The Statutory Interpretation Jurisprudence of Sir Lyman Duff

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I. INTRODUCTION

The so-called "plain meaning" approach to interpretation, said to arise at a particular point in Canadian history, is much maligned.[1] One scholar, writing in the heyday of legal realism, woefully complained that "[r]egret has been expressed that the fundamental interpretation of statutes *pro bono publico* which characterized the process of interpretation in the days of Plowden and Coke has given way to the new formalism".[2] While the common law has accommodated multiple methodologies of interpretation,[3] Canada's modern approach — which relies on text, context and purpose — is framed as a reaction to the flaws with plain meaning interpretation.[4]

This simple story may be compelling, but it is arguably incomplete. In part, it may arise from a lack of appreciation of Canadian judicial history, or a uniquely Canadian reticence to understand our own distinct story. Indeed, we need not consult ancient philosophers or medieval jurists to understand our law. One of Canada's greatest jurists — Chief Justice Sir Lyman Duff — advanced a theory of judicial interpretation that puts Canada's so-called "modern approach" to statutory interpretation in its best light. The modern approach is open to criticism because "[t]here is no sequential ordering of the modern principle factors, beyond beginning with the text of the statute to be interpreted".[5] On some accounts, pragmatism may be the best explanation of what the courts *in fact* do under the modern approach.[6] Far from

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1 See, *e.g.*, Sherwin Lyman, "The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation" (1969) 3:2 Man. L.J. 53; John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can. Bar Rev. 1; J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936) 1:2 U.T.L.J. 286 at 289.

2 E. Russell Hopkins, "The Literal Canon and the Golden Rule" (1937) 15:9 Can. Bar Rev. 689 at 689 [citations omitted].

3 Eric Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985) 35 U.T.L.J. 113 at 116-123.

4 Some representative recent cases of this proposition: *R. v. Williams*, [2020] O.J. No. 1779, 2020 ONSC 206 at para. 20 (Ont. S.C.J.); *New Minas Baptist Church v. Director of Assessment*, [2017] N.S.J. No. 94, 2017 NSSC 72 at para. 29 (N.S.S.C.).

5 *R. v. Walsh*, [2001] O.J. No. 602, 2021 ONCA 43 at para. 139 (Ont. C.A.) (Miller J.A.).

6 See, *e.g.*, Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999) 30:2 Ottawa L. Rev. 175 at 178.

being an outdated or theoretically empty plain meaning approach, Chief Justice Duff's interpretive jurisprudence implicitly advances a theory of legislative action that carries interpretive consequences for us by enriching our application of the modern approach. Specifically, his jurisprudence identifies the distinct contribution that statutory texts make to the law and explains why and how statutory texts constrain interpretation. This is not literalism, but it shows why and how the text carries juridical and normative weight in interpretation.

This short paper explains Chief Justice Duff's statutory interpretation jurisprudence. It is not a comprehensive analysis of all of the cases he decided in this area of the law. However, it sets out several themes that underlie at least some of his decisions. It first outlines the common, pragmatic understanding of the "modern approach". It then shows how Chief Justice Duff's jurisprudence presents a different vision of methodology in statutory interpretation, one that flows from a particular understanding of the special contribution that the text makes to our law.

II. MODERN PRAGMATISM

On first blush, the way courts interpret statutes is superficially settled: courts look to text, context and purpose to determine the intent of the legislature.[7] This approach was adopted in the *Rizzo* case,[8] and it has not been questioned since. Yet under the happy agreement, methodological imprecision remains. The reasons for the imprecision are varied and not entirely consistent with one another. One reason is historical. As mentioned above, while it might be said that statutory interpretation historically revolved around the "great sun" of plain meaning,[9] interpretive pluralism is a deep feature of the common law. Perhaps, on this account, pragmatism is inevitable. Another reason for the imprecision might simply be that judges have decided — for better or worse — that pragmatism is the best way to interpret statutes. As Ruth Sullivan has argued, whatever the Supreme Court says about statutory interpretation, its approach is "consistently pragmatic", with each judge taking "advantage of the full range of interpretive resources available to interpreters and deploy[ing] those resources appropriately given the particulars of the case".[10]

Methodological pragmatism means that core elements of Canada's statutory interpretation jurisprudence are undefined. The lack of definition attaches to several central questions in the interpretation of law. Perhaps most centrally, the Supreme Court has held that the point of legislative interpretation — its very object — is to discover the intent of the legislature.[11] The tools of interpretation recognized by the

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[7] *Michel v. Graydon*, [2019] S.C.J. No. 102, 2020 SCC 24 at para. 21 (S.C.C.).

[8] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 at para. 21 (S.C.C.).

[9] John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can. Bar. Rev. 1 at 1.

[10] Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999) 30:2 Ottawa L. Rev. 175 at 178.

[11] See, *e.g.*, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006]

modern approach, including text, context and purpose, are designed to reach a result that can be plausibly understood as the legislature's intent. But "legislative intent" is a complicated and contentious concept, and the Court has never indicated what understanding of the concept it endorses, despite frequent reliance on it. Some suggest that there is no such thing as an aggregated and shared "legislative intention" that can be ascribed to individual members of the legislature.[12] Others like Waldron argue that "in a sea of possible misunderstanding", there is only a minimal intention to enact a text, and to subject that text to interpretation using norms of language communication.[13] Still others suggest that legislative intent is a coherent concept that should influence the way courts interpret statutes.[14] With all of these options on the table, the very point of statutory interpretation is obscure.

