willis observed, "first Kings and then legislatures taxed the masses in order to benefit a few court favourites."[4] Private property, in contrast, was viewed as an essential bulwark of individual liberty.[5]

On this basis, it is not surprising that common law judges, who viewed the common law as the realm of legal principle and the guardian of individual liberty,[6] "leaned against taxing Acts"[7] as they did social reform

---

[2] Continued . . .
in the Modern State" (November 1948), 26 *The Canadian Bar Review* 1277-1300, at 1298-99; Gwyneth McGregor, "Literal or Liberal? Trends in the Interpretation of Income Tax Law" (March 1954), 32 *The Canadian Bar Review* 281-303; J.T. Thorson, "Canada," in International Fiscal Association, *Cahiers de droit fiscal international*, vol. 50a, *The Interpretation of Tax Laws with Special Reference to Form and Substance* (London: International Fiscal Association, 1965), 75-82; Gwyneth McGregor, "Interpretation of Taxing Statutes: Whither Canada?" (1968), vol. 16, no. 2 *Canadian Tax Journal* 122-36; Douglas J. Sherbaniuk, "Tax Avoidance—Recent Developments," in *Report of Proceedings of the Twenty-First Tax Conference*, 1968 Conference Report (Toronto: Canadian Tax Foundation, 1969), 430-42; and Stephen W. Bowman, "Interpretation of Tax Legislation: The Evolution of Purposive Analysis" (1995), vol. 43, no. 5 *Canadian Tax Journal* 1167-89.

[3] See, for example, *Stubart Investments Limited v. The Queen*, 84 DTC 6305, at 6323; [1984] CTC 294, at 316 (SCC); *Corporation Notre-Dame de Bon-Secours v. Communaute Urbaine de Quebec et al.*, 95 DTC 5017, at 5021; [1995] 1 CTC 241, at 248 (SCC); Willis, supra footnote 2; Friedmann, supra footnote 2; McGregor, "Literal or Liberal?" supra footnote 2; McGregor, "Interpretation of Taxing Statutes," supra footnote 2; and Sherbaniuk, supra footnote 2.

[4] Willis, supra footnote 2, at 25.

[5] See, for example, John Locke, *Second Treatise of Government* (1698), C.B. Macpherson, ed. (Indianapolis: Hackett, 1980). Strict construction stood in opposition to, and eventually displaced, equitable construction, the interpretive approach advocated by Thomas Hobbes and others: see the discussion in part 1 of this article at footnotes 64 to 67 and accompanying text. On the role of Lockean political theory and the "Glorious Revolution" of 1688 in the decline of equitable construction and its displacement by strict construction, see J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), 1 *University of Toronto Law Journal* 286-312, at 295-99.

[6] See, for example, Bowman, supra footnote 2, at 1173: "The traditional strict and literal approach taken by the courts did not arise in a legal or social vacuum. The same

([6, 7] Continued on the next page.)

legislation,[8] adopting a quasi-constitutional rule against the imposition of any tax except by the clearest possible language.[9] As the Supreme Court of Canada stated in 1877,

> [w]hen a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to him must be observed. Therefore it has been held, that acts which impose a charge or a duty upon the subject must be construed strictly.[10]

Indeed, since tax legislation was regarded as "essentially an arbitrary taking, the only purpose of which is to raise revenue,"[11] a literal approach to the interpretation of these statutes was often favoured on the grounds that literal interpretation secured the certainty and predictability that taxpayers required in order to plan their commercial and personal affairs with the least possible interference from the taxation authorities. As Ruth Sullivan explains,

---

[6, 7] Continued . . .
judges who developed and applied the general principles applicable to such interpretive issues spent the greater part of their careers dealing with legal issues arising outside the field of taxation. Indeed, much of their time, and undoubtedly most if not all of their training, was devoted to the study, advocacy, and judging of matters arising in the traditional non-statutory judge-made law developed by the common law courts and the courts of equity. For such judges, laws created by statute were the exception to the general rule that law emanated from the accumulated decisions of the courts." For an excellent example of this emphasis on common law methods of reasoning, see *Pryce v. Monmouthshire Canal and Railway Companies* (1878), 4 App. Cas. 197, at 202-3 (HL), in which the court justified the strict construction of taxing statutes on the grounds that "inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act."

[7] Willis, supra footnote 2, at 25.

[8] See Cass R. Sunstein, "Interpreting Statutes in the Regulatory State" (December 1989), 103 *Harvard Law Review* 407-505, at 408-9.

[9] See, for example, *Corporation Notre-Dame de Bon-Secours*, supra footnote 3, at 5021; 248: "The rule was based on the fact that, like penal legislation, tax legislation imposes a burden on individuals and accordingly no one should be made subject to it unless the wording of the Act so provides in a clear and precise manner." For a recent analysis of interpretive presumptions as quasi-constitutional rules, see William N. Eskridge Jr. and Philip P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking" (April 1992), 45 *Vanderbilt Law Review* 593-646. For an early appreciation of this quasi-constitutional character of judicial presumptions, see Willis, supra footnote 2, at 17-23.

[10] *Nicholls v. Cumming* (1877), 1 SCR 395, at 422. See also *The Canadian Northern Ry. Co. v. The King*, (1922), 64 SCR 264, at 275, in which the court stated that tax legislation "should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property"; and *Morguard Properties Ltd. v. City of Winnipeg* (1983), 3 DLR (4th) 1, at 13 (SCC), where the court stated that "the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. . . . [T]he courts must look for express language in the statute before concluding that these rights have been reversed."

[11] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994), 401, referring to Lord Halsbury's decision in *Tennant v. Smith*, [1892] AC 150 (HL).

> [t]he more arbitrary the content of the legislation, the more important it is for subjects to be able to rely on certain and stable forms. . . . To minimize the arbitrariness in such legislation, it was important to stick to whatever clear core of meaning was evident in the words.[12]

In any event, as the Supreme Court of Canada observed in 1983, since the legislature "has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression," the courts should "be slow to presume oversight or inarticulate intentions when the rights of citizens are involved."[13]

In contrast to strict construction, contemporary approaches to the interpretation of tax legislation emphasize the democratic character of the modern state,[14] the role of taxation in redistributing resources and financing the public goods and services provided by this modern state,[15] and the purposes of modern tax statutes both to distribute these taxes in an equitable manner and to encourage specific kinds of social and economic behaviour.[16] In this light, as one commentator observed,

> [t]axation has ceased to be regarded . . . as an impertinent intrusion into the sacred rights of private property and it is now rightly regarded as a vital instrument of State policy in securing a proper balance between the citizen's claim to the enjoyment of property and the social purpose of assisting the provision of essential social services, through the equitable distribution of burdens in the community.[17]

---

[12] Sullivan, supra footnote 11, at 401 and 404. For other references to the values of certainty and predictability as justifications for the strict construction of taxing statutes, see Thorson, supra footnote 2, at 79; and Sherbaniuk, supra footnote 2, at 436-37.

[13] *Morguard Properties Ltd.*, supra footnote 10, at 12. See also Thorson, supra footnote 2, at 79, commenting on the distinction between "the Canadian view that the letter of the law should govern in a taxing Act and that taken by the Courts in the United States that the true intent of the taxing Act should be deduced and applied accordingly." Thorson suggests as one reason for this difference the fact that "it is much easier to amend fiscal legislation in Canada than it is in the United States with the result that desirable fiscal legislation reform can be accomplished more easily and quickly in Canada than in the United States." Ibid.

[14] See, for example, Corry, supra footnote 5, at 289, emphasizing the importance of "intelligent judicial co-operation" in a parliamentary democracy in "the fulfilment of the aims and objects of parliament."

[15] See, for example, Sherbaniuk, supra footnote 2, at 436, noting that income taxation "is not simply a method of raising revenue to enable government to provide certain public goods and services such as defence, roads and education; it is also a means for funding the welfare state, for re-distributing wealth . . . and for regulating the economy."

[16] See, for example, Friedmann, supra footnote 2, at 1298, referring to "the equitable distribution of burdens in the community"; and McGregor, "Literal or Liberal?" supra footnote 2, at 283: "In recent years . . . a change has been taking place in the function and application of taxing statutes. They are no longer mere tax collecting agencies, for they are used also as economic and social weapons—to combat inflation, to discourage some types of business activities and consumer purchases and to encourage others, to promote the development of natural resources, to advance scientific research and social welfare schemes, and so on."

[17] Friedmann, supra footnote 2, at 1298.

Moreover, as the Saskatchewan Court of Appeal has stated,

> the purposes and objectives of taxing statutes have changed from simply raising revenue to playing an important role in encouraging economic growth and directing economic and fiscal policy. An examination of the Act reveals a range of non-revenue provisions. These are as varied as providing incentives for personal savings in the forms of registered retirement savings plans, to influencing business decisions made in the marketplace under the guise of investment tax credits. The theory that revenue statutes are solely for the purpose of collecting revenue is obsolete.[18]

As a result, as another critic of strict construction concluded, the "view of taxation as interference with proprietary rights reflects the *laissez-faire* economics of the latter part of the 19th century but is hardly consonant with contemporary thinking about the purposes of taxation."[19] On the contrary, as Estey J affirmed in *Stubart Investments Limited v. The Queen*, "the taxpayer's freedom to carry on his commercial and social affairs however he may choose" must be balanced against "the state interest in revenue, equity in the raising of the revenue, and economic planning."[20]

From this perspective, a rule requiring the courts to interpret tax statutes strictly, without regard to any purpose other than the collection of revenue, contradicts not only the actual purposes of modern tax legislation to distribute tax burdens equitably and promote social and economic policies, but also the most basic principles of a democratic society in which the unelected judicial branch is largely subordinate to the elected legislature.[21] Not surprisingly, therefore, where Canadian courts have construed the Income Tax Act strictly,[22] they have tended to frustrate both the objects of specific statutory provisions to prevent tax avoidance or account for differences in taxpayers' relative abilities to pay, and the most plausible intention of Parliament to distribute tax burdens in an equitable manner.[23] Indeed, to the extent that strict construction allowed taxpayers to insist on a literal reading of taxing provisions, this interpretive approach

[18] *Royal Bank of Canada v. Saskatchewan Power Corp.* (1990), 73 DLR (4th) 257, at 264 (Sask. CA).

[19] Sherbaniuk, supra footnote 2, at 436.

[20] Supra footnote 3, at 6321; 314. For a useful review of the expanded purposes of taxation identified in *Stubart*, see David Crerar, "Interpretations of GAAR: Before and Beyond McNichol and RMM," Case Comment feature (Fall 1997), 23 *Queen's Law Journal* 231-57, at 236-45.

[21] See, for example, Willis, supra footnote 2, at 17, explaining that resort to old presumptions to interpret statutes in the 20th century "no longer [has] anything to do with the intent of the legislature; they are a means of controlling that intent."

[22] See the cases discussed in part 1 of this article at footnotes 18 to 45 and accompanying text.

[23] See, for example, Sullivan, supra footnote 11, at 406: "Although fiscal legislation is arbitrary in the sense that other persons or property could have been chosen to pay the tax, the allocation of tax burden is never haphazard. Choices about which person and property are subject to tax and how much revenue should be raised generally are grounded in specific moral, political or economic views."

actually facilitated tax-avoidance schemes whereby taxpayers might enter into transactions or arrangements solely or primarily for the purpose of minimizing the tax burdens to which they would otherwise be subject.[24]

As for the values of certainty and predictability, it is unclear whether strict construction produced greater or lesser certainty in the application of the Act. Indeed, when statutory provisions were read literally, without regard to their context or purpose, judicial interpretations were often less certain and predictable than they might have been had the courts used a more contextual approach to statutory interpretation. As Stephen Bowman has suggested, referring to two cases in which statutory rules attributing income from one spouse to another were strictly construed,[25] the outcomes "were perhaps not entirely predictable by a person attempting to read the sections and determine the manner in which they would apply in practice."[26]

Finally, as critics have observed, while tax statutes might be amended to reverse judicial decisions considered unacceptable by the legislature, because these amendments are rarely retroactive, their effectiveness in discouraging tax avoidance is impaired.[27] More generally, as critics have also concluded, these amendments have greatly increased the length and complexity of the Income Tax Act, making it largely inaccessible to most persons to whom it applies.[28] In fact, as Bowman explains, "[t]he process becomes self-perpetuating": "[d]etailed legislative provisions invite the courts to conclude that the treatment of the subject is exhaustive, and that the legislation is meant to say exactly what it says and does not mean to say anything that it omits," while drafters respond "with increasing frequency to plug the gaps exposed by restrictive interpretations by the courts."[29] The result, as Bowman emphasizes, is "the creation over time of increasingly wide areas of law where even experienced practitioners must defer to

---

[24] See, for example, Sherbaniuk, supra footnote 2, at 430-31, describing strict and literal construction of taxing statutes as one of the two "pillars of tax planning"—the other being the traditional rule that tax consequences were to be determined according to the legal relationships validly created by the parties to a transaction or arrangement, rather than the economic substance of the transaction or arrangement. See also Sullivan, supra footnote 11, at 403-4, discussing the role of literalism in tax-avoidance schemes.

[25] *MNR v. MacInnes*, 54 DTC 1031; [1954] CTC 50 (Ex. Ct.); and *Robins v. MNR*, 63 DTC 1012; [1963] CTC 27 (Ex. Ct.). These cases are discussed in part 1 of this article in the text accompanying footnotes 21 to 26 and 29 to 31, respectively.

[26] Bowman, supra footnote 2, at 1183.

[27] See, for example, Crerar, supra footnote 20, at 239, mentioning the absence of retroactivity as a reason why enactment of the general anti-avoidance rule in section 245 was "necessary."

[28] See, for example, Sherbaniuk, supra footnote 2, at 439: "the stricter the construction of statutory language, the more the need for detailed specific provisions, and the greater the likelihood of creating a hopelessly complex, unmanageable labyrinth." See also Sullivan, supra footnote 11, at 409: "At least some of the prolixity and excessive detail of fiscal legislation has been caused by the need to overcome the courts' traditional reluctance to assist the legislature in its efforts to raise revenue."

[29] Bowman, supra footnote 2, at 1183-84.

specialists who are able to devote substantial time and energy to mastering the provisions."[30] As a result, he concludes:

> If one of the goals of legislation is to be readily comprehensible by the largest percentage of those affected as is practical in view of the nature of the legislation, the traditional strict and literal approach has not achieved that goal.[31]

In this light, one might reasonably expect the courts to abandon their traditional antagonism toward taxing statutes, adopting a more critical view of tax-avoidance schemes[32] and rejecting the traditional rule according to which tax statutes were to be strictly construed. Indeed, while the Supreme Court of Canada continues to affirm that taxpayers can, absent specific statutory provisions, "arrange their affairs in a particular way for the sole purpose" of minimizing tax,[33] this traditional rule is subject to the "object and spirit" test set out in *Stubart*,[34] occasional references to "commercial and economic reality,"[35] and the general anti-avoidance rule enacted in 1988.[36] Likewise, although traces of strict construction arguably linger in the literalism of the plain meaning rule and the residual presumption in favour of the taxpayer,[37] the Supreme Court has largely rejected this doctrine, referring in *Stubart* to "the demise of the strict interpretation rule

---

[30] Ibid., at 1184.

[31] Ibid.

[32] See, for example, Friedmann, supra footnote 2, at 1298, suggesting that "[a]voidance of tax is now seen as an improper advantage gained by an individual taxpayer at the expense of the community"; and McGregor, "Literal or Liberal?" supra footnote 2, at 283, observing that "the extent of modern taxation and its high rates have led to a growing feeling that every citizen should pay his full share and that no one should be permitted to avoid any part of his liability even by means that are technically within the law."

[33] See, for example, *Neuman v. The Queen*, 98 DTC 6297, at 6302; [1998] 3 CTC 177, at 188 (SCC).

[34] *Stubart*, supra footnote 3, at 6324; 317. According to this test, the "formal validity" of a transaction may be "insufficient" where " 'the object and spirit' of [an] allowance or benefit provision is defeated by . . . procedures blatantly adopted by [a] taxpayer to synthesize a loss, delay or other tax saving device, although these actions may not attain the height of 'artificiality.' " Although recent Supreme Court of Canada decisions appear to have downplayed this "object and spirit" test, it has not been explicitly rejected. See, for example, *Antosko et al. v. The Queen*, 94 DTC 6314; [1994] 2 CTC 25 (SCC); and *Duha Printers (Western) Ltd. v. The Queen*, 98 DTC 6334; [1998] 3 CTC 303 (SCC).

[35] See, for example, *The Queen v. Bronfman Trust*, 87 DTC 5059, at 5066-67; [1987] 1 CTC 117, at 128 (SCC); and the majority decision in *The Queen v. McClurg*, 91 DTC 5001, at 5010; [1991] 1 CTC 169, at 183 (SCC). While Supreme Court of Canada decisions such as *Antosko*, supra footnote 34, appear to have downplayed reliance on the commercial or economic substance of transactions as a general principle, it is arguable that commercial and economic reality remains relevant to the application of several statutory provisions, such as the interest deduction in subparagraph 20(1)(c)(i) and the anti-avoidance rule in subsection 56(2).

[36] See section 245 of the Act, enacted by SC 1988, c. 55, section 185, generally applicable with respect to transactions entered into on or after September 13, 1988.

