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The Role of Substantive Presumptions in Statutory Interpretation

Presented By

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Today's Agenda

1. Explore the tool of substantive presumptions in the exercise of statutory interpretation
2. Consider four important questions that arise from their use



SUBSTANTIVE PRESUMPTIONS

What are they?

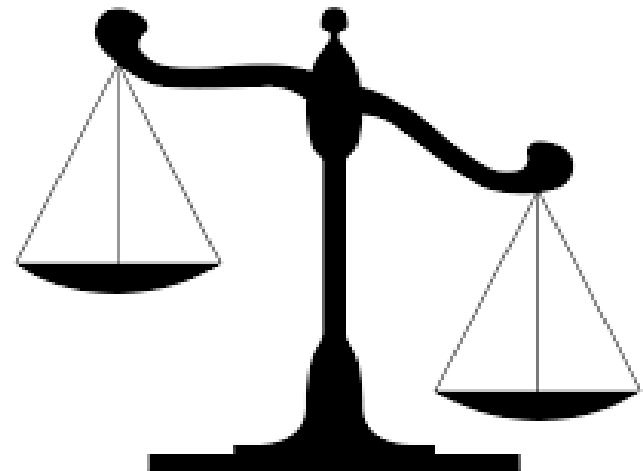


FOUR IMPORTANT QUESTIONS ARISING FROM THE USE OF SUBSTANTIVE PRESUMPTIONS

1. Is resorting to substantive presumptions a legitimate exercise of statutory interpretation?
2. When may substantive presumptions be deployed?
3. What is required to rebut their operation?
4. What relationship exists between substantive presumptions and the “modern approach” to statutory interpretation?

1. Is resorting to substantive presumptions a legitimate exercise of statutory interpretation?

- Is the conferral of quasi-constitutional protection still a valid justification in the epoch of the Charter where legal and human rights are constitutionally entrenched?
- Substantive presumptions are not policy neutral, but in fact are predetermined policy choices based on norms and fundamental social values and policies. Thus, will their use usurp legislative intent?



1. Is resorting to substantive presumptions a legitimate exercise of statutory interpretation?

From American Legal Scholarship:

- Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825 (2017)
- Based on empirical study of 296 cases of the Roberts Court in the Supreme Court of the United States, data shows contrary to conventional wisdom, substantive canons are infrequently invoked.
- Doctrinal analysis shows that Roberts Court repeatedly has used substantive canons to honour rather than frustrate congressional intent.



2. When may substantive presumptions be deployed?

Canadian Jurisprudence:

- As a principles of last resort, where there is ambiguity
 - E.g. *NAV Canada v Wilmington Trust*,
2006 SCC 24
- As a principles of first resort
 - E.g. *R v DeSousa*,
[1992] 2 SCR 944
- “Modern approach” – presumptions treated as part of the overall legislative context
 - E.g. *R v H(AD)*,
2013 SCC 28



2. When may substantive presumptions be deployed?

American Jurisprudence:

- Adopts a much more textualist approach
- Courts will not apply other canons of statutory interpretation unless statute remains ambiguous
- Even then, the Court will weigh application of the canon against the statutory context to see if the application is overcome by other “indicia of meaning”



3. What is required to rebut their operation?

- Parliamentary Supremacy – unambiguous provision must be given effect
 - *Németh v Canada (Justice)*, 2010 SCC 56
- Clear Statement Rule
 - *Morguard Properties Ltd v Winnipeg (City of)*, [1983] 2 SCR 493
- Super-Clear Statement Rule
 - *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44
- However, 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

4. What relationship exists between substantive presumptions and the “modern approach” to statutory interpretation?

- The “Modern Approach”
 - *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27
 - From Elmer A Dreidger, “*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.*”
- Substantive presumptions should 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.

4. What relationship exists between substantive presumptions and the “modern approach” to statutory interpretation?

- *R v Zora*, 2020 SCC 14 at para 33
 - “[T]his presumption of subjective fault reflects the underlying value in criminal law that the “morally innocent should not be punished” (H. (A.D.), at para. 27). This starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26).”
- *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 47
 - “[T]he approach set out below starts with the purpose and scheme of the Arbitration Act and reads the text of s. 7 in light of its full context, in a way that is both conscious of and consistent with the policy choices made by the legislature in the Arbitration Act itself and in other relevant statutes such as the Consumer Protection Act and the Class Proceedings Act. This is no “return to textualism”; instead, it is a careful reading of the statute, considered in its full context.”

4. What relationship exists between substantive presumptions and the “modern approach” to statutory interpretation?

- Substantive presumptions in the modern approach continue to respect Parliamentary intent
 - Hillier v Canada (Attorney General), 2019 FCA 44 at para 24-25
 - *“Even where, as here, the words of the legislative provision seem to be precise and unequivocal, we still must examine legislative purpose and context ... The need to examine purpose and context, however, is not a licence to overlook legislative text that is genuinely clear and unambiguous. Nor can the purpose of the legislation be used to extend the meaning of a legislative provision beyond what its plain, unambiguous words will allow.”*

Thank You

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