A second methodological problem arises in the use of statutory purpose. As noted above, there is no *ex ante* agreement on the relative weights of text, context and purpose in the analysis. In other words, Canadian courts proceed as if the text is merely a starting premise for legal reasoning in relation to statutes. Indeed, that is the very point of the use of purpose — to ensure that a bare reading of the text does not reveal a "latent ambiguity" that distorts the legislature's meaning.[15] However, because there is no *ex ante* weight assigned to any of these tools, the relationship between text and purpose is unclear, and Canadian courts use purpose in two different ways.[16] Sometimes, judges view the purpose of a provision — the reason why it was enacted — as representing the legal content of the statutory provision. On this account, purpose — a concise statement of the aim of the statute — is the proper medium by which the legislature communicates its intent. On the other hand, Canadian courts sometimes see the text as the proper medium by which the legislature communicates its intent. Here, it is not the objective of the law that best represents legislative intent. Rather, courts must interpret "the text through which the legislature seeks to achieve that objective".[17] These are two fundamentally different uses of statutory purpose, unbridled by any methodological guidance that

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S.C.J. No. 4, 2006 SCC 4 at para. 48 (S.C.C.).

[12] See, *e.g.*, Daniel A. Farber & Philip P. Frickey, "Legislative Intent and Public Choice" (1988) 74 Va. L. Rev. 423 at 423: "Courts foolishly give credence to this deceptive evidence of a legislative intent that itself is little more than a legal fiction; moreover, the courts sometimes even elevate counterfeit legislative history above the duly enacted language of the law itself."

[13] See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

[14] Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012).

[15] See, *e.g.*, *La Presse inc. v. Quebec*, [2023] S.C.J. No. 22, 2023 SCC 22 at para. 23 (S.C.C.).

[16] The following is sourced from: Mark Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat. L. Rev. 1.

[17] *MediaQMI inc. v. Kamel*, [2021] S.C.J. No. 23, 2021 SCC 23 at para. 39 (S.C.C.).

could advise which use of purpose is proper in the circumstances.

It is tempting to suggest that such methodological unknowns are inherent to the enterprise of interpretation. On this account, there is nothing that interpretation "just is";[18] or, more radically, methodological disagreements merely paper over deep, irreconcilable ideological differences, actioned through the power of judicial interpretation.[19] This temptation to fall victim to interpretive nihilism should be avoided. As Justice Rowe has written in extrajudicial work, a structured and deliberate methodology "guides analysis and constrains results, sometimes leading decision-makers to conclusions that do not align with their intuitions or policy preferences".[20] While it is inevitable that interpretive judgments are complex, intuitive and difficult to describe "with algorithmic specificity",[21] decisions taken under a structured and deliberate methodology "can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation".[22] These norms, which Owen Fiss calls "disciplining rules", serve to "constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged".[23]

The aim of objectivity is not desirable for objectivity's sake. True objectivity in the interpretation of law is an ideal in the truest sense. It may never be reached, owing to the inevitability of personal judgment, biases and motivations held by judicial interpreters. Nonetheless, the search for objectivity is a meaningful goal for a structured and deliberate methodology to pursue. Interpretation involves discovering the meaning of law enacted by Parliament, in a system where Parliament's work product must be respected absent constitutional objection. Giving up on objectivity would mean that there is no longer even a pretence of interest in the work product of the legislative branch. Commitment to constitutional principle demands a methodology that guides interpretation in ways that respect Parliament's role in the constitutional framework. These choices will constrain, but not completely compel, the way courts interpret statutes.

III. CHIEF JUSTICE DUFF'S CONTRIBUTIONS

Sir Lyman Duff was a member of the Supreme Court of Canada from 1906 to 1944,

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[18] See, *e.g.*, Cass Sunstein, "There is Nothing that Interpretation Just Is" (2015) 30 Constitutional Commentary 193.

[19] Representative of this view: Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Constit. Forum 53.

[20] Malcolm Rowe & Michael Collins, "Methodology and the Constitution" (2021) 42 Windsor Rev. Legal & Social Issues 1 at 4.

[21] Malcolm Rowe & Michael Collins, "Methodology and the Constitution" (2021) 42 Windsor Rev. Legal & Social Issues 1 at 4.

[22] Owen M. Fiss, "Objectivity and Interpretation" (1982) 34:4 Stan. L. Rev. 739 at 744.

[23] Owen M. Fiss, "Objectivity and Interpretation" (1982) 34:4 Stan. L. Rev. 739 at 744.

during which time he distinguished himself as one of Canada's finest jurists.[24] The first puisne justice of the Supreme Court of Canada to be appointed to the Judicial Committee of the Privy Council,[25] Chief Justice Duff was revered by his counterparts.[26] Yet, as Blake Brown points out, "[d]espite the attention given to Duff by legal historians, Canadian lawyers seem increasingly unaware of the former chief justice", explained by shifts in legal attitudes among the bar.[27] Plausibly, criticism of Chief Justice Duff's apparent interpretive formalism played a role.[28] Representative of this trend of criticism is R.C.B. Risk's provocative comment that while Lord Haldane was the "major villain" of Canadian federalism, Chief Justice Duff was his "willing collaborator".[29]

Chief Justice Duff's formalism, such as it is, may be a product of his time. But looking deeper into his jurisprudence, any argument that he was a "plain meaning" formalist who eschewed unwritten principles and purposes of law misses the mark. And as an exploration of some of his decisions demonstrates, he offers persuasive insights on the unanswered questions of our law of statutory interpretation: the role and function of legislative intent and the use of purpose in interpretation.

