

4-1-1999

## Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability

Shalin Sugunasiri  
*Dalhousie University*

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Jurisprudence Commons](#)

---

### Recommended Citation

Shalin Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999) 22:1 Dal LJ 126.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

---

Shalin M. Sugunasiri\*

Contextualism: The Supreme  
Court's New Standard of Judicial  
Analysis And Accountability

---

*Over the past few years, the "contextual approach" to law has acquired considerable cachet in juridical discourses across the country. In the Supreme Court of Canada, contextualism is now the new standard of judicial analysis and accountability. This article analyzes a decade of Supreme court jurisprudence on Charter interpretation, statutory interpretation and the common law in order to fully explicate what contextualism in law is, where it came from, and how it has achieved its current pre-eminent status. The future promise of the contextual approach is also here canvassed through a dialectical engagement with postmodernist concerns respecting inherent legal indeterminacies.*

*Dernièrement, les discours juridiques à travers le pays ont prêté leur attention à l'abordement contextuel au droit. Chez la Cour suprême du Canada la méthode contextuelle fonctionne comme le nouveau fondement de l'analyse et de la responsabilité juridique. L'auteur, en analysant la jurisprudence de la Cour suprême au fil des dernières années sur l'interprétation de la Charte, l'interprétation des lois, et le développement de la common law, relève le rôle de la méthode contextuelle, ses origines, et comment elle s'est arrivée à sa situation privilégiée. L'avenir de la méthode contextuelle est examiné à travers un engagement dialectique avec les inquiétudes post-modernistes respectant les indéterminations fondamentales du droit.*

---

\* Barrister-at-Law, of the Bar of Ontario, Assistant Professor, Faculty of Law, Dalhousie University, former Acting Senior Policy Advisor to the Hon. A. Anne McLellan, Minister of Justice and Attorney General of Canada. The views expressed in this article are the author's alone and are not intended to be representative of those of either the Minister or the Department of Justice. Grateful acknowledgements are extended to Richard Devlin, Sheila Wildeman, Douglas Taylor, Jacqueline Palumbo, and Lindsay Cader for their unique and invaluable contributions to this work.

## *Introduction*

### *I. Contextualism in Judicial Decision-making—Origins and Applications*

1. *Contextual Approach and the Canadian Charter of Rights and Freedoms*
2. *Contextual Approach and the Principles of Statutory Interpretation*
3. *Contextual Approach and the Common Law*

### *II. Contextualism in Judicial Analyses—The Underlying Theory*

1. *Introduction*
2. *The Principal Skeptical Concern—Lack of Constraint*
3. *The Contextualist Approach Theorized*
4. *Contextualism and Constraint*

## *Conclusion*

## *Introduction*

With relatively little fanfare, contextualism<sup>1</sup> has emerged over the last decade as the Supreme Court of Canada's new standard of judicial

---

1. In discussing contextualism in law, I will be using the following locutions interchangeably: "contextual approach," "contextualism," "contextualist." The exact nature and substance of this referent is developed over the course of the article; however, the following definition may serve as a useful, if general, starting point: contextualism in law is "the process of locating [legal] phenomena in their relational affinity to other influential forces": R.F. Devlin, "The Charter and Anglophone Legal Theory" (1997) 4 Rev. Const. Stud. 19 at 23 [hereinafter "Anglophone Legal Theory"].

I use the qualifier "in law" to signify that contextualism neither originated in, nor is it unique to, law. It has well developed, though differently shaped, contours in several other disciplines, including **philosophy** (see D.K. Henderson, "Epistemic Competence and Contextualist Epistemology: Why Contextualism is Not Just the Poor Person's Coherentism" (1994) 91 J. Phil. 627; D. Cornell, "Toward A Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291; W. Morrison, *Jurisprudence: From the Greeks to Post-modernism* (London: Cavendish, 1997) at 83, note 15); **sociology** (see S.C. Thomas, "A Sociological Perspective on Contextualism" (1996) 74 J. Counseling & Development 529; B.N. Steenbarger, "All the World is Not a Stage: Emerging Contextualist Themes in Counseling and Development" (1991) 70 J. Counseling & Development 288); **political science** (see R.M. Unger, *Social Theory, its Situation and its Task* (Cambridge: Cambridge University Press, 1987)); S. O'Neill,

analysis and accountability. Surprisingly, however, this first judicial response to postmodernist claims that law and legal process are too indeterminate to ensure actual judicial accountability and constraint<sup>2</sup> has garnered little attention amongst practitioners and academics.<sup>3</sup> Despite the fact that the move to contextualism represents the Court's single greatest analytical shift in its one hundred and twenty-four year history,<sup>4</sup> there is a dearth of answers to many basic questions: what is contextualism, where did it come from, when and how did it achieve its current pre-eminent status, and what are its theoretical foundations? In an age where criticism of the Supreme Court is a staple of academic success and where, in the world of practice, the Court's judgments are routinely scrutinized and found wanting for failure to accommodate the interests and concerns of one political group or another, the failure to fully engage with the Court's emergent contextualism is puzzling indeed.

In this article, as a first step towards rectifying these deficiencies in legal thought and scholarship, I attempt to outline exactly how contextual judicial analysis came into being, how it has grown over the past decade from a unique approach to *Charter*<sup>5</sup> interpretation to a ubiquitous resource and methodology for responsible curial discourse, and how it effectively addresses some rather serious contemporary fears about indeterminacy in law and legal process. In Part I, I explore the origins and various applications of the contextual approach by focusing on key Supreme Court rulings on *Charter* interpretation, statutory interpretation, and the

---

*Impartiality in Context: Grounding Justice in a Pluralist World* (Albany: State University of New York Press, 1997); M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983); **linguistics** (see G.L. Ormiston & A.D. Schrift, eds., *The Hermeneutic Tradition: From Ast to Ricoeur* (Albany: State University of New York Press, 1990); G.L. Ormiston & A.D. Schrift, eds., *Transforming the Hermeneutic Context: From Nietzsche to Nancy* (Albany: State University of New York Press, 1990); Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. & ed. D.E. Linge (Berkeley: University of California Press, 1976); L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1958)); **science** (see S. Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Ithaca, New York: Cornell University Press, 1991) [hereinafter *Whose Science?*]); and **education** (see B.A. Green, "Less is More: Teaching Legal Ethics in Context" (1998) 39 Wm. & Mary L. Rev. 357).

2. Proponents of such claims are listed in notes 190-194, *infra*.

3. See, for example, the survey in "Anglophone Legal Theory", *supra* note 1 at 44-45.

4. The Supreme Court of Canada was created in 1875 by the *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

common law. In Part II, I articulate some theoretical underpinnings of the contextual approach with a view to explaining its current eminence and its future promise. Drawing on the largely descriptive aspects of Part I, in this part, I distill and synthesize the primary prescriptive features of the contextual approach and then map out why I think it constitutes a maximally determinate mode of legal analysis and accountability. Contemporary skeptical claims respecting the law's ineluctable indeterminacy and the recent trend towards dialogism in legal theory provide an essential backdrop for the development of the latter thesis.

Although it is clear from the foregoing that this article is designed, in the first instance, to fill a gap in the current jurisprudential landscape, I also hope that it may prove useful to counsel charged with the difficult task of marshalling and presenting relevant facts in ways that comport not only with their clients' immediate interests, but also with counsel's longer term obligations as officers of the court. If contextualism is indeed the new standard of judicial analysis and accountability, then those charged with the responsibility for the advocacy that precedes and ultimately culminates in judicial decision-making cannot lightly ignore this critical intellectual resource.

### I. *Contextualism in Judicial Decision-making— Origins and Applications*

As a distinct curial methodology, the contextual approach first saw light as a technique of *Charter* interpretation. Within a year of its first appearance in a *Charter* case, contextualism took root as an analytical guide to the interpretation of ordinary legislation, and also began providing guidelines for the development of the common law. What follows is an elucidation of how contextualism's interpretive and generative capabilities evolved in little over a decade into its present incarnation as a rich and dynamic juridical methodology.

#### 1. *Contextual Approach and the Canadian Charter of Rights and Freedoms*

The 1989 judgment of Justice Wilson in *Edmonton Journal v. Alberta (Attorney General)*<sup>6</sup> is generally regarded as the originating source of the

---

6. [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to D.L.R.].

contextual approach in Supreme Court jurisprudence.<sup>7</sup> However, it would be decidedly acontextual and misleading to suggest that contextualism sprang forth from this judgment whole and entirely without precedent. For example, four years prior, in *R. v. Big M Drug Mart*,<sup>8</sup> the Supreme Court manifested a significant methodological commitment to taking broader social and philosophical contexts into consideration in elucidating fundamental legal principles.

It will be recalled that, in *Big M Drug Mart*, a constitutional challenge to the federal *Lord's Day Act*, R.S.C. 1970, c. L-13 provided the Court with its first opportunity to interpret the "Fundamental Freedoms" section of the *Charter*. In determining the meaning of "freedom of conscience and religion," Justice Dickson employed a robust analytical approach, which though not styled as "contextualist," displayed many of what would eventually become its characteristic features. For example, in construing the impugned legislative provisions, Justice Dickson took special care to (a) situate them within their broader legislative context,<sup>9</sup> (b) to consider their legislative history,<sup>10</sup> (c) to analyze their prior interpretations in this country as well as in others,<sup>11</sup> and (d) *only then*, to articulate their purpose and effects. In like manner, in assessing the relevant provision of the *Charter*, he considered (a) the broader legislative context,<sup>12</sup> (b) relevant domestic and international jurisprudence,<sup>13</sup> (c) various academic authorities,<sup>14</sup> (d) and *only then*, the provision's purpose and actual and intended effects.<sup>15</sup> The spirit of this approach is pithily captured in the following oft-quoted passage:

---

7. See, for example, R.E. Hawkins & R. Martin. "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1 at 35; *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 at 27 [hereinafter *Keegstra* cited to C.C.C.]; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter *Rocket* cited to D.L.R.]; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321 at 332-333 [hereinafter *Seaboyer* cited to C.C.C.]; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193 at 242 [hereinafter *Wholesale Travel* cited to C.C.C.]; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327 at 333 [hereinafter *Levogiannis* cited to C.C.C.]. In legal discourse, the most common way of signaling and acknowledging originating significance is to employ the adjective "seminal." In my view, however, there is simply no non-sexist justification for aligning the concept of origination with the male sexual generative potential. Accordingly, I have omitted this descriptor in my discussions of *Edmonton Journal* and cases of similar import.

8. [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385 [hereinafter *Big M* cited to C.C.C.].

9. *Ibid.* at 406-410.

10. *Ibid.* at 403.

11. *Ibid.* at 405, 413, 420.

12. *Ibid.* at 392.

13. *Ibid.* at 412, 419-423.

14. *Ibid.* at 415.

15. *Ibid.* at 414, 423.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protections. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* [citation omitted] illustrates, be placed in its proper linguistic, philosophic and historical contexts.<sup>16</sup>

Although contextually rich approaches were also utilized in other pre-*Edmonton Journal Charter* cases such as *R. v. Lyons*<sup>17</sup> and *R. v. Dymnt*,<sup>18</sup> *Edmonton Journal* gave contextualism its first nominate articulation as a distinct form of analysis. The issue in *Edmonton Journal* was whether the publication ban on certain aspects of matrimonial and civil litigation mandated by s. 30 of Alberta's *Judicature Act*, R.S.A. 1980, c. J-1 violated s. 2(b) of the *Charter*. The Court unanimously held that the civil litigation part of the ban, which prohibited pre-trial publication of all particulars of pleadings save the names of the parties and the general nature of the claims, was overbroad and could not be justified as a reasonable limit under s. 1. However, it split 6-3 on the issue of whether the privacy based proscriptions respecting matrimonial litigation were similarly overbroad.

The substantive details of the Court's *Charter* analysis are not particularly apposite for our purposes. What is of significance is Justice Wilson's methodological discussion in her concurring majority opinion, for it is here that the "contextual approach" is expressly propounded for the first time. In her view, there were two possible approaches to *Charter* interpretation: these she styled the "abstract approach" and the "contextual approach." Somewhat surprisingly, she also held that they were analytically identical:

---

16. *Ibid.* at 423-424. See also *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 at 197, 199, Dickson C.J.C. (*dissenting*); *R. v. Edward Books & Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at 73-74, La Forest J.; and *R. v. Dubois*, [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513 at 538, all to the same effect.

17. [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1 at 45.

18. [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244 at 253-254; see, as well, *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 and *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352.

Under each approach, it is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect. This is achieved through a purposive interpretation of Charter rights. It is also necessary under each approach to ascertain the legislative objective sought to be advanced by the impugned legislation. This is done by ascertaining the intention of the legislator in enacting the particular piece of legislation. When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.<sup>19</sup>

Despite her claim of analytical similarity, Justice Wilson objected to the abstract approach on the ground that it countenanced a comparison of incommensurable concepts: in this case, a comparison of the general right to freedom of expression and an individual litigant's right to privacy, instead of a litigant's rights to the protection of privacy in matrimonial disputes and the public's right to an open court process, the more factually specific competing considerations. According to Justice Wilson, the propensity for allowing a balancing of one value at large with a competing value in context is a serious methodological deficiency in the abstract approach,<sup>20</sup> one that effectively results in "pre-judge[ment of] the issue [at hand] by placing more weight on the value developed at large than is appropriate in the context of the case."<sup>21</sup> In her view, varying commitments to the "abstract" and the "contextual" approach also accounted for the Supreme Court's majority-minority divergence in several other cases.<sup>22</sup>

By contrast, the contextual approach gets much closer to the heart of the issue at hand, not only by precluding inappropriate comparisons but, as well, by mandating a more thoroughgoing consideration of the competing rights actually in issue.<sup>23</sup> By recognizing that rights and freedoms may have different meanings in different contexts, this form of analysis enables the Court to dispense justice in a more nuanced way. Thus, Justice Wilson concluded:

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that the freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual

---

19. *Edmonton Journal*, *supra* note 6 at 581.

20. *Ibid.* at 582.

21. *Ibid.*

22. *Ibid.* at 582-583.

23. *Ibid.* at 589.

approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.<sup>24</sup>

Although Justice Wilson's articulation of the contextual approach is theoretically thin and somewhat programmatic,<sup>25</sup> when taken together with the *dicta* of Justice Dickson in *Big M Drug Mart*, it becomes apparent that contextualism in *Charter* analysis is founded upon several key insights: (a) that divergences in methodological approaches can have significant substantive effects; (b) that a sound legal methodology must be analytically rigorous in the sense of precluding comparisons of incommensurable concepts;<sup>26</sup> (c) that rights have variable meanings which derive, not from their inherent nature, but from the broader sociopolitical contexts in which they are asserted; and (d) that a consideration of the impact of various legal interpretations on the actual litigants before the court is a methodological mandate of fairness and justice.

While each of these insights has been developed in succeeding non-*Charter* judgments, subsequent *Charter* analysis adds very little to the foregoing. By and large, the Supreme Court has been content to simply cite Justice Wilson's judgment for the proposition that *Charter* rights

---

24. *Ibid.* at 583-4. She further explained her position in the following manner:

It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smokestacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee: *ibid.* at 584.

25. That is, it is more about "what" should be done than about "why" the prescribed approach should be followed; compare the Court's much more substantial justificatory efforts in the area of statutory interpretation, discussed *infra*.

26. Ironically, Justice Wilson may herself have demonstrated insufficient analytical rigour in ascribing something other than a contextual approach to her concurring colleagues who formed the *Edmonton Journal* majority. A careful examination reveals that, in deriving their conclusions, the majority justices considered appropriate background circumstances; considered actual competing rights; and even imposed a contextually inspired rule of flexibility in the proportionality stage of *Charter* analysis: see *Edmonton Journal*, *supra* note 6 at 608-610, 611-612, and 618, respectively. Justice Wilson's objection ought, therefore, to have been to emphasis, not to the method employed.

may vary depending on context and to proceed from there to consider varying degrees of context.<sup>27</sup> It is interesting to note that while Justice Wilson's articulation of contextualism was largely ignored by her colleagues in *Edmonton Journal*, a mere five years later, in *R. v. Laba*, a majority of the Court confidently pronounced:

[i]t is now well established that the Charter is to be interpreted in light of the context in which it is being applied ... [and that] the historical, social and economic context in which a Charter claim arises will often be relevant in determining the meaning which ought to be given to Charter rights and is critical in determining whether limitations on those rights can be justified under s. 1.<sup>28</sup>

While such a relatively rapid and largely unexplained rise to orthodoxy is usually cause for concern, this phenomenon has not been ubiquitous. In the area of statutory interpretation, for example, the Court has, over the course of several years, gone to considerable lengths to situate its emerging contextualism within wider linguistic and philosophical traditions.

