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Statutory Interpretation in the Courtroom, the Classroom, and Canadian Legal Literature

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STATUTORY INTERPRETATION IN THE COURTROOM, THE CLASSROOM, AND CANADIAN LEGAL LITERATURE

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In recent years, judges and scholars in Canada and the United States are devoting more attention to the theory and techniques involved in statutory interpretation. Although some advocate "foundational" theories to answer all theories of interpretation, most difficult cases require a pragmatic approach that requires analysis of the statutory text, original legislative intent, and legislative purpose in light of modern circumstances. Moreover, the most difficult cases may not be answerable by any of these approaches. In difficult cases, judges often resort to "normative canons" -- rules they created to further a jurisprudence they desire. These canons need to be closely examined and justified. This article closely examines one American and one Canadian case, arguing that an appropriate normative canon interprets cases where the text, intent, and purpose are unclear in favour of the party least likely to have had its voice heard in the legislatures and against the party most likely to be able to secure legislative correction if the court's decision is politically undesirable.

Depuis quelques années, les juges et les personnes lettrées, au Canada et aux États-Unis, accordent plus d'attention à la théorie et aux règles d'interprétation des lois. Bien que certains préconisent que les théories « fondamentalistes » offrent la réponse à tout en matière d'interprétation, il faut dans les cas plus difficiles adopter une démarche pragmatique, laquelle comprend une analyse du texte législatif, de l'intention originale du législateur et de l'objet de la loi dans le contexte moderne. Dans les cas les plus difficiles, d'ailleurs, ces méthodes d'analyse ne sont parfois d'aucune utilité. Aussi les juges s'en remettent souvent aux « règles normatives » -- c'est-à-dire aux règles élaborées par eux à l'appui de la jurisprudence qu'ils favorisent. Il convient d'étudier ces règles et leur justification avec soin. L'auteur examine une décision canadienne et une décision américaine et argumente que la bonne application des règles normatives permet, lorsque le texte législatif, l'intention du législateur et l'objet de la loi sont ambigus, de choisir une interprétation en faveur de la partie la moins susceptible de se véhiculer son message aux législatures et à l'encontre de la partie la plus susceptible d'obtenir des mesures correctives si la décision judiciaire est jugée politiquement indésirable.

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Table of Contents

I. INTRODUCTION

> *Statutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ballroom. Although the interpretation of statutes has been an ongoing topic of interest since the colonial period, only since the early 1980s have American legal academics become intensely excited about statutory interpretation as an object of theoretical interest. In that time, theories of statutory interpretation have blossomed like dandelions in spring. They now eclipse theories of common law and compete with constitutional law theories for space in the public law agenda.*
> *The efflorescence is overdue. As long as there has been law, there has been statutory interpretation, and insight into the topic is more practically relevant now than ever before. In addition, the subject has been one of great theoretical interest because of its historical connection with general theories of interpretation and meaning. Although statutory interpretation theory has lain in conceptual desuetude here in America, there are intellectual opportunities for the field which can take it well beyond the work that has been done in constitutional and common law theory.*[1]

This essay is somewhat evangelical—its purpose is to encourage the Canadian legal academy to devote more time in the classroom and in their scholarship to understanding the theoretical bases of many interpretive approaches and to improving on accepted techniques employed by judges to interpret statutes. Statutory interpretation is not only among the most fascinating areas of study for legal theory, command of interpretative techniques is also among the most important practical skills that litigators and counsellors can bring to the task of serving their clients. Indeed, in another important article, the author of the excerpt quoted above and his co-author suggest that, although law professors posit abstract "grand theories" containing a single foundational basis for statutory interpretation, lawyers and most judges approach the project of interpreting statutes in a eclectic way, looking at the text, legislative history, the context of the original enactment, the overall legal landscape, lessons of common sense, and good policy.[2]

Glimmers of an enlivened discussion about statutory interpretation are apparent in Canada. As Madam Justice Claire L'Heureux-Dubé recently noted, statutory interpretation is "bound to become an essential part of the knowledge, skills and abilities

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[1] W.N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994) [hereinafter *Dynamic Statutory Interpretation*] at 1.

[2] W.N. Eskridge, Jr. & P.P. Frickey, "Statutory Interpretation as Practical Reasoning" (1990) 42 Stanford L. Rev. 321 [hereinafter "Practical Reasoning"].

that contemporary jurists must possess."[3] In *Haida Nation v. B.C. (Minister of Forests)*,[4] Esson J.A. included in his reasons a lengthy exegesis on the significant changes that he thinks have been made between the second and third editions of a leading treatise on the subject, complaining that the book's new author, Professor Ruth Sullivan, has improperly transformed Elmer Driedger's approach to statutory interpretation from one where the plain meaning of the text is given primacy to a more "contextual" approach.[5] Yet, despite the implication in Justice Esson's analysis that the plain meaning approach to interpretation remains dominant, judges and practitioners really use a pragmatic approach to interpretation. Such an approach uses theoretically distinct (and perhaps inconsistent) techniques that seem best suited to the resolution of the case *sub judice*.

Canadian judicial pragmatism toward statutory interpretation is evident both from *Haida Nation*'s survey of Supreme Court of Canada case law, showing support for both the plain meaning and contextual approach,[6] as well as an important discussion of the issue in a recent article by Professor Sullivan.[7] Sullivan critiques the inconsistency in the approaches that the justices of the Supreme Court of Canada say they are using, and employs insights from linguistics and psychology to demonstrate the shortcomings of the plain meaning approach.

Although both Justice L'Heureux-Dubé and Professor Sullivan catalogue language in different Supreme Court opinions, alternatively invoking the plain meaning

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[3] *2747-3174 Québec Inc.* v. *Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at 994, 140 D.L.R. (4th) 577 (concurring opinion) [hereinafter *Régie d'alcool* cited to S.C.R.]. See also *ibid.* (quoting Eskridge, *Dynamic Statutory Interpretation*, *supra* note 1 at 6-8 ("statutory interpretation is the most important form of legal interpretation in the modern regulatory state").

[4] (1997) 45 B.C.L.R. (3d) 80, 153 D.L.R. (4th) 1 (B.C.C.A.) [hereinafter *Haida Nation* cited to D.L.R.].

[5] *Haida Nation, ibid.* at 6-8. Two key excerpts quoted in *Haida Nation, ibid.* at 6, reflect these perceived differences. In E. A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, the "modern principle" was stated as follows: "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." In R.E. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 131 [hereinafter *Sullivan/ Driedger*], the "modern rule" was stated as follows: "courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids.... An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just."

[6] *Haida Nation, supra* note 4 at 10-14. See also *Régie d'alcool, supra* note 3 at 1006-08, L'Heureux-Dubé J.

[7] R.E. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999) 30:2 Ottawa L.Rev. 175 [hereinafter *Sullivan/Ottawa*]. This is not to suggest that Professor Sullivan is the only one harvesting these vineyards. See *e.g.* D.G. Duff, " *Neuman* and Beyond: Income Splitting, Tax Avoidance, and Statutory Interpretation in the Supreme Court of Canada" (1999) 32 Can. Bus. L. J. 345.

and contextual approaches,[8] Part I of this Article explains why L'Heureux-Dubé J. was perhaps being too idealistic when she complained that decisions from the Supreme Court of Canada "lack[ed] a coherent and consistent methodology of legal interpretation."[9] This part builds upon Professor Sullivan's recent critique of plain meaning to discuss three "foundational" theories of interpretation, and to explain why none are sufficient to resolve difficult cases of statutory interpretation. Because interpretive techniques may be more or less appropriate depending on the specific issues in a case, an arguably "inconsistent" pragmatic methodology might well be the best approach that can be achieved. Part II introduces the important and often opaque role of "normative canons" of statutory interpretation that are created by courts and reflect judicial rather than legislative policy preferences. This part explains why normative canons are often outcome-determinative. It will also provide justifications for some normative canons, and explain how the use of these canons provides a sounder ground for the *Haida Nation* judgment than either the plain meaning or contextual approach. Finally, Part III explains the importance of statutory interpretation scholarship and suggests some key areas where Canadian jurisprudence would substantially benefit from the targeting of the intellectual firepower of the Canadian legal academy on this important subject. Acknowledging that in some areas (such as grammatical canons), the American legal literature may be applicable to Canadian jurisprudence, the part sketches some of the uniquely Canadian issues that arise concerning the proper use of legislative history and the role of administrative construction of statutes.

II. FOUNDATIONALISM AND PRAGMATISM

Jurists and academics in both the United States and Canada have endeavoured to develop "foundationalist" theories of interpretation: approaches that provide judges with comprehensive, coherent, and normatively attractive techniques to interpret statutes. As Professor Sullivan demonstrated in her recent article, it would be an understatement to observe that no consensus has developed, and that judges in both the

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[8] See *Régie d'alcool, supra* note 3 at 1001 L'Heureux-Dubé J. (citing own opinion for the Court in *Hills* v. *Canada (Attorney General)*, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, for a modern interpretation method that includes a pragmatic analysis of a variety of factors); *Régie d'alcool, ibid.* at 1006-1008 (complaining that the Court "is wavering at random" between pragmatic and textual methods, citing: *R.* v. *McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481 [hereinafter cited to S.C.R.] (textual); *R.* v. *Creighton*, [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632 (rejecting plain meaning); *R.* v. *Lewis*, [1996] 1 S.C.R. 921, 133 D.L.R. (4th) 700 (citing *Sullivan/Dreidger, supra* note 5, insisting that words must be read in context); and, *Verdun* v. *Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415 (return to plain meaning)); and *Sullivan/Ottawa, supra* note 7 at 181-187 (citing: *Ontario* v. *C.P. Ltd.*, [1995] 2 S.C.R. 1028 at 1049-50, 125 D.L.R. (4th) 385 (as an example of textualism); *R.* v. *McIntosh, ibid.* at 712-713, McLachlin J. (as an example of intentionalism); *Régie d'alcool, supra* note 3 and *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 641, 93 D.L.R. (4th) 36, Gonthier J. (as examples of pragmatism)).

[9] As stated by R.E. Sullivan in *Sullivan/Ottawa, supra* note 7 at 178 (citing *Régie d'alcool, supra* note 3 at 995-996, L'Heureux-Dubé J.).

United States and Canada rarely adhere to a single approach to statutory interpretation.[10] A recent development in the United States is the emergence of a strong movement led by Supreme Court Justice Antonin Scalia calling for a return to an approach similar to early-20th century British textualism, where judges give effect to the ordinary meaning of the words used by the legislature, taken in the context of the entire *corpus juris.* (As Professor Sullivan demonstrates, the *language* used in a number of opinions, particularly by Chief Justice Antonio Lamer, supports the textual approach,[11] although not even Lamer C.J. seems to follow it as consistently as Justice Scalia does.) Other judges use textual and non-textual sources to implement their view that the overriding goal of the judicial interpreter is to effectuate the intent of the enacting legislature. Yet others suggest that judges should interpret statutes in light of the broader purposes that underlay the specific statutory provisions.