Consider, first, the concept of legislative intent. Perhaps Duff C.J.C.'s most famous judicial opinion in the field was rendered in *Canada v. Dubois*.[30] *Dubois* involved a discrete legal question: does the Crown's liability for torts "on a public work" extend to either: (a) a government car involved in the death of another person; or (b) the operation of the car as a public service related to Crown duties.[31]

For the unanimous Court, Duff C.J.C. laid down a rule that legislative intent does not exist at large. Rather, it exists only as it can be derived from the ordinary meaning of the text, enacted by Parliament, that best represents that intent. As Duff C.J.C. said:

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[24] See Richard Gosse, "The Four Courts of Sir Lyman Duff" (1975) 53:3 Can. Bar Rev. 483 at 483: "Sir Lyman Poore Duff is the dominating figure in the Supreme Court of Canada's first hundred years. He sat on the court for more than one-third of those years, in the middle period, from 1906 to 1944, participating in nearly 2,000 judgments—and throughout that tenure he was commonly regarded as the court's most able judge."

[25] R. Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47:3 McGill L.J. 559 at 574.

[26] See I.C. Rand, M. Grattan O'Leary & Lord Wright, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G. 1865-1995" (1955) 33:10 Can. Bar Rev. 1113.

[27] R. Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47:3 McGill L.J. 559 at 589.

[28] R. Blake Brown, "The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff" (2002) 47:3 McGill L.J. 559 at 590.

[29] R.C.B. Risk, "On the Road to Oz: Common Law Scholarship about Federalism after World War Two" (2001) 51:2 U.T.L.J. 143 at 150.

[30] [1935] S.C.J. No. 8, [1935] S.C.R. 378 (S.C.C.).

[31] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 393 (S.C.C.).

> One general observation will not, I think, be superfluous. The judicial function in considering and applying statutes is one of interpretation and interpretation alone. The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.[32]

Chief Justice Duff's position seems to implicitly suggest that there is something special about the text of the enactment. It embodies legislative intent which does not — and indeed, cannot — stand apart from the text. To the extent that Duff C.J.C.'s position is a statement of constitutional orthodoxy, there is wisdom contained in it that may help to explain the significance of legislative intent in our law.

Indeed, Duff C.J.C.'s position is not anachronistic. In more recent memory, Duff C.J.C.'s views were reflected in the Supreme Court's own interpretive jurisprudence, in different ways. *In Wellesley Hospital*,[33] for example, the fact situation involved a hospital's potential liability for the action of one of its psychiatric patients who attacked, randomly and without reason, a non-psychiatric patient. The provision at issue appeared to forestall liability: "No action lies against any psychiatric facility or any officer, employee or servant thereof for a tort of any patient."[34] For a majority, Laskin C.J.C. rejected the proposition that liability could not be extended to the hospital in this case. In terms that would have been familiar to Duff C.J.C., Laskin C.J.C. implicitly rejected the hospital's submission that the term "tort" in the statute should be interpreted liberally. In memorable terms, Laskin C.J.C. said: "The simple words of s. 59 cannot, in my opinion, be infused with such drastic meaning or be laid on a procrustean bed and stretched as far as the trial judge would go or even the lesser distance that the Court of Appeal would go."[35] For a minority of four judges, Pigeon J. went further to reject the hospital's submission that it should be protected from liability under the terms of the statute. Relying explicitly on *Dubois*, Pigeon J. noted that "[t]he enactment under consideration is concise and precise", with the word "tort" referring to an actionable wrong against the patient himself,

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[32] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 381 (S.C.C.). See also the opinion of Duff J. (as he then was) in *Bailey v. Victoria (City)*, [1920] S.C.J. No. 2, 60 S.C.R. 38 at 49 (S.C.C.): "It should also be noted that s.s. 176 applies, of course, to rural as well as urban municipalities and that the legislature must have had in view some practical expedient for bringing home notice of the plans of the council to persons being interested, we may, I think, not unreasonably assume that the legislative intention is best interpreted by reading the words according to their ordinary meaning."

[33] *Wellesley Hospital v. Lawson*, [1977] S.C.J. No. 83, [1978] 1 S.C.R. 893 (S.C.C.).

[34] *Wellesley Hospital v. Lawson*, [1977] S.C.J. No. 83, [1978] 1 S.C.R. 893 at 896 (S.C.C.).

[35] *Wellesley Hospital v. Lawson*, [1977] S.C.J. No. 83, [1978] 1 S.C.R. 893 at 899 (S.C.C.).

rather than the hospital vicariously.[36] Put this way, the enactment makes a distinct contribution to the law by expressing the legislature's intent.

This same sentiment — that the statute represents the legislature's intent, no more or less — was repeated and endorsed often in the 1980s and 1990s in the Supreme Court.[37] At first, it may seem like mere rhetorical flourish. But the insistence that the language of the statute represents the legislative intent means that there is a tight connection between legislative intent and text. That tells interpreters that there is something special about the text of the statute — perhaps, *contra* the pragmatic view of the modern approach, it is not just one factor to be considered.

The concept of legislative intent, framed in Duff C.J.C.'s sense, also provides a justificatory basis for other rules of interpretation. The idea that an intent is represented in a text means that the text was promulgated for certain reasons. This makes sense — legislation, in its truest form, does not merely declare pre-existing law. Legislation *changes* the law to accomplish some set of goals that the legislature, as a collective institution, viewed as important. The tie between text and intent means that the text must be read because it is *a legislature* promulgating that text, as a statute, at a certain point in time.