## 2. Contextual Approach and the Principles of Statutory Interpretation

The evolution of contextualism in the interpretation of ordinary legislation is essentially the story of how the Supreme Court abandoned the traditional "plain meaning" approach to statutory interpretation in favour of what has been termed the "modern approach"<sup>29</sup> to this central judicial function. Within the span of some eight years, from 1990 - 1998, the Supreme Court went from formalism to the very frontiers of legal interpretation and analysis. While this march to the cutting edge was not consistently unidirectional, it was accompanied by the Court's fullest and most self-

---

27. See, for example, *Rocket*, *supra* note 7; *Wholesale Travel*, *supra* note 7 at 242; *Keegstra*, *supra* note 7 at 27; *Seaboyer*, *supra* note 7 at 332-333; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385 [hereinafter *Committee For the Commonwealth of Canada* cited to D.L.R.]; *Levogiannis*, *supra* note 7 at 333. The contextual approach has now been applied in construing several sections of the *Charter*, including s. 8 (*Thomson Newspapers v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 54 C.C.C. (3d) 417) [hereinafter *Thomson* cited to C.C.C.]; s. 11(d) (*R. v. Harrer*, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193 at 201-203) [hereinafter *Harrer* cited to C.C.C.]; s. 15 (*Symes v. Canada*, [1993] 4 S.C.R. 695, 161 N.R. 243; *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693); and s. 1 (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1 at 31; *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, 100 C.C.C. (3d) 449; *R. v. Lucas*, [1998] 1 S.C.R. 439).

28. [1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385 at 411-412.

29. For reasons that will become evident later, this mode of analysis might more accurately be styled, the "postmodern approach."

conscious articulation of the meaning and import of contextualism in law to date.

A convenient starting point for analysis is the Supreme Court's 1990 unanimous judgment in *R. v. Multifform Manufacturing Co.*<sup>30</sup> The issue in that case was whether public authorities investigating *Bankruptcy Act* offences could obtain *Criminal Code* search warrants, despite the existence of express search authorization procedures in the *Bankruptcy Act*. The Court held that the 1985 legislative extension of *Criminal Code* search warrant provisions to "any other Act of Parliament" effectively overruled prior jurisprudence which would have answered the foregoing question in the negative; in so doing, the Court endorsed and purportedly applied the "plain meaning rule" of statutory interpretation. This term encapsulates the view that "[w]hen the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament."<sup>31</sup> Its underlying rationale was explained by the Court in the following manner:

As Maxwell stated in *The Interpretation of Statutes*, 12th ed. (1969), at pp.28-9:

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

The rule of construction is "to intend the Legislature to have meant what they have actually expressed." The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used," for "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law."

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise [citations omitted in original].

Or, as Professor P.A. Côté succinctly puts it in *The Interpretation of Legislation in Canada* (1984), at p.2: "It is said that when an Act is clear there is no need to interpret it: a simple reading suffices." To the same effect see Driedger, *Construction of Statutes*, 2d ed. (1983), at p. 28.<sup>32</sup>

30. [1990] 2 S.C.R. 624, 58 C.C.C. (3d) 257 [hereinafter *Multiform Manufacturing* cited to C.C.C.].

31. *Ibid.* at 261; see also R. Sullivan, *Statutory Interpretation* (Concord, Ontario: Irwin Law, 1997) at 49.

32. *Multiform Manufacturing, ibid.* at 262; see also J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar. Rev. 1 at 4-5.

According to *Multiform Manufacturing*, then, the primary judicial task in construing ordinary legislation is the determination of legislative intent. Since such intent cannot be inferred from the actual intent of the framers, it must be deduced from the language of the legislation under consideration. This language is quite capable of being clear and unambiguous, and when it is, the task of interpretation simply *does not arise*; in such cases, “a simple reading suffices.”<sup>33</sup> It is, of course, difficult to imagine a more positivistic, acontextual understanding of language and the juridical challenge in statutory interpretation. On the other hand, it is this very starkness that makes the evolution of the Court’s analytical approach over the next several years all the more vivid and confidence inspiring, for it provides cogent evidence that the Supreme Court is capable of reflexivity.<sup>34</sup>

The Court’s initial attempts to incorporate greater sensitivity to the contexts in which various interpretive problems arise appear in its judgments in *R. v. McCraw*<sup>35</sup> and *R. v. Chartrand*.<sup>36</sup> In these cases, without expressly claiming contextualism as its evaluative standard, the Court adopted an interpretive methodology that, in several respects, mirrored the approach taken in *Charter* interpretation.<sup>37</sup> In *McCraw*, the issue was whether a threat to rape constituted a threat to cause “serious bodily harm” within the meaning of s. 264.1(1)(a) of the *Criminal Code*. The trial judge had held that it did not, purportedly applying a plain meaning approach to the words of the accused:<sup>38</sup>

In this case, the threat to “rape,” to have non-consensual sexual intercourse may or may not involve serious bodily harm. It does not involve it necessarily ... Just as the worlds in *Gingras* [(1986), 16 W.C.B. 399 (Ont.

---

33. *Multiform Manufacturing, ibid.*

34. In other words, that it is capable of bending the collective judicial mind back on itself in critical contemplation so as to foster the evolution of best juridical thoughts. For a general elucidation of the nature and virtue of reflexivity, see S. Harding, “Rethinking Standpoint Epistemology: ‘What is Strong Objectivity?’” in Alcoff & E. Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993); *Whose Science?*, *supra* note 1.

35. [1991] 3 S.C.R. 72, 66 C.C.C. (3d) 517 [hereinafter *McCraw* cited to C.C.C.].

36. [1994] 2 S.C.R. 864, 91 C.C.C. (3d) 396 [hereinafter *Chartrand* cited to C.C.C.].

37. Once again, though, these first few steps are not entirely without precedent: see, for example, the Court’s prior human rights jurisprudence: *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577; *Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481; *Ontario (Human Rights Commission) v. Simpson Sears*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; and *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193.

38. Which were, *inter alia*, “I am going to fuck you even if I have to rape you”: *McCraw*, *supra* note 35 at 519-520.

Dist. Ct.)] are ambiguous and do not expressly or by necessary implication refer to causing serious bodily harm, so too the word “rape” in the case at bar is ambiguous and does not expressly or by necessary implication refer to the causing of serious bodily harm.

A unanimous Supreme Court came to the opposite conclusion, ostensibly taking a plain meaning approach to the legislation<sup>39</sup> and a contextual approach to the accused’s words.<sup>40</sup> With respect to the former, however, rather than engaging in the process of *non*-interpretation, prescribed in *Multiform Manufacturing*, the Court took care to consider (a) the legislative history of *Criminal Code* proscription of threatening communications; (b) related caselaw; and (c) the aim and purpose of the more particular serious bodily harm provisions, ultimately concluding that “‘serious bodily harm’ for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant.”<sup>41</sup>

With respect to the proper construction of the words used by the accused, the Court was more explicit about its contextualism. After holding that the issue of whether the impugned words constituted a threat to cause serious bodily harm is a question of law, not one of fact, the Court further held:

The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.

The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?<sup>42</sup>

The resolution of this issue ultimately entailed a consideration of rape as a general sociological phenomenon;<sup>43</sup> a consideration of the nexus between sex crimes and violence;<sup>44</sup> a consideration of academic studies

---

39. *Ibid.* at 523 (“The appellant urged that serious bodily harm is *ejusdem generis* with death. I cannot accept that contention. The principle of *ejusdem generis* has no application to this case. It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words ‘serious bodily harm’ are not in any way ambiguous.”).

40. *Ibid.* at 525.

41. *Ibid.* at 524.

42. *Ibid.* at 525.

43. *Ibid.* at 526.

44. *Ibid.* at 526-527.

detailing the psychological trauma attendant sexual violence;<sup>45</sup> a consideration of the unique perspective of women;<sup>46</sup> and, *only then*, a consideration of the words used in this case by the accused<sup>47</sup> and their impact on reasonable persons.<sup>48</sup> In the result, the Court agreed with a majority of the Ontario Court of Appeal that the threat to rape in this case clearly contravened s. 264.1(1) of the *Criminal Code*.

In *Chartrand*,<sup>49</sup> the Court was called upon to interpret the child abduction provision of the *Criminal Code*. In particular, it was called upon to elucidate the import of the qualifier “unlawfully” in the following proscription:

281. Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of an indictable offence and liable to imprisonment for term not exceeding ten years [emphasis added].<sup>50</sup>

At trial, on a motion for a directed verdict, judgment went in favour of the accused on the ground that, while there was undoubtedly “a taking” in this case, there was no evidence whatever that such taking was unlawful. The Crown appealed and argued that the term “unlawful” did not entail lawlessness beyond that already proscribed in the section and that, at most, the term meant “without lawful authority” or “without lawful justification or excuse.” To resolve this issue, once again, a unanimous Supreme Court engaged in a wide ranging interpretive analysis strongly reminiscent of its prescribed approach for *Charter* interpretation. It considered (a) the legislative history of the abduction provisions of the *Criminal Code*; (b) related academic authority and case law; (c) the broader legislative scheme (including the specific proscriptions of kidnapping, hostage taking, and adult abduction); (d) the social context in which the child abduction provision were enacted, as gleaned *inter alia* from the minutes and proceedings of the Parliamentary Standing Committee on Justice and Legal Affairs, the House of Commons debates, and RCMP and Statistics Canada numerical data; (e) general case law on the use and meaning of the qualifier “unlawfully”; and (f) the French text

---

45. *Ibid.* at 527.

46. *Ibid.* at 526.

47. *Ibid.* at 527.

48. *Ibid.* at 529.

49. *Supra* note 36.

50. *Ibid.* at 399.

of s. 281, which omits the term “unlawfully” entirely.<sup>51</sup> In the result, the Court concluded: “the word ‘unlawfully’ in the English text of the s. 281 of the *Code* means ‘without lawful justification, authority or excuse,’ and .... does not entail [sic] evidence beyond that of taking by a person without legal authority over the child.”<sup>52</sup>

A more dramatic volte face from the plain-meaning commitments in *Multiform Manufacturing* is difficult to imagine. The language of s. 281 seemed to be clear: the “taking” had to be unlawful in order to it to contravene the provision. Had Parliament not intended such a precondition, it would simply not have included this qualifier. After all, the term “unlawfully” is hardly unknown in the criminal law. Moreover, if the inclusion of this precondition makes proof of child abduction charges and thus child protection more difficult, a concern that seemed to preoccupy the Court, surely this is a state of affairs that Parliament is empowered to create where it expresses itself plainly. If Parliament is entitled to respect even when it legislates absurdly,<sup>53</sup> what warrant can there be for circumventing its clearly expressed intent merely on the grounds of improvidence or inefficiency? In so saying, I do not mean to suggest that the Supreme Court was necessarily wrong in construing the section as it did; I only wish to highlight how strong the Court’s contextualist impulse has sometimes been even in circumstances where there has been no obvious legislative ambiguity.

The strength of this impulse in relation to statutory interpretation was first *consciously* acknowledged by the Court in *Willick v. Willick*,<sup>54</sup> a judgment released a few months after *Chartrand*. The issue in *Willick* was whether child support variations under the *Divorce Act* required as conditions precedent both a material change in the circumstances of the payor as well as a material change in the circumstances of the child. The relevant portions of the Act are as follows:

---

51. *Ibid.* at 404-419.

52. *Ibid.* at 419.

53. See, for example, *R. v. McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481 at 494, 507 [hereinafter *McIntosh* cited to C.C.C.] (“where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark on a broad-ranging interpretive analysis [citation omitted]”: *ibid.* at 494).

54. [1994] 3 S.C.R. 670, 119 D.L.R. (4th) 405 [hereinafter *Willick* cited to D.L.R.].

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

a) a support order or any provision thereof on application by either or both former spouses; ...

(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of *either* former spouse *or* of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration *that change* [emphasis added].<sup>55</sup>

Although subsection 4 expressly lists changes in the circumstances of the payor spouse and changes in the circumstances of the child as disjuncts, in this case, a unanimous Saskatchewan Court of Appeal had held that it was an error to increase child support solely on the basis that there had been an increase in the payor spouse's income. The Supreme Court came to the opposite conclusion, holding that a material change of *either* the circumstances of the parent *or* those of the child could suffice. Two concurring judgments were written due to a perceived difference in analytical approach. However, a close analysis reveals that this divergence was more a disagreement in degree rather than one of kind, as both groups of judges were self-consciously contextual.

Justice L'Heureux-Dubé, writing for herself and Justices Gonthier and McLachlin, adopted the more thoroughgoing of the two contextual approaches. She took as her starting point the view that "an integral aspect of discovering parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known."<sup>56</sup> Then, recognizing that family statutes "do not exist in a vacuum" and that the social context of divorce is a continually evolving one, she argued strenuously in favour of a broadly contextual approach to statutory interpretation, one premised on a clear appreciation of the facts that. "law does not operate above or in isolation from our other social institutions," and that "law and society are inextricably interdependent."<sup>57</sup> Accordingly, it was appropriate and, indeed, essential to consider social science and social context evidence in construing statutes, even to the point of taking judicial notice of such evidence where

---

55. *Ibid.* at 416.

56. *Ibid.* at 416-417. This she derived from the Court's judgment in *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 at 484.

57. *Willick, ibid.* at 417-418.

necessary in the interests of justice.<sup>58</sup> Drawing on the demonstrated utility of contextualism in *Charter* analysis,<sup>59</sup> she also stressed the need to pay attention to the *effects* of various statutory interpretations before finally settling upon a correct view.<sup>60</sup>

Having thus sketched the parameters of her avowedly contextual analytical approach, and before turning to the issue before the Court, Justice L'Heureux-Dubé sought to distance herself from the "business as usual" stance she felt had been adopted by the majority concurring judges:

I cannot agree that the sections of the *Divorce Act* at issue in the present appeal should be interpreted without regard to their social context, and without consideration of the indisputable social realities in which the Act operates. Consequently, I prefer not to confine myself to "ordinary" rules of statutory construction in seeking the proper interpretation and application of the legislation at issue.<sup>61</sup>

In her view, the fact that these rules led to the same conclusion as that mandated by a contextual approach was "more fortuitous than probative of their actual worth, and [they were] certainly less reliable."<sup>62</sup> By and large, the better approach was to "contemplate the rationale underlying child support, the costs of raising children, the present economic state of children following divorce and the variation of separation agreements generally."<sup>63</sup>

Contrary to Justice L'Heureux-Dubé's criticism, however, the majority concurring judgment of Justice Sopinka,<sup>64</sup> was neither acontextual nor confined by the ordinary principles of statutory interpretation. In fact, Justice Sopinka was quite explicit about his contextualism: "I do not disagree with my colleague that a contextual approach to the interpretation of statutory provisions is appropriate. Indeed, I have applied this approach in my reasons." And, to be sure, prior to arriving at the identical conclusion as Justice L'Heureux-Dubé, Justice Sopinka considered (a) the purpose underlying the relevant legislation through the lens of applicable case law;<sup>65</sup> (b) the actual language used to convey Parliamentary

---

58. *Ibid.* at 418. In this case, that entailed taking judicial notice of "the significant level of poverty amongst children in single parent families and the failure of the courts to contemplate the hidden costs in their calculation of child support awards": *ibid.* at 421.

59. *Ibid.* at 419-422.

60. *Ibid.* at 422.

61. *Ibid.* at 422-423.

62. *Ibid.* at 423.

63. *Ibid.*

64. Writing for himself and Justices La Forest, Cory and Iacobucci.

65. *Willick*, *supra* note 54 at 460-461, 462.

intent;<sup>66</sup> (c) the legislative history, related provisions and the overall pattern of the *Divorce Act*;<sup>67</sup> and (d) the practical effect on and material realities of the parties before the Court.<sup>68</sup> The real reason for the divergence between the majority and minority concurring judges in this case was the latter's willingness to take judicial notice of extrinsic social context evidence. In Justice Sopinka's view this simply went too far: it unnecessarily required the Court to resolve "the thorny issue" of the appropriate use of "extraneous materials such as studies, opinions and reports," and it obscured the distinction between the interpretation of constitutional documents and the interpretation of ordinary legislation.<sup>69</sup> Although these objections were somewhat infelicitously expressed,<sup>70</sup> it is clear from the foregoing that the majority was not eschewing contextualism in advocating reliance on the rules of statutory interpretation; the disagreement, rather, was about the extent of contextualization.

Although *Willick* exhibited a significant measure of consensus on the value and legitimacy of a contextual approach to statutory interpretation, in *McIntosh*,<sup>71</sup> a decision released only a few months later, a majority of the Court returned "plain meaning" to its former stature. The issue in *McIntosh* was whether the *Criminal Code* self-defence provision relating to those causing death or grievous bodily harm was available to initial aggressors.<sup>72</sup> An affirmative answer to this question seemed more consistent with the language of the provision, but led to somewhat absurd results. As Chief Justice Lamer explained,<sup>73</sup>

if s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious. This is because the less serious aggressor could not take advantage of the broader defence in s. 34(2), as that provision is only available to an accused who "causes death or grievous bodily harm". Section 34(1) would not be available since it is explicitly limited to those who have not provoked an

---

66. *Ibid.* at 461.

67. *Ibid.* at 458, 461.

68. *Ibid.* at 462-463.

69. *Ibid.* at 453-454.

