STATUTORY INTERPRETATION IN A NEW NUTSHELL

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This article attempts to update a Canadian classic – the realist account of statutory interpretation published by John Willis in the Canadian Bar Review in 1938. Willis' insights are compelling and they remain relevant today. However, by focusing on the rhetoric of statutory interpretation, by far its weakest point, Willis disregards the considerable work that goes on when statutory interpretation is well done. This article draws attention to that work.

Part 2 looks at the kinds of analyses relied on by good interpreters to establish that elusive goal, the intention of the legislature. These include textual, purposive, scheme, policy and consequential analysis. Part 2 examines the difference between easy and hard cases, then focuses on the techniques used by interpreters to carry out the different kinds of analyses and how these relate to the formal rules.

Part 3 looks at the range of arguments interpreters may construct based on their preliminary analysis. Not every argument in statutory interpretation is about the meaning of words. Interpreters also confront drafter's mistakes, gaps in the legislative scheme, overlap and conflict, and language that is over- or under-inclusive. The structure of these different kinds of arguments is set out and illustrated in Part 3.

Cet article essaie de mettre à jour une théorie classique canadienne. En 1938, John Willis a publié dans cette revue un article prenant une méthode réaliste à l'interprétation législative qui continue d'être pertinente aujourd'hui. Mais il se concentrait sur la rhétorique et laissait de côté le travail considérable qui fait toujours une partie de l'interprétation sérieuse. Cet article essaie de mettre en relief ce travail important.

La deuxième partie examine les types d'analyse utilisées en cherchant un objectif évasif: l'intention du legislateur. Ces types d'analyses comprennent l'analyse textuelle, l'analyse fondée sur l'objet visé, le régime législatif, la position du législateur, et l'analyse des

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circonstances. Cette partie examine aussi la différence entre des cas simples et difficiles et se concentre sur les techniques utilisées par ceux qui font l'interprétation pour effectuer les differents types d'analyse, en considerant les règles formelles.

La troisième partie discute de la catégorie d'arguments qui peuvent être fondés sur l'analyse préliminaire. Les débats ne concernent pas toujours le sens des termes. Nous devons aussi confronter les erreurs du rédacteur de loi, les lacunes dans le régime legislatif, le chevauchement et l'incompatibilité entre les provisions, et les termes d'application trop exhausive ou d'application restreinte. Une démonstration de la structure des différents types d'argumentation est incorporée dans cette partie.

Part I: *Introduction*

In 1938 John Willis published an article called "Statutory Interpretation in a Nutshell".[2] Willis' article is a significant contribution to the legal realist literature of the twentieth century. In addition to being clever and amusing, it offers a concise exposition of the main rules of interpretation, with special focus on the so-called mischief rule, plain meaning rule, and golden rule. Willis' thesis is that because these rules are open-ended and inconsistent with one another, they are incapable of determining the outcome in statutory interpretation disputes. Although judges purport to apply them, in fact outcomes are determined by the politics and arbitrary preferences of the presiding judge. "What use do courts make of the 'plain meaning rule'?" Willis asks. "The answer is that they use it, as they use all other 'rules of construction', as a device whereby to achieve some desired result."[3]

A current reader of Willis must be struck by how little has changed since 1938. Judges continue to invoke the same rules, make the same arguments and rely on the same rhetoric[4] as they did when Willis wrote. And academics continue to deplore the contradictions and false premises that disturbed Willis and other legal realists of the day.[5]

Yet some things have changed. Since 1938 there has been a significant evolution in the way we think about rules and their role in interpretation. For Willis and other legal realists, the inconsistency and indeterminacy of the rules were unacceptable because these features undermined their status as law. If the outcome of a dispute is not determined by applying relevant rules to the facts of the case, then it is not determined by law. If it is not determined by law, then it must be determined by the personal preference of the individual judge. Those appeared to be the only choices.

Most contemporary jurists have a broader conception of law and the means by which legal disputes are resolved. They think of law as including not only rules (which are binding) but also principles (which

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[2] (1938) 16 Can. Bar Rev. 1.

[3] *Ibid.* at 11; see also at 13: "What use do the courts make of the 'golden rule' today? Again the answer is the same – they use it as a device to achieve a desired result..." and at 15: "What use do the courts make of the 'mischief rule' today? Once more, the answer is that they use it to achieve a desired result..."

[4] In this article I use the term "rhetoric" in a technical rather than a pejorative sense. Technically, rhetoric refers to the features of arguments that make them persuasive, the means by which one person persuades another that a conclusion is appropriate and should be accepted.

[5] See, for example, R. Sullivan, "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation" in Ejan Mackaay, ed., *Les certitudes du droit / Certainty and the Law* (Montreal: Les Éditions Thémis, 2000) at 151.

are not) as well as the values, assumptions and practices that contribute to an evolving legal tradition. This post-realist conception permits contemporary jurists to integrate statutory interpretation into law by thinking of it as a *principle*-governed rather than a *rule*-governed activity. As Dworkin might say, statutory interpretation is law because it is an activity carried out within a practice-based legal principle.[6]

This evolution in thinking about statutory interpretation is reflected in the Supreme Court of Canada's adoption of Elmer Driedger's so-called "modern principle". In the first and second editions of *The Construction of Statutes*,[7] Driedger explored the main rules discussed by Willis – the plain meaning rule, the mischief rule and golden rule – in the first three chapters of his book. He showed that each was dominant at one time in history; and each reflects (albeit imperfectly) an important aspect of interpretation, namely the reader's understanding of the text, the intentions of the legislature, and harmony with established legal norms. His thesis was that no single approach is adequate, that interpreters must take into account and attempt to harmonize all aspects of interpretation. In the fourth chapter he concluded:

> Today there is only one principle or approach; namely, 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.[8]

Since its initial appearance in 1974, this passage has been continually cited and relied on by Canadian courts. In 1998, in *Rizzo v. Rizzo Shoes Ltd.*, it was adopted by the Supreme Court of Canada as stating its preferred approach.[9]

While the modern principle is not immune from criticism,[10] it must be admired for the way it accommodates the post-realist conception of law as a practice within a tradition. Instead of reducing statutory interpretation to a silly game of pick-up-rules – or worse, to a shell game – it describes a purposeful, multifaceted activity. To resolve statutory interpretation disputes, judges must analyze and integrate a variety of

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[6] R.M. Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), especially chapters 2, 7 and 9. Of course, Dworkin is also responsible for the rule-principle distinction referred to in the text that has become a commonplace of legal discussion. See R.M. Dworkin, *Taking Rights Seriously* (Cambridge: Duckworth, 1978), especially at 22 – 27.

[7] Elmer Driedger, *The Construction of Statutes*, 1st ed. (Toronto: Butterworths: 1974) and 2nd ed. (Toronto: Butterworths, 1984).

[8] *Ibid.* at 67. As Driedger explains at 82 of the 1st ed. and at 106 of the 2nd ed., "intention of Parliament" includes presumed as well as express and implied intent.

[9] See *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27.

[10] See R. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-99) 30 Ottawa L. Rev. 178.

factors, including textual meaning, legislative purpose, acceptable consequences, and presumptions of intent. The attention paid to these factors and the amount of emphasis each receives depend on the circumstances of the case – the type of legislation, the subject matter and audience, how precise the language is, the lapse of time since enactment, and the like. On this approach, judges have considerable discretion, but this discretion is structured and constrained by a principle-based practice of decision- making.

So what role do the so-called rules of statutory interpretation play in the current approach? Do those classic objects of realist scorn continue to serve any purpose in statutory interpretation? Or have rules like *ejusdem generis* and the plain meaning rule become obsolete?