This simple explanation helps to fit and justify multiple tools of interpretation. Consider the original meaning canon.[38] There is no special reason to read words on a page as bearing the meanings they had at the time of enactment, unless one is interested in discovering the meaning of the terms used by the enacting legislature, the institution promulgating the law. Similarly, without a conceptual tie to the enacting legislature, there is no reason to read the text of laws as only applying within the jurisdiction over which the legislature is constitutionally capable of exercising power. That is because legislation is temporally and geographically bound to the institution — it is a product of legislative action.

Similarly, viewing the text of the law as the best representation of legislative intent also helps to clarify the relationship between statutes and the common law. It is an old rule of interpretation that an enactment "must be read as not altering the law beyond what it expressly states".[39] Put differently, the legislature's enactment

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[36] *Wellesley Hospital v. Lawson*, [1977] S.C.J. No. 83, [1978] 1 S.C.R. 893 at 903 (S.C.C.).

[37] See *R. v. Multiform Manufacturing Co.*, [1990] S.C.J. No. 83, [1990] 2 S.C.R. 624, at 630 (S.C.C.), citing Peter B. Maxwell, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969); *R. v. Rosen*, [1980] 1 S.C.R. 961 at 975 (S.C.C.); *Quebec (Construction Industry Commission) v. Montreal Urban Community Transit Commission*, [1986] S.C.J. No. 55, [1986] 2 S.C.R. 327 at 343-345 (S.C.C.); *R. v. Philips Electronics Ltd.*, [1981] S.C.J. No. 83, [1981] 2 S.C.R. 264 (S.C.C.), affg [1980] O.J. No. 3737, 30 O.R. (2d) 129 (Ont. C.A.).

[38] See *R. v. Perka*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

[39] *Wellesley Hospital v. Lawson*, [1977] S.C.J. No. 83, [1978] 1 S.C.R. 893 at 904

contributes to the law, and replaces any pre-existing common law, but it otherwise leaves undisturbed existing common law rules and rights. This insight is important. While it could be said that the text *is* the law, this pithy statement is not quite right. Rather, the text makes a *distinct contribution to* the law, because our law encompasses not only statutes, but common law rules and other unwritten legal norms. A statute, limited to its terms, contributes to that law, but does not entirely displace it, and sometimes incorporates it.

Consider an example from Chief Justice Duff's jurisprudence. In *Union Investment Co. v. Wells*,[40] the issue was "whether or not the promissory note upon which the action was brought was, at the time it was transferred to the appellants . . . an overdue note within the meaning of the . . . 'Bills of Exchange Act'".[41] The specific question was the meaning of "overdue". The legislature did not expressly define the term.[42] However, section 10 of the statute expressly incorporated the common law of England.[43] Because the term was not defined, and the statute expressly pointed to the common law, Duff J. (as he then was) resorted to the common law of England to resolve the question.[44] This is merely an application of the simple rule that the legislature makes a contribution to the law, but that contribution is limited to its text, and pre-existing common law rules and rights cannot be abrogated unless the statute does so.[45] Indeed, where the statute invites the use of other parts of the law — including unwritten norms and definitions sourced from the common law — it would ignore the special contribution of the text to underplay the significance of the unwritten law.

Put this way, statutes contribute to the law and take priority over conflicting common law, but there is no reason to read the text as the only law governing disputes, particularly given the common law's jealous guardianship of individual liberties. Justice Duff viewed the statutory law as commanding binding force, set against the backdrop of these liberties. In *Blackwoods Ltd. v. Canadian Northern Railway*,[46] Duff J. noted that "[a]mong canons of statutory construction none, I

(S.C.C.); *National Assistance Board v. Wilkinson*, [1952] 2 Q.B. 648, [1952] 2 All E.R. 255 at 658-659 (Q.B. (Eng.)).

[40] [1908] S.C.J. No. 2, 39 S.C.R. 625 (S.C.C.).

[41] *Union Investment Co. v. Wells*, [1908] S.C.J. No. 2, 39 S.C.R. 625 at 626-627 (S.C.C.).

[42] *Union Investment Co. v. Wells*, [1908] S.C.J. No. 2, 39 S.C.R. 625 at 628 (S.C.C.).

[43] *Union Investment Co. v. Wells*, [1908] S.C.J. No. 2, 39 S.C.R. 625 at 629-630 (S.C.C.).

[44] *Union Investment Co. v. Wells*, [1908] S.C.J. No. 2, 39 S.C.R. 625 at 630-634 (S.C.C.).

[45] See *Gordon v. Hebblewhite (c.o.b. Winnipeg Financial Corp.)*, [1927] S.C.J. No. 1, [1927] S.C.R. 29 (S.C.C.): "Because it introduces a new principle in derogation of the ordinary legal rights of a surety this statute must be taken to alter the law only in so far as its terms clearly express legislative intent to do so."

[46] *Blackwoods Ltd. v. Canadian Northern Railway Co.*, [1910] S.C.J. No. 47, 44 S.C.R. 92 (S.C.C.).

think, is more important than that which declares the legislature to be presumed, not to intend to take away private rights without compensation".[47] In this case, the *Railway Act*[48] — as in *Union Investment Co. v. Wells* — arguably incorporated this common law presumption, or at least did not oust it.[49] As a result, the presumption assists in the interpretation of the statute, given that the statute sits alongside the common law as applicable to the dispute.