70. "I have had the advantage of reading the reasons of my colleague Madame Justice L'Heureux-Dubé and I agree with her conclusion. I am able, however, to arrive at the same result on the basis of the rules of statutory construction without resort to extensive extrinsic materials": *ibid.* at 453.

71. *Supra* note 53.

72. See sections 34 and 35 of the *Criminal Code*, R.S.C. 1985, c. C-46.

73. Writing on behalf of the majority, composed of Justices Sopinka, Cory, Iacobucci, and Major.

assault. Therefore, the less serious aggressor could only have recourse to s. 35, which imposes a retreat requirement. It is, in my opinion, anomalous that an accused who commits the most serious act has the broadest defence.<sup>74</sup>

Although the Chief Justice acknowledged that it was anomalous, illogical and absurd to accord a perpetrator of more serious harm the widest available defence, he felt constrained to endorse such an interpretation because of what he regarded as the plain meaning of the legislation. The return to the position in *Multiform Manufacturing* was signalled in the following way:

I take as my starting-point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (Sir Peter Benson Maxwell, 12<sup>th</sup> ed., by P. St. J. Langan, *Maxwell on the Interpretation of Statutes* (London: Sweet & Maxwell, 1969), at p. 29).<sup>75</sup>

In thus resurrecting the orthodoxy of plain meaning, the majority largely ignored the contextualist consensus achieved in *McCraw*, *Chartrand*, and *Willick*. Indeed, these cases were not even mentioned, despite the majority's acknowledgment that a contextual approach to statutory interpretation was both reasonable and supported by persuasive academic authority.<sup>76</sup> Three main reasons were given for preferring the plain meaning approach. First, the Chief Justice claimed that the self-defence provisions of the *Criminal Code* were unduly technical, excessively detailed, and too internally inconsistent to allow for the ascertainment of Parliamentary intent;<sup>77</sup> since the contextual approach took such intent as its point of departure, it was here precluded *ab initio*.<sup>78</sup> Second, he claimed that the price of logic in this case was a judicial reading in of words not actually present, a legislative manoeuvre for which he could find no contextualist authority.<sup>79</sup> Third, the Chief Justice

74. *McIntosh*, *supra* note 53 at 496.

75. *Ibid.* at 489.

76. *Ibid.* at 490, 491.

77. In so doing, however, he did not purport to refute the general understanding that the search for legislative intent neither is nor ought be a search for the actual intent of individual legislators: see M. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863; P. Perell, "Plain Meaning for Judges, Scholars and Practitioners" (1998) 20 Adv. Q. 24 at 49, n. 64; see also *Reference Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 at 303-306 [hereinafter *BC Motor Vehicle* cited to C.C.C.].

78. *McIntosh*, *supra* note 53 at 490-491.

79. *Ibid.* at 492.

claimed that absurdity by itself was not tantamount to ambiguity,<sup>80</sup> and that even if the provisions in question were ambiguous, their plain meaning should still be given effect for that best accorded with the “overriding principle governing the interpretation of penal provisions,” viz., that they must be construed in the manner most favourable to the accused.<sup>81</sup>

Justice McLachlin, writing for the minority,<sup>82</sup> took issue with the foregoing approach, particularly with the contention that, when the terms of the legislation are plain, they require no interpretation. First, she disagreed that the words under consideration were in any way “plain,” pointing to the divergent interpretations they had received in the courts below. Second, she maintained that, even if the words were plain, the task of interpretation could not be avoided. In her view, “no modern court would consider it appropriate to adopt [a] meaning, however ‘plain,’ without first going through the work of interpretation.”<sup>83</sup> The appropriate point of departure when construing ordinary legislation, therefore, was the intention of the legislature as determined by purpose and effects.<sup>84</sup> At best, plain meaning was but a “secondary interpretative principle aimed at discerning the intention of the legislator,”<sup>85</sup> and was far from conclusive of the proper construction to be accorded a given set of terms.

Having thus set out the minority’s view of the proper methodological starting points, Justice McLachlin went on to consider (a) the legislative history of the relevant *Criminal Code* provisions, (b) related jurisprudence, (c) contextual linguistic analyses, and (d) broader policy considerations before finally concluding that section 34(2) could not avail those who provoked the predicate assault. Like the Chief Justice, however, Justice McLachlin also neglected to advert to the contextualist consensus achieved in *McCraw*, *Chartrand*, and *Willick*, nor did she style her approach as contextual, despite her clearly contextualist leanings.

The methodological conflict exhibited in *McIntosh* effectively stalled the Supreme Court’s march towards a consistent philosophy of statutory interpretation for a significant period of time. More than a year and a half after *McIntosh* was released, the Court was still engaging in *Willick*-type superficial disagreements on the proper interpretive approach to ordinary

---

80. *Ibid.* at 494.

81. *Ibid.* at 492.

82. Comprising herself, and Justices La Forest, L’Heureux-Dubé, and Gonthier.

83. *McIntosh*, *supra* note 53 at 500, citing E.A. Driedger, *Driedger on the Construction of Statutes*, 3rd ed. (Ruth Sullivan) (Toronto: Butterworths, 1994) at 4.

84. *Ibid.* at 500-501.

85. *Ibid.* at 501.

legislation. *Verdun v. Toronto-Dominion Bank*<sup>86</sup> is a case in point. The main issue in that case was whether a beneficial shareholder of the bank's common voting shares had the right to submit proposals for inclusion in a management proxy circular. The resolution of this issue depended on whether a beneficial shareholder was a "shareholder entitled to vote" within the meaning of section 143(1) of the *Bank Act*.<sup>87</sup> As in *Willick*, the Court was unanimous in its conclusion, but issued two main judgments due to a perceived difference in interpretive approach.

Purportedly applying the plain meaning rule, the majority concluded that a beneficial owner was not a "shareholder entitled to vote" and thus not entitled to submit management proxy proposals. Its main supporting authority was the following passage from the second edition of E.A. Driedger's text, *The Construction of Statutes*,<sup>88</sup> oft-cited in Supreme Court jurisprudence:<sup>89</sup>

Today there is only one principle or approach, namely, 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. . . . Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island* put it this way:

"In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."<sup>90</sup>

However, after thus proclaiming the paramountcy of plain meaning, the majority then engaged in the wide ranging interpretive inquiry that had come to characterize the contextual approach to statutory interpretation: it considered (a) related provisions of the *Bank Act*; (b) similar provisions in other federal and provincial statutes; (c) relevant U.S. jurisprudence; and (d) various task force and policy papers. The minority's point and sole purpose for writing a separate judgment was to highlight the fact that the majority had thereby effectively applied, not a plain meaning approach, but rather a clearly contextualist one, which

86. [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415 [hereinafter *Verdun* cited to D.L.R.].

87. *Ibid.* at 419.

88. (Toronto: Butterworths, 1983) at 87.

89. See, for example, *Multiform Manufacturing*, *supra* note 30; *Friesen v. Canada*, [1995] 3 S.C.R. 103, 127 D.L.R. (4th) 193; *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, 10 D.L.R. (4th) 1; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3.

90. *Verdun*, *supra* note 86 at 422.

Justice L'Heureux-Dubé styled, "the modern contextual approach."<sup>91</sup> According to the minority, the proper academic reference, therefore, was not to Driedger's second edition, but rather to the following passage in the more recent *third* edition of his work:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its *total context*, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the *courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate.* An appropriate interpretation is one that can be justified in terms of (a) *its plausibility*, that is, its compliance with the legislative text; (b) *its efficacy*, that is, its compliance with the legislative purpose; and (c) *its acceptability*, that is the outcome is reasonable and just [emphasis in cited passage].<sup>92</sup>

The minority's refusal to countenance a merely covert return to contextualism was eventually vindicated in *R. v. Hinchey*,<sup>93</sup> when a majority of judges implicitly endorsed the contextualism elucidated by Justice L'Heureux-Dubé in 2747-3174 *Québec Inc. v. Québec (Régie des Permis D'alcool)*.<sup>94</sup> Although the precedential authority of *Québec Inc.* is obscured somewhat by Justice L'Heureux-Dubé's seeming isolation on a procedural issue in that case, her contextualist principles are ones from which there can be no easy resiling, as will be seen below.

The substantive issue in *Québec Inc.* was fairly straightforward: whether in revoking the respondent Bar's liquor permit due to complaints of excessive noise, the provincial liquor control board had acted independently and impartially within the meaning of s. 23 of the *Québec Charter of Human Rights and Freedoms*. The respondent had alleged,

---

91. Hence Justice L'Heureux-Dubé wrote:

Thus, after reviewing the provisions in their immediate context, the Act as a whole, the external context and policy implications, my colleague [Justice Iacobucci, who wrote for a majority of five] came to a contextual interpretation of the phrase "entitled to vote." I fully agree with both the process he used and the conclusions he arrived at. However, with respect, the process used by Iacobucci J. is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to statutory interpretation is the one that is actually used in the instant case: *ibid.* at 417.

92. *Verdun, ibid.* at 417-418, citing *Driedger on the Construction of Statutes*, 3d ed. by Ruth Sullivan (Toronto: Butterworths, 1994) at 131. Although this not a particularly illuminating explanation of the approach, it nevertheless seems to be a step in the right direction.

93. [1996] 3 S.C.R. 1128, 111 C.C.C. (3d) 353 at 360 [hereinafter *Hinchey* cited to C.C.C.].

94. [1996] 3 S.C.R. 919, 42 Admin. L.R. (2d) 1 [hereinafter *Québec Inc.* cited to Admin L.R.].

*inter alia*, that the Board was not impartial because its employees participated at each stage of the adjudicative process, i.e., in the investigation and filing of complaints, in the presentation of cases before the Board, as well as in the making of Board decisions. It further alleged that the Board was not independent because it was under the effective control of a Minister who evaluated the Board's chair and who could require information on the Board's activities; and because its directors held office for only five-year terms and were vulnerable to discharge by the government for defalcation, mismanagement, or gross default.

Purportedly taking a plain meaning approach to the legislation, a majority of eight members of the Court first concluded that s. 23 of the *Charter of Human Rights and Freedoms* did apply since the Board was exercising quasi-judicial functions. Second, it concluded that, while the Board was sufficiently independent, it had not acted impartially in this case. This finding was based on the facts (a) that the Board's lawyers routinely aided the Board both in making decisions respecting the initiation of prosecutions as well in the rendering of decisions in specific cases and (b) that, in the circumstances of this case, a director who had participated in the decision to prosecute the respondent Bar had also participated in the final determination to cancel the Bar's permit. Thus, for both structural and case-specific reasons, the Board's decision to cancel the Bar's permit could not stand.

Justice L'Heureux-Dubé concurred in this conclusion, but via a significantly different route. First, rather than proceeding directly to statutory interpretation, she engaged in an extended discussion on the proper methodology to be employed in statutory interpretation.<sup>95</sup> In this part of her judgment, she developed express and detailed reasons why the contextual approach was the sole defensible interpretive methodology. Having established the appropriate methodological guidelines, Justice L'Heureux-Dubé then went on to apply them to the case at hand. Taking a contextual approach to the *Charter of Human Rights and Freedoms* she concluded that s. 23 applied only to quasi-judicial adjudications with penal consequences, which were not involved here. Having thus dispatched this legislative evaluative template, she nevertheless also held that the Board was still bound to comply with the common law principle of fairness, which included the duty to act impartially. For the reasons given by the majority concurring judges, she concluded that this had not occurred here and that a reasonable apprehension of bias had arisen.

---

95. In her view, the time had come to "set out in more precise terms the basic methodological approach that should normally be used by jurists engaged in legal interpretation," by which she meant, statutory interpretation: *ibid.* at 152.

For our purposes, the most significant portion of the Supreme Court's judgment in *Québec Inc.* is that containing Justice L'Heureux-Dubé's elucidation of the contextual approach to statutory interpretation as the *only* defensible interpretive methodology. She commenced her methodological discussion by stressing the importance of precision in selecting the correct approach to statutory interpretation, pointing out that "[w]hile imprecision in the substantive law may potentially affect a certain segment of our society, vagueness in legal methodology has effects that pervade the entire judicial system in its broadest sense and are accordingly felt by society as a whole."<sup>96</sup> Thus, it was incumbent upon the Court to exercise its residual normative jurisdiction<sup>97</sup> to articulate a definitive interpretive doctrine which could be deployed by judges for both heuristic and justificatory purposes in legal decision-making.<sup>98</sup>

---

96. *Ibid.* at 152-153.

97. According to Justice L'Heureux-Dubé, this jurisdiction derives from the common law and "relates, for example, to the *rules of practice of the adversary process* and, in so far as it is not codified, the *law of evidence*" [emphasis in original]; *ibid.* at 153.

98. In this regard, she endorsed following view of Côté [P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Que.: Yvon Blais, 1991)] :

The official theory of interpretation is first and foremost an *normative theory*, a doctrine; that is, an intellectual construction which *prescribes* the manner in which the phenomenon of legal interpretation should be conceived, *sets out the objectives* which the interpreter must pursue, and *indicates the means that he may and may not, or should and should not apply*. This theory *provides a model for the jurist*, in both the search for meaning of the enactment (the heuristic function of the theory), and in the justification of the meaning which is adopted in a given case (the justificative function of the theory). The official theory does not so much tend to describe or explain that phenomenon of interpretation as to impose on the legal community a correct theoretical mode, a doctrine, an orthodoxy [emphasis added in the initial citation]: *ibid.* at 153.

In Justice L'Heureux-Dubé's conception, this development of orthodoxy is not only characterized by precision, but by methodological rigour, as well. Her endorsement of the following passage from M. Nussbaum's article, "The Use and Abuse of Philosophy in Legal Education" (1993) 45 *Stan. L. Rev.* 1627 at 1637-1638, is instructive because it highlights the reflexivity and interdisciplinary flavour she envisions for the ideal interpretive model:

Philosophy does not just conduct inquiries into specific topics; it also turns round and examines itself, asking what belief and knowledge are, what rationality is, *what interpreting a text is*, what methods are and are not conducive to understanding. Once again, *this explicitness and rigour seems to me to have a great deal to offer to the law, which inevitably talks about evidence and knowledge, about interpretation and objectivity*, and about the nature of rationality. The point is not that philosophers have some secret key to these difficult questions, but that they spend their lives working on them, whereas lawyers rarely spend much time on them at all. So there is at least some chance that philosophers' more systematic and detailed inquiries will offer something to the lawyer .... Law has become *methodologically philosophical* in some areas, in particular, in the *debates about interpretation* in constitutional law. But this self-scrutiny could be extended further and could be pursued more rigorously, with benefit to all [emphasis in original]: *Québec Inc.*, *ibid.* at 165.

Before embarking on this project, however, Justice L'Heureux-Dubé took aim at what she regarded as a long-standing obstruction to progress in this regard, namely, the continued availability and use by the Court of the plain meaning approach to statutory interpretation.

A plethora of legal, philosophical and linguistic deficiencies were identified. First, it was pointed out that the plain meaning approach was founded upon the false assumption that words have plain and ordinary meanings *apart from their context*. In Justice L'Heureux-Dubé's opinion, such a view failed to acknowledge several indisputable facts, including:

- 1) that courts frequently pronounce the meaning of words to be plain and then promptly disagree on their interpretation;<sup>99</sup>
- 2) that general words are obviously capable of bearing several meanings<sup>100</sup> and that even specific words have *both* implicit and explicit components, the former of which can simply not be understood without regard to context;<sup>101</sup>
- 3) that, "research in semantics has shown that words only take their real meaning when placed in context" and that in "invit[ing] the judge to conclude his study if, upon reading the words of the law alone, the meaning is clear . . . the rule of literal interpretation seems virtually to contradict the basic principles of linguistic communication";<sup>102</sup>
- 4) that "if the drafter had to frame . . . enactment[s] in terms suitable for a reader ignorant of past and contemporary facts and of legal principles . . . he or she would need to use far more words than is practicable in order to convey the meaning intended";<sup>103</sup> and
- 5) that, in any event, no such unencumbered readers exist, for an "interpreter's own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts [emphasis in original]."<sup>104</sup>

If one accepts the foregoing, it is evident that the plain meaning approach is *either* "defeatist and lazy" in that it encourages judges to "give up the

---

99. *Ibid.* at 155, citing M. Zander, *The Law-Making Process*, 4th ed. (London: Butterworths, 1994).

100. *Ibid.*

101. *Ibid.* at 159-160, citing P.-A. Côté, *supra* note 98, who in criticizing the literal or plain meaning approach pointed out that "*the literal approach confines the courts to the explicit component of Parliament's message: the implicit component, which is derived from the text of the statute, must also be considered in the quest for legislative intent*" [emphasis in original] (at 160).

102. *Ibid.* at 154, citing Côté.

103. *Ibid.* at 157, citing F.A.R. Bennion, *Statutory Interpretation: A Code*, 2d ed. (London: Butterworth, 1992).

