

A UNIFIED APPROACH TO CONSTITUTIONAL AND STATUTORY INTERPRETATION

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As a jurisdiction with a written constitution, in Canada, questions arise about whether constitutional interpretation should be and is the same as ordinary statutory interpretation. Should the Supreme Court of Canada interpret constitutional and ordinary statutes in the same way? Does the Court do so? Although the jurisprudence and the scholarship hint at diverging answers to these questions, there has been little sustained attempt to answer them. In this article, I aim to fill that lacuna. I argue that the Court should adopt the same approach to constitutional and statutory interpretation. Then, I suggest that although the Court has purported to adopt different approaches to constitutional and statutory interpretation, its practice has been to adopt what is in substance and effect a unified approach. In short, I suggest that there is both a normative case and a descriptive case for a unified approach to constitutional and statutory interpretation in Canada. On the unified approach, the interpretation of a statute, whether the statute is constitutional or ordinary, considers the text and the entire context, including the purpose and history. Constitutional interpretation is a special case of statutory interpretation, given the distinctive text and context.

Le Canada étant doté d'une constitution écrite, la question se pose de savoir si l'interprétation constitutionnelle devrait correspondre et correspond aux mêmes règles que l'interprétation législative habituelle. La Cour suprême du Canada devrait-elle interpréter les lois constitutionnelles et les lois ordinaires de la même façon? Le fait-elle réellement? Bien que la jurisprudence et la doctrine laissent entrevoir des réponses différentes à ces questions, peu d'efforts ont été faits pour y répondre. Dans le présent article, l'auteur souhaite combler cette lacune. Il fait valoir que la Cour devrait adopter une approche commune pour l'interprétation constitutionnelle et l'interprétation législative. Il propose ensuite que, même si la Cour soutient avoir adopté différentes approches, sa pratique révèle plutôt l'existence d'une approche unifiée. En somme, à son avis, des considérations normatives et descriptives militent en faveur d'une approche unifiée d'interprétation constitutionnelle et législative au Canada. Selon cette approche, l'interprétation d'un texte de

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loi, qu’il soit constitutionnel ou ordinaire, tient compte de son libellé ainsi que de l’ensemble de son contexte, notamment son objet et son historique. L’interprétation constitutionnelle constitue une modalité particulière de l’interprétation législative, compte tenu des caractéristiques propres au texte et au contexte.

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I. Introduction

As a jurisdiction with a written constitution, in Canada, questions arise about whether constitutional interpretation should be and is the same as ordinary statutory interpretation. Should the Supreme Court of Canada interpret constitutional and ordinary statutes in the same way? Does the Court do so? Although the jurisprudence and the scholarship hint at diverging answers to these questions, there has been little sustained attempt to answer them. In this article, I aim to fill that lacuna. I argue that the Court should adopt the same approach to constitutional and statutory interpretation. Then, I suggest that although the Court has purported to adopt different approaches to constitutional and statutory interpretation, its practice has been to adopt what is in substance and effect a unified approach. In short, I suggest that there is both a normative case and a descriptive case for a unified approach to constitutional and statutory interpretation in Canada. On the unified approach, the interpretation of a statute, whether the statute is constitutional or ordinary, considers the text and the entire context, including the purpose and history. Constitutional interpretation is a special case of statutory interpretation, given the distinctive text and context.

I proceed as follows. In part II, I provide the background for the questions that arise about whether constitutional interpretation should be and is the same as ordinary statutory interpretation. I explain that although the jurisprudence and the scholarship hint at diverging answers to these questions, there has been little sustained attempt to answer them. In part III, I provide a sustained attempt to answer these questions. I argue that, as a normative matter, constitutional and statutory interpretation should be the same. Then, I suggest that, as a descriptive matter, the two are the same. In part IV, I conclude.

II. Background

In this part, I provide the background for the questions of whether constitutional interpretation should be and is the same as ordinary statutory interpretation.

For convenience, I take “constitutional statutes” to refer to constitutional statutory texts and “ordinary statutes” to refer to non-constitutional statutory texts. This reflects the fact that both kinds of texts are statutes, that is, enacted written laws. Although I sometimes follow others in distinguishing between “constitutions” and “statutes”, this suggests only that constitutions are special kinds of statutes and not that constitutions are not statutes. In using the terms “constitutional statutes” and “ordinary statutes”, I presuppose that constitutional and ordinary statutory texts are statutes. But I do not presuppose that there should be or is a unified approach for interpreting them. Rather, I take the claim that there should be and is a unified approach for interpreting them to be a contested claim in need of argument, one that I seek to provide.

Although these questions arise in any jurisdiction which has a written (or codified) constitution, my focus here is on Canada. There is a need to interpret both language in constitutional texts—such as Canada’s *Constitution Act, 1867*² and its *Constitution Act, 1982*³—and language in non-constitutional or ordinary statutory texts. Thus, questions arise as to whether interpretation in each case should be and is the same. While some of the considerations that are relevant to whether there should be and is a unified approach to constitutional and statutory interpretation are not specific to Canada, at least some of the considerations that are significant in Canada are specific to Canada. Accordingly, I confine my focus to constitutional and statutory interpretation in Canada.

Given my focus on Canada, I wish to say a word about where “quasi-constitutional” statutes belong in the dichotomy between constitutional and ordinary statutes. In Canada, the jurisprudence and the scholarship recognize some statutes, such as those on human rights and privacy, as “quasi-constitutional”.⁴ Examples include the *Canadian Bill of Rights*,⁵ human rights codes and privacy legislation. Although it is not easy to say exactly what makes a statute quasi-constitutional, the Supreme Court of

² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴ See Vanessa MacDonnell, “A Theory of Quasi-Constitutional Legislation” (2016) 53:2 *Osgoode Hall LJ* 508 [“A Theory of Quasi-Constitutional Legislation”].

⁵ SC 1960, c 44.

Canada has suggested that it is simply the statute's distinctive purpose: "The only effect of this Court's use of the expression 'quasi-constitutional' to describe these ... Acts is to recognize their special purpose."⁶ A theory of quasi-constitutional statutes, due to Vanessa MacDonnell, is that quasi-constitutional statutes implement constitutional imperatives.⁷ Although I take no position here on how exactly we should think of quasi-constitutional statutes, the jurisprudence and the scholarship on quasi-constitutional statutes assume that quasi-constitutional statutes are ordinary statutes, even if they are more important than other ordinary statutes.⁸ Thus, quasi-constitutional statutes fall on the ordinary statutory side of the dichotomy between constitutional and ordinary statutes.

So much for preliminaries. Let us now turn to the questions of whether there should be and is a unified approach to constitutional and statutory interpretation. There are two distinct but related questions here. First, as a normative matter, should the Supreme Court of Canada interpret constitutional and ordinary statutes in the same way? Second, as a descriptive matter, does the Court do so? These questions deal with independent issues. A positive answer to the normative question does not necessitate a positive answer to the descriptive question, and vice versa. It might be that the Court should adopt a unified approach, even though it does not. Or it might be that the Court should not adopt a unified approach, even though it does. Of course, I do not wish to overstate the distinctness of these questions. The descriptive fact that the jurisprudence is a certain way might provide a normative reason for the jurisprudence to be that way. Certainty, predictability and reliance might suggest maintaining the status quo. Further, insofar as it is reasonable to take the Court to adopt the approach that it should adopt, the approach that the Court adopts provides evidence of the approach that it should adopt, and the Court's pronouncements on the approach that it should adopt provide evidence of the approach that it adopts. Still, it is helpful to distinguish between the normative and the descriptive questions. We can distinguish between these questions while noting that an answer to one question might inform the answer to the other.

The jurisprudential basis for taking the Supreme Court to adopt different approaches to constitutional and statutory interpretation is in the foundational cases of *Hunter v Southam*⁹ and *Big M Drug*

⁶ See *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 26.

⁷ See MacDonnell, "A Theory of Quasi-Constitutional Legislation", *supra* note 4 at 508.

⁸ See *ibid* at 525–26.

⁹ *Hunter v Southam Inc.*, [1984] 2 SCR 145, 1984 CanLII 33 (SCC) [*Hunter v Southam*].

