Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

LexisNexis®

Sullivan on the Construction of Statutes
Fifth Edition by Ruth Sullivan

July 2008

Members of the LexisNexis Group worldwide

Canada	LexisNexis Canada Inc, 123 Commerce Valley Drive East, MARKHAM, Ontario
Australia	Butterworths, a Division of Reed International Books Australia Pty Ltd, CHATSWOOD, New South Wales
Austria	ARD Betriebsdienst and Verlag Orac, VIENNA
Czech Republic	Orac sro, PRAGUE
France	Éditions du Juris-Classeur SA, PARIS
Hong Kong	Butterworths Asia (Hong Kong), HONG KONG
Hungary	Hvg Orac, BUDAPEST
India	Butterworths India, NEW DELHI
Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Giuffré, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand, WELLINGTON
Poland	Wydawnictwa Prawnicze PWN, WARSAW
Singapore	Butterworths Asia, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
Switzerland	Stämpfli Verlag AG, BERNE
United Kingdom	Butterworths Tolley, a Division of Reed Elsevier (UK), LONDON, WC2A
USA	LexisNexis, DAYTON, Ohio

Library and Archives Canada Cataloguing in Publication

Sullivan, Ruth, 1946-
Sullivan on the construction of statutes / Ruth Sullivan. — 5th ed.

Includes index.
Previous ed. published under title: Sullivan and Driedger on the construction of statues.
ISBN 978-0-433-45183-9

1. Law—Canada—Interpretation and construction. I. Title.

KE265.S84S95 2008 349.71 C2008-903901-7
KF425.S95 2008

Printed and bound in Canada.

CHAPTER 1

Driedger's Modern Principle

ANALYSIS OF MODERN PRINCIPLE

Introduction. More than thirty years ago, in the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

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

The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo & Rizzo Shoes Ltd.* it was declared to be the preferred approach of the Supreme Court of Canada.[2] It has even been applied to interpretation of Quebec's Civil Code.[3]

The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own — one over which the reader has substantial control. Research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. These expectations are rooted in linguistic competence and shared linguistic convention; they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read

---

1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67.

2 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 41 (S.C.C.). See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559 (S.C.C.) and the cases cited at para. 26. The *Rizzo* case is discussed *infra* at pp. 10-11. For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

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

and influences in particular his or her impression of ordinary meaning — what Driedger calls the grammatical and ordinary sense of the words.

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

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

> It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
>
> - the expressed intention — the intention expressed by the enacted words;
> - the implied intention — the intention that may legitimately be implied from the enacted words;
> - the presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
> - the declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.[4]

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

---

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

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

The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases.[6]

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

- what is the meaning of the legislative text?
- what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
- what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

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

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

These several dimensions of statutory interpretation are not accidental or arbitrarily chosen. As Driedger indicated in his initial formulation of the modern

---

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

odds with one another and they are inevitably incomplete. The descriptions of purpose found in sources like commission reports or academic texts tend to be more detailed and therefore more helpful; however, they are less authoritative. And all descriptions of purpose, whether vague or precise, are themselves subject to interpretation.

The second way of establishing purpose is indirect in that it relies on inferences drawn by interpreters based on reading the legislation in context. Interpreters who wish to approximate the historical intentions of the enacting legislature base their inferences on the beliefs and values prevalent at the time of enactment. Interpreters who wish to establish intentions that are appropriate for local and current conditions base their inferences on currently shared beliefs and assumptions.

The advantage of establishing purpose through inference is that it is more likely to reveal the complex mix of policies, principles and material outcomes that legislatures typically wish to accomplish. In drawing inferences, interpreters rely on a range of assumptions and values which they implicitly attribute to the legislature and which they hope are shared by their audience. In a fully reasoned analysis, these underlying values and assumptions are exposed and, when necessary, they are justified.[48] This way of establishing purpose can be highly persuasive, particularly if the analysis is tied to features of the legislative scheme. The disadvantage is that a fully developed analysis is often hard to do and may prove inconclusive in the end.

Ideally, any analysis of purpose will rely on both direct and indirect approaches and draw on as many sources and techniques as possible.[49]

Legislative statements of purpose. The most direct and authoritative evidence of legislative purpose is found in formal purpose statements appearing in the body of legislation. Such statements are often placed at the beginning of the Act or a subdivision of the Act along with other interpretation provisions;[50] they also appear in conjunction with provisions that confer discretion.[51] In recent years, purpose statements have also been included in delegated legislation.[52] If two or more Acts are closely related, the purpose statement of one of them may be re-

---

48 Justification is necessary if the values and assumptions are not self-evident to the interpreter's audience. For discussion of the role of norms in inference drawing, see *infra* at pp. 273-75.

49 For a good example of the preferred approach, see *R. v. Chartrand*, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864, especially at 875ff (S.C.C.).

50 Standard interpretation provisions include not only purpose statements but also definitions, provisions governing the temporal or territorial application of the legislation and provisions indicating the relation of the Act to other legislation.

51 See, for example, *Hickey v. Hickey*, [1999] S.C.J. No. 9, [1999] 2 S.C.R. 518 (S.C.C.) and the cases cited by L'Heureux-Dubé J. at 529, interpreting s. 15.2(6) of the *Divorce Act*, "These objectives set out the principles and values that must be considered by judges in exercising their discretion when making or revising support orders."

52 See, for example, *Francis v. Baker*, [1999] S.C.J. No. 52, [1999] 3 S.C.R. 250, at 269 (S.C.C.), where the Court relied on a purpose statement in the *Federal Child Support Guidelines* made under the *Divorce Act*.

CHAPTER 9

Consequential Analysis

INTRODUCTION

What counts as absurdity and what, if anything, courts should do in response to absurdity are questions that have a lengthy and vexed history in statutory interpretation. This chapter begins by briefly reviewing that history, focusing on the different answers that have been given to these questions and the justification for taking absurdity into account. It sets out a principle that purports to summarize current judicial practice.

The chapter next describes certain well-established categories of absurdity — defeating the purpose, irrational distinctions, contradictions and anomalies, inconvenience, interference with the administration of justice, and egregious violations of fairness or right reason.

The chapter ends by examining the ways avoiding absurdity is used to help resolve interpretation issues.

Relevance of consequences in interpretation. When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity. As O'Halloran J.A. explained in *Waugh v. Pedneault*:

> The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. The members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances. Words used in enactments of the Legislature must be construed upon that premise. That is the real "intent" of the Legislature. That is why words in an Act of the Legislature are not restricted to what are sometimes called their "ordinary" or "literal" meaning, but are extended flexibly to in-

> clude the most reasonable meaning which can be extracted from the purpose and object of what is sought to be accomplished by the statute.[1]

This understanding has been affirmed on numerous occasions by the Supreme Court of Canada. In *Morgentaler v. The Queen*, Dickson J. wrote:

> We must give the sections a reasonable construction and try to make sense and not nonsense of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.[2]

In *R. v. McIntosh*, McLachlin J. wrote:

> While I agree ... that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament.[3]

In *Ontario v. Canadian Pacific Ltd.*, Gonthier J. wrote:

> Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.[4]

In *Re Rizzo and Rizzo Shoes Ltd.*, Iacobucci J. wrote:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.[5]

Propositions comprising consequential analysis. The modern understanding of the "golden rule" or the presumption against absurdity includes the following propositions.

(1) It is presumed that the legislature does not intend its legislation to have absurd consequences.

(2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.

(3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.

---

1 [1948] B.C.J. No. 1, [1949] 1 W.W.R. 14, at 15 (B.C.C.A.).

2 [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616, at 676 (S.C.C.).

3 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at 722 (S.C.C.), from the dissenting judgment of McLachlin, La Forest, L'Heureux-Dubé and Gonthier JJ.

4 [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031, at para. 65 (S.C.C.). See also *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at para. 84 (S.C.C.), where Bastarache J. dissenting says: "We must presume that the legislature ... provided for [statutory] conditions [in insurance contracts] which are just and reasonable for both the insured and the insurer."

5 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 43 (S.C.C.).