[37] See the discussion in part 1 of this article at footnotes 85 to 98 and accompanying text.

for the construction of taxing statutes"[38] and concluding in *The Queen v. Golden et al.* that

> [s]trict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.[39]

To the extent that contemporary interpretive doctrines better reflect the purposes of modern taxation and the principles of a democratic society, the "demise" of strict construction should not be mourned.

PURPOSIVE INTERPRETATION

As explained in part 1 of this article, modern purposive interpretation originates in the writings of legal realists like John Willis and the legislative reforms of the modern administrative state.[40] To the extent that the former criticized formalist approaches to legal reasoning, while the latter encouraged a purposive approach to the interpretation of broad regulatory schemes, the arguments in favour of purposive interpretation mirror those against strict construction.

Above all, as Willis wrote, purposive interpretation, in contrast to the literalism and presumptions of strict construction, accords with the constitutional principle of legislative supremacy.[41] By interpreting the Income Tax Act not strictly, but in light of "the scheme of the Act, the object of the Act, and the intention of Parliament," courts do not frustrate legislative intentions and statutory purposes, but cooperate in the fulfilment of these aims and objects in a manner consistent with the proper role of an unelected judiciary in a democratic society.[42] Moreover, as critics of strict construction have observed, a more purposive approach to the interpretation of the Act is likely to lessen opportunities for abusive tax avoidance[43]

[38] Supra footnote 3, at 6323; 316.

[39] 86 DTC 6138, at 6140; [1986] 1 CTC 274, at 277 (SCC).

[40] See the discussion in part 1 of this article at footnotes 105 to 107 and accompanying text.

[41] Willis, supra footnote 2, at 14. See also James M. Landis, "A Note on 'Statutory Interpretation' " (April 1930), 43 *Harvard Law Review* 886-93, at 886, noting that an emphasis on legislative intent derives from the "Anglo-American scheme of government [which] conceived of lawgivers apart from and at times paramount over courts"; Harry Willmer Jones, "Statutory Doubts and Legislative Intention" (June 1940), 40 *Columbia Law Review* 957-74, at 965, emphasizing that "[i]n our legal and political theory . . . the originative function of lawmaking is the province of the legislative department"; and Archibald Cox, "Judge Learned Hand and the Interpretation of Statutes" (1947), 60 *Harvard Law Review* 370-93, at 372, observing that "[u]nder our traditions the judge's role, while final, is still subordinate."

[42] See supra footnote 14.

[43] See, for example, Sherbaniuk, supra footnote 2, at 438: "Flagrant cases of tax avoidance, which may succeed because of strict interpretation of the Act, can bring the tax system into disrepute. Not only are dollars lost to the revenue, but other taxpayers are emboldened to imitate these efforts, and new avoidance schemes are spawned. The tax system can function soundly only if there is a conviction that the burden is fairly apportioned."

and reduce the need for lengthy and complex drafting and amendments to counteract inappropriate judicial decisions.[44]

Despite these apparent advantages, however, purposive interpretation has also been criticized on the grounds that it presumes the existence of legislative intentions and statutory purposes where none may exist, that it confers excessive discretion upon unelected judges, that it produces questionable judgments and doctrinal confusion, and that it contradicts the rule of law by making legal rules dependent on legislative intentions and statutory purposes not expressed in the authoritative form of statutory provisions.

This section examines each of these criticisms, rejecting the first but accepting the other three as legitimate objections to the manner in which the Supreme Court of Canada has defined and applied purposive interpretation in recent tax cases.[45] While these criticisms do not preclude attention to legislative intentions and statutory purposes in interpreting the meaning of statutory provisions, they call into question the key tenet of purposive interpretation: that in determining the meaning of a statutory provision, "the scheme of the Act, the object of the Act, and the intention of Parliament" have priority over the words of the provision.

Legislative Intentions and Statutory Purposes

Many commentators have analyzed the distinction between legislative intentions and statutory purposes and their respective roles in statutory interpretation.[46] On the basis of this literature, one can define the concept of legislative intent as the specific meaning that the legislature or a majority of the legislature would give to a statute or provision in the context of a particular fact situation,[47] while statutory purpose refers to the more general

---

[44] See, for example, Bowman, supra footnote 2, at 1184, commenting that "if the purposive approach results in greater conformity of judicial results to legislative purposes, there should at least be a reduction in the volume of legislation designed to remedy judicial action, and perhaps over the long term the adoption of a plainer style of legislative drafting."

[45] For an analysis of these cases, see part 1 of this article at footnotes 111 to 193 and accompanying text.

[46] See, for example, Landis, supra footnote 41; Cox, supra footnote 41; Jones, supra footnote 41; Gerald C. MacCallum, "Legislative Intent" (April 1966), 75 *Yale Law Journal* 754-87; and Reed Dickerson, "Statutory Interpretation: A Peek into the Mind and Will of a Legislature" (Winter 1975), 50 *Indiana Law Journal* 206-37. For more recent considerations, see Earl M. Maltz, "Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach" (November 1988), 63 *Tulane Law Review* 1-28; and Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction" (Winter 1988), 11 *Harvard Journal of Law and Public Policy* 59-66.

[47] See, for example, Landis, supra footnote 41, at 888, defining legislative intent, narrowly understood, as the "immediate concept of meaning" contemplated by the legislature; Cox, supra footnote 41, at 371, defining legislative intent in terms of "the specific particularized application which the statute was 'intended' to be given"; and Dickerson, supra footnote 46, at 208, defining intent as "the specific message that the user intended to convey."

goals or policies at which the statute or provision is aimed.[48] Although these concepts shade into one another, they are nonetheless distinguishable to the extent that the latter inheres not in the mind of any one individual or collective body but in the statutory scheme to which the legislature has given life.

Given these definitions of legislative intent and statutory purpose, it is not difficult to see why the existence of the former might be questioned. To the extent that legislators are unlikely to accord identical meanings to statutory provisions, and may not even be familiar with the details of the legislation they enact, it is often argued that the intent of a legislative body is a legal fiction that is not only unknowable in practice but unachievable in principle.[49] Moreover, as commentators have observed, since the particular circumstances to which a statute or provision is applied are often unforeseen at the time of enactment, it is impossible in these cases to speak of any actual legislative intent even if it were possible to determine the intent of a collective body.[50]

In addition to these traditional objections, more recent critics have also questioned the existence of any coherent statutory purposes according to which courts might interpret statutory provisions. Inspired by contemporary theories of the legislative process that emphasize the role of individual

---

[48] See, for example, Cox, supra footnote 41, at 370, describing the purpose of legislation as "the general aim or policy which pervades the statute but has yet to find specific application." See also Sullivan, supra footnote 11, at 45: "When interpreters refer to the aim or object of legislation or its goals, they usually mean the primary social, economic or political effects that the legislature hoped to produce through the operation of the legislation."

[49] See, for example, Max Radin, "Statutory Interpretation" (April 1930), 43 *Harvard Law Review* 863-85, at 870: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs. . . . The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small." See also Jones, supra footnote 41, at 968, concluding that "[i]f legislative 'intention' is supposed to signify a construction placed upon statutory language by every individual member of the two enacting houses, it is, obviously, a concept of purely fictitious status"; Willis, supra footnote 2, at 3, explaining that "[t]he expression ["the intent of the legislature"] does not refer to actual intent—a composite body can hardly have a single intent"; and Corry, supra footnote 5, at 290, noting that "[e]ven the majority who vote for complex legislation do not have any common intention as to its detailed provisions. Their vote indicates party dragooning rather than approval and appreciation of the measure." For a more recent statement of this position, see Kenneth A. Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron" (June 1992), 12 *International Review of Law and Economics* 239-56.

[50] See, for example, Cox, supra footnote 41, at 371-72: "Few, if any, legislators think in terms of the specific controversies which courts must settle by giving a statute one or another meaning. Many such controversies cannot be foreseen because they spring from circumstances which no one can anticipate when enacting legislation. In consequence, the charge is easily and often made that the courts which purport to seek out the legislative intent in doubtful cases indulge themselves in a shameless fiction devised, consciously or in self-deception, to cloak the fact that they are not interpreting, but making law according to their own notions."

incentives and voting rules in influencing legislative outcomes,[51] these critics view legislative enactments as unprincipled and largely unpredictable deals or compromises among legislative actors (for whom the primary purpose of any statute is the personal goal of re-election) and well-organized interest groups (seeking public benefits or "rents" at the expense of less well-organized interests).[52] On this basis, US Judge Frank Easterbrook has argued, "It is not only impossible to reason from one statute to another but also impossible to reason from one or more sections of a statute to a problem not resolved."[53] On the contrary, he contends, since "compromises lack 'spirit,' "[54] statutes should be interpreted strictly to avoid "upsetting the balance" of the deal.[55]

Although the concepts of legislative intention and statutory purpose are by no means straightforward, it is implausible to suggest that they do not exist at all. On the contrary, while the characterization of these intentions and purposes is itself an interpretive enterprise, these elements of statutory meaning are neither wholly imaginary nor thoroughly inaccessible.

With respect to the traditional objections that legislative intent may not exist, advocates of purposive interpretation have offered two responses. First, to the extent that legislative majorities either concur with or acquiesce in the views of those most closely associated with drafting or sponsoring a particular statute or amendment, the effective intent of the legislature may be identified with the actual intent of these specific individuals.[56] On

---

[51] Among the leading works in this body of "public choice" theory are James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, Mich.: University of Michigan Press, 1962); Kenneth J. Arrow, *Social Choice and Individual Values*, 2d ed. (New Haven: Yale University Press, 1963); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press, 1965); and William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (San Francisco: Freeman, 1982). For a useful overview of these theories, see D.C. Mueller, *Public Choice II* (New York: Cambridge University Press, 1989).

[52] For useful summaries of public choice theory and its implications for statutory interpretation, see William N. Eskridge Jr., "Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation" (March 1988), 74 *Virginia Law Review* 275-338; Daniel A. Farber and Philip P. Frickey, "Legislative Intent and Public Choice" (March 1988), 74 *Virginia Law Review* 423-69; and Edward L. Rubin, "Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes" (April 1991), 66 *New York University Law Review* 1-64. For a recent analysis of the implications of public choice theory for statutory interpretation in Canada, see Paul Horwitz, "Judicial Romanticism, Public Choice and Parliamentary History" (unpublished paper on file with author, 1997).

[53] Frank H. Easterbrook, "Statutes' Domains" (Spring 1983), 50 *University of Chicago Law Review* 533-52, at 547.

[54] Ibid., at 541.

[55] Ibid., at 540: "What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package."

[56] See, for example, Landis, supra footnote 41, at 888-89; Jones, supra footnote 41, at 968-70; and Dickerson, supra footnote 46, at 210-13. See also John M. Kernochan, "Statutory

(The footnote is continued on the next page.)

this basis, it follows, evidence of legislative intent may be discerned not only in the statutory texts that the legislature enacts, but also in the so-called legislative history of a statute, consisting of committee reports, legislative debates, and other authoritative statements accompanying the introduction of new legislation.[57] In addition, where the Act has been subject to legislative amendment, legislative intentions may reasonably be inferred by tracing "the evolution of legislation from its inception, through successive amendments, to its current form."[58]

Second, and more generally, although legislators may not have a specific intent concerning the manner in which a statute or provision ought to apply to concrete cases, they and the statutes that they enact can be said to have more general purposes to which courts might reasonably be expected to defer when interpreting a statute or provision in the context of a particular fact situation.[59] On this account, as US Judge Learned Hand advised, courts should endeavour to imagine how legislators, pursuing these purposes, would have resolved a particular issue had it been presented to them when the statutory provision was enacted.[60] While these

---

[56] Continued . . .
Interpretation: An Outline of Method" (1976-77), 3 *The Dalhousie Law Journal* 331-66, at 347: "It is practicable and realistic in relation to purposes and even to details of legislation that the views of those to whom the legislators delegate responsibility should be taken as standing for the views of the legislature."

[57] See, for example, Landis, supra footnote 41, at 888-90. For a useful review of arguments for and against the "authority value" of legislative history as evidence of "specific legislative intent," see William N. Eskridge Jr., "Legislative History Values" (1990), vol. 66, no. 2 *Chicago-Kent Law Review* 365-440, at 369-91.

[58] Sullivan, supra footnote 11, at 58.

[59] See, for example, Corry, supra footnote 5, at 292: "Though the intention of the legislature is a fiction, the purpose or object of the legislation is very real. No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose. It is what is variously called the aim and object of the enactment, the spirit of the legislation, the mischief and the remedy. . . . In part it is to be inferred from the discussion of the bill in committee and in the house, in part from the prior legislative history of the measure, and in part from general history and the trend of social forces." Among the leading exponents of this purposive approach to statutory interpretation are Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tentative ed. (Cambridge, Mass.: Harvard Law School, 1958), who argue (at 1156) that "every statute must be conclusively presumed to be a purposive act" and (at 1415) statutes should be interpreted as the products of "reasonable persons pursuing reasonable purposes reasonably." See also Jones, supra footnote 41, at 973, suggesting that "in determining the effect of a statute in cases of interpretive doubt, the judge should decide in such a way as will advance the general objectives which, in his judgment, the legislators sought by enactment of the legislation"; and Kernochan, supra footnote 56, at 353, emphasizing that "[l]egislation, like other utterances, is a purposive act and the effort must be to reconstruct the purpose that propelled the lawgivers if meaning is to be assigned faithfully and intelligently."

[60] *Borella v. Borden Co.*, 145 F.2d 63, at 64 (2d Cir. 1944) (aff'd. 325 US 679 (1945)): "We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." For an excellent summary of Judge Learned Hand's approach to the
(The footnote is continued on the next page.)

purposes are often varied and conflicting,[61] and may be described at different levels of generality,[62] they may nonetheless play a useful role in statutory interpretation. Moreover, for this purpose, judicial attention to legislative history and legislative evolution may be justified less for what it may say about specific legislative intentions than for what it might suggest about the reasons why a statute or amendment was enacted and the objects at which the statute or provision aims.[63] In other cases, statutory

---

60 Continued . . .
interpretation of statutes, see Cox, supra footnote 41. For a more recent exposition of this interpretive approach, see Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), 273, referring to this purposive method as "imaginative reconstruction." For critical evaluations of this "archaeological" approach, emphasizing instead the dynamic character of statutory interpretation, see Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986), 313-54; William N. Eskridge Jr., "Dynamic Statutory Interpretation" (July 1987), 135 *University of Pennsylvania Law Review* 1479-1555; T. Alexander Aleinikoff, "Updating Statutory Interpretation" (October 1988), 87 *Michigan Law Review* 20-66; and William N. Eskridge Jr., *Dynamic Statutory Interpretation* (Cambridge, Mass.: Harvard University Press, 1994). This issue is discussed further below under the heading "Words-in-Total Context Approach—Changed Contexts."

61 See, for example, Sullivan, supra footnote 11, at 47: "The primary goals of legislation are almost never pursued single-mindedly or whole-heartedly. A number of secondary principles and policies are usually considered important enough to be included in the legislative plan. Others may be introduced by the drafter, pursuant to government or legislative directives. These secondary purposes may complement and facilitate pursuit of the primary goals, or they may conflict with those goals or hinder their free pursuit." As indicated earlier, for example (supra footnotes 14 to 20 and accompanying text), the income tax is designed (1) to raise revenue, (2) to distribute the tax burden in an equitable manner, and (3) to promote specific social and economic policies. While the first and second objectives may be compatible, the second (equity) often conflicts with the first (revenue raising) to the extent that it necessitates deductions and credits to account for the costs of earning income and the personal circumstances of the taxpayer. Likewise, while the second and third objectives may be compatible where social and economic policies are designed to accommodate differences in taxable capacities, the third objective (public policy) often conflicts with the second (equity) to the extent that these policies favour some taxpayers but not others, and it typically conflicts with the first objective (revenue raising) by providing financial incentives in the form of deductions, credits, or other tax advantages.

62 See Hart and Sacks, supra footnote 59, at 1414, observing that purposes exist in "hierarchies and constellations" ranging from very specific goals, such as the prohibition of some activity, to more abstract purposes, such as the promotion of the public good. A good example is the anti-avoidance rule in subsection 56(2). The purpose of this rule can be characterized (1) narrowly, as in the majority decision in *McClurg*, supra footnote 35, at 5011; 183-84, as being "to prevent avoidance by the taxpayer, through the direction to a third party, of receipts which he or she would otherwise have obtained"; (2) more broadly, as in *Neuman*, supra footnote 33, at 6301; 187, as being "to prevent tax avoidance through income splitting"; or (3) more generally still, as being to ensure the collection of revenues and the equitable distribution of the tax burden through the prevention of tax avoidance.

63 See, for example, Sullivan, supra footnote 11, at 57-59. See also Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed" (April 1950), 3 *Vanderbilt Law Review* 395-406, at 400, characterizing references to legislative intent as "reasonably realistic" in this sense and concluding that "committee reports, legislative debate, historical knowledge of contemporary thinking or campaigning which points up the evil or the goal can have a significance"; Cox, supra

(The footnote is continued on the next page.)

purposes may be inferred directly by reading the statutory text in the context of the scheme of the Act.[64]

Although English and Canadian courts traditionally excluded extrinsic evidence derived from the legislative history of a statute or amendment,[65] they have long recognized the relevance of legislative evolution and the statutory scheme in statutory interpretation.[66] In *Golden*, for example, a majority of the Supreme Court of Canada considered both the evolution

---

[63] Continued . . .
footnote 41, at 379: "[w]hatever the dangers may be in the use of such materials to reveal the specific meaning of a statute on a particular occasion, they cause few difficulties when used only to disclose the general purpose, for while any interpretation which they contain may be that of only a few individuals, they are likely to reflect with sufficient accuracy the policy adopted"; and Sunstein, supra footnote 8, at 430, concluding that "legislative history provides a sense of the context and purpose of a statutory enactment, which . . . can provide important interpretive help." For a useful review of arguments for and against the "purpose value" of legislative history, see Eskridge, supra footnote 57, at 391-417.