1. Interpretive Consequences

Union Investment Co. v. Wells signals that there are significant interpretive consequences when courts recognize the distinctive contribution of the statutory text. This is true even under the modern approach. If the text has a special resonance in relation to the intention of the legislature, that resonance should inform how judges order the tools of interpretation. Here, most relevant is the connection between the text of the statute and its purposes — the reasons why the statute was enacted by the legislature in the first place. The potential relationship between text and purpose is a common issue in statutory interpretation, such that purpose can play at least two different roles in the analysis. As I have argued in past work,[50] purpose can serve: (1) as the legal norm that courts must implement, such that the text must be understood to best reach that legal norm; put differently, the ordinary meaning of the text is not exhaustive of the legislature's intention; or (2) as a sort of pragmatic enrichment that instructs interpreters, where the text invites it, to consider and use purpose. This most often arises where there is a broad and open-ended statutory term that could carry multiple meanings. In such cases, the legislative choice to enact a broad term cannot resolve the subsidiary question of which meaning the provision should carry among the possible options. Where the ordinary meaning of the term invites reliance on purpose or other legal norms, courts should pay attention to those choices.

Chief Justice Duff's position in this regard was fleshed out in several cases. A particularly insightful example is *McBratney v. McBratney*.[51] At issue in this case was a provision of the *Married Women's Relief Act*.[52] The relevant provision stated:

> 2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

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[47] *Blackwoods Ltd. v. Canadian Northern Railway Co.*, [1910] S.C.J. No. 47, 44 S.C.R. 92 at 100 (S.C.C.).

[48] R.S.C. 1906, c. 37.

[49] *Blackwoods Ltd. v. Canadian Northern Railway Co.*, [1910] S.C.J. No. 47, 44 S.C.R. 92 at 100-101 (S.C.C.).

[50] Mark Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat. L. Rev. 1.

[51] [1919] S.C.J. No. 59, 59 S.C.R. 550 (S.C.C.).

[52] S.A. 1910, 2nd Sess., c. 18.

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> 8. On any such application, the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.[53]

As Duff J. (as he then was) mentioned in his opinion, "[t]wo interpretations of this enactment" arose on the facts.[54] The first would mean the provision entitled the judge to grant *any* just and equitable share of the estate. The second would mean that the judge can only grant that part of the estate that the applicant would be entitled to in a case of intestacy. The second of these interpretations is more restrictive than the first.

In his opinion adopting the second reading of the provision, Duff J. posed the problem squarely: "It is nevertheless not to be disputed that the rival construction is also a construction of which these provisions are reasonably capable."[55] In this recognition — far from understanding the provision as pellucidly plain — Duff J. recognized that the language was ambiguous, and that it could not on its own solve the interpretive difficulty. But Duff J. also saw the language as framing the next inquiry, which concerned the proper selection and use of the "object or principle of the statute":

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it; for as Lord Selborne pointed out in *Caledonian Railway Co. v. North British Railway Co.*, that which is within the spirit of the statute where it can be collected from the words of it is the law, and not the very letter of the statute where the letter does not carry out the object of it. See *Cox v. Hakes*; *Eastman Co. v. Comptroller General*.[56]

Put this way, Duff J.'s view of the significance of the text carries interpretive consequences. It fixes and constrains judicial interpretation, telling courts how, and to what extent, unwritten and extratextual norms can be incorporated and used in the interpretive process. This use of text does not sideline purpose. Quite the contrary: it recognizes, as Duff J. mentioned in a different context, that interpretation relies on "the meaning of the language used or of the proper inferences respecting the legislative intention . . . to be drawn from a consideration of the subject-matter,

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[53] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 550-551 (S.C.C.).

[54] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 559 (S.C.C.).

[55] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 560 (S.C.C.).

[56] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 561 (S.C.C.) [citations omitted].

the nature of the provisions as a whole and the *character of the objects of the legislation as disclosed thereby*".[57]

McBratney v. McBratney is important for another reason. While it discloses a sound relationship between text and purpose, it does not sideline *context* — a sometimes forgotten aspect of the modern approach. A contextual approach to the interpretation of statutes does not focus only on the specific provision under interpretation, but also inquires whether that specific provision integrates into a larger whole, or, put differently, whether other sections of the statute suggest that a particular interpretation would be unsound.[58] This type of interpretation is ancient: as Coke famously said, "it is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers".[59]

The justification for this perspective on statutes can again be ascribed to the concept of legislative intent. Whatever the theoretical heft of that concept, it carries — at the very least — a thin commitment to the idea that legislatures promulgate statutes to make some change in the law.[60] The promulgation occurs under defined procedural circumstances, and the product of the promulgation is a statute. As we shall see, that statute can make value compromises that may not be entirely logical. But understanding the totality of the legislative choice means understanding how other provisions of the same statute may qualify or extend the specific provision under interpretation, expressly or impliedly.

Justice Duff's reasoning in *McBratney v. McBratney* subtly incorporated contextual interpretation of statutes.[61] One reason for rejecting the interpretation of the statute that permitted the court to pay any amount of the estate was simple: it would undermine the practical operation of the entire statutory scheme. As Duff J. said, there is a specific "condition" that triggers the exercise of jurisdiction enabling the court to pay the amount: "that the share of the widow under the husband's will falls short of the share she would have been entitled to under an intestacy".[62] If this condition does not exist, the entire statutory context — the "machinery for relief

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[57] *Alberta Railway and Irrigation Co. v. Alberta (Attorney-General)*, [1911] S.C.J. No. 1, 44 S.C.R. 505 at 524-525 (S.C.C.) [emphasis added].

[58] See Frederick J. De Sloovere, "Contextual Interpretation of Statutes" (1936) 5:2 Fordham L. Rev. 219 at 219-220.

