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REVISITING THE ROLE OF PRESUMPTIONS OF LEGISLATIVE INTENT IN STATUTORY INTERPRETATION

The Honourable Thomas A Cromwell, Siena Anstis and Thomas Touchie*

This paper proposes a fundamental reshaping of the law regarding presumptions of legislative intent in statutory interpretation. Looking to substantive presumptions in particular, it reviews the jurisprudence and concludes that greater consistency would be desirable and that tensions should be resolved between the traditional approach to substantive presumptions and the modern approach to statutory interpretation consistently adopted by the Supreme Court of Canada. Our proposal seeks to provide a uniform methodology for the use of substantive presumptions by incorporating them into the contextual analysis mandated by the modern approach set out in Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27, 154 DLR (4th) 193. Rejecting the language of "presumptions" and rules of "strict" or "liberal" construction, it argues in favour of interpretation that relies on a transparent discussion of all relevant sources of statutory meaning (including textual and contextual sources, such as the values underlying substantive presumptions) and against a reflexive or mechanical application of substantive presumptions.

Cet article propose une révision fondamentale des principes relatifs à l'intention présumée du législateur dans le cadre de l'interprétation législative. En examinant surtout les intentions présumées dites substantielles, les auteurs passent en revue la jurisprudence pour en venir à la conclusion qu'une plus

* The Honourable Thomas Cromwell served on the Supreme Court of Canada from 2008 until 2016 and is now counsel at Borden Ladner Gervais; Siena Anstis is an associate at Morrison & Foerster LLP in New York City and a former clerk at the Supreme Court of Canada and the Ontario Court of Appeal; Thomas Touchie recently completed the BCL & LLB program at McGill University and is now clerking at the Supreme Court of Canada.

grande cohérence est souhaitable et qu'il y a lieu de régler les positions qui existent entre l'approche traditionnelle des intentions présumées substantielles et l'approche moderne de l'interprétation législative uniformément adoptée par la Cour suprême du Canada. Les auteurs cherchent à développer une méthodologie uniforme visant l'examen des intentions présumées substantielles en les incorporant à l'analyse contextuelle prescrite par l'approche moderne établie dans l'arrêt Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 RCS 27, 154 DLR (4e) 193. Rejetant le « langage des intentions présumées » et les règles de l'interprétation « stricte » ou « libérale », les auteurs font état d'arguments favorisant une interprétation fondée sur une discussion ouverte de toutes les sources pertinentes permettant de dégager le sens de la loi (dont les sources textuelles et contextuelles, telles que les valeurs qui sous-tendent les intentions présumées substantielles). Ils font également part des arguments contre une application mécanique ou réflexive des intentions présumées substantielles.

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1. Introduction

This paper proposes a fundamental reshaping of the law regarding presumptions of legislative intent in statutory interpretation. Courts

have, for centuries, relied on such presumptions in their interpretation of statutory language.[1] Textual presumptions, such as the presumption that legislatures intend the ordinary grammatical meaning of words, provide guides to statutory meaning based on common sense expectations about how laws are drafted.[2] Substantive presumptions, by contrast, bring to bear on the interpretative process certain "policies and values" to which society is committed and that legislatures are assumed to have respected when enacting legislation.[3] Sometimes called substantive canons, these presumptions may mandate a strict or liberal construction of statutes dealing with certain subjects or they may require a clear legislative statement of contrary intent in order to be displaced.[4]

In Canada, two legal developments require us to fundamentally reassess the role of substantive presumptions in statutory interpretation.[5] The first development is the constitutional entrenchment of fundamental rights in the *Constitution Act* of 1982, coupled with the fact that these rights and freedoms may be limited where such a need may be demonstrably justified in a free and democratic society.[6] This development diminishes the importance of—and perhaps undermines the legitimacy of—using judicially created presumptions of intent as a sort of quasi-constitutional protection against legislative and executive excesses. Why, it may be asked, should the democratically entrenched set of rights and freedoms require

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1 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 481 [Sullivan, *Statutes*].

2 Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 325 [Côté, Beaulac & Devinat]. Note that "textual" presumptions are not, strictly speaking, presumptions of *intent*. Rather, they are rules of interpretation premised on common-sense expectations about *how* legislatures draft statutes. Côté, Beaulac, and Devinat argue that these form part of a "systematic and logical method" that relies on a broad presumption of rationality by which legislatures are presumed to express themselves coherently and consistently. Among "textual" presumptions, the presumption of internal coherence and the presumption of consistent expression are the most common. See also Sullivan, *Statutes*, *supra* note 1 at 481.

3 Sullivan, *Statutes*, *supra* note 1 at 481; Frank B Cross, *The Theory and Practice of Statutory Interpretation* (Stanford: Stanford University Press, 2009) at 96–97 [Cross]; William N Eskridge Jr, "Norms, Empiricism, and Canons in Statutory Interpretation" (1999) 66:3 U Chicago L Rev 671 at 675.

4 William N Eskridge Jr, Philip P Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation*, 2nd ed (New York: Foundation Press, 2006) at 342 [Eskridge, Frickey & Garrett].

5 See e.g. William N Eskridge Jr, *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard University Press, 1994) at 275 [Eskridge, *Dynamic Statutory Interpretation*]. Substantive presumptions have been criticized for rendering statutory interpretation "mechanical" and simply acting as "window dressing" for decisions that were ultimately decided on other grounds.

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

supplemental protection by rules of construction? This question forms part of a *normative* critique of presumptions of legislative intent, which considers whether courts are justified in using presumptions as interpretive tools. In addition to constitutional considerations, this critique questions the validity of the underlying justification for substantive presumptions, namely by asking whether the values represented by the presumptions can truly be assumed to be in the legislature's mind at the time of drafting. Finally, this critique inquires as to whether presumptions are simply discretionary tools for judges to produce certain policy outcomes when they so desire.[7]

The second development is the unequivocal adoption of the "modern approach" in Canadian statutory interpretation.[8] This approach mandates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[9] In their current use, however, substantive presumptions of intent are not always congruent with this approach; applied as mandatory rules, for example, they may be used to defeat the results of this fully contextual approach. This issue forms part of the *methodological* critique of presumptions, which asks when and how presumptions of legislative intent should be used by the judiciary as well as how substantive presumptions relate to other approaches to statutory interpretation.[10]

In this paper, we focus primarily on this *methodological* critique and propose a new framework for the application of substantive presumptions of legislative intent. This discussion, however, is inevitably linked to the *normative* question of whether courts are justified in relying on such presumptions in the first place. While the methodological framework we propose seeks to answer the questions of when and how the courts should use presumptions, providing answers to these questions will in turn assuage some of the normative concerns that the judiciary—in using presumptions in what may appear to be an unstructured, discretionary manner—is

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7 John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1; Daniella Murynka, "Some Problems with Killing the Legislator" (2015) 73:1 UT Fac L Rev 11 [Murynka]; Cross, *supra* note 3; Eskridge, *Dynamic Statutory Interpretation*, *supra* note 5.