[64] See Sullivan, supra footnote 11, at 54-57.

[65] In England, the exclusionary rule is generally traced to *Millar v. Taylor* (1769), 98 ER 201, at 217 (KB), in which the court concluded that "the sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise." Among Canadian statements of the rule, see *Gosselin v. The King* (1903), 33 SCR 255, at 264, per Taschereau CJ; and *Atty Gen. of Canada v. Reader's Digest Assoc. (Canada) Ltd.*, [1961] SCR 775, at 782, per Kerwin CJ. For excellent analyses of the history and structure of this exclusionary rule, see D.G. Kilgour, "The Rule Against the Use of Legislative History: 'Canon of Construction or Counsel of Caution'?" (October 1952), 30 *The Canadian Bar Review* 769-90; Gordon Bale, "Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process" (March 1995), 74 *The Canadian Bar Review* 1-28; and Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation" (1998), 43 *McGill Law Journal* 287-324. In contrast to English and Canadian courts, US courts have long recognized the role of legislative history in statutory interpretation, though the extent of its use has been subject to considerable criticism in recent years. See Eskridge, supra footnote 57. For criticisms of reliance on legislative history by US courts, see Kenneth W. Starr, "Observations About the Use of Legislative History" [June 1987] *Duke Law Journal* 371-79; Frank H. Easterbrook, "What Does Legislative History Tell Us?" (1990), vol. 66, no. 2 *Chicago-Kent Law Review* 441-50; Note, "Why Learned Hand Would Never Consult Legislative History Today" (March 1992), 105 *Harvard Law Review* 1005-24; and Frank H. Easterbrook, "Text, History, and Structure in Statutory Interpretation" (Winter 1994), 17 *Harvard Journal of Law and Public Policy* 61-70. For recent arguments favouring the use of legislative history, see Nicholas S. Zeppos, "Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation" (October 1990), 76 *Virginia Law Review* 1295-1374; Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes" (January 1992), 65 *Southern California Law Review* 845-74; and W. David Slawson, "Legislative History and the Need To Bring Statutory Interpretation Under the Rule of Law" (January 1992), 44 *Stanford Law Review* 383-427. For an excellent analysis of the role of legislative history in the interpretation of the US Internal Revenue Code, see Michael Livingston, "Congress, the Courts and the Code: Legislative History and the Interpretation of Tax Statutes" (March 1991), 69 *Texas Law Review* 819-87. See also Paul L. Caron, "Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers" (Winter 1994), 13 *Virginia Tax Review* 517-90, at 531-54.

[66] See Sullivan, supra footnote 11, at 58-59 and 449-59 (referring to legislative evolution) and 56-57 (referring to the statutory scheme).

of section 68 of the Act and the scheme of the Act as a whole to conclude that this provision as it then read applied to the transaction at issue.[67]

More recently, English and Canadian courts appear to have rejected the traditional rule excluding legislative history[68] and are increasingly willing to consider such extrinsic materials as evidence of legislative intentions and statutory purposes.[69] In *Symes v. The Queen et al.*,[70] for example, the majority of the Supreme Court of Canada cited the white paper preceding the enactment of the child-care expense deduction in section 63 to support its conclusion that the taxpayer could not deduct child-care expenses in computing her business income under the general rules in subdivision b of the Act.[71] In other income tax cases, the Federal Court of Appeal has referred to budget statements and Department of Finance technical notes accompanying the release of draft legislation.[72] While the partisan nature of parliamentary debates and budget statements suggests that these materials should be considered cautiously,[73] this is less true of other materials like technical notes, which represent a more impartial effort to convey the intended meaning and purpose of legislative amendments.[74] In either case,

[67] See the analysis of the *Golden* case in part 1 of this article at footnotes 291 to 316 and accompanying text.

[68] In the United Kingdom, the traditional exclusionary rule was rejected in *Pepper v. Hart*, [1993] 1 All ER 42 (HL). In Canada, the rule was rejected in *R v. Morgentaler*, [1993] 3 SCR 463.

[69] See Sullivan, supra footnote 11, at 431-49.

[70] 94 DTC 6001; [1994] 1 CTC 40 (SCC).

[71] See the analysis of the *Symes* case in part 1 of this article at footnotes 317 to 352 and accompanying text. While the minority opinion acknowledged Parliament's intention at the time of the white paper "to permit a tax deduction for child care expenses, *under carefully controlled terms*" (ibid., at 6019-20; 65-66, citing E.J. Benson, *Proposals for Tax Reform* (Ottawa: Department of Finance, 1969), paragraph 2.7 [emphasis added by the court]), it questioned any specific intention to preclude the deduction of child-care expenses as a business expense on the grounds that, at the time, these expenses were generally considered to be of a personal nature.

[72] See *Lor-Wes Contracting Ltd. v. The Queen*, 85 DTC 5310; [1985] 2 CTC 79 (FCA), in which MacGuigan JA referred to the budget statement of June 23, 1975 to support his conclusion that the taxpayer, which carried on a contracting business building logging roads for logging companies, was eligible for an investment tax credit under subsection 127(5) on the basis that the property was "used" by the taxpayer "primarily for the purpose of . . . logging"; and *Maritime Telephone and Telegraph Company, Limited v. The Queen*, 92 DTC 6191; [1992] 1 CTC 264 (FCA), where the court cited Department of Finance technical notes to support its conclusion that amendments to paragraph 12(1)(b) did not authorize the taxpayer's use of a "billed" method of accounting for revenues associated with telecommunication services provided in the taxpayer's taxation year.

[73] See, for example, *R v. Heywood* (1994), 120 DLR (4th) 348, at 381 (SCC), per Cory J, noting that "the political nature of parliamentary debates brings into question the reliability of the statements made."

[74] Bowman, supra footnote 2, at 1188, observes that these explanatory notes are "intended to inform the public as to the intended meaning and purpose of the legislation," are "official statements" issued by the Department of Finance in the name of the minister, and are generally "non-partisan, and reflect a considered view rather than a polemic."

the relevance of these extrinsic materials is best addressed by ruling on their weight rather than their admissibility.[75]

With respect to more recent arguments questioning the existence of coherent statutory purposes, advocates of purposive interpretation have challenged both the description of the legislative process on which these arguments are based and the normative implications of this descriptive theory even where it might accurately depict the process by which legislation is actually enacted. As other legislative process scholars have argued, predictions of legislative incoherence contradict the relative stability of legislative outcomes in legislatures such as the US Congress.[76] Moreover, even if these accounts were to present an accurate picture of the legislative process of the US Congress, it is arguable that they are less applicable to a parliamentary system such as Canada's,[77] and even less applicable to the process of tax law reform, much of which occurs within the Department of Finance rather than Parliament.

Regardless, as advocates of purposive interpretation have observed, even if it were true that legislative enactments are the product of unprincipled deals, the conclusion that statutes should be strictly construed does not necessarily follow from this premise. On the contrary, as US Judge Richard Posner argues, to the extent that statutes embody legislative compromises, purposive interpretation is rendered more complex, but not displaced:

> The "deals" approach can be tucked into the purposive approach by noting that the relevant purpose is not that of the faction that was pushing the legislation but that of the enactment itself with any compromises that may have been built into it.[78]

Although Canadian courts have not always appreciated this complexity,[79] more sophisticated approaches to purposive interpretation take into account

[75] For a recent statement to this effect, see *The Queen v. Fibreco Export Inc. et al.*, 95 DTC 5412, at 5414; [1995] 2 CTC 172, at 174 (FCA), per Hugesson JA.

[76] See Farber and Frickey, supra footnote 52, at 429-37, who suggest a number of explanations consistent with public choice theory to explain this relative stability.

[77] For a brief discussion of the differences between Canadian and US legislative processes and the significance of these differences for public choice theories of statutory interpretation, see Horwitz, supra footnote 52, at 47-50. For one of the few extended analyses of the Canadian legislative process and its implications for statutory interpretation, see J.A. Corry, "The Use of Legislative History in the Interpretation of Statutes" (June-July 1954), 32 *The Canadian Bar Review* 624-37.

[78] Posner, supra footnote 60, at 278.

[79] See, for example, Ruth Sullivan's criticisms of *Lor-Wes Contracting*, supra footnote 72, in which (as noted, ibid.) the Federal Court of Appeal relied on a federal budget statement to support its conclusion that the taxpayer was eligible for an investment tax credit under subsection 127(5). Sullivan comments, supra footnote 11, at 63, "Although the case may be rightly decided, [the court's] reasoning is unsatisfactory. It accepts the extremely broad purpose stated by the Minister, namely, guarding against any slowdown in investment, while ignoring the evidence that the means adopted by the legislature to

(The footnote is continued on the next page.)

the multiple and conflicting purposes associated with complex statutes and legislative compromises.[80]

Finally, while it might be argued that legislative enactments favouring well-organized interest groups should be strictly construed in order to protect the broader public interest,[81] it is arguable that other statutory provisions should be broadly construed to promote public interests otherwise underrepresented in the legislative process.[82] In this respect, as Cass Sunstein has written, "an interpretive approach that is alert to the risks of deals and that attempts to make sense of statutory enactments will produce a superior system of law."[83] Applied to the Income Tax Act, this approach might favour the strict construction of incentive provisions favouring well-organized private interests and a more liberal interpretation of other provisions like anti-avoidance rules aimed at the achievement of equity among taxpayers.[84]

Purposive Interpretation and Judicial Discretion

While the preceding analysis defends the concepts of legislative intent and statutory purpose as legitimate constituents of statutory meaning, it recognizes that the identification of these intentions and purposes is often difficult, involving an interpretive exercise all on its own. To the extent that authoritative statements of legislative intent are often unreliable or non-existent, while statutory purposes are generally varied and conflicting,

---

79 Continued . . .
achieve this goal were meant to be limited. The legislature might have extended the investment [tax] credit to every expenditure on industrial equipment, but it did not do so. The credit was limited to equipment used for certain industries only. Five or six were listed in the legislation and neither construction nor road building was mentioned. To appreciate the purpose of the provision the court must ask not only why the credit was created but also why it was available for some investments but not others. Until this second question has been answered, the purpose of the provision is not fully known."

80 See, for example, Sullivan, ibid., at 47-48.

81 See, for example, Sunstein, supra footnote 8, at 486-87, concluding that courts should "narrowly construe" statutory provisions that "serve no plausible public purpose, and amount merely to interest-group transfers."

82 See, for example, Jonathan Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model" (March 1986), 86 *Columbia Law Review* 223-68.

83 Sunstein, supra footnote 8, at 450.

84 See, for example, J.E. Fulcher, "The Income Tax Act, the Rules of Interpretation and Tax Avoidance. Purpose vs. Plain Meaning: Which, When and Why?" (December 1995), 74 *The Canadian Bar Review* 563-84, at 568, favouring a "liberal interpretation" of provisions aimed at equity among taxpayers and a "jaundiced approach" to the interpretation of incentive provisions of the Act that are "unrelated to either the raising of revenue or equity among taxpayers." For a similar suggestion in the US context, see Deborah A. Geier, "Interpreting Tax Legislation: The Role of Purpose" (1995), vol. 2, no. 8 *Florida Tax Review* 492-519, at 493-503, advocating a purposive approach to the interpretation of Internal Revenue Code provisions comprising "the fundamental structure underlying the income tax" and a textualist approach to "statutory language when no structural value is implicated."

and definable at various levels of generality, critics have argued that purposive interpretation is largely indeterminate, conferring significant discretion upon unelected judges.[85] Indeed, at least one advocate of purposive interpretation has acknowledged that "[j]udges have considerable freedom in formulating their descriptions of legislative purpose."[86]

The question of judicial discretion is central to any theory of statutory interpretation, as it is to other jurisprudential theories. For formalists, this discretion must be narrowly constrained by the words of the statutory text, to ensure that courts fulfil their proper role as interpreters of legislation, rather than legislators in their own right.[87] Those favouring more purposive approaches to statutory interpretation, on the other hand, question the assumed determinacy of statutory texts,[88] emphasize the inescapable role of the interpreter in statutory interpretation,[89] and regard the characterization of legislative intentions and statutory purposes as sufficiently circumscribed to impose meaningful constraints on judicial interpreters.[90]

---

[85] See, for example, Easterbrook, supra footnote 46, at 62: "The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court [emphasis in original]."

[86] Sullivan, supra footnote 11, at 60. See also ibid., at 48, describing the interpretation of multiple and conflicting purposes as "one of the more discretionary aspects of statutory interpretation."

[87] See, for example, Robert S. Summers, "Judge Richard Posner's Jurisprudence" (May 1991), 89 *Michigan Law Review* 1302-33, at 1320, concluding that "judicial adherence to the ordinary meaning of ordinary words in the statute restricts the opportunity for strong-willed judges to substitute their own personal political views for those of the legislature."

[88] See, for example, Sunstein, supra footnote 8, at 415-24, criticizing textualist approaches to statutory interpretation and emphasizing (at 416) that "[s]tatutory terms are not self-defining, and words have no meaning before or without interpretation." See also William N. Eskridge Jr. and Philip P. Frickey, "Statutory Interpretation as Practical Reasoning" (January 1990), 42 *Stanford Law Review* 321-84, at 340-45, rejecting textualist approaches to statutory interpretation on the grounds (among others) that they "oversimplify the meaning of statutory texts" and "are not so determinate as they sound." This issue is discussed further below under the heading "Plain Meaning Rule—Meaning, Interpretation, and the Plain Meaning Rule."

[89] See, for example, Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60, at 58-68, discussing "the critical role of the interpreter's perspective" in statutory interpretation. See also Daniel A. Farber, "Statutory Interpretation and Legislative Supremacy" (December 1989), 78 *Georgetown Law Journal* 281-318; William N. Eskridge Jr., "Spinning Legislative Supremacy" (December 1989), 78 *Georgetown Law Journal* 319-52; and Daniel A. Farber, "The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law" (April 1992), 45 *Vanderbilt Law Review* 533-59. Many of these insights are based on contemporary works in philosophical hermeneutics, which is discussed below under the heading "Plain Meaning Rule—Meaning, Interpretation, and the Plain Meaning Rule."

[90] See, for example, Sullivan, supra footnote 11, at 52-54, where she describes as "norms of plausibility" the background norms or assumptions on which courts necessarily rely to derive plausible inferences of legislative intentions and statutory purposes. Sullivan emphasizes (ibid., at 60) the extent to which these assumptions are apt to be shared by members of an interpretive community, though she acknowledges that disagreements

(The footnote is continued on the next page.)

Indeed, as elements of statutory meaning together with the statutory text, it is arguable that purposive considerations impose a further constraint on statutory interpretation in addition to the words of the statute.[91]

While the latter arguments justify an important role in statutory interpretation for "the scheme of the Act, the object of the Act, and the intention of Parliament," they do not support the key principle of purposive interpretation that these elements of statutory meaning have priority over the words of the Act. On the contrary, as critics rightly charge, to the extent that purposive interpretation downplays the words of the statutory text, it increases judicial discretion and the possibility of inappropriate judicial legislation.

In *Neuman v. The Queen*,[92] for example, where the Supreme Court of Canada considered the anti-avoidance rule in subsection 56(2) of the Act, the court's purposive interpretation ignored the final words of the provision, which require an amount to be included in the taxpayer's income "to the extent that it would be if the payment or transfer had been made to the taxpayer," and effectively rewrote the text of the Act to exclude from the scope of this rule the payment of all dividends except those to which a reassessed taxpayer had a pre-existing entitlement before their payment to a third party.[93] Moreover, as argued in part 1 of this article, this decision contradicts not only the words of subsection 56(2) but also the acknowledged purpose of the provision itself "to prevent tax avoidance through income splitting."[94]

Purposive Interpretation and Doctrinal Confusion

To the extent that purposive interpretation ignores the words of the statutory text, it not only increases judicial discretion and law making, but

---

90 Continued . . .
regarding these background norms are a "source of indeterminacy." For a similar emphasis on the constraints imposed by the shared understandings of interpretive communities, see Owen M. Fiss, "Objectivity and Interpretation" (April 1982), 34 *Stanford Law Review* 739-63. See also Sunstein, supra footnote 8, at 442, concluding that statutory interpretation is typically "quite predictable, largely because background norms are uncontested among the judges"; and Posner, supra footnote 60, at 272, commenting that "the existence of shared values is a partial answer to criticisms that judicial creativity is inherently usurpative."

91 See, for example, Kernochan, supra footnote 56, at 347-48, arguing that the concepts of legislative intent and statutory purpose define interpretive guideposts "outside [the court's] own subjective judgment," suggesting "a goal, attainable to a degree," and demanding "an interpretive attitude that acknowledges the role of the legislature." See also Sunstein, supra footnote 8, at 430, suggesting that "[w]ithout reference to [legislative] history, interpretation sometimes becomes far less bounded."

92 Supra footnote 33.

93 See the analysis of the *Neuman* case in part 1 of this article at footnotes 178 to 193 and accompanying text. For a more detailed analysis of the Supreme Court of Canada decision in *Neuman*, see David G. Duff, "*Neuman* and Beyond: Income-Splitting, Tax Avoidance, and Statutory Interpretation at the Supreme Court of Canada," *Canadian Business Law Journal* (forthcoming).