104. *Ibid.* at 157, citing W.N. Eskridge, *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994).

attempt to understand the document at the first attempt,”<sup>105</sup> or it is positively insidious, for it “obscures the fact that the so-called ‘plain meaning’ is based on a set of underlying assumptions that are concealed in legal reasoning.”<sup>106</sup> In other words,

*The assertion in a judicial opinion that a statute needs no interpretation because it is “clear and unambiguous” is in reality evidence that the court has already considered and construed the act. It may also signify that the court is unwilling to consider evidence bearing on the question how the statute is to be construed, and is instead declaring its effect on the basis of the judge’s own uninstructed and unrationalized impression of its meaning [emphasis in original].*<sup>107</sup>

According to Justice L’Heureux-Dubé, in addition to being disingenuous and intellectually indefensible, the plain meaning approach is problematic on several ethical fronts. To explicate these, she drew on some of her prior comments in *Willick*<sup>108</sup> and on the following cogent passage by Zander:

It is not that the literal approach necessarily gives the wrong result but rather that the result is purely accidental. It is the intellectual equivalent of deciding the case by tossing a coin. The literal interpretation in a particular case may in fact be the best and wisest of the various alternatives, but the literal approach is always *wrong* because it amounts to an *abdication of responsibility* by the judge. Instead of decisions being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred . . . . The approach is mechanical, divorced from the realities of the use of language *and from the expectations and aspirations of the human beings concerned* and, in that sense, it is *irresponsible* [emphasis added].<sup>109</sup>

In the result, Justice L’Heureux-Dubé concluded that “the era of concealed underlying premises” had drawn to a close and that “those premises must now be brought to the surface in order to promote consistency in our law *and the integrity of our judicial system* [emphasis added].”<sup>110</sup> The

---

105. In other words, “Instead of struggling to discover what it means, he simply adopts the most straightforward interpretation of the words in question – without regard to whether this interpretation makes sense in the particular context”: *ibid.* at 155, citing Zander.

106. *Ibid.* at 154.

107. *Ibid.* at 156, citing N.J. Singer, *Statutes and Statutory Construction*, 5th ed. (Deerfield, IL: Clark Boardman Callaghan, 1992), vol. 2A. To phrase the matter somewhat more generally, “in reality, the ‘plain meaning’ *can be nothing but* the result of an *implicit process* of legal interpretation” [emphasis in original]: *ibid.* at 154.

108. *Supra* note 54 at 423.

109. *Québec Inc.*, *supra* note 94 at 155-156, citing Zander.

110. *Ibid.* at 157.

solution, in her view, was what she had previously styled as the “modern approach” to statutory interpretation.<sup>111</sup>

We have already seen some of the central features of this approach. These features were further refined and elaborated on by Justice L’Heureux-Dubé in *Québec Inc.* In terms of foundational underpinnings, in addition to the above-enumerated facts, the modern approach also rests on the following key insights:

- 1) that “language does not govern purpose, rather it serves it. The law is an instrument for realizing legal policy, and therefore interpretation needs to aim toward emancipating the wording from its semantic bonds, were these to distance it from the legislative purpose which the words are intended to realize”;<sup>112</sup>
- 2) that language is open textured and that “for any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time”;<sup>113</sup> thus, “the plainer [the language] seem[s], the more the reader needs to be on guard”;<sup>114</sup> and
- 3) that, accordingly, a court should “not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in the light of the guides to legislative intention, the *context* of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.”<sup>115</sup>

With respect to constitutive elements of the “modern approach” to statutory interpretation, Justice L’Heureux-Dubé was at pains to point out that, to begin with, it is founded upon the following legal rule: “the interpreter is to infer that the legislator, when setting the wording of an enactment, intended it to be given a fully informed rather than a purely literal, interpretation.”<sup>116</sup> In her view, in order to give such an informed interpretation, a court must consider “at the outset[,] not only the words themselves but also, *inter alia*, . . . the context, the statute’s other

---

111. What I have called the “contextual approach to statutory interpretation”: see *Verdun*, *supra* note 84 at 417 and *Québec Inc.*, *ibid.*, at 158.

112. *Québec Inc.*, *ibid.* at 159, citing Justice Shamgar [President of the Supreme Court of Israel], *Selected Judgments of the Supreme Court of Israel* (1992), vol. VIII.

113. *Ibid.* at 156, citing Eskridge. Some of the reasons for this are: the natural ambiguities of language, the frailties of even the most skilled draftspeople, the impossibility of foreseeing and the need to provide for future events: *ibid.* at 155, citing Zander. See also H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 124 *et seq.*

114. *Québec Inc.*, *ibid.* at 158, citing Bennion.

115. *Ibid.*, at 157, citing Bennion.

116. *Ibid.* at 157, citing Bennion. See also *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028, 125 D.L.R. (4th) 385 at 414 [hereinafter *Canadian Pacific* cited to D.L.R.] for the *Charter* analog of this approach.

provisions, provisions of other statutes *in pari materia* and the legislative history.”<sup>117</sup> It must take cognizance of and bring to the fore the hidden assumptions that underwrite each step of the interpretive process;<sup>118</sup> and it must give due regard to the consequences of particular interpretations.<sup>119</sup> Only then can a definitive interpretation be safely arrived at. Accordingly, the modern approach to statutory interpretation aspires to be a responsible, pragmatic and functional methodology which focuses on the spirit and purpose of any given piece of legislation<sup>120</sup> and which conscientiously eschew, what Justice L’Heureux-Dubé termed, “Humpty-Dumpty-like” interpretive exercises “based on random or vague rules or solely on intuition or unrationalized impressions.”<sup>121</sup>

According to Justice L’Heureux-Dubé, in light of the availability of such a viable alternative interpretive method, the Court’s continuing reliance upon the plain meaning approach could no longer be tolerated. After reviewing the dissension detailed above as well as that exhibited in other judgments,<sup>122</sup> she chastized the Court for its methodological sloppiness and moved resolutely to remedy the situation:

---

117. *Québec Inc.*, *ibid.* at 158.

118. *Ibid.* at 160, citing L.M. du Plessis, *The Interpretation of Statutes* (Durban: Butterworths, 1986); see also *ibid.* at 158.

119. *Ibid.* at 159, citing Cote and her own judgment in *Hills v. Canada (A.G.)*, [1988] 1 S.C.R. 513 [hereinafter *Hills*].

120. *Québec Inc.*, *ibid.* at 158-159, citing her own judgment in *Hills*, *ibid.*

121. *Ibid.* at 163. The reference to “Humpty-Dumpty” is, of course, a reference to Lewis Carroll’s work *Through the Looking Glass*, cited in P. Perell, “Plain Meaning for Judges, Scholars and Practitioners” (1998) 20 Adv. Q. 24 at 34 [hereinafter “Plain Meaning”]:

“There’s glory for you!” [said Humpty Dumpty]

“I don’t know what you mean by ‘glory’,” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t – till I tell you. I mean ‘there’s a nice knock-down argument for you.’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument for you’,” Alice objected.

“When I use a word”, Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is”, said Alice “whether you *can* make words mean so many different things.”

“*The question is*”, said Humpty Dumpty, “*which is to be master – that’s all.*”

[emphasis added].

122. The cases discussed were *R. v. Hills*, *supra* note 119; *McIntosh*, *supra* note 53; *Creighton*, [1993] 3 S.C.R. 3; *Canadian Pacific*, *supra* note 116; *Lewis*, [1996] 1 S.C.R. 921; and *Verdun*, *supra* note 86.

The fact that this Court is wavering at random between the former “plain meaning” method and the “modern” contemporary method introduces uncertainty into the law as far as this methodological point is concerned. What method should jurists use? As things stand at the moment, the answer is at best obscure. If the courts randomly choose one of the two interpretation methods depending on the desired result, then the activity of legal interpretation is reduced to an arbitrary exercise whose result is unpredictable . . . . In light of the dynamic development of our law, the plurality of perspectives on legal analysis, the methodological problems presented by the “plain meaning” [approach] and the growing international recognition of all these factors, I believe that it is time to abandon the former “plain meaning” method in Canada and, from now on, to use the “modern” method as the basic approach to legal interpretation.<sup>123</sup>

As indicated previously, Justice L’Heureux-Dubé’s view of the contextual (what she called the modern) approach to statutory interpretation became the majority position of the Court in *Hinchey*<sup>124</sup> and should now be regarded as the pre-eminent methodology in this area of legal decision-making.

### 3. Contextual Approach and the Common Law

Although attention to context has frequently been said to characterize the common law,<sup>125</sup> this feature has seen steady growth in both scope and

123. *Québec Inc.*, *ibid.* at 162-163.

124. *Supra* note 93 at 360 (“In interpreting any section of the *Criminal Code*, or indeed of any statute, it is always crucial to begin by considering the section itself and the rationale which is underlying it. This is in accordance with the contextual approach I have discussed recently in *Manulife Bank of Canada v. Conlin*, *Verdun v. Toronto Dominion Bank*, and *2747-3174 Québec Inc. v. Québec (Régie des permis d’alcool)*” [citations omitted]).

It is noteworthy that this position, articulated by Justice L’Heureux-Dubé. (*La Forest*, Gonthier and McLachlin JJ., concurring), was not contested by Justice Cory, who wrote a concurring opinion on behalf of himself and Justices Sopinka and Iacobucci, and this despite the fact that they disagreed on the proper construction of the legislation in question (s. 121(1)(c) of the *Criminal Code*). The principal contextualist considerations in *Hinchey* were (a) legislative intent and its underlying rationale (at 360); (b) legislative language, both of the specific provision as well as of the surrounding provisions (at 363); (c) the general area of law affected (371) and (d) prior jurisprudence. There was, as well, the requisite premium placed on analytical clarity (at 362) and unabashed candour (no rewriting under the guise of interpreting) (at 371).

125. See, for example, *R. v. Salituro*, [1991] 3 S.C.R. 654, 68 C.C.C. (3d) 289 at 307 (S.C.C.) (“The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.”); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at 156 (holding that the obligation to interpret the common law in a manner that is consistent with *Charter* principles “is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values.”); see, as well, *Seaboyer*, *supra* note 7 and S.M. Waddams, *Introduction to the Study of Law*, 3d ed. (Toronto: Carswell, 1987) c. 7.

sophistication in the past decade. Two areas in which common law contextualism has sprung to the fore are in the Court's vagueness jurisprudence<sup>126</sup> and in its bias jurisprudence.<sup>127</sup>

The leading cases on vagueness are *Nova Scotia Pharmaceutical Society*<sup>128</sup> and *Canadian Pacific Ltd.*<sup>129</sup> *Nova Scotia Pharmaceutical*, the Court was called upon to assess the constitutionality of sections 32(1)(c) and 32(1.1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. The central issues were whether these provisions were impermissibly vague and whether the offence they created possessed a sufficient *mens rea* component within the meaning of section 7 of the *Charter*. A unanimous Court upheld the legislation and provided what has proved to be its most articulate analysis of vagueness doctrine to date.

---

126. What I have called the "vagueness jurisprudence" has also been more clumsily termed "the doctrine of void for vagueness," or "the 'void for vagueness' principle": see, for example, *Mewett & Manning on Criminal Law*, 3d ed. (Toronto: Butterworths, 1994) at 13. Although this doctrine has been mainly developed in the context of *Charter* litigation, its judicial identification as a principle of fundamental justice, i.e., as a qualifier of s. 7 rights, as opposed to a constitutional right *simpliciter*, makes clear that it is a common law principle at heart, albeit one that has now acquired significant constitutional import: see, generally, *BC Motor Vehicle Act*, *supra* note 77.

127. Other areas of the common law in which the Court has manifested its growing commitment to contextualism are in its self-incrimination jurisprudence (i.e., with respect to the *principle* (as opposed to the privilege) against self-incrimination) and in its contract interpretation jurisprudence pertaining to the subject of guarantees. In the former case, the Court deployed the contextual approach over the course of some nine cases to actually *create* a principle of fundamental justice: see *R. v. Dubois*, [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513; *R. v. Lyons*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, 56 D.L.R. (4th) 309; *Thomson*, *supra* note 27; *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555, 89 C.C.C. (3d) 289; *R. v. Jones*, [1994] 2 S.C.R. 229, 89 C.C.C. (3d) 353; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, 97 C.C.C. (3d) 505; and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 102 C.C.C. (3d) 144. With respect to the evolution of the Court's approach to the interpretation of guarantees, see *Holland-Canada Mortgage v. Hutchings*, [1936] S.C.R. 165; *Bauer v. The Bank of Montreal*, [1980] 2 S.C.R. 102; *Citadel General Assurance v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513; all of which culminated in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426. In both of these areas, the Court manifested what may now be regarded as characteristic contextualist features, viz., reflexivity, emphasis on analytical clarity, and a careful attention to language, jurisprudential history (case law as well as academic commentary) and broader jurisprudence (including international statutory provisions and case law).

128. [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289 [hereinafter *Nova Scotia Pharmaceutical* cited to C.C.C.].

129. *Supra* note 114.

In expressing the judgment of the Court, Justice Gonthier first considered prior Supreme Court jurisprudence. In canvassing past rulings,<sup>130</sup> he critically observed that although the issue of vagueness and its related concept, overbreadth, had already figured in several decisions, “few statements [had hitherto] been made to *substantiate* the notion of vagueness, and its relationship with overbreadth” [emphasis added].<sup>131</sup> With a view to laying a foundation for doing just that, after summarizing key principles emerging out of the earlier cases, Justice Gonthier moved to a consideration of relevant U.S. authorities to delineate the conceptual difference between vagueness and overbreadth.<sup>132</sup>

Justice Gonthier’s next step was to uncover and develop the rationales underlying the vagueness jurisprudence. His resources for this exercise were national and international case law and academic authorities,<sup>133</sup> and his analysis extended to embrace such diverse issues as (a) the sociological nature of legal proscriptions generally;<sup>134</sup> (b) the ontological status of language;<sup>135</sup> (c) the proper relation between law and society given our foundational sociopolitical commitment to the rule of law;<sup>136</sup> (d) the mediating role of the judiciary;<sup>137</sup> and (e) the import of current state participation in virtually all facets of human behaviour and life.<sup>138</sup> Although his analysis was not particularly extensive, it did nevertheless provide a broad base for his ultimate conclusions, which largely supported the contextualist vision of law and legal process expressed by Justice L’Heureux-Dubé in *Québec Inc.*<sup>139</sup>

---

130. By the time *Nova Scotia Pharmaceutical* came to be decided, the Court had canvassed vagueness doctrine in eight prior judgments, viz., *Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449; *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577; *Reference Re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65; *Keegstra*, *supra* note 7; *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577; *Committee for Commonwealth of Canada v. Canada*, *supra* note 27; *Osbourne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321; *R. v. Butler*, [1992] 1 S.C.R. 452, 70 C.C.C. (3d) 129.

131. *Nova Scotia Pharmaceutical*, *supra* note 128 at 298.

132. *Ibid.* at 303.

133. Among the international cases considered were *The Sunday Times Case* (1979), Eur. Ct. H.R. Ser. A, No. 30; the *Malone Case* (1984), Eur. Ct. H.R. Ser. A, No. 82; and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); some of the international authorities canvassed were: P. Amssele, “La teneur indélicate du droit” (1992) 26 R.J.T. 1; L.C. Blaau, “The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights” (1990) 107 S. African L.J. 76; and J. Chitty, *Chitty on Contracts*, 25th ed. (London: Sweet & Maxwell, 1983).

134. *Nova Scotia Pharmaceutical*, *supra* note 128 at 310.

135. *Ibid.* at 311.

136. *Ibid.* at 311-312.

137. *Ibid.* at 312.

138. *Ibid.* at 312.

139. *Supra* notes 94-123 and accompanying text.

In terms of conceptual background, Justice Gonthier held that legal rules outline permissible and impermissible areas of human activity. In so doing, they also identify and delineate zones of risk, but only in a general way: they “only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority.”<sup>140</sup> Accordingly, legal rules may be said to be “characterized by their unresolved nature, inasmuch as they are neither objective nor complete.”<sup>141</sup> Indeed, no higher standard of certainty may be imposed upon them given the complexities of the modern state and the inherent limitations of language:

[s]emantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool that some think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.<sup>142</sup>

According to Justice Gonthier, the complexities of the modern state also require that enactments be framed in general terms, particularly in areas animated by public policy considerations that vary from time to time and from case to case. Too much detail can preclude the flexibility required to address society’s complex needs.<sup>143</sup> On the other hand, due regard must also be had for “the rule of law principles that form the backbone of our polity”:<sup>144</sup> it must never be forgotten that the twin rationales underlying the vagueness doctrine are “fair notice to citizen[s]” and the “limitation of enforcement discretion.”<sup>145</sup> In order to maintain a proper balance between the two, recourse could be had to the judiciary’s “mediating role in the actualization of law.”<sup>146</sup> Thus, we find that

---

140. *Nova Scotia Pharmaceutical*, *supra* note 128 at 310.

141. *Ibid.*, endorsing Amselek.

142. *Ibid.* at 311.

143. *Ibid.* at 312-313.

144. *Ibid.* at 311.

145. *Ibid.* at 306-309.

146. Which was more fully explained in the following manner:

[t]his arbitration [of increasingly complex social affairs] must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion, the generality of these terms may entail a greater role for the judiciary, but unlike some authors (see F. Neumann, *The Rule of Law* (1986), at pp. 238-9), I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and “mechanical” provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary: *Nova Scotia Pharmaceutical*, *ibid.* at 312.