In my view, although we no longer imagine that interpretation disputes are resolved by applying rules to texts, we continue to rely on the old rules and to develop new ones because they help to structure interpretation, and they aid communication. The rules operate as a checklist of relevant considerations. They suggest different lines of inquiry and ensure that no possibility has been overlooked. They are relied on by counsel in developing arguments and by judges to justify outcomes in interpretation disputes. Although they are sometimes used to disguise choice, or avoid explaining the real basis of choice, they need not be used in that way. The rules are a medium within which interpreters work, the bricks used to build a structure. The medium constrains, but does not control.[11] The controlling factor is the interpreter and the work that he or she does in producing an opinion, factum or judgement.

In speaking of interpreters I include both judges and lawyers. Obviously there is a difference in the way these two groups approach statutory interpretation, particularly in the context of a dispute. Lawyers are obliged to seek a resolution that favours their client; judges are obliged to adopt a resolution that accords with the law. To do their jobs well, however, both groups must engage in the type of analysis and argument construction described below.

In Part II of this paper I describe the type of analysis that interpreters should carry out before turning to the business of constructing arguments. The natural impulse of most interpreters is to minimize this work, or skip it altogether. It is difficult to resist the siren call of those tried and true arguments – the meaning is plain, the mischief must be overcome, the legislature cannot have intended such an absurd result. However, these arguments are unpersuasive if they are not tied to a sound textual

[11] The notion of law as a medium within which judges work to construct decisions the way builders make structures out of bricks is suggested and developed by D. Kennedy in "The Phenomenology of Judging" in A. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987).

analysis, to cogent evidence of legislative intent and to justification of the norms relied on in calling something absurd. Preliminary analysis enables the interpreter to:

- identify the sources of doubt, conflict or confusion that have arisen in attempting to apply the legislation to particular facts
- work out the legislative purpose and scheme
- appreciate which contextual factors are relevant to interpretation and how they support one outcome or another

In Part III of this paper I set out the varying models of argument that can be used in statutory interpretation and suggest how argument is structured under each model. My purpose in Part III is to illustrate how disputes about the meaning of legislation are argued and to emphasize that there is more to statutory interpretation than such disputes. Sometimes the meaning is clear, but there is a gap in the legislative scheme, and the question is whether the court can do anything about it. Sometimes there is overlap between a clear provision and the common law, and the issue is whether both apply. Many disputes are about the circumstances in which a court should update a statute or decline to apply a legislative rule even though its meaning appears to be clear. In short, determining the meaning of words in a legislative text is an important task of interpreters, and a necessary first task, but it is only part of the work of interpretation.

Part II: *Preliminary analysis*

When an interpreter sits down to deal with an issue in statutory interpretation, he or she begins with a set of facts. The job is to determine whether any legislative provision applies to those facts, and if so, to what effect. To make this determination the interpreter has to answer the following questions:

- What is the meaning of the legislative text?
- What was the legislature's intent? That is, when the text was enacted, what rule did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding these facts?
- What would the consequences be if a proposed interpretation were adopted? Would these consequences violate important, legally recognized norms?

The interpreter asks these questions because, as Driedger's modern principle tells us, these are the determinants of outcome in statutory interpretation.

If all goes well, the meaning of the text (as understood by the interpreter) coincides with the legislature's intention (as reconstructed by the interpreter) and produces results that (in his or her view) accord with

important, legally recognized norms. This convergence of factors makes for an easy case. All an interpreter need do is persuade others that this analysis of meaning, intention and norms is sound.

Suppose, for example, that the provision to be interpreted is a prohibition against bringing vehicles into a park.[12] John (looking for a friend) drives his truck into a large green space that has no roadways, rutting the grass and crushing flower beds until he stalls in the sand under the children's swings. Assuming the green space is a park, this is an easy case. Although the word "vehicle" has fuzzy edges and can sometimes be hard to apply, cars are the very prototype of vehicles. A car is certain to be within the definition of "vehicle" in any ordinary language dictionary. Furthermore, driving is a form of "bringing" when it comes to cars. As for legislative intent, there are many reasons why a legislature might want to keep cars out of parks: the safety of the occupants; protection of the grounds from damage; creation of an exhaust-and noise-free environment. However the purpose of the legislation is defined, John's incursion into the park is clearly within the mischief. Finally, keeping John's car out of the park would not violate any important legal norms.

In harder cases, one or more of the factors relied on in interpretation proves unhelpful. For example, the meaning of the legislative text is obscure. Or the legislature's intentions are unknowable, contradictory, or too vague to offer much insight in the circumstances. Or the relevant norms point in different directions. In such cases, the interpreter appropriately gives less weight to the weak or indeterminate factors and more to the factors (if any) that seem clear and compelling.

Suppose, for example, that instead of driving a truck into the park, John rode a bicycle. It is not self-evident that a bicycle is (or is not) a vehicle. It depends on the context. If a landlord asks a tenant whether he needs a parking space for his vehicle, chances are "vehicle" does not include bicycle. But if an employer asks a prospective employee whether he has a vehicle to get him to work, "vehicle" could well include bicycle. Similarly, it is not self-evident that John's incursion into the park is within the contemplated mischief. While bicycle riding can threaten the security of pedestrians (or wandering children or pets), bicycles do not create foul smells or loud noises. Depending on the circumstances, they may or may not create a significant threat to the landscape. To resolve a case such as this, the interpreter must try to establish the legislature's intention and then work out the implications of that intention for bicycles in parks.

In the hardest cases, two or more factors are strongly suggestive but they suggest different outcomes. In such cases, the apparent meaning of

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[12] This example is one of H.L.A. Hart's enduring contributions to legal philosophy. See H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961) at 89-95.

the text differs from the meaning that was probably intended by the legislature. Or applying the text as written leads to anomalous consequences that were probably unforeseen by the legislature. In such cases the interpreter is forced to choose an outcome, ideally on a principled basis, which he or she can both articulate and support.

Suppose, for example, that John drove an ambulance into the park, in response to an emergency call, to save the life of a seriously injured child. An ambulance is clearly a vehicle. Moreover, it has the potential to do damage to grass and flower beds; it produces exhaust and more than its share of disruptive noise; and it is a threat to the safety of pets and pedestrians who may be using the park. Nonetheless, most people would agree that the ambulance should have legal access to the park. It would be absurd to exclude it. The legislature must have taken it for granted that rational interpreters would read down the prohibition to exclude obvious exceptions such as these.

The point of these examples, like the point of Driedger's modern principle, is that in *every* case, interpreters must explore *all* aspects of interpretation. Before deciding which factors to rely on and how they will construct their arguments, interpreters must know whether the case is easy or hard, and if hard, why and how it is hard. They must identify sources of doubt or conflict and the relevant indicators of legislative meaning and intent; and they must assess the weight of the competing factors. Preliminary analysis of this sort is necessary to ensure sound judgement and persuasive argument.

There is no standard way of classifying the different types of analyses that must be carried out at the preliminary stage. In the list below I describe them under the headings *textual analysis*, *purposive analysis*, *scheme analysis*, *policy analysis*, and *consequential analysis*. I also include a short comment on the use of extrinsic aids. Others might prefer fewer, or more, or different categories.[13] The important thing is not how this preliminary work is categorized, but how it is carried out. The goal is to be as comprehensive and as explicit as possible.

Being explicit is particularly important. Interpretation normally operates at a sub-conscious level. Upon reading the words of a text, a reader may intuitively reach certain conclusions – the text is clear (or unclear), it expresses a particular meaning or purpose, it leads to absurd

[13] My categories are not mutually exclusive. For example, scheme analysis overlaps with purposive analysis on the one hand and textual analysis on the other; policy analysis overlaps with purposive and consequential analysis. The descriptions of the different categories of analysis and of the rules relied on by interpreters in carrying out these analyses is found in R. Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1996) and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002.