94 *Neuman*, supra footnote 33, at 6301; 187.

produces questionable judgments and doctrinal confusion, requiring subsequent litigation and/or legislative amendment to clarify the meaning of the original rule.[95] As examples of these results, one need only consider the Supreme Court of Canada decisions in *The Queen v. Bronfman Trust*[96] and *The Queen v. McClurg*.[97] While the outcome in each of these cases may have been justified, the reasons are unsatisfactory and disregard important aspects of the statutory text. Moreover, in each case, the decisions produced considerable doctrinal confusion followed by subsequent litigation and/or legislation.

In *Bronfman Trust*, which involved the interest deductibility provision in subparagraph 20(1)(c)(i), the court erroneously emphasized the direct *use* of borrowed funds rather than the *purpose* of the use as mandated by the statutory text, resulting in a confused analysis of two earlier decisions[98] and considerable uncertainty about the proper application of the rule.[99] Although the Department of Finance released draft legislation responding to the decision in 1991,[100] this legislation is extremely complicated, has not been enacted into law, and appears to have been abandoned by the federal government.[101] In the meantime, courts continue to grapple with the requirements of subparagraph 20(1)(c)(i), having yet to fully resolve the doctrinal confusion created by the decision in *Bronfman Trust*.[102]

In *McClurg*, which involved the anti-avoidance rule in subsection 56(2), the majority decision ignored the final words of the provision (which, as noted above, require an amount to be included in the taxpayer's income "to the extent that it would be if the payment or transfer had been made

---

[95] See Michael Livingston, "Practical Reason, 'Purposivism,' and the Interpretation of Tax Statutes" (Summer 1996), 51 *Tax Law Review* 677-724, at 701.

[96] Supra footnote 35.

[97] Supra footnote 35.

[98] *Trans-Prairie Pipelines Ltd. v. MNR*, 70 DTC 6351; [1970] CTC 537 (Ex. Ct.); and *Zwaig v. MNR*, 74 DTC 1121; [1974] CTC 2172 (TRB).

[99] See the analysis of this case in part 1 of this article at footnotes 122 to 145 and accompanying text.

[100] Canada, Department of Finance, Draft Legislation: Tax Treatment of Interest Expense, December 20, 1991. See proposed sections 20.1 and 20.2 and proposed subparagraphs 20(1)(c)(v) and (vi).

[101] See Brian J. Arnold and Tim Edgar, "Deductibility of Interest Expense" (1995), vol. 43, no. 5 *Canadian Tax Journal* 1216-44, at 1229.

[102] For post-*Bronfman Trust* decisions emphasizing the direct use of borrowed funds, see *The Queen v. Attaie*, 90 DTC 6413; [1990] 2 CTC 157 (FCA); *Livingston International Inc. v. The Queen*, 92 DTC 6197; [1992] 1 CTC 217 (FCA); *Garneau v. The Queen*, [1995] 1 CTC 2978 (TCC); *74712 Alberta Limited v. The Queen*, [1997] 2 CTC 30 (FCA); and *Singleton v. MNR*, [1999] FTR 33201 (FCA). For other cases in which the deduction of interest on borrowed funds has been allowed on the basis of an eligible indirect use, see *Morscher v. MNR*, 92 DTC 2214; [1992] 2 CTC 2534 (TCC); and *Grenier v. MNR*, 92 DTC 1678; [1992] 1 CTC 2703 (TCC), aff'd. 98 DTC 6439; [1998] 3 CTC 243 (FCTD). When this article went to press, the Supreme Court of Canada's reasons in *Shell Canada Limited* had not yet been released.

to the taxpayer"), affirmed a questionable doctrine excluding most dividends from the scope of the statutory rule, and created considerable doctrinal uncertainty with its obiter statement suggesting that the provision might nonetheless apply to the payment of a discretionary dividend when a "non-arm's length shareholder has made no contribution to the company."[103] While the court's subsequent decision in *Neuman* appears to have resolved this uncertainty by rejecting the obiter statement and reaffirming the general rule that subsection 56(2) cannot apply to the payment of a dividend, as stated above,[104] this conclusion contradicts both the text of the provision and its acknowledged purpose "to prevent tax avoidance through income splitting." Although the decision may forestall future litigation,[105] it has already provoked a legislative response. In the February 1999 budget, the federal government proposed to introduce a special "income-splitting tax," applying the top marginal rate of tax to taxable dividends (as well as certain other amounts) received by a minor child.[106] According to the budget, this measure was necessary because "recent case law [that is, *Neuman*] has provided support for income-splitting techniques contrary to policy intent."[107] In addition, the budget explained:

> The scope of this new measure is narrow; it targets those structures that are primarily put in place to facilitate income splitting with minors. The government will monitor the effectiveness of this targeted measure, and may take appropriate action if new income-splitting techniques develop.[108]

Therefore, even this new measure may not be the last word on the subject.

Purposive Interpretation and the Rule of Law

For the purposes of this article, the rule of law can be characterized by five basic criteria of a legal system:[109]

1) knowability, according to which laws are publicly available and prospective in effect;

---

[103] *McClurg*, supra footnote 35, at 5013; 185. See the analysis of this case in part 1 of this article at footnotes 146 to 177 and accompanying text.

[104] See supra footnotes 93 and 94 and accompanying text.

[105] Even this result may be uncertain, to the extent that Iacobucci J's decision in *Neuman* is qualified by the assumption (supra footnote 33, at 6304; 193) that "proper consideration was given for the shares when issued." To the extent that "proper consideration" is difficult to determine for shares on which discretionary dividends might subsequently be paid, this qualification might well be tested through subsequent litigation.

[106] Canada, Department of Finance, 1999 Budget, annex 7, February 16, 1999, 193-94 and 238-39.

[107] Ibid., at 193.

[108] Ibid., at 194.

[109] These criteria are derived from Lawrence B. Solum, "Equity and the Rule of Law," in Ian Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994), 120-47, at 121-23. For useful discussions of the rule of law, see also Joseph Raz, "The Rule of Law and Its Virtue" (April 1977), 93 *Law Quarterly Review* 195-211; and Margaret Jane Radin, "Reconsidering the Rule of Law" (July 1989), 69 *Boston University Law Review* 781-819.

2) generality, demanding that statutes and other legal rules are of general application, not aimed at particular individuals;

3) regularity, by which similar cases are to be treated similarly;

4) performability, demanding that laws be such that persons may reasonably be capable of fulfilling their commands; and

5) fair and orderly procedures for the determination of specific cases.

The rule of law also underlies the various procedural requirements that a legislature must satisfy to translate its intentions and purposes into authoritative legal form.[110]

On this basis, one can readily see why critics might object to a purposive approach to statutory interpretation. To the extent that purposive interpretation considers elements extrinsic to the words of the statutory text, it is argued, this approach contradicts the principles of knowability and performability according to which citizens should be able to determine the legal rules to which they are subject. As Peter Hogg and Joanne Magee suggest,

> [i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.[111]

Indeed, it is on this basis that English and Canadian courts traditionally excluded legislative history as an admissible aid to statutory interpretation.[112]

In addition, critics argue, by regarding legislative intentions and statutory purposes, rather than statutory texts, as the essential elements of statutory meaning, purposive interpretation ignores fundamental legal principles according to which statutory law comprises only duly authorized legislative enactments, not underlying intentions and purposes that have not satisfied the procedural steps necessary to the enactment of valid statutory provisions. In this respect, as Oliver Wendell Holmes once wrote, courts should "not inquire what the legislature meant" but "only what the

---

[110] For a brief summary of the legislative processes by which tax legislation is enacted, see Vern Krishna, *The Fundamentals of Canadian Income Tax*, 5th ed. (Scarborough, Ont.: Carswell, 1995), 10-11.

[111] Peter W. Hogg and Joanne E. Magee, *Principles of Canadian Income Tax Law*, 2d ed. (Scarborough, Ont.: Carswell, 1997), 476. See also Karen Sharlow, "The Interpretation of Tax Legislation and the Rule of Law—Rejoinder" (March 1996), 75 *The Canadian Bar Review* 151-54, at 152, commenting that the use of statutory purpose "to distort the meaning of the words used in the *Income Tax Act* . . . undermines the rule of law, ultimately jeopardizing the integrity of the tax system."

[112] See, for example, *Pepper v. Hart*, supra footnote 68, at 52, in which Lord Oliver of Aylmerton cautioned against the use of interpretive aids that are not "readily or ordinarily accessible to the citizen whose rights and duties are to be affected."

statute means."[113] Similarly, US Judge Frank Easterbrook emphasizes that "[t]he words of the statute, and not the intent of the drafters, are the 'law.' "[114]

While the rule of law is an important value in a free and democratic society, it must be balanced against other values such as fairness and efficiency. Where persons engage in schemes that are deliberately designed to adhere to the letter of a statute while violating its spirit, the values of certainty and predictability rightly yield to principles of fairness.[115] In the application of the Income Tax Act, such a balance underlies judicial anti-avoidance doctrines such as the "object and spirit" test set out in *Stubart*;[116] specific anti-avoidance rules such as section 68, which applies where an amount "can reasonably be regarded" as something other than its true legal character;[117] the "artificial transactions" rule in former subsection 245(1); and the general anti-avoidance rule in section 245. Likewise, where legislation contains drafting errors or leads to absurd consequences, it is well established that courts may disregard the actual words of the statute to achieve a fair and reasonable result consistent with legislative intentions and statutory purposes.[118] In at least one Canadian income tax case, for example, the Tax Review Board allowed a taxpayer's deduction for capital cost allowance on the basis that the words "corrugated iron," which does not exist, should be read, as they now do, as "corrugated metal."[119]

Subject to these qualifications, methods of statutory interpretation that disregard the words of the statutory text are rightly criticized on the basis that they offend the rule of law. To the extent that purposive interpretation downplays the textual elements of statutory interpretation, therefore, both of the arguments considered above are valid. In fact, as illustrated by the Supreme Court of Canada decision in *Neuman*, purposive interpretation can produce decisions strikingly at odds with the words of the statute.[120]

---

[113] Oliver Wendell Holmes, "The Theory of Legal Interpretation" (January 25, 1899), 12 *Harvard Law Review* 417-20, at 419.

[114] Easterbrook, supra footnote 46, at 60. Radin, supra footnote 49, at 871, emphasizes that "in law, the specific individuals who make up the legislature are men to whom a specialized function has been temporarily assigned. That function is not to impose their will even within limits on their fellow-citizens, but to 'pass statutes,' which is a fairly precise operation." Sunstein, supra footnote 8, at 416, observes, "Statutory terms are the enactment of the democratically elected legislature and represent the relevant 'law.' Statutory terms—not legislative history, not legislative purpose, not legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law."

[115] See the discussion of avoidance schemes in Sullivan, supra footnote 11, at 114-22 and 413-15.

[116] See supra footnote 34.

[117] For other anti-avoidance rules employing similar language, see subsections 6(3) and 16(1).

[118] See Sullivan, supra footnote 11, at 79-99 and 104-10.

[119] *Triple "F" Holdings Ltd. v. MNR*, 81 DTC 135; [1981] CTC 2084 (TRB). This case is discussed in part 1 of this article at footnotes 77 to 79 and accompanying text.

[120] See supra footnotes 93 and 94 and accompanying text.

Nonetheless, although these arguments challenge the primary tenet of purposive interpretation that “the scheme of the Act, the object of the Act, and the intention of Parliament” are the primary considerations in statutory interpretation, they do not rule out judicial attention to these purposive considerations in interpreting the meaning of statutory provisions. On the contrary, where courts draw inferences regarding legislative intentions and statutory purposes from authoritative statutory texts, these inferences offend the rule of law no more than any other method of statutory interpretation. Likewise, to the extent that courts refer to extrinsic aids, such as the legislative history of a statute or amendment, in order to interpret (and not supplant) statutory texts, the rule of law is also unimpaired. Indeed, much legislative history—for example, budget statements and Department of Finance technical notes—is as readily accessible as prior judicial decisions whose interpretive relevance is unquestioned.

Plain Meaning Rule

In response to the various concerns about purposive interpretation outlined in the previous section, courts and commentators have placed increasing emphasis on the primacy of the statutory text.[121] In several recent cases, for example, the Supreme Court of Canada has affirmed a “plain meaning rule” according to which “clear words” of a statutory provision should be applied regardless of “the scheme of the Act, the object of the Act, and the intention of Parliament,” which may be considered only to resolve some pre-existing doubt or ambiguity, not to create it.[122]

Since this emphasis on a “plain meaning” approach is best understood as a reaction to the deficiencies of purposive interpretation, it is not surprising that the primary arguments in its favour correspond to those against the purposive approach. Thus, advocates contend, by interpreting statutes literally, without regard to legislative intentions and statutory purposes except where statutory texts are ambiguous on their face, a plain

---

[121] For example, Sunstein, supra footnote 8, at 415-16, observes, “Textualism appears to be enjoying a renaissance in a number of recent cases, and perhaps in the academy as well, partly because of dissatisfaction with alternative interpretive strategies . . . which counsel courts to rely on ‘purpose’ or to produce ‘reason’ in regulatory regimes.” For an early appreciation of the shift to textualist interpretation in the US Supreme Court, see Note, “Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court” (February 1982), 95 *Harvard Law Review* 892-915. For other analyses of this development in the United States, see William N. Eskridge Jr., “The New Textualism” (April 1990), 37 *UCLA Law Review* 621-91; Nicholas S. Zeppos, “Justice Scalia’s Textualism: The ‘New’ New Legal Process” (June 1991), 12 *Cardozo Law Review* 1597-1643; and George H. Taylor, “Structural Textualism” (March 1995), 75 *Boston University Law Review* 321-85. For a leading statement of the textualist approach to statutory interpretation by its most prominent advocate on the US Supreme Court, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997).

[122] See, for example, *R v. McIntosh*, [1995] 1 SCR 686; *Antosko*, supra footnote 34; and *Friesen v. The Queen*, 95 DTC 5551; [1995] 2 CTC 369 (SCC). These cases are examined in part 1 of this article at footnotes 199 to 268 and accompanying text.

meaning rule limits judicial discretion[123] and advances the values of certainty and predictability associated with the rule of law.[124] In addition, it is suggested, to the extent that the legislature has expressed itself in clear and unambiguous statutory language, a plain meaning rule respects the principle of legislative supremacy by giving full effect to this language regardless of its consequences. This reasoning is reflected in the words of Lamer CJ in *R v. Multiform Mfg.*:

> When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute.[125]

Finally, it is argued, such an approach facilitates economical decision making by inexpert judges[126] and creates incentives for legislatures to draft statutes in clear and precise language that may be easily understood by citizens and the courts.[127]

To critics, however, the plain meaning rule oversimplifies the meaning of statutory texts, creates a questionable and malleable distinction between "ambiguous" and "unambiguous" statutory language, and mischaracterizes the respective institutional responsibilities and capacities of courts and legislatures. As a result, it is argued, the plain meaning rule obscures the process of statutory interpretation, artificially limits its scope, produces decisions contrary to legislative intentions and statutory purposes, permits substantial judicial discretion, and places an unreasonable burden on legislative drafters.

This section considers each of these arguments, accepting all as persuasive criticisms of the plain meaning approach affirmed in recent Supreme Court of Canada decisions. While the emphasis of this interpretive approach

---

[123] See, for example, Summers, supra footnote 87, at 1320; and Easterbrook, "Text, History, and Structure in Statutory Interpretation," supra footnote 65, at 63.

[124] See, for example, Hogg and Magee, supra footnote 111, at 475-76; and Sharlow, supra footnote 111. For similar arguments in favour of a plain meaning approach in the United States, see Antonin Scalia, "The Rule of Law as a Law of Rules" (Fall 1989), 56 *University of Chicago Law Review* 1175-88.

[125] (1990), 79 CR (3d) 390, at 394 (SCC). For an earlier statement of this view, see the *Sussex Peerage Case* (1844), 8 ER 1034, at 1057 (HL), per Tindal CJ: "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 ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

[126] See, for example, Frederick Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning" [1990] *The Supreme Court Review* 231-56; and Easterbrook, "Text, History, and Structure in Statutory Interpretation," supra footnote 65, at 69.

[127] For example, Shepsle, supra footnote 49, at 253, suggests that "a potential benefit of a rather rigorous application of plain meaning" is that "rational legislators with a modicum of foresight will seek to make their statutes plainer and more meaningful."

on the words of the statutory text is a salutary response to the defects of purposive interpretation, the plain meaning rule goes too far by ignoring the role that purposive and contextual considerations should and necessarily do play in the interpretation of statutory words.

Meaning, Interpretation, and the Plain Meaning Rule

Textual analysis is a subject of many fields of academic inquiry, the most relevant of which for statutory interpretation are the philosophy of language,[128] literary theory,[129] and philosophical hermeneutics (the study of interpretation).[130] From these disciplines, critics of the plain meaning rule have drawn three crucial insights about the meaning of texts in general and statutory texts in particular.

