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CALLING ON U.S. COURTS TO ADOPT CANADA'S UNIFIED APPROACH TO STATUTORY INTERPRETATION

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I. INTRODUCTION

In the United States, courts have been divided between the new-textualist and purposive approaches to statutory interpretation, although currently the new-textualist approach appears to dominate.¹ This paper encourages courts using either approach to consider adopting the “*unified* textual, contextual and purposive approach to statutory interpretation”² (also referred to as the “words-in-total-contexts approach”³), as it has been developed by the Supreme Court of Canada in recent years.

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1. See e.g. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1761–62 (2010).

2. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at ¶ 22 (quoting *Canada Trustco Mortgage Co. v. R.*, 2005 SCC, ¶ 47) (emphasis added).

3. *Singleton v. R.*, 2001 SCC 61 at ¶¶ 59–61 (discussing this unified approach).

II. STATUTORY INTERPRETATION IN THE UNITED STATES: NEW TEXTUALIST AND PURPOSIVE APPROACHES

The common objective of all approaches to statutory interpretation is “to ascertain and effectuate the legislative intent wherever possible.”⁴ This common objective is typically referred to as a cardinal rule of interpretation. The approaches differ, however, in their conception of the legislative intent as well as in their method of ascertaining that intent. And the various ways in which to interpret statutes all fit within the broad categories of either the textualist or the purposive approach.⁵

The legal systems of the past were usually dominated by a “word-oriented (i.e. objective) approach” to interpretation.⁶ This objective approach, which is broadly referred to in the United States as textualism, is based on the plain-meaning rule. Textualism has evolved over time from the traditional approach (commonly referred to as old textualism), which relies on a soft plain-meaning rule, to the more recent new textualism, which relies on a hard plain-meaning rule.⁷

According to the traditional textualist approach, the goal of statutory interpretation was to identify and give effect to the intent and purpose of the enacting Congress based on the plain meaning of the statutory text, derived by using the aid of dictionaries and generally accepted conceptions of ordinary parlance.⁸ Yet, the courts using this approach would also consult

4. *Bankers Trust of S.C. v. Bruce*, 267 S.E.2d 424, 425 (S.C. 1980).

5. See e.g. Aharon Barak, *Purposive Interpretation in Law* chs. 7, 8 (Princeton U. Press 2005).

6. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 621 (Oxford U. Press 1996).

7. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) (discussing history of textualism).

8. *Id.* at 626–27 (noting that the Warren and Burger Courts often consulted legislative history to confirm that Congress intended particular statutory language to have its plain meaning); see also John J. Dichello Jr., Student Author, *Crossing Textualist Paths: An Analysis of the Proper Textualist Interpretation of “Use” under Section 3B1.4 of the United States Sentencing Guidelines for “Using” a Minor to Commit a Crime*, 107 Dickinson L. Rev. 359, 363 (2002) (referring to “competing textualist interpretations set forth by the Sixth and Eleventh Circuits”).

the legislative history⁹ in order to check for evidence of congressional intention inconsistent with the intention conveyed by the plain meaning of the words.¹⁰ If such inconsistency is found, then under this traditional approach, “the plainest meaning can be trumped by contradictory legislative history.”¹¹ This result, which led to characterizations of the old textualists’ reliance on the statute’s plain meaning as soft, was exemplified by cases such as *INS v. Cardoza-Fonseca*¹² and *TVA v. Hill*.¹³

By the 1980s, the traditional textualist approach attracted significant criticism,¹⁴ which influenced some members of the United States Supreme Court—notably Justice Scalia—to increasingly replace the old textualism with a new approach. This new textualism “favors understanding the text the way a reasonable reader would have read it at the time it was enacted,” and its adherents’ goal “is not to discover . . . what the legislature wanted, but rather what it said.”¹⁵ Indeed, if asked how a court—presumed to embody the reasonable person¹⁶—should ascertain the intention conveyed by the plain meaning of a statute, the new textualists’ reply is that judges “must study the language of the text as a whole, and if the statute is plain, they should give it its plain meaning”; that “[t]hey may also consult dictionaries and linguistic aids to equip themselves with information about how readers understood the statute at the time of its enactment”; and that “[t]hey may consult interpretive maxims in effect at the time of enactment.”¹⁷ New textualists

9. Eskridge, *supra* n. 7, at 636–37 (indicating that extrinsic sources from which courts reconstruct legislative history could vary considerably, through different weight would be given to sources depending on their perceived reliability, and noting that Congressional committee reports are frequently cited and relied on because they are generally regarded as reliable and authoritative).