(4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

Evolution of the presumption against absurdity. Judicial concern with the consequences of legislation is a constant in statutory interpretation, although at different times it has been expressed in different ways. In the era of equitable construction,[6] the courts focused primarily on positive consequences. To ensure the realization of the intended consequences of legislation, judges adopted interpretations that suppressed the mischief, promoted the remedy, cured underinclusive language and defeated avoidance measures.[7]

In the eighteenth century, using the technique of presumed intent, the courts focused primarily on the negative consequences that might result from the application of legislation, such as interference with private rights or a curtailing of basic freedoms. By presuming the legislature intended to avoid these undesirable consequences, but conceding that the presumption could be rebutted, the courts ensured acceptable outcomes while at the same time deferring to the legislative will.[8]

In the nineteenth and twentieth centuries the judicial concern for consequences took the form of the so-called golden rule. It permitted courts to depart from the ordinary meaning of the words used in legislation in order to avoid absurdity. As explained by Lord Wensleydale in *Grey v. Pearson*:

> [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.[9]

One problem with the golden rule is that it developed in response to the plain meaning rule and it shares the fundamental assumption on which that rule is based, namely, the only reliable or legitimate evidence of legislative intent is the meaning of the legislative text. This assumption is inconsistent with the modern principle, which insists that legislative intent must be inferred from reading a text in light of its total context, including assumptions about reasonableness, fairness, rule of law and the like.

Questions raised by the presumption against absurdity. Although the presumption against absurdity has been invoked on innumerable occasions, its implications are far from clear. From the beginning the courts have struggled with the following questions.

---

6 Equitable construction is discussed *supra*, Chapter 8, at pp. 256-57.

7 Presumed intent is described in Chapter 16.

8 See *Heydon's Case*, (1584), 3 Co. Rep. 7a, 76 E.R. 637.

9 (1857), 6 H.L. Cas. 61, at 106, 10 E.R. 1216, at 1234.

(1) What is meant by absurdity? Is it limited to "objective" factors like internal inconsistency or does it extend to outcomes that the courts dislike on their merits?

(2) In order to avoid an absurdity, what is a court entitled to do? May it disregard what appears to be the clear meaning of a provision? May it "rewrite" provisions to whatever extent is necessary to avoid absurdity?

(3) How can judicial concern with consequences be reconciled with the judicial obligation to give effect to legislative intent?

These questions are obviously interrelated. If absurdity is limited to cases of actual impossibility or logical contradiction, the problem of justification hardly arises. If it is defined broadly to include any consequence a presiding judge finds undesirable, the problem of justification becomes acute. Similarly, if courts respond to absurdity by choosing another interpretation that is equally plausible, no one is likely to object. The problem arises when absurdity is relied on to reject a meaning that appears to be plain in favour of a meaning that on linguistic grounds seems strained or implausible.

EVOLUTION OF CONSEQUENTIAL ANALYSIS

"Objective" absurdity. Some courts have adopted a narrow conception of absurdity, one that purports to be objective. This conception can be traced to *Warburton v. Loveland d. Ivie*[10] the Irish case relied on by Lord Wensleydale in *Grey v. Pearson*.[11] In the *Warburton* case Burton J. acknowledged that the words to be interpreted were perfectly clear. He then went on to say:

> I admit that the generality of words may properly be restrained within the limits of the declared or implied policy of the statute, the more especially if a construction, to the full extent of its phrase, would lead to any repugnance or inconsistency in its provisions. That policy is, however, I conceive, only to be looked for in the statute itself, and not to be either enlarged or contracted, upon merely speculative grounds — a mode of construction that always incurs the hazard, and has, perhaps in some instances, produced the effect of legislating in the form of exposition.[12]

Later, he laid down the rule that obviously was the foundation for Lord Wensleydale's rule in *Grey v. Pearson*. He said:

> [I]t is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provi-

---

10 (1828), 1 Hud. & B. 623; affd (1832), 6 Bli. N.S. 1 (H.L.).

11 *Supra* note 9.

12 *Supra* note 10, at 636.

> sions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no farther.[13]

The absurdity referred to here consists of a repugnance or inconsistency between the provisions of the statute or between provisions of the statute and its avowed object or purpose. This absurdity is considered "objective" because what the legislature has said in one place conflicts with other sources of legislative meaning. On this analysis, the essence of absurdity is disharmony or internal contradiction; one part of the law is in conflict with another.[14]

"Subjective" absurdity. In *River Wear Commissioners v. Adamson*, Lord Blackburn said:

> ... I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, *viz.*, that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which though less proper, is one which the Court thinks the words will bear.[15]

The test of absurdity laid down by Lord Blackburn in this case allows a judge to assess the consequences of adopting a given interpretation against standards of justice, reasonableness or convenience. Because these are personally held standards, the resulting judgment is considered "subjective".

The reasoning of Lord Blackburn in the *River Wear* case has been condemned because it appears to permit individual judges to substitute their own views of sound policy for the views of the legislature. The judges in *River Wear* refused to give effect to the apparent meaning of the legislation because they could not believe that Parliament really intended to make persons liable for damage in the absence of any fault on their part. The case is considered by many to be a classic example of a court second-guessing the wisdom of the legislature, contrary to its proper constitutional role.[16]

The current view of absurdity. To understand the current approach, the distinction between "objective" and "subjective" absurdity is unhelpful. Judges test consequences against a range of considerations:

- norms of rationality, such as logical coherence and internal consistency

---

13 *Ibid.*, at 648.

14 This is the conception of absurdity advocated by Elmer Driedger in the first and second editions of his book. See E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at pp. 50ff.

15 (1877), 2 App. Cas. 743, at 764-65 (H.L.); see also *Coutts & Co. v. I.R.C.*, [1953] A.C. 267, at 281 (H.L.); *Mohindar Singh v. The King*, [1950] A.C. 345 (P.C.).

16 See J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1935-36), 1 U. Toronto L.J. 286, at 305-07.

- common law norms, such as compliance with rule of law and other presumed intentions
- shared community norms, such as fairness and tolerance.

These norms are "objective" to the extent they are shared by others living in the same community. The more widely shared a norm is, and the less challenged it is by competing norms, the more objective it feels to those who have internalized it. Conversely, norms held by others that are not shared are experienced as biased or arbitrary and "subjective". In this sense norms can be described as objective or subjective. However, the distinction turns on whose norms we are talking about and how widely they are shared, not on their content or character.

When judges rely on a community standard in assessing the consequences of a proposed interpretation, they do not substitute their own personal values or views for those of the legislature; rather they appeal to values and views that they believe are shared by other members of the community, including the legislature. Relying on shared ideas of reasonableness and justice in determining acceptable consequences is not essentially different from relying on conventions of language in determining ordinary meaning[17] or on norms of plausibility in determining purpose.[18] In each case, the interpretation is constructed out of cultural materials that are more or less uniform and widely accepted.

When the norms relied on by judges in interpreting legislation are in fact uniform and widely accepted, they have the appearance and feel of eternal verities and no one would think to fault the courts for invoking them. However, in diverse societies or in times of change, this universal acceptance may not occur and interpreters must be on guard against taking too much for granted. A norm that appears to be timeless and universal to one interpreter may look doubtful or even discriminatory to others. Norms that are not universally accepted call for examination and defence.[19]

The judicial response to absurdity. Just as historically there have been different views of absurdity, so there have been different views of what courts can legitimately do when confronted with absurdity. In *Brown & Sons v. The Russian Ship "Alina"*, for example, Jessel M.R. wrote:

> The rule of construction as laid down in all the cases, and notably in the House of Lords is this, that where you have plain terms used in ... an Act of Parliament nothing less than manifest absurdity will enable a court to say that the ordinary

---

17 For discussion, see *supra*, Chapter 2, at pp. 23ff.

18 For discussion, see *supra*, Chapter 8, at pp. 273-275.

19 Of course, it is possible for members of a community who occupy positions of power to believe that certain values and assumptions are accepted as true by all members of the community even though this belief is false. It is also possible for them to dismiss challenges to their views as mistaken or ill-conceived. The views held by the mainstream or those in power are often assumed to be "objectively" true or correct. In fact, all views are "subjective" in the sense that they depend on what the "subject" (the person who holds the views) is prepared to accept as true or plausible.

> and natural meaning of the terms is not the true meaning.... [W]e must first determine whether the words are in themselves unambiguous, and if we must arrive at that conclusion then we must consider whether there is any such manifest absurdity as will enable a court of construction to say that the natural meaning of the words could not possibly be the meaning intended by the Legislature to be put upon them.[20]

On this analysis, to avoid a manifest absurdity a court is entitled to depart from the ordinary meaning of the legislative text even where that meaning is clear. Furthermore, in the words of Lord Wensleydale in *Grey v. Pearson*, "the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."[21]

In *R. v. The Judge of the City of London Court*, dealing with the same question under the same statute, Lord Esher expressly rejected the rule of construction relied on by Jessel M.R. in the *Alina* case. He wrote:

> Now, I say that no such rule of construction was ever laid down before. If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this - if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.[22]

Lord Esher here insists on the plain meaning rule. If the meaning of the words in a legislative text is plain, that meaning must be accepted regardless of consequences.[23] This position was adopted by a majority of the Supreme Court of Canada in *R. v. McIntosh*:

> [W]here, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be.... The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.[24]

On this approach, avoiding absurdity is a reason to prefer one plausible meaning over another, but it cannot be relied on to distort or disregard the meaning of the text. This view is often asserted by the Court when interpreting fiscal legislation.