(or reasonable) results. But legal interpreters cannot afford to rely on intuition alone. To be persuasive, they have to expose the basis of their intuitive judgements – the chain of inferences that leads to their conclusions about meaning or purpose or consequence: and the assumptions upon which those inferences are based.

(A) *Textual analysis*

In textual analysis, the interpreter focuses on the language of the legislative text and the conventions of legislative drafting. The task is to show how a particular meaning emerges from reading the words to be interpreted in their immediate context and the more extended literary context consisting of the Act as a whole and any other related legislation. Reference may also be made to the legislation of other jurisdictions, to treaties or agreements, or to model legislation.

The first and most fundamental rule of legislative drafting is ordinary language use. Drafters choose their words and arrange them in sentences using the same lexicon and grammar, and relying on the same knowledge, as the public that is governed by the legislation. In legislation like the *Criminal Code*, this is the general public, the "average person" on the street.[14] In legislation aimed at a specialized audience – manufacturers of aircraft, for example – this is a limited segment of the public with specialized knowledge and a technical vocabulary. In either case, the idea is to use language that conforms to the standards of usage of competent speakers within the audience addressed.

This fundamental idea underlies a number of interpretative rules, including the ordinary meaning rule, the technical meaning rule and the plausible meaning rule:

- Ordinary meaning rule: the meaning that spontaneously comes to the mind of a competent reader upon reading the legislative text is presumed to be the meaning intended by Parliament. This meaning governs unless the evidence suggests some other meaning was intended.

- Technical meaning rule: when legislation deals with a specialized subject and uses language that people governed by the legislation would understand in a specialized way, that specialized understanding is preferred over ordinary usage.

[14] In fact, of course, the average person or the general public is a convenient fiction. The audience to which legislation is addressed, particularly legislation like the *Criminal Code*, is diverse in terms of culture, gender, race, and the like. These differences undermine traditional assumptions about "common" meaning and "common" sense.

- Plausible meaning rule: if the ordinary meaning is rejected to give effect to the actual or presumed intentions of the legislature, the meaning adopted must be one the words are capable of bearing.

To determine the ordinary meaning of bilingual legislation, reference must be made to both language versions and the same meaning must be assigned to each. Both the English and French versions of legislation are authentic and equally authoritative at the federal level and in New Brunswick, Quebec, Ontario and Manitoba. If the two versions share a particular meaning, that shared meaning is presumed to be intended. However, the presumption is rebutted if other evidence shows that some other meaning – one not shared by the two versions – better reflects the legislature's intent.

While drafters observe the conventions of ordinary language use, they also rely on conventions that reflect the special status and function of legislation. For example, they write in a formal and impersonal style and try to avoid figurative or decorative language. They choose language with unusual care and use it consistently, without stylistic variation. They say things in a straightforward fashion, using as few words as possible. These conventions form the basis for the following presumptions relied on in analyzing legislative texts:

- Straightforward expression: the legislature chooses the clearest, simplest and most direct way of stating its meaning ("had the legislature intended [the rejected interpretation], it would have used other words")

- Uniform expression: the legislature uses the same words and techniques to express the same meaning and different words and techniques to express different meanings
- No tautology ("the legislature does not legislate in vain"): there are no superfluous words in legislation; every feature of the text has an identifiable role in the legislative scheme

- Internal coherence: all the provisions of a legislative text fit together logically and work together coherently to achieve the purposes of the legislature

These presumptions are the basis of a number of standard interpretation rules, including:

- Implied exclusion (expressio unius est exclusio alterius): if something is not mentioned in circumstances where one would expect it to be mentioned, it is excluded by implication

- Associated words (noscitur a sociis): the meaning of a word is affected by the other words to which it is linked in a sentence

- Limited class (ejusdem generis): when general language follows a series of more specific terms, the class of things referred to by the general language may be read down to refer to a narrower class of things to which the specific terms all belong.

(B) *Purposive analysis*

In purposive analysis, the interpreter identifies the objects that the legislature wanted to achieve in enacting its legislation – the practical impacts it hoped to produce, the policies, attitudes and behaviour it wished to promote, or the evils or "mischief" it wished to cure. Sometimes the purpose of legislation is narrowly focussed and specific; this is often the case in amending legislation, for example. Normally, legislation seeks to promote a range of purposes, some competing and some complementary.

The challenge in purposive analysis is threefold: (1) to put words to each purpose – that is, to articulate each one in an express formulation that is rhetorically effective; (2) when there are two or more purposes, to work out the relationship among the purposes and, if necessary, to rank or balance them; and (3) to provide evidence that the legislature intended to pursue the purposes identified and to rank or balance them as suggested.

Legislative purposes are often described in a preamble or purpose statement or discussed in extrinsic materials like a government commission report. Such material provides direct evidence of the legislature's intentions. Alternatively, purpose may be inferred by reading the legislative text in its external context, taking into account the circumstances existing at the time of enactment and the conditions in which the legislation was expected to operate. Purpose can also be inferred quite compellingly from amendments introduced to the legislation over the years.

When inferring the purpose of legislation, interpreters rely heavily on so-called "common sense", the store of knowledge and values that are presumed to be shared by everyone. Interpreters can infer that a prohibition against vehicles in parks is designed to protect safety, create a pollution- free environment, and prevent the destruction of grass and flowers because they know what "everybody knows" — the sort of thing that parks are used for, what vehicles typically do, and the need for safe havens for children's play and adult leisure activity.

(C) *Scheme analysis*

In scheme analysis, the interpreter explores how the legislation is intended to operate so as to bring about desired goals. The idea is to determine how each provision of the legislation was meant to relate to the others and work with them in a purposeful and coherent fashion.

Whereas in textual analysis the legislation is approached as a literary genre, with a specialized set of conventions for conveying meaning, in scheme analysis it is approached as a means to an end. The fundamental premises are that:

- the legislature has devised a coherent and effective implementation plan
- each provision has a role to play in implementing that plan
- a provision's role in the scheme controls its meaning and scope

Scheme analysis often turns out to be the most compelling indicator of legislative intent and it often provides a sound basis for preferring or rejecting a particular interpretation. The only drawback to this form of analysis is that it requires considerable effort. The interpreter has to read the entire Act, and perhaps other Acts as well. He or she has to work out the legislature's purposes and its envisaged implementation plan, then work out how the provision to be interpreted contributes to that plan, and finally work out how to communicate that analysis to the audience. This last step is particularly difficult when the scheme in question is complex or subtle or presupposes specialized knowledge.

(D) *Note on extrinsic aids*

Textual, purposive and scheme analysis are often assisted by so-called "extrinsic aids", including the following:

- Legislative sources: consists of conventions, treaties or model legislation that legislation is designed to implement or on which it has been based in whole or in part.

- Legislative history: consists of statements formally brought to the attention of the legislature during the legislative process, including Ministerial statements, committee reports, recorded debate and tabled background material.

- Legislative evolution: consists of the successive amendments and reenactments a provision has undergone from initial enactment to time of application; subsequent evolution is excluded.

- Expert opinion: consists of precedent, administrative opinion, and scholarly legal publications, as well as expert testimony.

The rules governing the admissibility and use of this material are complex and in a state of flux. Generally speaking, legislative sources and legislative evolution are always admissible, as is precedent. Legislative history and other forms of expert opinion are subject to specialized rules.

(E) *Policy analysis*

In policy analysis, the interpreter considers the values, principles and concerns the legislature is presumed to respect when it enacts legislation. Whereas purposive analysis focuses on actual intent – the goals that were self-consciously pursued by proponents of the legislation – policy analysis focuses on values and concerns that are presumed to inform every legislative initiative. In purposive analysis, the interpreter must tender evidence that establishes legislative intent as a matter of fact. In policy analysis, the interpreter relies on law, or the evolving legal tradition, to establish presumed intent.