Mart,¹⁰ which were early cases on *Charter* interpretation.¹¹ In *Hunter v Southam*, the unanimous Court suggested that it was appropriate to adopt different approaches and accordingly purported to adopt an approach to constitutional interpretation that differed from its approach to ordinary statutory interpretation.¹² Writing for the Court, Justice Dickson (as he then was) distinguished constitutional interpretation from statutory interpretation:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.¹³

In other words, constitutional interpretation differs from statutory interpretation due to differences between constitutional and ordinary statutes in terms of ease of enactment, function and ease of amendment. Justice Dickson proceeded to adopt a “purposive” approach to interpreting the *Charter*, an approach which attends to the purpose of the text.¹⁴ One year later, in *Big M Drug Mart*, the Court elaborated on the purposive approach.¹⁵ Justice Dickson again wrote for the Court. After citing the purposive approach from *Hunter v Southam*, he wrote:

[T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the

¹⁰ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M Drug Mart*].

¹¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹² *Hunter v Southam*, *supra* note 9 at 155.

¹³ *Ibid* at 155. See also *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 365–66, 1984 CanLII 3 (SCC) [*Skapinker*]; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 318, 1984 CanLII 17 (SCC) (citing *Re Residential Tenancies Act*, [1981] 1 SCR 714 at 723, 1981 CanLII 24 (SCC)).

¹⁴ *Hunter v Southam*, *supra* note 9 at 157.

¹⁵ *Big M Drug Mart*, *supra* note 10.

meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.¹⁶

The purposive approach attends to the purpose and text of the provision and the *Charter* as a whole, and to relevant history. As Justice Dickson proceeded to emphasize, the *Charter* must “be placed in its proper linguistic, philosophic and historical contexts.”¹⁷ The purposive approach to constitutional interpretation from *Big M Drug Mart*, which emphasizes the text and the entire context, remains the Supreme Court’s current approach.¹⁸

To see the supposed difference between the Court’s purposive approach to constitutional interpretation and its approach to statutory interpretation, we must consider the Court’s approach to statutory interpretation. In *Rizzo & Rizzo Shoes*, the Court summarized its now well-known approach to statutory interpretation.¹⁹ Writing for the unanimous Court, Justice Iacobucci cited Elmer Driedger’s *Construction of Statutes* for the “modern” approach to statutory interpretation:

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.²⁰

Several years later, the Court affirmed this approach in *Bell ExpressVu*.²¹ Again writing for the unanimous Court, Justice Iacobucci cited Driedger’s formulation and noted that “Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings.”²² He also

¹⁶ *Ibid* at 344.

¹⁷ *Ibid*.

¹⁸ See *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 7 [9147-0732 *Québec inc*]. See also *R v Bissonnette*, 2022 SCC 23 at para 65. For discussion, see Jacob Weinrib, “What is Purposive Interpretation?” (2023) 74:1 UTLJ 74 [Weinrib]; Benjamin J Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms” (2015) 65 UTLJ 239.

¹⁹ *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [*Rizzo & Rizzo Shoes*].

²⁰ *Ibid* at para 21 (citing Elmer Driedger, *Construction of Statutes*, 2nd ed (1983) at 87).

²¹ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 [*Bell ExpressVu*].

²² *Ibid* at para 26.

emphasized the “important role that context must inevitably play”²³ in statutory interpretation, elaborating as follows:

[A]s Professor John Willis incisively noted in his seminal article “Statute Interpretation in a Nutshell” (1938), 16 *Can. Bar Rev.* 1, at p. 6, “words, like people, take their colour from their surroundings”. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.²⁴

Driedger’s formulation of the modern approach, which the Court elaborated on in the oft cited and leading cases of *Rizzo & Rizzo Shoes* and *Bell ExpressVu*, considers the text and the entire context, including the purpose. The Court’s endorsement of Driedger’s modern approach in those cases was not new, however, but a reaffirmation of its endorsement from cases as early as *Stuart Investments*²⁵ in 1984, which was the same year that it decided *Hunter v Southam*.²⁶

Is the purposive approach to constitutional interpretation the same as the modern approach to statutory interpretation? The two approaches are superficially different but might boil down to the same approach. Granted, leading formulations of both approaches explicitly require considering the language or text and purpose, though only the leading formulation of the purposive approach explicitly requires considering history. But it turns out that the modern approach also considers history, if only implicitly as part of the entire context. The Supreme Court has held that “legislative background and history offer contextual clues to and insight into the legislative purpose of the bill” in the context of discussing the modern approach to statutory interpretation.²⁷ So, both the purposive approach to constitutional interpretation and the modern approach to statutory interpretation require considering text, purpose and history. This suggests that although the formulations of the approach are slightly different, the two approaches are in substance and effect the same. Both

²³ *Ibid* at para 27.

²⁴ *Ibid*.

²⁵ *Stuart Investments Ltd v The Queen*, [1984] 1 SCR 536 at 578, 1984 CanLII 20 (SCC) [*Stuart Investments*].

²⁶ The Supreme Court continues to affirm the modern approach. See e.g. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117 (citing *Rizzo & Rizzo Shoes*, *supra* note 19 at para 21; *Bell ExpressVu*, *supra* note 21 at para 26, both quoting Driedger, *supra* note 20).

²⁷ *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 6. See also *R v Borowiec*, 2016 SCC 11 at para 18; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 64; *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at paras 32–33.

approaches require considering the text given the entire context, which includes the purpose and history.

The similarities between the two approaches lead some to suggest that although they are superficially different, they really do boil down to the same approach. In his historical account of Canadian scholarship on constitutional and statutory interpretation in the first half of the 20th century, Richard Risk treats constitutional and statutory interpretation in Canada together: “Combining them in Canada makes sense because they overlap. The same issues and ideas illuminate both; the courts and the doctrine often make no distinction between them, and perhaps most important, the scholars I wish to study often made none.”²⁸ In doing so, Risk cites *Lambe*, a late 19th century case in which the Privy Council held that the *Constitution Act, 1867* must be interpreted “by the same methods of construction and exposition which [courts] apply to other statutes.”²⁹ I will return to the Privy Council’s holding on this point later, but for now I note that Risk takes it to be obvious that constitutional and statutory interpretation are the same. Similarly, A Wayne MacKay writes that “[t]he evolution of statutory interpretation towards a more flexible and purposive approach... benefits from the living tree approach to constitutional interpretation”³⁰ and that “th[e] purposive approach to statutory interpretation [i.e., the modern approach from *Rizzo & Rizzo Shoes*] is a logical extension of the ‘living tree’ approach to constitutional interpretation.”³¹ And Marshall Rothstein, writing extrajudicially, is explicit that the purposive approach from *Big M Drug Mart* is “similar” to the modern approach to statutory interpretation:

In both constitutional and statutory interpretation, courts consider the purpose of the legislative provision under review, the text, the history and origins, and the context by reference to associated provisions. The similarity in interpretive approach makes sense because, after all, the constitutional texts of 1867 and 1982 are statutes enacted by legislatures, albeit of superordinate importance.³²

²⁸ Richard Risk, “Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s” (2000) 63 Sask L Rev 195 at 195–96 [footnote omitted] [Risk]. See also Nicole Spadotto, “Applying Purposive Textualism to Quebec’s Codes” (2024) 61 Alta L Rev 671 at 675.

²⁹ Risk, *supra* note 28 at 196 (citing *Bank of Toronto v Lambe* (1887), 12 App Cas 575 at 579, [1887] UKPC 29 [*Lambe*]).

³⁰ A Wayne MacKay, “Evolving Fundamental Principles and Merging Public Law Silos: The Reshaping of Canada’s Constitutional Landscape” (2013) 61:2 SCLR (2d) 83 at para 43.

³¹ *Ibid* at para 46.

³² “The Forgotten Roots of Canada’s Living Tree: Constitutional Interpretation and the Rule of Law” (2022) 105 SCLR (2d) 15 at para 18.

Nonetheless, members of the Supreme Court of Canada have suggested that constitutional and statutory interpretation differ with respect to the role of the text and with respect to the appropriateness of static interpretation.

First, in 9147-0732 *Québec inc.*, Justice Abella suggested that constitutional interpretation gives less primacy to the text than statutory interpretation does.³³ The issue was whether section 12 of the *Charter* protected corporations from cruel and unusual treatment or punishment. The Court was unanimous that section 12 did not do so, but it divided three ways on what to say about the proper approach to constitutional interpretation. Justices Brown and Rowe, writing for a five-member majority, emphasized the “primacy” of the text in the purposive approach to constitutional interpretation from *Big M Drug Mart*.³⁴ For them, the text “is not the sole consideration, but treating it as the first indicator of purpose is not in the least inconsistent with the principles of *Charter* interpretation; it is in fact constitutive of them.”³⁵ However, Justice Abella, writing for a three-member minority, objected to the majority’s approach: “Instead of using the text as the beginning of the search for purpose, the majority has given it ‘primacy’ and assigned a secondary role to the other contextual factors, thereby erasing the difference between constitutional and statutory interpretation.”³⁶ Justice Abella did not explain how giving primacy to the text erases the difference between constitutional and statutory interpretation, but implicit in her reasoning is that statutory interpretation but not constitutional interpretation gives primacy to the text. Justice Kasirer, writing for himself, concluded that “all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations,” so he found it “unnecessary to consider questions relating to the proper approach to constitutional interpretation.”³⁷

Second, in two criminal law cases, other judges suggested that dynamic interpretation was appropriate for constitutional interpretation but not statutory interpretation, for which static interpretation was appropriate. In *Jarvis*, Justice Rowe, writing for a three-member minority, wrote that “[d]ifferent interpretive principles apply to the interpretation of constitutional and statutory provisions.”³⁸ In his view, it was not appropriate to interpret a provision of the *Criminal Code*,³⁹ which is “a

³³ 9147-0732 *Québec inc.*, *supra* note 18.