Current practice. Determining the permissible response to absurdity remains a live issue in Canada and has received considerable attention from the courts in recent years. If the text is judged to be ambiguous, avoiding absurdity is a good reason to prefer one interpretation over another. However, if the text is judged to

---

20 (1880), 42 L.T. 517, at 518 (C.A.).

21 *Supra* note 9, at 1234.

22 [1892] 1 Q.B. 273, at 290 (C.A.).

23 For discussion of the plain meaning rule, see *supra*, Chapter 1, at pp. 9ff.

24 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at 704 (S.C.C.).

be clear, many courts would say there is nothing they can do to avoid any absurdity flowing from text. This claim is misleading, however. Given the resources of statutory interpretation, and the vagueness of concepts like "plain" and "plausible", there is always something the court can do — for example, (1) declare the provision to be ambiguous or (2) rely on the stronger version of the "golden rule" that permits departure from ordinary meaning to the extent necessary to avoid absurdity or (3) invoke the court's jurisdiction to correct drafter's errors.

The problem here is not inadequate resources, but the inadequate rhetoric relied on by courts when dealing with hard cases, and in particular the tendency to fall back on the rhetoric of the plain meaning rule.[25] Texts are said to be either plain or ambiguous and the consequences that flow from texts are said to be either absurd or not absurd. In reality, of course, things are more complex. A text in relation to a set of facts is more or less plain; clarity is a relative concept. Furthermore, the degree of clarity perceived in a text depends on the interaction of a complex range of factors — textual, legal, cultural and personal. Similarly, there are different types and degrees of absurdity. A provision that contradicts itself or is impossible to comply with is likely to be judged more absurd than a provision that creates administrative inconvenience. A provision that discriminates on the basis of race is more likely to be judged absurd than one that discriminates on the basis of annual income.

Although courts often assert that the "plain" or "ordinary" meaning of a text can be rejected only if there is a plausible alternative, if the absurdity becomes glaring enough at least some courts are prepared to depart, and acknowledge they are departing, from ordinary language use. In *R. v. Scott*,[26] for example, the accused was charged with "using an imitation firearm while committing an indictable offence" contrary to s. 85(2) of the *Criminal Code*. He was acquitted at trial because the firearm he used was never recovered and therefore the Crown was unable to prove that it was an imitation firearm as opposed to a real one. The judge relied on a line of cases that required proof beyond reasonable doubt that the "imitation firearm" used was incapable of being discharged so as to cause harm to another. On appeal, the British Columbia Court of Appeal held that this interpretation of "imitation firearm" defeated the purpose of s. 85(2), which was to prevent the alarm and trauma resulting from the use of an object that has the appearance of a gun. It concluded that "to avoid absurdities in firearms cases, and interpret s. 85(2) in harmony with the intention of Parliament, the term 'imitation firearm' must include real firearms."[27] Braidwood J.A. wrote:

> ...although the term "imitation firearm" may be considered to be unambiguous, it must be ascribed an "unordinary" meaning so as to better achieve the purpose of Parliament. This provision was enacted so that the Code would cover offenders

---

25 For criticism of the rhetoric of the plain meaning rule, see Chapter 1, at pp. 9ff.

26 [2000] B.C.J. No. 800 (B.C.C.A.).

27 *Ibid.*, at para. 45.

> who commit indictable offences using what appears to be a firearm, but cannot be charged under s. 85(1) [prohibiting the use of (real) firearms in indictable offences]: either because it was a "fake" gun such as a toy gun; or because it was a real gun that could not later be recovered. To demand that the Crown prove beyond a reasonable doubt that a weapon cannot be discharged would make a prosecution impossible when the gun is not recovered.[28]

In a concurring judgment, McEachern C.J.B.C. offered an interpretation of "imitation" that was broad enough to include both real and fake firearms. However, in the following passage he showed that he also accepted Braidwood J.A.'s analysis:

> Thus, in order to rectify an obvious absurdity and give effect to the intention of Parliament in drafting these two provisions, the court is permitted to ascribe to the term "imitation" a meaning that modifies the grammatical sense in which it is ordinarily used.[29]

When the plain or ordinary meaning of a text is incoherent, self-contradictory or otherwise absurd, and there is no plausible alternative, another approach is to rely on the courts' jurisdiction to correct drafting mistakes.[30] The judgment of the Alberta Court of Appeal in *R. v. R.(T.S.)*[31] offers a good illustration of this approach. The appellant was a young person who was ordered under s. 487.05 of the *Criminal Code* to provide samples of bodily substance for the purpose of DNA analysis. He resisted on the grounds that because the *Youth Criminal Justice Act* did not provide for destruction of his bodily substances and related information when the rest of his youth record would be destroyed, the judge should have declined to make the order. The Court found that the failure of the relevant legislation to provide for the destruction of DNA records in the case of young persons was the result of a drafter's error. Berger J.A. wrote:

> In my opinion, this is a case where judicial correction is justified. Failure to rectify would give rise to an absurdity. Under the *Young Offenders Act*, access to information in the convicted offender's index is removed; under the *Youth Criminal Justice Act* it would not be. There is no logical reason to make such a distinction. That was not the intention of Parliament.[32]

Berger J.A. was able to identify the exact nature of the drafter's mistake and to show how it came about. In attempting to amend certain provisions of the *DNA Identification Act* to ensure the destruction of young persons' DNA records, the drafter mistakenly amended provisions that had already been repealed and replaced. Therefore, the desired amendment had no effect. The mistake occurred,

---

28 *Ibid.*, at para. 44.

29 *Ibid.*, at para. 67. On further appeal to the Supreme Court of Canada, speaking from the bench, the Court adopted McEachern C.J.B.C.'s judgment as its own: see *R. v. Scott*, [2001] S.C.J. No. 71 (S.C.C.).

30 For discussion of the jurisdiction to correct mistakes, see *infra*, Chapter 6 at pp. 173-77.

31 [2005] A.J. No. 1053, 257 D.L.R. (4th) 500 (Alta. C.A.).

32 *Ibid.*, at para. 16.

he showed, because of a series of complicated amendments and conditional transitional provisions which made it difficult to trace the evolution of the legislation. Finally, Berger J.A. was also able to determine with considerable certainty Parliament's true intention with respect to the destruction of DNA records. For this purpose, he relied on a 2005 amendment, which he took to be declaratory of the law existing since 2002 when the *Youth Criminal Justice Act* came into force:

> The failure to address destruction of records and bodily substances, in my opinion, stems from legislative oversight ... now remedied by Bill C-13 ... which awaits proclamation. Section 21 of the Bill makes clear that when the young person's youth record is destroyed so is his DNA.[33]

Having corrected the drafting error, the court could affirm that the appellant's records would be destroyed in due course. The judge's order to provide DNA was therefore upheld.

Governing principle. Although the courts do not expressly say so, their practice appears to be guided by the following principle: the more compelling the absurdity to be avoided, the greater the departure from ordinary meaning that is tolerated; conversely, the clearer the language of the text, the greater the absurdity required to justify departure from its apparent meaning. If the language is relatively precise and clear, it receives considerable weight. If the absurdity is relatively obvious and intolerable, the court may strain language to avoid it.

Justification. In a constitutional democracy, the task of enacting legislation is reserved to the legislature. But because legislation consists of rules that are not self-applying, they are always incomplete. This is so even if the rules are well drafted and seem to be clear. Deciding whether a provision applies to particular facts, and if so how it applies, belongs initially to unofficial interpreters — to those who apply the legislation to themselves or their clients, normally in an effort to maximize personal benefit. These unofficial interpretations are subject to review by official interpreters — bureaucrats and tribunals and ultimately the courts. In resolving interpretation disputes, the courts ensure that rules declared by the legislature are applied to individual cases impartially and in accordance with the law. Part of this role involves ensuring, as Lamer J. once put it, that the law does not become an idiot or an ass:

> Courts have always been reluctant to give statutes exceptional construction.... But this reluctance did not stop courts from departing from the ordinary rules of construction if through their application the law were to become what Dickens' Mr. Bumble said it sometimes could be, "a ass, a idiot" (Dickens, Oliver Twist).[34]

---

[33] *Ibid.*, at para. 14. See also the dissenting judgment of McLauchlin J. in *R. v. McIntosh*, *supra*, note 24; *R. v. Paul*, *infra* note 34.