8 *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 154 DLR (4th) 193 [*Rizzo*]. The approach set out in *Rizzo* has since been adopted as the preferred approach to statutory interpretation by the Supreme Court. See e.g. *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559 [*Bell ExpressVu*]; *Ludco Enterprises Ltd v Canada*, 2001 SCC 62 at para 37, [2001] 2 SCR 1082; *R v Ulybel Enterprises Ltd*, 2001 SCC 56 at para 29, [2001] 2 SCR 867; *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at para 25, [2004] 1 SCR 727. See also Sullivan, *Statutes*, *supra* note 1 at 1.

9 Elmer A Driedger, *The Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87 [Driedger].

10 Sullivan, *Statutes*, *supra* note 1 at 481–87; Murynka, *supra* note 7.

usurping the role of the legislature and obscuring the real reasons for its interpretive choices.[11]

The goal of the changes we propose, briefly outlined below, is to ensure that statutory presumptions—and the fundamental values they represent—are considered and applied in a manner consistent with the modern approach to Canadian statutory interpretation. We suggest that this reformed methodology for the use of substantive presumptions will increase the predictability of interpretive outcomes and enhance the transparency and legitimacy of statutory interpretation.

The methodological framework we advocate may be divided into four proposals. The first is that the law should abandon the language of *presumptions* and instead speak of—and think about—*principles* of statutory interpretation. Second, these principles should be considered as part of the statutory context under the modern approach to interpretation articulated in *Re Rizzo & Rizzo Shoes Ltd*.[12] This integration of substantive presumptions into the modern approach achieves several objectives. It emphasizes that these presumptions represent values so fundamental to our democratic legal order that legislatures must be aware of them as inherent to the context in which laws are drafted. It also ensures that substantive presumptions no longer risk defeating the contextual approach to statutory interpretation repeatedly endorsed by the Supreme Court. Third, if these principles are to be seen as one of several factors within the interpretive context, then courts must not attempt to ascribe any fixed weight to the various values they represent nor treat them invariably as principles of first or last resort. Redefined as principles of interpretation *within* the statutory context, presumptions should no longer be applied based on predetermined weight; rather, the values they represent must be clearly identified, understood, and openly discussed in the context of other competing fundamental values. Fourth, and finally, our proposal maintains one exception to this approach, which is already well-established in the jurisprudence. It relates to the presumption that the legislature conforms to the *Canadian Charter of Rights and Freedoms* ("*Charter*").[13] For reasons we will explain, this presumption should continue to apply only *after* a determination of genuine textual ambiguity in the language of the statutory provision. We underscore at the outset that *genuine* ambiguity refers only to those cases where a fully contextual application of the modern approach set out in *Rizzo* yields "two

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11 Ruth Sullivan, "Interpreting the *Criminal Code*: How Neutral Can it Be? A Comment on *R. v. McCraw*" (1989) 21:1 Ottawa L Rev 221 at 224 [Sullivan, "Interpreting the *Criminal Code*"].

12 *Supra* note 8.

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

or more plausible readings, *each equally in accordance with the intentions of the statute*."[14]

2. A Brief Primer on Substantive Presumptions

Presumptions of legislative intent are guides to statutory interpretation. They provide support for certain interpretative outcomes based on what the legislature is presumed to have intended. Faced with the task of interpreting statutory language, courts turn to substantive presumptions when certain fundamental issues or values are at play. For example, the presumption that criminal statutes require subjective *mens rea* on the part of offenders reflects the fundamental social value that the morally innocent should not be punished and incorporates it into the interpretative process.[15] The assumption underlying resort to these sorts of presumptions is that the legislature intends to respect fundamental social values and policies when drafting legislation and it is therefore appropriate for courts to take them into account in interpreting statutes.[16]

Probably the most sophisticated Canadian judgment dealing with substantive presumptions is found in *Re Estabrooks Pontiac Buick Ltd*, where La Forest JA (as he was then) discussed how presumptions formed a sort of quasi-constitutional protection against legislative and executive excesses.[17] "Legislative supremacy," he writes, "is not all there is to the *Constitution*. In determining whether a statute is just or reasonable, the courts can derive considerable assistance from the nature and origins of our political organization as a Parliamentary democracy."[18] Drawn from the "original foundations of our governmental organization," early presumptions provided that Parliament *could not have intended* certain outcomes absent express language.[19] By establishing default interpretive rules that favoured individual rights, for example, presumptions "permitted [the courts] to exercise an important role in the protection of individual liberties even in the absence of an entrenched Bill of Rights."[20]

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14 *Bell ExpressVu*, *supra* note 8 at para 29 [emphasis in original], citing *CanadianOxy Chemicals Ltd v Canada (AG)*, [1999] 1 SCR 743 at para 14, 171 DLR (4th) 733 [*CanadianOxy*]; *Rizzo*, *supra* note 8.

15 Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at 170–74 [Barak]; Oliver Jones, ed, *Bennion on Statutory Interpretation*, 6th ed (London, UK: LexisNexis, 2013) at 713; Daniel Greenberg, ed, *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation*, 10th ed (London, UK: Sweet & Maxwell, 2012) at 739.

16 Sullivan, *Statutes*, *supra* note 1 at 8, 481; Côté, Beaulac & Devinat, *supra* note 2.

17 (1982) 44 NBR (2d) 201, 144 DLR (3d) 21 (CA) [*Estabrooks* cited to NBR].

18 *Ibid* at 8.

19 *Ibid*.

20 *Ibid* at 9.

A classic example is the presumption against interference with property rights. Rooted in the historical struggle of English society against the arbitrary exercise of political power, this presumption emerged at common law over the course of the eighteenth century.[21] As La Forest JA described in *Estabrooks*:

> Those who struggled to wrest power from the Stuart Kings and placed it in the hands of the elected representatives of the people were not of a mind to replace one despot by another. Rather they were guided by a philosophy that placed a high premium on *individual liberty* and *private property* and that philosophy continues to inform our fundamental political arrangements.[22]

Based on the recognized importance of individual freedom, this presumption allowed judges to interpret vague statutory language in a manner that reduced public interference with private property. Similarly, courts have protected individual rights via the presumption against retroactivity and the presumption against implied repeal[23] by insisting that laws that appear "to transgress our basic political understandings should be clearly expressed so as to invite the debate which is the lifeblood of Parliamentary democracy."[24]

There are no fixed or closed categories of substantive presumptions and new presumptions may emerge to reflect how societal preoccupations evolve.[25] While there is no specific manner in which new values become presumptions of legislative intent, courts play a central role in this process by describing and affirming the existence of such presumptions through their interpretation of statutes. Derived from the protections typically afforded at common law to certain rights and values, presumptions of legislative intent can provide default rules that guide the interpretation of statutes in a manner that is respectful of these rights. As new rights and values gain social and political recognition, courts may recognize new presumptions that the legislature intends to respect.

Yet, despite this well-established tradition, the role of substantive presumptions is far from settled. One question is whether these sorts of quasi-constitutional presumptions have a role since the entrenchment of legal and human rights in the *Charter*.[26] There is a risk that presumptions may in effect short circuit the justification process permitted under section 1 of the *Charter*.[27] This concern is reflected in the jurisprudence that a

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21 Sullivan, *Statutes*, *supra* note 1 at 482.

22 *Estabrooks*, *supra* note 17 at 8 [emphasis added].

23 Sullivan, *Statutes*, *supra* note 1 at 367–79, 734–35.

24 *Estabrooks*, *supra* note 17 at 9.