10. *Id.* at 627.

11. *Id.* at 626 (suggesting that this override is the essence of the soft plain-meaning approach).

12. 480 U.S. 421 (1987).

13. 437 U.S. 153 (1978).

14. See e.g. Eskridge, *supra* n. 7, at 642–50 (summarizing realist, historicist, and formalist critiques).

15. Barak, *supra* n. 5, at 277.

16. See e.g. *Vector Gas Ltd. v Bay of Plenty Energy Ltd.*, [2010] NZSC 5, ¶ 19 (Tipping, J.) (noting that a court “embodies” the “reasonable and properly informed third party” whose understanding of language should control).

17. Barak, *supra* n. 5, at 278.

believe in addition that “a text cannot be understood out of context,” and “permit interpreters to consult other statutes passed by the legislature, in order to draw inferences from the legislature’s use of similar language.”¹⁸ They do not, however, “allow interpreters to consult legislative history or the system’s fundamental values as they existed at the time of interpretation.”¹⁹ Thus, “[e]ven when the plain language leads to absurdity, or when the language is unclear, *interpreters may not consult legislative history or fundamental values*,” and “have no choice but to say that the issue lies beyond the reach of the statute”²⁰ if they are acting in accordance with new-textualist principles.

Therefore, reliance on the plain meaning of statutory text has moved farther toward the hard end of the analytic scale under the new-textualist approach.²¹ Not only will judges who follow this approach not replace the plain meaning of terms with a constructed legislative intent based on the legislative history, they will not even consider the legislative history unless the statutory terms are ambiguous or absurd, or if their plain meaning seems unreasonable.²² As the Supreme Court of the United States has held,

[t]he preeminent canon of statutory interpretation requires us to “presume that [the] legislature says in a statute what it means and means in a statute what it says there.” . . . Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.²³

Some judges have, however, resorted to the purposive approach to interpretation, which requires the court to ascertain and give effect to the actual intention of Congress.²⁴ Justice Breyer, for example, acknowledges that judges “should not

18. *Id.* at 278–79.

19. *Id.* at 279 (emphasis added).

20. *Id.*

21. Eskridge, *supra* n. 7, at 656–67; see also Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* 3 (Aug. 31, 2008) (recognizing that “the Court has begun to place more emphasis on statutory text and less emphasis on legislative history and other sources ‘extrinsic’ to that text”).

22. Eskridge, *supra* n. 7, at 658–59.

23. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) (citations omitted); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (citing *Bedroc*).

24. Barak, *supra* n. 5, at 260.

substitute” their own policy views “for the statute that Congress enacted,”²⁵ but takes the position that the Court’s members “certainly should consider Congress’ view of the policy for the statute it created” and should remember that the legislators’ view “inheres in the statute’s purpose.”²⁶ He notes that “[s]tatutory interpretation is not a game of blind man’s bluff,” concluding that “[j]udges are free to consider statutory language in light of a statute’s basic purposes.”²⁷

This focus on ascertaining the actual intentions of the enacting Congress results in a “willingness to consider an array of extrinsic interpretative aids, including legislative history.”²⁸ Moreover, a purposivist would “generally feel freer to go beyond the confines of statutory text and will not necessarily find that text trumps contradictory evidence of purpose.”²⁹

III. THE APPROACH TO CONTRACTUAL INTERPRETATION IN THE UNITED STATES: A DIFFERENT TREND

The cardinal rule that guides statutory interpretation—intent—also guides the interpretation of contracts.³⁰ Not surprisingly, the question of how to approach the interpretation of the parties’ intention in a contract has also been debated. At one end of the debate were advocates—most notable being Professor Williston—of the plain-meaning approach, which resembles textualism. At the other end of the debate were advocates—most notable being Professor Corbin—of the modern approach, which resembles the purposive approach.

25. *Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, ___ U.S. ___, ___, 128 S. Ct. 2326, 2343 (2008) (Breyer, J., dissenting) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003)).