[34] *R. v. Paul*, [1982] S.C.J. No. 32, [1982] 1 S.C.R. 621, at 662 (S.C.C.).

Clearly the courts are not allowed, under the guise of interpretation, to substitute their own notions of good policy for those of the legislature. Even the strongest proponents of consequential analysis do not suggest that courts can blithely disregard the clear intentions of the legislature. In certain circumstances, however, they may reject the apparent clear meaning of a text. Under the plain meaning rule, courts must apply the text as written because textual meaning is considered the only safe indicator of legislative intent. Under the modern principle, however, the chief duty of the courts is to give effect to the intentions of the legislature in so far as these can be discerned with reasonable certainty, relying on both the text and the entire context. The entire context includes norms of rationality, fairness and the like which are shared by a community as well as evolving common law norms.

CURRENTLY RECOGNIZED CATEGORIES OF ABSURDITY

There are no limits to the ways in which norms of reason and justice can be violated. However, certain types of violation are frequently noted by the courts and form what might be called the standard categories of absurdity. These categories are not treated as formal presumptions of intent, but they operate in much the same way. They reflect persistent concerns singled out by courts when contemplating the consequences of applying legislation to particular facts. There can be significant overlap between the categories.

To be successful, a claim that certain consequences will follow from a particular interpretation must be grounded in real possibility. Evidence is admissible to establish the truth of this claim, but normally the courts rely on judicial notice in judging whether a claimed absurdity is convincing or "merely speculative". Courts may reject an absurdity-based argument if the facts on which it depends are unlikely to occur or are unlike those at issue in the case.[35]

Purpose is defeated. Statutory interpretation is founded on the assumption that legislatures are rational and competent agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way. An interpretation that would tend to frustrate legislative purpose or thwart the legislative scheme is likely to be labelled absurd.

In *R. v. Proulx*,[36] for example, the Supreme Court of Canada had to determine whether a conditional sentence was a "sanction other than imprisonment" within the meaning of s. 718.2(e) of the *Criminal Code*. Even though conditional sentences were defined in the Code as a sentence of imprisonment, the court concluded they were not a "sanction [of] imprisonment" for purposes of s. 718.2(e).

---

35 See *Air Canada v. Ontario*, [1997] S.C.J. No. 66, 148 D.L.R. (4th) 193 (S.C.C.); *C.P. Airlines v. Canadian Air Line Pilots Assn.*, [1993] S.C.J. No. 114, [1993] 3 S.C.R. 724, at 743-45 (S.C.C.).

36 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61 (S.C.C.).

As Lamer C.J. explained, if imprisonment were here given its technical sense as set out in Part XXIII of the Code, it would "fly in the face of Parliament's intention in enacting s. 718.2(e) — reducing the rate of incarceration....

> [I]f this interpretation of s. 718.2(*e*) were adopted, it could lead to absurd results in relation to aboriginal offenders. The particular circumstances of aboriginal offenders would only be relevant in deciding whether to impose probationary sentences, and not in deciding whether a conditional sentence should be preferred to incarceration. This would greatly diminish the remedial purpose animating Parliament's enactment of this provision, which contemplates the greater use of conditional sentences and other alternatives to incarceration in cases of aboriginal offenders.[37]

To avoid this absurd result, the Court interpreted the phrase "sanction other than imprisonment" to mean "sanction other than incarceration", an interpretation supported as well by the French language version of the provision.

Irrational distinctions. A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.

In *Hills v. Canada (A.G.)*,[38] for example, a majority of the Supreme Court of Canada rejected an interpretation of the *Unemployment Insurance Act* partly because it made entitlement to unemployment insurance benefits depend on an arbitrary circumstance. The provision to be interpreted disqualified claimants for unemployment insurance if they were out of work because of a strike which they themselves were "financing". The issue was whether a claimant could be said to be "financing" a strike at his workplace because some of his union dues automatically went to an international strike fund from which the striking workers at his plant were paid. The majority wrote:

> Here ... it might be out of sheer convenience that claimant's union strike funds were handled by the international union. They could just as well have been administered by the union local to which appellant belonged or deposited in a bank or other financial institution. There is no doubt that in such case, the claimant would have been entitled to unemployment insurance benefits as neither he nor his union could have been held to have financed the strike of the other local of the union. Could the legislature really have intended disentitlement to be dependant upon such a trivial fact? I think not.[39]

In *R. v. Paré*,[40] the Supreme Court of Canada was concerned with the meaning of the words "while committing" in s. 214(5)(b) of the *Criminal Code*. It

---

37 *Ibid.*, at para. 92. See also *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652, at para. 28 (S.C.C.).

38 [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

39 *Ibid.*, at 557-58, *per* L'Heureux-Dubé J.

40 [1987] S.C.J. No. 75, [1987] 2 S.C.R. 618 (S.C.C.).

classified as first degree murder any "murder ... when the death is caused by [a] person ... while committing an offence under section ... 156 (indecent assault on male)". The defendant argued that the words "while committing" meant that the homicide must be exactly simultaneous with the sexual offence. However, this argument was rejected because of the unacceptable consequences that would follow if exact simultaneity were required. Wilson J. wrote:

> The first problem with the exactly simultaneous approach flows from the difficulty in defining the beginning and end of an indecent assault. In this case, for example, after ejaculation the respondent sat up and put his pants back on. But for the next two minutes he kept his hand on his victim's chest. Was this continued contact part of the assault? It does not seem to me that important issues of criminal law should be allowed to hinge upon this kind of distinction. An approach that depends on this kind of distinction should be avoided if possible.
>
> A second difficulty with the exactly simultaneous approach is that it leads to distinctions that are arbitrary and irrational. In the present case, had the respondent strangled his victim two minutes earlier than he did, his guilt of first degree murder would be beyond dispute. The exactly simultaneous approach would have us conclude that the two minutes he spent contemplating his next move had the effect of reducing his offence to one of second degree murder. This would be a strange result. The crime is no less serious in the latter case than in the former.... An interpretation of s. 214(5) that runs contrary to common sense is not to be adopted if a reasonable alternative is available.[41]

In both *Hills* and *Paré*, the absurdity consisted in making the fate of the parties turn on something that appeared to be foolish or trivial; there was no rational connection between the consequence and the key determining factor — in *Hills*, the place where union funds were deposited, in *Paré*, the two-minute pause.

In *Berardinelli v. Ontario Housing Corp.*,[42] the Supreme Court of Canada had to decide whether s. 11 of Ontario's *Public Authorities Protection Act*, which imposed a short limitation period on actions against public authorities, applied to the defendant corporation in respect of all its activities or only those having a public dimension. Estey J. wrote:

> The Court is here confronted with at least two possible, but quite different, interpretations of s. 11. The one would impose on all actions involving the [defendant municipality] ..., however minor or miniscule, the protection of the limitation period established by s. 11. The imposition of this limitation period for this special class would have the direct result of producing two categories of housing units in the community: the one operated by persons having a statutory mandate to which a six-month limitation period would extend; and the other operated by a person without statutory authority to which the general limitation period would apply. Of course both housing projects would appear identical in fact to the attending public whose rights are directly affected by the distinction.[43]

---

41 *Ibid.*, at 631. See also *Re Rizzo and Rizzo Shoes Ltd.*, *supra* note 5, at 39 and 41; *Fillion v. Degen*, [2005] M.J. No. 155, at para. 13 (Man. C.A.).

42 [1978] S.C.J. No. 86, [1979] 1 S.C.R. 275 (S.C.C.).

43 *Ibid.*, at 280.

To avoid creating "different conditions of owner liability for two apparently similar housing facilities,"[44] the Court opted for the other interpretation. In this case, although there might have been grounds for treating public authorities differently from private entrepreneurs, the Court clearly judged them to be inadequate or inapplicable to these circumstances.[45]

Misallocation and disproportion. A variation on irrational distinction occurs when an interpretation leads to an outcome in which persons deserving of better treatment receive worse treatment or vice versa. In *R. v. Wust*,[46] the Supreme Court of Canada had to determine whether the discretion to give credit for pre-sentencing custody conferred on a sentencing court by s. 719(3) of the *Criminal Code* applied to mandatory minimum sentences. Arbour J. wrote:

> If this Court were to conclude that the discretion provided by s. 719(3) ... was *not* applicable to the mandatory minimum sentence of s. 344(a), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders.... Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s. 344(a), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation ... that would reward the worst offender and penalize the least offender is surely to be avoided.[47]
>
> [Author's emphasis]

---

44 *Ibid.*, at 283-84. For other examples of absurdity defined by irrational distinctions, see *Canada v. Antosko*, [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312, at para. 42 (S.C.C.); *Rawluk v. Rawluk*, [1990] S.C.J. No. 4, [1990] 1 S.C.R. 70, at 94-95 (S.C.C.); *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554, at 673, *per* Lamer J. (S.C.C.); *Slattery (Trustee of) v. Slattery*, [1993] S.C.J. No. 100, [1993] 3 S.C.R. 430, at 451-54 (S.C.C.).