First, words do not have fixed and certain meanings but derive their meanings from linguistic conventions and cultural norms, as well as the specific contexts in which they are used.[131] As US Judge Learned Hand observed,

> [w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.[132]

---

[128] See, for example, Ludwig Wittgenstein, *Philosophical Investigations*, 2d ed., trans. G.E.M. Anscombe (Oxford: Blackwell, 1958); John R. Searle, *Speech Acts: An Essay on the Philosophy of Language* (Cambridge, Eng.: Cambridge University Press, 1969); and Paul Ricoeur, *The Rule of Metaphor: Multi-Disciplinary Studies of the Creation of Meaning in Language*, trans. Robert Czerny with Kathleen McLaughlin and John Costello (Toronto: University of Toronto Press, 1977). See also "Interpretation Symposium: Philosophy of Language and Legal Interpretation" (1985), 58 *Southern California Law Review* 277-549.

[129] See, for example, Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980); "Symposium on Law and Literature" (March 1982), 60 *Texas Law Review* 373-586; and Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989).

[130] See, for example, Hans-Georg Gadamer, *Truth and Method*, 2d rev. ed. (New York: Crossroad, 1989); and Paul Ricoeur, *Hermeneutics and the Human Sciences* (Cambridge, Eng.: Cambridge University Press, 1981). For useful introductions to this literature and its relevance to statutory interpretation, see "Interpretation Symposium: Hermeneutics and Legal Interpretation" (1985), 58 *Southern California Law Review* 35-275; Francis J. Mootz III, "The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur" (May 1988), 68 *Boston University Law Review* 523-617; William Eskridge Jr., "Gadamer/Statutory Interpretation" (April 1990), 90 *Columbia Law Review* 609-81; and "A Symposium on Legal and Political Hermeneutics" (1995), 16 *Cardozo Law Review* 1879-2351.

[131] See, for example, Sunstein, supra footnote 8, at 416, observing that "the meaning of words (whether 'plain' or not) depends on both *culture* and *context* [emphasis in original]."

[132] *National Labor Relations Board v. Federbush Co.*, 121 F.2d 954, at 957 (2d Cir. 1941). See also *Towne v. Eisner*, 245 US 418, at 425 (1918), per Holmes J, observing that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"; and *British Columbia Telephone Company v. The Queen*, 92 DTC 6129, at 6132;

(The footnote is continued on the next page.)

As a result, while the meaning of a statutory provision depends partly on the internal structure of the provision and its relationship to the statute as a whole (the "internal context" of the statutory text),[133] it also depends on external assumptions regarding the conventional use of a shared language, the purpose and subject-matter of the text, and the legal and cultural norms of the society in which the statute is enacted and operates (the "external context" of the statutory text).[134]

Second, the meaning of a text does not exist independently of interpretation but is the result of interpretation.[135] Words, as Sunstein explains, "are not self-defining," and texts "do not have pre-interpretive meanings."[136] On the contrary, as Hans-Georg Gadamer has written,

> [i]nterpretation is not an occasional, post facto supplement to understanding; rather, understanding is always interpretation, and hence interpretation is the explicit form of understanding.[137]

As a result, although specific contexts and shared background assumptions may suggest a single plausible meaning for a statutory text,[138] this

---

[132] Continued . . .
[1992] 1 CTC 26, at 30 (FCA), per MacGuigan JA, emphasizing that "words can never be considered apart from their context, since context imparts meaning to that which it surrounds."

[133] For example, William D. Popkin, "The Collaborative Model of Statutory Interpretation" (March 1988), 61 *Southern California Law Review* 541-627, at 593, describes the "internal context" of the statute as "the statute's language surrounding the words being interpreted." For a useful discussion of this internal context, see Taylor, supra footnote 121, at 359-62. For a detailed summary of the various interpretive principles governing the use of this internal context in statutory interpretation, see Sullivan, supra footnote 11, at 155-92, 197-213, and 245-84. The role of this internal context in statutory interpretation is examined more fully below under the heading "Words-in-Total-Context Approach—Internal Context."

[134] See, for example, Popkin, supra footnote 133, at 593, describing the "external context" of the statute as "information about the world outside the statute that sheds light on the text's meaning. It includes the common understanding of the language that the writer and reader are likely to share, the purposes of the text, and the surrounding background of values in which the text is adopted." See also Sunstein, supra footnote 8, at 411, emphasizing that "[t]he meaning of a statute inevitably depends on the precepts with which interpreters approach its text" and adding that "[t]hese principles are usually not 'in' any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture"; and Posner, supra footnote 60, at 296, suggesting that "meaning does not reside simply in the words of a text, for the words are always pointing to something outside. Meaning is that which emerges when linguistic and cultural understandings and experiences are brought to bear on the text." For a useful discussion of this external context, see Taylor, supra footnote 121, at 362-83. See also Sullivan, supra footnote 11, at 285-425. The role of external context in statutory interpretation is examined more fully below under the heading "Words-in-Total-Context Approach—External Context."

[135] See, for example, Eskridge and Frickey, supra footnote 88, at 346: "Hermeneutics suggests that the text lacks meaning *until* it is interpreted [emphasis in original]."

[136] Sunstein, supra footnote 8, at 416 and 411.

[137] Gadamer, supra footnote 130, at 307.

[138] See, for example, Sullivan, supra footnote 11, at 9: "In so far as the readers of a legislative text belong to the same linguistic community and share the same conventions, the meaning they attribute to the text is likely to be 'common' or 'ordinary' in the sense of being more or less 'the same for all.' "

meaning, as Stanley Fish explains, is not pre-interpretive but "a product of perspective" and "itself an interpretation."[139] Moreover, in other circumstances, changed contexts or cultural diversity may support more than one plausible meaning.[140] Indeed, as US Judge Richard Posner observes, "[t]he diversity of modern legal culture makes it inevitable that there will be a large area of interpretive indeterminacy."[141]

Third, to truly understand a text, an interpreter must neither impose a preconceived meaning upon the text nor attempt to disregard the preconceptions that he or she inevitably brings to the text, but must engage with the text in order to examine and, where necessary, revise these presuppositions. Describing this "back and forth" process of textual analysis as a "hermeneutic circle," Gadamer explains:

> A person who is trying to understand a text is always projecting. He projects a meaning for the text as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.[142]

Thus, he continues:

> A person trying to understand something will not resign himself from the start to relying on his own accidental fore-meanings, ignoring as consistently and stubbornly as possible the actual meaning of the text until the latter becomes so persistently audible that it breaks through what the interpreter imagines it to be. Rather, a person trying to understand a text is prepared for it to tell him something.[143]

In this respect, as William Eskridge Jr. observes, successful interpretation can be likened to a conversation or dialogue, in which meaning emerges from a "to-and-fro movement of genuine interaction" between the interpreter and the text.[144] Likewise, he suggests, the most exemplary method of statutory interpretation is similarly conversational or "dialogical": "multidimensional," not confined, "open rather than dogmatic, critical rather than docile, inquiring rather than accepting."[145]

Returning to the plain meaning rule, these insights on the meaning of texts and the nature of interpretation suggest three specific criticisms.

First, the assertion that the meaning of a statutory text is "clear and plain" is properly understood not as a conclusion rendering interpretation

---

[139] Fish, *Doing What Comes Naturally*, supra footnote 129, at 185.

[140] See the analysis of these issues below under the heading "Words-in-Total-Context Approach—Changed Contexts."

[141] Posner, supra footnote 60, at 296.

[142] Gadamer, supra footnote 130, at 267.

[143] Ibid., at 269.

[144] Eskridge, supra footnote 130, at 623-24.

[145] Ibid., at 633.

unnecessary but as a judgment resulting from an interpretative process in its own right. As one critic observes,

> when courts say that a statute is plain and therefore needs no interpretation, they do so in an inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation.[146]

As a result, the suggestion in one recent Supreme Court of Canada decision that "the task of interpretation does not arise" whenever "the language of the statute is plain and admits of only one meaning"[147] is surely mistaken. On the contrary, the very conclusion that "the language of the statute is plain and admits of only one meaning" is, in the words of Stanley Fish, "a product of perspective" and "itself an interpretation."[148]

Second, while shared norms and contextual understandings may suggest a single plausible meaning that can be characterized as "clear or plain,"[149] differing background assumptions may support more than one plausible meaning.[150] Indeed, disagreements about the meaning of a text frequently turn on differences in the background assumptions through which the text is understood.[151] In these circumstances, references to the "plain meaning" of the text not only are incomplete, but conceal, if only inadvertently, the background assumptions underlying the conclusion that the meaning of the text is in fact clear and plain. In *Antosko et al. v. The Queen*,[152] for example, the Supreme Court of Canada's conclusion that the transaction at issue fell within the "clear and plain" meaning of subsection 20(14) of the Act reflects an underlying assumption that taxpayers are entitled to the benefit of statutory provisions irrespective of their object and spirit, provided that the transaction at issue is neither a sham, nor artificial, nor blatantly synthetic.[153] While this assumption has a lengthy

---

[146] Radin, supra footnote 49, at 869. See also Dworkin, supra footnote 60, at 352, explaining that the conclusion that a statute is unclear "is the *result* rather than the *occasion*" of statutory interpretation (emphasis in original).

[147] *McIntosh*, supra footnote 122, at 697, per Lamer CJ. See the discussion of this case in part 1 of this article at footnotes 199 to 203 and accompanying text.

[148] Fish, *Doing What Comes Naturally*, supra footnote 129, at 185.

[149] See Sunstein, supra footnote 8, at 423: "In easy cases, interpretive norms—on which there is wide or universal consensus—and context both play a part in the process of ascertaining statutory meaning. Because such norms are so widely shared, they are invisible and are not an object of controversy. Only in these cases can meaning ever be said to be 'plain.' "

[150] See, for example, Willis, supra footnote 2, at 2, noting that "it is quite possible for all the members of a court to agree that the meaning of a section is so plain that it cannot be controlled by the context and yet disagree as to what that plain meaning is."

[151] See Sunstein, supra footnote 8, at 418: "In many hard cases . . . the source of the difficulty is that the particular background norm and the nature of its application will be highly controversial."

[152] Supra footnote 34.

[153] See the analysis of the *Antosko* case in part 1 of this article at footnotes 208 to 229 and accompanying text.

history in Anglo-Canadian income tax law,[154] it is not inevitable[155] and has been legislatively overruled in Canada by the enactment of the general anti-avoidance rule.

Third, by disregarding indications of statutory meaning other than the text alone, the plain meaning rule imposes artificial limits on the interpretive process.[156] In many cases, the meaning of a statutory text may seem clear and plain on the basis of an acontextual reading but ambiguous when read in light of "the scheme of the Act, the object of the Act, and the intention of Parliament." In *Friesen v. The Queen*,[157] for example, the majority's "plain reading" of subsection 10(1) of the Act (as it then read) is rendered ambiguous through the minority's contextual analysis of the purpose of inventory accounting and the relationship between subsection 10(1) and section 9.[158] Likewise in *Golden*, the minority's plain reading of the words "something else" in section 68 of the Act (as it then read) becomes ambiguous in light of the majority's contextual analysis.[159] To the extent that the plain meaning rule ignores these purposive and contextual considerations, judges who rely on it are apt to misinterpret statutory provisions,[160] producing questionable results at odds with legislative intentions and statutory purposes,[161] and increasing uncertainty in the application of the law.[162]

---

[154] See, for example, *Inland Revenue Commissioners v. Westminster (Duke)*, [1936] AC 1 (HL).

[155] The US Supreme Court, for example, adopted a markedly different approach, affirming a "business purpose test" in *Gregory v. Helvering*, 293 US 465 (1935).

[156] Ruth Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1997), 50. See also Posner, supra footnote 60, at 264, commenting that the plain meaning approach "artificially truncates the interpretive process."

[157] Supra footnote 122.

[158] See the analysis of the *Friesen* case in part 1 of this article at footnotes 230 to 268 and accompanying text.

[159] See the discussion of the *Golden* case in part 1 of this article at footnotes 291 to 316 and accompanying text.

[160] See, for example, Mary L. Heen, "Plain Meaning, the Tax Code, and Doctrinal Incoherence" (April 1997), 48 *Hastings Law Journal* 771-820, at 812: "An increased emphasis on 'plain meaning' analysis of the Code poses an increased risk of misinterpretation in tax cases."

[161] See, for example, Sunstein, supra footnote 8, at 424: "An interpretive strategy that relies exclusively on the ordinary meaning of words . . . will sometimes produce irrationality or injustice that the legislature did not intend." See also Brian J. Arnold, "Statutory Interpretation: Some Thoughts on Plain Meaning," in *Report of Proceedings of the Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 6:1-36, at 6:23, suggesting that the plain meaning rule "leads to unfair, arbitrary, ridiculous results."

[162] See, for example, Kerry Harnish, "Interpreting the Income Tax Act: Purpose v. Plain Meaning and the Effect of Uncertainty in the Tax Law" (1997), vol. 35, no. 3 *Alberta Law Review* 687-725, at 696, arguing that the plain meaning rule "introduces an unwarranted level of subjectivity into the interpretive process that can only heighten the overall *uncertainty* in society as to the application of particular tax laws [emphasis in original]."

Finally, although judges who invoke the plain meaning rule typically consider other indications of statutory meaning in order to confirm their initial reading of the text, these analyses are generally unconvincing, reflecting not a "genuine interaction" between the interpreter and the text, but a questionable imputation of assumed purposes designed to support the "plain reading" at which the judge has already arrived. In *Friesen*, for example, the majority's analysis of the purpose of the lower of cost and market rule in subsection 10(1) of the Act (as it then read) ignores the implication of its traditional limitation to ordinary trading businesses that it was a limited exception to the realization and matching principles, which did not extend to adventures in the nature of trade.[163] Likewise in *Golden*, the minority's argument that the purpose of section 68 (as it then read) was "to allow the Minister to deem an allocation between the proceeds of disposition of property and sums received by the taxpayer in return for something other than property"[164] seems implausible in light of the majority's analysis of "the scheme of the Act, the object of the Act, and the intention of Parliament."[165] Consequently, while it is true, as Ruth Sullivan observes, that the plain meaning rule has a pronounced rhetorical character and is often invoked by courts "less to constrain their own interpretive practice" than to "discount the weight of the arguments that favour alternative interpretations,"[166] it is also true that judicial references to this doctrine influence the process of interpretation, attaching much more weight to initial acontextual readings of the statutory text than to other elements of statutory meaning. Indeed, as the majority decision in *Friesen* and the minority decision in *Golden* suggest, even rhetorical uses of the plain meaning rule may, by discouraging a genuine process of open, critical, and inquiring interpretation, cause judges to misinterpret statutory provisions and arrive at conclusions contrary to legislative intentions and statutory purposes.

Ambiguity

In addition to these objections, the plain meaning rule can be criticized for the artificial emphasis that it places on a preliminary finding of textual ambiguity. To begin with, since the conclusion that the meaning of a statutory text is plain or ambiguous itself depends on cultural norms and contextual understandings that are external to the text, it is odd to make a finding of textual ambiguity the test by which these external understandings may be explicitly considered in the process of statutory interpretation.[167]

---

[163] See part 1 of this article at footnotes 230 to 268 and accompanying text.

[164] Supra footnote 39, at 6143; 282.

[165] See part 1 of this article at footnotes 291 to 316 and accompanying text.

[166] Sullivan, supra footnote 156, at 51. See also Sullivan, supra footnote 11, at 5-6, discussing the rhetorical use of the plain meaning rule.

[167] See, for example, Paul Mitchell, "Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation" (1996), 41 *McGill Law Journal* 713-38, at 719-20, observing that "the declaration that a statute is 'ambiguous' cannot be separated from the interpreter's substantive views."

More generally, since the standard by which ambiguity is determined is itself unclear and based on unarticulated background assumptions, courts may effectively consider contextual and purposive factors whenever they so choose simply by expressing some doubt as to the "plain meaning" of the text.[168] Indeed, as Cory J observed in *The Queen v. Province of Alberta Treasury Branches et al.*, "agile legal minds could probably find an ambiguity in as simple a request as 'close the door please' and most certainly in even the shortest and clearest of the ten commandments."[169] As a result, the plain meaning rule not only fails to limit judicial discretion, but actually increases judicial discretion by making such a crucial stage in the interpretive process depend on a vague standard.[170] In any event, as Brian Arnold observes, "counsel must be prepared to make arguments concerning legislative purpose" in every case, "in case the court finds that there is some doubt or ambiguity in the statutory language."[171]

Finally, since legal disputes often arise where the meaning of a statute is subject to different plausible interpretations, a measure of textual ambiguity is often apparent in litigated tax cases, particularly those appealed to higher level courts.[172] In *Alberta Treasury Branches*, for example, Cory J observed that

> the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, 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.[173]

As a result, even if were possible to determine the plain meaning of the text without regard to cultural norms and contextual understandings, the concept of a "plain meaning" would have a small role to play in actual tax cases.

Institutional Competence

Notwithstanding these criticisms, one might nonetheless defend the plain meaning rule on the grounds that it facilitates economical decision making by inexpert judges and encourages the legislature to draft statutes in a clear and precise manner that may be readily understood by courts and

---

[168] See Sullivan, supra footnote 11, at 3; and Arnold, supra footnote 161, at 6:25.

[169] 96 DTC 6245, at 6248; [1996] 1 CTC 395, at 403 (SCC). On potential ambiguity in the expression "close the door please," see Arnold, supra footnote 161, at 6:25, footnote 78, where he interprets the phrase as a response to the statement "I'm leaving you." Although the words might, as Arnold suggests, have a sarcastic meaning along the lines of "What's stopping you?" or "I don't care," they might also suggest an effort at reconciliation, with the speaker requesting the other person to remain in the room to sort things out.

[170] Arnold, supra footnote 161, at 6:25.