This Part sketches three "foundational" theories of statutory interpretation. *Textualism* relies primarily on the judge's perception of the plain meaning of the statute's words, plus other grammatical and dictionary aids to interpretation and a "benign fiction" that the legislature intends that the entire *corpus juris* be read in a coherent manner.[12] Textualism generally eschews the use of techniques that explore the legislative and political context in which the statute was enacted. *Intentionalism* is an approach that uses: the judge's understanding of the text; grammatical and other aids to linguistic interpretation; legislative history; and, the political context in which the legislation was enacted—all with an aim to effectuating the intent of the enacting legislature. *Purposivism* uses all of these techniques and a healthy dose of judicial judgment as to the public purposes that underlay the need for the legislation, in order to best carry out the statute's goals.

As the brief survey in this Part suggests, each approach draws upon descriptively accurate and normatively desirable aspects of the legislative process and the interaction between judges and legislatures. Ultimately, however, none is likely to be fully successful in guiding the judicial interpreter. This Part concludes that judges in reality draw upon the insights from each of these approaches to carry out their tasks. In Part II, I suggest that none of these approaches, even in combination, provide a confident or satisfactory means to resolve difficult cases, so that courts must and do resort to judicially-created presumptions ("normative canons") to shape the outcome of a case.

A. Textualism

The central thesis of textualism is that judges should interpret statutes based on the ordinary meaning that a speaker of English would give to the statutory text. Although textualists would deny that they are literalists, they limit their contextual

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[10] *Ibid.* For a survey of the lack of consensus in the American academy, see generally W.N. Eskridge & P.P. Frickey, *Cases and Materials on Legislation: statutes and the creation of public policy*, 2d ed. (St. Paul: West, 1994) [hereinafter *Cases on Legislation*].

[11] *Sullivan/Ottawa, supra* note 7 at 181.

[12] This phrase is from an oft-cited explication of textualism by Scalia J. in *Green* v. *Bock Laundry*, 490 U.S. 504 at 527-529 (1989) (concurring opinion).

inquiry to the statutory text (albeit including the entire body of statutory law) and extrinsic linguistic aids, like dictionaries. Textualists firmly reject techniques that employ extrinsic contextual evidence in order to permit a judicial interpretation that best implements either the actual legislative expectations or the broader public purposes that led to the passage of the statute.

There are at least two varieties of textualism.[13] The stricter version, currently enjoying support among some prominent American jurists, adopts the "foundational" view that the text is the sole legitimate source of interpretation. Under this view, only what the legislature *said* is relevant, not what the legislature may have intended. Under a softer view that seems more prevalent in Canadian opinions, the plain meaning of statutory text is far and away the best evidence of what the legislature actually intended.[14]

Textualists believe in the primacy of text and the inappropriateness of using broader context for several reasons. Formally, textualists believe that power is vested in legislatures to pass law, not to declare intents or purposes, and that power is vested in courts to apply these laws without regards to fairness or political context.[15] In their view, contextual techniques create too much of a risk that judges will usurp legislative policy judgments in the name of effectuating "purposes" or "intents" that are simply their own policy preferences.[16] Even where judges are well-meaning, many lack the sophistication about the political process necessary to separate reliable from unreliable contextual evidence.[17] In addition, textualists believe that adherence to plain meaning is more likely to create a stable understanding of rules, while use of context is likely to vary from one interpreter to the next, undermining the principle of the rule of law.[18]

Much ink has been spilled about textualism that need not be rehearsed here.[19] Professor Pierre-André Côté has written that deliberately ignorning non-textual, contextual evidence "seems virtually to contradict the basic principles of linguistic communication."[20] Professor Sullivan's recent article develops this argument in detail, drawing upon linguistic theory to demonstrate the inability of textualism to provide

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[13] "Practical Reasoning", *supra* note 2 at 340.

[14] *R.* v. *Canadian Pacific Ltd., supra* note 8 at 1049-1050. See also *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85 at 143, 8 E.R. 1034 at 1057 (H.L.) (precise and unambiguous words "best declare the intention of the lawgiver").

[15] See *e.g.* A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997) at 9-13 [hereinafter *Matter of Interpretation*].

[16] See *e.g. Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 at 473, Kennedy J. (concurring opinion) (criticizing interpretation to fulfil spirit of legislation because the "problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice").

[17] See *e.g.* K.W. Starr, "Observations About the Use of Legislative History" 1987 Duke L.J. 371.

[18] *Sullivan/Drieger, supra* note 5 at 26.

[19] For a compilation of some recent American articles supporting or criticizing textualism, see W.N. Eskridge, Jr., "Textualism, The Unknown Ideal?" (1998) 96 Mich. L. Rev. 1509 at 1513 n. 10 & 13 [hereinafter "Unknown Ideal"].

[20] P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Éditions Yvon Blais Inc., 1991) at 241-242.

certain and objective answers to legal problems.[21] To be sure, almost all questions of statutory interpretation that are presented to lawyers and judges each and every day are resolved by sole resort to the ordinary meaning of the statutory text. But these questions do not wind up in court. Once difficult interpretive issues arise in litigation, interpreters will inevitably be influenced by their own background and biases if they exclude evidence of legislative intent and purpose – a point made by Professor Sullivan.[22] Although in some cases contextual evidence points both ways, and judges may be inclined to select the extrinsic evidence that is most consistent with their biases, in the area of contract interpretation, Americans have recognized that extrinsic evidence will serve to mitigate, not aggravate, this tendency.[23]

B. Intentionalism

The argument that the judiciary's primary mission should be to effectuate legislative intent is grounded in the notion that judges should be faithful servants of the legislature. This argument has normative appeal in a representative democracy. Especially where judges accept that legislative intent should be paramount and seem to prefer textualism as the most reliable instrument for ascertaining intent, a departure from plain meaning is, in many cases, justified. A good example is *Pepper v. Hart,*[24] the precedent-breaking decision by the British House of Lords permitting reference to *Hansard* in statutory interpretation cases. Despite a British rule of construction that ambiguities in tax legislation are to be construed in favour of the taxpayer, a panel of the Lords initially held that the plain language of the text supported Inland Revenue. On reconsideration, their Lordships took account of the express statement, made by the relevant minister before a parliamentary committee, that the statute adopted a construction of "income" that was favourable to the taxpayer in the case. The second decision noted that it would be ineffective and improper to prohibit members of Parliament from relying on unequivocal statements made by a minister and to insist on further statutory clarifications.[25]

As Professor Sullivan notes, a major problem with intentionalism is that it imputes outcomes to the intention of the legislature not only in cases where this is plausible but equally in cases where it is not.[26] This problem is exacerbated by two facts of life about the legislative process: strategic voting, and underlying legislative assumptions that prove to be incorrect over time. Some significant issues arising out of the interpretation of the American *Civil Rights Act of 1964* are illustrative.

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[21] *Sullivan/Ottawa, supra* note 7.

[22] *Ibid.* at 200. Indeed, a frustration with the use of the text by conservative judges to frustrate progressive social reforms in the United States (see *e.g.* F.J. de Sloovère, "Extrinsic Aids in the Interpretation of Statutes" (1940) 88 U. Pa. L. Rev. 527) eventually led the U.S. Supreme Court to broadly embrace legislative history and reject textualism in *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940).

[23] See S.F. Ross & D. Tranen, "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation" (1998) 87 Georgetown L.J. 195.

[24] [1993] A.C. 593, 1 All E.R. 42 (H.L.) [hereinafter cited to A.C.].

[25] *Ibid.* at 633-634, Browne-Wilkinson L.J.

[26] *Sullivan/Ottawa, supra* note 7 at 222.

The first concerns American judges' efforts to discern what Congress meant when it prohibited employment discrimination on account of "sex" in that landmark statute, in light of the fact that the provision was adopted by the House of Representatives in a classic display of strategic voting. The legislation, as it emerged from committee, prohibited discrimination only on the basis of race, colour, creed, or national origin. During debate in the House of Representatives, an amendment was offered to add "sex" to the list of prohibited criteria. The amendment was not offered by a cutting-edge feminist, but rather by a leading segregationist representative from Virginia, intent on making the entire bill unpalatable. Indeed, many northern liberal representatives opposed the amendment for that very reason, while other northern representatives were swayed by the passionate advocacy of several of the six women serving in the House at the time.[27] The amendment was adopted by a coalition of northerners and virtually all the white southern representatives, with no legislative debate or committee consideration of how a ban on sex-based discrimination should be implemented. In cases like this, intentionalism does not provide a very helpful guide for the judicial interpreter.

Another significant interpretive issue ill-suited to exclusive reliance on intentionalism, because of outmoded legislative assumptions, concerns the legality of affirmative action under the same *Civil Rights Act.* In 1964, many assumed that removing race as a relevant criterion in employment and other commercial contexts would indeed be sufficient to remedy past discrimination and achieve a full integration of previously oppressed groups into the economy. When legislative sponsors of the *Civil Rights Act* spoke of economically integrating African-Americans into the American economy and of creating a "color-blind" society, they did not appreciate that those two lofty purposes would, in the medium-term, come into conflict.[28] How, then, to determine whether voluntary ameliorative plans "discriminate on account of race" in violation of the statute?[29] If the "intent" of the legislature is how members would have answered a hypothetical question in the abstract, many would concede that legislators in 1964 would not have favoured affirmative action. But, if asked how a court should decide the issue fifteen years later, especially if litigants presented persuasive evidence that a legal prohibition on blatant racial discrimination proved insufficient to break down barriers to employment, the intentionalist inquiry becomes unclear. And if asked the "meta" question—whether courts should use post-enactment changes in society as a contextual factor in interpreting statutes—the "intent" of the legislature might actually support a broad, evolutive approach that could conceivably reach an interpretation actually counter to the original expectations in 1964.

Intentionalism also raises normative difficulties when it is employed to effectuate backroom deals for which elected legislators are unwilling to take the political

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[27] See *Cases on Legislation, supra* note 10 at 22-24.

[28] By 1982, when the *Charter of Rights and Freedoms* was enacted, the need for ameliorative action was apparent. See *Constitution Act, 1982*, s.15(2), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[29] See *United Steelworkers* v. *Weber*, 433 U.S. 193 (1979). See also *Dynamic Statutory Interpretation, supra* note 1 at 14-31, for Professor Eskridge's critique of intentionalism in the context of this statute.