26. *Id.*

27. *Id.*

28. Gluck, *supra* n. 1, at 1764.

29. *Id.*

30. See e.g. *Vision Info. Servs., LLC v. C.I.R.*, 419 F.3d 554, 558 (6th Cir. 2005) (quoting *Pickren v. U.S.*, 378 F.2d 595, 599 (5th Cir. 1967): “The cardinal rule in the interpretation of contract is to ascertain the mutual intention of the parties and then, so far as it is possible so to do consistently with legal principles, give effect to that intention.”).

A. Williston

According to Williston, the courts must ascertain and give effect to the objectively manifested intentions of the parties, as they were conveyed by the terms of the contract, either expressly or by implication.³¹ To clarify, the objective intentions are those that a reasonable person would have identified based on the plain meaning of the terms of the contract.³² Hence, Williston believed that a court should not be concerned with the parties' actual subjective intentions, except to the extent that those were objectively manifested through the terms of the contract. Where, however, the parties' intentions could not be derived from the plain meaning of the terms, Williston instructed judges

to use "secondary" canons of interpretation, which did not inquire as to the actual intent of the parties, but instead reflected generalizations about the use of language and judicially-created normative views about how contracts ought to be drafted.³³

Because this approach is focused on ascertaining and giving effect to intentions that are objectively manifested by the plain meaning of the terms of the contract, extrinsic evidence should not be admissible "to prove the actual intent of the parties."³⁴ It is the intent conveyed by the terms that must be ascertained and given effect.

B. Corbin

In contrast to Williston, Corbin argued that the courts must ascertain and give effect to the parties' actual subjective intent.

31. Stephen R. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 Geo. L.J. 195, 197 (1998).

32. *Id.*

33. *Id.* at 201 (footnote omitted). Those secondary canons included "construe so as not to conflict with the main purpose of the contract; pay attention to grammar and punctuation; the specific governs the general; construe against the drafter; written matter trumps printed matter; and prior clauses trump latter clauses." *Id.* at 201 n. 25 (noting in addition that "Williston also employed the interpretive maxim *noscitur a sociis* (words should be given a meaning consistent with surrounding words) . . . a technique common to statutory interpretation as well").

34. *Id.* at 202.

To ascertain their actual intentions, the court must take into account not only the terms of the contract (i.e. terms within the four corners of the agreement that make up the agreement's internal contexts) but also extrinsic evidence of the agreement's relevant external contexts (commonly referred to as its "factual matrix," "matrix of facts," and "surrounding circumstances") irrespective of whether the contractual terms were ambiguous.³⁵

There has been a growing gravitation in the United States towards this modern approach to contractual interpretation. The California courts, for example, were early adopters,³⁶ and the modern purposive approach has been embraced by the Restatement as well.³⁷

C. The Implications for Statutory Interpretation

One commentator has noted that "American law is ready to consult authorial intent in contracts and wills," and wondered why it is "unwilling to do so for statutes and for the Constitution."³⁸ The analysis that follows addresses this inquiry by (i) distinguishing statutory interpretation from contractual interpretation and (ii) demonstrating that statutory interpretation requires the flexibility of a unified textual, contextual, and purposive approach rather than either a textual or purposive approach alone.

35. *Id.* at 203–05.

36. The California trend was apparent by the late 1960s. See *Pac. Gas & Elec. Co. v G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) ("If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents.").

37. Restatement (Second) of Contracts § 212 cmt. b (ALI 1981) (providing that "[a]ny determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties").

38. Barak, *supra* n. 5, at 277. Others have of course explored this same question. See e.g. Ross & Tranen, *supra* n. 31, at 199, 222 (arguing that there is a "strong analogy between contract and statutory interpretation" and concluding accordingly that an approach akin to the modern purposive approach to contractual interpretation—and not the new textualist approach—ought similarly to apply to statutory interpretation).

IV. THE NEED FOR A UNIFIED APPROACH TO STATUTORY INTERPRETATION

Recall that the interpretation of both statutes and contracts is driven by the same cardinal objective of giving effect to the authors' intentions. Notwithstanding this common objective, however, courts must be mindful that different instruments serve distinctive functions and have distinctive characteristics, which may necessitate different approaches to interpretation.³⁹ The interpretation of commercial contracts necessitates ascertaining the historical intentions of the parties. In contrast, the interpretation of statutes may, depending on how the terms of a statutory provision have been phrased, necessitate ascertaining the historical intentions of the legislature or, alternatively, may necessitate having the court apply a dynamic interpretation. These dual functions of courts require the flexibility of a unified textual, contextual, and purposive approach to interpretation.