[a] vague provision [is one that] does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics . . . . Once more, an impermissibly vague law will not provide sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements.<sup>147</sup>

In other words, “a law will be found to be unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.”<sup>148</sup>

If there were any doubts about the contextualism inherent in this approach, they were soon dispelled by the Court’s judgment in *Canadian Pacific*. The issue in that case was whether section 13(a) of the *Environmental Protection Act*, R.S.O. 1980, c. 141 was impermissibly vague and thus violative of section 7 of the *Charter*. In concluding that it was not, a majority of the Court,<sup>149</sup> expressing itself once again through Justice Gonthier, further refined the substantive aspects of the vagueness doctrine and provided expressly contextualist methodological underpinnings.

For example, after affirming the central principles discussed above, Justice Gonthier cautioned that “[i]n undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision.”<sup>150</sup> This entailed engaging the judiciary’s mediating role in a serious way<sup>151</sup> and recognizing the practical difficulties legislators face when attempting to simultaneously address specific present issues and unspecified future contingencies.<sup>152</sup> Accordingly,

---

147. *Ibid.* at 311 and 313.

148. *Ibid.* at 313.

149. Comprising Justices Gonthier, La Forest, L’Heureux-Dubé, McLachlin, Iacobucci and Major.

150. *Canadian Pacific*, *supra* note 116 at 413.

151. In this regard, Justice Gonthier went so far as to say: “[t]he use of broad and general terms in legislation may well be justified, and s. 7 [of the *Charter*] does not prevent the legislature from placing *primary* reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations [emphasis added]”: *ibid.* at 414.

152. Justice Gonthier found the following articulation of these difficulties by A.S. Butler, “A Presumption of Statutory Conformity with the *Charter*” (1993) 19 *Queen’s L.J.* 209 at 225-227 to be particularly helpful:

Let us consider the practical difficulties facing legislators in giving statutory expression to their intentions. One difficulty faced in the drafting of statutes is meeting the demand that laws operate prospectively. Legislatures cannot as a rule set down *ex post facto*

[v]agueness must not be considered *in abstracto*, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.<sup>153</sup>

Justice Gonthier also reiterated that the other factors to be considered in assessing vagueness were those summarized in *Nova Scotia Pharmaceutical*, viz., (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate, and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.<sup>154</sup>

The contextualist commitments revealed in the foregoing jurisprudence are extended in a somewhat different form in the Court's bias jurisprudence. Whereas the focus in the vagueness jurisprudence is on the rules and text being interpreted, the focus in the bias jurisprudence is on the interpreters themselves and on their accountability, not to the text, but rather to the broader interpretive community. An examination of the bias jurisprudence serves, therefore, to round out our survey of the Court's emerging contextualist understanding of law and legal process.

---

provisions, which identify types of fact situations intended to be caught by a particular enactment, distinguished from others. Accordingly, legislators face a dilemma: they must pay particular attention to and identify the core commonalities of the fact situations they *do* wish to legislate against (which become embodied within statutes), while at the same time not neglecting to anticipate and provide for variations on those fact situations, which may occur in the future . . . . The usual solution to this dilemma is to fall back on general language, which is adequate to cover the particular situations envisaged, and which holds out the possibility of catching unforeseen variations. This strategy can often lead to broadly expressed statutory language, with the danger that it may apply to too much activity – the problem of overbreadth – or that it will not be expressed in concrete enough terms – the problem of vagueness. *In such instances, however, the expectation of the legislators will invariably be that the courts will flesh-out the generality of the provisions through interpretation based upon experience* [emphasis in original]: *Canadian Pacific, ibid.* at 414.

153. *Canadian Pacific, ibid.* at 413-414.

154. *Ibid.* at 414. Given the flexibility inherent in the foregoing criteria, one might be excused for wondering whether legislation could ever be found wanting under the Court's vagueness standard; however, at least two such instances exist at the Supreme Court level: *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91 ("public interest" arm of *Criminal Code* bail provision: s. 515(10)(b)) and *R. v. Heywood*, [1994] 3 S.C.R. 761, 94 C.C.C. (3d) 481 (vagrancy offence: *Criminal Code*, s. 179(1)(b)). Instances in which vagueness arguments have succeeded in the United States are: *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance) and *Kolender v. Lawson*, 461 U.S. 352 (1983) (compulsory identification statute).

The Supreme Court's leading judgment in the area of bias is *R. v. S.(R.D.)*.<sup>155</sup> The issue in that case was relatively straightforward: whether a reasonable apprehension of bias arose from the reasons given by the trial judge for acquitting the accused.<sup>156</sup> The accused was a 15-year-old black youth charged with assault, resisting arrest, and unlawfully assaulting with intent to prevent the lawful arrest of another. All charges pertained to his interaction with a white police officer who was, at the material time, engaged in the process of detaining the accused's young cousin. Only two witnesses testified at trial: the accused and the officer, and each gave significantly different versions of the events.<sup>157</sup>

In her oral reasons, the Youth Court Judge reviewed the evidence of both the officer and the accused and indicated that, while she did not accept everything the latter had said, his evidence had certainly raised a doubt in her mind. Accordingly, she acquitted. The Crown appealed, alleging that the following portion of the Judge's oral reasons gave rise to a reasonable apprehension of bias on her part:

The Crown says, well, why would the officer say that the events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

At any rate, based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit.<sup>158</sup>

By a majority of 6-3, the Supreme Court held that the foregoing statement did not give rise to a reasonable apprehension of bias in this case. Four sets of reasons were issued, with the lead judgments emanating

---

155. [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353. [hereinafter *S.(R.D.)* cited to C.C.C.]; see *R. v. Elliott* (1998), 123 C.C.C. (3d) 573 (Ont. C.A.); *R. v. Parker*, [1998] O.J. No. 469 (Ont. C.A.), online: QL. For a concise review of the bias jurisprudence, generally, see Professor Devlin's article, "We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18 Dal. L.J. 408 at 416-422 [hereinafter "Suspicious Minds"].

156. *S.(R.D.)*, *ibid.* at 377, 383.

157. *Ibid.* at 377-378.

158. *Ibid.* at 379-380.

from Justice Cory and from Justices L'Heureux-Dubé and McLachlin, writing together.<sup>159</sup>

All judges agreed that the test to be applied was that set out by Justice de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the questions and obtaining thereon the required information . . . . [T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly” . . . . The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the “very sensitive or scrupulous conscience.”<sup>160</sup>

Although some might contend that unanimous endorsement of a test in which infinitely malleable and question-begging terms like “reasonable” and “right minded” do all the analytical work does little to establish the Court’s contextualist *bona fides*,<sup>161</sup> it bears noting that this test does expressly require the assessment of bias to be “realistic and practical,” and thus, at least implicitly, directs reviewing courts to consider wider surrounding contexts. Moreover, when one considers the majority’s conception of such contexts, the Court’s commitment to contextualism as

---

159. The majority issued three sets of reasons: Justice Cory wrote for himself and Justice Iacobucci, Justices L'Heureux-Dubé and McLachlin wrote together, and Justice Gonthier wrote on behalf of himself and Justice La Forest. Although there may be some legitimate confusion as to majorities and minorities in this case (compare, for example, B.P. Archibald, “The Lessons of the Sphinx: Avoiding Apprehensions of Judicial Bias in a Multi-racial, Multi-cultural Society” (1997) 10 C.R. (5th) 54 and R.J. Delisle, *Annotation to R. v. S.(R.D.)* (1997) 10 C.R. (5th) 7), the ensuing discussion reveals the considerable degree of consensus that exists on the nature of judicial analysis and accountability.

160. [1978] 1 S.C.R. 369 at 394-395.

161. As Professor Devlin reminds us, “[w]hile the case law tells us that . . . [the reasonable person] should be informed, thoughtful and right minded, in the end the reasonable person is a fictional *abstraction*. Throughout the case law on judicial bias the reasonable person is assumed to be without age, gender, or race. But this universal figure is like no one we know or can recognize [footnotes omitted; emphasis added]: “Suspicious Minds,” *supra* note 155 at 418-9.

the new standard of judicial analysis and accountability is clearly confirmed.<sup>162</sup>

Several aspects of Justice Cory's judgment support this conclusion.<sup>163</sup> For example, after pointing out that fair trials and the appearance of fair trials are fundamental goals of the justice system of any free and democratic country, Justice Cory clarified who comprised the relevant audience of accountability. Not content to rely upon fictional abstractions, he explained:

Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canada has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.<sup>164</sup>

His contextualism extended as well to his understanding of the nature of judicial decision-making. Although he was not as careful as Justices L'Heureux-Dubé and McLachlin in distinguishing between "neutrality" and "impartiality,"<sup>165</sup> he ultimately arrived at similar conclusions respecting the complex variables that factor into any judicial decision. For example, he denied that impartiality required judges to discount their own life experiences in arriving at legal conclusions,<sup>166</sup> and he expressly acknowledged the role and value of bringing diverse perspectives to the judicial task.<sup>167</sup> His contextualist conception of judicial decision-making

---

162. For example, according to Justices L'Heureux-Dubé and McLachlin, the reasonable person contemplated by the foregoing test is,

is a person who approaches the question of whether there exists a reasonable apprehension of bias with a *complex and contextualized understanding* of the issues in the case. The reasonable person understands the *impossibility of judicial neutrality*, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality [emphasis added]: *S.(R.D.)*, *supra* note 155 at 373.

163. All of which were assented to by Justices Iacobucci, L'Heureux-Dubé, McLachlin, Gonthier and La Forest.

164. *S.(R.D.)*, *supra* note 155 at 385.

165. See *infra* notes 177-187 and accompanying text.

166. *S.(R.D.)*, *supra* note 155 at 392 ("The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes.")

167. *Ibid.* at 393 ("It is obvious that good judges will have a wealth of personal and professional experience that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.")

is perhaps best reflected in his endorsement of the following excerpt from the Canadian Judicial Council's *Commentaries on Judicial Conduct* (1991):

[the duty to be impartial] does not mean that a judge does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to their grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.<sup>168</sup>

Finally, with respect to the issue of the proper scope of evidence to be considered in arriving at judicial conclusions, and in particular the response to the suggestion that judges should be able to advert to power imbalances between sexes or races as well as to other aspects of social reality, Justice Cory counselled case-by-case analyses.<sup>169</sup> He also opined that, in the development of legal principle, judges could certainly refer to relevant social conditions "so that the law may evolve in a manner which reflects social reality";<sup>170</sup> and with respect to the assessment of credibility, he held that judges were "obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of such factors as testimony and demeanour."<sup>171</sup>

The main divergence between Justice Cory and Justices L'Heureux-Dubé and McLachlin pertained to *the manner* in which the trial judge had communicated her contextually arrived at conclusions. In Justice Cory's view, the trial judge's comments were "unfortunate," "troubling," and "inappropriate"<sup>172</sup> *not* because they suggested that she was biased and *not* because they gave rise to a reasonable apprehension of bias, but because they *may* have created a perception that "the findings of credibility [had] been made on the basis of generalizations, rather than [on the basis of] the

---

168. *S.(R.D.)*, *supra* note 155 at 393.

169. *Ibid.* at 393-394.

170. *Ibid.* at 394.

171. *Ibid.* at 396.

172. *Ibid.* at 401, 402, and 403, respectively.

conduct of the particular officer.”<sup>173</sup> In his view, the trial judge ought to have been clearer in explaining exactly why she had adverted to prevalent attitudes of the day and to past police over-reactions towards non-white groups.<sup>174</sup> Justice Cory concluded, however, that the trial judge’s comments nevertheless had to be evaluated, not in isolation, but rather in the context of the entire proceeding. When this was done, and in particular, when the trial Crown’s suggestion that “there’s absolutely no reason to attack the credibility of officer” was taken into consideration, a reasonable and informed person would clearly understand that the trial judge was, in the impugned comments, simply exploring possible reasons why the officer might have had the perception of the events that he did.<sup>175</sup>

Justices L’Heureux-Dubé and McLachlin commenced their reasons by endorsing Justice Cory’s several comments respecting judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumptions that should attach to judicial integrity.<sup>176</sup> In addition to supporting the contextualist insights elucidated above, they also added a number of analytical and, what might possibly be regarded as epistemological, refinements.

First, and unlike Justice Cory, they distinguished between neutrality and impartiality. In their view, judicial neutrality is “a fallacy” and pure objectivity, an impossibility, for “judges, like all other humans, operate from their own perspectives.”<sup>177</sup> In this regard, they found the following comments of Justice Cardozo particularly illuminating:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . . In this mental background, every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.<sup>178</sup>

---

173. *Ibid.* at 402.

174. *Ibid.* at 402-403.

175. *Ibid.* at 402-403.

176. *Ibid.* at 366-367.

177. *Ibid.* at 369.

178. *Ibid.*, citing B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at p. 12-13. They also relied on the passage quoted by Justice Cory from the Canadian Judicial Council’s *Commentaries on Judicial Conduct*: see *supra* note 168 and accompanying text.

Although neutrality is, therefore, beyond even aspirational bounds, impartiality is well within judicial moral and analytical reach. Indeed, in Justice L'Heureux-Dubé and McLachlin's view, it is a positive prerequisite for both judges and judging and one of the central reasons why the test for bias recognizes

*as inevitable and appropriate* that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are *relevant* to the cases, are not based on *inappropriate stereotypes*, and do not prevent a fair and just determination of the cases based on the facts *in evidence* [emphasis added].<sup>179</sup>

Building upon Justice Cory's comments respecting judging in a multicultural society and echoing his sentiments respecting the value of a diversified bench, Justices L'Heureux-Dubé and McLachlin further held that,

judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.<sup>180</sup>

Justices L'Heureux-Dubé and McLachlin were also careful to point out, however, that there are limits on the role that individual perspectives may play in judicial decision-making. For one, when identifying and applying the law to the facts, "it must be the law that governs and not a judge's individual beliefs that may conflict with the law."<sup>181</sup> Second, although judges may draw on their own insights into human nature in making findings of credibility or other factual findings, they must do so "only after being equally open to, and considering the views of, all parties before them",<sup>182</sup> in other words, they must "undertake an open-minded,

---

179. *S. (R.D.)*, *supra* note 155 at 367. This is also why Justice Cory held that, in demonstrating partiality, "it is therefore not enough to show that a particular [trier of fact] has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the [adjudicator] from setting aside any preconceptions and coming to a decision on the basis of the evidence" [citation omitted]: *ibid.* at 389.

180. *Ibid.* at 370.

181. *Ibid.*

182. *Ibid.*

carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.”<sup>183</sup>

According to Justices L’Heureux-Dubé and McLachlin, a consideration of wider contexts also factors into the “how” part of impartial judicial decision-making. To use their own words:

[t]here is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous actors, influenced by innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces.<sup>184</sup>

Accordingly, inquiry into the relevant factual, social and psychological contexts within which litigation arises is a key investigative and evaluative step in judicial analysis.<sup>185</sup> Such information may be obtained from expert witnesses, from academic studies properly before the court, as well as “from the judge’s personal understanding and experience of the society in which the judge lives and works.”<sup>186</sup> The “enlargement of mind” that can result from such a broad investigative process is, according to Justices L’Heureux-Dubé and McLachlin, a pre-condition for impartial judicial decision-making.<sup>187</sup>

In the result, and like Justice Cory, Justices L’Heureux-Dubé and McLachlin concluded the trial judge’s comments in this case did not give rise to a reasonable apprehension of bias. Although they went somewhat further, in *obiter*, in suggesting that the trial judge could also have *justifiably* found a racially motivated overreaction by the officer in this case,<sup>188</sup> in the main, it can be seen from the foregoing that all three judges held similar, contextualist views on the nature of judicial analysis and judicial accountability. Whether such views can be justified as being predicated upon a coherent legal theory is the issue canvassed next.

## II. Contextualism in Judicial Analyses—The Underlying Theory

### 1. Introduction

It seems reasonably clear from the Supreme Court’s constitutional, statutory and common law jurisprudence of the past decade that

---

183. *Ibid.*

184. *Ibid.* at 371.

185. *Ibid.*

186. *Ibid.* at 372.

187. *Ibid.* The term “enlargement of mind” was drawn from J. Nedelsky’s article “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91 at 107 [hereinafter “Embodied Diversity”].

188. *S.(R.D.)*, *ibid.* at 367, 375, 376.

contextualism now sets the standard for judicial analysis and accountability. Unfortunately, the Court has yet to say very much about the theoretical underpinnings of this approach.<sup>189</sup> In a related vein, it has also not yet *expressly* addressed persistent skeptical concerns that law and legal process are too inherently indeterminate to prevent judicial decision-making from being anything other than a mere undemocratic exercise in power and politics.