"heat," or that reflect outmoded but unexpressed social attitudes. *Haida Nation* provides an example. The B.C. *Forests Act* permitted the Minister of Forests to grant tree farm licenses to Crown land, but only if the land was not "encumbered." The Haida Nation sought a judicial declaration that a particular license was invalid, because it was encumbered by an Aboriginal land title claim. The government persuaded the lower court that the phrase "encumbered" should be interpreted as limited to traditional forest tenures. Among other arguments, counsel for the Crown employed the intentionalist approach to claim that when the Act was passed in 1978, the government and majority of the B.C. Legislative Assembly were quite hostile to Native land claims and thus would not have intended to encompass such claims within the definition of a legal "encumbrance."[30] Although the majority rejected this argument on "plain meaning" grounds, there are significant normative problems with interpreting even an ambiguous textual provision to effectuate legislative hostility or indifference toward politically marginalised groups, two decades before the case was litigated. This would seem to be especially true in a parliamentary democracy where the government can, with relative ease, explicitly effectuate their social views by securing passage of new legislation.[31]

In her critique of intentionalism, Professor Sullivan suggests that courts frequently refuse to effectuate legislative intent where to do so "would produce unacceptable outcomes—outcomes that are unconstitutional, irrational, incoherent, unjust, or unfair."[32] She correctly and astutely notes that when judges exercise discretion to avoid outcomes they deem unacceptable under the guise of legislative intent, the resulting lack of transparency mutes judical responsibility, rendering it unlikely that this sort of judicial discretion will be critically examined. This process also "tends to empty the notion of 'legislative intent' of real significance."[33]

A more transparent approach that would alleviate some of Professor Sullivan's concerns would require judges to either ground their departures from specific legislative intent in legislative expectations themselves, or to abandon intentionalism as a foundationalist approach to interpretation. To the extent that a judge can conclude that the enacting legislature itself would have found a statute's literal application to a particular case to be unconstitutional, irrational, incoherent, unjust, or unfair, the judge is faithful to intentionalism. In many cases, however, judges have no way of answering this question.

C. Purposivism

This theory is based on the proposition that statutes are not enacted arbitrarily or to further nefarious ends, but rather because our elected representatives believe that legislative changes will improve the common welfare. Judges act as partners with the legislature in this public-spirited endeavour, and interpretive judgment should therefore further the purpose underlying the legislation. Although the approach is of ancient

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[30] *Supra* note 4 at 15. The lower court opinion is reported at (1995) 130 D.L.R. (4th) 661, 15 B.C.L.R. (3d) 154.

[31] This theory is discussed in Part II, below.

[32] *Sullivan/Ottawa, supra* note 7 at 224.

[33] *Ibid.* at 225.

lineage,[34] it was recast in the post-war United States as a means of adhering to the principle of legislative supremacy without the rigidity and other problems of intentionalism.[35] Rather than ascribing to the legislature a specific intent that determines the outcome of the litigation, the purposive approach assumes that the legislature may not have considered the precise question at issue and seeks to resolve ambiguities consistent with the broader public purposes that underlay the statute. Canadian purposivism has been influenced by American case law, developments in linguistic theory that stress the importance of purpose in determining meaning, and the civilian approach traditionally used to interpret Quebec's Codes.[36] This approach is alive and well in Canada. Indeed, it is the dominant mode of constitutional interpretation,[37] and a "staple of statutory interpretation" in the Supreme Court of Canada.[38]

The purposive approach has not been without academic and judicial critics. Its principal American academic proponents acknowledge that it is based on the assumption that a statute is "the work of reasonable [people] pursuing reasonable purposes reasonably."[39] Academic adherents to the "public choice" view of the legislative process suggest that legislators are not motivated to enact legislation by the desire to remedy defects in the current law for some reasonable public purpose, but rather seek to "sell" legislation to supporters in order to secure re-election. Legislation often benefits small numbers of citizens while burdening a great many, and public choice theory posits that small special interest groups will be able to organize and lobby more successfully. As a result, legislation does not reflect stirring public purposes, but instead resembles commercial contracts.[40] Advocates of this viewpoint suggest that judges should not effectuate what they incorrectly perceive as a public purpose, but rather adopt an intentionalist approach and simply give effect to the bargains struck in the legislative

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[34] In *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637 at 638, the court wrote:

> for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

[35] "Practical Reasoning," *supra* note 2 at 332-333.

[36] Côté, *supra* note 20 at 318.

[37] *R.* v. *Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321.

[38] *Sullivan/Driedger*, *supra* note 5 at 38-39 (citing *Clarke v. Clarke*, [1990] 2 S.C.R. 795 at 807, 73 D.L.R. (4th) 1.

[39] H.M. Hart, Jr. & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Tent. ed. (Cambridge, MA: 1958) at 1157.

[40] See e.g., D.A. Farber & P.P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991).

process.[41]

Two United States Supreme Court decisions involving employment discrimination and the *Civil Rights Act* illustrate the differences between the purposive and public choice approaches. In *Weber v. United Steelworkers*,[42] the Court held that ameliorative action did not constitute illegal discrimination on account of race. Justice William Brennan's majority opinion was based in large measure on the view that the statutory purpose was to economically benefit racial minorities. To find ameliorative action illegal would "bring about an end completely at variance with the purpose of the statute."[43] The principal dissent used the same approach, arguing that the purpose of the statute was to remove race entirely from any employment criteria.[44]

In contrast, the Court in *Firefighters Local Union No. 1784* v. *Stotts*[45] held that the statute did not permit race-conscious deviation from a seniority system for determining layoffs. Rejecting the parties' efforts to re-litigate the purposive dispute in *Weber*, Justice Byron White observed that the Act contained a specific statutory provision protecting *bona fide* seniority systems from legal challenge: the provision had been inserted at the behest of labour unions, whose political support for the entire legislation was critical to its passage. Courts, *Stotts* concluded, should give effect to this legislative bargain.[46]

Regardless of whether the insights of public choice theory are persuasive or applicable to the Canadian legislative context, it is clear that many statutory provisions do not reflect the legislature's laser-like focus on a single social problem, but rather reflect a compromise between competing public purposes. Consider bankruptcy law. In reality, bankruptcy law reflects an attempt at a fair balance between the needs and legitimate interests of debtors, creditors, and other interests affected by the proceeding. Although one could attempt to craft a single overriding public purpose at a very broad level of generality to explain the various policy choices made in such legislation, such an abstraction would be of little aid to a statutory interpreter.

Even where statutes do not reflect a balancing of conflicting interests, Professor Sullivan has correctly observed that the legislature "almost never wishes to pursue its goals at all costs or by any means, regardless of other considerations."[47] Sullivan also correctly observes that the characterization of legislative purpose can be indeterminate.[48] *Weber* is the most famous American example—in prohibiting employment discrimination "on account of race," was Congress' purpose to economically integrate

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[41] See e.g. W.M. Landes & R.A. Posner, "The Independent Judiciary in an Interest-Group Perspective," (1975) 18 J. L. & Econ. 875.

[42] *Supra* note 29.

[43] *Ibid.* at 202 (quoting from *United States* v. *Public Utilities Comm'n*, 345 U.S. 295 at 315).

[44] *Ibid.* at 252-53 (Rehnquist J., dissenting).

[45] 467 U.S. 561 (1984).

[46] For an analysis of *Stotts* along these lines, see F.H. Easterbrook, "Foreword: The Court and the Economic System," (1984) 98 Harv. L. Rev. 4 at 55-56.

[47] *Sullivan/Driedger, supra* note 5 at 62.

[48] *Ibid.* at 60-62.

African Americans into the American economy?[49] To eliminate race as a lawful criterion to achieve a colour-blind society?[50] Or was Congress' purpose based on ideas or concepts that had quickly proved outmoded?[51]

Although in some cases a purposive analysis proves helpful, in many cases its value may be based on unrealistic assumptions about the legislative process, or evidence of broad legislative purposes that can be used to support either party's version of the statute. As such, it will often fail to provide the single coherent formula that resolves many difficult interpretive issues.

D. Using "practical reason" in lieu of foundationalist theories

Courts and practising lawyers tend to prefer a more pragmatic approach. This suggests a recognition of the inadequacies of a single foundational approach to interpretation. In some cases the textual language is unmistakably clear while the evidence proferred by counsel seeking another meaning is of doubtful reliability. In other cases one construction might be slightly preferred but reference to legislative materials makes it clear that another meaning was unmistakably intended. Some interpretations would clearly frustrate the statute's purposes; in other cases there is no overarching purpose for an interpretation to frustrate. Judges seeking a sensible result are not so ideologically wedded to one form of jurisprudence as to forego other techniques.[52]

While adherents to foundational approaches reject interpretations and interpretive techniques that are inconsistent with theory, Professors William Eskridge and Philip Frickey suggest that judges and practitioners consider a variety of factors, including those used by intentionalists, purposivists, and textualists. Pragmatists find in easier cases that almost all the factors point in the same direction, and resolve the more difficult cases based on the relative strength or reliability of the various factors they have considered.[53] Their analysis places the variety of factors that are pragmatically considered into three categories. First are considerations that relate to the statutory text—factors given primacy by textualists. Included here is whether the text seems to have a plain meaning, whether the interpretations set forth by opposing counsel can fit within the statutory language, a variety of linguistic canons that shed light on the meaning of the text, as well as the broader statutory context in which the text is used. Second are considerations that relate to the original understanding of the text. This category includes materials employed by intentionalists and purposivists, including

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[49] This was Justice Brennan's opinion for five justices in *Weber, supra* note 29 at 197 (although Blackmun J. concurred separately, see note 51 *infra*).

[50] This was the view of Justice Rehnquist, as he then was, for himself and Burger C.J. in *ibid.* at 419.

[51] This was the view of Justice Blackmun in *ibid.* at 209.

[52] See e.g., *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 at 610 n.4 (1991) (arguing that "common sense suggests that inquiry benefits from reviewing additional information" from the legislative history "rather than ignoring it", and quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358 at 386 (1805) Marshall C.J.: "[w]here the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived").

[53] See "Practical Reasoning," *supra* note 2 at 352-354.

evidence about whether the legislature actually considered the specific issue *sub judice*; whether the political history of the legislation makes clear how the legislature would have considered the issue, even if there is no evidence that it was consciously considered (this technique is often called "imaginative reconstruction")[54]; as well as consideration of the interpretation that best furthers the general legislative purpose that led to the statute's adoption.

Finally, and perhaps most controversially, courts do take account of "evolutive considerations"—how the statute has evolved over time.[55] This can be "intentionalist" where there is evidence that the legislature intended the courts to re-interpret statutory enactments in light of modern circumstances.[56] Even absent such evidence, courts will construe broad phrases to effectuate legislative purposes where circumstances change so that original expectations and purposes are no longer congruent.

Braschi v. Stahl Associates[57] illustrates this "dynamic" and pragmatic approach, where the court used a variety of interpretive tools, re-examined preliminary conclusions based on further inquiry, and applied the legislative purpose in a contemporary context. Pursuant to New York City's rent control ordinance, the respondent sought to evict Braschi from a rent-controlled apartment in mid-town Manhattan. The tenant of record was Braschi's long-standing domestic partner. Braschi argued that he was exempt from eviction because of a regulation that prevented any eviction of "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant." The intermediate appellate court held that this provision protected only "family members within traditional, legally recognized familial relationships."[58] The Court of Appeal reversed, holding that including Braschi within the protection of the statute best effectuated the legislative purpose.