25 Sullivan, *Statutes*, *supra* note 1 at 482; see also Barak, *supra* note 15 at 173.

26 *Charter*, *supra* note 13.

27 *Ibid*.

presumption of *Charter* compliance comes into play only in the event of genuine ambiguity, a point to which we later return. Without attempting a definitive resolution of the question, we observe that presumptions, if overused, may have the effect of thwarting legislative intent rather than giving effect to it. Then, there is the matter of when and how presumptions should be used, a question to which our survey of the jurisprudence revealed no definitive answer. It is to these methodological concerns that we turn to now.

3. Substantive Presumptions in the Jurisprudence

A) The Different Approaches to Substantive Presumptions

We propose a fundamental overhaul of the law's approach to presumptions of legislative intent. We do this because the jurisprudence is complicated and the cases are at times hard to reconcile with one another. The purposes of this section, then, are to highlight the different ways in which presumptions have been used and underscore some of the most vexing questions that have no consistent answers in the current law.

The Canadian jurisprudence shows that there are at least three different approaches to the question of when the interpreter should have resort to a presumption of legislative intent. For example, courts have referred to and applied certain presumptions as principles of "last resort". In such cases, the presumption only affects the interpretation in the event that other interpretative techniques result in a finding of ambiguity. In other situations, presumptions are applied as principles of "first resort", clear statement rules, or as "super-strong" clear statement rules. In these situations, the presumption mandates a particular interpretation unless the presumed meaning is rebutted by sufficiently clear legislation. Still other presumptions simply form part of the context to be considered under the modern approach to statutory interpretation without requiring ambiguity. In order to illustrate these varying approaches, we will briefly review some of the jurisprudence applying presumptions of legislative intent.

Consider, for example, the strict construction rule in relation to penal statutes.[28] As Dickson J wrote in *Marcotte v Canada (Deputy AG)*, "[n]o authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced."[29] Thus, "[i]f one is to be incarcerated, one should at least know that some Act

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[28] See e.g. *R v Mac*, 2002 SCC 24, [2002] 1 SCR 856; *R v Levkovic*, 2013 SCC 25, [2013] 2 SCR 204.

[29] *Marcotte v Canada (Deputy AG)*, [1976] 1 SCR 108 at 115, 51 DLR (3d) 259.

of Parliament requires it in express terms, and not, at most, by implication."[30] The concern here is that the public must be given fair notice of what acts or omissions could result in criminal liability.[31]

Following the adoption of the *Charter*, this presumption has typically been treated as one of last resort in that the presumption will apply only in the event that the modern approach results in a finding of ambiguity.[32] As LeBel J noted in *R v Jaw*, this principle is one "of last resort that does not supersede a purposive and contextual approach to interpretation."[33] In *Bell ExpressVu Ltd Partnership v Rex*, a case often cited for the point that presumptions apply only where there is ambiguity, the Supreme Court of Canada confirmed that the strict construction of penal statutes is a concern that arises only "where there is ambiguity as to the meaning of the provision."[34]

Another example is the presumption against interference with rights and vested rights, which has been framed both as a presumption that applies only in the case of ambiguity and as a clear statement rule. In its application as a clear statement rule, this presumption provides that the legislature "does not intend to abolish, limit or otherwise interfere with the rights of subjects."[35] This means that legislation "designed to curtail the rights that may be enjoyed by citizens or residents" is not only subject to the rule of strict construction, but requires that the legislature must clearly evidence an intention to do so before an adverse interpretation may be adopted.[36] This is what has been called a "clear statement" rule.[37]

In *Spooner Oils Ltd v Turner Valley Gas Conservation Board*, the Supreme Court described this presumption, noting that: "[a] legislative enactment is not to be read as prejudicially affecting accrued rights, or 'an existing status' … unless the language in which it is expressed requires such a construction."[38] The Court continued: "the underlying assumption being

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30 *Ibid*.

31 Sullivan, *Statutes*, supra note 1 at 492.

32 Stéphane Beaulac, "Commentaire : Les dommages collatéraux de la Charte canadienne en interprétation législative" (2007) 48:4 C de D 751. See also *R v Hasselwander*, [1993] 2 SCR 398, 152 NR 247. *Charter*, *supra* note 13.

33 2009 SCC 42, [2009] 3 SCR 26 at para 38 [*Jaw*]. We note that the comments by LeBel J regarding the presumption of restrictive interpretation of penal statutes were made in *obiter* as the interpretation issue in *Jaw* concerned a jury charge rather than statutory language.

34 *Supra* note 8 at para 28.

35 Sullivan, *Statutes*, *supra* note 1 at 497.

36 *Ibid* at 497.

37 Eskridge, Frickey & Garrett, *supra* note 4 at 373.

38 [1933] SCR 629 at 630, [1933] 4 DLR 545 [footnotes omitted].

that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference."[39] In *Morguard Properties Ltd v Winnipeg (City of)*, Estey J similarly observed that "courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly."[40] Thus, "the courts must look for express language in the statute before concluding that these rights have been reduced."[41]

Conversely, this presumption has also been framed as a presumption of last resort that applies only where ambiguity arises. In *Gustavson Drilling (1964) Ltd v MNR*, Dickson J noted:

> The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation … This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions.[42]

Similarly, in *NAV Canada v Wilmington Trust Co*, the Supreme Court, in considering whether the presumption against interference with private rights applied, noted that "only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as 'strict construction'."[43] Thus, while the court determines whether the legislature used sufficiently express language to rebut the presumption in drafting the statute, this consideration arises only after an initial finding of ambiguity.

One year before the *NAV Canada* decision, however, the Supreme Court suggested that the strict application of a requirement of ambiguity before applying the presumption against interference with vested rights should be relaxed.[44] In *Dikranian v Quebec*, Bastarache J observed that "[i]n the past, this Court has stressed that the presumption against interference with vested rights could be applied only if the relevant legislation were ambiguous, that is, reasonably susceptible of two constructions."[45] Bastarache J went on to note that this statement should be "qualified" and that "care must be taken not to get caught up in the last vestiges of the literal

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39 *Ibid* at 638.

40 [1983] 2 SCR 493 at 509, 3 DLR (4th) 1.

41 *Ibid*.

42 [1977] 1 SCR 271 at 282, 66 DLR (3d) 449.

43 2006 SCC 24 at para 84, [2006] 1 SCR 865 [*NAV Canada*].

44 *Dikranian v Quebec (AG)*, 2005 SCC 73 at paras 35–36, [2005] 3 SCR 530.

45 *Ibid* at para 35.

approach to interpreting legislation."[46] He further noted that "[s]ince the adoption of the modern approach to statutory interpretation, this Court has stated time and time again that the 'entire context' of a provision must be considered to determine if the provision is reasonably capable of multiple interpretations."[47] *Dikranian*, then, introduces an alternative approach to the application of presumptions of legislative intent in our brief review. This approach suggests that presumptions should be considered as part of the contextual considerations that arise under the modern approach to statutory interpretation rather than being relegated to principles of "last resort".