A. Interpretation of Contracts: Theory and Mechanics

When parties negotiate the terms of their commercial contract, they—presumably—are not intending to leave it up to the courts to sort out and apply some broad policy objectives. Rather, they—presumably—rely on having a court give effect to their bargain, though the court may be expected to try to resolve inadequacies in how the terms have been expressed in order to give effect to the contract. Thus, the court's "task is to discover what the parties meant from what they have said," without imposing on the contract's words "a meaning which they cannot fairly bear," because the latter would be "to substitute for the bargain actually made one which the court believes could better have been made."⁴⁰ The court must remember, then, that

[p]articularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for [the parties] to be confident

39. See e.g. Barak, *supra* n. 5, at 185.

40. *Charter Reinsurance Co. Ltd. v. Fagan*, (1997) AC 313, 388 (Lord Mustill, J.).

that they can rely on the court to enforce their bargain according to its terms.⁴¹

It can therefore be asserted that generally, when interpreting a commercial contract, the function of the court is confined to ascertaining the parties' historical intention as it existed when the parties entered into the contract. One commentator eloquently described this historical intention as "permanently set," and noted that it "can never be changed with the passage of time" because "[t]he interpreter's role resembles that of an historian, or an archeologist, in quest of an ancient thought of which the enactment may contain traces."⁴²

B. Interpretation of Statutes: Theory and Mechanics

Unlike parties to contracts, legislators often pursue their objectives in statutes by means of, on the one hand, specific and detailed rules and, on the other hand, vague rules or policies. This paradox is exemplified by statutory regimes around the world that are designed to combat tax-avoidance transactions. It is commonplace for countries to have Specific Anti-Avoidance Rules (SAARs),⁴³ and increasingly, countries have also been introducing General Anti-Avoidance Rules (GAARs). Whereas a SAAR applies to a specific and defined type of transaction, the GAAR will set a vague standard of what constitutes tax avoidance, and this standard could apply to a wide and open-ended spectrum of unforeseeable transactions.

In Canada, for example, a transaction is an "avoidance transaction" if, but for section 245 of the Income Tax Act, it "would result, directly or indirectly, in a tax benefit."⁴⁴ When the Minister of National Revenue alleges that a transaction is an avoidance transaction as set out in section 245(3), the burden is on the taxpayer to prove otherwise on the basis that the transaction can "reasonably be considered to have been

41. *Id.*

42. Randal N. Graham, *A Unified Theory of Statutory Interpretation*, 23 *Statute L. Rev.* 91, 93 (2002) (quoting Pierre André Coté, *The Interpretation of Legislation in Canada* 6 (2d ed. Editions Yvon Blais, Inc. 1992)).

43. For more about SAARs, see Brian M. Studniberg, *Minding the Gap in Tax Interpretation: Does Specificity Oust the General Anti-Avoidance Rule Post-Copthorne?* 38 *Queen's L.J.* 209 (2012).

44. *Income Tax Act*, pt. XVI, § 245(3)(a).

undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.”⁴⁵ If the taxpayer fails to prove that the transaction is not an “avoidance transaction,” then the Minister has the burden of proving, on a balance of probabilities, that the avoidance transaction would result in an abuse or misuse (either directly or indirectly) of a provision in any of the instruments specified in section 245(4), which includes the ITA.⁴⁶ If the Minister fails in this task, the taxpayer would not be denied the tax benefit even though the transaction was an avoidance transaction.⁴⁷ But if the Minister proves that the avoidance transaction resulted in misuse or abuse of the relevant provision, then the taxpayer can be denied the tax benefits from the transaction.⁴⁸

What constitutes “misuse” or “abuse”? The approach to determining whether a transaction results in a misuse or abuse for the purposes of section 245(4) was explained by the SCC in *Canada Trustco Mortgage Company v. The Queen*.⁴⁹ Commentators have criticized the rule as being too vague,⁵⁰ a critique that is equally relevant to other GAARs around the world.⁵¹

45. *Id.*

46. *Lipson v. R.*, [2009] 1 SCR 3, 2009 SCC 1 (CanLII), ¶ 21.