The Court acknowledged two conflicting purposes: a desire to protect tenants was "juxtaposed against" an overall objective of a gradual transition from a controlled to market economy through free market rents on vacant apartments, so that "mere roommates" should not be entitled to protection. The Court concluded that the "intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of

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[54] See e.g., *Fishgold* v. *Sullivan Drydock & Repair Corporation.*, 154 F.2d 785 (2d Cir. 1946) Hand, J. (ambiguity in statute granting employment seniority rights to returning soldiers construed narrowly, noting statute enacted in 1940 when Congress contemplated a one-year draft and did not envision the harrowing service that soldiers would be called upon to perform in World War II). The term was popularized by Judge Richard Posner in his book *Federal Courts: Crisis and Reform* (Cambridge, MA: Harvard University Press, 1985).

[55] "Practical Reasoning," *supra* note 2 at 358-362.

[56] See e.g. *Li* v. *Yellow Cab Company of California*, 119 Cal. Rptr. 858 at 866, 532 P.2d 1226 at 1234 (1975) (changing California tort law from rule of contributory negligence to one of comparative negligence, based in part on Civ. C. §4 (1872), directing courts to interpret code "liberally" and "with a view to effect its objects and to promote justice"). See also *Interpretation Act*, R.S.C. 1985, c.I-21, s.10 (law "shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning").

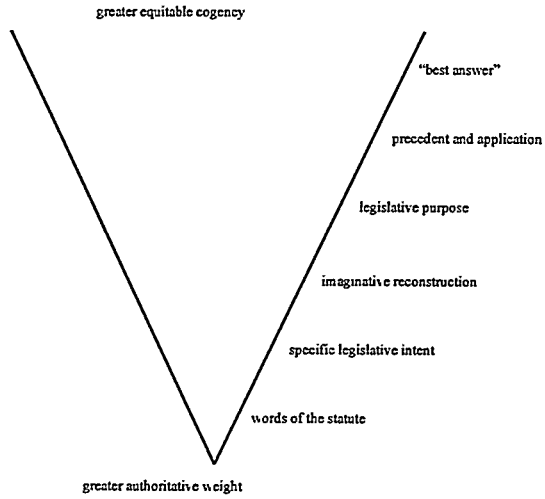
[57] 74 N.Y.2d 201, 543 N.E.2d 49 (1989) [cited to N.E.2d].

[58] *Ibid.* at 53 (quoting 143 A.D.2d 44 at 45, 531 N.Y.S.2d 562).

family life."[59] The Court bolstered its view with dictionary definitions of family broad enough to encompass Braschi and his partner, and its view—clearly reflecting modern sensibilities—that the tenant of record was more like a member of Braschi's family than a "mere roommate."[60]

Ultimately, the basis of the court's decision is not transparent. Although observers might be tempted to conclude that the majority had simply rendered a victory for gay rights because this ideology was closest to that of the judges, a fair-minded jurist attempting to balance the legislature's competing purposes of tenant protection and a humane, gradual conversion to free markets might well conclude that protecting Miguel Braschi fully effectuated the former, and allowing long-standing domestic partners to receive the benefits of the "family" exception would not unduly impair the rental housing market, even in New York.

Braschi exemplifies the pragmatic process modeled by the "Funnel of Abstraction" developed by Professors Eskridge and Frickey:[61]



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[59] *Ibid.*

[60] *Ibid.* at 53-54 & n.4. The concurring judge rejected the majority's broad holding in favour of an interpretation emphasizing the harsh effect of eviction and the broad construction that should therefore be given to the word "family" in this particular statute.

In light of the pragmatic reference to both text and context, *Braschi* can be contrasted with *A.G. Ontario and Viking Homes* v. *Regional Municipality of Peel*, [1979] 2 S.C.R. 1134 at 1139, 104 D.L.R. (3d) 1 at 5, where Laskin C.J. refused to interpret a 1908 statute authorizing the placement of a juvenile in a "suitable family home" as permitting the placement of a child in a commercially operated group home (a concept that did not exist in 1908). The opinion makes clear that a liberal interpretation to effectuate a statute's policies does not permit courts to interpret the text beyond "what the language in which [the text] is couched may bear on the widest reading."

[61] The version of the funnel in the text is taken from W. N. Eskridge, Jr., & P.P. Frickey, *Teacher's Manual for Cases and Materials on Legislation and the Creation of Public Policy*, 2d ed. (St. Paul: West, 1995).

The court began with the words of the statute, and found the word "family" to have no plain meaning. Nor was there any evidence about any specific legislative intent concerning the treatment of domestic partners. Although an imaginative reconstruction of thirty year-old legislative expectations would probably have revealed an antipathy toward gay couples, the court emphasized the legislative purpose of balancing fairness to families with economic policies in favour of gradually deregulating rental markets. Having located its most confident ground regarding legislative purpose, the court then returned to the words of the statute to find dictionary definitions broad enough to encompass domestic partners as a family.

Note that the "best answer" approach can be more complex than a knee-jerk realist might suppose. A judge might favour or oppose Braschi's claim because of sympathy or hostility to gay rights; they might favour or oppose his claim because of a sympathy or hostility toward rent control; a judge like L'Heureux-Dubé might see the case as a good one to advance the cause of dynamic interpretation; a judge like Esson might see the case as a good one to limit the interpretation to his own "ordinary meaning" of family. Given that the "best answer" is multi-layered, a single judge might find these and other factors pointing in opposite directions. For example, a libertarian judge might favour gay rights and deregulated housing markets.

Thus, the pragmatic application of the Funnel suggests that the variety of relevant factors will affect different cases depending on their relative strength in each case's specific context.[62] This approach differs from the foundationalist approaches discussed above in two fundamental ways. First, pragmatic interpreters do not exclude evidence based on theory. Second, pragmatists do not moor themselves to effectuating the original expectations of the legislature.

Although generally sympathetic with and inclined to embrace pragmatism, Justice L'Heureux-Dubé cautions that it may not provide sufficient constraints for judicial discretion. She is particularly troubled by her perception that this form of interpretation would allow judges to "manufactur[e] interpretations that are diametrically opposed to the clear purpose of a statute."[63] Her concerns might also be applicable to Professor Sullivan's version of pragmatism, which requires the judge to adopt an "appropriate" interpretation that balances compliance with the text, the promotion of

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[62] To this extent, I would quibble with Professor Sullivan's suggestion that the identity of considerations to be taken into account depends on the court's theory of interpretation. See *Sullivan/Ottawa, supra* note 7 at 181. As a descriptive matter, Sullivan finds that Canadian judges embrace the pragmatic approach modelled by Eskridge & Frickey. See *Sullivan/Driedger, supra* note 5 at 132:

> Canadian judges are pragmatic rather than dogmatic in their approach to interpretation. Where different indicators of meaning point in different directions, they respond to whatever seems compelling in the circumstances, given the language to be interpreted, the problem to be solved, the type of legislation in question, what is suggested by the various contexts examined, the importance of the rules or presumptions judged to be relevant, the persuasiveness of other opinions and so on.

[63] *Régie d'alcool, supra* note 3 at 1010. See also Côté, *supra* note 20 at 384 ("interpretation in light of....consequences" brings "serious risks" of abuse, and "its scope should therefore be circumscribed.").

legislative purpose, and the achievement of an outcome that is "reasonable and just."[64]

Although these concerns are not without merit, they significantly short-change each of these pragmatic approaches. Eskridge emphasizes that interpretation requires a "fusion" of original expectations and current understanding, not simply a result that is "just and reasonable" under modern standards.[65] The Funnel of Abstraction emphasizes that both imaginative reconstruction and legislative purpose have greater authoritative weight than the "best answer" a judge might develop. As I understand Eskridge, fair-minded judges will deviate from the "clear purpose of the statute" only where: (1) doing so is plausibly supported by text; (2) the original expectations in the statute clearly reflect changed circumstances; and, (3) there is some basis for assuming, either at a general level or in the specifics of the case, that the legislature's overall goals can best be effectuated by a dynamic approach. Thus, the Eskridge approach would not allow, for example, a bare majority of the Supreme Court of Canada to re-interpret the *Canada Health Act* to permit a province to shred the principle of universal health care simply because the five justices strongly believed that the Canadian health care system was a policy disaster and that, therefore, the result was "the appropriate outcome."[66]

Similarly, when Sullivan talks about justifications for departing from text or intent, she makes it clear that judges should look to "the rest of the statute book, the common law and the evolving legal tradition which draws on current social and political values as well as those of the past,"[67] not each judge's personal view of the just outcome of the case at hand. Indeed, she suggests that those judges who insist that any interpretive outcome be derived from a single source will not be able to single out and assess those cases where text or intent genuinely do constrain the judge because of their clarity and force in the particular case,[68] thus facilitating the ability of judges to allow their personal biases to opaquely creep into their reasons for judgment.

Judges continue to avoid adherence to a single, foundational theory of statutory interpretation and instead rely on a combination of factors: the words of the statute; evidence of the legislature's intent; and, the broad purposes that underlay the legislation—both originally and as applied in the context of current social problems—to

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[64] *Sullivan/Driedger, supra* note 5 at 131.

[65] *Dynamic Statutory Interpretation, supra* note 1 at 60 (citing H.-G. Gadamer, *Truth and Method*, 2d ed. trans. J. Weinsheimer & D.G. Marshall (New York: Crossroad, 1989) at 306).

See also W.N. Eskridge, Jr., "Spinning Legislative Supremacy" (1989) 78 Geo. L.J. 319 at 327-329 & n.26, where Eskridge employs an interesting analogy to illustrate how dynamic interpretation is constraining and consistent with legislative supremacy in establishing policy through statute. One analogy, drawn from F. Lieber, *Legal and Political Hermeneutics,* 2d ed. (St. Louis: F.H. Thomas & Co., 1880) at 17-20, is of a principal who instructs a servant to purchase five pounds of "soupmeat" each Monday. Eskridge argues that facing changed circumstances not contemplated when the instructions were issued (*e.g.* "soupmeat leftover from previous weeks", or the soupmeat at the store appeared to be spoiled), inconsistent directives from the principal (*e.g.* instructions to prepare only low-cholestorol meals), or new overriding directives (*e.g.* spend less on food), a faithful agent would and should construe the soupmeat instruction dynamically and not purchase the five pounds as instructed. However, if the servant simply became tired of soup, it would not be permissible to alter the principal's instructions.

[66] Compare *Sullivan/Ottawa, supra* note 7 at 185-186.

[67] *Ibid.* at 226.

[68] *Ibid.*

resolve difficult questions of statutory interpretation. But overlooked in American efforts to model the process of statutory interpretation, such as the "Funnel of Abstraction", and under-emphasized in the Canadian literature, is the role of "normative canons"—judicially-created default rules that often determine the results of difficult cases. Why they are important, why they might be justified, and how their use might be evaluated, are the subjects to which I turn next.