In carrying out a policy analysis, interpreters rely on the following presumptions, each of which reflects particular values or norms:

- strict construction of penal legislation
- strict construction of legislation that interferes with individual rights
- strict construction of exceptions to the general law
- liberal construction of human rights codes
- liberal construction of remedial legislation
- liberal construction of social welfare legislation
- liberal construction of legislation relating to Aboriginal peoples
- presumed compliance with constitutional law
- presumed compliance with the rule of law
- presumed compliance with international law
- presumed continuation of common law
- presumed non-interference with common law rights

presumption against the extra-territorial application of legislation

- presumption against the retroactive application of legislation
- presumption against interference with vested rights (both common law and statutory)
- presumption against applying legislation to the Crown and its agents

The list is not closed. In recent years, Canadian courts have added the following policy-based presumptions:

- the legislature intends to combat the feminization of poverty
- the legislature intends to protect the environment from pollution

(F) *Consequential analysis*

In consequential analysis, the interpreter predicts and evaluates the consequences of adopting a particular interpretation. Consequences that are judged to be good are presumed to have been intended. Consequences that are judged to be absurd or otherwise unacceptable are presumed not to have been intended.

An interpretation may be considered absurd if it has one or more of the following effects:

- it creates irrational distinctions (treating like things differently or different things the same way)
- it defeats the purpose of the legislation
- it leads to incoherence, contradiction or anomaly
- it undermines the efficient administration of justice
- it violates important norms of justice or fairness

The clearer and more precise a text seems to be, the greater the absurdity required to depart from its ordinary meaning. The greater the absurdity that flows from a particular interpretation, the more justified an interpreter is in rejecting it.

Having carried out these different types of analysis, the interpreter must then consider how the results can be used to support a preferred position (in the case of litigants) or to explain and justify the correct legal result (in the case of judges). This involves choosing an appropriate model of argument and developing persuasive supporting arguments.

Part III: *Constructing Argument*

This part surveys the various models of argument that can be used to structure disputes about the proper interpretation of a legislative text. It is based on the following framework:

If the problem is...,	**the model of argument is...**
inaccurate or garbled text	corrigible mistake
ambiguous, vague or incomplete text	disputed meaning
over-inclusive text	non-application
under-inclusive text	incorrigible gap in legislative scheme, or supplementation with common law rule or remedy
overlapping provisions	(no conflict): exhaustive code (conflict): paramountcy

In a **corrigible mistake argument**, the interpreter claims that the provision in question contains a drafting mistake, which must be corrected before determining whether the provision applies to the facts. He or she must establish what the legislature clearly intended and what the text would have said had it been properly drafted.

In a **disputed meaning argument**, the interpreter claims that, properly interpreted, the provision in question has the following meaning: [here the interpreter sets out an appropriate paraphrase or definition or test.] He or she must establish that this is the ordinary meaning, or the intended technical meaning, or at least a plausible meaning. If this interpretation is adopted, the provision obviously applies (or does not apply) to the facts.

In a **non-application argument**, the interpreter identifies a reason not to apply a provision to the facts even though, given its ordinary meaning, it would otherwise apply. For example, the provision may be read down to promote the purpose or to avoid absurdity or to comply with presumed intent.

In a **incorrigible gap argument**, the interpreter claims that the legislation as drafted cannot apply to the facts even though, given its purpose, it should apply. Whether this omission is deliberate or inadvertent, the court has no jurisdiction to fill a gap in a legislative scheme or otherwise enlarge the scope of legislation.

In a **supplementation argument**, the interpreter concedes that the legislation as drafted does not apply, but claims that the common law applies so as to supplement the under-inclusive legislation.

In the absence of conflict, if two or more provisions apply to the same facts, each is to be applied as written. In an **exhaustive code argument**, the interpreter concedes that the overlapping provisions are not in conflict but claims that one of them was meant to apply exhaustively, to the exclusion of the others.

In a **paramouncy argument**, the interpreter claims that the overlapping provisions are in conflict and one is paramount over the others.

(A) *Disputed meaning model*

Whether legislation applies to particular facts, and how it applies, depend fundamentally on what the legislation "says": the content of the legal rule as declared by the words of the text. A majority of disputes in statutory interpretation are understood as disputes about the meaning of particular words in the legislative text.

To mount an effective argument using the disputed meaning model, a number of steps should be followed and a number of claims should be

made. To illustrate this approach, the judgement of the Supreme Court of Canada in *R. v. Hasselwander*[15] will be used. The dispute arose in *Hasselwander* when the defendant's Mini-Uzi sub-machine gun was seized under s. 102 of the *Criminal Code*,[16] which authorized the seizure and forfeiture of so-called prohibited weapons. As defined in s. 84(1) of the *Code*, "prohibited weapon" included what is colloquially known as automatic weapons, meaning:

any firearm... that is capable of firing bullets in rapid succession during one pressure of the trigger	toute arme à feu... pouvant tirer rapidement plusieurs balles pendant la durée d'une pression sur la détente

In the condition in which it is manufactured and sold, a Mini-Uzi sub-machine gun cannot fire bullets in rapid succession during a single squeeze of the trigger. However, once a certain part is removed, it becomes a fully automatic weapon. The defendant claimed the seizure was unlawful because the Mini-Uzi was not an automatic weapon as defined in the Code.

(1) *Identifying sources of doubt*

The interpreter's first step is to identify which words in the relevant provision are possible candidates for dispute. These are words or expressions whose meaning is doubtful in relation to the facts of the case. In any attempt to apply legislation to facts, some things will be perfectly obvious or at least reasonably clear, but there may be one or two words whose meaning or scope or import in relation to the facts is doubtful. Because of this doubt, it is unclear whether the legislation applies or how it applies. These are the words in dispute on which argument will focus.

To identify potential sources of doubt, the interpreter tests how clearly each word in the relevant provision applies (or does not apply) to the facts of the case. In *Hasselwander*, no one – not even the defendant – could plausibly deny that the Mini-Uzi was a "firearm" as defined in the Code.[17] Similarly no one – not even the Crown – could insist that the gun, at the moment of seizure, was one that "fired bullets in rapid succession during one pressure of the trigger." However, it was established at trial that converting the Mini-Uzi to a fully automatic weapon was easy and inexpensive, an adjustment that any gun-owner could make. In light of that fact, it was not so obvious whether the appellant's Mini-Uzi was

[15] *R. v. Hasselwander*, [1993] 2 S.C.R. 398.
[16] R.S.C. 1985, c. C-46.

"capable of" firing bullets in the relevant way. On this point the appellant and the Crown could each make plausible, but conflicting claims. These, then, were the words of doubtful application.

(2) *Formulating an effective interpretation*

The second step is to develop an interpretation of the doubtful language that effectively clarifies whether the legislation applies and leads to the preferred result.[18] Such an interpretation usually takes the form of a paraphrase or definition, or in some cases a set of criteria that operates as a legal test. The formulation should be as precise and concise as possible and should be set out as the initial claim in the argument: "In this provision, properly understood, the words in dispute mean..."

Coming up with an effective definition, paraphrase or set of criteria is perhaps the most challenging and important task in interpretation. It is here that the skill and imagination of counsel can make a real difference.

In the *Hasselwander* case, the defendant claimed that the phrase "is capable of" means "has a *current* or *existing* capacity to do a thing". Since at the moment of seizure the Mini-Uzi had no existing capacity to fire bullets in rapid succession during one pressure of the trigger, it was not a prohibited weapon within the meaning of the Code. The defendant wisely included the word "is" in identifying the language in dispute to emphasize existing as opposed to future capability.