With a view towards encouraging the Court and others to engage with these issues more directly, in this Part, I attempt to survey some of the relevant conceptual terrain. First, I catalogue the central concerns of the skeptics. Next, by way of initial response to the latter, I outline some of the more salient theoretical features of the Court's contextualism. Finally, I provide a contextualist rebuttal of the key critique that "the fact that anything might go, *entails* that anything goes." The main focus in this section is on persistent concerns respecting law's indeterminacies generally and the trend towards dialogism in particular. My conclusion is that these objections are not so much erroneous as they are misplaced, and that, in fact, contextualism ensures as much constraint as the legal system both admits and requires.

## 2. *The Principal Skeptical Concern—Lack of Constraint*

Over the years legal skeptics have propounded various objections to law's hegemony, and they continue to work diligently at their craft.<sup>190</sup> In the main, their preoccupation is with the lack of constraint in and on judges and judicial decision-making. From a broader perspective, their view is that, far from being an objective, rational, determinate process in which human adjudicators produce predictable results by measuring

---

189. The notable exceptions being *Québec Inc.*, *supra* note 94 and *S.(R.D.)*, *supra* note 155.

190. Some of the more prominent exponents are: M. Tushnet, "Does Constitutional Theory Matter?: A Comment" (1987) 65 *Tex. L. Rev.* 777; J.W. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 *Yale L.J.* 1; S. Levinson, "Law as Literature" (1982) 60 *Tex. L. Rev.* 373; M. Burton, "Determinacy, Indeterminacy and Rhetoric in a Pluralist World" (1997) 21 *Melbourne U. L. Rev.* 544; J. Bakan, "What's Wrong with Social Rights?" in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992); J. Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5 *Canterbury L. Rev.* 207; H. Glasbeek, "A No-Frills Look at the *Charter of Rights and Freedoms* or How Politicians and Lawyers Hide Reality" (1989) 9 *Windsor Y.B. Access Just.* 293; D. Kennedy, "Legal Education as Training for Hierarchy" in D. Kairys, ed., *The Politics of Law: A Progressive Critique*, rev. ed. (New York: Pantheon Books, 1990) 38 at 42-47. See, also, the reviews of B. Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1983) 33 *McGill L.J.* 451 at 454-465 and K. Kress, "Legal Indeterminacy and Legitimacy" in G. Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* (Berkeley: University of California Press, 1992) 200.

contested social activity against prior well-defined laws, legal process is, in fact, little more than a heavily veiled medium for the wielding of undemocratic, unaccountable, raw political power.<sup>191</sup> In this conception, judges are not impartial arbiters and ministers of justice, but rather witting or unwitting purveyors of political interests that align with their own. Judges are constrained neither by legislative language,<sup>192</sup> nor by their own precedents,<sup>193</sup> and what passes for judicial reasoning is nothing more than “*ex post* rationalizations for *ex ante* decisions.”<sup>194</sup> In short, skeptics believe that law is politics any way you slice it and all the way down, lacking even in the minimalist checks and balances that typically circumscribe the political arena.

Those committed to responding to such accusations face a daunting task. On the one hand, they are bound to insist that laws and their application are sufficiently determinate to comport with our foundational political commitment to the rule of law.<sup>195</sup> On the other hand, they must admit sufficient flexibility in law and legal process to permit fair, case-specific adjudication of the myriad of social issues that invariably arise

---

191. R.F. Devlin, “Nomos and Thanatos (Part A) The Killing Fields: Modern Law and Legal Theory” (1989) 12 Dal. L.J. 298; R.F. Devlin, “Law, Postmodernism and Resistance: Rethinking the Significance of the Irish Hunger Strike” (1994) 14 Windsor Y.B. Access. Just. 3 [hereinafter “Law, Postmodernism and Resistance”]; C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) [hereinafter *Feminism Unmodified*] and *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) [hereinafter *Toward a Feminist Theory*]; P. Goodrich, “Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language” (1984) 4 Oxford J. Leg. Stud. 88; A.C. Hutchinson, “The Importance of Not Being Ernest” (1989) 34 McGill L.J. 233 at 235-236 [hereinafter “The Importance of Not Being Ernest”].

192. For a concise and fairly comprehensive review of proponents of this thesis, see “Plain Meaning” *supra* note 121 at 30-45.

193. A.C. Hutchinson, “A Postmodern’s Hart: Taking Rules Sceptically” (1995) 58 Mod. L. Rev. 788 at 792 [hereinafter “A Postmodern’s Hart”]; D. Stuart, *Canadian Criminal Law: A Treatise*, 3d ed. (Toronto: Carswell, 1995) at 9 (“[a]n unwelcome precedent can be distinguished on its facts and the proposition or propositions of law involved can be restated at a different level of generality, consigned to mere *obiter dicta* (i.e., not logically necessary for the decision) or qualified by reference to other precedent” [footnotes omitted].) [hereinafter *A Treatise*]; Kennedy, *supra* note 188 at 42-47; J. Frank, *Courts on Trial, Myth and Reality in American Justice* (New York: Athenium, 1969) at c. 19.

194. “A Postmodern’s Hart,” *ibid.* at 797; see, as well, P. Suber, “Legal Reasoning After Post-Modern Critiques of Reason” (1997) 3 Legal Theory 21 at 22-24 [hereinafter “Legal Reasoning”].

195. *A Treatise*, *supra* note 193 at 16. Excellent contemporary analyses of the nature and implications of our commitment to the rule of law may be found in F. Dallmayr, “Hermeneutics and the Rule of Law” in G. Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* (Berkeley: University of California Press, 1992) 3 at 5 [hereinafter *Legal Hermeneutics*]; A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987); I.M. Young, “Impartiality and the Civic Republic: Some Implications of Feminist Critiques of Moral and Political Theory” in S. Benhabib & D. Cornell, eds., *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 56 at 57; F.J. Mootz, “Is the Rule of Law Possible in a Postmodern World?” (1993) 68 Wash. L. Rev. 249; M.J. Radin, “Reconsidering the Rule of Law” (1989) 69 B.U. L. Rev. 781; and M.J. Horwitz, “The Rule of Law: An Unqualified Human Good?” (1977) 86 Yale L.J. 561.

in the affairs of any complex society. Overseeing both and attempting to maintain a measure of balance between the two, defenders must be able to identify decision-makers capable of “formulating a workable combination of analytical generality and contingent specificity”;<sup>196</sup> decision-makers who can sift through the foregoing complexity with due respect to the law, the individual parties before them, society at large, and their own ineluctable conceptions of the good and the just—all without letting either their analyses or their judgments devolve into *a priori* political declamations. In other words, the challenge is somehow to demonstrate that

there is a workable range of determinacy that can allow for interpretive movement, but not be so wide as to be commensurate with the existing spread of views in the political forum[,] . . . that law is different from politics in that the application of legal reasoning to particular problems will make an appreciable difference to their resolutions [and] that . . . law is a rational discipline and not merely a convenient battery of technical rationalizations.<sup>197</sup>

For much of the past century, defenders of law and legal process have been largely unequal to this challenge. With the advent of contextualism, however, help is now at hand.

### 3. *The Contextualist Approach Theorized*

The heart of the contextualist approach in law is the hermeneutic insight<sup>198</sup> that all legal meaning is based on language and that language is

---

196. “The Importance of Not Being Ernest,” *supra* note 191 at 238.

197. *Ibid.* at 252. Put another way, they must show “how is it possible to get beyond a discredited formalism without turning judging into an open-ended exercise in ideological wrangling”: “A Postmodern’s Hart,” *supra* note 191 at 790. For an excellent example of what Hutchinson has called “a convenient battery of technical rationalizations,” see K.N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed” (1949-50) 3 *Vanderbilt L. Rev.* 395.

198. Those unfamiliar with hermeneutics may find the following explication helpful:

Hermeneutics is not a method or program or substantive doctrine. It is a philosophical activity the aim of which is understanding the way we understand. Hermeneutics sets for itself an ontological task, namely, identifying the ineluctable relationships between text and reader, past and present, that allow for understanding to take place at all . . . . Hermeneutics teaches us that all understanding presupposes contemporary texts of meaning . . . . Because all human understanding is historically and temporally conditioned, construing the meaning of legal doctrine involves a reconstruction of the legal text in light of contemporary practices, interest, and problems . . . . The hermeneutical claim, then, is that without contexts there can be no understanding at all: G. Leyh, “Legal Education and the Public Life” in *Legal Hermeneutics*, *supra* note 195 at 283-284.

fundamentally a matter of context and interpretation.<sup>199</sup> Contrary to the claim of “plain meaning” proponents,<sup>200</sup> there is simply no such thing as intelligibility without advertence to context, as the following, politically uncontroversial examples demonstrate:

“Dogs must be carried on the escalator.” This is not perhaps quite as unambiguous as it seems at first sight: does it mean that you *must* carry a dog on the escalator? Are you likely to be banned from the escalator unless you can find some stray mongrel to clutch in your arms on the way up? Many apparently straightforward notices contain such ambiguities: “Refuse to be put in this basket,” for instance [ref/use, re/fuse] or the British road-sign “Way Out” as read by a Californian.<sup>201</sup>

Modern pragmatics knows that a sentence such as ‘It is cold here’ is, according to the dictionary, a simple statement about the temperature of a given place; but if the sentence is uttered in given circumstances, it can also convey the actual intentions; the intended meaning, of its utterer, for instance, “Please, let us go elsewhere.”<sup>202</sup>

However, contextualism is more than “trivially true” and entails far more than mere attention to wider contexts. Indeed, it is as much a philosophy about judges as it is a methodology for judicial decision-making in particular cases.<sup>203</sup> Judges in the contextualist world are not Dworkinian super-men and women who through integrity and industry

---

See also G.L. Ormiston & A.D. Schrift, eds., *The Hermeneutic Tradition: From Ast to Ricoeur* (Albany: State University of New York Press, 1990) [hereinafter *The Hermeneutic Tradition*] and G.L. Ormiston & A.D. Schrift, eds., *Transforming the Hermeneutic Context: From Nietzsche to Nancy* (Albany: State University of New York Press, 1990).

199. See, generally, Hans-Georg Gadamer, “The Universality of the Hermeneutical Problem” in *Philosophical Hermeneutics*, trans. & ed. D. Linge (Berkeley: University of California Press, 1976) 3; G. Graff, “‘Keep Off the Grass,’ ‘Drop Dead,’ and Other Indeterminacies: A Response to Sanford Levinson” (1982) 60 *Tex. L. Rev.* 405 at 408; and S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

200. See *Multiform Manufacturing*, *supra* note 30 and accompanying text; see also *McIntosh*, *supra* note 53 and accompanying text.

201. T. Eagleton, *Literary Theory – An Introduction* (Minneapolis: University of Minnesota Press, 1983) at 6-7.

202. U. Eco, *The Limits of Interpretation* (Indianapolis: Indiana University Press, 1990) at 15. See also Burton, *supra* note 190 at 548-549; compare P. Lin, “Wittgenstein, Language and Legal Theorizing: Toward a Non-Reductive Account of Law” (1989) 47 *U.T. Fac. L. Rev.* 939 at 967.

203. This should not surprise, for as Sunstein says: “Law is a normative exercise; it is inevitably philosophical”: C. Sunstein, “On Legal Theory and Legal Practice” in I. Shapiro & J.W. DeCew, eds., *Theory and Practice: NOMOS XXXVII* (New York: New York University Press, 1995) at 267 [hereinafter “On Legal Theory and Legal Practice”].

always ferret out the one right answer to any given dispute;<sup>204</sup> rather, they are lesser, more fallible, but altogether more human souls. They are men and women for whom neutrality is an impossibility, but for whom impartiality is a mandatory goal;<sup>205</sup> men and women who understand that they come to adjudications with a variety of predispositions that need to be overcome rather than obscured or subsumed;<sup>206</sup> who understand that,

[W]hat makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an “enlargement of mind.” We do this by taking different perspectives into account. This is the path out of the blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective . . . . *It is the capacity for “enlargement of mind” that makes autonomous, impartial judgment possible* [emphasis added].<sup>207</sup>

They realize that it is only by engaging with issues in this way and by being forthright in so doing that they can fully discharge their responsibilities to the democratic community that they serve.<sup>208</sup>

---

204. R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); E.J. McCaffery, “Ronald Dworkin, Inside Out”. Book Review of *Freedom's Law: The Moral Reading of the American Constitution* by R. Dworkin (1997) 85 Cal. L. Rev. 1043; R. Nordahl, “Rousseau in Dworkin: Judicial Rulings as Expressions of the General Will” (1997) 3 Legal Theory 317 at 317-322; J. Allan, “Legal Interpretation and the Separation of Law and Morality: A Moral Sceptic's Attack on Dworkin,” (1997) 26 Anglo-Amer. L. Rev. 405 at 406 ff.

205. *S.(R.D.)*, *supra* note 155 and accompanying text.

206. R.F. Devlin, “Nomos and Thanatos (Part B): Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation” (1990) 13 Dal. L.J. 123 at 149 [hereinafter “Nomos and Thanatos (Part B)”]; see, as well, S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980), cited in Burton, *supra* note 190 at 575, n. 184; M. Heidegger, *Being and Time in The Hermeneutic Tradition*, *supra* note 198 at 123; compare Jean-Paul Sartre, “On The Idiot of the Family,” in *Life/Situations: Essays Written and Spoken*, trans. P. Aster & L. Davis (New York: Pantheon Books, 1977) at 12.

207. “Embodied Diversity,” *supra* note 187 at 107; see as well, S. Harding, “Rethinking Standpoint Epistemology: ‘What is Strong Objectivity?’” in Alcoff & E. Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993) and K.T. Bartlett, “Feminist Legal Methods” (1990) 103 Harv. L. Rev. 829 at 872. Hans-Georg Gadamer expresses this same insight at a greater level of generality through his concept of “fusion of horizons”: see J. Habermas, “A Review of Gadamer's *Truth and Method*” in *The Hermeneutic Tradition*, *supra* note 198 at 221.

208. In other words, they realize that “the illegitimate move is not the reliance on ideology, but the unwillingness to acknowledge it [and that] [t]here is no philosophical method, no matter how hard or long any theorist searches for it, that will relieve people [and particularly judges] of the burden of choosing and taking responsibility for their own value judgments”: “The Importance of Not Being Ernest,” *supra* note 191 at 246; *Québec Inc.*, *supra* note 94 and accompanying text.

Contextualist judges also have a unique conception of the nature and limits of language, the lifeblood of the law. Not for them, a simple transparency between signifier and the signified - instead, they operationalize the post-Wittgensteinian insights, *inter alia*, that language is a social activity which is as much constitutive as it is designative;<sup>209</sup> that language circumscribes the knowable even as it probes the limits of the known;<sup>210</sup> and that language draws normative force, not from alignment with transcendental truths, but from articulable standards of functional adequacy that are self-consciously situated in both culture and time.<sup>211</sup> Thus, contextualist judges are at the very vanguard of “the interpretive turn” in law, a critical movement that “challenges, in a fundamental way, the traditional jurisprudential dichotomization of law as either a transcendental subject or reified object.”<sup>212</sup> In short, contextualist judges

209. “A Postmodern’s Hart,” *supra* note 193 at 802. See, generally, R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); L. Wittgenstein, *Philosophical Investigations*, G.E.M. Anscombe trans. (Oxford: Basil Blackwell, 1958); and “Legal Theory and Wittgensteinian Thought” (1990) 3 *Can. J. Law & Jur.* 1, D.M. Patterson, ed., which includes articles by T. Morawetz, “The Epistemology of Judging: Wittgenstein and Deliberative Practices” (at 35); A. Marmor, “No Easy Cases?” (at 61); C. Yablon, “Are Judges Liars? A Wittgensteinian Critique of *Law’s Empire*” (at 123); and G.A. Smith, “Wittgenstein and the Sceptical Fallacy” (at 155); and Lin, *supra* note 202 at 967.

210. G.L. Ormiston & A.D. Schrift, eds., “Editor’s Introduction” in *Transforming the Hermeneutic Context: From Nietzsche to Nancy* (Albany: State University of New York Press, 1990) 1 at 9 (“Use creates, ordering the linguistic field which it engages and the interpretive boundaries of that field. Thus, it is the self-production, the self-effacement of language, in this case the dialogue, which twists and turns words through their use, that determines (1) *how* one understands the ideas and objects one encounters, (2) *what* one understands *about* these ideas and objects, and (3) *that* understanding is possible. Linguistic meaning is determined in and through the dialogue, itself the scene or stage on which the experience of interpretation is played out” [footnotes omitted]).

211. *Québec Inc.*, *supra* note 94 and accompanying text; “A Postmodern’s Hart,” *supra* note 193 at 798-802. Unlike many Left-leaning scholars, such as G. Binder (“Beyond Criticism” (1988) 55 *U. Chicago L. Rev.* 888) and A.C. Hutchinson (see, for example, “Blurred Visions: The Politics of Civil Obligation” in K. Cooper-Stephenson & E. Gibson, eds., *Tort Theory* (North York, Ontario: Captus Press, 1993) 276), contextualist judges are not aporetic about law’s instrumental capacities. By the same token, however, it is certainly not the case that “anything pragmatic goes.” Recall, for example, that in *Québec Inc.*, Justice L’Heureux-Dubé took special care to rule out any pragmatism that ranged uninhibitedly beyond the ambit of legislative intent contextually derived on the ground, *inter alia*, that would “diverge from the rule of law and *état de droit* concepts . . . accepted today in our democratic societies.” Instead, she counselled a more modest and constrained instrumentalism that circumscribed functional reasoning and analysis with the “web of beliefs” that invariably surround any given statute: *ibid.* at 164. For helpful review of the theoretical transition from formalism to this type of neo-pragmatism, see P. Goodrich, “The Role of Linguistics in Legal Analysis” (1984) 47 *Mod. L. Rev.* 523 and the works collected in M. Brint & W. Weaver, eds., *Pragmatism in Law and Society* (Boulder: Westview Press, 1991).