³⁴ *Ibid* at para 10.

³⁵ *Ibid* at para 11.

³⁶ *Ibid* at para 61.

³⁷ *Ibid* at para 142.

³⁸ *R v Jarvis*, 2019 SCC 10 at para 94 [*Jarvis*].

³⁹ RSC 1985, c C-46.

statute, not a constitutional document,” in the same way as interpreting section 8 of the *Charter*, even though both provisions protect reasonable expectation of privacy.⁴⁰ For Justice Rowe, this point was “reinforced by reference to the original meaning rule of statutory interpretation, according to which the words of an ordinary statute are to be read in the way they were understood at the time the statute was enacted: “The words of a statute must be construed as they would have been the day after the statute was passed.””⁴¹ His suggestion was that static interpretation was appropriate for statutory but not constitutional interpretation. In *Kirkpatrick*, Justices Côté, Brown and Rowe, writing for a four-member minority, echoed this.⁴² They wrote that the meaning of a *Criminal Code* provision, as a statutory provision, “does not shift over time” and that “[i]t is a fundamental error to apply the ‘living tree’ methodology to the interpretation of statutes.”⁴³

Some scholars likewise suggest distinguishing between constitutional and statutory interpretation. The most sustained scholarly treatment of constitutional and statutory interpretation is by Kent Greenawalt.⁴⁴ Although he focuses on the US, he provides normative considerations for distinguishing between constitutional and statutory interpretation that we can consider in Canada.⁴⁵ I extract from Greenawalt’s work the following considerations that might favour adopting different approaches

⁴⁰ *Jarvis*, *supra* note 38 at para 95.

⁴¹ *Ibid* at para 96 (citing *Perka v The Queen*, [1984] 2 SCR 232 at 264–65, 1984 CanLII 23 (SCC) [*Perka*] (quoting *Sharpe v Wakefield* (1888), 22 QBD 239 at 242 (CA))).

⁴² *R v Kirkpatrick*, 2022 SCC 33 [*Kirkpatrick*].

⁴³ *Ibid* at para 131.

⁴⁴ Kent Greenawalt, “Constitutional and Statutory Interpretation” in Jules L Coleman, Kenneth Einar Himma & Scott J Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004) 268; *Statutory and Common Law Interpretation* (Oxford: Oxford University Press, 2013); *Interpreting the Constitution* (Oxford: Oxford University Press, 2015).

⁴⁵ For US scholarship on whether there should be and is a unified approach to constitutional and statutory interpretation, see Kevin M Stack, “The Divergence of Constitutional and Statutory Interpretation” (2004) 75:1 U Colo L Rev 1; Christopher Serkin & Nelson Tebbe, “Is the Constitution Special?” (2016) 101 Cornell L Rev 701; Richard Primus et al, “Debating Is the Constitution Special?” (2017) 102:6 Cornell L Rev 1649. For a recent discussion of the issue in Canada (in the context of providing an account of purposive interpretation), see Weinrib, *supra* note 18 at 83 (quoting *Hunter v Southam*, *supra* note 9 at 155). For Weinrib, “the kinds of reasons that animate interpretation shift depending on the kind of legal text that one considers” (*supra* note 18 at 83 (citing Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at 185 (“Purposive interpretation applies to the interpretation of all legal texts, but it treats each type of text specially, according to its nature.”))). See also James Allan, “Constitutional Interpretation v. Statutory Interpretation” (2000) 6 Legal Theory 109.

to constitutional and statutory interpretation:⁴⁶ (a) in terms of *authority*, constitutional provisions are superordinate to statutory provisions; (b) in terms of *source*, constitutional provisions tend to be enacted by bodies that differ from those that enact statutory provisions; (c) in terms of *age*, constitutional provisions tend to be older than statutory provisions; (d) in terms of *generality of textual language*, constitutional language tends to be more general, open-ended and vague than statutory language; (e) in terms of *subject matter*, constitutional provisions tend to deal with basic political structures and values more than statutory provisions; (f) in terms of *symbolic significance*, constitutional provisions tend to have more symbolic significance than statutory provisions; (g) in terms of *primary addressees*, constitutional provisions tend to be addressed to public officials more than statutory provisions; and (h) in terms of *ease of revision*, constitutional provisions tend to be more difficult to amend or repeal than statutory provisions.

The jurisprudence and the scholarship hint at diverging answers to whether there should be and is a unified approach to constitutional and statutory interpretation, but there has been little sustained attempt to answer these questions. In what follows, I aim to fill that lacuna.

III. There Should be and is a Unified Approach

In this part, I turn to explaining why there should be and is a unified approach to constitutional and statutory interpretation. I begin by making the *normative* case that the Court should adopt a unified approach. I draw attention to two significant features of Canada's constitution: first, Canada's founding constitutional statute, namely the *Constitution Act, 1867*, was enacted as an imperial statute of the UK Parliament; and second, some provisions of what otherwise seem like ordinary statutes are constitutional provisions. I explain why, given these features, it makes sense to adopt a unified approach to constitutional and statutory interpretation. I also show that reasons offered in the jurisprudence and the scholarship for adopting different approaches do not withstand scrutiny. Then, I make the *descriptive* case that, despite its occasional rhetoric to the contrary, the Supreme Court of Canada has long adopted a unified approach. In doing so, I address potential complications arising from the suggestion that the Court's approaches to constitutional and statutory interpretation have fluctuated in practice.

⁴⁶ "Constitutional and Statutory Interpretation", *supra* note 44 at 271; *Statutory and Common Law Interpretation*, *supra* note 44 at 293–94; *Interpreting the Constitution*, *supra* note 44 at 5–11.

I start with the normative case. Should there be a unified approach to constitutional and statutory interpretation? I suggest that there should, although I do not take this to be obvious. Given two important features of Canada's constitution, it makes sense to adopt a unified approach.

The first important feature of Canada's constitution is that the founding constitutional statute, the *Constitution Act, 1867*, was enacted as an imperial statute of the UK Parliament for Canada. This feature is important because it explains the approach that the Privy Council took to interpreting the *Constitution Act, 1867* when the Privy Council was the final appellate court for Canada, and nothing suggested adopting a different approach when the Supreme Court of Canada became the final appellate court in 1949 or when the *Constitution Act, 1867* was patriated in 1982.

In *Edwards*, the Privy Council affirmed its approach to interpretation in *Lambe* while enunciating the now famous "living tree" approach to constitutional interpretation.⁴⁷ The case concerned the interpretation of section 24 of the *Constitution Act, 1867*—then known as the "*British North America Act, 1867*" or the "*BNA Act, 1867*". In interpreting this provision, the Privy Council stated: "The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada."⁴⁸ The Privy Council also affirmed that "Courts of law must treat the provisions of this (British North America) Act by the same methods of construction and exposition which they apply to other statutes."⁴⁹ That is, constitutional provisions must be interpreted like other statutory provisions. The Privy Council continued: "[b]ut there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony."⁵⁰ The specific approach to interpreting a statute might differ depending on the specific statute. The Privy Council emphasized the distinctive purpose of the constitutional statute: "[we] are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country."⁵¹

⁴⁷ *Edwards v Canada (Attorney General)*, [1930] 1 DLR 98 (UKPC), 1929 CanLII 438 (UK JCPC) [*Edwards*].

⁴⁸ *Ibid* at 107.

⁴⁹ *Ibid* (citing *Clement's Canadian Constitution*, 3rd ed at 347).

⁵⁰ *Ibid* (citing *Clement's Canadian Constitution*, 3rd ed at 347).

⁵¹ *Ibid*.