[171] Ibid.

[172] Ibid.

[173] Supra footnote 169, at 6248; 403.

citizens. Moreover, as the Supreme Court of Canada suggested in *Morguard Properties Ltd. v. City of Winnipeg*,[174] the legislature may always amend a statute to reverse a judicial decision with which it disagrees.[175]

The last of these arguments was addressed in the earlier evaluation of strict construction, where it was noted that subsequent amendments increase the length and complexity of legislative enactments and fail to discourage continued efforts at tax avoidance.[176] To the extent that literal interpretations disregarding legislative intentions and statutory purposes are reversed by legislative amendment, the same criticisms may be directed at the plain meaning rule. Moreover, as critics have noted, although judicial decisions may be reversed by amendment, this process is both costly and time-consuming.[177] As a result, as Arnold concludes, it makes more sense for courts to "work with the legislature to keep legislation workable and up-to-date and to avoid making it necessary for the legislature to continually fix inappropriate court decisions."[178]

As for the argument that a plain meaning approach is likely to encourage clear and precise statutory drafting, the legacy of strict construction suggests otherwise: that legislatures will enact detailed and ponderous statutory provisions designed to ensure that specific amounts and transactions are brought within "the letter of the law." Indeed, as one critic has observed, the plain meaning approach "frustrates the drafter's task by establishing an abnormal, noncooperative communication relationship between the drafter and the court."[179] More generally, since it is impossible to foresee all potential ambiguities in the application of a statute as pervasive and detailed as the Income Tax Act, it is unreasonable to expect the legislature to draft clear and precise language to address every eventuality.[180] On the contrary, as critics of the plain meaning rule suggest, in the application of statutory provisions to concrete facts, comparative institutional competence rests with the courts, not the legislature.[181] As Sunstein observes,

> the focus on the particular circumstances enables judges to deal with applications that no legislature, no matter how farsighted, could conceivably have foreseen. Under changed or unforeseen circumstances, mechanical application of statutory terms is unlikely to produce sound results, even

---

[174] Supra footnote 10. See also Lamer CJ's decision in *McIntosh*, supra footnote 122.

[175] See supra footnote 13 and accompanying text.

[176] See footnotes 27 to 31 and accompanying text.

[177] See, for example, Farber and Frickey, supra footnote 52, at 458; and Heen, supra footnote 160, at 815.

[178] Arnold, supra footnote 161, at 6:12.

[179] Farber, "The Inevitability of Practical Reason," supra footnote 89, at 551.

[180] See, for example, Eskridge, supra footnote 121, at 677, questioning whether textualist approaches to statutory interpretation are likely to "have much, if any, effect on the way Congress drafts statutes."

[181] See, for example, Neil Brooks, "The Responsibility of Judges in Interpreting Tax Legislation," in Graeme S. Cooper, ed., *Tax Avoidance and the Rule of Law* (Amsterdam: International Bureau of Fiscal Documentation, 1997), 93-129, at 104-6.

> from the standpoint of the enacting legislature. By contrast, judicial resolution of individual cases, allowing an emphasis on particular settings with which a lawmaker could not be familiar, contains significant advantages for interpretation.[182]

Finally, this relative institutional competence of courts over legislatures provides a response to the first argument that the plain meaning rule facilitates economical decision making by inexpert judges. Although this approach may indeed facilitate a more economical process of judicial reasoning, it does so only by disregarding the unique judicial responsibility to interpret statutory provisions in the context of particular cases.[183] Moreover, to the extent that inexpert judges are considered a barrier to effective judicial decision making in the field of tax law, the appropriate remedy lies not in an interpretive doctrine designed to mask this deficiency, but in effective advocacy by knowledgeable counsel and expert tribunals like the Tax Court of Canada.[184]

WORDS-IN-TOTAL-CONTEXT APPROACH

Although the Supreme Court of Canada has, in the years since its decision in *Stubart*, espoused both purposive interpretation and the plain meaning rule, the words-in-total-context approach is arguably most consistent with the dicta in *Stubart*[185] and most compatible with the actual content of recent Supreme Court decisions, which, as the cases examined in part 1 illustrate, tend to examine both the text of the statute and its purpose, regardless of the interpretive doctrine that the decision purports to apply.[186] Moreover, in *Alberta Treasury Branches*, a majority of the court appears to have favoured this approach, concluding 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.' "[187]

---

[182] Sunstein, supra footnote 8, at 439.

[183] See, for example, Robert Thornton Smith, "Interpreting the Internal Revenue Code: A Tax Jurisprudence" (September 1994), 72 *Taxes: The Tax Magazine* 527-58, at 553, concluding that "[c]ourts have front-line responsibility for application in tax matters."

[184] See, for example, Arnold, supra footnote 161, at 6:36, considering "the possibility of creating a final tax court of appeal composed of judges who have tax expertise and restricting the jurisdiction of the Supreme Court to hear tax cases."

[185] Arnold, ibid., at 6:21, argues that the words-in-total-context approach was "adopted by the Supreme Court in *Stubart* before the confusion over plain meaning in the *Antosko* and *Friesen* cases."

[186] This is not to suggest that the choice of interpretive doctrine has no influence on the manner in which the case is decided. On the contrary, as the evaluations of purposive interpretation and the plain meaning rule suggest, purposive interpretation tends to downplay the importance of the text while the plain meaning rule tends to downplay the role of contextual and purposive considerations.

[187] Supra footnote 169, at 6248; 403-4, per Cory J. Significantly, although Iacobucci J joined Major J's dissent, he concurred in Cory J's approach to statutory interpretation. (The footnote is continued on the next page.)

Insofar as the words-in-total-context approach represents a synthesis of the plain meaning rule and purposive interpretation, the arguments in favour of the former approach build upon those against each of these doctrinal alternatives. Unlike purposive interpretation, which is insufficiently attentive to the text of the Act, the words-in-total-context approach places primary emphasis on the words of the statutory text, giving "greater weight to clear words supported by their immediate context than to larger assertions of parliamentary intention, particularly those based on extrinsic evidence."[188] Unlike the plain meaning rule, on the other hand, which disregards contextual and purposive considerations except where the words of the Act are ambiguous on their face, the words-in-total-context approach acknowledges the influence of context on statutory meaning and emphasizes the role of legislative intentions and statutory purposes as important elements in this contextual analysis. Moreover, by recognizing both textual and purposive considerations, the words-in-total-context approach limits judicial discretion; promotes values of certainty, knowability, and legitimacy associated with the rule of law; and respects democratic values associated with the principle of legislative supremacy.[189]

Notwithstanding its superiority to purposive interpretation and the plain meaning rule, however, the words-in-total-context approach suffers from considerable uncertainty as to the appropriate scope of the interpretive analysis that it suggests. In *British Columbia Telephone Company v. The Queen*, for example, MacGuigan JA suggested that the words-in-total-context approach involves only four elements: "the words themselves, their immediate context, the purpose of the statute as manifested throughout the legislation, and extrinsic evidence of parliamentary intent to the extent admissible."[190] In *Symes*, however, both the majority and the minority decisions considered not only these four elements, but also the legal and social context in which the relevant statutory provisions were enacted and interpreted.[191]

This section examines the scope of contextual analysis, considering the "internal context" of the statutory text (the words of the provision and their relationship to the statute as a whole), the "external context" of the

---

[187] Continued . . .
Unfortunately, Cory J's affirmation of the words-in-total-context approach is marred by his simultaneous (and contradictory) affirmation of the plain meaning rule that "when 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." Ibid., at 6248; 403.

[188] *British Columbia Telephone Company*, supra footnote 132, at 6132; 31. See the analysis of this case in part 1 of this article at footnotes 274 to 284 and accompanying text.

[189] For a useful analysis of contextual approaches to the interpretation of the US Internal Revenue Code, see Lawrence Zelenak, "Thinking About Nonliteral Interpretations of the Internal Revenue Code" (1986), vol. 64, no. 3 *North Carolina Law Review* 623-76.

[190] Supra footnote 132, at 6132; 31.

[191] See the analysis of the *Symes* case in part 1 of this article at footnotes 317 to 352 and accompanying text.

statutory text (background assumptions concerning the purpose and subject-matter of the provision, and the legal and cultural norms of the society in which it was enacted and operates), and the challenges to statutory interpretation arising from changed legal and social contexts. While the relevant contexts for statutory interpretation necessarily depend on the facts of the given case,[192] the review of textual meaning in the previous section suggests that it is inappropriate to exclude any relevant consideration from the scope of contextual analysis. On the contrary, as one advocate explains, "[t]he precise words which are in issue in relation to the facts must be weighed in light of successive circles of context."[193]

Internal Context

The internal context of a statutory text refers to the words of the provision at issue as well as other statutory provisions and structural features (such as headings and subdivisions) relevant to the interpretation of these words.[194] While the words of the provision itself constitute the "immediate context" of the text, the relevant internal context may extend beyond those words to include separate statutory definitions,[195] related statutory provisions,[196] and the structure of the statute reflected in headings and subdivisions.[197]

For formalists, this internal context is defined by traditional interpretive canons concerning the interaction among specific words of the provision itself as well as the relationship between the words of the provision and the statute as a whole. The associated words and limited class rules (*noscitur a sociis* and *ejusdem generis*), for example, reflect the conventional insight that words take their meaning from accompanying words and phrases with which they appear.[198] The principle of implied

[192] See, for example, Livingston, supra footnote 65, at 831, suggesting that the key issue in tax interpretation "is not whether to rely on context, but rather *which* context is most persuasive on the given facts [emphasis in original]."

[193] Kernochan, supra footnote 56, at 348-49.

[194] See Taylor, supra footnote 121, at 359-62.

[195] See, for example, *Friesen*, supra footnote 122, in which the court considered the definition of "inventory" in subsection 248(1) of the Act in order to determine the application of the inventory valuation rule in subsection 10(1).

[196] See, for example, *Symes*, supra footnote 70, in which the court considered the statutory deduction for child-care expenses in section 63 of the Act in order to determine the deductibility of child-care expenses under the general rules governing the deductibility of business expenses. See also *Friesen*, supra footnote 122, in which the minority decision emphasized the relationship between the inventory valuation rule in subsection 10(1) and the general rule governing the computation of profit in subsection 9(1).

[197] See, for example, *Golden*, supra footnote 39, in which the majority interpreted the anti-avoidance rule in section 68 in light of its location in subdivision f, entitled "Rules Relating to Computation of Income."

[198] Willis, supra footnote 2, at 6-7, observes that "words, like people, take colour from their surroundings." For a detailed discussion of these textual canons of construction, see Sullivan, supra footnote 11, at 197-213.

exclusion (*expressio unius est exclusio alterius*), on the other hand, entails an imputation of meaning from the absence of associated words that a reader might normally expect.[199] Other interpretive canons presume that statutes are drafted clearly and precisely such that each and every word must be given effect,[200] that identical words and expressions are given consistent meanings throughout the statute,[201] and that conflicts are avoided by giving priority to specific provisions over those of general application.[202]

In a devastating critique of the traditional canons of statutory construction, Karl Llewellyn adduced a contrary rule to each of these interpretive maxims, concluding that "to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon."[203] Similarly, US Judge Richard Posner has written:

> There are a vast number of canons, corresponding to the vast number of considerations that come into play (often unconsciously) when one is reading. Cautionary rather than directive, often pulling in opposite directions like their counterparts the maxims of ordinary life ("haste makes waste," but "he who hesitates is lost"), the canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday life to be solved.[204]

As these and other critics have observed, while some canons may play a useful role in directing the interpreter's attention to the grammatical structure of the text,[205] their actual application in any given context depends on external assumptions regarding the likely meaning and purpose of the text.[206] Other canons such as those presuming consistent expression and structural coherence reflect extrinsic norms concerning the manner in which statutes ought to be understood (and drafted), less than serious efforts to gauge the legislature's actual intentions and expectations regarding applicable provisions.[207] In each case, therefore, analysis of the internal context of a statutory text depends on the external context by which the text is understood.

---

[199] Willis, supra footnote 2, at 7-8, describes the maxim as "most unreliable." For a detailed discussion of this principle, see Sullivan, supra footnote 11, at 168-76.

[200] See Sullivan, supra footnote 11, at 159-63.

[201] Ibid., at 163-68.

[202] Ibid., at 176-92.

[203] Llewellyn, supra footnote 63, at 401.

[204] Posner, supra footnote 60, at 280.

[205] See, for example, Sunstein, supra footnote 8, at 454-56.

[206] See, for example, Farber, "The Inevitability of Practical Reason," supra footnote 89, at 535-41. See also Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60, at 283, observing that "[m]ost of the canons are highly context-dependent."

[207] See, for example, Sunstein, supra footnote 8, at 425-26 and 437-41, questioning the agency model of statutory interpretation, according to which judges are strictly constrained to promote the will of the legislature.

External Context

The external context of a statutory text refers to all relevant information beyond the words of the statute itself that sheds light on the text's meaning. As suggested earlier, it includes the common understanding of the language in which the statute is written, background assumptions as to the purpose and subject-matter of the text, and the legal and cultural norms of the society in which the statute is enacted and interpreted.[208]

The relevance of external context to statutory interpretation is explicit in traditional doctrines regarding statutes that use common law terms and concepts, which are presumed to retain their common law meanings subject to specific statutory definitions to the contrary,[209] and statutes on the same subject (*in pari materia*), which are to be "taken and construed together, as one system, and as explanatory of each other."[210] Other applications of external context are apparent in established presumptions that statutes should be interpreted to comply with constitutional and international law.[211] In addition to these more visible examples, external context enters into statutory interpretation in the various background assumptions of meaning, purpose, and subject-matter that judicial interpreters bring to the statutory text at issue.

Like the textual canons of construction examined above, substantive canons comprising the external context of the text reflect both plausible assumptions as to the legislature's likely intentions and expectations and judicially imposed norms regarding the manner in which statutes ought to be understood.[212] Indeed, as discussed earlier, the traditional rule according to which taxing statutes were to be strictly construed reflected extrinsic norms derived from 19th-century conceptions of the state and private property much more than plausible assumptions as to the legislature's actual intentions and expectations. Given the democratic character of the modern state and the varied purposes of modern tax statutes, however, this interpretive doctrine and the legal and cultural norms on which it is based became increasingly anachronistic.[213]

---

[208] See supra footnote 134.

[209] See the discussion in Sullivan, supra footnote 11, at 301-4.

[210] *Rex v. Loxdale* (1758), 97 ER 394, at 395 (KB). For a contemporary Canadian authority, see *Nova v. Amoco Canadian Petroleum Co. Ltd.* (1981), 128 DLR (3d) 1, at 9 (SCC), per Estey J: "While each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes, sometimes assistance in determining the meaning of the statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere." For a detailed discussion of this principle of statutory interpretation, see Sullivan, supra footnote 11, at 285-88.

[211] See the discussion of these presumptions in Sullivan, supra footnote 11, at 322-45.

[212] See the analysis of interpretive principles in Sunstein, supra footnote 8, at 456-60.

[213] See the discussion at footnotes 4 to 39 and accompanying text.

While statutory interpretation cannot proceed without background norms and assumptions,[214] these norms and assumptions should reflect the values of the society of which they are a part, not those of a bygone era.[215] For this reason, a residual presumption in favour of the taxpayer, a lingering legacy of strict construction,[216] is perhaps less convincing than a residual presumption in favour of political accountability and democratic decision making.[217] In a case like *Symes*, where the taxpayer sought unsuccessfully to deduct child-care expenses under the general rules governing the deduction of business expenses, such a presumption would have favoured the taxpayer, prompting a more general debate about the structure and purpose of the statutory child-care expense deduction and the pervasive inequities between the tax treatment of business and employment income.[218] In *Fries v. The Queen*,[219] on the other hand, where the taxpayer argued successfully that strike pay was not income from an unspecified source within the meaning of paragraph 3(a) of the Act, such a presumption would have favoured the Crown,[220] requiring labour unions and their members to justify a special exemption for strike pay notwithstanding that union dues are deductible in computing a taxpayer's employment income[221] and the investment income that accumulates in a union's strike fund is tax-exempt.[222]

Changed Contexts

Among the most difficult issues in statutory interpretation is the impact of changes in the legal and social contexts in which statutory provisions are read and applied.[223] As the demise of strict construction illustrates,

---

[214] See the discussion at footnotes 131 to 166 and accompanying text.

[215] See, for example, Sunstein, supra footnote 8, at 462-93, discussing and proposing interpretive principles for the modern regulatory state. See also William N. Eskridge Jr., "Public Values in Statutory Interpretation" (April 1989), 137 *University of Pennsylvania Law Review* 1007-1104.

[216] See the analysis in part 1 of this article at footnotes 91 to 98 and accompanying text.

[217] See, for example, Sunstein, supra footnote 8, at 413, favouring interpretive principles that "will serve the purposes of deliberative government"; and Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60, at 285-97, discussing the role of substantive canons to implement underenforced constitutional norms, to enhance democracy, and to ameliorate dysfunctions in the democratic process.

[218] See the analysis of the *Symes* case in part 1 of this article at footnotes 317 to 352 and accompanying text.

[219] 90 DTC 6662; [1990] 2 CTC 439 (SCC).

[220] Given the language of paragraph 3(a), which applies to income from all sources, of which office, employment, business, and property are listed as prominent examples "without restricting the generality" of the general inclusion, it is arguable that the strike pay should have been taxable even without relying on such a residual presumption.

[221] See paragraph 8(1)(i).