212. “Nomos and Thanatos (Part B),” *supra* note 206 at 135. An excellent collection of works on the interpretive turn in law is: *Legal Hermeneutics*, *supra* note 195; see also “A Postmodern’s Hart,” *supra* note 193 at 798.

recognize that meanings of words, including legal words, are but conventions of a community of speakers that are contingent and contestable at all points in time.<sup>213</sup>

Given the foregoing ontological and epistemological commitments, it should surprise no one that contextual legal reasoning is exceedingly rigorous in terms of analysis and accountability. From the standpoint of analysis, for example, it counsels, first, an appreciation of the relationship that subsists between method and substance.<sup>214</sup> Then, with due regard to the implementational imperatives of praxis,<sup>215</sup> it prescribes for virtually any given legal situation a careful consideration of (1) the language and tests in issue and their underlying (often hidden) legal and sociopolitical premises; (2) their surrounding linguistic contexts; (3) their surrounding jurisprudential contexts, gleaned through case law and extra-curial commentaries; (4) their potential impact on the litigants before the court; and (5) their potential impact on society at large—all of which must occur *prior* to the formulation of any final legal conclusions.<sup>216</sup>

---

213. Hans-Georg Gadamer, "The Universality of the Hermeneutical Problem," *supra* note 197; H.L.A. Hart, as read by Hutchinson, "A Postmodern's Hart," *supra* note 193; O.M. Fiss, "Objectivity and Interpretation" (1982) 34 *Stan. L. Rev.* 739; R. Rorty, *Truth and Progress: Philosophical Papers Volume 3* (New York: Cambridge University Press, 1998); F. de Saussure, *Cours de linguistique générale* (1916) trans. *Course in General Linguistics* (1959), cited in S. Blackburn, *The Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 1996); Burton, *supra* note 190 at 554, n. 55; see, as well, the discussion of "deconstruction" in "Law, Postmodernism and Resistance", *supra* note 191 at 18-22 and in D. Cornell *et al.*, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).

214. Bartlett, *supra* note 207; *Whose Science?*, *supra* note 1; L. Code, *What Can She Know: Feminist Theory and the Construction of Knowledge* (Ithaca: Cornell University Press, 1991); M.J. Mosman, "Feminism and Legal Method: The Difference It Makes" (1986) 3 *Aust. J. of L. & Soc.* 30; D. Cole, "Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory" (1985) 8 *Harv. Women's L.J.* 59; T. Eagleton, *The Significance of Theory* (Oxford: Basil Blackwell, 1990) at 24-38.

215. Originating in Aristotle, modified by Kant, and revolutionized by Marx, praxis is a term that describes a constellation of methodological approaches the central aspect of which is a moral obligation to ground all theorizing in the day to day needs and practices of those for whom such theorizing is done. Sometimes this entails commencing the process of theorizing from material realities and working one's way up to theoretical constructs; always it entails maximal inclusivity in terms of viewpoints, and accountability at its most robust—by investigators to the investigated, by investigators to themselves, by investigators to society at large, and, finally, by investigators to the facts. In comparison, standard scientific methodology seems positively anemic, as it only requires accountability to facts: see, generally, S. Blackburn, ed., *Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 1994) at 298; *Whose Science?*, *supra* note 1; Code, *supra* note 214; *Feminism Unmodified*, *supra* note 191 and *Toward a Feminist Theory*, *supra* note 191; G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995) at 4, 230; J.H. Stone, "Christian Praxis as Reflective Action" in *Legal Hermeneutics*, *supra* note 195 at 103; L. Alcoff & E. Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993); L.J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990).

216. See, generally, the jurisprudence canvassed in Part I.

During the deliberative phase, therefore, contextualist jurists are obliged to be sensitive to historic uses and abuses of sociopolitical power;<sup>217</sup> to maintain the integrity and vitality of general and overarching legal principles even as they address the localized needs of justice in particular cases;<sup>218</sup> and to strive for analytical clarity at all stages of the evaluative process.<sup>219, 220</sup> On occasion, this may entail engaging reflexively

---

217. *McCraw*, *supra* note 35; *Seaboyer*, *supra* note 7; *Lavallée* (1990), 55 C.C.C. (3d) 97 (S.C.C.), [1990] 1 S.C.R. 852; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Williams*, [1998] 1 S.C.R. 1128; M. Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. by C. Gordin, (New York: Pantheon Books, 1980); A. Hunt & G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994); W. Conklin, "'Access to Justice' As Access to a Lawyer's Language" (1990) 10 Windsor Y.B. Access Just. 454; A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) [hereinafter *Waiting for Coraf*]; Goodrich, *supra* note 191.

218. Bartlett, *supra* note 207 at 856-857; Young, *supra* note 195 at 57; "Embodied Diversity," *supra* note 187. In other words, contextualists are committed to fostering legal principles that are sufficiently nuanced to be responsive to particular fact situations, but also sufficiently general to be of wide application. In so doing, they are of course also mindful of the inherent structural tendency of case-specific adjudication to decontextualize complex social, legal, philosophical issues: see, for example, J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 548; I. Greene, *The Charter of Rights* (Toronto: J. Lorimer, 1989) at 62-69, 222.

219. See, for example, *supra* notes 20-26, 98-122, 177-187 and accompanying text. In this regard they will not shy away from drawing on the hard learned insights of other related disciplines, philosophy for example: see M.C. Nussbaum, "The Use and Abuse of Philosophy in Legal Education" (1993) 45 Stan. L. Rev. 1627; J.G. Murphy & J.L. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (Totowa, N.J.: Rowman & Allanheld, 1984); P. Suber, "Legal Reasoning," *supra* note 194; Sunstein, *supra* note 203.

220. Now, to some, it might appear that contextualist legal reasoning is really just *feminist* legal reasoning by another name. It is true that I have relied upon a number of "feminist" authorities in grounding and explicating this form of juristic analysis; it is also incontrovertible that many feminist methodological approaches counsel, *inter alia*, reflexivity, a strong link between theory and practice, attention to exclusion, attention to power dynamics, respect for broader sociopolitical contexts, and sensitivity to the impact of various legal interpretations on actual lived lives: see, generally, Bartlett, *supra* note 207 and "Nomos and Thanatos (Part B)," *supra* note 206. However, these are not *uniquely* feminist insights.

First, it must be remembered that feminism is a polyvocal and often fractured movement in which no one ideology or methodology holds hegemonic sway: see Devlin, *ibid.* at 127; D.G. Réaume, "What's Distinctive About Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law" (1996) 2 Legal Theory 265; R.F. Devlin, "On the Road to Radical Reform: A Critical Review of Unger's Politics" (1990) 28 Osgoode Hall L.J. 641 at 647, n. 5. Second, many of the foregoing feminist methodological insights and commitments actually originated in earlier authors who had little or no affinity for feminism: e.g. Rorty, Foucault, Habermas, Gadamer, Wittgenstein, Nietzsche, Hegel, Hume, to name but a few. On the other hand, it is fair to say that feminists have been the most vocal and eloquent *contemporary* exponents of contextualism's various characteristic features, particularly as regards the subject of methodology. The following is but a small sample of their outstanding work: S. Boyd & E. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice"

with and even overturning prior orthodoxies, whether in the form of well-established precedent or canons of legal interpretation. However, with a perpetual commitment to “enlargement of mind” and an understanding that law’s corrigibility is a virtue, not a vice,<sup>221</sup> contextualist jurists are comparatively well-equipped for this most difficult of judicial tasks. In any event, for them, no lesser standard of analysis will do.

The element of accountability is somewhat less complex, but certainly no less sublime. Candour is the central guiding light. Although contextualist jurists are palpably aware that legal decision-making is fundamentally a form of persuasion as opposed to a means for unveiling the one truth for all people and all time,<sup>222</sup> they are not disposed to dissimulation. They resolutely reject hidden premises and formalistic, obfuscatory legal pronouncements,<sup>223</sup> not only because of the humility that invariably goes with a deep commitment to praxis, not only because of a recognition that their judgments and conclusions are as contingent and contestable as any that have gone before, but, as well, because they realize that they can only discharge their democratic responsibilities to a nation that is culturally rich and ideologically diverse by *demonstrating* that they have considered a full range of perspectives and resources in arriving at their results.

---

(1986) 2 C.J.W.L. 1; M. Cain, “Realism, Feminism, Methodology, and Law” (1986) 14 Int’l J. of Soc. of L. 255; P.A. Cain, “Feminist Jurisprudence: Grounding the Theories” (1989) 4 Berkeley Women’s L.J. 191; T.B. Dawson, ed., *Women, Law and Social Change: Core Readings and Current Issues*, 2d ed. (North York, Ont.: Captus Press, 1993); L.M.G. Clark, “Politics and Law: The Theory and Practice of the Ideology of Male Supremacy; or, It Wasn’t God Who Made Honky Tonk Angels” in D.N. Weisstub, ed., *Law and Policy* (Toronto: Osgoode Hall Law School, 1976) 35; T.S. Dahl, “Taking Women as a Starting Point: Building Women’s Law” (1986) 14 Int’l J. of Soc. of L. 239; A.M. Jaggard & P.S. Rothenberg, *Feminist Frameworks: Alternative Theoretical Accounts of the Relations Between Women and Men*, 2d ed. (New York: McGraw-Hill, 1984); K.A. Lahey, “...Until Women Themselves Have Told All That They Have To Tell ...” (1985) 23 Osgoode Hall L.J. 519; C. Menkel-Meadow, “Mainstreaming Feminist Theory” (1992) 23 Pac. L. J. 1493; C. Menkel-Meadow, “Portia in a Different Voice: Speculations on Women’s Lawyering Process” (1985) 1 Berkeley Women’s L.J. 39; C. Miller, *Feminist Research Methods: An Annotated Bibliography* (New York: Greenwood, 1991); M.J. Mossman, “Feminism and Legal Method: The Difference It Makes” (1986) 3 Aust. J. of L. & Soc. 30; A. Scales, “Towards a Feminist Jurisprudence” (1981) 56 Indiana L.J. 375; C. Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Thousand Oaks, 1995); S.H. Williams, “Feminist Legal Epistemology” (1993) 8 Berkeley Women’s L.J. 63; B. Wilson, “Will Women Judges Really Make A Difference?” (1990) 28 Osgoode Hall L.J. 507; M. Thornton, “Feminist Jurisprudence: Illusion or Reality?” (1986) 3 Aust. J. L. & Soc. 5; and J.M. Vickers, “Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research” in A. Miles & G. Finn, eds., *Feminism: From Pressure to Politics*, 2d ed. (Montreal: Black Rose Books, 1989) 27.

221. “Nomos and Thanatos (Part B), *supra* note 206 at 138, n. 69; 170, 175, 183-184.

222. C. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996); compare Burton, *supra* note 190 at 571, n. 168.

223. See, generally, *supra* notes 100-122 *supra* and accompanying text.

It can be seen, then, that legal decision-making in a contextualist world is necessarily a dialogic process. Legal meanings and outcomes are not simply read off legislation or common law precedent, but are contested and struggled for each step of the way. In virtually every case, judges engage in complex conversations in the present, with a variety of different parties, in order to make better sense of the past and to provide better guidance for the future.<sup>224, 225</sup> Although the litigants bear much of the discursive burden, it is the adjudicator who must ultimately choose *and defend* an interpretation and application that best conduces to justice in any given case. It is, therefore, he or she who stands best to benefit from contextualism's rich resources for analysis and accountability.

#### 4. *Contextualism and Constraint*

Although contextualism's rigour and robustness in analysis and accountability appear to address many skeptical claims, some may argue that there still remains the problem of lack of constraint. It may be contended that it is all very well to regard law as one big discursive thinkfest in which ostensibly humble judges empathetically solicit the views of diverse parties before arriving at judicious best results; at the end of the day, however, these undemocratically situated adjudicators still hold final sway. They regularly determine outcomes in matters that

---

224. In part, this is because they "recognise that another way of understanding the past is to imagine a better future for the present," and that this can only be done through the broadest possible inquiries: A.C. Hutchinson, "The Reasoning Game: Some Pragmatic Suggestions" Book Review of *Legal Reasoning and Political Conflict* by C. Sunstein (1998) 61 Mod. L. Rev. 263 at 278; see, as well, K. Greenawalt, "Interpretation and Judgment" (1997) 9 Yale J. L. & Hum. 415 at 421, note 22; M. Kingwell, *A Civil Tongue: Justice, Dialogue and the Politics of Pluralism* (University Park: Pennsylvania State University Press, 1995).

225. Thus, by "dialogic," I mean no more than the fact that such decision-making is discursive in nature. To put the matter more plainly, contextualist decision-making is about conversations—it is about the conversations judges have with themselves, the conversations they have with each other, and the conversations they have with the parties, the legislators, and always, in one way or another, with the general public. For a general elucidation of dialogism so understood, see *Waiting for Coraf*, *supra* note 217; P.W. Hogg & A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; J. Jai, "Policy, Politics and Law: Changing Relationships in Light of the Charter" (1996) 9 N.J.C.L. 1; A. Bayefsky, "The Judicial Function Under the Canadian Charter of Rights and Freedoms" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printers, 1988) 121 at 155, 162; C. Stychin, "A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination" (1994) 17 Dal. L.J. 61; J. Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1; L. Trakman, *Reasoning with the Charter* (Toronto: Carswell, 1992) at c.1; D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) at 25-26; S. O'Neill, *Impartiality in Context: Grounding Justice in a Pluralist World* (Albany: State University of New York Press, 1997) at 4.

profoundly affect citizens' lives by exercising the power to choose some *over* others: to believe some witnesses and not others, to follow some precedents and not others, to change some legal doctrines and not others. Thus, it might be argued that, despite its goodwill, candour, and complexity, contextualism fails to constrain because it cannot tell us in advance who and which will be favoured and who and which will fall.<sup>226</sup>

This lack of constraint also fails to ensure protection against deep-seated iniquities. Taking particular aim at contextualism's immanent dialogism, a number of skeptics have pointed out that conversational metaphors may well *reinforce* oppression,<sup>227</sup> obscure situational inequalities,<sup>228</sup> and homogenize and camouflage fractured realities.<sup>229</sup> Professor Devlin has argued, for example, that the dialogic conception of law and legal process, contextualist or otherwise, seems predicated upon the problematic assumption that "differences are essentially substantive and that with sufficient communicative goodwill it is possible to eventually get to yes."<sup>230</sup> His follow-up attack is despairing but seductive nonetheless:

First, and obviously, politics and power are driven as much by bad faith as by good faith and this inevitable reality cannot be glossed over. Second, even assuming that parties to a politico-judicial dialogue were to operate in good faith, there is the question of what language they are to communicate in. The assumptions here appear to be twofold: language is equally available to all, and that language is basically transparent and neutral. But again, not everyone has equal access to language, either qualitatively or quantitatively, thus there is the danger of the "dictatorship of the articulate." Moreover, a language is not just a medium, it also captures and refracts specific cultural norms and practices that are not always translatable. No where in the Anglophone scholarship reviewed have I encountered a jurist even considering whether the dialogue should be in a language other than English. This not just a political or moral problem, which would be serious enough; it is also epistemological. Third, advocates of dialogism concur that the conversation should remain continually open, but again there are at least two problems here: a) do most citizens really have that much time available?; b) at some point some decisions have to be made, even relatively temporary ones, and so some mechanisms for closure are inevitable, or else some players may continue to discuss simply to avoid ever getting to a resolution. In short, when we unpack the premise underlying the dialogic model is that of liberal contractualism, a regime of

---

226. See generally, the authorities cited at notes 190, 192, and 193.

227. J. Nedelsky & C. Scott, "Constitutional Dialogue" in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) at 69.

228. *Waiting for Coraf*, *supra* note 217 at 189.

229. "Anglophone Legal Theory," *supra* note 1 at 78-79.

230. *Ibid.* at 77.

haggling, a world of offering and counter-offering, of giving and taking [footnotes omitted].<sup>231</sup>

The problem with the foregoing critique, and with that of the indeterminacy thesis generally, is not so much that it is factually false, but that it is misdirected. Failing to appreciate the distinction between first and second-order skepticism, proponents of such views mistakenly believe that what are actually global critiques can have, *without more*, cogent analytical purchase at the purely local level, in other words, that first-order solutions are appropriate targets for second-order criticisms.<sup>232</sup> In the result, these skeptics believe that the fact that anything might go *entails* that anything goes.<sup>233</sup>

To see the difficulties inherent in this view, it is helpful, first, to bear in mind the level of determinacy to which the law actually aspires. Recall the Supreme Court's vagueness jurisprudence. Legal rules, whether deriving from common law or from legislation, are not intended to provide certainty of result, but rather a basis of judicial debate. They are "characterized by their unresolved nature, inasmuch as they are neither objective nor complete," and they are embraced, despite these facts,

---

231. *Ibid.* at 77-78.