Not surprisingly, the Crown focussed more narrowly on the words "capable of". It argued that this expression refers to a potential as well as an existing capacity to do a thing. It put forward a test of potentiality, consisting of criteria to be met for a semi-automatic firearm to be considered "capable of" fully automatic discharge: the conversion to automatic discharge must be quick, easy and inexpensive for the average gun-owner. Relying on a test of this sort is often helpful when the doubtful language is vague or otherwise confers discretion on those who apply the legislation. Even though the criteria adopted here are neither precise nor objective, they offer a measure of guidance and they create a sense of impersonal evaluation. Thus, from a rhetorical perspective, the formulation is effective.

(3) *Establishing a linguistic basis*

The third step is to work out a sound linguistic basis for the preferred interpretation. Because of the presumption in favour of ordinary meaning,

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[17] "Firearm" is defined in s. 84(1) of the Code as a barrelled weapon from which a bullet can be discharged and which is capable of causing serious bodily harm.

[18] For counsel, the preferred result is the one that favours the client; for a court, it is the result that the judge believes to be legally correct.

interpreters should if possible claim that their preferred interpretation corresponds to the ordinary meaning of the text. If that claim cannot be made, they may try to establish a technical or legal meaning. At the least, they must try to show that their interpretation is a meaning the text can plausibly bear.

It is surprisingly difficult to come up with evidence to support a claim about the ordinary or plausible meaning of words. Dictionaries are a readily available source and interpreters rightly rely on them. However, relying on dictionaries fosters a tendency to focus on single words as opposed to phrases, which may not always be appropriate, and to equate ordinary meaning with dictionary definition, which is never appropriate. Dictionaries can indicate the range of plausible usage. But the meaning of words in a text is the meaning of its words *in that particular context*. For this reason interpreters often start with a dictionary but go on to refine the definition in light of relevant contextual factors. This approach was used by Cory J. in the *Hasselwander* case:

> The word "capable" as it is defined in the Oxford English Dictionary (2nd ed. 1989) includes an aspect of potential capability for conversion....
>
> ... [T]he French definition as well clearly conveys the idea that the word "pouvant" includes a potential which has yet to be realized...
>
> Yet, that potential aspect must be given some reasonable restriction. It is the proper role of the court to define the meaning of "capable" as it is used in the definition of "prohibited weapon" in s. 84(1). In my view, it should mean capable of conversion to an automatic weapon in a relatively short period of time with relative ease.[19]

Apart from dictionaries, interpreters can appeal directly to the linguistic intuitions of their audience by citing (or making up) analogies or related contexts in which the disputed words clearly bear the preferred meaning. In *Hasselwander*, for example, counsel for the defendant might have put the following scenario to the court. Suppose that a person looking to buy Mr. Hasselwander's gun on the day it was seized said, "Well, the Mini-Uzi looks to be in good condition, but is it capable of firing automatically?" To avoid misrepresentation, Mr. Hasselwander would have to answer no to this question. It is hard to see how the same gun can be simultaneously both capable and not capable of firing automatically.

Authoritative assertions of ordinary or plausible meaning can sometimes be found in case law. Finally, interpreters may try to introduce the expert testimony of a professional linguist. Normally, the ordinary and legal meaning of words is judicially noticed and the courts receive expert opinion evidence only to establish the technical meaning of words.

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[19] *Supra* note 15 at 415-16. Emphasis added.

In recent years, however, professional linguists have developed new techniques to establish contextual word meaning and their expertise could be of assistance to the courts.[20] Of course, the admissibility of such evidence would have to be established.

(4) *Establishing legal argument in favour of preferred interpretation*

The final step in mounting a disputed meaning argument is to show that the preferred interpretation fits the context and overall scheme of the Act, promotes relevant purposes, avoids unacceptable consequences and is supported by extrinsic evidence of legislative intent. This is where the interpreter draws on the various analyses carried out at the preliminary stage.

In *Hasselwander*, counsel for the defendant relied heavily on textual analysis to support his interpretation. He pointed out, for example, that in other *Criminal Code* provisions dealing with illegal weapons, when Parliament wanted to address the potential for alternation or adaptation, it used different and more pointed language — such as "adapted" and "*can be made* capable of". Given the convention of consistency in legislative drafting, he argued that the court should infer that Parliament did not intend to deal with the possibility for adaptation when it used the contrasting expression "*is* capable of".

The defendant also relied on scheme analysis. He pointed out that both before and after the 1977 amendment, the *Criminal Code* distinguished two categories of firearms: restricted and prohibited. One purpose of the 1977 amendment was to transfer automatic weapons from the restricted to the prohibited category, subject to this consideration: semi-automatic weapons registered as restricted weapons when the new legislation came to force were to be grandfathered. Under the former legislation, automatic weapons were defined as "any firearm that is *designed, altered or intended to* fire bullets in rapid succession during one pressure of the trigger". This description clearly excluded semi-automatic firearms such as Mr. Hasselwander's, which had only a potential capacity to fire automatically. Under the new regime to which Mr. Hasselwander was subject, restricted weapons were redefined as follows:

> Restricted: any firearm that is designed, altered or intended to fire bullets in rapid succession during one pressure of the trigger and that on January 1, 1978, was registered as a restricted weapon....
>
> Prohibited: any firearm that is capable of firing bullets in rapid succession during one pressure of the trigger

[20] For an excellent example, see C. Cunningham et al., "Plain Meaning and Hard Cases", (1994) 103 Yale L.J. 1561.

Under this scheme, counsel argued, weapons that were designed, altered or intended to fire automatically were merely restricted before 1978 but after that date the *same* weapons became prohibited unless they were registered as restricted on January 1, 1978. In order for this scheme to work, the class of weapons described as "capable of" firing automatically must be coextensive with the class described as "designed, altered, or intended" to fire automatically. Otherwise, those who owned convertible semi-automatic weapons at the start of 1978 would have had to give up their weapons whereas those with fully automatic weapons could have kept them – an obvious absurdity. To avoid this absurdity, the class of firearm that is capable of firing automatically must be limited to firearms actually altered and not just capable of being altered to fire automatically.

Finally, the defendant's counsel relied on both purposive and policy analysis. He pointed out that the goal of protecting the public was adequately served by including semi-automatic weapons in the category of restricted weapons. He also pointed out that penal legislation traditionally receives a restrictive interpretation. If there is a choice between a narrow and a broad interpretation of disputed language, the narrow interpretation should prevail.

Counsel for the Crown relied primarily on purposive and consequential analysis, and its arguments were adopted by a majority of the Court. Cory J. wrote:

> What then should "capable" mean as it is used in the s. 84(1) definition of prohibited weapon? It should not be restricted to the narrow meaning of immediately capable. Such a definition would mean that the simple removal of a part, which could be replaced in seconds, would take the weapon outside the definition. This surely could not have been the intention of Parliament. If it were, the danger from automatic weapons would continue to exist just as strongly as it did before the prohibition was enacted.[21]

Parliament's purpose was to protect the public from weapons whose only purpose, Cory J. suggested, is to wound or main people. Given the pressing importance of this purpose, and the minimal social utility of permitting ordinary citizens to possess such weapons, achieving the purpose was assigned considerable weight – enough to defeat the text-and-scheme-based arguments of the defendant.

(5) *Conclusion*

If the interpreter has done her job of identifying the disputed language, interpreting it, and supporting her interpretation on both linguistic and legal grounds, the result will be obvious. Once the court in

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[21] *Supra* note 15 at 415.

Hasselwander decided that the words "is capable of" meant "have a potential that can be met in a relatively short period of time with relative ease", it was obvious that the appellant's semi-automatic was within the definition of "prohibited weapon".