III. THE USE OF NORMATIVE CANONS IN STATUTORY INTERPRETATION[69]

Try as they might, lawyers and judges do not and cannot derive reliable answers to a significant minority of difficult questions of statutory interpretation from the traditional techniques discussed above. Textual language is often ambiguous. Canons which seek to accurately describe the probable intention of drafters are not always reliable.[70] The legislative history often does not reveal how the legislature would

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[69] This part summarizes an ongoing research project concerning normative canons in general, and the *BFP* v. *Resolution Trust* case in particular, *infra* note 81, currently undertaken in collaboration with Professor Robert Lawless. See also R.M. Lawless, "Legisprudence Through a Bankrutpcy Lens: A Study in the Supreme Court's Bankruptcy Cases" (1996) 47:1 Syracuse L. Rev. 1 at 70-77.

[70] The hoary canon *expressio unius est exclusio alterius* does not necessarily reflect the realities of drafting lengthy and complicated legislation where there is little time for careful editing: see *Sullivan/Driedger, supra* note 5 at 167. (In theory, the greater ministerial control of Canadian legislation should limit this problem to a greater degree than in the United States). Similarly, the descriptive accuracy of what Sullivan calls the presumption against tautology (*ibid.* at 160, presuming that "words add something which would not be there if the words were left out," see *Hill* v. *William Hill (Park Lane) Ltd.*, [1949] A.C. 530 at 547, 2 All E.R. 452 (H.L.)), may give way in the pressures of modern legislative drafting. In my own legislative experience as a staff counsel in the United States Senate, it was commonplace for a Senator, aide, or a lobbyist to suggest a phrase or text intended to achieve a goal with greater certainty. Although I was quite confident that the existing text adequately achieved the desired result, it was much easier to incorporate the redundant phrase than to offend the offeror of the additional language. Professor Sullivan has suggested to me that the control exercised by ministers and their professional drafters in Canada makes this scenario less likely north of the border, although she concedes that this tight control has loosened in recent years.

Even linguistic canons that appear to be generally reliable may not be so in particular cases, often due to oversight in drafting complex legislation. For example, in *Montana Wilderness Ass'n* v. *United States Forest Serv.*, 655 F.2d 951 (9th Cir. 1981), the court considered whether § 1323(a) of the *Alaska Lands Act of 1980* created a nationwide right of access to national forest land for owners of private land within the National Forest System. The plaintiffs argued that the provision applied only to land in Alaska, relying on the stipulation that §1323(b) of the Act created a right of access to national park land for owners of private land but only for national parks within the state of Alaska. The court rejected this argument, relying on subsequent legislative history demonstrating that Congress clearly intended this purpose (Congress deleted a provision in a statute dealing with forest land in Colorado because of the nationwide access provision): *Ibid.* at 957. Additional legislative history, apparently not known at the time of the litigation confirms the accuracy of the court's assessment of the legislative intent: see *Cases on Legislation, supra* note 10 at 520 n.a. Although this case has attracted some scholarly attention in the United States, no one has ever provided an explanation for why two seemingly identical sections would have been intended to create different effects.

have resolved the matter at hand. Legislation is usually not directed at a single overriding purpose. Even if judges were inclined to resolve hard cases by imposing their own view of the best public policy solution, judges do not in fact have strong policy preferences concerning many of the cases that come before them, and in other cases, multiple policy preferences can point to opposite results. Although these difficult cases may be exceptional, it is in these difficult cases that lawyers and judges deploy their elaborate training. In other words, although these difficult cases are a minority, they are a minority that matters.

Judges — sometimes without saying so -- often resolve difficult cases using "normative canons" of interpretation.[71] Normative canons are principles that allow courts to construe statutory ambiguities in order to further some policy objective, usually one that is judicially-created.[72] These "normative canons" must be analytically distinguished from interpretive rules with which they are often confused—"descriptive canons" are grounded in generalizations about what the legislature actually intended, and what the drafters actually meant. (A good example of a descriptive canon is *noscitur a sociis* —interpreting words in light of similar words in the surrounding text.)[73] Unlike descriptive canons, normative canons are created by judges to further some substantive or procedural outcome.

In some cases, almost everyone recognizes the normative basis of the canon. For example, the doctrine that statutes in derogation of the common law are to be strictly construed is not based on any realistic assessment that Parliament and the provincial legislatures have such a high regard for judge-made law that they would not possibly want to disturb it except to remedy the narrowest of defects. Indeed, a recent and thoughtful commentary on British law, by David Robertson, expressly argued against the use of contextual evidence such as legislative history because of the potential that

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[71] Professor Sullivan criticizes Chief Justice Antonio Lamer's "literalism" in criminal cases: *Sullivan/Ottawa, supra* note 7 at 196-197. Lamer's approach is opaque, however. For example, in *R.* v. *McIntosh, supra* note 8 at 699-703, he engages in the rhetoric of textualism while applying the normative rule of lenity in criminal cases.

This is not a uniquely Canadian problem. In 1958, Professors Hart and Sacks complained that American judges needed to ground statutory interpretation decisions on defensible "policies of clear statement" (what I would call normative canons) rather than unthinking interpretive rules. Referring to normative canons, they rhetorically asked: "Can the body of statutory law ever attain any semblance of rationality and consistency unless the courts continue unremittingly the effort to discern and articulate principles such as these?": Hart & Sacks, *supra* note 39 at 1241.

[72] See S.F. Ross, "Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?" (1992) 45 V.and L. Rev. 561 at 563. For an excellent empirical study of U.S. Supreme Court decisions emphasizing the importance of normative canons, see J.S. Schacter, "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond," (1998) 51 Stanford L. Rev. 1.

[73] See *e.g. R.* v. *Goulis* (1981), 125 D.L.R. (3d) 137, 32 O.R. (2d) 55 (Ont. C.A.) [hereinafter *Goulis* cited to O.R.](discussed in *Sullivan/Driedger, supra* note 5 at 200-201). In *Goulis*, the court held that a debtor did not illegally "conceal" property by failing to disclose its existence to the trustee in bankruptcy, because the *Criminal Code* provided that it was illegal if one "removes, conceals, or disposes" of the property. Read in that context, the court held that Parliament intended "a positive act of concealment.": *Ibid.* at 61.

legislative sponsors could, with an off-hand comment, trump venerable normative canons designed to protect civil liberties or other virtues in a legal system that lacks a written constitution to protect these values.[74]

The sharpest example of a normative canon is one designed to protect a politically marginalised group or individual. The rule of lenity for penal statutes and the canon that resolves all ambiguities in First Nations' treaties in favour of Aboriginals are two examples. No one seriously suggests that criminal defendants and Aboriginal peoples are so popular or politically powerful that, as a descriptive matter, courts can confidently assume that legislatures would only legislate against their interests in the clearest of terms.

The distinction between what I call descriptive and normative canons is often confused. For example, although Driedger clearly distinguishes legislative intent that is expressed in the words of the statute or may be legitimately implied from the enacted words from the "presumed intention -- the intention that the courts will in the absence of an indication to the contrary impute to Parliament," he groups all these concepts under the heading "intention of Parliament."[75] Although the leading commentators generally make the distinction clear,[76] Professor Sullivan notes that courts will label a normative canon as a "presumption of intent" and thus falsely suggest that they are giving effect to legislative policy instead of taking responsibility for the validity of canons of judicial, not legislative, origin.[77]

To be sure, in some cases the distinction between normative and descriptive canons gets murky. Consider the presumption that the legislature intends to comply with constitutional norms. As Cartwright J. wrote in *McKay* v. *The Queen*, when one interpretation would render a statute *ultra vires* and another would allow the court to find the legislation *intra vires*, the notion that the drafters intended an interpretation that would result in valid legislation seems descriptively sound.[78] As a matter of positive political science though, the case that legislatures intend to incorporate judicially-interpreted *Charter* values, "federalism, the preservation of cultural heritage, comity among provinces," etc., is much harder to make.[79]

This is not to suggest that normative canons are normatively wrong. Indeed, there is a strong normative case for such canons in a constitutional democracy.[80] They provide a critical intermediate safety-valve that allows the courts to protect politically marginalised groups and individuals, or other values inherent in the *Charter*, without

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[74] D. Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press, 1998) at 181.

[75] Driedger, *supra* note 5 at 105-106.

[76] See *Sullivan/Driedger, supra* note 5 (devoting chapters 7 and 9 to descriptive canons and chapters 14-16 to normative interpretive rules); Côté, *supra* note 20 (normative canons discussed in separate chapter 5).

[77] *Sullivan/Ottawa, supra* note 7, at 225.

[78] [1965] S.C.R. 798 at 803-804, 53 D.L.R. (2d) 532.

[79] *Sullivan/Driedger, supra* note 5 at 322-323.

[80] Two leading American scholars of statutory interpretation have previously defended this use of normative canons: see C.R. Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 Harv. L. Rev. 405 at 472-473; W.N. Eskridge, Jr., "Public Values in Statutory Interpretation" (1989) 137 U. Pa. L. Rev. 1007 at 1032-1034.

having to resort to the brute force of constitutional invalidation. By creating clear normative canons, courts actually enhance the democratic process by requiring the government to draft legislation harmful to these values in the clearest possible terms, and accept whatever political costs are involved in the transparent adoption of public policy. Indeed, part of the legitimacy of normative canons lies in the ability of the legislature, through amendment of the *Interpretation Act* or its provincial equivalent, to short-cut this process entirely. Moreover, although I note below how normative canons can be employed for broad ideological ends, the creation of normative canons lessens *ad hoc* judicial discretion—where the interpretive result is determined by the judge's predilections about the "just" result in the particular case.

One American and one Canadian case illustrate the potential uses and abuses of normative canons. *BFP* v. *Resolution Trust Co.*[81] demonstrates how normative canons can be outcome-determinative and can play a more decisive role than a judge's view of the "best answer" (in the Eskridge & Frickey model). The case also shows the need for a transparent normative defense of normative canons, and the particular risks that can arise when normative canons are used in an opaque manner combined with textualism. An analysis of *Haida Nation* v. *B.C. (Minister of Forests)*[82] reveals the difficulties with a textualist approach to plain meaning, suggests both descriptive and normative problems with an intentionalist approach, and offers a normative alternative as a more satisfactory basis for deciding the case.

BFP v. *Resolution Trust Co.* involved a federal court bankruptcy proceeding where the debtor had lost a piece of real estate in a state court foreclosure proceeding. In the foreclosure, a third party had purchased the property for $433,000. The federal Bankruptcy Code, like many state statutes governing creditors' rights, allows a debtor to set aside a "fraudulent transfer," defined in this instance as a prebankruptcy transfer by a debtor at (or near) insolvency that occurs for less than a "reasonably equivalent value."[83] Claiming the property actually was worth $725,000, the debtor sued to set aside the foreclosure sale as a pre-bankruptcy transfer for less than a "reasonably equivalent value," so that the property could be returned to the debtor's estate. BFP, the third-party purchaser, defended on the grounds that any price obtained at a foreclosure sale was, by definition, "reasonably equivalent value." A narrow majority of the United States Supreme Court agreed.