The Privy Council's decisions in *Lambe* and especially *Edwards* suggest that the same approach is to govern the interpretation of constitutional and ordinary statutes alike. Although constitutional statutes are distinctive, their distinctiveness lies in their distinctive text and especially their distinctive purpose, namely, to function as a constitution. This distinctiveness does not call for a fundamentally different approach to interpretation, just as the distinctiveness of penal or taxing statutes does not do so. Statutory interpretation is flexible enough to consider a distinctive text or purpose, as well as any other distinctive part of the context.

Not only was there no reason in *Lambe* and *Edwards* to depart from the ordinary approach to statutory interpretation, but I suggest that given the *Constitution Act, 1867*'s origin as an imperial statute, the Privy Council's approach made sense. In interpreting the *Constitution Act, 1867*, the Privy Council was not interpreting a statute of a foreign jurisdiction in the way that a domestic court might interpret a foreign statute. Rather, the Privy Council, which was an imperial court, was interpreting an imperial statute for Canada.⁵² The *Constitution Act, 1867* was an imperial statute of the UK Parliament (rather than a statute of the Canadian Parliament), so the Privy Council, created by the UK Parliament to hear cases from colonial courts,⁵³ had every reason to interpret it in the way that it would interpret any other imperial statute of the UK Parliament.

Although the Supreme Court of Canada became the final appellate court in Canada in 1949 and the *Constitution Act, 1867* was patriated in 1982, these events did not justify departing from the Privy Council's approach to interpreting the *Constitution Act, 1867* in the same way as any other statute. The abolition of appeals to the Privy Council in 1949 did not change the constitutional status of the *Constitution Act, 1867*. And although the patriation of the *Constitution Act, 1867* meant that Canada could amend that constitutional text on its own, the change in the amendment process also did not change the constitutional status of the *Constitution Act, 1867*. Thus, these events did not justify adopting a different approach to interpreting constitutional texts.

Why then was the Supreme Court of Canada so intent on distinguishing between constitutional and statutory interpretation in cases like *Hunter v Southam* and *Big M Drug Mart*? An important reason was the advent

⁵² See *R v British Coal Corporation*, 1935 CanLII 308 (UK JCPC), [1935] 3 DLR 401 at 412 ("the appeal to the King in Council [i.e., (the Judicial Committee of) the Privy Council] is an appeal to an Imperial, not a merely British, tribunal"). The Privy Council acts "as a Court of Law in reality though not in name" (404–405).

⁵³ See *ibid* at 403.

of the *Charter* in 1982, which occurred at the same time as patriation. The Court sought to breathe life into the new constitutional text and to avoid the restrictive interpretation that the Court had of the *Bill of Rights*, which was and is an ordinary statute, although a quasi-constitutional one. In the 22 years between the enactment of the *Bill of Rights* in 1960 and the enactment of the *Charter* in 1982, the Court held a statute to be inoperative for breaching the *Bill of Rights* in only one case.⁵⁴ Given the Court's restrictive interpretation of the *Bill of Rights*, the Court took pains to distinguish the *Charter* from the *Bill of Rights*.⁵⁵ In *Big M Drug Mart*, Justice Dickson for the Court sought to free the *Charter* from the strictures of the *Bill of Rights* and in this context held that the Court had to look to the "distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada."⁵⁶ The attempt to distinguish the constitutional *Charter* from the non-constitutional *Bill of Rights* also explains Justice Dickson's remark, cited earlier, in *Hunter v Southam*, that "[t]he task of expounding a constitution is crucially different from that of construing a statute."⁵⁷ The attempt was explicit in *Skapinker*, which was the Court's first case interpreting the *Charter*, where Justice Estey for the Court wrote that the *Charter* "is not a statute or even a statute of the extraordinary nature of the *Canadian Bill of Rights*[.] It is a part of the constitution[.]"⁵⁸ It is hard to take all these statements at face value, nor is it necessary to do so. Ironically, in *Skapinker*, despite having claimed that the *Charter* was "not a statute", Justice Estey proceeded to discuss the use of headings in the *Charter* and in this context considered the use of headings "in the interpretation of statutes"⁵⁹ and what Driedger's *Construction of Statutes* had to say about headings in statutes.⁶⁰ Clearly, Justice Estey took the *Charter* to be a statute after all.⁶¹ Meanwhile, in *Hunter v Southam*, immediately after suggesting that constitutional interpretation was different from statutory interpretation, Justice Dickson proceeded to invoke the "living tree" approach to constitutional interpretation from the Privy Council's decision in *Edwards*.⁶² We saw earlier that the Privy Council in *Edwards* made it clear that courts were to interpret constitutional texts like other statutory texts. Yet *Hunter v*

⁵⁴ See Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters Canada, 2022) at § 35:8 [Hogg & Wright].

⁵⁵ See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 510–11, 1985 CanLII 81 (SCC); *R v Oakes*, 1986 CanLII 46 (SCC) at para 38, [1986] 1 SCR 103.

⁵⁶ *Big M Drug Mart*, *supra* note 10 at 344.

⁵⁷ *Hunter v Southam*, *supra* note 9 at 155.

⁵⁸ *Skapinker*, *supra* note 13 at para 10.

⁵⁹ *Ibid* at para 22.

⁶⁰ *Ibid* at para 21.

⁶¹ See *ibid* at paras 16–22.

⁶² *Hunter v Southam*, *supra* note 9 at 155–56.

Southam did not purport to depart from *Edwards* and instead purported to follow it.

The second important feature of Canada's constitution is that some provisions of what otherwise seem like ordinary statutes are constitutional provisions. The Supreme Court of Canada established this remarkable proposition in the *Supreme Court Act Reference*,⁶³ where it held that certain provisions of the *Supreme Court Act*⁶⁴ were part of Canada's constitution. At issue was the proper interpretation of sections 5 and 6 of the *Supreme Court Act* and Parliament's authority to amend them.⁶⁵ The Court held that although the Act was enacted in 1875 as an "ordinary statute", Parliament's authority to amend the Act was now limited by the constitution: sections 5 and 6 of the Act reflected an essential feature of the Supreme Court of Canada—its composition—which was "constitutionally protected" under Part V of the *Constitution Act, 1982*.⁶⁶ Parliament could not unilaterally change the composition of the Court, as such changes could only be made with the unanimous consent of Parliament and the provincial legislatures.⁶⁷ The notion of "composition" referred to sections 4(1), 5 and 6 of the Act, which codified the composition of and eligibility requirements for appointment to the Court as they existed in 1982.⁶⁸ Changes to other essential features of the Court could only be made with the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.⁶⁹ Thus, certain provisions of the Act, which otherwise seems like an ordinary statute, now have constitutional status.⁷⁰

This feature is important because it suggests that it only makes sense to adopt a unified approach to constitutional and statutory interpretation. The contrasting view that there should be different approaches to constitutional and statutory interpretation faces two challenges given that some provisions of what otherwise seem like ordinary statutes are constitutional provisions.

One challenge for the view that there should be different approaches is that in interpreting a provision, we might not know whether it is a

⁶³ *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

⁶⁴ RSC 1985, c S-26, ss 5, 6.

⁶⁵ *Supreme Court Act Reference*, *supra* note 63 at para 8.

⁶⁶ *Ibid* at para 19.

⁶⁷ *Ibid* at para 74.

⁶⁸ *Ibid* at para 91.

⁶⁹ *Ibid* at para 74.

⁷⁰ See Hogg & Wright, *supra* note 54 at §§ 1:4, 8:14. See also MacDonnell, "A Theory of Quasi-Constitutional Legislation", *supra* note 4 at 525.

constitutional or an ordinary statutory provision, so we risk adopting the “wrong” approach to interpreting the provision. As Maxime St-Hilaire, Patrick F Baud and Elena S Drouin observe, “[n]ot only is there no clear answer in Canadian law as to what the ‘supreme law’ of Canada comprises, but no agreement on how to find that answer.”⁷¹

We risk mistaking a constitutional provision for an ordinary statutory provision and interpreting it using the modern approach to statutory interpretation, when—according to the contrasting view—we should interpret it using the purposive approach to constitutional interpretation. The mere fact that a provision is part of what seems like an ordinary statute does not show that it is an ordinary statutory provision. Some provisions of the *Supreme Court Act*, which seems like an ordinary statute, are constitutional provisions. The Court in the *Supreme Court Act Reference* reasoned that because sections 5 and 6 of the Act were constitutional provisions, they had to be interpreted using the purposive approach from *Hunter v Southam*, *Edwards* and *Big M Drug Mart*.⁷² The Court proceeded to consider the text, history, purpose and surrounding context.⁷³ But before the Court’s decision in the *Supreme Court Act Reference*, it was far from clear that those provisions were constitutional provisions. The *Supreme Court Act* was not enumerated in section 52 of the *Constitution Act, 1982* as forming part of the Constitution of Canada.⁷⁴ Attempts to expressly entrench the qualifications for appointment to the Court via constitutional amendment had failed, suggesting that the qualifications were not entrenched.⁷⁵ And the view of Peter Hogg, a leading constitutional scholar, was that the *Supreme Court Act* was not part of the constitution.⁷⁶ Still, the Court concluded that at least some of the Act’s provisions were part of the constitution. So, although we now know that some provisions of the Act are constitutional provisions, we do not know which other provisions of that Act, or which provisions of other statutes, are constitutional provisions. Accordingly, we risk mistaking a constitutional provision for an ordinary statutory one.