45 Compare *R. v. Biniaris*, [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381 (S.C.C.), where the Crown claimed that it was absurd to interpret the appeal provisions of the *Criminal Code* as granting an appeal from unreasonable convictions, but no corresponding appeal from unreasonable acquittals. The Court responded, at 402-03, by pointing out different policy considerations apply to appeals of convictions and appeals of acquittals, and therefore it was not irrational to treat them differently.

46 [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 (S.C.C.).

47 *Ibid.*, at para. 42. See *R. v. Arthurs*, [2000] S.C.J. No. 20, [2000] 1 S.C.R. 481, at 486 (S.C.C.), and *R. v. Arrance*, [2000] S.C.J. No. 21, [2000] 1 S.C.R. 488, at 492 (S.C.C.), dealing with the same issue. In these cases, the Court emphasizes "the absurdity and the unfairness that results from an interpretation of the *Criminal Code* that precludes granting credit for time served prior to sentencing." See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] S.C.J. No. 68, [2003] 3 S.C.R. 228, at para. 76 (S.C.C.), where the appellant's attempt to rely on s. 18(2) of Quebec's *Charter of Human Rights and Freedoms* was rejected because the Court was "not satisfied that [by enacting s. 18(2)] the legislature intended to provide people convicted of a penal or criminal offence with more job security than accused persons."

Interpretations that result in a lack of fit between conduct and consequences may be rejected as absurd. In *R. v. Hinchey*,[48] for example, the issue was application of s. 121(1)(c) of the *Criminal Code*, which made it an offence for government employees to accept "a commission, reward, advantage or benefit of any kind". Cory J. wrote:

> The section could not have been designed to make a government clerk or secretary guilty of a crime as a result of accepting an invitation to dinner or a ticket to a hockey game from one known to do business with government.[49]

Along similar lines L'Heureux-Dubé J. wrote:

> My colleague is rightly concerned about this section imposing a criminal sanction for a benefit received which is so minimal it clearly does not warrant such a harsh reprisal. I agree that such an interpretation would clearly be absurd, and as such is not one which should be followed.[50]

Contradictions and anomalies. From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity. Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labelled absurd.

In *Canada (Attorney-General) v. Public Service Alliance of Canada*,[51] for example, the issue was whether the Public Service Staff Relations Board was correct in treating persons who provided services to the federal government under long-term government contracts as "employees" within the meaning of the *Public Service Staff Relations Act*. A majority of the Supreme Court of Canada said no because treating these persons as employees would disrupt the labour relations scheme established through the joint operation of several federal Acts. Sopinka J. wrote:

> In the scheme of labour relations which I have outlined above there is just no place for a species of *de facto* public servant who is neither fish nor fowl. The introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.[52]

Sopinka J. went on to describe the confusion that would result if the suggested interpretation were accepted. The workers would be subject to contradictory terms and conditions of employment and contradictory bargaining regimes. Such

---

48 [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128 (S.C.C.).

49 *Ibid.*, at 1190.

50 *Ibid.*, at 1160-61. See also *Ontario v. Canadian Pacific Ltd.*, *supra* note 4, *per* Gonthier J. at 1082: "since the legislature is presumed not to have intended to attach penal consequences trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision."

51 [1991] S.C.J. No. 19, [1991] 1 S.C.R. 614 (S.C.C.).

52 *Ibid.*, at 633.

basic matters as who would pay their salary and what deductions would be made at source would be unclear.[53] To suppose that such confusion was intended would be absurd.

Interpretations are also labelled absurd if they create an inconsistency or anomaly when considered in the light of some other provision in the statute. In *Swan v. Canada (Minister of Transport)*,[54] for example, the court had to interpret s. 3.7(4) of the *Aeronautics Act* which empowered the Minister of Transport to "establish, maintain and carry out, at aerodromes, ... such security measures as may be prescribed by regulations of the Governor in Council or such security measures as the Minister considers necessary...". The Minister argued that under this provision he had an administrative power to establish security measures equal in scope to those which might be prescribed by the Governor in Council by regulation. Reed J. acknowledged that this interpretation was plausible on a hasty reading of the section. But she went on to say:

> Such a result does not, however, accord well with the other provisions of the Act. For example, s. 3.3(1) allows the Minister to subdelegate to members of the R.C.M.P. *or to any other person any* of his powers under the Act. It is hard to conclude that such a broad subdelegation of authority would have been prescribed if the Minister's powers under s. 3.7(4) were equal in scope to the regulation-making powers of the Governor in Council.[55]
>
> [Emphasis in original]

The interpretation favoured by the Minister was rejected because its implications, in light of other provisions in the Act, were unacceptable.

Hardship and inconvenience. Another recurring ground on which outcomes are judged to be absurd is pointless inconvenience or disproportionate hardship. While the legislature often imposes burdens and obligations on persons as part of the means by which its objects are achieved, when these seem greatly disproportionate to any advantages to be gained, and still more when these appear to serve no purpose at all, they may be judged absurd.

In *Québec (Services de santé) v. Québec (Communauté urbaine)*,[56] for example, the Supreme Court of Canada had to interpret the provisions of Quebec's *Code of Civil Procedure* governing the filing of incidental appeals. Article 499 of the Code provided that a party wishing to appeal must file an appearance at

---

53 *Ibid.*, at 633-34.

54 [1990] F.C.J. No. 114, 67 D.L.R. (4th) 390, at 409 (F.C.T.D.).

55 *Ibid.*, at 410. See also *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.), where La Forest J. concluded at 141 that the words "Her Majesty" in s. 90(1) of the *Indian Act* did not refer to Her Majesty in right of a province because if this interpretation were adopted it would be impossible to make any sense of s. 90(2); *McKibbon (Rodger, David) v. R.*, [1984] S.C.J. No. 8, [1984] 1 S.C.R. 131 (S.C.C.), where Lamer J. wrote at 155: "giving to those words the meaning suggested by appellant ... would lead to an absurdity.... Parliament could not have intended to abolish under s. 505(4) the power it had conferred upon the prosecutor under s. 504(*b*)."

56 [1992] S.C.J. No. 14, [1992] 1 S.C.R. 426 (S.C.C.).

the office of the Appeal Court. Article 500 provided that a party could also "make an incidental appeal, without formality other than a declaration, served on the adverse party and filed at the same time as his written appearance." The appellant in the case, wishing to make an incidental appeal, served the required declaration on the adverse party and then filed it in the office of the trial court. The issue was whether this satisfied the filing requirement set out in art. 500. The Court ruled that the filing requirement imposed by art. 500 contemplated filing at the office of the Court of Appeal. L'Heureux-Dubé J. wrote:

> [I]t would be incongruous, to say the least, if the appearance and incidental appeal, which, under art. 500 *C.C.P.*, are to be filed *at the same time*, were required to be filed in two different places which, depending on the judicial district, may be a considerable distance apart. In my view, an interpretation that leads to such a result is untenable.[57]
>
> [Emphasis in original]

Even though the *Code of Civil Procedure* is to be interpreted in a non-formalistic way, so as to facilitate the efficient disposition of suits on their merits, this absurdity was too much to ignore.

Interference with the efficient administration of justice. Another important category of absurdity is based on the efficient and orderly administration of justice. The courts have always regarded law enforcement as a matter particularly suited to judicial supervision. In exercising their supervisory role various principles based on the rule of law have been developed to protect individual subjects from arbitrary law enforcement. Apart from this concern for the individual, however, and potentially opposed to it, is a concern for values like efficiency and effectiveness and a desire to promote the smooth operation of law enforcement machinery. Interpretations that interfere with the operation of this machinery or render the enforcement of the law ineffective may be labelled absurd.[58]

In *R. v. Budget Car Rentals (Toronto) Ltd.*,[59] for example, the Ontario Court of Appeal had to interpret s. 460(8)(b) of Ontario's *Municipal Act* which provided that the owner of a vehicle "is liable to any penalty" provided for in any parking by-law made under the section. The respondent argued that although this language might render the owner of a vehicle liable to pay a fine, it did not create an offence of which the owner could be found guilty. The court rejected this argument on the following grounds:

---

57 *Ibid.*, at 437. See also *Poulin v. Serge Morency et Associés Inc.*, [1999] S.C.J. No. 56, [1999] 3 S.C.R. 351, at 366-68 (S.C.C.).