The majority and dissenting Justices seemed to agree that the textual phrase "reasonably equivalent value" did not have a plain meaning. The author for the majority, textualist Justice Scalia, refused to review the legislative history to identify any specific legislative intent on this issue. The dissenters suggested that the text, while vague, was not consistent with the broad interpretation given by the majority. They also could point to evidence suggesting that Congress rejected an interpretation that would have immunized valid foreclosure sales from bankruptcy court review of "reasonable equivalence" in value: a provision which would have explicitly accomplished this result was included in the version of the legislation reported by the Senate Judiciary Committee, but was dropped without explanation during consideration on the Senate

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[81] 511 U.S. 531 (1994) (5-4 decision).

[82] *Supra* note 4.

[83] 11 U.S.C. § 548(a)(2) (1988).

floor. However, there was no evidence as to how Congress thought courts should interpret the section. Purposive analysis also seemed unavailing, as the issue in the case involved the proper balance to be struck between fairness to all creditors and maintaining the security of title in real estate, and both sides could certainly marshal evidence to support Congress' desire to promote both goals.

Unlike the critical/realist stereotype of result-oriented judging, neither the majority nor the dissent appear to have decided this case based on their personal views of sound bankruptcy policy.[84] Rather, the majority decided the case based on the normative canon that state law proceedings should not be upset absent a clear statement by Congress.[85] The dissent, in contrast, argued that a "pro-state" normative canon was inappropriate since: (1) the very purpose of the constitutionally-delegated congressional power to enact bankruptcy legislation is to supersede state debtor-creditor law; and, (2) on balance, the best arguments as to legislative intent pointed in favour of a case-by-case review to determine whether a specific property transfer via foreclosure was really for a "reasonably equivalent value."[86]

The decision illustrates several problems with the use of normative canons, and, in particular, the "federalism" canon invoked by the majority to require that ambiguities be resolved in favour of state law principles. A grounding of normative canons in values enshrined in constitutional law would certainly have normative appeal, but at the time the United States Supreme Court on the role of the states as a matter of constitutional law adopted the view (over the dissent of the now-ascendant conservatives) that the American national political process *itself* reflected adequate protection for state prerogatives.[87] As a matter of American constitutional law, the Court concluded that states exercise sufficient political power within Congress so that state law prerogatives will be fully considered by Congress in enacting bankruptcy legislation. Such a finding might support a *weak* default canon, as a descriptive matter, in favour of preserving state laws (*i.e.,* absent evidence to the contrary, judges will assume that Congress intended state prerogatives to be protected). But there is no basis other than the personal views of the majority of the Justices to impose a stronger normative canon, especially in the context of the constitutional delegation, to Congress, of the power to enact bankruptcy rules.

There is significant merit to the employment of normative canons after a consideration of the text, legislative intent, and purpose yields no confident conclusion.

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[84] This claim hopefully has intuitive appeal to many readers, who will accept without rigorous survey research the assertion that most judges simply do not have strongly held policy views about bankruptcy, nor are they interested in the amount of work it would require to develop such views.

[85] *Supra* note 81 at 543-545.

[86] *Ibid.* at 550 n.1 and 569, Souter J. (dissenting opinion).

[87] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at 551, n.11 and 554 (1985) (citing J.H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980)). But see *United States* v. *Lopez*, 514 U.S. 549 (1995). Much of the Canadian jurisprudence on federalism, in contrast, is based on the assumption that provincial interests will not be adequately represented in Ottawa, thus necessitating and justifying a more active judicial role in federalism questions. See *e.g.* P.C. Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at 174.

However, to invoke them whenever a skilled judge finds an ambiguity in the words of a statute is troubling. Canons are rebuttable presumptions, but they are more likely to be employed where the extrinsic evidence that could be used to rebut the presumptions will be excluded.[88] As a result, a textualist approach results in judge-created normative canons prevailing over legislative policy decisions. This is particularly problematic in light of the textualist claim that their project is fundamentally intended to reduce judicial policy discretion.[89]

BFP illustrates both the theoretical and practical importance of normative canons. Resolving all ambiguities in bankruptcy law (and, by *implication*, all federal statutes) in favour of what, in Canada, would be the provincial authority over Property and Civil Rights, raises a variety of interesting and controversial issues relating to federalism. As a practical matter, such a canon provides counsel whose interpretation is more closely aligned with state law with a powerful litigating advantage. In the actual case, the third-party purchaser, who would have had considerable difficulty persuading any of the Justices to have strong feelings about the case, was able to focus the five most conservative Justices' attention on something that was near and dear to their hearts—limiting the federal government at the expense of the states.

BFP illustrates how courts actually use normative canons to determine the outcome of difficult interpretive cases. *Haida Nation* illustrates how a fuller and more satisfactory statement of reasons would have emerged from the use of normative canons as part of a pragmatic approach. Although the Court of Appeal rejected the lower court's contextual approach and interpreted the statute in light of the law's perceived plain meaning, in fact there are serious reasons to question how plain the language was. On the other hand, there were solid reasons to reject the evidence of intent and purpose put forth by the defendant. In this context, relying on an express normative canon in favour of Aboriginals may make more sense than an unsophisticated or *sub rosa* invocation of plain meaning to reach the same result.[90]

The Haida sought judicial review of a tree farm license granted to MacMillan Bloedel by the B.C. government, on the ground that section 28 of the *Forest Act* limited such licenses to "an area of Crown land, the timber on which is not otherwise encumbered, determined by the minister."[91] The Haida claimed Aboriginal title to the land on which the timber grew, and thus, argued that the timber in question was indeed "otherwise encumbered" and thus, not subject to a ministerial license. However, the government successfully persuaded the chambers judge that when the British Columbia Legislative Assembly used the word "encumbered" in s. 28, it did not intend to include Aboriginal land claims.

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[88] "Unknown Ideal," *supra* note 19 at 1543-1548.

[89] See *e.g. A Matter of Interpretation, supra* note 15 at 25.

[90] The real-world use of techniques of statutory interpretation to affect the way that a judge looks at the case was also apparent in *Haida Nation, supra* note 4. Whatever the defects in the textualist approach to interpretation, it tends to be favoured by more traditional or conservative jurists. This conservative appeal was used to good effect by counsel for the Haida, who successfully invoked the "plain meaning" of the statutory text to ban a potentially significant amount of new forest activity on property subject to an aboriginal land claim, a goal that might not be expected to find sympathy with many traditional or conservative jurists.

[91] *Forest Act*, R.S.B.C. 1979, c. 140, s. 28(1)(*b*)(i) (now R.S.B.C. 1996, c. 157).

The B.C. Court of Appeal reversed the trial court judgment. Justice Esson saw "no reason to doubt that, as a matter of plain or grammatical meaning, the Aboriginal title claimed by the Haida Nation, if it exists, constitutes an encumbrance on the Crown's title to the timber."[92] This, in his view, was the beginning and end of the matter.

The lower court had agreed with arguments, made by counsel for the Crown and MacMillan Bloedel, that s. 28 should be construed to apply to other forms of forest tenures (such as pre-existing limited or unlimited timber and pulp licenses) and not Aboriginal rights, for several reasons. First, counsel argued that the purpose of the *Forest Act* was to provide for forest management and timber harvesting, not to advance Aboriginal land claims. The Haida position, if accepted, would completely alter the entire system of forest tenures contemplated by the *Forest Act*. Second, counsel noted (using the accepted and generally accurate descriptive canon *in pari materia*) that tree licenses required for foresting on private land are not subject to the qualification that the timber thereon not be "otherwise encumbered," arguing that if the legislature had intended for the Ministry of Forests to withhold tree licenses for timber on Crown land subject to Aboriginal claims, surely it would have provided the same limit on private land subject to similar claims.[93]

As is the nature of the textualist project, Esson J.A. did not need to respond to the arguments that the B.C. Supreme Court had found persuasive. Indeed, the Court of Appeal reached its judgment[94] despite Justice Esson's acknowledgment that it was "likely that those who drafted and those who voted for [the statute], had they considered at all the question of whether timber could be 'otherwise encumbered' by Aboriginal title, would have said no" because of the position that the Attorney General of the province had been taking in contemporaneous Native land claims litigation.[95]

In her recent article, Professor Sullivan provides a number of strong arguments as to why interpretation cannot take place without an inquiry into the context in which the text was drafted.[96] Although the majority expressly rejected Sullivan's approach in *Haida*, the reasons for judgment are necessarily incomplete and, as Huddart J.A. noted, are likely to result in an interpretation "derived from judicial intuition with hidden assumptions."[97] Justice Esson's opinion that the term "encumbered" *plainly* includes Aboriginal land claims fails to account for: (1) the lower court's conclusion that a broad interpretation of the word "encumbered" to include Aboriginal land claims was contrary

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[92] *Supra* note 4 at 5.

[93] See *Haida Nation, supra* note 4 at 661, 668-69.

[94] Southin J.A. agreed with Justice Esson's plain meaning argument: *Ibid.* at 18. Huddart J.A. concurred in the result, but stated that she was "not....of the plain meaning school" and, stating a preference for Professor Sullivan's approach, nevertheless (without further elaboration) concluded that the meaning of encumbrance was so clear that intentional or contextual arguments to the contrary could not be accepted: *Ibid.* at 19.

[95] *Ibid.* at 16.

[96] *Sullivan/Ottawa supra* note 7.

[97] *Haida Nation, supra* note 4 at 19. See also *Regie d'alcool, supra* note 3 at 997 L'Heureux-Dubé J. ("the principal failing of the 'plain meaning' process is the following: it obscures the fact that the so-called 'plain meaning' is based on a set of underlying assumptions that are concealed in legal reasoning").

to the purposes of the *Forests Act*, (2) the intrinsic clue of legislative intent that forest licenses on private land were inexplicably not made subject to similar restrictions, and (3) the extrinsic clue of legislative intent that the province's Attorney General was taking the legal position that Native land claims were not valid.

There are two ways to explain the court's conclusion in light of these claims that the legislature intended a contrary meaning. One is that the clues about legislative intent were misleading and wrong, and that the Legislature did indeed intend to include Aboriginal land claims within the terms of the *Forest Act*. Although the *Forest Act* may have been intended broadly to further policy goals concerning forest management and timber harvesting, this does not necessarily mean that such goals should be accomplished without regard to other societal values. Indeed, the qualification contained in s. 28 makes it clear that the Legislature believed that the Minister's discretion to issue tree farm licenses should not interfere with clearly established third party property rights claims in the land or timber subject to the license. Once the legislative purpose is seen as facilitating sound forestry practices *subject to existing property rights*, the Haida's interpretation of s. 28 seems less contrary to legislative purpose. Although the differential treatment of Crown and private land for purposes of Aboriginal land claims is not apparent, neither is the differential treatment of Crown and private land for purposes of more traditional clouds on title.