47. *Id.* at ¶ 25.

48. Income Tax Act, pt. XVI, § 245(2).

49. [2005] 2 SCR 601, 2005 SCC 54 (CanLII), ¶ 44 (making clear that courts should use “a contextual and purposive interpretation of the provisions of the Act that are relied on” by first determining “their object, spirit and purpose,” and then determining “whether the transaction falls within or frustrates that purpose”).

50. See e.g. Brian J. Arnold, *The Canadian Experience with a General Anti-Avoidance Rule* 3 (Oxford U. Centre for Business Taxation 2007) (discussing abuse standard articulated in § 245, and arguing that it should apply even when an abuse is inserted into a series of legitimate transactions).

51. See e.g. Ltr. from William J. Sampl, Chair, Taxn. Comm., U.S. Council for Intl. Bus., to Ram Mohan Singh, Additional Dir. of Income Tax–Intl. Taxn., IRS (India), http://www.uscib.org/docs/Final_letter_GAAR_7_19_12.pdf (July 19, 2012) (cautioning India’s IRS that provisions in its proposed GAAR guidelines are “extraordinarily broad” and “too vague”) (accessed Aug. 1, 2014; copy on file with Journal of Appellate Practice and Process). As India’s proposed GAAR is set to come into effect in April 2015, some argue that this move should be deferred and rethought. See Pravin Agrawal and Namrata Arora, *Budget 2014–15: What Corporate India Wants*, on TaxIndiaOnline.com, http://www.taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=20874 (July 9, 2014) (“There are many provisions under GAAR that may be considered vague and unclear. If clear guidelines are not put in place, it would lead to uncertainty in the tax system and an additional risk leading to hampering the confidence of the investors. As an

In statutes, this use of vague statements or words is unlikely to be the result of bad draftsmanship. Rather, vagueness is likely an intentional tool of draftsmanship by which the legislature invites—or relies on—the courts to assume an interpretative role that is more dynamic than that presumably expected from the courts by parties to a commercial contract. This sort of dynamic interpretation “permits the interpreter to select a construction that fits with current needs and departs from historical expectations” while also permitting the court to mould interpretation of the statute

in response to “needs which are identified at the time the rule is being applied, either with reference to the current rather than the historic will of the legislature, or with respect to what the interpreter considers is dictated under the circumstances.”⁵²

This view of legislation assumes that “statutory language must grow and adapt in response to changing social conditions . . . [and] views the author’s intent as merely one (marginally relevant) element of construction” because “[t]he drafters’ understanding of the statute” is “merely one potential construction.”⁵³ Thus, “[a]s time passes and the text is applied to new situations, the statute’s meaning adapts to become something more than what the drafters first intended.”⁵⁴

To emphasize, dynamic interpretation of a statute is typically triggered, or prompted, by the legislature’s use of vague language.⁵⁵ But the use of vague language in statutory

immediate step the implementation of GAAR needs to be deferred and the provisions could be rolled out later after suitable appraisal and discussions.”) (accessed Aug. 1, 2014; copy on file with Journal of Appellate Practice and Process).

52. Graham, *supra* n. 42, at 105 (quoting Coté, *supra* n. 42).

53. *Id.*

54. *Id.* In the same vein, Professor Eskridge has written about several examples of the manner in which dynamic interpretation can cause a statute to grow in ways that conflict with the drafters’ expectations. Perhaps his most striking example is the evolution of § 212(a)(4) of the Immigration and Nationality Act of 1952. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 51–52 (Harv. U. Press 1994).

55. Vagueness is of course distinguishable from ambiguity. “[W]here language leaves the interpreter with a choice between an easily ascertainable number of specific interpretative choices, the problem can be attributed to ambiguity. Where the language being interpreted leads to a broad continuum of meanings (giving rise to ‘marginal questions of degree’), the problem can be attributed to language that is vague.” Graham, *supra* n. 42, at 121.

provisions “does not necessarily imply a lack of skill on the part of the statute’s drafters.”⁵⁶ Indeed, by employing vague language, the legislature may be “sending signals to the courts that should help the judiciary select the appropriate method of resolving interpretative problems” because

vague language may actually imply that the legislature’s intent (which is the touchstone of originalist construction) was to permit the use of dynamic interpretation and to acknowledge the role of judicial “creativity” in the construction and application of legislation.⁵⁷