There are other examples of presumptions being treated as part of the overall legislative context in applying the modern approach. One is the presumption of compliance with international obligations, a "well-established principle of statutory interpretation that legislation will be presumed to conform to international law."[48] This presumption is predicated on the judicial policy that courts will seek to avoid interpreting domestic law in a way that violates international obligations, "unless the wording of the statute clearly compels that result."[49] The Supreme Court of Canada has consistently found that this presumption plays an important role in the broader interpretive context in the exercise of statutory interpretation rather than being relegated to a principle of last resort—only applying where there is strict ambiguity in the statutory language.

For example, in *National Corn Growers Association v Canada (Import Tribunal)*, Gonthier J applied this presumption and noted:

> In interpreting legislation which has been enacted with a view towards implementing international obligations … it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.[50]

Importantly, Gonthier J noted: "more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic

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46 *Ibid* at para 36.

47 *Ibid*.

48 *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*]. For a critical discussion of this particular presumption, see Stéphane Beaulac, "International Law Gateway to Domestic Law: Hart's 'Open Texture', Legal Language and the Canadian Charter" (2012) 46:3 RJT 443 at 479–84 [Beaulac, "International Law"].

49 *Hape*, *supra* note 48 at para 53.

50 *National Corn Growers Association v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371, 74 DLR (4th) 449.

legislation."[51] Gonthier J specifically rejected the "suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face."[52]

In *Baker v Canada (Minister of Citizenship and Immigration)*, L'Heureux-Dubé J also considered the role of international law in determining whether the best interests of the child was a primary consideration in an application for humanitarian and compassionate relief.[53] On the impact of international law, L'Heureux-Dubé J noted that while the *Convention on the Rights of the Child* had not been implemented by Parliament, it nevertheless played a role in the analysis.[54] She observed: "Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[55] Citing Ruth Sullivan, L'Heureux-Dubé J noted that "'[t]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred*.'"[56] In this way, the majority decision in *Baker* clearly considers the values underlying the presumption of compliance with international norms as "being part of the context of adoption and of application of domestic legislation."[57]

More recently, in *R v Hape*, LeBel J observed that this presumption forms a part of the initial inquiry into the meaning of the legislative language.[58] He noted that there were two aspects to this presumption. The first aspect is the presumption that the legislature acted "in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community."[59] Thus, "[i]n deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations."[60] The second aspect is the presumption "that the legislature is presumed to comply with the values and principles

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51 *Ibid*.

52 *Ibid*.

53 [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

54 *Ibid*; *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3, 28 ILM 1456 (entered into force 2 September 1990).

55 *Baker*, *supra* note 53 at para 70.

56 Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 330, cited in *Baker*, *supra* note 53 at para 70 [emphasis added (by L'Heureux-Dubé J)].

57 Beaulac, "International Law" *supra* note 48 at 475.

58 *Supra* note 48 at para 53.

59 *Ibid*.

60 *Ibid*.

of customary and conventional international law."[61] It is understood that "*[t]hose values and principles form part of the context in which statutes are enacted*, and courts will therefore prefer a construction that reflects them."[62] At the same time, the presumption is rebuttable, as "Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation."[63]

A final example of a presumption being considered as part of the overall context is the presumption of subjective *mens rea*. This presumption embodies the principle that the legislature intends for crimes to have a subjective *mens rea* as an element of the crime.[64] As Sopinka J observed in *R v DeSousa*, "[i]t is axiomatic that in criminal law there should be no responsibility without personal fault."[65] He continued: "The criminal law is based on proof of personal fault and this concept is jealously guarded when a court is asked to interpret criminal provisions, especially those with potentially serious penal consequences."[66] In *R v ADH*, a majority of the Court explained that this presumption "sets out an important value underlying our criminal law", namely "that the morally innocent should not be punished."[67]

While it is clear that the presumption does not depend on ambiguity for its operation, it remains unclear whether the presumption is one of first resort or whether it is simply part of the context that needs to be taken into account in interpreting the legislation. In *DeSousa*, for example, Sopinka J observed that "a provision should not be interpreted to lack any element of personal fault unless the statutory language mandates such an interpretation in clear and unambiguous terms."[68] This approach suggested that the presumption will govern the outcome of the interpretation unless there is a clear intent otherwise, making it a principle of "first resort". Conversely, the majority in *ADH* indicated that the presumption applied as part of the interpretative context under the modern approach to statutory interpretation. The majority observed that presumptions of legislative intent "*form part of the enactment's context*, as they reflect ideas which can be assumed to have been both present in the mind of the legislature and sufficiently current as to render their explicit mention unnecessary."[69] It is for this reason that "Parliament must be understood to know that this presumption will likely

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61 *Ibid*.

62 *Ibid* [emphasis added].

63 *Ibid.*

64 Sullivan, *Statutes*, *supra* note 1 at 515.

65 [1992] 2 SCR 944 at 956, 95 DLR (4th) 595 [*DeSousa*].

66 *Ibid* at 957.

67 2013 SCC 28 at para 27, [2013] 2 SCR 269 [*ADH*].

68 *DeSousa*, *supra* note 65 at 956.

69 *ADH*, *supra* note 67 at para 26 [emphasis added].

be applied unless some contrary intention is evident in the legislation."[70] Thus, the presumption of subjective fault "*forms part of the context which the modern approach requires to be considered*" and therefore requires no initial finding of ambiguity in order to apply.[71]

B) A Case Study of the Difficult Nature of Presumptions: Solicitor-Client Privilege

Adding yet another layer of complexity, certain substantive presumptions may be thought of as "super strong clear statement rules" because they require a high degree of legislative clarity before a court should conclude that the legislature had anything other than the presumed intention. Such presumptions provide strong protection for the values that inspire them. Their unintended consequence, however, is to cast doubt on both the level of clarity required before the presumption is displaced and on the relationship between presumptions and the modern approach.

Solicitor-client privilege is an interesting example of these challenges. The presumption that the legislature does not intend to abrogate solicitor-client privilege may be understood as a "super-clear" statement rule, in that the Court has specifically required "'clear, precise and unequivocal language'" before that intention is attributed to the legislature.[72] In analyzing the jurisprudence of the Court applying this presumption, a number of important conclusions can be drawn on the manner in which presumptions are being applied.

The presumption regarding solicitor-client privilege started as a rule of strict construction. In *Descôteaux v Mierzwinski*, the Supreme Court wrote that "[u]nless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality."[73] Similarly, in *Pritchard v Ontario (Human Rights Commission)*, the Court observed that "[l]egislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively" and cannot be abrogated by inference.[74]

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70 *Ibid*.

71 *Ibid* at para 28 [emphasis added].

72 *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 26, [2008] 2 SCR 574 [Blood Tribe].

73 [1982] 1 SCR 860 at 875, 41 DLR (3d) 590.

74 *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 33, [2004] 1 SCR 809. See also *Lavallee v Canada (AG)*, 2002 SCC 61 at para 18, [2002] 3 SCR 209.