(B) *Non-application of ordinary meaning*

A provision is over-inclusive when, taking its ordinary meaning, it applies to facts to which, for one reason or another, it should not apply. The courts respond to over-inclusive provisions by reading them down, declaring implied qualifications or exceptions or otherwise declining to apply the provision to particular facts. Much of the law of statutory interpretation is about identifying legitimate reasons for invoking one of these non-application techniques.

Some non-application arguments are grounded in purposive analysis. The interpreter argues that the legislature intends its legislation to apply only in so far as it promotes the purposes of the legislation. Applications outside that purpose are impliedly excluded, especially if the legislation limits freedom or interferes with private property. Other non-application arguments are grounded in consequential analysis. In *Re Vabalis*,[22] for example, a married woman applied to change her name from Vabalis to Vabals under Ontario's *Change of Name Act*. Section 4(1) of the Act was in the following terms:

> A married person applying for a change of surname shall also apply for a change of the surnames of his or her spouse and all unmarried minor children of the husband or of the marriage.

Since Ms. Vabalis had not adopted her husband's name when she married, applying this provision to her would have required her husband, whose surname was different, to change his name to Vabals. Here is how the court responded:

> In our opinion the double application requirement contained in s. 4(1) should be construed as being applicable only where the married person applying for the change of surname uses the same surname as the spouse. We are all agreed that the literal interpretation of s. 4(1) as requiring a change of name of the applicant's spouse in the present situation would lead to an obvious absurdity. A statute enacted by the Legislature of this province should not be so interpreted.[23]

Many non-application arguments are grounded in common law presumptions of legislative intent. Several of these presumptions explicitly address the application of legislation – for example, the

[22] (1983), 2 D.L.R. (4th) 382 (Ont. C.A.).

[23] *Ibid.* at 383-84.

presumptions against retroactive or extra-territorial application and against interference with vested rights. Others address the relation of legislative provisions to other sources of law – for example, the Charter or international law. The remaining presumptions address common law values that the legislature is presumed to respect, most notably private property and the rule of law. If applying a provision to facts would violate one of these presumptions, the interpreter may argue that, given the absence of evidence to the contrary, the legislature did not intend the provision to apply to those facts.

In *Re Goodman and Manitoba Injuries Compensation Board*,[24] for example, the appellant claimed an entitlement to compensation on the ground that he had been injured while trying to protect his wife from a criminal assault. Under s. 6(1) of Manitoba's *Criminal Injuries Compensation Act, 1970*, if injury resulted to a person while he "was endeavouring to... prevent lawfully the commission of a criminal offence", the person was entitled to compensation.

The Manitoba Court of Appeal conceded that the husband's attempt to thwart the attack on his wife was an endeavour to lawfully prevent the commission of a criminal offence, but it nonetheless concluded that the provision did not apply because this endeavour had occurred while the couple was vacationing in Nevada. The Court said:

> It would be unthinkable that the legislature of Manitoba intended to give a right of compensation to all citizens of Russia, China, Jamaica, Uganda, etc., who are injured in those countries as a result of endeavouring to preserve the peace. If the subsections are to have any reasonable construction, it is necessary to imply some qualification: either they are limited by the residence of the applicant or they are limited by the place of occurrence.[25]

Because non-residents injured in Manitoba were expressly entitled to apply for compensation under the legislation, the court concluded that the qualification must be place of occurrence. Therefore, residents of Manitoba injured outside Manitoba were not entitled to compensation.

Notice that the issue in the *Vabalis* and *Goodman* cases was not the meaning of the words used in the legislation. On their face, the provisions in question in these cases clearly applied. However, the appellant in *Vabalis* and the Commission in *Goodman* were able to provide convincing legal reasons for non-application.

Two other grounds for non-application are (1) conflict between two overlapping provisions, such that it is impossible for both to apply, and (2) a provision constitutes or is part of an exhaustive code, such that all

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[24] (1980), 120 D.L.R. (3rd) 235 (Man. C.A.).

[25] *Ibid.* at 238.

other provisions are impliedly excluded. These grounds are examined below.

(C) *Avoiding overlap: paramountcy and exhaustive codes*

In Canada, persons wishing to determine their rights and obligations must look to federal and provincial statute law, to regulations, by-laws and other forms of delegated rule-making, and to private law rules governing such matters as contract, civil liability and restitution. Even though these rules occupy different positions in the legal hierarchy, assuming they are validly made, all are presumed to apply in accordance with their terms. There is nothing impermissible or surprising in attaching more than one legal consequence to a given set of facts. Subjects are obliged to comply with every applicable obligation and prohibition, and may equally claim every benefit to which they are entitled under the law.

The presumption that overlapping rules apply regardless of overlap can be rebutted in two ways. First, if there is a conflict between two applicable rules, such that it is impossible to comply with both, then obviously one must prevail over the other. It would be an intolerable violation of the rule of law if citizens were subject to contradictory rules. Second, even in the absence of conflict, if a rule-maker intends its rule to apply to the exclusion of other rules of equal or lesser status in the hierarchy, the courts must give effect to this intention. In such cases, the court concludes that the rule in question (or the regime of rules of which it is a part) was intended to be an exhaustive "code".

(1) *Paramountcy*

An interpreter who wishes to use the paramountcy model of argument must establish two things: first, that a conflict exists between two applicable provisions or rules, and second, that one of them is paramount and therefore applies to the exclusion of the other.

Establishing that there is conflict between legal rules is relatively straightforward: two rules are in conflict if and only if it is impossible to comply with both.[26] Establishing which rule is paramount in cases of conflict is rather more challenging. Over the years the courts have established a number of paramountcy rules. Some are based on hierarchy:

- entrenched constitutional law prevails over legislation
- federal legislation prevails over provincial legislation
- legislation prevails over common law

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[26] *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 39- 39.

These paramountcy rules have the force of genuine rules: they are binding on the courts.

Other rules establish paramountcy among legislative provisions:

- primary legislation prevails over delegated legislation
- quasi-constitutional legislation prevails over ordinary legislation
- specific provisions prevail over general ones (specialibus generalia non derogant)
- subsequently enacted provisions prevail over previously enacted ones

Unlike the rules based on hierarchy, these paramountcy rules are based on presumed legislative intent. They are therefore liable to be displaced by evidence of actual intent revealed through textual, purposive, scheme, policy and consequential analysis.

A good example of the paramountcy model of argument is found in *R. v. Greenwood*.[27] In that case an accused was charged with sexual assault and sexual interference involving a thirteen-year-old child. At the preliminary inquiry, the only evidence adduced was the unsworn testimony of the child. The issue was whether this evidence was admissible. Section 16(3) of the *Canada Evidence Act* provided:

> A person referred to in subsection (1) [i.e. a person under 14 years of age] who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

After questioning the child, the provincial court judge concluded that the child did not understand the nature of an oath or a solemn affirmation, but did understand the importance of telling the truth in the circumstances. He therefore ruled that the child's evidence was admissible, given the ordinary meaning of s. 16(3).

Counsel for the accused did not challenge this interpretation of s. 16(3), but argued that the section did not apply because it was superceded by s. 540(1)(a) of the *Criminal Code*. That provision required evidence at a preliminary inquiry to be given under oath:

> Where an accused is before a justice holding a preliminary inquiry, the justice shall (a) take the evidence under oath....

It was not difficult to establish a conflict between the two applicable rules. A witness cannot both be required to give evidence under oath and be permitted to give unsworn testimony. The challenge was to establish which of the two rules should be regarded as paramount in the circumstances of the case. Since both rules were established by

[27] (1992), 7 O.R. (3rd) 1 (C.A.).

enactments of the federal Parliament, they occupied the same place in the legal hierarchy.