58 Since 1982, of course, the competition between the protection of individual rights and efficient law enforcement must take Charter rights and remedies into account.

59 [1981] O.J. No. 2888, 20 C.R. (3d) 66 (Ont. C.A.), *per* Howland J. See also *Bisallon v. Concordia University*, [2006] S.C.J. No. 19, [2006] 1 S.C.R. 666, at paras. 94-96 (S.C.C.); *R. v. Deruelle*, [1992] S.C.J. No. 69, [1992] 2 S.C.R. 663, at 675 (S.C.C.); *R. v. Chase*, [1987] S.C.J. No. 57, [1987] 2 S.C.R. 293, at 302-03 (S.C.C.); and *R. v. B.(G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 28 (S.C.C.), where interpretations were rejected because they would unduly hamper the enforcement process.

> [I]f the respondent's interpretation is accepted ... then the only way in which the penalty could be enforced against the owner, other than by amending the statute, would be for the appellant to endeavour to recover the penalty in Small Claims Court. This would be a highly impractical remedy. The tremendous volume of parking tags issued, coupled with the need for street-by-street surveillance to obtain the driver's name, would make the by-law unenforceable for all practical purposes.[60]

To avoid this result, the court accepted the interpretation proposed by the Crown even though this was contrary to the principle that ambiguities in penal legislation should be resolved in favour of the accused.

Interpretations that would interfere with the proper exercise of judicial discretion,[61] would render the task of interpretation too onerous or arbitrary,[62] or would permit easy avoidance or abuse of the legislation[63] may be dismissed as absurd. So may interpretations that would encourage litigation or unduly tax the resources of the court.[64]

Consequences that are self-evidently irrational or unjust. There is a residual category of absurdity consisting of consequences that violate norms of what is

---

60 *Ibid.*, at 82. See also *R. v. Bernshaw*, [1994] S.C.J. No. 87, [1995] 1 S.C.R. 254, at 290 (S.C.C.), where the Court rejected an interpretation that would have invalidated the alcohol consumption test if police officers waited to administer the test and equally if they didn't — "an intolerable situation [which] would emasculate the statutory scheme...."

61 See, for example, *R. v. Fitzgibbon*, [1990] S.C.J. No. 45, [1990] 1 S.C.R. 1005, at 1017 (S.C.C.) (proposed interpretation rejected because it "would severely limit the role of the sentencing judge which is so valid to the administration of criminal law"); *R. v. Thompson*, [1990] S.C.J. No. 104, [1990] 2 S.C.R. 1111, at 1172 (S.C.C.) (proposed interpretation rejected because it "would presuppose that a judge would exercise his discretion to issue a renewal when satisfied that it was not in the best interests of justice to do so").

62 See, for example, Cory J. in *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (rejecting an interpretation because it would render the concept in question too vague and open-ended); McLachlin J. in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, at 1412-13 (S.C.C.) (rejecting proposed interpretation because it would require courts or juries to make determinations on questions of morality that they are not in a position to make); see also *Pfizer Co. Ltd. v. Deputy M.N.R.*, [1975] S.C.J. No. 126, [1977] 1 S.C.R. 456, at 461-62 (rejecting proposed interpretation because it would create a slippery slope).

63 See, for example, *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41, [1992] 1 S.C.R. 986, at 1005 *per* Iacobucci J. (S.C.C.): "Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny the employees their common law right...." See also *Canada (M.N.R.) v. Crown Forest Industries*, [1995] S.C.J. No. 56, [1995] 2 S.C.R. 802, at 826-27 (S.C.C.).

64 See, for example, *Rawluk v. Rawluk*, *supra* note 44, at 363, *per* McLachlin J. dissenting (proposed interpretation rejected because it would add uncertainty and promote litigation featuring detailed inquiries into matters difficult to prove and it might upset the operation of other legal doctrines). See also *C.B.C. v. Canada (Labour Relations Board)*, [1995] S.C.J. No. 4, [1995] 1 S.C.R. 157, at 182 (S.C.C.), where majority rejected an interpretation lest "virtually every unfair labour practice complaint under this section... would be subject to review by the courts on a standard of correctness."

fair, good or sensible. In *Grini v. Grini*,[65] for example, the court was called on to interpret a provision in the federal *Divorce Act* which permitted a claim for maintenance by persons over the age of 16 if they were unable "by reason of illness, disability or other cause" to provide themselves with the necessaries of life. The issue was whether the words "other cause" were broad enough to include attendance at school by a 17-year-old claimant. The defendant in the case argued that the words "other cause" were limited to involuntary incapacities similar to illness and disability. The court did not accept this interpretation:

> If that is correct, the education of many a child whose attendance at school depends absolutely upon the receipt of maintenance will be cut off in mid-term because of the unfortunate accident of a sixteenth birthday. I find it hard to believe that this is what Parliament intended.[66]

The court here took it for granted that attendance at school is a social good that is sufficiently valued by the community to justify the broader reading of the phrase "other cause".

Similarly in *R. v. McCraw*,[67] the Court had to consider whether a threat of rape was a threat to cause serious bodily harm within the meaning of s. 264.1 of the *Criminal Code*. This section made it an offence to cause serious bodily harm to any person, to damage real or personal property or to injure an animal or bird that is the property of any person. In concluding that a threat of rape was indeed contrary to the section, the Court noted:

> [I]t would be ludicrous and contrary to the purpose of s. 264.1 to interpret the section as criminalizing the threat to damage a piece of property or a pet while permitting a threat to rape a woman on the grounds that it did not constitute a threat to commit serious bodily harm.[68]

The Court here assumed that rape is a more serious and reprehensible crime than damaging property or injuring a pet; it was not necessary to explain or prove the point because it was so obviously true.

USES OF CONSEQUENTIAL ANALYSIS

The court's jurisdiction to avoid absurd results parallels and complements its jursidiction to promote legislative purpose. Whereas purposive analysis justifies the preference for interpretations that lead to good consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to bad consequences, which are presumed not to be intended. Like purposive analysis, consequential analysis should be part of every effort to apply

---

65 (1969), 5 D.L.R. (3d) 640 (Man. Q.B.).

66 *Ibid.*, at 644.

67 [1991] S.C.J. No. 69, [1991] 3 S.C.R. 72 (S.C.C.). See also *Skoke-Graham v. R.*, [1985] S.C.J. No. 6, [1985] 1 S.C.R. 106, at 119 (S.C.C.).

68 *Ibid.*, at 85.

legislation to particular facts. It may be relied on to help resolve any type of problem, from ambiguity or vagueness, to overlapping provisions, to the temporal operation of legislation.

Resolving ambiguity. When absurdity is relied on to resolve ambiguity, it works though a process of elimination. This effect is illustrated in the judgment of the Supreme Court of Canada in *Cardinal v. R.*[69] In that case the Court was concerned with s. 49(1) of the *Indian Act* which required certain acts affecting the property of an Indian band to be "assented to by a majority ... of the male members of the band of the full age of twenty-one years, at a meeting or council thereof". This provision was ambiguous and could be read in several ways, including the following:

1. A majority of all adult male members must attend a meeting and vote in favour of the surrender.
2. A majority of all resident adult male members must attend a meeting and vote in favour of the surrender.
3. A majority of all resident adult male members who attend a meeting must vote in favour of the surrender.
4. A majority of the resident adult male members who attend a meeting and vote must vote in favour of the surrender.

Interpretation (1) was rejected because it was inconsistent with s. 49(2) which disqualified non-resident band members from voting. It would make no sense for Parliament to count non-residents as part of the majority in one subsection, thereby giving them a negative vote, and then disqualify those same non-residents from voting in the very next subsection.[70] Interpretations (2) and (3) were rejected because they "would put undue power in the hands of those members who, while eligible, do not trouble themselves to attend, or if in attendance, to vote; ... it would give undue effect to the indifference of a small minority."[71] Such a result was judged to be both irrational and unfair. Interpretation (4), on the other hand, avoided these unacceptable consequences and was consistent with the common law method of determining the will of groups. Thus, through a process of eliminating absurdity, the Court arrived at an appropriate interpretation.[72]

Justifying a restrictive interpretation. Absurdity is often relied on to justify giving a restricted application to a provision. As explained by Gonthier J. in *Ontario v. Canadian Pacific Ltd.*:

---

69 [1982] S.C.J. No. 22, [1982] 1 S.C.R. 508 (S.C.C.).