Consider, for example, these four situations in which a legislature may choose vague language:

- When drafting a statute “involves hard political choices, vagueness may be employed as an expedient drafting tool to delay the choices by remitting them to future judicial construction”,⁵⁸
- When it is the legislature’s intention “to grant discretion to the courts and other officials charged with the task of administering legislation,” vague language may appear in a statute because “[o]nly a rough idea of the legislature’s meaning has been established, with the details left to be worked out by the courts or administrative officials”,⁵⁹
- When a legislature seeks “to delegate its powers to judicial or administrative bodies” because its members “recognize their own inability to predict the practical ramifications of legislation” and know that “the members of the judiciary (or other individuals charged with administering and enforcing legislation) often have the experience and the knowledge that are required to apply vague

56. *Id.*

57. *Id.* at 122.

58. *Id.*

59. *Id.* at 123.

statutory language in a manner that is appropriate,” vague language may be a proper choice,⁶⁰ and

- When drafters intend to “permit the language of an enactment to take on a life of its own,” an alternative ignored by originalists, who fail to account for “the possibility that the framers were content to leave the detailed application . . . to the courts of the future,” even knowing that those courts might “apply the text in ways unanticipated at the time of drafting.”⁶¹

V. INTERPRETATION OF STATUTES IN THE SUPREME COURT OF CANADA: THE GAAR AS ILLUSTRATION

Parliament's use in § 245(4) of the terms “misuse” and “abuse,”⁶² which set a vague standard of what constitutes tax avoidance, appears to have been for the purpose of delegating the task of filling in the legislative blanks to the judiciary. That is, the GAAR makes it possible for legislatures to defer to the courts the task of determining, on a case-by-case basis, the circumstances in which a transaction amounts to misuse or abuse. Parliament benefits from having the courts exercise this role because it is not possible for the legislature to anticipate every possible variation of tax-avoidance schemes.⁶³

60. *Id.* To illustrate this point, Professor Graham points out that “disturbing the peace is not defined” in the Criminal Code, and neither does it “describe how one could disturb the peace in a ‘tumultuous’ manner.” He concludes in consequence that “[i]n instances such as these, the drafter has used an extremely broad term for the purpose of delegating the task of filling in the ‘legislative blanks’ to the judiciary.” He posits legislators’ understanding that “[j]udges are able to determine what ‘disturbs the peace tumultuously’ because of their great experience adjudicating offences against the public order,” and suggests that “[t]he legislature, by contrast, has neither the expertise nor the inclination to define these vague terms with specificity.” Thus, “[t]hrough the use of the vague language found in such provisions, the legislature acknowledges the judiciary’s expertise and grants the courts the discretion to apply and interpret the law as they see fit.” *Id.*

61. *Id.* at 124 (internal quotation marks omitted).

62. For a general discussion of Canada’s GAAR, see section IV(B), *supra*.

63. See e.g. Aviv Pichhadze & Amir Pichhadze, *Economic Substance Doctrine: Time for a Legislative Response*, 48 Tax Notes Intl. 61 (Oct. 1, 2007); see also Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 St. Louis U. L.J. 29 (2010). The bottom line is that had Parliament known of a particular scheme in advance, it could have responded by enacting a SAAR. The GAAR’s broad language could be seen as intended to give courts authority to deal with new tax-avoidance schemes as they appear.

It should not be assumed, however, that courts will necessarily engage in dynamic interpretation just because a statutory provision is phrased vaguely. With respect to the GAAR, for example, numerous commentators have argued that for the GAAR to be effective it should apply to any transaction that lacks economic substance, even though the transaction was carried out using a valid legal form. One expert maintains, for example, that “[a]ny GAAR or general anti-avoidance doctrine must consider the economic substance of transaction[s] if it is to be effective.”⁶⁴ Another opines that the economic-substance doctrine “offers the best standard for drawing the line between legitimate tax planning and abusive tax avoidance.”⁶⁵ The application of this economic-substance doctrine is not novel. It has already been applied in several jurisdictions. Most notably, the United States Supreme Court articulated the doctrine as far back as 1935.⁶⁶ In Canada, though, the ITA does not explicitly specify whether a transaction that lacks economic substance amounts to an abusive tax-avoidance transaction. Due to the GAAR’s vagueness, this question would have to be determined by the courts.