⁷¹ Maxime St-Hilaire, Patrick F Baud & Elena S Drouin, “The Constitution of Canada as Supreme Law: A New Definition” (2019) 28:1 Const Forum Const 7 at 7 [St-Hilaire, Baud & Drouin]. They add that the Supreme Court “lack[s] both a theoretical and a practical understanding of what makes the difference between ordinary law and supreme law” (8). See also Richard Albert, “Multi-Textual Constitutions” (2023) 109 Va L Rev 1629 at 1661 (“Where is the constitution?’ is an open question in Canada.), 1662 (there is “deep contestation on what counts as constitutional”).

⁷² *Supreme Court Act Reference*, *supra* note 63 at para 19.

⁷³ *Ibid* at paras 20–68.

⁷⁴ See *ibid* at para 97.

⁷⁵ See *ibid* at para 102.

⁷⁶ Hogg & Wright, *supra* note 54 at § 1:4.

The converse problem might also occur. We risk mistaking an ordinary statutory provision for a constitutional provision and interpreting it using the purposive approach to constitutional interpretation, when—according to the contrasting view—we should interpret it using the modern approach to statutory interpretation. Some contend that only provisions “that cannot be amended (or repealed) by ordinary law and can only be amended (or repealed) through a constitutional amendment” are constitutional provisions rather than ordinary statutory ones.⁷⁷ On that contention, “any provision that can be altered by ordinary law must itself be ordinary, rather than supreme, in nature.”⁷⁸ If that contention is correct, we risk mistaking a provision of even the *Constitution Act, 1867* to be a constitutional provision.⁷⁹ The provision might be an ordinary statutory provision (if the provision is amendable by ordinary statute).⁸⁰

The question arises: what would the difference be if we were to apply the “wrong” approach—the modern approach to a constitutional provision or the purposive approach to an ordinary statutory provision? Implicit in the view that different approaches are appropriate for constitutional and statutory interpretation is that using the “wrong” approach could yield incorrect interpretations. Otherwise, there would be no point in insisting on adopting different approaches. But I wonder whether using the “wrong” approach would make any difference. In the *Supreme Court Act Reference*, the Court adopted the purposive approach to interpreting sections 5 and 6 of the *Supreme Court Act*, as those provisions were constitutional provisions. Would it have interpreted those provisions differently if it had instead adopted the modern approach to statutory interpretation? I suggest that it would have made no difference. In interpreting those provisions, the Court considered the text, history, purpose and surrounding context—in line with the modern approach to statutory interpretation. In its analysis, the Court tellingly invoked the “shared meaning rule of bilingual interpretation, which requires that where the words of one version may raise an ambiguity, one should look to the other official language version to determine whether its meaning is plain and unequivocal,” citing treatises and precedents on statutory

⁷⁷ Maxime St-Hilaire & Patrick F Baud, “Legal Roadblocks to Proposals for a Quebec Constitution” in Richard Albert & Léonid Sirota, eds, *A Written Constitution for Quebec?* (McGill-Queen’s University Press, 2023) 59 at 62 [St-Hilaire & Baud]. See also St-Hilaire, Baud & Drouin, *supra* note 71 at 11. But see Emmett Macfarlane, “Provincial Constitutions, the Amending Formula, and Unilateral Amendments to the Constitution of Canada: An Analysis of Quebec’s Bill 96” (2023) 60:3 Osgoode Hall LJ 655 at 669 [Macfarlane].

⁷⁸ St-Hilaire & Baud, *supra* note 77 at 64.

⁷⁹ See Macfarlane, *supra* note 77 at 669, 683–84.

⁸⁰ As I explain later, sections 44 and 45 of the *Constitution Act, 1982*, *supra* note 3 permit some amendments by ordinary statute.

interpretation.⁸¹ This blending of approaches to constitutional and statutory interpretation suggests that there is no difference between the two. (I explore this suggestion more thoroughly later, when I focus on the descriptive case that there is a unified approach to constitutional and statutory interpretation.)

I have been discussing one challenge for the contrasting view that there should be different approaches to constitutional and statutory interpretation, but there is another challenge for that view. Since some provisions of what otherwise seem like ordinary statutes are constitutional provisions, a challenge arises not only when we do not know whether the provision that we are interpreting is constitutional but also when we *do* know. Consider provisions of the *Supreme Court Act* once more. We know that certain provisions—namely, sections 4(1), 5 and 6—are constitutional provisions. This is consistent with other provisions of the Act being merely ordinary statutory provisions, so let us suppose that is the case. On the contrasting view that there should be different approaches to constitutional and statutory interpretation, we should use the approach to constitutional interpretation to interpret sections 4(1), 5 and 6. On that view, we should use the different approach to statutory interpretation to interpret other provisions of the Act, namely those that are ordinary statutory provisions. But then vexing questions arise. What approach should we use to interpret a *mixed* collection of provisions, some of which are constitutional provisions and others of which are ordinary statutory provisions, from the Act? And what approach should we use to interpret the entire Act, assuming that some of its provisions are constitutional and others are not? No answer seems to be forthcoming. These vexing questions seem so insuperable that it seems to only make sense to adopt a unified approach to constitutional and statutory interpretation.

I take the two significant features of Canada's constitution that I have discussed to make a strong case that there should be a unified approach to constitutional and statutory interpretation. To complete this normative argument, I now return to the jurisprudential and scholarly arguments to the contrary that I reviewed in part II. Those arguments, I suggest, are not convincing.

Although Justice Dickson in *Hunter v Southam* offered several reasons for adopting different approaches to constitutional and statutory

⁸¹ *Supreme Court Act Reference*, *supra* note 63 at para 32 (citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (2008) at 99–116; Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (2011) at 347–49; *R v Daoust*, 2004 SCC 6 at para 28).

interpretation, none of those reasons withstand scrutiny. To repeat part of the earlier quotation, he held that:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended.

Justice Dickson's reasons were that: (a) constitutional and ordinary statutes have different "function[s]"; (b) a statute defines "present" rights and obligations, but a constitution is "drafted with an eye to the future"; and (c) statutory provisions are easily enacted and repealed, but constitutional provisions are not easily repealed or amended. As to (a), ordinary statutes as well as constitutional statutes can function "to provide a continuing framework for the legitimate exercise of government power." Although the specific purposes might differ, that is fully consistent with the overall approach to interpretation being one which considers the purpose. As to (b), it is false that a statute only defines "present" rights and obligations, if that is the supposed contrast with a constitution, as even ordinary statutes define continuing rights and obligations and are "drafted with an eye to the future."⁸² At issue is whether ordinary statutes can apply to facts that arise after the time of enactment, but even ordinary statutes almost always are at least meant to apply to such facts. It would be a mistake to take a criminal statute prohibiting some conduct to apply only to facts contemporaneous with the statute's enactment. Whether ordinary statutes can live up to this aspiration is something that the "always speaking" principle of statutory interpretation addresses, and I will return to this point shortly. As to (c), it is false that constitutional statutes are necessarily not easily repealed or amended. It depends on the specific constitutional statute. Part V of the *Constitution Act, 1982* sets out the procedure for constitutional amendment and shows that some parts of the constitution can be repealed or amended as easily as ordinary statutes. Section 44 shows that the federal Parliament can make laws "amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons," so the parts of the constitution relating to those matters can be repealed or amended like any

⁸² See Ruth Sullivan, *The Construction of Statutes*, 7th ed (LexisNexis Canada, 2022) at § 6.01 [Sullivan] ("Most often, the public Acts of a legislature are not meant to operate as historical documents. They are written with an eye to the indefinite future, on the assumption that they will be applied not only to facts in existence at the time they come into force but also to conditions and circumstances as they evolve from time to time.").

federal statute. Similarly, section 45 shows that a provincial legislature can “make laws amending the constitution of the province,” so the parts of the constitution relating to the constitution of a province can be repealed or amended like any provincial statute.