[59] Edward Coke, *The First Part of the Institutes of the Law of England* in *The Selected Writings of Sir Edward Coke* (Indianapolis: Liberty Fund, 2003) 728 at 741.

[60] See, *e.g.*, Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) at 25.

[61] See, similarly, his opinion in: *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 104 (S.C.C.) (dissenting): speaking of the "tenor of the enactment as a whole".

[62] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 561 (S.C.C.).

provided for by the statute does not come into operation".[63] This focus on machinery is intriguing. If the statute works as an integrated scheme, it means that any interpretation that exceeds the limits of the entire statutory plan — as disclosed by the statutory context — is undesirable.[64]

For Duff J., purposive and contextual considerations come together by reading the text, in its ordinary meaning. The text guides the process of interpretation. The text, first, aids in *sourcing purpose*. The reasons that the legislature enacted the law in question can usually be determined by simply reading the provision through and understanding it syntactically. This is clear from *McBratney v. McBratney* — the purpose of the scheme was discerned by understanding the way it works: it limited the power of the court to pay out of the estate in specific circumstances. The statute was enacted for this purpose, and only this far.

More significantly, the text also assists interpreters in *using* purpose. Justice Duff's view can be fleshed out by considering Lawrence Solum's work on pragmatic enrichment in American textualism.[65] As he points out, "The word 'pragmatics' is used in theoretical linguistics and the philosophy of language to name the roles that context and intention play in the production of meaning."[66] Purpose, as a form of pragmatic enrichment, can help to disambiguate terms that may have many different senses, so that we might identify the meaning that the legislature adopted in service of certain purposes. This methodological choice manifests itself through Solum's description of *fair traceability*. As he says, sometimes statutes will create a "construction zone by employing words and concepts that are vague or open textured",[67] creating the possibility of many plausible meanings. In such cases, the purpose and overall context of the provision assists in prescribing a meaning that (1) is fairly traceable to a possible meaning of the broad provision under interpretation; and (2) is rationally connected to a properly sourced purpose of a provision.

On this account, sometimes purpose and the overall statutory scheme will limit the ordinary meaning of a broad text, amenable to different interpretations. Justice Duff deployed this use of purpose in *Dome Oil*.[68] At issue in that case was whether an incorporated company had the power to drill for oil under a provision granting

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[63] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 561 (S.C.C.).

[64] *McBratney v. McBratney*, [1919] S.C.J. No. 59, 59 S.C.R. 550 at 562 (S.C.C.).

[65] Lawrence Solum, "Pragmatics and Textualism" (July 1, 2024), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881344.

[66] Lawrence Solum, "Pragmatics and Textualism" (July 1, 2024), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881344 at 1.

[67] Lawrence Solum, "Pragmatics and Textualism" (July 1, 2024), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881344 at 60.

[68] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 (S.C.C.).

authority "to dig for . . . minerals . . . whether belonging to the company or not".[69] The question was whether a company boring an oil well was "digging for minerals" in the sense used by the provision. A majority of the Supreme Court concluded that drilling for rock oil is an accepted activity captured by the provision. In the words of Fitzpatrick C.J.C., who was in that majority, "[t]he words, I think, cover any process by which the earth is broken into for the extraction of minerals."[70] Justice Duff, however, disagreed. For him, "[t]he words 'mining' and 'mineral' are words of very elastic meaning and they are words whose scope has frequently been restricted by the application of the principle *noscitur a sociis.*"[71] For him, the original meaning canon ruled out an interpretation that equated "mining" and "minerals" with oil: "[A]t the time the enactment was passed, oil had not been found in Alberta in conditions making the development of oil fields commercially profitable."[72] But this was not the primary ground of Duff J.'s opinion. Rather, "the general scope of the enactment" — another term for the purpose of the statute — narrowed the elastic terms. Here, "the restrictive intent, to use the phrase of Holmes J., 'breathes from the pores' of the enactment".[73]

Of course, this use of purpose is open to possible misuse. Justice Duff knew this. In *Townsend v. Northern Crown Bank*,[74] the Supreme Court was called upon to interpret a provision of the *Bank Act*[75] that permitted a bank to loan money to a "purchaser", "shipper" or "dealer" in "products of . . . the forest".[76] The question was whether "products of the forest" encompassed a builder using dressed lumber.[77] Justice Duff rejected a narrow interpretation that proposed that "timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture".[78] Here, unlike in *Dome Oil*, the scheme of the provision could not narrow the broad signification of the words "products of the forest". However, Duff J. was alive to cases like *Dome Oil*, and the difficulty they presented. He lamented "the difficulty of drawing an abstract line" in cases like *Dome Oil* and *Townsend*.[79]

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[69] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 93 (S.C.C.).

[70] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 93 (S.C.C.).

[71] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 105 (S.C.C.).

[72] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 105 (S.C.C.).

[73] *Dome Oil Co. v. Alberta Drilling Co.*, [1916] S.C.J. No. 7, 28 D.L.R. 93 at 105 (S.C.C.).

[74] [1914] S.C.J. No. 12, 20 D.L.R. 77 (S.C.C.).

[75] R.S.C. 1906, c. 29.

[76] *Townsend v. Northern Crown Bank*, [1914] S.C.J. No. 12, 20 D.L.R. 77 at 78 (S.C.C.).

[77] *Townsend v. Northern Crown Bank*, [1914] S.C.J. No. 12, 20 D.L.R. 77 at 79 (S.C.C.).

[78] *Townsend v. Northern Crown Bank*, [1914] S.C.J. No. 12, 20 D.L.R. 77 at 79 (S.C.C.).