232. The reality, of course, is that "first-order" analyses (skeptical or otherwise) neither address nor contest a given system's *foundational* characteristics, premises, or infelicities; rather, they work from within to uncover and eventually eliminate *intra-system* deficiencies. "Second-order" analyses, on the other hand, do precisely the opposite; they critique a system *qua* system, usually through a comparison of alternative *systems*. Their primary preoccupation is with global, *foundational* flaws. For example, a critical claim that targets the institution of adjudication by judges is "second-order" in nature because it interrogates the legal system *at its very core*. By contrast, a critical claim that targets particular juristic philosophies or methodologies (like that advanced by contextualists) is "first-order" in nature, *inter alia*, because it seeks to improve judicial decision-making *while leaving the foundational office of "judge" existentially intact and uninterrogated*.

Another way to understand the distinction between the two is to note their markedly different purposes: first order analyses seek only to critically evaluate and improve the *inner workings* of a given system; second order analyses question the suitability or desirability of the given system itself. Ideally, both types of inquiries will occur simultaneously in society for, as Professor Devlin himself reminds, for any general emancipatory or remedial project, it is important to "build as you go": "Nomos and Thanatos (Part B)," *supra* note 204 at 170. The important point to note for our purposes is that, given their different objectives and natures, it can never be a legitimate critique of first-order solutions that they fail to address second-order problems. Thus, when skeptics shift *facilely* between the two in order to advance their critiques, they do little more than mystify and obtain merely superficial purchase for their positions. In short, skeptics argue fallaciously when they direct second-order criticism towards targets which profess only first-order facts and solutions: see, generally, Allan, *supra* note 204 at 405; Fiss, *supra* note 213; P. Suber, "Legal Reasoning," *supra* note 194; and "Plain Meaning," *supra* note 121.

233. "A Postmodern's Hart," *supra* note 193 at 798.

because the flexibility they engender is essential for addressing society's complex and changing needs.<sup>234</sup> As Justice Gonthier reminds,

[l]anguage is not the exact tool that some think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.<sup>235</sup>

The fact that absolute certainty is only achieved *post hoc* in individual cases *after* judges have engaged discursively with legislation, precedents, the parties and with each other is, thus, not an insidious or covert structural premise of the legal system, but rather an open and avowed one.

Second, while the rule of law, fair notice to citizens and the control of enforcement discretion are vaunted aspects of the overall legal system,<sup>236</sup> it is workable justice, not perfect justice that is the actual juridical goal.<sup>237</sup> As Professor Hutchinson, himself a notable skeptic, puts it,

... law is another arena for the stylised struggle over the terms and conditions of social life. Determinacy and indeterminacy are polarities on the plain of praxis. While theory [and judicial practice] ha[ve] to try and disentangle them, our existential condition means that we must experience and embrace them simultaneously.<sup>238</sup>

The compromise that this entails is reflected, not only in the law on vagueness, but as well in the Court's finality jurisprudence. The issue there, usually, is whether litigants, often convicted persons, may have final legal dispositions overturned on the ground that they were based upon laws, subsequently determined to be erroneous or even unconstitutional. The simple answer is that they cannot, unless the applicants were "in the judicial system" at the time of the subsequent rectification.<sup>239</sup> The reason, as explained by Justice L'Heureux-Dubé, is that, absent such a principle,

---

234. See, for example, *supra* notes 140-154 and accompanying text, and *ibid.* at 794.

235. *Supra* note 142.

236. See *supra* notes 144-148 and accompanying text.

237. *R. v. O'Connor*, [1995] 4 S.C.R. 441, 103 C.C.C. (3d) 1 at 78; *Harrer*, *supra* note 27; *Seaboyer*, *supra* note 7.

238. "The Importance of Not Being Ernest," *supra* note 191 at 254.

239. Which means they had already (1) launched an appeal to the relevant appeal court, (2) made an application for leave to appeal within legislatively prescribed time requirements, or (3) obtained an extension of time for filing an appeal based on the criteria that normally apply in such cases: see *R. v. Wigman*, [1987] 1 S.C.R. 246, 33 C.C.C. (3d) 97; *R. v. Thomas*, [1990] 1 S.C.R. 713, 75 C.R. (3d) 352; *R. v. Sarson*, [1996] 2 S.C.R. 223, 107 C.C.C. (3d) 21; *Nova Scotia Pharmaceutical*, *supra* note 128.

the court would be placed in the unsatisfactory position of having to sift through the trial record, the facts read in on a guilty plea, or affidavit evidence received many years after the trial, in an effort to determine whether a conviction could be supported under some other statutory provision [or common law rule]. The practical problems associated with reopening convictions in this manner make it essential to have a rule which permits an accused to contest his conviction throughout the appeals process, but which considers the matter *res judicata* once all appeals have been exhausted. This rule "affords a means of striking a balance between the 'wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process.'" As my colleague McLachlin J. observed in *R. v. O'Connor*, "[p]erfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice [citations omitted; emphasis in original]."<sup>240</sup>

At the level of foundations, therefore, we see that the aspirations of the system targeted by skeptics are actually quite humble. It neither purports to unveil the one right answer for all people, for all time, nor does it claim for its judges the equivalent of papal infallibility. It simply attempts to provide a course between the Scylla of contingency and the Charybdis of finality with a view to ensuring that justice is both done and seen to be done in each and every case.

Does it do so with due restraint? I think it does, particularly with the advent of contextualism as the new standard of judicial analysis and accountability. In this regard, it bears noting that constraint in judicial decision-making need not necessarily come from outside the web of contingency.<sup>241</sup> Even avid indeterminists like Jacques Derrida agree that postmodern variability does not inevitably devolve into textual solipsism<sup>242</sup> and that deconstruction does not deny the possibility of relatively determinate meanings.<sup>243</sup> As well, others, like Professors Devlin and Bartlett, actually recommend an enlargement of mind approach similar to that adopted by Justice L'Heureux-Dubé in *S. (R.D.)* on the grounds that

---

240. Sarson, *ibid.* at 41-42.

241. S. Fish, "Play of Surfaces" in *Legal Hermeneutics*, *supra* note 195 at 305.

242. J. Derrida, *Limited Inc.: ABC* (Evanston, Illinois: Northwestern University Press, 1988) at 128; see, as well, J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in D. Cornell *et al.*, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 at 16, 19, 21, 22-23, 28 [hereinafter *Deconstruction*]; Burton, *supra* note 190 at 547, n. 11.

243. Eagleton, *supra* note 201 at 148; see, generally, D. Cornell *et al.*, eds., *Deconstruction*, *ibid.*; compare H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 127; C. Synowich, "Feminism and the Critique of Political Theory" (1996) 16 *Oxford J. Leg. Stud.* 174 at 178; T.A.O. Endicott, "Linguistic Indeterminacy" (1996) 16 *Oxford J. Leg. Stud.* 667; see also Burton, *supra* note 190 at 574, note 182.

formative contexts are *constraining* as well as constitutive.<sup>244</sup> What contextualism does is infuse organizing and evaluative structure into the open epistemic spaces between these poles.

By prescribing a rigorous methodology for legal analysis,<sup>245</sup> it provides a template against which all judicial reasoning can be critically measured. By highlighting and insisting upon the uncovering of hidden premises, it clears away convenient brambles beneath which even contextualist jurists might otherwise be tempted to retreat. Finally, by openly acknowledging and embracing the contingency of all legal results, it imposes ongoing moral obligations to struggle for and defend premises and conclusions (of fact and of law) in every case. In this way, contextualism structurally constrains and actually aligns judicial reasoning with the central judicial function, which is not, at heart, mere decision-making, but *persuasion*.<sup>246</sup>

Of course, the ultimate test of jurisprudential viability in terms of constraint is the ability of a given approach or method to uncover analytical infelicities in the products of its own processes. If a proposed approach can be shown to truly reveal, rather than obscure, the fallibility of its wielders, we have the strongest possible reason for believing it to be a worthy evaluative tool. Corrigibility, then, is key<sup>247</sup> and here too

---

244. “Nomos and Thanatos (Part B),” *supra* note 206 at 149; Bartlett, *supra* note 207. For an elucidation of the view that *Charter* discourse may be *too* constraining, see P. Hughes, “The Morgentaler Case: Law as Political Tool” in E. Bennett, ed., *Social Intervention: Theory and Practice* (Toronto: Edwin Mellen Press, 1987) 255; E. Sheehy, “Feminist Argumentation before the Supreme Court of Canada in *R. v. Seaboyer*; *R. v. Gayme*: The Sound of One Hand Clapping” (1991) 18 *Melb. U. L. Rev.* 450.

245. Recall that, in addition to placing a premium on candour and analytical clarity, for any given case, this methodology directs, *inter alia*, a careful consideration of (1) the language and tests in issue and their underlying (often hidden) legal and sociopolitical premises; (2) their surrounding linguistic contexts; (3) their surrounding jurisprudential contexts, gleaned through case law and extra-curial commentaries; (4) their potential impact on the litigants before the court; and (5) their potential impact on society at large, all of which must all occur *prior* to the formulation of any final legal conclusions: see *supra* note 216 and accompanying text.

246. “A Postmodern’s Hart,” *supra* note 193 at 814. It should be clear from the foregoing that contextualism can make no claim to *exclusive* alignment with “progressive” legal and sociopolitical commitments. It is available to jurists of all ideological stripes to employ in analysis and to deploy in communication and argumentation. What it does ensure, however, is that each position advocated, each philosophical commitment presupposed, and each piece of evidence considered is clearly articulated, acknowledged and defended—not hidden—and therein lies its virtue.

247. See “Nomos and Thanatos (Part B),” *supra* note 206 at 138, n. 69, 170, 175, 183-184, who details the critical value of corrigibility even in fundamentally emancipatory approaches. For example, it is evident from Professor Devlin’s analysis that without immanent corrigibility, feminism may never have progressed beyond the narrow strictures of formal equality, middle class first world solipsism, and stultifying heterosexual orthodoxy: *ibid.* at 171.

contextualism commands respect. Even a cursory glance at the jurisprudence considered in Part I reveals a number of contextually identifiable possible deficiencies. Consider, for example, Justice Wilson's judgment in *Edmonton Journal*. In that case, the pioneering comparison of the "abstract" and "contextual" approaches was preceded by the claim that each mandated identical analytical steps.<sup>248</sup> Justice Wilson's own subsequent reasons and, indeed, the Court's subsequent jurisprudence clearly demonstrate that nothing could be further from the truth.<sup>249</sup> The contextualist objection here, therefore, might be that in holding as she did, Justice Wilson violated her obligation of candour and sacrificed analytical clarity on the altar of common law incrementalism.<sup>250</sup>

Another example, this time from the Court's statutory interpretation jurisprudence, could well be the final portion of Justice L'Heureux-Dubé's otherwise visionary judgment in *Québec Inc.* There, after virtually eviscerating the "plain meaning rule" on linguistic, epistemological and sociopolitical bases, Justice L'Heureux-Dubé then purported to carve out a plain meaning exception for the jurisprudence on taxation! She reasoned that tax law is a technical field in the business world that has a language of its own; that a large number of business terms have already been precisely defined by those working in this area; and that such terms are subject to ongoing research and scrutiny by those in the business community.<sup>251</sup> Accordingly,

the "plain meaning" rule is justified in taxation because of the imperatives of stability and predictability of the law; moreover, the use of "plain meaning" in taxation does not have any dysfunctional side effects.<sup>252</sup>

Given Justice L'Heureux-Dubé's prior repudiation of the theoretical and practical foundation of so-called plain meaning, the contextualist indictment here would, at the very least, include charges of analytical inconsistency and abdication of judicial duty and accountability.

A final example from the Court's common law jurisprudence emerges in *S.(R.D.)*. In that case, despite a multiplicity of judgments, all of the Justices agreed that the proper legal test for ascertaining reasonable apprehension of bias was as follows:

---

248. *Edmonton Journal*, *supra* note 6 at 581.

249. See *supra* notes 20-26 and accompanying text; see, as well, the contextualist jurisprudence on statutory interpretation, *supra* note 30 *et seq.*

250. See *Harrison v. Carswell* (1975), [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68 at 82 (S.C.C.).

251. *Québec Inc.*, *supra* note 94 at 166-167.

252. *Ibid.* at 167.

the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the questions and obtaining thereon the required information .... [T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.”<sup>253</sup>

The contextualist objection here should be fairly obvious: this test is the epitome of obfuscatory formalism. Not only are the operant terms “reasonable” and “right-minded” question-begging and infinitely malleable, they give little implementational guidance and simultaneously provide a convenient haven for hidden sociopolitical assumptions and premises.<sup>254</sup>

Clearly, then, contextualism as practised necessarily implies corrigibility. In my view, what the foregoing weaknesses and strengths demonstrate is that this new standard of judicial analysis and accountability is actually filled with as much constraint as our existential condition admits. It is not the kind of constraint that cowers behind formalistic declamations about plain meaning and legal stability, nor the kind of constraint that purchases requisite flexibility by obscuring foundational premises. Instead, the constraint engendered by contextualism acknowledges its own contestability even as it grapples with the requirements of justice within a framework of imposed finality.<sup>255</sup>

No doubt, the operational standard imposed by contextualism is an onerous one. However, what the above-described jurisprudence firmly demonstrates is that this standard is not merely aspirational, a state of grace that may only be approached asymptotically. Contextualism can be done, theoretically as well as practically, not by obscuring life’s (and law’s) indeterminacies, but by committing jurists to an articulable evaluative system the characteristic features of which are humility, honesty, analytical clarity, and corrigibility. As for continuing skepticism about the virtues of dialogism or adjudication via the legal system, contextualism does not deny them. It simply demonstrates that these concerns are largely “second order” in nature, that they reveal “not that jurists are not constrained when they engage in legal decision-making, but rather that the nature of such constraints is in any way non-relative to the jurists themselves and their historically contingent, linguistic, legal

---

253. *Supra* note 160.

254. Fortunately, a majority of the Court went on to situate this test within a determinate contextual framework of analysis and accountability: see *supra* note 162 *et seq.*

255. See, generally, Sunstein, *supra* note 222; S. Fish, *There’s No Such Thing as Free Speech, and It’s A Good Thing, Too* (New York: Oxford University Press, 1994) at 191; “A Postmodern’s Hart,” *supra* note 193.

and sociopolitical culture.”<sup>256</sup> In other words: the fact that anything might go *does not* mean that anything goes.

### *Conclusion*

Unless the Supreme Court takes a radical turn, contextualism will continue to grow and develop as the new national standard of judicial analysis and accountability. In this article, I have attempted to demonstrate exactly how this state of affairs came into being. I have also attempted to elucidate some of the compelling theoretical insights that animate and inform this approach to the complexities of judicial decision-making. In so doing, I have tried to demonstrate that the Court’s contextualism has both “substantive plausibility and real-world administrability”<sup>257</sup> and is, like the feminist “discourse of difference,” an admirable “politics that refuses to succumb to the moral nihilism of our post-modern condition.”<sup>258</sup>

The advent of contextualism in law clearly heralds “ends” in several respects—of certain principles of statutory interpretation, of Faustian formalism, and of conclusory reasoning, to name but a few. I wish to conclude, however, by focusing on some attendant “beginnings.” First, it should be evident to all that much work remains to be done in this area, by judges and jurists alike. The contextualist methodological template is still relatively new; it needs to be developed and refined so that lower courts will know exactly what is expected of them in terms of comprehensiveness, analytical clarity, and substantive accountability. As well, counsel and scholars need to fully embrace the new mandate to uncover hidden premises in order that their probes of the deeper structures of all aspects of legal thought will be maximally fruitful. Second, and more affirmatively, judges and jurists need to consider the possibility of using the commitment of contextualism to dialogism to further foster the discourses *between* them. Now might be a good time to take sterner measures to stem the slow leak of meanings and opportunities for justice occasioned by the long-standing legal tradition of talking “at” rather than “with” relevant others. Third, and relatedly, judges and jurists may now wish to consider harnessing the integrative ethos of contextualism to include more extra-legal insights in their juridical conversations. Justice, after all, is neither the sole concern nor the sole preserve of the legal

---

256. Allan, *supra* note 204 at 405 (“[a second order skeptic] doubts not that people judge and value but rather that the status of such evaluations is in any way non-relative to the evaluator and her culture” [footnotes omitted].).

257. “On Legal Theory and Legal Practice,” *supra* note 203 at 271.

258. “Nomos and Thanatos (Part B),” *supra* note 206 at 171.

profession. Ultimately, if these and related recommendations are operationalized in the Supreme Court's evolving contextualist jurisprudence, law and the legal process may better survive the crisis of confidence that characterizes the postmodern condition.