70 *Ibid.*, at 515-16.

71 *Ibid.*, at 517-18.

72 See also *Mitchell v. Peguis Indian Band, supra* note 55; *Color Cove Ltd. v. Canada Permanent Trust Co.*, [1986] O.J. No. 2939, 28 D.L.R. (4th) 639, at 640 (Ont. Div. Ct.).

> One method of avoiding absurdity is through the strict interpretation of general words.... Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended.[73]

This technique is nicely illustrated in *Goodman v. Criminal Injuries Compensation Board and Attorney General for Manitoba*.[74] In that case a claimant sought compensation under Manitoba's *Criminal Injuries Compensation Act* for injuries sustained when he was trying to protect his wife from a criminal assault that occurred in Nevada. Subsection 6(1) of the Act reserved recovery to (a) victims of crimes that occurred in Manitoba or (b) persons injured while attempting to

> (i) arrest any person or preserve the peace, or
>
> (ii) assist a peace officer in carrying out his duties with respect to law enforcement, in Manitoba, or
>
> (iii) prevent lawfully the commission of a criminal offence or suspected criminal offence.

The claimant argued that since the words "in Manitoba" did not appear in clauses (i) and (iii), those clauses must extend to events occurring outside Manitoba; and even if the failure to mention Manitoba in those clauses was a legislative oversight, it is not for the court to fill gaps in the legislature's scheme. The Manitoba Court of Appeal responded to this argument by invoking the presumption against absurd results:

> I agree we should not fill in gaps in legislation. With respect, however, we are not confronted in this case with a gap. We have to construe s. 6(1)(*b*)(i) and s. 6(1)(*b*)(iii). Standing alone, without the implication of any qualification, the sections would give a right to apply for compensation to anyone in the world for acts or omissions anywhere in the world. This would be absurd. It is unthinkable that the legislature of Manitoba intended to give a right of compensation to all citizens of Russia, China, Jamaica, Uganda, etc., who are injured in those countries as a result of endeavouring to preserve the peace. If the subsections are to have any reasonable construction, it is necessary to imply some qualification: either they are limited by the residence of the applicant or they are limited by the place of occurrence. The implying of one of these qualifications is not a matter of filling in gaps of legislation, but a matter of construction in accordance with well settled rules.[75]

---

73 *Supra* note 4, at 1082.

74 [1980] M.J. No. 187, [1981] 2 W.W.R. 749 (Man. C.A.).

75 *Ibid.*, at 753. For other examples of restrictive interpretation, see *Re Vabalis*, [1983] O.J. No. 2388, 2 D.L.R. (4th) 382, at 383 (Ont. C.A.), in which the court refused to apply s. 4(1) of the *Change of Name Act* to an applicant who came within the clear meaning of the provision because "requiring a change of name of the applicant's spouse in the present situation would lead to an obvious absurdity"; *Canadian Fishing Co. Ltd. v. Smith*, [1962] S.C.J. No. 10, [1962] S.C.R. 294, at 309 (S.C.C.), in which the Court qualified the obligation of the Director of Investigations under the *Combines Investigation Act* to prepare a statement of evidence and to

The court here limits the scope of the provision so that it does not apply to facts that otherwise would come within the ordinary meaning of the words. Although this departure from ordinary meaning is significant, it appears to be well justified by the compelling nature of the absurdity to be avoided.

There are several ways to characterize this type of interpretive effort. One could say that the court paraphrased the provision to make express a qualification that was implicit in the legislation; or it applied well established presumptions of intent, namely, the legislature does not intend its provisions to have extra-territorial application nor does it intend to produce absurd consequences; or it corrected an obvious drafting mistake.[76] Arguably, this last explanation is the most accurate. But all are permissible interpretive techniques.

Justifying an expansive interpretation.[77] The use of absurdity to justify an expansive reading of a provision is illustrated by the judgment of Houlden J.A. in *Campbell (G.T.) & Associates Ltd. v. Hugh Carson Co.*[78] This case turned on the meaning of the word "creditor" in Ontario's *Business Corporations Act.* Under s. 252 an action could be brought against a dissolved corporation within two years of its dissolution. Under s. 253 an action could be brought by "creditors" of the dissolved corporation within the same two-year period against any shareholder who received property from the corporation by way of distribution; each shareholder was liable to the extent of the property received. The issue was whether a plaintiff in an action for unliquidated damages brought against a dissolved corporation under s. 252 was a "creditor" within the meaning of s. 253 and therefore entitled to bring an action against former shareholders. Lacourcière J.A., dissenting, thought that the word "creditor" should be given its usual common law meaning, namely a person to whom a debt is owing.[79] However, a majority of the court rejected this view. Houlden J.A. wrote:

> If the interpretation that Lacourcière, J.A., has given to "creditor" is correct, then the right given by s. 252(1)(*b*) to a person with an unliquidated claim for damages is for all intents and purposes worthless. The judgment obtained against the corporation can only be satisfied by recovery from the shareholders to whom the

---

submit it "to each person against whom an allegation is made [therein]" by notionally adding the words "only in so far as such evidence relates to the allegations made against such person".

76 When the provision was first enacted, it ended after clause (ii). In that initial enactment, the words "in Manitoba" were mistakenly included in clause (ii) instead of being placed outside both clauses at either the beginning or the end of the paragraph (b). This mistake was exacerbated when clause (iii) was added by way of amendment. In correcting this mistake, the court does not fill a gap in the legislative scheme because the words it adds narrow rather than expand the scope of the legislation. For an explanation of the distinction between mistakes and gaps, see Chapter 6.

77 See also *Grini v. Grini*, *supra* note 67, and *R. v. McCraw*, *supra* note 65.

78 [1979] O.J. No. 4248, 99 D.L.R. (3d) 529 (Ont. C.A.).

79 *Ibid.*, at 536. Lacourcière J.A. acknowledged the problem identified by the majority, but found (at 538) that "[t]he interpretation does not result in any obvious inconsistency or absurdity which requires corrective interpretation."

> corporation's property has been distributed; and if the two-year period fixed by s. 253 has elapsed, no recovery will be possible.[80]

Houlden J.A. pointed out that although it might be theoretically possible for a plaintiff who commences an action under s. 252 to recover judgment against the corporation within two years, the chances of doing so in practice would be nil.[81] He therefore concluded:

> If the word "creditor" in s. 253 is given its ordinary common law meaning, it leads, in my opinion, to an unreasonable and unjust result, and it renders s. 252(1)(*b*) largely inoperative. To avoid that result ... "creditor" in s. 253 cannot be restricted to its ordinary common law meaning of a person to whom a debt is owing but must be given an extended meaning of a person with a claim coming within s. 252.[82]

Determining scope of power or discretion. In *Zingre v. R.*,[83] the jurisdiction to avoid absurdity was relied on to help determine the scope of judicial discretion conferred by s. 43 of the *Canada Evidence Act*. Under this section a court could order the examination of witnesses in Canada to obtain evidence for legal proceedings in a foreign country. Section 43 provided:

> Where ... any court or tribunal of competent jurisdiction ... in any foreign country, before which any ... criminal matter is pending, is desirous of obtaining the testimony ... of a party or witness within [a Canadian] jurisdiction ... the court or judge may, in its or his discretion, order the examination ... of such party or witness....

An examination of witnesses in Canada was sought by Swiss authorities who were investigating a fraud perpetrated against the Government of Manitoba by Swiss nationals. The investigation was instigated at the request of the Canadian government. In seeking the examination of witnesses, the Swiss authorities acted in accordance with a treaty between Switzerland and Great Britain which was applicable in Canada. However, their s. 43 application was resisted on the grounds that the power to order an examination could not be exercised to assist what were merely pre-trial investigatory procedures conducted by magistrates in Switzerland. In rejecting this limitation, Dickson J. wrote:

> In my opinion, the circumstances of the present case are such that the Court should exercise its discretion in favour of the investigating Magistrates. I reach this conclusion because the contrary view would result in the purpose of the 1880 Treaty being completely frustrated: Article I of that Treaty is designed to ensure that Swiss nationals who commit crimes in Great Britain, or in Canada, are prosecuted in Switzerland.... It will be impossible for the Swiss authorities to ful-

---

80 *Ibid.*, at 539.

81 *Ibid.*

82 *Ibid.* See also *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72, [2005] 3 S.C.R. 425, at para. 27 (S.C.C.).

83 [1981] S.C.J. No. 89, [1981] 2 S.C.R. 392 (S.C.C.).