The SCC’s first opportunity to address this question was in *Canada Trustco*,⁶⁷ in which the SCC could have applied the economic-substance doctrine through judicial statutory interpretation.⁶⁸ This possibility led to great anticipation. Yet, despite Parliament’s vague language, which may be seen to have invited the courts to read into § 245 the requirement of economic substance, the SCC refrained from such dynamic interpretation. Even though the Explanatory Notes demonstrate a legislative intention that the GAAR is intended to ensure that the provisions of the ITA will “apply to transactions with real economic substance, the Supreme Court held that economic substance is relevant under the GAAR only if the provisions in

64. Arnold, *supra* n. 50, at 3.

65. Jinyan Li, “Economic Substance”: Drawing the Line between Legitimate Tax Minimization and Abusive Tax Avoidance, 54 Canadian Tax Journal 23, 56 (2006).

66. See *Gregory v. Helvering*, 293 U.S. 465, 469–70 (1935) (indicating that a taxpayer may attempt to decrease or avoid taxes but not to evade them, and characterizing the transaction before the Court as “devious” and concluding that it was “outside the plain intent of the statute”).

67. 2005 SCC 54.

68. Li, *supra* n. 65, at 30.

question contemplate or refer to economic substance.”⁶⁹ In addition, “[v]ery few statutory provisions explicitly refer to economic substance,” and “lack of economic substance is only one factor to be considered and is insufficient by itself to establish abusive tax avoidance.”⁷⁰ It seems in consequence that “economic substance is unlikely to be an important factor in the application of the GAAR if the Supreme Court’s approach is adhered to strictly by the lower courts.”⁷¹

As the above discussion reveals, the courts’ function in the construction of statutes may be more dynamic than it is in the construction of contracts, depending on how a statutory provision has been phrased. Indeed, contractual interpretation differs from statutory interpretation in that it is focused on analyzing language in order to ascertain and give effect to the intentions of the parties to the contract, while “constitutional and statutory interpretation are not so much about the meaning of language as about political debates over the proper role of the courts in a democracy.”⁷²

This distinction has important implications for choosing an interpretative approach. In the construction of contracts the court’s function is to ascertain and give effect to the historical intentions of the parties. This necessitates a textual interpretation that focuses on the parties’ intentions as they were objectively conveyed (at the time the contract was concluded) through the plain meaning of the expressed terms (and, where relevant, also implied terms), read in light of their total context. Conversely, in

69. Arnold, *supra* n. 50, at 4; see also Judith Freedman, *Converging Tracks? Recent Developments in Canadian and UK Approaches to Tax Avoidance*, 53 *Canadian Tax J.* 1038, 1039 (2005) (noting that “[o]ne might have expected that the GAAR would give a legislative signal to judges to be bold, but it seems to have had the opposite effect of making them all the more careful to protect the taxpayer”).

70. Arnold, *supra* n. 50, at 4.

71. *Id.*

72. Lord Hoffman, *The Intolerable Wrestle with Words and Meanings*, 114 *S. Afr. L.J.* 656, 672 (1997) (noting in addition that “disagreements between judges or between judges and academics over questions of statutory interpretation . . . arouse the most extraordinary passions,” and that “these disputes . . . are in essence political and concern the relationship between the judges and the legislature”); see also Geoff R. Hall, *Canadian Contractual Interpretation Law* 4 (LexisNexis Canada 2d ed. 2012) (quoting Hoffman, recognizing differences between the interpretation of contracts and the interpretation of statutes, and pointing out that judges involved in statutory interpretation can have “fundamental disagreements about the nature of the exercise”).

the construction of statutes the courts' function can vary. Where the legislature sets out specific and detailed rules and requirements, this presumably signals the legislature's intention to have the statutory provision applied based on its plain meaning in order to give effect to the legislature's historical intentions. As was explained by the SCC with respect to the interpretation of the ITA, "because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned."⁷³ Similarly, in *Canada Trustco* the SCC stated that "[t]he Income Tax Act remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation."⁷⁴ On the other hand, where the legislature sets out vague rules and requirements, this presumably signals the legislature's intention to have the statutory provision applied with judicial discretion by means of dynamic interpretation, which in turn would necessitate a more contextual and purposive interpretation. As was explained by the SCC, "where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary."⁷⁵ Again, this is exemplified by Canada's GAAR. As the SCC recently noted, the GAAR is a "legal mechanism whereby" Parliament directs the court to go "behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer."⁷⁶ And sometimes, although the taxpayer's transactions will be "in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose."⁷⁷

Therefore, in comparison to the interpretation of commercial contracts, statutory construction requires greater flexibility, rather than limiting the courts to either textualist or purposive approaches. This flexibility can be achieved by following Canada's unified approach, which requires the courts

73. *Placer Dome*, 2006 SCC 20 at ¶ 21.