Having shown that Justice Dickson’s reasons in *Hunter v Southam* do not withstand scrutiny, I suggest that the reasons I extracted from Greenawalt’s work also do not withstand scrutiny, at least in Canada. With respect to (a) authority, although it is uncontroversial that constitutional statutes are superordinate to statutory provisions, that fact only concerns the supremacy or authoritativeness of constitutional statutes and does not require adopting different approaches to constitutional and statutory interpretation. With respect to (b) source, as discussed above, the source of a statute is not determinative of its constitutional status or authoritativeness.⁸³ With respect to (c) age, Canada has plenty of old ordinary statutory provisions (from as early as Canada’s Confederation in 1867) and plenty of new constitutional provisions (such as those from the *Constitution Act, 1982*). With respect to (d) generality of textual language, constitutional language can be quite narrow and precise,⁸⁴ while ordinary statutory language can be general, open-ended and vague.⁸⁵ With respect to (e) subject matter, ordinary statutory provisions, such as those in human rights codes, can also deal with basic political structures and values.⁸⁶ With respect to (f) symbolic significance, ordinary statutory provisions can be just as symbolically significant as constitutional statutes.⁸⁷ With respect to (g) primary addressees, statutory provisions can just as much be addressed to public officials.⁸⁸ And with respect to (h) ease of revision, as discussed above, some constitutional provisions can be as easily amended or repealed as ordinary statutes of the federal Parliament or the provincial legislatures.

Before continuing, I wish to return to the insistence on the part of some members of the Supreme Court of Canada that constitutional and

⁸³ There are constitutional provisions in the *Supreme Court Act*, *supra* note 64. This was enacted as an ordinary statute, but some of its provisions now have constitutional status.

⁸⁴ E.g., section 23 of the *Constitution Act, 1867*, *supra* note 2, which requires that senators be “of the full age of Thirty Years”.

⁸⁵ E.g., section 60 of the *Wills, Estates and Succession Act*, SBC 2009, c 13, which permits the court to make a provision from a will-maker’s estate that it thinks is “adequate, just and equitable”.

⁸⁶ E.g., provisions in the *Canadian Human Rights Act*, RSC 1985, c H-6.

⁸⁷ E.g., provisions in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. See *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 4.

⁸⁸ E.g., provisions in the *Federal Courts Act*, RSC 1985, c F-7.

statutory interpretation are fundamentally different, either because of the different role of the text or the appropriateness of dynamic versus static interpretation. In my view, these supposed differences do not withstand scrutiny.

First, the role of the text is the same in both the purposive approach to constitutional interpretation and the modern approach to statutory interpretation. In both cases, we must consider the text and the entire context, including the purpose and history. In *9147-0732 Québec inc.*, Justice Abella implicitly assumed that statutory but not constitutional interpretation gives primacy to the text. Yet nothing in Driedger's canonical formulation of the modern approach to statutory interpretation suggests that statutory interpretation gives primacy to the text: "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." The modern approach is clear that the text is to be read in its "entire context" and "harmoniously" with other factors.⁸⁹ The "relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole."⁹⁰

Second, dynamic and static interpretations are equally at home in both constitutional and statutory interpretation. With respect, Justice Rowe in *Jarvis* and Justices Côté, Brown and Rowe in *Kirkpatrick* were wrong to suggest that static interpretation was appropriate for statutory but not constitutional interpretation. It is true that static interpretation can be appropriate for statutory interpretation.⁹¹ But dynamic interpretation can also be appropriate for statutory interpretation, in part due to the "always speaking" principle of statutory interpretation.⁹² The "always speaking"

⁸⁹ See Thomas A Cromwell, Siena Anstis & Thomas Touchie, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95:2 Can Bar Rev 297 at 320.

⁹⁰ *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10.

⁹¹ See *Perka*, *supra* note 41 at 264–65 (citing *Sharpe v Wakefield*, *supra* note 41 at 242). See also Léonid Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation" (2021) 47:1 Queen's LJ 78 at 104–105 [Sirota]; Mark P Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat L Rev 1 at 4 ["Two Uses of Purpose"].

⁹² See *Tataryn v Tataryn Estate*, [1994] 2 SCR 807, 1994 CanLII 51 (SCC) at 814–15; *R v 974649 Ontario Inc*, 2001 SCC 81 at para 38 [974649 Ontario Inc]; *Telus Communications Inc v Federation of Canadian Municipalities*, 2025 SCC 15 at para 34 [Telus]. I say "in part" because courts sometimes explicitly rely on the principle, but they sometimes engage in dynamic interpretation without citing the principle. For example, consider *R v Tran*, 2010 SCC 58, where the Supreme Court of Canada interpreted a statutory provision codifying the common law defence of provocation. The Court held

principle is codified in federal and provincial interpretation acts, and it has long been part of Canadian law, although its significance has been underappreciated in Canada.⁹³ Elaborating on this principle, the Supreme Court of Canada has held: “Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. While the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances[.]”⁹⁴ More recently, the Court has similarly elaborated on the “always speaking” principle thus: “A legislature may... intend that a provision be interpreted dynamically, in that the provision should be capable of applying to new sociological or technological circumstances as they arise.”⁹⁵ Further, dynamic interpretation can clearly be appropriate for constitutional interpretation, due to the “living tree” approach to constitutional interpretation.⁹⁶ Less obvious but still true is that static interpretation can also be appropriate for constitutional interpretation.⁹⁷ Of course, the appropriateness of dynamic and static interpretations in constitutional and statutory interpretation is a highly complex issue, so my suggestion here is necessarily brief. Although I cannot go into detail here, I discuss dynamic and static interpretation in

that although the “wording ... remain[ed] substantially unaltered” since codification in 1892 (para 18), the same could not “be said of the social context in which it [was] embedded” (*ibid*). Although Parliament had not chosen to reform the defence, “[t]his [did] not mean ... that the defence in its present articulation should not continue to reflect contemporary social norms, and in particular, *Charter* values” (para 19). The defence was “not frozen in time” and was “necessarily informed by contemporary social norms and values” (*ibid*).

⁹³ I discuss the principle at length in other work. See “What is Canada’s ‘Always Speaking’ Principle of Statutory Interpretation?” (forthcoming) *Alta L Rev*; “Constitutional Statutes are ‘Always Speaking’” (forthcoming) *Osgoode Hall LJ*.

⁹⁴ 974649 *Ontario Inc*, *supra* note 92 at para 38.

⁹⁵ *Telus*, *supra* note 92 at para 34 (citing Sullivan, *supra* note 82 at § 6.03). See also *Telus*, *supra* note 92 at para 155 (per Justice Côté (dissenting, but not on this point)).

⁹⁶ See *Edwards*, *supra* note 47 at 106–107.

⁹⁷ See Bradley W Miller, “Origin Myth: The Persons Case, the Living Tree, and the New Originalism” in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism* (Cambridge: Cambridge University Press, 2011) 120; J Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada” (2016) 53 *Osgoode Hall LJ* 745; Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism’?” (2016) 42:1 *Queen’s LJ* 107; Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 *UBC L Rev* 505; Asher Honickman, “The Original Living Tree” (2019) 28 *Const Forum Const* 29; Hoi L Kong, “Comeau and Constitutional Interpretation” (2020) 94 *SCLR* 57; Dwight Newman, “Is Canadian Constitutional Law Canadian?” (2023) 32:2 *Const Forum Const* 37.

constitutional and statutory interpretation in more detail elsewhere.⁹⁸ Here, I will say no more but note Ruth Sullivan's observation that "[i]n recent years, the courts are less apt to distinguish constitutional from ordinary texts and to reject dynamic interpretations of the latter."⁹⁹

Having concluded the normative case, I now turn to the descriptive case. Is there a unified approach to constitutional and statutory interpretation? I suggest that there are good reasons to think so, although there are potential complications for this suggestion that I will address.

Stéphane Beaulac convincingly shows that (at least until the time he was writing, in 2017), despite the Court's occasional rhetoric to the contrary, the Court has long adopted a unified approach to constitutional and statutory interpretation.¹⁰⁰ He hypothesizes that "in spite of the claims of ontological exceptionalism, there is nothing inherently and fundamentally different about constitutional interpretation in Canada—not anymore, in any event—when compared with the general methodology of statutory interpretation."¹⁰¹ He suggests that the approaches to constitutional and statutory interpretation converge:

the "modern principle" in statutory interpretation has created a convergence of approaches, where the construction of regular legislation and of constitutional instruments such as the *Canadian Charter* follows one and the same logical reasoning or analytical scheme. Put another way, empirically, one cannot observe any real or essential distinctions in the methodology applicable to constitutional interpretation and statutory interpretation[.]¹⁰²

At least since 1984—the year that the Court affirmed Driedger's formulation of the modern approach to statutory interpretation (in *Stuart Investments*)

⁹⁸ See "What is Canada's 'Always Speaking' Principle of Statutory Interpretation?", *supra* note 93; "Constitutional Statutes are 'Always Speaking'", *supra* note 93. See also *Telus*, *supra* note 92 at paras 35–36, especially para 36 ("There is no bright line between statutes that are 'static' and statutes that are 'dynamic'.").