[222] See paragraph 149(1)(k).

[223] See, for example, Sunstein, supra footnote 8, at 493, emphasizing that "[w]hen circumstances change, statutory interpretation becomes especially difficult."

these legal and social changes are apt to produce changes in the background norms and assumptions through which courts interpret statutory texts. As well, as suggested by the Supreme Court of Canada decision in *Symes*, these changes can affect the interpretation of specific statutory provisions themselves, the original enactment of which may have reflected a set of norms and assumptions (for example, in *Symes*, that child-care expenses are purely personal expenses and not incurred for the purpose of gaining or producing income) that are no longer widely shared.[224]

In these circumstances, at least one commentator has argued that courts should have the authority to disregard obsolete provisions, treating them as if they were "no more and no less than part of the common law."[225] Other commentators reject this idea on the basis that it contradicts the principle of legislative supremacy, but argue that courts should adapt statutory provisions to new conditions by interpreting statutory language in light of contemporary social and legal values.[226] In a notable US tax case,[227] for example, a non-profit private school with a racially discriminatory admissions policy was denied tax-exempt charitable status, notwithstanding that the Internal Revenue Code contained no explicit prohibition to this effect and that Congress would have been unlikely to object to discriminatory admissions policies when the exemption was first enacted in 1894. Indeed, to the extent that the meaning of a statutory text depends on the perspective of the interpreter and the circumstances in which the text is interpreted,[228] it is arguable that statutory interpretation is inescapably dynamic, whether or not the court explicitly acknowledges the influence of changes in the legal and social context.[229]

Although originalist models of statutory interpretation suggest that courts should respond to changed contexts by adhering steadfastly to meanings likely to be held by the enacting legislature, leaving it to contemporary

---

[224] See the analysis of the *Symes* case in part 1 of this article at footnotes 317 to 352 and accompanying text.

[225] Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982), 2. For a critical evaluation of this proposal, see Robert Weisberg, "The Calabresian Judicial Artist: Statutes and the New Legal Process" (January 1983), 35 *Stanford Law Review* 213-57.

[226] See, for example, Dworkin, supra footnote 60, at 313-54; Eskridge, "Dynamic Statutory Interpretation," supra footnote 60; Aleinikoff, supra footnote 60; Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60; and Sunstein, supra footnote 8, at 493-97.

[227] *Bob Jones University v. United States*, 461 US 574 (1983).

[228] See, for example, Gadamer, supra footnote 130, at 265-341, emphasizing the "historicity of understanding," which conditions the interpretive "horizon" available to the interpreter; discussing Aristotle's concept of practical reasoning (*phronesis*); and explaining (at 310) that "discovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process."

[229] See, for example, Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60, at 48-68.

legislatures to update statutory provisions,[230] several arguments favour a more dynamic approach according to which statutory provisions should be understood in their contemporary context notwithstanding the original meanings likely to have been held by the enacting legislature. First, as at least one commentator has observed, such an approach may be consistent with the legislature's more general intentions and purposes to ensure the statute's reasonable application to changing circumstances.[231] Indeed, to the extent that a statute employs general language like "personal or living expenses,"[232] it is arguable that the legislature has deliberately delegated to the courts the task of defining such terms in the context of particular cases. That previous judicial decisions may have regarded child-care expenses as wholly personal, therefore, should not govern the characterization of these expenses in the context of a different legal and social environment. As a result, both majority and minority decisions in *Symes* were surely right to reject the view that child-care expenses were necessarily personal in nature.[233]

More generally, as Sunstein explains, a dynamic approach to statutory interpretation "is likely to produce greater coherence in the law; to reduce the problem, pervasive in modern government, of regulation by measures that are badly out of date; and to lead to a legal system that is both more rational and more consistent with democratic norms."[234] In *Symes*, for example, the minority decision would have rendered the tax treatment of child-care expenses more compatible with the principles of gender equality enshrined in the Canadian Charter of Rights and Freedoms, recognized expenses much greater than the unrealistically low limits that were then allowed by the statutory deduction, and fostered a democratic debate about the structure and purpose of the child-care expense deduction and the inequities between the tax treatment of business and employment income. The majority decision, on the other hand, relied on Parliament's original intention to enact a limited statutory deduction for child-care expenses in concluding that this statutory deduction precluded the deduction of child-care expenses under the general rules governing the computation of business income, notwithstanding the absence of any explicit language to

---

[230] See, for example, John Copeland Nagle, "Newt Gingrich, Dynamic Statutory Interpreter" (June 1995), 143 *University of Pennsylvania Law Review* 2209-50; and Anthony D'Amato, "The Injustice of Dynamic Statutory Interpretation" (Spring 1996), 64 *University of Cincinnati Law Review* 911-35.

[231] Aleinikoff, supra footnote 60, at 56-57. See also Sunstein, supra footnote 8, at 433, suggesting that instead of "going back" to ask how the enacting legislature would have interpreted the statute, "perhaps the better route would be to imagine that the enacting legislature could be 'brought forward' into the present and then to ask how it would decide the question in light of new developments of law, fact, and policy."

[232] See paragraph 18(1)(h) of the Act, which prohibits the deduction of "personal or living expenses" in computing a taxpayer's income from a business or property.

[233] On this point and in respect of the commentary immediately following, see the analysis of the *Symes* case in part 1 of this article at footnotes 317 to 352 and accompanying text.

[234] Sunstein, supra footnote 8, at 494.

this effect. Given the "significant social change in the late 1970s and into the 1980s, in terms of the influx of women of child-bearing age into business and into the workplace" that the majority itself noted,[235] it is arguable that Parliament's original intention in enacting section 63 should have been given much less weight than contemporary understandings regarding the tax character of child-care expenses.

PRAGMATIC APPROACH

In rejecting the extremes of purposive interpretation on the one hand and the plain meaning rule on the other, the words-in-total-context approach affirms a more "open-textured" approach to statutory interpretation,[236] in which the words of the Act are read "in their entire context . . . harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[237] In this respect, it is largely pragmatic, in the tradition of the philosophical movement of this name, which shuns "foundationalist" theories of knowledge in favour of more contextual modes of reasoning that draw on a plurality of values and considerations.[238] In contrast to a more thoroughgoing pragmatism, however, which would also consider the practical consequences of different interpretations,[239] the words-in-total-context approach limits the scope of the interpretive inquiry to the words of the Act, the scheme of the Act, the purposes of the Act, and the intentions of Parliament.

---

[235] *Symes*, supra footnote 70, at 6011; 54, citing the decision of the trial judge, 89 DTC 5243, at 5248; [1989] 1 CTC 476, at 483 (FCTD).

[236] *British Columbia Telephone Company*, supra footnote 132, at 6132; 31. This case is discussed in part 1 of this article at footnotes 274 to 284 and accompanying text.

[237] E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), 87.

[238] For a useful introduction to philosophical pragmatism, see Louis Menand, ed., *Pragmatism: A Reader* (New York: Vintage, 1997). On the relevance of philosophical pragmatism to statutory interpretation, see Eskridge and Frickey, supra footnote 88; Farber, "The Inevitability of Practical Reason," supra footnote 89; and Eskridge, *Dynamic Statutory Interpretation*, supra footnote 60, at 192-204, referring to his proposed interpretive approach as "critical pragmatism." On the relevance of philosophical pragmatism to legal thought more generally, see "Symposium on the Renaissance of Pragmatism in American Legal Thought" (1990), 63 *Southern California Law Review* 1569-1909. For a similar argument for a pragmatic approach to statutory interpretation, of which I became aware only after completing this article, see Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-99), 30 *Ottawa Law Review* 175-223.

[239] See, for example, William James, *Pragmatism* (1907), Bruce Kuklick, ed. (Indianapolis: Hackett, 1981), 26, explaining that the "pragmatic method" endeavours "to interpret each notion by tracing its respective practical consequences." For pragmatic approaches to statutory interpretation emphasizing the consequences of alternative interpretations, see Posner, supra footnote 60, at 299-300, suggesting that statutory interpretation might proceed by examining consequences alone and observing that "among the consequences to be considered is the impact that unpredictable statutory applications will have on communication between the legislature and court"; and Brooks, supra footnote 181, at 99, arguing that "[t]he role of judges in tax cases should not involve parsing the words and phrases of the tax legislation, or attempting to decipher the legislature's true intent or purpose from

(The footnote is continued on the next page.)

This section sets out the basic principles of a pragmatic approach to statutory interpretation, considering the role of consequential analysis in statutory interpretation and the manner in which practical consequences and other interpretive considerations are properly brought together in the context of a particular case.

Consequential Analysis

Among the key premises of philosophical pragmatism is the view, familiar to students of the common law, that sound judgments are best made not in the abstract but in the context of specific problems requiring principled answers. The early American pragmatist William James explained:

> The pragmatist clings to facts and concreteness, observes truth at its work in particular cases and generalizes. Truth, for him, becomes a class-name for all sorts of definite working-values in experience.[240]

The American pragmatic jurist Oliver Wendell Holmes made a similar point when he wrote in the opening paragraph of his book *The Common Law*, "The life of the law has not been logic; it has been experience."[241] Indeed, this insight appears in Aristotle's *Nichomachean Ethics*, which emphasizes the practical nature of human judgment, noting that sound deliberation concerns itself not with universal principles in the abstract, but with the application of these universals to particular circumstances.[242]

Likewise in statutory interpretation, the judge is not involved in an abstract debate about the meaning of the statutory text, but in a thoroughly practical exercise concerning its application to a particular set of facts. As J.A. Corry observed,

> no judge ever begins the process of judging until he knows the facts upon which he is to decide. Then he begins at once to think of the statute in

---

[239] Continued . . .
the legislative debates or some other source" but should "involve three steps: (1) the postulation of a range of plausible, alternate policy options for each interpretive issue; (2) a consideration of the consequences of each in terms of tax fairness, the neutrality of the tax system, administrative practicality, and other relevant evaluative criteria; and then (3) a choice among the alternatives based upon what makes the most sense in terms of tax principles (given the general structure of the tax legislation being interpreted)." To the extent that these consequentialist approaches downplay or render contingent important values associated with a separate emphasis on textual and purposive considerations, they constitute a form of consequentialist foundationalism inconsistent with the pluralistic pragmatism advocated here.

[240] James, *Pragmatism*, supra footnote 239, at 34.

[241] Oliver Wendell Holmes, *The Common Law* (1881), Mark DeWolfe Howe, ed. (Boston: Little Brown, 1963), 6. For an excellent account of Holmes's legal pragmatism, see Thomas C. Grey, "Holmes and Legal Pragmatism" (April 1989), 41 *Stanford Law Review* 787-870.

[242] Aristotle, *Nichomachean Ethics*, trans. Terence Irwin (Indianapolis: Hackett, 1985), book VI, chapter 7, paragraph 1141b, observing that the practical wisdom involved in good deliberation not only is concerned with "universals," but "must also come to know particulars, since it is concerned with action and action is about particulars." On the relevance of Aristotle's practical philosophy to modern hermeneutics, see Gadamer, supra footnote 130, at 312-24, emphasizing the situated character of moral knowledge.

> relation to those facts and they inevitably colour his interpretation. . . . In considering his decision, he goes back and forth from facts to statute and from statute to facts, and the processes of interpretation and application are telescoped together in a manner that defies separation.[243]

Not surprisingly, therefore, judges are likely to consider the practical consequences of alternative interpretations, regarding those considered just or good more favourably than those deemed unjust or unreasonable.[244] The traditional "golden rule," for example, has long allowed courts to depart from the literal words of a statute in order to avoid "absurd" or "anomalous" results.[245] Moreover, in the years since *Stubart*, the Supreme Court of Canada has engaged in consequential analysis on several occasions in order to decide among alternative interpretations.

In *Bronfman Trust*, for example, where the taxpayer argued that interest on borrowed money used to finance capital allocations to the beneficiary of a personal trust should qualify for the deduction in subparagraph 20(1)(c)(i) of the Act on the grounds that the borrowed money preserved the income-producing assets of the trust, Dickson CJ observed that "the consequences of the interpretation sought by the trust" would be unfair as between affluent taxpayers with income-earning property and less affluent taxpayers without such assets:

> In order for the trust to succeed, subparagraph 20(1)(c)(i) would have to be interpreted so that a deduction would be permitted for borrowings by any taxpayer who owned income-producing assets. Such a taxpayer could, on this view, apply the proceeds of a loan to purchase a life-insurance policy, to take a vacation, to buy speculative properties, or to engage in any other non-income-earning or ineligible activity. Nevertheless, the interest would be deductible. A less wealthy taxpayer, with no income-earning assets, would not be able to deduct interest payments on loans used in the identical fashion. Such an interpretation would be unfair as between taxpayers and would make a mockery of the statutory requirement that, for interest payments to be deductible, borrowed money must be used for circumscribed income-producing purposes.[246]

Together with the court's purposive approach, this consequential analysis creates a compelling argument against deductibility on the facts of the case.[247]

---

[243] Corry, supra footnote 5, at 291. See also Gadamer, supra footnote 130, at 329, emphasizing that "[t]he work of interpretation is to *concretize* the law in each specific case—i.e., it is a work of *application*"; and Sullivan, supra footnote 11, at 79, noting that "[w]hen a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of persons for better or worse."

[244] On the role of consequential analysis in statutory interpretation, see Sullivan, supra footnote 11, at 79-99.

[245] See the discussion in part 1 of this article at footnotes 64 to 79 and accompanying text.

[246] *Bronfman Trust*, supra footnote 35, at 5065; 126.

[247] See the analysis of the *Bronfman Trust* case in part 1 of this article at footnotes 122 to 145 and accompanying text. As explained in part 1 (at footnote 134 and accompanying

(The footnote is continued on the next page.)

Likewise, in *Antosko*, where the minister argued, inter alia, that the deduction of accrued interest on the transfer of a debt obligation under paragraph 20(14)(b) of the Act was conditional on the prior inclusion of the interest under paragraph 20(14)(a), Iacobucci J rejected this argument on the grounds, among others, that "the consequences that would ensue" if the provision were read in this way would be anomalous in the context of "open-market bond transactions," to which the provision "would be equally applicable":

> It is simply unworkable to require market purchasers to discern whether the vendor of the bond is tax-exempt in order to be able to assess whether a s. 20(14)(b) deduction is permitted. Without this knowledge, the prospective purchaser would thus be unable to gauge the true value of the security.
>
> Moreover, a debt instrument held by a non-taxable entity would be worth less than an identical instrument held by a body that was liable to tax. Any taxpayer who purchased a security previously held by either the federal or provincial Crown, or by one of the persons enumerated in s. 149(1) of the Act [listing persons exempt from tax], would be disentitled from deducting. Given that many of the bonds sold on the open market are sold by the Bank of Canada, a body to whom s. 20(14)(a) does not apply, the interpretation of the section advanced by the respondent would mean that these bonds would have to be sold at a discount compared with identical bonds sold by other parties.[248]

Although the deduction in *Antosko* might have been disallowed on the grounds that it was "artificial" or "synthetic," the court's consequential analysis, together with its textual analysis, renders its conclusion on the relationship between paragraphs 20(14)(a) and (b) highly persuasive.[249]

Other examples of consequential analysis can be found in other cases surveyed in part 1 of this article—some of them convincing, others less so. In *Friesen*, for example, the minority's purposive argument that the lower of cost and market rule in subsection 10(1) of the Act was unavailable to taxpayers engaged in adventures in the nature of trade was strengthened by the observation that this result would require difficult and costly annual valuations of all such property, absent any sale.[250] In *McClurg*, on the other hand, the majority's problematic analysis of subsection 56(2) of the Act is aided by its questionable conclusion that the application of this anti-avoidance rule to dividends could render corporate directors "liable for the tax consequences of any declaration of dividends made to a third

---

247 Continued . . .
text), the court might have devoted more attention to the text of subparagraph 20(1)(c)(i), which refers to the *purpose* for which borrowed money is used, not (as the court emphasized) the direct *use* of the borrowed money.

248 *Antosko*, supra footnote 34, at 6322; 35.

249 See the analysis of the *Antosko* case in part 1 of this article at footnotes 208 to 229 and accompanying text.

250 Supra footnote 122, at 5571; 405-6. See the discussion of this point in part 1 of this article at footnotes 266 to 267 and accompanying text.

party."[251] As explained in part 1 of this article, since a benefit within the meaning of the provision cannot be said to exist where a payment is made "for adequate consideration in the context of a legitimate business relationship," it follows that subsection 56(2) would not apply to the declaration and payment of dividends in the context of ordinary commercial relationships between arm's-length parties even if dividends were not excluded from the scope of the anti-avoidance rule.[252]

While it is always possible for courts to mischaracterize the likely consequences of a particular interpretation, as it is possible for courts to misread the text of a statutory provision, or misconstrue its purpose, the many decisions in which the Supreme Court of Canada has considered the practical consequences of alternative interpretations suggest that consequential analysis is often relevant to statutory interpretation. In several of these cases, for example, the consequences of particular interpretations are considered incompatible with legislative intentions.[253] Since legislators are unlikely to have discussed or even foreseen the interpretive issue with which the court must deal,[254] however, these references to legislative intent are largely fictional, suggesting incompatibility with statutory purposes more generally defined[255] or with widely held background norms regarding the manner in which statutes ought to apply irrespective of any actual legislative intent.[256] In this respect, like the substantive canons of statutory construction examined earlier, an interpretive presumption against unjust or unreasonable consequences reflects both a plausible assumption as to the legislature's likely intentions and expectations, and a judicially

---

[251] Supra footnote 35, at 5012; 184. See also *Neuman*, supra footnote 33, at 6303; 190, contending that the majority's interpretation in *McClurg* "is the only interpretation which makes sense and avoids absurdity in the application of s. 56(2)."