The progression towards a super strong clear statement rule began in earnest in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*.[75] Writing for the Court, Binnie J explained that the presumption against abrogation of solicitor-client privilege gives effect to the fact that "[s]olicitor-client privilege is fundamental to the proper functioning of our legal system."[76] The presumption is thus intended to protect "this fundamental policy of the law."[77] Binnie J affirmed the principles enunciated in prior cases, namely that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents."[78] He further wrote that "express words" are required for a regulator or other statutory official to "pierce" the privilege and that "[s]uch clear and explicit language [did] not appear in [the legislation at issue]."[79]

It is worth noting that the Court applied this presumption against abrogation without a requirement that there be ambiguity in the law, but also specifically adopted the submission of the Attorney General of Canada that a full contextual analysis supported the conclusion that no abrogation of the privilege was intended. In some respects, it seems that the presumption of legislative intent has been applied as a principle of first resort—without consideration for the modern approach to statutory interpretation. At the same time, Binnie J raised and dismissed a number of contextual indicators usually considered a part of the modern approach to statutory interpretation in finding that privilege was not abrogated.

The Supreme Court applied and further developed the *Blood Tribe* principle in three recent decisions. In *MNR v Thompson*, the Court specified that contextual factors such as legislative history and statutory context could "provide supporting context where the language of the provision is already sufficiently clear" to establish that there is an intent to abrogate solicitor-client privilege.[80] Thus, this presumption seems to continue to apply as a super-clear statement rule, with the modern approach only applicable to reinforce the conclusion that the statutory language itself is sufficiently express to override the presumption. In this sense, rather than apply as a tool for determining whether language is express in the first place, the modern approach merely functions as a backup consideration to buttress a predetermined outcome. In the recent cases of *Lizotte v Aviva Insurance Co*

75 *Blood Tribe*, *supra* note 72.

76 *Ibid* at para 9.

77 *Ibid* at para 11.

78 *Ibid* [emphasis in original].

79 *Ibid* at para 2.

80 2016 SCC 21 at para 25, [2016] 1 SCR 381.

of Canada and *Alberta (Information and Privacy Commissioner) v University of Calgary*, however, the Court affirmed the pre-eminence of the modern approach in no uncertain terms.[81] In the former case, the Court extended the *Blood Tribe* super strong clear statement rule to the question of whether legislation abrogates litigation privilege.[82]

Four conclusions can be drawn from this review of the jurisprudence. They are illustrative in that they support our argument in favor of integrating presumptions into the modern approach.

First, the presumption that the legislature does not intend to abrogate solicitor-client privilege (or litigation privilege) applies even in the absence of ambiguity. The Court appears to have adopted this approach given the recognised importance of the values at play. Yet the jurisprudence does not explain why some other presumptions that reflect other important values apply only in the presence of ambiguity.

Second, solicitor-client privilege is an example of a "super-strong" clear statement rule that adds another degree of complexity to the various ways that presumptions have been applied. The various descriptions in *Blood Tribe* of the required degree of clarity were understood in *Lizotte* and *Information Commissioner* as requiring that a provision be "clear, explicit and unequivocal."[83] This means that some presumptions, including solicitor-client privilege, will require clearer language from the legislature in order to be rebutted, while with others, language of a less exacting standard will suffice.

This conclusion raises its own set of questions regarding any attempt to ascribe *prima facie* "weight" or "clarity requirements" to substantive presumptions. For example, one could interpret the jurisprudence as setting out different degrees of intensity with respect to each presumption. In this view, the jurisprudence suggests that some presumptions are rebutted only where the text is clear while others are rebutted only where the text is very clear. Yet as there are no means of defining degrees of clarity in the abstract—the inherently contextual nature of language defies this possibility—such an explanation appears impracticable. In light of the contextually variable nature of language, it seems undesirable to adopt different thresholds that the legislature has to meet to rebut a presumption. There is no acontextual way to determine whether legislation is "clear" or "very clear". The notion

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81 2016 SCC 52, [2016] 2 SCR 521 [*Lizotte*]; 2016 SCC 53, [2016] 2 SCR 555 [*Information Commissioner*].

82 *Lizotte*, *supra* note 81; *Blood Tribe*, *supra* note 72.

83 *Lizotte*, *supra* note 81 at paras 1, 5, 61, 64, 67; *Information Commissioner*, *supra* note 81 at paras 2, 118; *Blood Tribe*, *supra* note 72.

of clarity inherently imposes an undefinable standard on the legislature. There is no bright-line rule on when a statutory provision would appear to be "clear" enough to rebut a presumption. This is part and parcel of the problem of statutory interpretation: determining whether or not statutory language is clear enough to convey meaning forms a central part of the judicial role in statutory interpretation. This determination of meaning will always involve some degree of subjectivity as judges have yet to develop a mechanically applicable means of recognising specific degrees of clarity.

Ultimately, attributing different weight to substantive presumptions, while well entrenched in the jurisprudence, is problematic. For one thing, the types of cases that come before the courts are generally already about competing principles and values: establishing an artificial and "objective" ranking of competing principles and values would amount to short-circuiting the work that forms the very core of the judicial role in statutory interpretation. Furthermore, assigning *prima facie* weight to certain values ignores the fact that these values may bear comparatively less weight in different factual circumstances; the process of making these value judgments in the context of each case is better made with transparent and candid justification rather than by the application of predetermined weighted rules. Finally, weighting presumptions seems to be at odds with the modern approach to statutory interpretation, which requires a consideration of the words of the statute and the contextual factors that inform its interpretation without necessarily saying that one factor is objectively more important than another. In light of these concerns, the framework we propose does not attempt to assign *a priori* weight to principles of interpretation.

A third conclusion can be drawn from the cases about solicitor-client privilege. In assessing whether the presumption should be extended, the Court conducted a fulsome examination of the important values that the presumption helps protect. There is an extensive discussion of the fundamental position that solicitor-client privilege plays in the administration of justice that informs the scope and application of the presumption. This, we will argue, is where the emphasis should lie when considering a presumption in the exercise of statutory interpretation. Presumptions are important in that they draw attention to fundamental social values that—as part of the context in which courts function—should receive consideration in the interpretive exercise.

Fourth, and finally, these cases underline that the development and application of these super strong clear statements rules does not mark a reversion by the Court to a plain meaning approach to statutory interpretation; the modern approach remains the fundamental principle

of statutory interpretation.[84] The Court has reaffirmed many times that the modern approach to interpretation is the preferred approach and our proposals as to how presumptions ought to be applied is intended to address this. A word of caution, however: where super strong clear statement rules require clear and unequivocal wording in the statute to displace the presumption, and where the factors in the modern approach are displaced by that requirement alone, then it would seem that the plain meaning rule may be creeping back into the interpretive process.

C) The State of Presumptions Today

As it stands, there is no overall framework for when and how substantive presumptions should be applied in the interpretative process. Rather, presumptions are applied at different points in the interpretative process and are assigned different weights with little justification. While this approach is evident in the jurisprudence, it deserves further consideration as it risks undermining the legitimacy of presumptions of legislative intent as judicial tools in the exercise of statutory interpretation. The reason for this should be obvious. The legitimacy of presumptions is premised on the assumption that the legislature is aware of the values and principles underlying each presumption. It is on this basis that the legislature is *presumed* to intend certain outcomes through its drafting of statutory language. Based on the obvious importance of these values and principles, legislatures are implicitly deemed to know when each presumption will apply. This premise is hard to sustain, however, if substantive presumptions are applied in different—and even inconsistent—ways by interpreting courts without explanation. This in turn lends support to criticism that judges selectively rely on presumptions to support a particular outcome rather than use them consistently as interpretative tools. It also makes a complex interpretive process even more unpredictable, which does little for the transparency of judicial reasons or the development of a dialogue between the judiciary and the legislature. The bottom line, then, is that presumptions of legislative intent should not be treated in an *ad hoc* manner and reliance on them ought to be better integrated into the modern approach to statutory interpretation.