⁹⁹ Sullivan, *supra* note 82 at § 6.01. See also Randal N M Graham, *Statutory Interpretation: Theory and Practice* (Emond, 2001) at 130–138; Randal N Graham, "A Unified Theory of Statutory Interpretation" (2002) 23:2 Stat L Rev 91.

¹⁰⁰ "Constitutional Interpretation: On Issues of Ontology and of Interlegality" in Peter Oliver et al, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 867 at 867–78 (citing Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *Revue juridique Thémis* 131) [Beaulac]. See also Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (LexisNexis Canada, 2018) at 134.

¹⁰¹ Beaulac, *supra* note 100 at 871.

¹⁰² *Ibid.*

and articulated the purposive approach to constitutional interpretation (in *Hunter v Southam*)—the Court has adopted the same approach to constitutional and statutory interpretation. In *Blais*, for example, the unanimous Court wrote: “The starting point in this endeavour [interpreting a constitutional statute] is that a statute—and this includes statutes of constitutional force—must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).”¹⁰³ The Court’s approach in *Blais* and other cases is unsurprising given the similarities between Driedger’s formulation of the modern approach and the Court’s formulation of the purposive approach in *Big M Drug Mart*.¹⁰⁴ Beaulac concludes that

because of the general endorsement of Driedger’s modern principle by the Court, what has happened in the last 30 years is a convergence of methodology. The same elements of text-context-object are to be considered in all instances, be it to interpret a constitutional instrument such as the *Canadian Charter* or to ascertain legislative intent in an ordinary statute.¹⁰⁵

Beaulac was writing in 2017, and the Supreme Court has only confirmed his hypothesis since then. In the 2018 case of *Comeau*, the unanimous Court treated constitutional and statutory interpretation as a unified exercise.¹⁰⁶ At issue was how to interpret section 121 of the *Constitution Act, 1867*, and the Court held that the approach to statutory interpretation was relevant:

The modern approach to statutory interpretation provides our guide for determining how “admitted free” should be interpreted. The text of the provision must be read harmoniously with the context and purpose of the statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §2.6. Constitutional provisions must be “placed in [their] proper linguistic, philosophic and historical contexts”: *Big M Drug Mart*, at p. 344. Constitutional texts must be interpreted in a broad and purposive manner: *Hunter*, at pp. 155–56; *Big M Drug Mart*, at p. 344; *Reference re Supreme Court Act*, at para. 19. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they “must continually adapt to cover new realities”: *Reference re Same-Sex Marriage*, at para. 30; see also *Reference re Employment Insurance Act*, at para. 9. This is the living tree doctrine: *Edwards*, at pp. 106–7.¹⁰⁷

¹⁰³ *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 at para 16 [*Blais*].

¹⁰⁴ Beaulac, *supra* note 100 at 875–78.

¹⁰⁵ *Ibid* at 878.

¹⁰⁶ *R v Comeau*, 2018 SCC 15 [*Comeau*].

¹⁰⁷ *Ibid* at para 52.

As in *Blais*, but even more vividly, the Court moved seamlessly between formulations of the approaches to constitutional and statutory interpretation.

To be sure, there are potential complications in the Supreme Court's jurisprudence on constitutional and statutory interpretation. Although the Court has not purported to deviate from its longstanding approaches to interpretation, scholars in recent years have suggested that the Court's approaches have fluctuated in practice.¹⁰⁸ These fluctuations might suggest that the Court does not approach constitutional and statutory interpretation in the same way after all.

With respect to constitutional interpretation, the scholarship and the jurisprudence suggest fluctuation in how the Court treats text and history. Scholars suggest that several cases from within the last decade—*Stillman*¹⁰⁹ (2019), *Poulin*¹¹⁰ (2019), *9147-0732 Québec inc*¹¹¹ (2020) and *City of Toronto*¹¹² (2021)—exemplify a shift towards emphasizing text and history. Léonid Sirota argues that *Stillman*, *Poulin* and *9147-0732 Québec inc*, as well as *City of Toronto*, are more “textualist” and even “originalist” (rather than “purposivist”) than before.¹¹³ Similarly, Colin Feasby argues that *Poulin*, *9147-0732 Québec inc* and *City of Toronto* exemplify a “textual turn.”¹¹⁴ But he is unsure that *Stillman* and *Poulin* were originalist, and he reads both *9147-0732 Québec inc* and *City of Toronto* as describing and applying a “purposive textual interpretation” (quoting from *City of Toronto*), which “prioritizes text and limits interpretive discretion.”¹¹⁵ For her part, Vanessa MacDonnell argues that *9147-0732 Québec inc* and *City of Toronto* emphasize text and that *Stillman* emphasizes history, though

¹⁰⁸ On constitutional interpretation, see Sirota, *supra* note 91 at 104–105; Colin Feasby, “The Evolving Approach to *Charter* Interpretation” (2022) 60:1 *Alta L Rev* 35 [Feasby]; Vanessa MacDonnell, “The Enduring Wisdom of the Purposive Approach to *Charter* Interpretation” in Howard Kislowitz, Kerri A Froc & Richard Moon, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (Vancouver: UBC Press, 2024), ch 15 [“Enduring Wisdom”]. On statutory interpretation, see Mark Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022) 59:4 *Alta L Rev* 920 [“The Purpose Error”]; Mancini, “Two Uses of Purpose”, *supra* note 91.

¹⁰⁹ *R v Stillman*, 2019 SCC 40 [*Stillman*].

¹¹⁰ *R v Poulin*, 2019 SCC 47 [*Poulin*].

¹¹¹ *Supra* note 18.

¹¹² *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*City of Toronto*].

¹¹³ Sirota, *supra* note 91 at 79–80, 109–111.

¹¹⁴ Feasby, *supra* note 108 at 38.

¹¹⁵ *Ibid* at 53–57, 65.

she adds that she thinks the shift in emphasis is just a tool to impose limiting constraints on legislative choice.¹¹⁶

In my view, these cases on constitutional interpretation do not detract from my suggestion that there is a unified approach to constitutional and statutory interpretation. To reiterate, the Court has not purported to deviate from its longstanding approaches to interpretation, and all the cases in question at least purport to be following the Court's established approach to constitutional interpretation, as set out in foundational cases like *Hunter v Southam* and *Big M Drug Mart*.¹¹⁷ Sirota, Feasby and MacDonnell suggest that the Court has shifted at least in the way that it applies the approach, but we should be careful about what we can infer from these shifts. It does not follow that the shifts represent shifts in the approach itself. The shifts might just be shifts in how to apply the purposive approach or shifts in emphasis with respect to the same factors (text and the entire context, including the purpose and history) within the approach. A shift towards emphasizing text and history does not entail a departure from the purposive approach set out in *Big M Drug Mart*, which attends to the purpose and text of the *Charter* as a whole and of the particular provision, and to relevant history. As Feasby explains, the Court in *Big M Drug Mart* "outlined elements to be considered in ascertaining the purpose of a right, but left open the weighting of the different elements."¹¹⁸ Feasby invokes a helpful metaphor: "The Supreme Court's purposivism is closer to being a list of ingredients for a cake than a recipe; it identifies flour, sugar, and eggs but fails to specify the quantities of each or how the ingredients are to be combined."¹¹⁹ He goes on to suggest that the Court's recent cases indicate a "remaking of its purposive approach,"¹²⁰ but implicit in this characterization is that the approach remains the same: it is a "remaking" of "its" purposive approach. Although he concludes that the Court's approach to constitutional (and specifically *Charter*) interpretation has "changed",¹²¹ this language does not entail that the approach is a fundamentally different one. He goes on to qualify his conclusion: "At this juncture it is also impossible to tell if the evolving method of *Charter* interpretation is still a form of purposivism."¹²² In other words, for Feasby, it is possible that the Court's approach to constitutional interpretation remains purposive. To return

¹¹⁶ MacDonnell, "Enduring Wisdom", *supra* note 108.