[252] See the analysis of the *McClurg* and *Neuman* decisions in part 1 of this article at footnotes 146 to 193 and accompanying text. For a more detailed analysis of this issue, see Duff, supra footnote 93.

[253] See, for example, *Bronfman Trust*, supra footnote 35, at 5065; 126, per Dickson CJ, concluding that "the consequences of the interpretation sought by the trust" suggest that "it cannot have been intended by Parliament"; the majority decision in *McClurg*, supra footnote 35, at 5012; 184, concluding that the application of subsection 56(2) to dividends "cannot legitimately be considered as within the parameters of the legislative intent" of the provision; and the minority decision in *Friesen*, supra footnote 122, at 5571; 405-6, per Iacobucci J, questioning whether it was "the intent of the drafters of the exception to the realization principle contained in subsection 10(1)" to require owners of property held as an adventure in the nature of trade "to make yearly appraisals of the worth of that property for taxation purposes."

[254] See supra footnote 50 and accompanying text.

[255] See supra footnotes 60 to 61 and accompanying text. See also Sullivan, supra footnote 11, at 79: "Consequences judged to be good generally are presumed to be intended and are regarded as part of the legislative purpose. Consequences judged to be unjust or unreasonable are regarded as absurd and are presumed to have been unintended."

[256] See, for example, Sullivan, supra footnote 156, at 155, noting that "the norms relied on by the courts are not personal whims" but "come out of common experiences and values, a shared culture and knowledge base."

imposed norm regarding the manner in which statutory provisions ought to be understood.

In either event, as Sunstein observes, "[b]ecause courts are able to focus upon the concrete and often unforeseeable effects of general statutory provisions, . . . they are in a better position [than legislatures] to judge whether a particular provision produces peculiar consequences in a particular setting."[257] In these circumstances, he explains, since it is "unrealistic to think that any legislature can or should correct every such problem," a strong presumption against unjust or unreasonable consequences is "entirely legitimate—at least if the injustice or irrationality is palpable and there is no affirmative evidence that the legislature intended the result."[258] As Sullivan concludes,

> an essential part of the court's role in statutory interpretation lies in adjusting the application of fixed rules to individual cases in order to avoid absurd or unjust results. This is the basis on which the equitable jurisdiction of English courts was originally founded and later expanded in subsequent centuries. Like the rigid forms of the early common law, statutory rules sometimes require qualification or exception to ensure justice in particular circumstances. This flexibility does not undermine the authority of the legislature, but complements it.[259]

As a result, it follows, the practical consequences of alternative interpretations are an important consideration in statutory interpretation in addition to the words of the Act, the scheme of the Act, the purposes of the Act, and the intentions of Parliament. Indeed, the current most recent statement of the "modern interpretation rule" in *Driedger on the Construction of Statutes* identifies "the consequences of proposed interpretations" as a separate element in statutory interpretation in addition to textual and purposive considerations.[260]

Pluralism

In addition to its emphasis on consequential analysis, philosophical pragmatism favours "anti-foundationalist" modes of reasoning that draw on a plurality of values and considerations. The American philosopher Charles Sanders Peirce suggested in an early essay on pragmatic philosophy:

---

[257] Sunstein, supra footnote 8, at 482.

[258] Ibid.

[259] Sullivan, supra footnote 156, at 155. See also Aristotle, *Nichomachean Ethics*, supra footnote 242, book V, paragraph 1137b: "[W]henever the law makes a universal rule, but in this particular case what happens violates the [intended scope of] the universal rule, here the legislator falls short, and has made an error by making an unconditional rule. Then it is correct to rectify the deficiency; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in his legislation."

[260] Sullivan, supra footnote 11, at 131: "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 the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

> Philosophy ought . . . to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibres may be ever so slender, provided they are sufficiently numerous and intimately connected.[261]

A similar emphasis on philosophical pluralism is apparent in the dialogical method of reasoning favoured by contemporary pragmatists such as Richard Bernstein.[262]

Likewise with statutory interpretation, pragmatic approaches are pluralistic and dialogical, drawing on a variety of values and considerations.[263] The words-in-total-context approach, for example, employs a pluralistic methodology by requiring the words of a statute to be read (according to Driedger's prescription) "in their entire context . . . harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[264] Similarly, the pragmatic approach proposed in this article suggests that the words of the relevant statutory provision be read in their total context, having regard to the scheme of the Act, the purposes of the Act, the intentions of Parliament, and the practical consequences of different interpretations. The key issue in the application of this pragmatic approach concerns the manner in which these various interpretive elements should be taken into account in the context of a particular case.

As the passage from Driedger suggests, the most persuasive interpretations are those that take all relevant considerations into account, fashioning a mutual harmony among different interpretive elements. As William Eskridge and Philip Frickey explain,

> a true dialogue with the text requires the interpreter to reconsider her preunderstandings as she considers the specific evidence in the case, and then to formulate a new understanding, which in turn is subject to reconsideration. . . . The "to and fro movement" involved in the hermeneutical circle is not just the interpreter's movement from a general view of the statute to the specific evidence and back again; rather, it requires her to test different understandings of the text in an ongoing effort to determine its proper interpretation.[265]

---

[261] Charles Sanders Peirce, "Some Consequences of Four Incapacities" (1868), in Max H. Fisch, general ed., *Writings of Charles S. Peirce: A Chronological Edition*, vol. 2 (Bloomington: Indiana University Press, 1982), 213.

[262] See, for example, Richard J. Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge, Mass.: MIT Press, 1992), 336-37, advocating an "engaged fallibilistic pluralism" in which interlocutors "genuinely seek to achieve a mutual reciprocal understanding" by recognizing the value of alternative perspectives and the contingency of their own.

[263] For example, Eskridge and Frickey, supra footnote 88, at 345-62, present a "positive model of practical reasoning in statutory interpretation" that attempts both to explain the US Supreme Court's practice in statutory interpretation and to reflect the insights of pragmatic and hermeneutical theories of interpretation.

[264] Driedger, supra footnote 237, at 87.

[265] Eskridge and Frickey, supra footnote 88, at 352. See also the discussion at footnotes 142 to 145 and accompanying text.

In easy cases, where different interpretive elements point in the same direction, the interpretive process is largely invisible and the meaning of the statutory provision may be characterized as "clear and plain."[266] In more difficult cases, however, where different interpretive elements appear discordant, the pragmatic approach proposed here suggests that these elements be reconsidered to determine whether they can be brought into harmony, and that they be weighed according to relative priorities only where these initial conflicts prove to be irreconcilable.

Although difficult, some of the cases considered in part 1 of this article suggest that apparently discordant interpretive elements may be rendered mutually consistent by a dialogic interpretive approach, such as that proposed here, which requires initial understandings to be reconsidered in light of other interpretive elements. In *Golden*, for example, where the taxpayer argued that the anti-avoidance rule in section 68 did not apply to transactions involving the sale of property alone, the majority's words-in-total-context approach resulted in a plausible reading of the statutory text in harmony with the majority's persuasive analysis of the scheme of the Act, the object of the Act, and parliamentary intentions.[267]

In other cases examined in part 1, a pragmatic approach to statutory interpretation such as that advocated here could have produced a greater degree of interpretive harmony than that achieved by purposive interpretation, which downplays textual considerations, or the plain meaning rule, which downplays purposive considerations. In *Neuman*, for example, attention to the text of subsection 56(2), which applies "to the extent that" the payment or transfer of property at issue "would be [included in computing the taxpayer's income] if the payment or transfer had been made to the taxpayer," and to the consequences of the transaction, which permitted the taxpayer to split income with his spouse, might have supported a different outcome consistent with the provision's acknowledged purpose "to prevent tax avoidance through income splitting."[268] In *Friesen*, on the other hand, where the taxpayer relied on the inventory valuation rule in subsection 10(1) (as it then read) to deduct unrealized losses on an interest in real property held as an adventure in the nature of trade, attention to the purpose of the provision to permit a limited exception to the realization and matching principles, and to the consequences of the decision, which would require annual valuation of property held as an adventure in the nature of trade, might have led to a different result based on a more

---

[266] See, for example, Sunstein, supra footnote 8, at 423. See also the discussion at footnotes 146 to 150 and accompanying text.

[267] See the analysis of the *Golden* case in part 1 of this article at footnotes 291 to 316 and accompanying text.

[268] Supra footnote 33, at 6301; 187. See the analysis of the *Neuman* case in part 1 of this article at footnotes 178 to 193 and accompanying text. See also the more detailed analysis of this case in Duff, supra footnote 93.

careful reading of the key opening words of subsection 10(1), "[f]or the purpose of computing income from a business."[269]

Where interpretive elements remain implacably opposed, however, courts face an unavoidable choice as to the weight or priority to be accorded to each interpretive element. With respect to this choice, the pragmatic approach proposed here follows the traditional practice of English, US, and Canadian jurisprudence by according greater weight to apparently unambiguous words supported by their immediate context than to other elements of statutory meaning, and greater weight to legislative intentions and statutory purposes than to practical consequences.[270] Although one might reasonably favour a different ranking of priorities,[271] this traditional hierarchy reflects a range of values that are widely shared in contemporary liberal-democratic societies.

As Eskridge and Frickey explain, a preference for textual elements in statutory interpretation reflects widely held values associated with legislative supremacy and the rule of law:

> Formally, all that is enacted into law is the statutory text, and at the very least legislative supremacy means that an interpreter must be attentive to the text. Functionally, citizens and lawmakers will rely on the apparent meaning of statutory texts. Textual primacy can also be a useful concrete limit on judicial power.[272]

For these reasons, it is generally agreed, courts should give "significant weight" to the "ordinary meaning" of a text that would be "understood by a competent user of the language upon reading the words in their immediate context."[273] To the extent that the scheme of the Act sheds light on this text, however, textual analysis should "further consider how the statutory provision at issue coheres with the general structure of the statute."[274] In general, though, the values underlying a preference for textual considerations suggest that judicial interpretations should normally be limited to plausible interpretations "that the text of the legislation is reasonably capable of bearing."[275] In certain contexts, however—for example, in the

---

[269] See the analysis of the *Friesen* case in part 1 of this article at footnotes 230 to 268 and accompanying text.

[270] For a similar approach, see the "funnel of abstraction" proposed in Eskridge and Frickey, supra footnote 88, at 353.

[271] See, for example, Brooks, supra footnote 181, who favours consequential over textual and purposive considerations.

[272] Eskridge and Frickey, supra footnote 88, at 354.

[273] Sullivan, supra footnote 11, at 8 and 24-26, defining the "ordinary meaning" of a text and explaining why the "ordinary meaning" of a legislative text is properly given significant weight.

[274] Eskridge and Frickey, supra footnote 88, at 355.

[275] Sullivan, supra footnote 11, at 101 and 103, defining this "plausible meaning rule" and explaining why it is generally regarded as "an important constraint on judicial interpretation."

case of legislative mistakes or drafting errors—even unambiguous statutory words may be outweighed by compelling purposive and consequential considerations.[276] Moreover, with respect to avoidance transactions, a similar emphasis on purpose over text has been written into the general anti-avoidance rule in section 245 of the Act.[277]

Following these textual considerations, an emphasis on legislative intentions and statutory purposes is generally defended in terms of their consistency with the values of a democratic society. Eskridge and Frickey observe:

> Original legislative expectations are important in a democracy where the legislature is the primary source of lawmaking. . . . To the extent that the Court can recover that original meaning, it subserves democratic values by enforcing the law as the legislature understood it, thus limiting judicial discretion and power.[278]

In the context of the Income Tax Act, attention to purposive considerations is likely to limit opportunities for abusive tax avoidance and reduce the need for lengthy and complex provisions designed to reverse or prevent judicial decisions at odds with legislative intentions or statutory purposes.[279] However, to the extent that purposive considerations are incompatible with any plausible reading of the statutory text, they are unlikely to outweigh this textual consideration.

Among the various interpretive elements that a court might consider, the practical consequences of a particular interpretation are generally accorded the least weight in statutory interpretation. To the extent that consequential considerations are generally "within the ambit of the legislature, not the courts,"[280] judicial attention to practical consequences appears to violate both legislative supremacy and the rule of law.[281] Nonetheless, as Sullivan suggests, "these are not the only values worth striving for in our legal system," and they must be balanced against other important values, such as fairness and efficiency.[282] As a result, she explains, "the more compelling the absurdity to be avoided, the greater the departure from ordinary meaning

[276] See, for example, *Triple "F" Holdings Ltd.*, supra footnote 119, at 138; 2087, where the Tax Review Board read the words "corrugated iron" as "corrugated metal" after accepting the evidence of a metallurgical engineer that "no such thing as corrugated iron exists." This case is discussed briefly in part 1 of this article at footnotes 77 to 79 and accompanying text. For a more general discussion of drafting errors, see Sullivan, supra footnote 11, at 104-10.

[277] See the discussion in part 1 of this article at footnotes 226 to 227 and accompanying text. See also the analysis of avoidance schemes in this context in Sullivan, supra footnote 11, at 114-22.

[278] Eskridge and Frickey, supra footnote 88, at 356.

[279] See the discussion at footnotes 43 to 44 and accompanying text.

[280] *Antosko*, supra footnote 34, at 6321; 33.

[281] Sullivan, supra footnote 156, at 155-56.

[282] Ibid., at 156.

that may be tolerated."[283] As a general rule, however, consequential considerations should never outweigh clear indications of legislative intentions or statutory purposes.[284]

CONCLUSION

In the years since the Supreme Court of Canada rejected the traditional strict construction rule in *Stubart*, the court has employed various doctrines to interpret the Income Tax Act, without yet settling on a preferred approach. Some cases have applied a purposive or teleological approach to statutory interpretation, according to which courts should "first . . . determine the purpose of the legislation" and apply a strict or liberal construction to the provision at issue "depending on the purpose underlying it."[285] Other cases have adopted a plain meaning rule, requiring courts to give effect to statutory words irrespective of their purpose or consequences unless the statutory language "admits of some doubt or ambiguity in its application to the facts,"[286] in which event the court may then, but only then, examine purposive or consequential considerations in order to resolve the ambiguity.[287] Yet other cases have employed the words-in-total-context approach suggested by Driedger's "modern rule," according to which "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[288]

None of these doctrines is as compelling as the pragmatic approach outlined in this article. While purposive interpretation respects the democratic values expressed through legislative intentions and statutory purposes, it accords insufficient weight to rule of law values reflected in a primary emphasis on the words of the statutory text. While the plain meaning rule affirms the primacy of statutory language, it downplays other important values associated with democracy, fairness, and efficiency, and oversimplifies the meaning of statutory texts, thereby artificially limiting the scope of statutory interpretation and obscuring the grounds on

---

[283] Sullivan, supra footnote 11, at 85.

[284] See, for example, Sunstein, supra footnote 8, at 482, arguing that unjust or unreasonable consequences justify "what might appear to be aggressive construction" provided that "there is no affirmative evidence that the legislature intended the result."

[285] *Corporation Notre-Dame de Bon-Secours*, supra footnote 3, at 5023; 252. See the discussion of this doctrine in part 1 of this article at footnotes 99 to 193 and accompanying text.

[286] Peter W. Hogg and Joanne E. Magee, *Principles of Canadian Income Tax Law* (Scarborough, Ont.: Carswell, 1995), 454, cited with approval in *Friesen*, supra footnote 122, at 5553; 373-74.

[287] See the discussion of this doctrine in part 1 of this article at footnotes 194 to 268 and accompanying text.

[288] Driedger, supra footnote 237, at 87, cited in *Stubart*, supra footnote 3, at 6323; 316. See the discussion of this doctrine in part 1 of this article at footnotes 269 to 352 and accompanying text.

which judicial decisions are ultimately based. While the words-in-total-context approach is more attractive than the other two doctrines, in that it recognizes textual and purposive considerations, is most compatible with the court's actual practice (which tends to consider various aspects of statutory meaning), and is most consistent with the dicta in *Stubart*, it is unclear as to the allowable scope of contextual analysis and disregards concerns for fairness and efficiency underlying judicial attention to consequential considerations.

Unlike each of these interpretive doctrines, the pragmatic approach proposed here makes the practical consequences of alternative interpretations an explicit consideration in statutory interpretation. Moreover, like the words-in-total-context approach, it is pluralistic and dialogical, acknowledging the many values and considerations at stake in statutory interpretation, endeavouring to vindicate these values to the greatest extent possible in the context of particular decisions, and striving toward mutual harmony among different interpretive elements through a genuine interaction between the interpreter and the text. Where this harmony is ultimately unachievable, the pragmatic approach follows the traditional practice of English, US, and Canadian jurisprudence by generally according more weight to textual considerations than to purposive considerations, and more weight to purposive considerations than to consequential considerations.

Since Supreme Court of Canada decisions interpreting the Income Tax Act already examine textual, purposive, and consequential considerations, the pragmatic approach advocated here is not so much a departure from the court's current practices as a more satisfactory account of these practices than the various doctrines to which the court actually refers. To the extent that these doctrines shape the process of statutory interpretation and the outcome of judicial decisions, however, this pragmatic approach promises a more open, reasoned, and balanced method of statutory interpretation than each of the alternatives otherwise available.