[79] *Townsend v. Northern Crown Bank*, [1914] S.C.J. No. 12, 20 D.L.R. 77 at 79 (S.C.C.).

Nonetheless, the facts of the case tasked him "to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits".[80] The "line" to which Duff J. refers is one discerned from understanding how the statute achieves its purposes, and the "given limits" are set by the text. Again, text frames the use of purpose.

2. Normative Consequences

These are the interpretive consequences of Chief Justice Duff's view of the text. Missing from this account is a normative position that demonstrates why, in the Canadian system of government, the text's special contribution should be respected by courts. Here, too, Chief Justice Duff has offered intriguing thoughts. The starting point, implicit in Chief Justice Duff's position, is that it is misleading to simply say that the text is the law simply because it is promulgated by a sovereign legislature. This, of course, is legally true, and explains the accuracy of statements asserting that "the principle of parliamentary sovereignty remains foundational to the structure of the Canadian state: aside from [limits on parliamentary law-making powers placed by the Constitution], the legislative branch of government remains supreme over both the judiciary and the executive".[81] Such statements explain the legal validity of statutes — or, put differently, why the product of legislative intention must be respected — but they do not necessarily explain the distinct contribution of the text of statutes to the legal fabric and the good normative reasons to respect statutory texts by limiting judicial methods that may corrupt them.

Chief Justice Duff's own view carries resonance with the role of legislatures in mediating disputes in a society of persistent disagreement and value pluralism. *Dubois*, again, is instructive. Recall that the case involved the scope of liability against the Crown in relation to "public works". Chief Justice Duff acknowledged that this law "presents certain peculiarities",[82] because it limits the class of torts for which a remedy can be granted against the Crown, and "the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty".[83] Those reasons cannot be stated with certainty because the language of statutes is ultimately a matter of political contestation, the product of the give-and-take of Westminster government and parliamentary drafting. As Duff C.J.C. said: "A particular enactment of the legislature is sometimes, as everybody knows, the result of compromise — a result which it would often be difficult to explain by reference to any broadly conceived principle of legislative action."[84]

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[80] *Townsend v. Northern Crown Bank*, [1914] S.C.J. No. 12, 20 D.L.R. 77 at 79 (S.C.C.).

[81] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 at para. 58 (S.C.C.).

[82] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 381 (S.C.C.).

[83] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 381 (S.C.C.).

[84] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 381 (S.C.C.). See also *R. v. Archambault*, [2024] S.C.J. No. 35, 2024 SCC 35 at para. 66 (S.C.C.) (Côté and Rowe JJ.).

Chief Justice Duff's comment in *Dubois* is remarkable because it seems so modern. As Joseph Raz argues, a failure to recognize the nature of democratic institutions in modern, value-pluralistic societies, might "idealize the law out of the concreteness of politics".[85] This is a problem because "in countries with decent constitutions, the untidiness of politics is morally sanctioned".[86] On this view legislation is the product of imperfect processes of give-and-take, including the process of executive policy development, committee consideration, opposition attack, media scrutiny and adoption of these proposals by a legislature.[87] Even before a legislature acts, executive proposals by their nature will pick certain options over others, necessarily compromising certain interests against others. Ultimately, given this reality, we should expect legislatures to split the difference on the length and distance of the law. As Waldron argues, this plurality and even incoherence is "the elementary circumstance of modern politics".[88] The adoption of, and compromise between, multiple objectives is a commonplace feature of modern statutes.[89] As Stephen Laws eloquently states:

> For a proposal for legislative change to be introduced as a Bill into Parliament, it has to be politically desirable, and also important enough for the government to be willing to put it, at least potentially, at the centre of the political stage. It must be worth paying the price for its passage in terms of Parliamentary time and critical opposition.[90]

This sort of compromise manifests itself in different ways in the Westminster system. When drafters receive executive policy proposals, there is always a question that must be asked: how should the proposal be accomplished?[91] This requires settling on not only the objectives or general philosophy that the proposal pursues, but the means — *how* — the legislation will accomplish its goals. Drafters who put pen to paper express these different choices through legislative language; legislatures assent to that language.

In legislation, compromise occurs because there are always multiple ways that laws can achieve their goals. Indeed, the Supreme Court has accepted that

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[85] Joseph Raz, "The Relevance of Coherence" (1992) 72 B.U.L. Rev. 273 at 310.

[86] Joseph Raz, "The Relevance of Coherence" (1992) 72 B.U.L. Rev. 273 at 310.

[87] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 144.

[88] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 144.

[89] *R. v. Rafilovich*, [2019] S.C.J. No. 51, 2019 SCC 51 at para. 29 (S.C.C.).

[90] Stephen Laws, "Legislation and Politics" in David Feldman, ed., *Law in Politics, Politics in Law* (Oxford: Hart, 2013) at 87.