¹¹⁷ See *Stillman*, *supra* note 109 at para 21; *Poulin*, *supra* note 110 at para 32; 9147-0732 *Québec inc*, *supra* note 18 at para 7; *City of Toronto*, *supra* note 112 at para 14.

¹¹⁸ Feasby, *supra* note 108 at 45.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at 54.

¹²¹ *Ibid* at 65.

¹²² *Ibid* at 66 (he continues: "or whether it is a waystation on a journey to originalism").

to Feasby's metaphor, if someone lists ingredients for a cake without providing a recipe, and then they later provide a recipe (the quantities of each ingredient and how the ingredients are to be combined), does it follow that we have deviated from the ingredients originally listed? I would think not. So too, a shift in how to apply the purposive approach, or an increased emphasis on text and history as factors, does not indicate deviation from the purposive approach.

With respect to statutory interpretation, the scholarship and the jurisprudence suggest fluctuation in how the Court treats text and purpose. Mark Mancini suggests that although the Supreme Court of Canada's modern approach to statutory interpretation considers text, context and purpose, there is uncertainty about the respective roles of text and purpose.¹²³ He argues that a harmonious interpretation of text, context and purpose requires giving proper weight to text and not giving improper weight to purpose.¹²⁴ Moreover, recent decisions of the Court might suggest emphasizing text. In the Court's 2024 decision of *CISSS*, Chief Justice Wagner for the unanimous Court wrote that there must be "close attention ... paid to the text", which is "the anchor of the interpretive exercise."¹²⁵ In elaborating on this point, Chief Justice Wagner cited Mancini¹²⁶ and some of the Court's decisions from 2020 to 2023.¹²⁷

Mancini's observations and arguments do not detract from my suggestion that there is a unified approach to constitutional and statutory interpretation. Even if there is uncertainty about the respective roles of text and purpose, it does not follow that there is uncertainty about whether Driedger's modern approach remains the current approach to statutory interpretation. The uncertainty is only uncertainty about how to apply the approach or about the respective roles of text and purpose within the approach. As Mancini points out, "beyond the typical boilerplate description of the modern approach in *Rizzo*, there is no *ex ante* assignment of weight given to text and purpose in interpretation."¹²⁸ Further, "a well-acknowledged perspective in Canada on interpretation ... assigns no inherent weight in the abstract to constraints on interpretation."¹²⁹

¹²³ Mancini, "The Purpose Error", *supra* note 108 at 920; Mancini, "Two Uses of Purpose", *supra* note 91 at 2.

¹²⁴ Mancini, "The Purpose Error", *supra* note 108 at 921; Mancini, "Two Uses of Purpose", *supra* note 91 at 2.

¹²⁵ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 24 [CISSS].

¹²⁶ Mancini, "The Purpose Error", *supra* note 108 at 927, 930–31.

¹²⁷ *R v Breault*, 2023 SCC 9 at para 26 (quoting *MediaQMI inc v Kamel*, 2021 SCC 23 at para 39; 9147-0732 *Québec inc*, *supra* note 18 at para 10).

¹²⁸ Mancini, "The Purpose Error", *supra* note 108 at 920–21 [footnote omitted].

¹²⁹ Mancini, "Two Uses of Purpose", *supra* note 91 at 5.

Feasby's metaphor on constitutional interpretation is equally apt as one on statutory interpretation. To paraphrase: the Supreme Court's modern approach is closer to being a list of ingredients for a cake than a recipe. Again, we might ask whether we have deviated from the ingredients if someone lists the ingredients and then later provides a recipe, and we follow that recipe. Again, I would think not. Uncertainty about how to apply the modern approach, or an increased emphasis on text as a factor, does not indicate deviation from the modern approach.

As for the Court's recent decisions, although the Court has sometimes emphasized the text, it has not done so at the expense of purpose or other factors, and so these recent decisions also do not detract from my suggestion that there is a unified approach to constitutional and statutory interpretation. In *CISSS*, the passage in which the "anchoring" point appears provides important context for understanding that point:

First, the [statute at issue] must be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit[.] However, just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes. These means "may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation"[.] In other words, they may "tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal"[.] As this Court recently noted, an interpreter must "interpret the 'text through which the legislature seeks to achieve [its] objective', because 'the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective'[.]"¹³⁰

Chief Justice Wagner highlights the need to pay "close attention" to the text when considering the purpose ("object"), and he suggests that this need is on roughly equal footing ("just as") with the need to consider the text given the context and purpose ("object"). Although the text is the anchor of the interpretive exercise, that is because the text can tell us something about purpose, namely, "the means chosen by the legislature to achieve its purposes," which "may disclose qualifications to primary purposes". It is because the text indicates purpose that "the text remains the focus of interpretation." The goal of interpretation is to "find harmony between the words of the statute and the intended objective." The Court's later decisions confirm the need to find harmony between the text and purpose. In *Piekut*, Justice Jamal for the majority affirmed Chief Justice Wagner's

¹³⁰ *CISSS*, *supra* note 125 at para 24 [citations omitted].

statement from *CISSS* that “just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretative exercise.”¹³¹ In the broader discussion of the principles of statutory interpretation in which he affirmed this statement, Justice Jamal noted that although the modern approach requires a court to find harmony among the text, context and purpose, “a court need not address text, context, and purpose separately or in a formulaic way, since these elements are often closely related or interdependent.”¹³² He added that “statutory interpretation ‘cannot be founded on the wording of the legislation alone’ ... because ‘words, like people, take their colour from their surroundings.’”¹³³ Thus, Justice Jamal clarified that there is a need to consider both text and purpose harmoniously.

In short, even if the Supreme Court’s approach to either constitutional or statutory interpretation has fluctuated in practice, so that the two might not align perfectly, the fluctuations do not go as far as to show that the Court has in substance or effect adopted different approaches to constitutional and statutory interpretation. At most, the fluctuations show that there are occasional differences in the Court’s emphasis with respect to text, history and purpose—all of which remain essential factors in its approach to interpretation.

I conclude that it is appropriate to adopt a unified approach to constitutional and statutory interpretation. The unified approach interprets a statute, whether the statute is constitutional or ordinary, given the text and the entire context, including the purpose and history.

IV. Conclusion

In this article, I have argued for a unified approach to constitutional and statutory interpretation. Specifically, I have argued that there both should be and is a unified approach: we interpret both constitutional and ordinary statutory provisions considering the text and the entire context, including the purpose and history. Although the Supreme Court of Canada has purported to adopt different approaches to constitutional and statutory interpretation, its practice has been to adopt what is in substance and effect a unified approach. This approach is justified due to important features

¹³¹ *Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 45 [*Piekut*], citing *CISSS*, *supra* note 125 at para 24.

¹³² *Ibid* at para 43 (citing *Bell ExpressVu*, *supra* note 21 at para 31 and *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 28).

¹³³ *Ibid* at para 44 (citing *Rizzo & Rizzo Shoes*, *supra* note 19 at para 21 and *Bell ExpressVu*, *supra* note 21 at para 27).

of Canada's constitution, which make it difficult to maintain adopting different approaches to constitutional and statutory interpretation. None of the reasons offered in the jurisprudence and the scholarship for adopting different approaches withstand scrutiny. The upshot of all of this is that we should avoid being bogged down by the supposed reasons for distinguishing between constitutional and statutory interpretation and the illusory differences between them. Instead, we should focus on the often challenging but genuine task of interpretation itself.¹³⁴

¹³⁴ As this article was being edited for publication, the Supreme Court of Canada released its decision in *Taylor v Newfoundland and Labrador*, 2026 SCC 5. While I cannot comment on the case in detail, I note that although the Court divided 5–3–1, all members of the Court affirmed the principles in *Hunter v Southam* and *Big M Drug Mart*: see paras 70–85 (per Justices Karakatsanis and Martin); 266–67, 278–82 (per Justices Kasirer and Jamal in partial dissent); 326–30 (Justice Rowe in partial dissent). Although the judges divided over how to apply the purposive approach to constitutional interpretation, they all considered the text in the entire context, in line with the modern approach to statutory interpretation. In its subsequent decision in *Alford v Canada (Attorney General)*, 2026 SCC 14, the Court affirmed that “[t]he interpretation of a constitutional provision must be anchored in the meaning of its words, considered in context, with a view to the purpose it was intended to serve” (para 47). It added that “[c]onstitutional documents must be read generously and purposively within their textual, contextual, and historical confines” and that “[t]he meaning given to a constitutional provision must also be harmonious with the structure of government implemented by the Constitution, as expressed through both the 1867 and 1982 *Constitution Acts*” (paras 47–48).