Counsel for both parties tried to rely on the *specialibus* rule: when two provisions conflict, the more specific one impliedly creates an exception to the more general one. Counsel for the accused focussed narrowly on the conflicting provisions themselves. He argued that s. 16(3) of the *Canada Evidence Act* should be considered general because that provision applies to proceedings of all kinds whereas s. 540 of the *Criminal Code* should be considered specific because it is limited to preliminary hearings. Conversely, counsel for the Crown focussed broadly on the two statutes as a whole. He argued that the *Canada Evidence Act* should be considered the specific legislation because it deals with the specialized subject of evidence in contrast to the Code, which deals with crime in general. He could also have argued, focussing on the two conflicting provisions, that s. 16(3) of the *Canada Evidence Act* is specific because it deals with the special case of minors whereas the *Criminal Code* provision is general because it applies to witnesses in general.

In the end, the court concluded that the *Canada Evidence Act* provision should prevail. However, the basis for this conclusion was not the *specialibus* rule but rather the court's purposive and consequential analysis. Griffiths J.A. wrote:

> If s. 540(1)(a) of the Code were literally interpreted[28] to exclude the application of s. 16(3) of the Canada Evidence Act, then this would lead to a highly undesirable and anomalous result, which surely could not reflect the intention of Parliament. To deny the applicability of s. 16(3) to the preliminary inquiry is to defeat its manifest purpose, most especially in cases of sexual assault and cognate crimes against children.[29]

After pointing out other unacceptable consequences that would flow from assigning paramountcy to the Code, Griffiths J.A. concluded that s. 16(3) of the *Canada Evidence Act* was meant to operate as an exception to the general rule set out s. 540(1)(a) of the Code.

(2) *Exhaustive code*

An interpreter may wish to rely on an exhaustive code model of argument in either of the following circumstances:

- provisions from different statutes apply without conflict to particular facts, or
- legislative provisions and the common law apply without conflict to particular facts.

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[28] Griffiths J. says "literally interpreted" but he means "applied". The problem here is not meaning, but conflict among applicable rules.

[29] *Supra* note 27 at 8.

Although in these circumstances the overlapping provisions and rules are presumed to apply, this presumption can be rebutted by establishing that the legislature intended one of its provisions (or series of provisions) to deal exhaustively with the facts in question, to the exclusion of everything else.

To establish that intention, interpreters rely on the types of analysis described in Part 2: textual, purposive, scheme, policy, and consequential. They focus in particular on the following considerations:

- whether the provision is part of a scheme that is detailed and comprehensive and appears to be complete
- whether the provision provides an adequate solution or remedy to the facts of the case
- whether resorting to other provisions or the common law would merely duplicate the effect of the provision
- whether resorting to other provisions or the common law would interfere with the scheme of the Act or tend to defeat its purpose

Because rules made by the legislature prevail over judge-made rules, it is relatively easy to establish that legislation is meant to exclude the common law. To the extent legislation changes the common law, it operates like an amendment: in effect it "repeals" inconsistent common law. However, when legislation codifies, or partially codifies, the common law, the outcome can be difficult to predict, for the court must determine whether the legislation was intended to definitely displace the common law.

It is harder to establish that the provisions of one statute are meant to exclude the provisions of other statutes issuing from the same legislature. However, if there is evidence that this is what the legislature intended, the courts will rule accordingly. In *Re British Columbia Teachers' Federation and Attorney General for British Columbia*,[30] for example, British Columbia's Court of Appeal found that the province's *School Act* was a complete code which excluded the application of other legislation.

The issue in the case was whether the Treasury Board of British Columbia had authority to issue a directive that reduced appropriations to any local school board that reduced the number of teachers it employed below a certain number and gave the remaining teachers a raise. On the basis of s. 24(1) of the *Financial Administration Act*, it appeared that a directive along these lines was authorized:

24.(1) The Treasury Board may

(a) by directive, control or limit expenditure under any appropriation;

(b) by directive, ... set conditions for any kind of expenditure under an appropriation.

[30] (1985), 23 D.L.R. (4th) 161 (B.C.C.A.).

However, the Court of Appeal ruled otherwise. Anderson J.A. for the majority offered the following explanation:

> The above quoted provisions [from the *Financial Administration Act*], although framed in wide and general language, do not, in my opinion give the power to issue directives in respect of matters specifically dealt with by the School Act.
>
> ... the School Act provided a comprehensive code dealing with local self-government in the public education field.... [T]he very matters dealt with by the directive were specifically reserved to school boards subject to the collective bargaining and arbitration process outlined in the School Act.[31]

Anderson J.A. emphasized several features of the *School Act* suggesting that it should be treated as an exhaustive code. The first was its constitutive character – it established an elaborate institutional framework and conferred powers on various offices or agencies. In addition, it dealt with the school board matters in a comprehensive fashion. Every aspect of running a school system was covered by the Act: there were no gaps. The Act set out general principles governing the operation of local schools as well as detailed provisions for implementing those principles. Finally, the Act dealt with an important area of governmental activity that historically had been dealt with at the local level. On the basis of these features, the court concluded that the *School Act* was meant to be exhaustive and that s. 24 of the *Financial Administration Act* could therefore not be used to issue directives to school boards.

(D) *Filling gaps*

Gaps arise when the purpose of legislation is clear, but the means devised to achieve the purpose are inadequate because a provision is under- inclusive or there is a lacuna in the legislative scheme. In contrast to mistakes, which are always inadvertent, gaps may or may not be inadvertent; they may in fact reflect the legislature's intent. Thus, unlike mistakes, which are always blamed on the drafter and which can be fixed by courts, gaps in legislation are attributed to the legislature itself and courts have no jurisdiction to fill them.

The key consideration in distinguishing incorrigible gaps from corrigible mistakes is the difference between under-inclusion on the one hand, and the other types of deficiencies that may occur in drafting legislation on the other. In order to fill a gap, a court must enlarge the scope of a provision or add a new provision to the legislative scheme – a

[31] *Ibid.* at 173 and 175-76.

new right, obligation or power, or an additional curtailment of freedom. Only the legislature has the constitutional authority to subject citizens to new prohibitions or obligations, create new entitlements or confer new powers on agents of the state.

In *Pacific Press Ltd. v. Cain*,[32] for example, the issue was whether a coroner had the power to find a witness at an inquest in contempt if the witness refused to answer a question. Section 38(3) of the *Coroner's Act* provided:

> A coroner has the same powers to compel the attendance of witnesses and to punish a witness for disobeying a summons to appear, refusing to be sworn, or refusing without lawful excuse to give evidence as are conferred on a justice by the Offence Act.

However, the powers conferred on a justice by the *Offence Act* were limited to punishment for failure to attend or remain in attendance and did not extend to punishment for failure to answer a question.

Counsel pointed out that the legislature clearly intended coroners to have the power to compel witnesses to answer questions, and this power would be incomplete and useless without the power to punish for refusal. Although the court conceded that this might be so, it was nonetheless unwilling to fill the gap:

> Although it seems that the legislature might have intended that the coroner have some sort of power to compel a witness to give evidence, the [statute as drafted does not confer] the intended power. That gap clearly might be regarded as a drafting error, but [there is nothing] which justifies the court filling the gap rather than waiting for a legislative remedy.[33]

Even though the legislative intent was fairly clear, and even though the failure to achieve that intent was probably due in fact to a mistake by the drafter, the court could not correct it because to do so would effectively confer a new power on the coroner – a power to send journalists to jail. Not surprisingly, the court held that it lacked jurisdiction to do this.

Notice how paramountcy and exhaustive code arguments differ from the disputed meaning model of argument. Whereas the disputed meaning model addresses doubt about the meaning of a provision in relation to particular facts, paramountcy and exhaustive code arguments are concerned with the relationship among legal rules.