4. The Way Forward

A) Reaffirming the Modern Approach

The Supreme Court has long endorsed the modern approach to interpretation as definitive. As we have seen, however, many of the current approaches to substantive presumptions foreclose the possibility of any

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[84] *Lizotte*, *supra* note 81 at para 61; *Information Commissioner*, *supra* note 81 at paras 29, 78.

meaningful engagement with the modern approach. First, "strict" or "liberal" construction rules fit uneasily with the full examination of the statutory text and context called for under the modern approach. Similarly, presumptions of last resort (i.e. those considered only in the event of ambiguity) seem to require that certain fundamental values on which presumptions are based cannot be considered as part of the interpretative context absent ambiguity. Finally, presumptions of first resort (i.e. those that apply absent clear words to the contrary) are equally incongruent with the full contextual analysis. More often than not, presumptions of first resort determine the interpretative outcome, absent clear language to the contrary. But this interpretative starting place is hard to reconcile with the full consideration of text and context for which the modern approach calls.

Each of these divergent approaches to substantive presumptions are hard to reconcile with the fundamental aim of the modern approach to interpretation, which is to fully effectuate legislative intent by considering all *relevant* sources of statutory meaning. Either by mandating a particular outcome absent an express statement of contrary intent or by relegating any consideration of their underlying values to a position of last resort, most of our current approaches to substantive presumptions risk defeating this aim at the outset. This conclusion is troubling for one reason above all: by foreclosing a full application of the modern approach, these divergent rules echo the plain meaning rule, which was once the dominant theory of interpretation in Canada. Under the plain meaning rule, courts could only rely on contextual sources of meaning if the statutory text itself was ambiguous on its face. If the text was plain, as Sullivan writes, "there [was] no need for interpretation; the plain meaning [prevailed] over other evidence of legislative intent to the extent of any discrepancy."[85] In other words, the determination that the text in question possessed a "plain meaning" foreclosed any consideration of contextual factors. This rule has been definitively criticised by both scholars and judges for its failure to account for the inherent ambiguities of language and was authoritatively rejected following the Supreme Court's adoption of the modern approach in *Rizzo*.[86] Yet despite the recognized importance of considering statutory language in its *full* context, an *ad hoc* approach to substantive presumptions bears the same risk as a return to the plain meaning rule—the risk of precluding judges from conducting the full contextual analysis required by the modern approach.

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[85] Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1999) 30:2 Ottawa L Rev 175 at 201 [Sullivan, "Statutory Interpretation"].

[86] See e.g. Côté, Beaulac & Devinat, *supra* note 2; *2747-3174 Quebec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at paras 160, 166, 201, 140 DLR (4th) 577; *Rizzo*, *supra* note 8.

In our view, the modern approach is premised on the fact that language—and its intended meaning—is inherently contextual. We also suggest that the values underlying substantive presumptions form a meaningful part of the context in which laws are enacted. As Sullivan writes, "[p]resumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs."[87] As an integral element of the context in which legislation is drafted, substantive presumptions—and the values they represent—should be folded into the modern approach rather than remain outlier rules subject to inconsistent application. The final section of our paper provides a detailed proposal for how this integration should take place.

B) Integrating Substantive Presumptions into the Modern Approach

We propose that substantive presumptions play a legitimate role within the modern approach because they recognize certain important values that form part of the "entire context" in which legislation is drafted. As these values form the backdrop of our society, there is consequently no reason to exclude them from the interpretive process. On this point, we wholly agree with Sullivan, who writes that "[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 the legislative intent, as that concept is explained by Driedger."[88] The principles that underpin these presumptions reflect societal values of primary importance and established legal norms. It should therefore not be a stretch to expect that the legislature has these principles in mind when drafting laws nor is it unreasonable to expect that the legislature will not trench on these principles lightly (i.e. absent a clear indication). In order to align the law of statutory interpretation with this view, we propose four significant changes to the current law.

1) Abandon the Language of Presumptions and Rules of "Strict" or "Liberal" Construction

We propose to abandon "strict" or "liberal" construction common law rules as well as the language of "presumptions". Instead, we ought to speak—and think—in terms of principles of interpretation. We do so for two main reasons.

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87 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham: Butterworths, 2002) at 2.

88 Sullivan, *Statutes*, *supra* note 1 at 8.

First, rules calling for "strict" or "liberal" construction tend to obscure the values being served and are frequently contradictory. Remedial laws (which are to be generously construed) often change the common law (which can only be done by clear language.) Moreover, the difference between a "strict" or "liberal" construction rule and a presumption rebuttable by clear language is more a matter of form than of substance. It is unclear what the difference is between applying "strict construction" and requiring a "clear intent" to achieve the opposite of what is presumed to be the intent.

Second, the use of the term "presumptions" is unhelpful and potentially misleading. In the general law, presumptions are either alternative statements of the burden of proof (for example, the presumption of innocence) or shortcuts to proof of certain facts once others have been established (for example, inferring death from absence of the person for seven years and the person being unheard of by persons likely to have heard after due inquiry are proved). A true presumption mandates a factual conclusion either until the contrary is proved or there is some evidence to the contrary. Presumptions in the general law thus compel an outcome and have a certain weight in the sense that a defined state of the evidence must exist before their operation will be ousted. Presumptions of legislative intent, however, are not concerned with the burden of proof and do not come into operation once other facts have been established. Rather, they are principles of interpretation. Principles do not presumptively apply and are not "rebutted"; they state in general terms a requirement of justice that may have different impacts on the outcome of a particular case in different situations.[89]

Getting away from the language of presumptions would help to break these interpretative principles free of the idea that their operation depends on the existence of a particular state of affairs or is concerned with the burden of proof or that some specific element must be present to "rebut" their application.

2) Abandon "Super Strong" Clear Statement Rules

Next, we propose that principles of interpretation ought not to be assigned differing weights in terms of the degree of clarity that is needed to overcome the interpretative outcome that results from their application. Four points support this proposal.

As discussed earlier, weighted presumptions fit uneasily within the modern approach in which the different elements of the contextual approach

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[89] See e.g. *R v Jones*, [1994] 2 SCR 229, 114 DLR (4th) 645; *R v Hart*, 2014 SCC 52 at para 124, [2014] 2 SCR 544; RM Dworkin, "Is Law a System of Rules?" in RM Dworkin, ed, *The Philosophy of Law* (New York: Oxford University Press, 1977) 38 at 47.

are not assigned predetermined weight but are rather considered as a whole. Weighting presumptions in effect ranks some underlying values as more important than others and makes objective, predetermined decisions about the importance of each value without additional *contextual* information critical to making such choices. Further, the assignment of weight risks relegating the modern approach to a secondary consideration where a "strong presumption" is being applied. Finally, it is doubtful that degrees of statutory clarity can be defined. While there will inevitably be debates about whether a particular text is clear, there is little to be gained by debates about whether a text is merely clear as opposed to "very" or "really" clear. The wide array of modifiers used in the jurisprudence to describe degrees of clarity do not seem to add a great deal to the interpretative process.