[91] See the discussion in Paul Delnoy, "The Role of Legislative Drafters in Determining the Content of Norms" (last modified August 26, 2022), *Government of Canada*, online: https://justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/norm/index.html.

legislatures do not pursue their purposes at all costs.[92] This reveals a certain understanding of what legislative action entails. Viewing legislation as simply declaratory of legal principle tells an interpreter little about *how* the legislature wanted to achieve its goals — a choice that ultimately compromises the achievement of higher-order objectives. This view presents a more complex and realistic account of legislative design, created by imperfect humans pursuing varied interests.[93]

The result, as Judge Easterbrook points out, is that "[s]tatutes do more than point in a direction, such as 'more safety'. They achieve a particular amount of that objective, at a particular cost in other interests."[94] He has described legislation as a complex set of design choices that indicate how and to what extent a legislature wishes to achieve its goals:

> Different designs pull in different directions. To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified.[95]

Chief Justice Duff was alive to the varied ways that legislatures can pursue different design choices. In *Canadian National Railway Co. v. Nova Scotia*, Duff J. (as he then was) rejected arguments based on general policy aims — in the language of *Dubois*, a "broadly conceived principle of legislative action"[96] — because:

> The function of this court is to give effect to the intention of the legislature, as disclosed by the language selected for the expression of that intention. Whatever views may have inspired the policy of a statute, it is no part of the function of a court of law to enlarge, by reference to such views, even if they could be known with certainty, the scope of the operative parts of the enactment in which the legislature has set forth the particular means by which its policy is to be carried into effect.[97]

All this is notable because, on this account, statutory interpretation is not a mystical exercise. The first task of a judge, in this view, is to understand the scope of the textual scheme, before resort to considerations of purpose and principle.

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[92] See *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6 at para. 158 (S.C.C.).

[93] See, *e.g.*, *Manns v. Vancouver Island Health Authority*, [2024] B.C.J. No. 506, 2024 BCCA 110 at para. 32 (B.C.C.A.).

[94] *Contract Courier Servs. v. Research & Special Programs Admin.*, 1991 U.S. App. LEXIS 1567, 924 F.2d 112 at 115 (U.S.C.A. 7th Cir.).

[95] Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction" (1988) 11 Harv. J.L. & Pub. Pol'y 59 at 63.

[96] *Canada v. Dubois*, [1935] S.C.J. No. 8, [1935] S.C.R. 378 at 381 (S.C.C.).

[97] *Canadian National Railway Co. v. Nova Scotia*, [1927] S.C.J. No. 92, [1928] S.C.R. 106 at 120-121 (S.C.C.).

Doing otherwise would require constructive interpretation of the statute to better achieve first-order principles of justice or equity. For Duff J., such a practice would involve "speculations as to the relative weight of possible motives" which would "carry us far beyond the strict limits of the judicial function"[98] because the required appeals to "general considerations . . . rather assumes the possession by this court of an authority which is not vested in it as a court of law".[99]

On this account, interpretation does not require an interpreting judge to provide an idealized account of the statutory action, in light of some thick, background theory of justice. Nor does it require the judge to "indulge in conjecture as to what the legislature would have done if the particular case under consideration had been brought to its attention" in light of presumptions about what the legislature *should* be taken to know.[100] The worry seems to be that absent some compelling reason to believe otherwise, judicial insistence on coherence with an overarching purpose might "displace a great deal of legislative policy making".[101] This worry can be justified because of the centrality of design choice to the legislative act. Where the legislature has spoken, for example, in the form of general statutory rules — which will inevitably fail to map onto pristine background principles — changing the scope of those rules to take account of a specific case would change the law itself.

There are several takeaways from this short review of Chief Justice Duff's statutory interpretation jurisprudence. First, statutory texts disclose the nature of the compromise adopted as law, in a statutory scheme. That compromise derives from the varied choices made by the executive, drafters and legislators. Those choices include not only the selection of objective — what the statute seeks to accomplish — but also the means chosen to accomplish that objective. The distinct contribution of the text to our law stands as a representation of the compromises that undoubtedly must be made when designing statutory rules. The compromise should not be unravelled by appeals to "general considerations" or "broadly conceived principles

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[98] *Canadian Northern Railway Co. v. Canada*, [1922] S.C.J. No. 38, 64 S.C.R. 264 at 271 (S.C.C.).

[99] *Canadian National Railway Co. v. Nova Scotia*, [1927] S.C.J. No. 92, [1928] S.C.R. 106 at 120 (S.C.C.).

[100] See *Lamontagne v. Quebec Railway, Light, Heat and Power Co.*, [1914] S.C.J. No. 53, 50 S.C.R. 423 at 445-446 (S.C.C.) (Anglin J.): "Nor is it permissible to treat a statute, contrary to the expressed meaning, as embracing or excluding cases merely because of a probable view as to legislative intent and because no good reason appears for their inclusion or exclusion, as the case may be . . . or to indulge in conjecture as to what the legislature would have done if the particular case under consideration had been brought to its attention." I have argued that this mode of thinking, popular in some methods of interpretation, presents a significant counterfactual problem that should advise caution: see Mark Mancini, "Two Uses of Purpose in Statutory Interpretation" (2024) 45:2 Stat. L. Rev. 1 at 15-16.

[101] John F. Manning, "Competing Presumptions About Statutory Coherence" (2006) 74 Fordham L. Rev. 2009 at 2042.

of legislative action". While such appeals may seem appropriate for courts seeking to make the best of messy statutory texts, Duff's view implies that it is not the function of a court to redesign legislative choices to better approximate general considerations of justice or equity.

IV. CONCLUSION

Sir Lyman Duff was a revered figure in Canadian law, but his contributions — perhaps owing to the fickleness of modern memory — do not seem to resonate in today's Canada. They should. Particularly in statutory interpretation, the modern approach has left several questions unanswered about the proper way to interpret statutes. These questions are not unanswerable. As Chief Justice Duff's cases show us, an approach that views the text considering its evident purposes was not birthed by *Rizzo*. In other words, the modern approach was not a statutory interpretation Enlightenment. Chief Justice Duff's cases demonstrate how the modern approach can incorporate a principled focus on the text with concerns about purpose and context. The modern approach has not changed the constitutional integrity of the principled relationship outlined by Chief Justice Duff. His contributions are ripe for rediscovery.