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[32] (1997), 147 D.L.R. (4th) 339 (B.C.S.C.).

[33] *Ibid.* at 357.

(E) *Supplementation*

Although courts cannot fill gaps in legislation, in appropriate cases they can supplement an under-inclusive provision or scheme by resorting to the common law. Supplementation is clearly inappropriate if the provision or scheme is meant to be exhaustive. Conversely, supplementation is clearly appropriate if the subject matter of the legislation is within the inherent jurisdiction of the court. Legislation dealing with the welfare of children, for example, is often supplemented by invoking the *parens patriae* jurisdiction. Similarly, procedural legislation may be supplemented when a court invokes its inherent jurisdiction to control its own process.

Even outside the areas of inherent jurisdiction, the courts on occasion appeal either to established common law rules or to their jurisdiction to add to the common law (within appropriate limits) as justification for supplementing a defective legislation scheme. A rather striking example occurred in *R. v. Jobidon*,[34] which concerned the scope of the offence of assault as defined in s. 265(1) of the *Criminal Code*:

> 265(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;...

In interpreting this language, Canadian courts traditionally incorporated various common law limitations on consent, including the rule that a person did not consent to the application of force by voluntarily engaging in a fight or brawl. In 1983, the common law limitations on consent were partially codified in the following provision, added to s. 265:

> (3) For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.

The appellant argued that by including only some common law limitations on consent and leaving out the others, Parliament clearly indicated its intention to enlarge the scope of the offence. The voluntary fight limitation was impliedly excluded.

This was a plausible argument. Supposing Parliament intended to

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[34] [1991] 2 S.C.R. 714.

retain the full panoply of common law limitations, it clearly failed to implement that intention when it enacted s. 265(3). By mentioning some but not all of the limitations, it created a gap in the intended scheme. However, the court did not purport to fill this gap by reading in an additional limitation. Rather it applied existing common law to supplement the legislative scheme. Of course, the end result was the same. Gonthier J. wrote:

> While at first glance the appellant's argument may seem cogent, it is ultimately unpersuasive. Parliament did not set foot into new territory when listing the four vitiating factors in s. 265(3). On the contrary it will be seen that, for the most part, that list merely concretized, and made more explicit, basic limits on the legal effectiveness of consent, which had for centuries formed part of the criminal law in England and in Canada. Their expression in the Code did not reflect an intent to remove the existing body of common law, which already described those limitations and their respective scope.[35]

In effect, the Court here relied on supplementation to fill a gap.

(F) *Correcting (drafting) mistakes*

Although in principle legislation should not contain mistakes, in practice mistakes are commonplace. To rely on the corrigible mistake model of argument, an interpreter must establish one of the following claims:

> (1) The wording of the text is contradictory or incoherent and it is impossible to make sense of it using the standard techniques of interpretation. The court must redraft the provision so as to give it some sensible application.
>
> (2) The wording of the text states or suggests one thing, but it is clear that the legislature intended something else. This discrepancy between meaning and intention is due to a drafting mistake. The court has jurisdiction to correct this mistake by notionally redrafting the text so as to bring it in line with the clear intention of the legislature.

An example of a court assigning meaning to an incoherent text is found in the judgement of the New Brunswick Court of Appeal in *Association of Parents for Fairness in Education, Grand Falls District, 50 Branch v. Minority Language School Board No.50 et al.*[36]. New Brunswick's *Schools Act* provided that a school board organized on the basis of one official language could not provide classes in the other official language to "persons of the other official language / des personnes parlant l'autre

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[35] *Ibid.* at 739.

[36] (1987), 40 D.L.R. (4th) 704 (N.B.C.A.)

langue officielle". Angers J.A. found it impossible to make sense of this language, in part because the English and French versions established different bases for the categories: "the French version of the Act identifies people on the basis of their phonetic characteristics, whereas the English version does so by their being members of an ethnic group."[37] More importantly, neither basis was workable because of the large bilingual, bicultural population in New Brunswick. This group of people would not fall into either class. Here is how Angers J.A. dealt with the problem:

> There are rare circumstances where the court may remove or substitute words so that the meaning of an Act is intelligible and to ensure that it can be put to practical use... I believe that such circumstances exist in the case before us.
>
> Thus, if we remove ... the words "for persons of the other official language", words which are of no practical use, the section reads as follows:
>
> ...
>
> 3.3 ... a school board (organized on the basis of one official language) shall not provide classes ... in which the language of instruction is [the] other official language...[38]

An example of a court bringing the text in line with what the legislature obviously intended is found in the judgement of the Ontario Court of Appeal in *R. v. Creaghan*.[39] The defendant was charged with mischief under the *Criminal Code* and relied on what was then s. 386(2) as a defence:

> No person shall be convicted of an offence under sections 387 to 402 where he proves that he acted with legal justification or excuse and colour of right.

Although the defendant could not establish that he acted with legal justification or excuse, he did establish to the satisfaction of the court that he acted with "colour of right". In the view of the court, despite the wording of s. 386(2), it was not necessary for the defendant to establish that he acted not only with colour of right but also with legal justification or excuse:

> We are all of the view that the word "and" which precedes the words "with colour of right" in s. 386(2) should be read as "or". Manifestly, it would not be sensible to require the accused to prove not only that he acted with legal justification or excuse and with colour of right. If the accused acted with legal justification or excuse he is not criminally liable and that is the end of the matter and there is no need to resort to colour of right.[40]

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[37] *Ibid.* at 712.
[38] *Ibid.* at 713-14.
[39] (1982), 31 C.R. (3rd) 277 (Ont. C.A.).
[40] *Ibid.* at 282.

Notice that the claim being made by the interpreter who relies on this model of argument is not that courts are entitled to amend legislation or disregard the will of the legislature. The claim is that, due to incompetent drafting, the provision as written fails to express the true intent of the legislature, and if the court is to give effect to that intention, it must repair the drafting mistake. In order to establish the true intention of the legislature, the interpreter relies on the various forms of analyses canvassed in Part 2 and on any relevant extrinsic aids.

Part IV: *Conclusion*

In this article I have tried to show that statutory interpretation disputes are resolved, not by arbitrary preference, but by work. During the preliminary analysis stage, the interpreter analyzes the legislation to locate sources of doubt and conflict. He or she then identifies reasons to resolve the doubt or conflict one way as opposed to another. During the argument construction stage, the interpreter decides which model of argument is best and formulates the claims associated with that model. He or she then relies on the preliminary analyses of text, purpose, scheme, policy and consequences in support of the claims.

I have also tried to show that there is more to statutory interpretation than argument about the meaning of text and whether it is plain or ambiguous. Determining whether legislation applies, and how it applies, depends on all admissible evidence of legislative intent, both actual and presumed. While some interpretation problems can be dealt with in one way only, many lend themselves to more than one model of argument. In such cases, the choice of model is strategic: the interpreter adopts the model that best supports his or her preferred outcome. This aspect of interpretation is nicely illustrated by the judgement of the Supreme Court of Canada in *R. v. McIntosh*,[41] which considered the self-defence provisions of the *Criminal Code*. The majority used the disputed meaning model of argument and purported to decide the case on the basis that the ordinary meaning was plain. The dissent relied on the corrigible mistake model of argument.

It is obvious that interpreters enjoy significant discretion when they argue and resolve interpretation disputes. However, they are obliged to justify what they do by showing how their preferred outcome relates to the meaning of the text, the intentions of the legislation and evolving legal norms. These considerations determine the outcome in easy cases, where they all point in the same direction. In hard cases, they limit the range of acceptable outcomes. These considerations also underlie the rules of statutory interpretation, which, properly used, do not disguise choice but expose it and justify it in a persuasive way.

[41] [1995] 1 S.C.R. 686.