As to the imaginative reconstruction of the intent of the legislators voting for the 1978 legislation enacting s. 28, the question posed and then dismissed by Esson J.A. (whether they would have considered that timber could be "otherwise encumbered" by Aboriginal title) is, with respect, arguably the wrong question. Perhaps a better question to ask M.L.A.'s would have been whether timber could be "otherwise encumbered" if, as it turned out, the Attorney General was wrong about Aboriginal title and that such title did indeed exist (as the Court subsequently held[98]). The reported decisions provide no basis to answer such a speculative question with any degree of certainty.

Thus, it may well be that the Legislature meant exactly what it seemed to say when it denied the Minister the discretion to issue tree farm licenses to any timber that was "otherwise encumbered." However the only way to reach this conclusion with any confidence is to make the sort of contextual inquiries discussed in the paragraphs above.

Another possibility, of course, is that the contextual evidence correctly reflects the Legislature's expectations, and that the reason that they used the phrase "otherwise encumbered" to refer only to traditional forest tenures is that the phrase does *not* have the "plain meaning" that the B.C. Court of Appeal attaches to it. Indeed, unrefuted contextual evidence that the Legislature attached a meaning to the phrase different than the one held by the court would seem to be *prima facie* evidence that the text's meaning is *not* plain. Unfortunately, this observation is all too often lost by judges who derive their interpretations from intuition and hidden assumptions.[99]

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[98] *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300 (B.C.C.A.), aff'd [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.

[99] See *Sullivan/Ottawa, supra* note 7 at 202. For a rare and refreshing contrary view, see *Alberta (Treasury Branches)* v. *Canada*, [1996] 1 S.C.R. 963 at 976-77, 133 D.L.R. (4th) 609 Cory J. ("the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal

A third possibility is that the phrase "otherwise encumbered" does indeed have a plain meaning and that the Legislature's use of that phrase to signify a narrower concept was the result of sloppy drafting. Courts may well wish to follow plain meaning in these cases, but they need a normative justification for doing so, and it is difficult to reach generalizations without the contextual inquiry that the B.C. Court of Appeal rejects. One rationale might be that the plain meaning is so likely to reflect actual legislative intent that an inquiry is wasteful. There are too many cases where judges have reached anti-intentional results using plain meaning to justify this argument, as the British House of Lords recently recognized in overturning their long-standing refusal to consult legislative debate.[100]

Another argument for deliberately ignoring sloppy drafting is to "teach the Legislature a lesson" and to encourage greater drafting precision. The propriety of the judiciary acting as a scolding nanny is questionable in a system based on legislative supremacy. In labour contexts, after all, "work to rule" regardless of intent is usually a hostile, non-cooperative act.[101] Moreover, the realities of a legislative process featuring complex legislation and sophisticated special interest lobbying suggests that courts need to appreciate who are the "victims" and "beneficiaries" of imprecise drafting. Some American decisions support the proposition that the courts will not generously interpret sloppily-drafted legislation benefitting well-represented special interests, but are willing to overlook oversights in other contexts.[102]

Textualists may claim that "rule of law" principles of fair notice dictate that the courts not rescue legislatures from their sloppy drafting. This certainly has appeal in the criminal context, and it is no accident that Professor Sullivan discusses this issue in that context.[103] The rule of lenity, though, is better understood as incorporating *Charter* values intended to protect the innocent and the criminally accused rather than a general principle of notice. Consider the issue in the context of the *Haida Nation* case – the principal "victims" of sloppy drafting seem to be the drafter itself (the Minister of Forests), and MacMillan Bloedel, who doubtlessly protects itself already against sloppy drafting through the retention of skilled legislative counsel.[104]

Ultimately, we cannot say with confidence whether the phrase "otherwise encumbered" encompasses Native land claims not contemplated when the statute was

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minds, neither the meaning of the legislation nor its application to the facts is clear.").

[100] *Pepper* v. *Hart*, *supra* note 24.

[101] M.A. Eisenberg, "*Strict Textualism*" (1995), 29 Loy. L.A. L. Rev. at 13, 37.

[102] Compare *Chicago Professional Sports Ltd.* v. *National Basketball Ass'n*, 961 F.2d 667 at 671-72 (7th Cir. 1992) (courts read special interest exceptions "narrowly, with beady eyes and green eyeshades") with *Shine* v. *Shine*, 802 F.2d 583 (1st Cir. 1986) Breyer J. (refusing to adhere to plain meaning of statute appearing to permit a spouse to discharge a debt arising out of a particular type of pre-divorce alimony order, in recognition of hasty drafting process and clear legislative intent to expand, not contract, family law obligations that were non-dischargeable in bankruptcy).

[103] *Sullivan/Ottawa*, supra note 7 at 182 (discussing *R.* v. *McIntosh*, supra note 8). See also *R.* v. *Hasselwander*, [1993] 2 S.C.R. 398 (questioning vitality of rule of lenity).

[104] In contrast, millions of Canadian taxpayers and their accountants rely on the text of tax legislation for business planning purposes, and so notice principles have stronger support in this area. See *Regie d'alcool*, *supra* note 3, at 1011-1015, L'Heureux-Dubé J. (explaining why the plain meaning rule has greater force in taxation cases that with ordinary statutes).

written, whether the legislature really intended to permit or deny ministerial discretion to grant tree farm licenses on lands subject to as yet unrecognized Aboriginal land claims, or whether consideration of Native land claims would or would not frustrate the *Forest Act*'s purposes. Instead, the most satisfactory basis for resolving this issue would have been to give weight to a normative canon: in disputes between the government and politically powerful private interests on the one hand, and politically marginalised First Nations on the other, courts should resolve ambiguities in favour of Aboriginal interests.

This canon builds upon, but is analytically distinct from, the well-established canon that federal legislation relating to First Nations or Aboriginal people receive a large and purposive interpretation.[105] That canon is based on the trust relationship that the federal government assumed for itself over Native peoples and Native lands. In cases arising under this canon, the federal government was typically the drafter of textual language reflecting a contract with Native people, or acting as the trustee for such people. Thus, the traditional Aboriginal canon is best seen as a logical extension of the contract law principle that ambiguities will be construed against a sophisticated drafter in favour of the unsophisticated party,[106] or to the special fiduciary relationship that the government had assumed.[107]

As the Crown correctly argued, *Haida Nation* does not involve an interpretation of a treaty or legislation specifically relating to Aboriginal rights. Indeed, the Crown's argument was that the *Forest Act* did not seek to legislate regarding Aboriginal rights at all. Nonetheless, strong normative arguments drawn from the *Charter*, and the goal of enhancing deliberative democracy, point to resolving statutory issues like those raised in *Haida Nation* in favour of Aboriginal interests.

In a related context, the Supreme Court of Canada has accepted the idea that "Charter values" should play a role in judicial decision-making in cases that do not necessarily involve a claim that a specific governmental act is invalid for inconsistency with the *Charter*. In *Hill* v. *Church of Scientology*,[108] the Court held that, although the common law was not itself a governmental act subject to the *Charter* under s.32, the common law of defamation had to be reconsidered in light of the *Charter*'s adoption in

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[105] See *Sullivan/Ottawa, supra* note 7 at 224. Even Dickson C.J.C., one of the most vigourous proponents of the canon, expressly limited it to treaties and legislation that specifically relate to Native peoples: *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 99-100, 71 D.L.R. (4th) 193.

[106] See, *e.g. Hillis Oil & Sales* v. *Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57 at 68-69, 25 D.L.R. (4th) 649.

[107] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at 537, 137 D.L.R. (4th) 289 (principle in favour of broad and liberal interpretation of legislation relating to Aboriginals "arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake.") An American scholar (relying on the United States Supreme Court's opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Marshall C.J.) argues for a normative canon construing Indian treaties to preserve the sovereignty of Indian tribes unless expressly abrogated: P.P. Frickey, "Marshaling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harv. L. Rev. 381.

[108] *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129.

1982 to accommodate "Charter values."[109]

These values should likewise play a role in resolving difficult statutory cases. Section 35 of the *Charter*, by constitutionally affirming and recognizing Aboriginal rights, reflects a recognition that ordinary political processes are insufficient to protect Aboriginal interests adequately. Such a recognition can be contrasted with the rejection of the need for judicial protection against the potential that Parliament and provincial legislatures might unduly impair economic liberty or property rights. At the same time, constitutional recognition of Aboriginal rights can be analogized to the inclusion in the *Charter* of sections 8 through 14, which similarly reflect a recognition that inflamed temporary majorities might, absent constitutional restraint, unduly affect the application of fair and natural justice for those accused of crime. From this perspective, section 35 not only constitutionally proscribes governmental acts such as the extinguishing of Aboriginal title[110] or the prohibition of an Aboriginal practice, custom or tradition integral to distinctive Aboriginal culture[111] but also creates an interpretive canon that requires that legislators seeking to enact laws that adversely affect Aboriginal interests must do so with clarity.

A normative canon in favour of Aboriginal interests can also be justified as democracy-enhancing.[112] Consider again the issue raised by *Haida Nation*, where the effect of Aboriginal land claims on forestry practices was not considered when the B.C. Legislative Assembly enacted the *Forest Act*, because such claims were not thought to exist. Whatever result was reached by the courts in the actual case, once Aboriginal claims to vast amounts of B.C. forest land were recognized, the best result would surely have been a legislative reconsideration of the extent to which these claims should be considered in authorizing tree farming. In light of the relative political power of the Forest Ministry, MacMillan Bloedel, and the Haida Nation, there is little question that the best means to assure express legislative deliberation on this issue is to create a "default rule" in favour of the Haida. If there is political support for allowing tree farming on disputed forest land, there should be little difficulty in allowing the majority to work its will through the legislative process. The likelihood that the Haida, had they lost their case, could have persuaded a Social Credit government to put the matter on the legislative agenda is far slimmer, a political reality recognized by section 35 of the *Charter*.[113]

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[109] *Ibid.* at 1165 (citing *RWDSU* v. *Dolphin Delivery, Ltd.*, [1986] 2 S.C.R. 573 at 603, 33 D.L.R. (4th) 174). The Court then concluded (at 1172-1179) that the inhibition of the value of free expression reflected in s.2(b) of the *Charter* inherent in the award of damages for defamation was reasonable in light of the strong and traditional concern for protection of reputation reflected in the common law.

[110] See *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

[111] *R.* v. *Van der Peet, supra* note 107.

[112] For the proposition that, indeed, the primary role of judicial review is to create doctrines that facilitate democratic processes, see P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87.