74. 2005 SCC 54 at ¶ 13.

75. *Placer Dome*, 2006 SCC 20 at ¶ 22.

76. *Cophorne Holdings Ltd. v. R.*, 2011 SCC 63 at ¶ 66.

77. *Id.*

to undertake a textual, contextual, and purposive interpretation.⁷⁸ The degree of emphasis that will be placed on any of these factors—text, context, or general purpose—should, as the SCC explained, be informed by the level of precision and clarity with which the legislation has been drafted.⁷⁹ As Justice Greenberg of Manitoba's Court of Queen's Bench recently explained, “the starting point in interpreting a statutory provision is the ordinary meaning of the words used but, except where the words are precise, one must consider the meaning of the words using a purposive and contextual analysis.”⁸⁰

It is worthwhile to consider the SCC's criticism in *Singleton* of an approach to statutory interpretation that focuses on either the extreme of a plain-meaning approach or the opposite extreme of a purposive interpretation (which it referred to as the teleological approach), and its explanation for choosing the middle ground made possible by the words-in-total-contexts approach. As Justice LeBel explained there, the teleological approach is problematic because starting from the statute's purposes risks “obscuring the meaning of the particular statutory language” because of the court's “enthusiasm to forward the general statutory purpose.”⁸¹ Instead, then, “[c]areful attention must always be taken to give effect to the particular language Parliament chose to use.”⁸²

As for the plain-meaning approach, he wrote in *Singleton* that “it surely cannot mean that we are always to ignore context when interpreting statutory language,” but “must be understood to say that although context is always important, sweeping considerations of general statutory purpose cannot outweigh the specific statutory language chosen by Parliament.”⁸³ Justice LeBel continued by cautioning against “finding a single purpose for the Act as a whole and using it to interpret the clear language of specific provisions,” encouraging the Court to use those

78. *Placer Dome*, 2006 SCC 20 at ¶ 22.

79. *Id.* at ¶ 23; see also *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at ¶ 21 (quoting description of “precise and unequivocal” language from *Canada Trustco*).

80. *Bell ExpressVu Inc. v. Winnipeg (City)*, 2010 MBQB 26 at ¶ 27 (citing *Placer Dome*).

81. *Singleton*, 2001 SCC at ¶ 64.

82. *Id.*

83. *Id.* at ¶ 68.

general purposes “only as a context to help elucidate the meaning of the specific statutory language.”⁸⁴ If used in this way, the plain-meaning approach “is not inconsistent with the basic thrust of the words-in-total-context approach.”⁸⁵

Recognizing the words-in-total-context approach as the preferred method for analyzing statutory language, Justice LeBel characterized it as an analysis that “steers a middle course” between the teleological and plain-meaning approaches and allows a “more ‘open-textured’ approach to statutory interpretation.”⁸⁶ Equally important, it “ensures that clear statutory language is not overlooked in order to carry out a broad statutory purpose more effectively.”⁸⁷

V. CONCLUSION

Statutory interpretation in the United States continues to be torn between the textualist and purposivist approaches, though the new-textualist approach has been gaining dominance. Commentators have argued that courts in the United States should focus their approach on either one of those extremes. In contrast, the SCC has, in recent years, opted for a middle ground by applying a unified textual, contextual, and purposive approach. This Canadian approach is preferable to the dichotomy seen in the United States because it provides the courts with the flexibility they require for statutory interpretation. Depending on how specific and technical a statutory provision’s phrasing, the Canadian approach enables the court to properly ascertain the legislature’s intentions, either by focusing on the legislature’s historical intentions or instead by applying a more dynamic interpretation. Courts in the United States should consider adopting this Canadian approach.



84. *Id.*

85. *Id.*

86. *Id.* (citation omitted).

87. *Id.* at ¶¶ 61–62.