3) Apply Presumptions as Part of the Modern Approach to Interpretation

Our main recommendation concerns the full integration of the substantive presumptions into the modern approach. When applied as principles of last resort (i.e. only in the presence of ambiguity), presumptions and their underlying values are excluded from the contextual factors to be considered under the modern approach. As Sullivan observes, this jars with the aims of the modern approach. As she writes: "[a]fter the *Rizzo* case, one would have expected the question of whether a text is ambiguous to have no bearing on the question of what a court should look at in resolving the statutory interpretation problem. In every case, the entire context is to be taken into account."[90] If the aim of the exercise is to glean the intention of the legislature, then it would make sense to consider the fundamental values that the legislature must bear in mind when drafting legislation (i.e. those embodied in substantive presumptions) in addition to other factors like the statutory scheme and the relevant legislative history. As Sullivan argues, "[t]o suggest that the norms underlying presumptions must not be considered unless a text proves to be ambiguous after the completion of an analysis based on Driedger's modern principle falsely presumes that legal norms do not form part of the context in which legislation is drafted and read."[91] Excluding the values underlying substantive presumptions from the interpretive context is problematic because, as Sullivan writes:

> Certainly every legislative drafter is aware of these norms and what is required to rebut them. Legally educated interpreters have the same knowledge and appropriately rely on it when forming an impression of the intended meaning of a text, its purpose or the consequences that the legislature would likely have wished to avoid."[92] When

90 Sullivan, *Statutes*, *supra* note 1 at 22.

91 *Ibid* at 486.

92 *Ibid*.

> presumptions are applied as super-clear statement rules, the converse problem arises because in such cases, the modern approach to interpretation is subordinated to the presumption.

These principles of interpretation—and more particularly the values that they embody—should always be considered as part of the statutory context within the modern approach to statutory interpretation. To conclude otherwise would risk backsliding into a "plain meaning" approach or creating more uncertainty as to what interpretative framework applies in statutory interpretation.[93] It is largely for this reason that substantive presumptions should be treated as principles of interpretation that are "part of the context which the modern approach requires to be considered."[94] This is reflective of the underlying premise that the legislature is aware of the values and policies underlying the various presumptions of legislative intent and that they form a part of the context in which legislation is drafted and later enacted.[95]

Integrating substantive presumptions into the "entire context" of statutory interpretation is, in a sense, a full evolution of the modern approach.[96] Interpretation under the modern approach aims to be flexible and pragmatic, responding to the nuances of both language and "reality". In achieving this ideal, it rejects the mechanical application of hard and fast rules as determinants of meaning. Our proposal takes us one step further to fully realizing this aim: by stripping presumptions of any mechanical application and fully integrating them into the modern approach, our framework invites interpreters to consider the values underlying an applicable presumption as part of the statutory context *from the very start* of the interpretive process.

What does this mean in practice? Remember that the modern approach requires that "the words of an Act are to be read *in their entire context* and in their grammatical and ordinary sense harmoniously with the scheme of

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93 *Ibid* at 9.

94 *ADH*, *supra* note 67 at para 28, cited in Sullivan, *Statutes*, *supra* note 1 at 486; Eskridge, *Dynamic Statutory Interpretation*, *supra* note 5 at 275.

95 See *Hape*, *supra* note 48; *ADH*, *supra* note 67.

96 See e.g. Lorne Neudorf, "Taking Comparative Law Seriously: Rethinking the Supreme Court of Canada's Modern Approach to Statutory Interpretation" (2017) Stat L Rev [forthcoming in 2017], where Neudorf makes a similar point regarding the use of foreign legal sources in statutory interpretation. He argues that "meaningful comparisons to foreign law" should be incorporated into the "broader context from which the court can draw insight in appropriate cases." Concluding that a more structured approach to the consideration of foreign sources would enhance the legitimacy of statutory interpretation, he makes a recommendation similar to our own, namely, that a broader understanding of "context" would lead to greater methodological consistency.

the Act, the object of the Act, and the intention of Parliament."[97] We note, however, that the modern approach itself does not ascribe any predetermined weight or value to these variables nor does it mandate any particular order if they are to be considered. We conclude from this absence of precision that the modern approach invites judges to consider all relevant textual *and contextual* sources of meaning as part of their interpretive process.[98] Simply put, if the values underlying applicable presumptions form part of the interpretive context, then the modern approach requires that they be considered both in the initial determination of meaning *and* in any eventual resolution of ambiguity should that initial determination fail to produce a single conclusive interpretation. Indeed, there may not be a single conclusive interpretation in many of the cases that come before appellate courts. What matters, however, is that interpreters fully engage with the underlying values at play and provide transparent justifications for their chosen interpretation rather than rely on predetermined rules regarding when and how certain presumptions should apply.

An obvious corollary to this approach is that strict ambiguity should not be required for these principles to play a role in the interpretive process (with the exception of the presumption that the legislature intends to comply with *Charter* values, of which more to follow).[99] Relegating these principles to solely resolving ambiguity or elevating them to driving the interpretation absent a different intent divorces them from the contextual factors considered under the modern approach. Either approach deprives the court of an exhaustive and complete analysis of the intended meaning of the legislation. Rather, these principles of interpretation should play a role from the beginning as contextual factors subsumed within the modern approach to statutory interpretation.

However, if a full contextual analysis, which includes consideration of the values underlying an applicable presumption, leads to the conclusion that the legislative text is ambiguous in the strict sense (i.e. that there are at least two equally plausible interpretations), the principles of legislative intent will likely play a decisive role. In other words, if the court finds the text to be

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97 *Rizzo*, *supra* note 8 at para 21, citing Driedger, *supra* note 9 at 87 [emphasis added].

98 Several statements in the jurisprudence support this approach. Consider, for example, the following statement by Bastarache J in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 48, [2006] 1 SCR 140 [emphasis added]: "This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider *the total context* of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading." It is on this basis that Bastarache J "[proceeded] to examine the purpose and scheme of the legislation, the legislative intent *and the relevant legal norms*" as part of his assessment process.

99 *Supra* note 13.

ambiguous having considered all relevant values as part of the full contextual approach, the interpretative result should be reached in accordance with the applicable principle of interpretation. Yet this is not because the principle functions as a tie-breaking rule between equally plausible interpretation. It is because, more often than not, the value underlying the principle will be of more relative importance than other indicators of meaning within the interpretative context, leading courts to choose the interpretation that respects the value in question rather than one that does not. This, however, can only be done if there is no conflicting and applicable principle of interpretation.

Ambiguity, then, must be clearly defined. As the court stated in *Bell ExpressVu*, ambiguity should only arise where the provision must be reasonably capable of more than one meaning, each equally consistent with the intentions of the statute.[100] It is only in these situations that a presumption will likely play a "decisive" role in the interpretive exercise. We repeat, however, that ambiguity is not a requirement for the court to *consider* a relevant principle; in all cases, presumptions should be considered in assessing the meaning of the words of a statute, even before there is a finding of strict ambiguity.