[113] This argument has stronger force in Canada than in the United States, where bicameralism, weak party discipline, and minority procedural rights make it difficult to predict confidently that a majority can necessarily work its will in the legislative process. To be sure, there may be political costs to a government seeking to correct a judicial statutory interpretation decision, but the need for the correction was, in some sense, caused by the government's own

The foregoing discussion demonstrates the difficulty with reliance on textualist, intentional, or purposive approaches to difficult questions of statutory interpretation, and the need and inevitability of normative canons that will resolve these issues (whether or not explicitly acknowledged by the judges in their reasons for decision). The analysis also provides an initial basis to evaluate the desirability of particular normative canons that might be invoked. This is only one of a host of issues of statutory interpretation that deserve fuller attention, in Canada and elsewhere.

IV. A CALL TO CANADIAN TEACHERS AND SCHOLARS

With her revisions to *Driedger on the Constructions of Statutes* and her attack on plain meaning and call for a more explicit and pragmatic interpretive process in *Statutory Interpretation in the Supreme Court of Canada*, Professor Ruth Sullivan will hopefully re-ignite widespread interest in the theory and practice of statutory interpretation throughout Canada.[114] This Part briefly sketches some ideas on how she and others might further the inquiry.

A. Teaching law students about statutory interpretation

Most North American law schools initially responded to the post-war transformation of our legal system from the common law to an "age of statutes" by ignoring it. Today, first-year classes still focus almost exclusively on the few remaining areas where the common law methodology remains paramount. Even in courses on company, labour, tax, or environmental law that are today primarily governed by statute, instructors have enough trouble covering difficult and important substantive principles and have little time or inclination to delve into the interpretive methodology of the cases studied. Two alternatives deserve consideration.

At a minimum, law schools ought to offer a course on statutory interpretation (Professor Sullivan does at Ottawa). Such a course can provide students with a sound theoretical understanding of the various approaches to statutory interpretation utilized by the courts as well as a technical understanding of particular interpretive canons. A well-designed course has the potential to permit a serious discussion of important jurisprudential issues about separation of powers, "judicial activism," and the reconciliation of the rule of law with justice in the case. Such a course will also provide graduates with powerful tools to improve their advocacy of the clients' interests on

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imprecise drafting. To the extent that the government is reluctant to introduce new forestry legislation, for example, because it would give the opposition a political opportunity to debate government policies in the area, the normative canon I propose here would seem to facilitate democratic debate and thus be democracy-enhancing.

[114] Until Elmer Driedger's publication of the first edition of his treatise in 1974, there had not been any substantial work on Canadian statutory interpretation since the 1930s: H.W. MacLauchlan, Book Review of *Driedger on the Construction of Statutes, 3d ed.* by R.E. Sullivan, (1995) 41 McGill L.J. 185 at 188. MacLauchlan notes that students in the 1970s were still studying the landmark work of J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1935-36) 1 U.T.L.J. 286, and J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1. See also R.C.B. Risk, "John Willis -- A Tribute" (1985) 9 Dalhouse L.J. 521.

statutory issues. As I tell my students, whether they go into court seeking vindication of the "plain meaning" of a statute, or seeking to disregard the most obvious meaning in favour of a more purposive approach, they will have a natural advantage over opposing counsel who can only throw unthinking bromides into their arguments without a good understanding of the theoretical underpinning of their arguments.

Beyond that, Canadian schools might consider an experimental approach undertaken at the University of Illinois, where first-year students select from among a number of elective courses concerning statutory law (prior examples include welfare, employment discrimination, bankruptcy, copyright, and disabilities law) where the principal goal is to use the statutes as a context for teaching about statutory interpretation rather than disseminating substantive legal doctrines. Some courses provide an introduction to the substantive law, then an introduction to statutory interpretation, followed by a synthesis of the two. Others include a detailed study of the legislative procedures that led to the adoption of a particular statute, and (aided by computer-search tools) find cases interpreting the relevant statutes that invoke canons of interpretation, the plain meaning rule, intentionalist and purposive approaches, the use of legislative history, and the like. Alternatively, students already familiar with a field of statutory law, like tax or environmental law, could take an advanced course studying interpretive techniques within the context of a legal regime with which they are already familiar.

B. Academic development of the field

Statutory interpretation issues cry out for further elucidation by the Canadian academy. Professor Sullivan's attack on the mythology of plain meaning jurisprudence warrants critique or validation. A variety of other areas have not even been explored. Many of the interpretive rules catalogued in the treatises deserve critical examination. Some examples:

* Are there any categories of statutes where legislatures really do intend to leave the common law undisturbed except where being manifestly derogated? What are the normative arguments in favour of presuming an intent to preserve the common law?

* Do legislatures really intend that their acts be construed consistently with constitutional law? With international law? If not, what arguments support such a presumption?

* What is the jurisprudential support for, and limits on, the rule of lenity in criminal cases? The rule of liberal construction for social welfare legislation? What should be the default presumption in tax cases?

* Just as the economic rights of property owners are protected by presumptions against encroachment on the enjoyment of property rights,[115] should the economic rights of the poor be protected by judicially-created presumptions in their favour? To what extent would the use of such a presumption obviate some of the traditional objections to the constitutionalizing of a social charter?[116]

* Do grammatical rules of construction, such as *in pari materia, noscitur a*

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[115] Côté, *supra* note 20 at 401-404.

[116] See, *e.g.* J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at chapter 9.

sociis, inclusio unius est exclusio alterius, and the presumption against surplus language, reflect the modern day realities of legislative drafting?

As to these inquiries and some others, a fair amount of work has already been done in the United States.[117] In at least two areas, fundamentally different issues arise in the context of a nation featuring bicameral legislatures, weak party discipline, and a separation of executive and legislative power and one featuring (functionally) unicameral legislatures, strong party discipline, and cabinet government. Specifically, I refer to legislative history and the role of agencies in statutory interpretation.

In some cases, the argument for legislative history is much stronger in parliamentary democracies than in the United States. Consider *Pepper v. Hart*,[118] the path-breaking British case permitting judicial reference to *Hansard*. The legislative history consisted of an unequivocal statement made by the minister responsible for the legislation about the intended meaning of a technical phrase, during careful committee deliberations where the bill was being re-drafted. As the House of Lords properly concluded, parliamentarians should be able to reasonably rely on such comments, and because in British (as well as Canadian) politics, the Minister's view of legislation will prevail. Although American courts will often rely on statements by the committee chair or bill's sponsor, no single American legislator packs the political wallop of a British or Canadian minister.

In other cases, legislative debate may be less reliable in Canada than in analogous American contexts. For example, suppose a bill's sponsor provides assurances to a member of the Opposition that a legislative provision will not have the adverse effects feared by the opponent. Especially in the United States Senate, a strong argument can be made that this statement should be given effect, because the assurance may well have led the inquiring senator to acquiesce in the bill's speedy passage and forego the many dilatory tactics that individual senators enjoy (such as unlimited debate absent cloture voted by sixty of 100 senators). The analysis is more complex in the Canadian context. The substance of the answer given to the inquiry is likely to be irrelevant, since party discipline will ensure that the government has the power to pass the bill regardless of how favourable or unfavourable the answer given to an opposition parliamentarian. Moreover, legislative super-majorities are not required to pass ordinary legislation in Canada. On the other hand, Canadian federal and provincial governments go to great lengths to avoid the political costs of legislation that may prove unpopular with various interests across the country or province, and there is something to the argument that if the government wants to "sell" a bill to its constituents by providing certain assurances about the bill's effects in response to legislative questions, the courts should hold the government to its "warranty." In short, Professor Côté is correct in observing that "not all extrinsic materials have the same value in interpretation,"[119] but much more work can be done to assist judges in identifying the context in which

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[117] *Cases on Legislation, supra* note 10, is an excellent reference source.

[118] *Supra* note 24.

[119] Côté, *supra* note 20 at 366.

materials are most and least reliable.[120]

A significant number of old-growth trees from B.C. forests have probably ended up being used in the United States for judicial decisions, books, and law review articles concerning the question of curial deference to administrative agency decisions in interpreting statutes. But different problems are raised when legislative and executive powers are combined. In the landmark *Chevron* case, the United States Supreme Court insisted on curial deference to reasonable agency interpretations of their own statute, unless Congress has clearly addressed the "precise question at issue" in the case.[121] One of the problems with curial deference is illustrated by the *Chevron* case itself. An environmental statute passed in 1977, when centre-left Democrats controlled the House of Representatives, the Senate and the White House, was designed to require industry to do everything practically possible to improve air quality in areas of the country still subject to significant pollution. In 1983, the agency, now controlled by conservative Republicans, changed regulations to permit some industrial improvements that did not improve air quality as much as possible. If the agency had proposed a statutory amendment to effectuate this policy, it would clearly have been rejected by the House, still controlled by the Democrats. Instead, the agency prevailed in court, and of course the House Democrats were powerless to overturn the decision by legislation, which would have been vetoed by President Reagan.

These problems are absent in Canada. Suppose the conservative government in Ontario wanted to re-think the policies behind Orders in Council issued by the previous social democratic government. Requiring them to pass new legislation, rather than granting the government the leeway to interpret broadly-worded legislation through new Orders in Council, seems to be an exercise in empty formalities since the government could with relative ease enact new governing legislation through the provincial parliament.

These two points are not offered to confidently assert how Canadians ought to resolve these issues, but merely to suggest rich areas that deserve the attention of Canadian scholars. Academic inquiry will not only provide jurisprudential insights, but also provide additional understanding of interpretive tools that are often poorly used by judges. This is not because the courts are cravenly grasping at ill-fitting interpretive techniques to achieve a pre-ordained result, but simply because the courts have not been provided with the rigorous analysis they need to better interpret statutes.

V. CONCLUSION

Although Canadian jurisprudence will surely benefit from any discussion of fundamental approaches to statutory interpretation, judges and lawyers will continue to pragmatically interpret statutes, drawing upon a host of textual, contextual and canonical tools to do their work. Serious attention to the use of interpretive canons that are based

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[120] See e.g. S. Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 McGill L.J. 287; G.A. Costello, "Average Voting Members and Other 'Benign Fictions': The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History" (1990) Duke L.J. 39.

[121] *Chevron, U.S.A., Inc.* v. *National Resources Defense Council*, 467 U.S. 837 (1984).

on judicially-created norms will provide superior rationales for many difficult cases of statutory interpretation. In particular, Canadian courts should seriously consider the use of *Charter* values to create default rules for interpretation, such as a presumption that, in the absence of clear legislative intent, statutes should be construed in favour of Aboriginal interests. The *corpus juris* of Canadian law will also benefit from a rigorous analysis of existing interpretive canons, the use of legislative history, and the proper relationship between courts and agencies in statutory interpretation.

American scholars in jurisprudence, constitutional and administrative law, as well as those toiling in substantive law fields dominated by statutes, have benefitted enormously by the outpouring of inquiry into statutory interpretation. Hopefully, the "Cinderella of legal scholarship" will dance in your home and native land as well.