> fil their obligations unless they are permitted to gather evidence at the scene of the alleged offence.... In short, if we prohibit the Swiss authorities from gathering evidence here, we will effectively make it impossible for them to conduct the prosecution which Canadian authorities asked them to undertake.... The only beneficiaries from this absurdity would be the accused who would be exempted from answering for their alleged offences.[84]

In exercising their powers under the section Canadian courts normally decline to order examinations to assist pre-trial proceedings. Given the consequences of refusing in this case, however, it was appropriate to respond differently.

Similarly, in *Lyons v. R.*, Estey J. relied on the following argument to justify a broad reading of the *Criminal Code* provisions relating to the authorization of electronic surveillance:

> When seeking the proper interpretation of these provisions one should ask if Parliament must be taken as intending to give an authority to the investigating forces which could not be put to use. The invocation of powers granted under Part IV.1 in aid of crime detection serves no purpose if the authorization granted relates only to isolated pieces of equipment without any direction or authorization that it be employed in association with authorized devices for interception.... It is one thing to leave too much to the discretion of the investigative agency but quite another to stultify the whole undertaking.[85]

To avoid the absurdity of supposing that Parliament meant to confer powers on investigating agencies that could not be used in practice, the majority of the court concluded that Part IV.1 of the Code by necessary implication authorized entry onto private property for the purpose of installing interception devices.

Other uses. In *R. v. Chase*,[86] the Supreme Court of Canada had to decide whether the offence of sexual assault, introduced into the *Criminal Code* in 1983, required the Crown to prove specific intent. In deciding that it did not, the court relied on the following reasoning:

> To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment. Moreover, there are strong reasons in social policy which would support this view. To import an added element of specific intent in such offences would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences

---

84 *Ibid.*, at 406-07. See also *R. v. B. (G.) (No. 1)*, [1990] S.C.J. No. 59, [1990] 2 S.C.R. 3, at 28-29 (S.C.C.), where Wilson J. warned against imposing too restrictive a standard on the reception of children's testimony lest serious offences go unpunished: "it is reasonable to assume that the legislator did not intend an accused to benefit from the youthful age of his victim by placing unnecessary impediments in the way of prosecuting offences against small children".

85 [1984] S.C.J. No. 63, [1984] 2 S.C.R. 633, at 691 (S.C.C.). See also *R. v. Hasselwander*, [1993] S.C.J. No. 57, [1993] 2 S.C.R. 398 (S.C.C.), where the Court rejected an interpretation to avoid defeating the purpose of legislation.

86 [1987] S.C.J. No. 57, [1987] 2 S.C.R. 293 (S.C.C.).

> requiring only the minimal intent to apply force.... For these reasons, I would say that the offence will be one of general rather than specific intent.[87]

The presumption against absurd consequences has also been invoked to help the courts determine whether the Crown is bound by a statute,[88] whether a provision has retroactive effect[89] and the proper relation between conflicting provisions within a statute.[90]

---

87 *Ibid.*, at 303.

88 See *CNCP Telecommunications v. Alberta Government Telephones*, [1989] S.C.J. No. 84, [1989] 2 S.C.R. 225, at 281 (S.C.C.): "The words 'mentioned or referred to' in [s. 16] are capable of encompassing ... an intention to bind where the purpose of the statute would be 'wholly frustrated' if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced."

89 See *Re Cadillac Fairview Corp. and Allin et al.*, [1979] O.J. No. 4270, 7 R.P.R. 287 (Ont. H.C.J.), in which the court concluded (at 296) that the new version of Ontario's *Condominium Act* could not have a retroactive effect because "to hold otherwise would place a windfall in the hands of the purchaser and rewrite the agreement between the parties".

90 See *Kannata Highlands Ltd. v. Kannata Valley (Village)*, [1987] S.J. No. 719, 61 Sask. R. 292, at 297 (Sask. C.A.), followed by *Marathon Realty Co. v. R.*, [1989] S.J. No. 584, 64 D.L.R. (4th) 241, at 252 (Sask. C.A.), in which the court adopted a strained reading of the words "shall have regard to" to avoid the absurdity of permitting an appellate Board to undermine the work of a Commission created under the same legislation.

> **75 (1)** Where a *statutory condition* is not applicable ...
>
> **76** ... the *statutory conditions* need not be printed ... if ...
>
> **102** Where there has been imperfect compliance with a *statutory condition* ...
>
> **[167] (2)** The conditions set forth in the Schedule shall be deemed to be part of every contract ... and shall be printed ... with the heading "*Statutory Conditions*" ...
>
> **[168] (2)** The ... manner of giving the notice ... shall be the same as notice ... under the *statutory conditions* in the contract.
>
> The latter demonstrates how the legislature is not shy to explicitly refer to the specific type of condition in other sections of the Act. This additional factor further steers the analysis toward the non-application of s. 171 to statutory conditions.[18]
>
> [Emphasis in original]

Even though the *Insurance Act* is a sprawling document that has been amended many times and is often inconsistent in its wording, Bastarache J. was able to document a pattern of consistent reference and to some extent consistent treatment in the case of statutory conditions. This pattern was relied on to justify his inference that the legislature did not intend to include this type of condition in the relief accorded "stipulations, conditions and warranties" in s. 171.

The legislative scheme. When analyzing the scheme of an Act, the court tries to discover how the provisions or parts of the Act work together to give effect to a plausible and coherent plan. It then considers how the provision to be interpreted can be understood in terms of that plan. The court's reasoning is described by Greschuk J. in *Melnychuk v. Heard*:

> The court must not only consider one section but all sections of an Act including the relation of one section to the other sections, the relation of a section to the general object intended to be secured by the Act, the importance of the section, the whole scope of the Act and the real intention of the enacting body.[19]

The fundamental presumption in scheme analysis is that modern legislation (unlike much early legislation) is not just a series of rules. It typically includes a mix of interpretation provisions, application provisions, office- and institution-establishing provisions, power conferring provisions, dispute resolution provisions and transitional provisions as well as traditional prohibitions and entitlements, all of which are meant to operate together in a particular institutional setting. The fundamental skill in scheme analysis is being able to grasp and explain the basic structure on which the Act is built and how the various parts and provisions were meant to function within this structure to achieve the desired

---

[18] *Ibid.*, at paras. 96-97. See also *R. v. C.D.; R. v. C.D.K.*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668 (S.C.C.).

[19] [1963] A.J. No. 72, 45 W.W.R. 257, at 263 (Alta. S.C.).

At the federal level, regulations are broadly defined in the *Interpretation Act* to include orders, rules, tariffs, proclamations, by-laws and other instruments made under a power conferred by an Act.[27] Similar definitions are found in provincial Acts. In these and other contexts, the term is thus used as a loose synonym for delegated legislation.

Interpretation of regulations. It is well established that delegated legislation, like Acts of the legislature, must be interpreted in accordance with Driedger's modern principle.[28] Generally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations. There are some differences, however. As explained by Binnie J. and Bastarache J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*,[29] regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions.[30] Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read.

In the *Bristol-Myers* case, the Court rejected the "plain meaning" of s. 5(1.1) of the *Patented Medicines (Notice of Compliance) Regulations* in favour of an interpretation that harmonized the regulatory provision with Act as a whole. Bristol-Myers had been issued a patent for a drug Taxol which contained paclitaxel, a medicine in the public domain. Biolyse subsequently discovered a new way to produce paclitaxel and applied to the Minister of Health for a notice of compliance, which was a precondition for marketing its product. To obtain the notice Biolyse prepared a "new drug submission". Because it was relying on a new botanical source for the paclitaxel, it could not make an abbreviated submission referencing the work done by Bristol-Myers.

Bristol-Myers alleged that Biolyse was in breach of s. 5(1.1) of the Notice of Compliance Regulations which applied to persons meeting the following description:

> 5(1.1) ... where a person files or has filed a submission for a notice of compliance in respect of a drug that contains a medicine found in another drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person ....

---

27 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2. See also the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 2.

28 See, for example, *Contino v. Leonelli-Contino*, [2005] S.C.J. No. 65, [2005] 3 S.C.R. 217, at para. 19 (S.C.C.); *Glykis v. Hydro-Québec*, [2004] S.C.J. No. 56, [2004] 3 S.C.R. 285, at para. 5 (S.C.C.).

29 [2005] S.C.J. No. 26, [2005] 1 S.C.R. 533 (S.C.C.).

30 *Ibid.*, at para. 38 (Binnie J.) and paras. 97-101 (Bastarache J. dissenting). See also *Hamid v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 896, at para. 20 (F.C.A.).