We think that this emphasis on the values underlying principles of interpretation will also enhance candid and transparent justification. The perennial critique of substantive presumptions is that they are nothing more than rhetorical expedients for judges to produce particular policy outcomes. Reinforced by methodological clarity, transparent and candid justification wards off criticism of unrestrained judicial discretion while providing a clear standard for legitimate interpretation.[101] Courts should therefore engage in frank discussions of *why* a given principle applies and what importance it is given in the particular context. In particular, courts should set out and consider not only the contextual factors that justify their decision to apply a principle but also those that weigh against it and explain why these are not determinative. Integrating presumptions into the modern approach is not to be considered a free-for-all approach to interpretation. Rather, the methodological rigour and transparency required of judicial decisions should come through in the requirement that judges engage in a frank and open discussion of the values and principles they are applying within their interpretative process. Statutory interpretation is a notoriously opaque exercise; abiding by a clear methodological framework and applying it transparently, judges can shed light on their decisions and engage the

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100 *Supra* note 8 at paras 29–30. See also *CanadianOxy*, *supra* note 14 at para 14.

101 See e.g. David L Shapiro, "In Defense of Judicial Candor" (1987) 100:4 Harv L Rev 731.

public in an open dialogue about the law and the fundamental public values that inform its interpretation.

4) Only Apply the Charter Compliance Presumption in the Face of Ambiguity

We mention finally the presumption that the legislature enacts laws that respect the values embodied in the *Charter*.[102] This presumption should be applied only where there is genuine ambiguity in the legislative language that leads to "'two or more plausible readings, *each equally in accordance with the intentions of the statute*.'"[103] The reasons for this requirement are succinctly summarized in *Bell ExpressVu*.[104] Ambiguity is required because "a blanket presumption of *Charter* consistency" could frustrate the intention of the legislature regarding the application of the *Charter*.[105] Plainly stated, if the presumption were applied before a finding of ambiguity, this might preclude the application of the *Charter* as a tool for challenging the validity of a statutory provision and the possibility that the impugned provision might be justified under section 1 of the *Charter*.[106] Rather than apply the *Charter* to evaluate the constitutionality of legislation, the Court would simply be "consulting" the *Charter* and construing all statutory provisions as compliant even if the legislature intended the *Charter* to operate otherwise.[107] As such an approach would defeat the very purpose of section 1 of the *Charter*, these considerations justify a departure from the general approach that we have described.[108]

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102 *Supra* note 13.

103 *Bell ExpressVu*, *supra* note 8 at para 29 [emphasis in original], citing *CanadianOxy*, *supra* note 14 at para 14. For applications of this requirement, see *R v Clarke*, 2014 SCC 28 at paras 12–15, [2014] 1 SCR 612; *Charlebois v Saint John (City of)*, 2005 SCC 74 at paras 23–24, [2005] 3 SCR 563; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 25, [2015] 3 SCR 300; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2004 SCC 19 at para 16, [2004] 1 SCR 485; *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76 at para 178, [2002] 4 SCR 45; *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para 67, [2014] 3 SCR 431; *Pharmascience Inc v Binet*, 2006 SCC 48 at para 29, [2006] 2 SCR 513; *R v Rodgers*, 2006 SCC 15 at para 18, [2006] 1 SCR 554.

104 *Supra* note 8.

105 *Ibid* at case summary; *Charter*, *supra* note 13.

106 *Supra* note 13, s 1.

107 *Bell ExpressVu*, *supra* note 8 at para 64. See also *Willick v Willick*, [1994] 3 SCR 670 at 689–92, 119 DLR (4th) 405 [*Willick*]; *Symes v R*, [1993] 4 SCR 695, 110 DLR (4th) 470 [*Symes*]; *Charter*, *supra* note 13.

108 For an extensive discussion of the presumption of compliance with *Charter* values, see Marc Power & Darius Bossé, "Une tentative de clarification de la présomption de respect des valeurs de la *Charte canadienne des droits et libertés*" (2014) 55:3 C de D 775. The authors conduct a thorough review of the jurisprudence and conclude that courts have not applied a consistent requirement of ambiguity before resorting to this presumption. They propose that, beginning with *Hills v Canada (AG)*, [1988] 1 SCR 513, 48 DLR (4th) 193;

5. Conclusion

Substantive presumptions of legislative intent have been important tools in the exercise of statutory interpretation. Their application, however, has been inconsistent and a coherent overall methodological framework is lacking. This paper argues that presumptions of legislative intent should be treated as principles of interpretation that form part of the broader context in which legislation is enacted. A transparent discussion of all factors considered under the modern approach is essential to ensure that the process of statutory interpretation is not simply a means to an end.[109] Of course, the process of interpreting a statute inevitably "involves choice" because language is inherently indeterminate in degrees.[110] The methodological framework we propose is intended to provide a more streamlined and transparent means of justifying that choice and to prevent the manipulation of the broad and textured factors that are to be considered under the modern approach to statutory interpretation. As Sullivan writes, the rules of statutory interpretation can "limit the range of acceptable outcomes; they impose a

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Slaight Communications Inc v Davidson, [1989] 1 SCR 1038, 59 DLR (4th) 416; and *R v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606, 93 DLR (4th) 36, the Supreme Court required that, as between *two possible interpretations* of an ambiguous statutory provision, the one complying with the *Charter* should be preferred. The Court then appears to have raised this requirement of ambiguity in the form of two *equally convincing interpretations* in *Symes*, *supra* note 107 and *Willick*, *supra* note 107, thus relegating the presumption to a subsidiary role. The authors suggest that the Court then oscillated between these two definitions of ambiguity in cases like *R v Lucas*, [1998] 1 SCR 439, 157 DLR (4th) 423 and *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45, before attempting to definitively clarify the question of ambiguity in *Bell ExpressVu*, *supra* note 8, by requiring "two or more plausible readings, each equally in accordance with the intentions of the statute"—i.e. two equally convincing interpretations (at para 29). The authors survey a number of Supreme Court and other appellate decisions to argue that this definitive standard has not been consistently applied. In the face of this inconsistency, they suggest the following: in cases where *Charter* values clearly form part of the legislative context (e.g. in cases where the statute explicitly refers to the *Charter*), courts should only require ambiguity in the form of two possible interpretations before opting for one that is *Charter* compliant. Conversely, the *Bell ExpressVu* requirement that there be two equally convincing interpretations should be maintained for all other cases. While an extensive discussion of this issue is beyond the scope of the paper, our position is that the presumption (or principle) of *Charter* compliance requires genuine ambiguity, as defined in *Bell ExpressVu*, but *Charter* values and other basic constitutional principles are part of the context that a court may consider provided that the act of interpretation does not short-circuit the legislature's ability to justify limitations.

109 Murynka, *supra* note 7 at 16; Sullivan, "Statutory Interpretation", *supra* note 85 at 225–27.

110 Sullivan, "Interpreting the *Criminal Code*", *supra* note 11 at 224. See also Yves-Marie Morissette, "Peut-on « interpréter » ce qui est indéterminé?" in Stéphane Beaulac & Mathieu Devinat, eds, *Interpretatio non cessat: Mélanges en l'honneur de Pierre-André Côté* (Cowansville: Yvon Blais, 2011) 9 at 29.

certain discipline on judicial creativity; above all, they help to define the nature of the choices facing a judge in particular cases and to indicate the type of reasons that may be invoked to justify the outcome."[111] We hope that our proposed framework will serve these goals.

111 Sullivan, "Interpreting the *Criminal Code*", *supra* note 11 at 224.