

LAW, LEGISLATION & POLICY
SECTION 2 - M. DEHKA
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JAMIE MYRAH

Branches of Government	2
<i>Principles</i>	3
Legislative Process	5
<i>Stage 1 - Creation of Legislative Policy</i>	5
<i>Stage 2 - Drafting the Legislation</i>	5
<i>Stage 3 - Enactment of a Law</i>	6
Problem of Meaning	8
Statutory Interpretation	9
<i>Overview of SI Approaches</i>	9
<i>Overview of Interpretation “Rules”</i>	9
<i>Sullivan’s Critique</i>	12
Statutory & Common Law Principles	17
<i>Approaches to Defining Words</i>	17
<i>Interpretation Acts: Purpose & Provisions</i>	17
<i>Components of a Statute</i>	19
Summary of Midterm Concepts & Process	21
<i>Key Principles of a Contextual Analysis</i>	21
<i>Application of Principles to Case Law</i>	21

Branches of Government

	LEGISLATIVE	EXECUTIVE	JUDICIAL
<u>Role & Function:</u>	Make laws (statutes) Drafts, debates & votes	Implement/ administer laws Make laws (primarily sub-ordinate/ regulatory)	Interpret/apply laws Make laws (common law - case law/jurisprudence)
<u>Structure & Positions:</u> <i>Note: Privy Council</i> - all members of past/present cabinets - the "Crown's advisors" - power exercised by the current cabinet/P.M.	Monarch - G.G. (Royal Assent) Parliament Senate (unelected) House of Commons (elected) ----- Monarch - L.G. (Royal Assent) Legislature	Monarch - G.G./L.G. P.M. / Premier *Cabinet Ministers Committees Bureaucracy ---->> (civil service)	Monarch (appointments) <u>*Court Systems:</u> Supreme Court of Canada Federal / Provincial Courts (Administrative Bodies) **not courts
<u>Accountability:</u>	"The People" (elections) <u>Note:</u> 'statist' tradition/culture - deference to government (relatively strong political executive); participation limited to elections (Philip Resnick, <i>Parliament vs. People</i>)	Legislative Branch	Rule of Law - constitution, etc. One another - disciplinary committees <u>Note:</u> the legislative branch can 'talk back' to the judicial branch through legislation as long as it's constitutional (exception: notwithstanding clause)
<u>Powers Limited By:</u>	Constitution (federalism/Charter/ Section 35)	Constitution (federalism/Charter/ Section 35)	Constitution (federalism/Charter/ Section 35)

	LEGISLATIVE	EXECUTIVE	JUDICIAL
<u>Principles:</u>	Separation of Powers Democratic Government Parliamentary Sovereignty vs. Constitutional Supremacy (esp. since the Charter)	Separations of Powers Responsible Government Ministerial Responsibility	Separation of Powers Judicial Independence
<u>Institutional Expertise:</u>	Balance multiple interests Appease different constituents	Drafting/ implementing policy	Best at two-party disputes with simple facts rather than policy

*Court Systems:

Federal Court of Appeal -- Federal Court Trial Division

Provincial Appellate (BC Court of Appeal) -- Superior/Supreme Court -- Provincial Courts

Principles

Responsible Government - P.M. & Cabinet require the confidence of the House of Commons; part of the “living constitution”

- defeat on important legislation (i.e. budget, government spending) or a motion of no confidence (by opposition party) = less of right to govern
- part discipline - MPs of a party generally vote as a block
- *rights of the legislature* - scrutinize, debate, vote on proposed policies, question the government, demand explanations, etc.
- corresponding *obligations of government* - provide opportunities for scrutiny, account for its action before Parliament
 - *standing orders* - codification of these rights & obligations; rules that govern parliamentary procedure

Ministerial Responsibility - obligation of a cabinet minister to explain/defend policies carried out in their name

- constitutional law & parliamentary tradition

- Section 54, CA, 1867 - gives exclusive right of cabinet to introduce measures re: raising/spending public revenue
 - requirement that legislation must originate in the elected House of Commons - “no taxation without representation”
- combines *strong executive authority & democratic accountability*
 - MPs (particularly Ministers) must remain directly accountable for policy & major decisions (power of which is often passed to unelected officials)

Parliamentary Supremacy - Parliament’s authority is superior to that of all other institutions of government

- courts will not second guess Parliament’s right to pass any law - they are the embodiment of “popular will”
- federal and provincial governments are supreme as long as they act within the spheres of constitutional authority (federalism)

Constitutional Supremacy - has replaced Parliamentary Supremacy (unless no Charter or other constitutionally protected right is at issue and division of powers is respected)

- Charter - applies to both federal & provincial governments and all matters under their authority
- Section 52(1) (C.A. 1982) - “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
 - Charter, Section 33 - “notwithstanding clause” - also laws violating rights & freedoms to operate temporarily (max. 5 years)
- courts have become important venues for the resolution of political issues; some groups may no bypass electoral/legislative politics (p. 1-9)
 - not necessarily more democratic/accessible than other forums for politics

Judicial Independence - judges are to be free from any and all interference in their decision making

- role of the judiciary is largely based on constitutional convention and statute law

Separation of Powers - guarantees the special role of the judiciary to interpret the law and the meaning of the Constitution when disputes arise

- relies on cultural norms, statute law & constitutional conventions (more than constitutional law)
- Section 24 (C.A. 1982) - enforcement of the Charter shall be through the courts (check on the powers of Parliament/legislatures)

Legislative Process

Goal: to give legal effect to government policy in a form that clearly communicates the policy to those required to obey it and those required to administer it (p. 1-29)

Stage 1 - Creation of Legislative Policy

- *Policy Development* - usually by ministry responsible for administration
 - information gathering/assessment
 - planning context - budgets, strategic plans, ministry service plans
- *Request for Legislation (RFL)* - formal cabinet submission
 - established by the Cabinet Operations Office
 - analyzes the problem; proposes solution/potential impacts
- *Policy Review Document (Three Column Document)* - high-level policy overview of the proposal (primary audience - Cabinet committees)
 - describes current legislative situation
 - describes proposed change
 - provide's reasons for the change
- *Drafting Instructions* - details of the scheme
- *Treasury Board Staff & Legislative Counsel Comments* - attached to RFL when submitted to Cabinet
 - anticipated financial impact
 - drafting considerations
- *Ministry Solicitor* - RFL prepared in consultation with appropriate ministry solicitor
 - knowledgeable of ministry business & legal issues
 - advise re: legal process, legal analysis, policy intentions
- *RFL Approval Process* - signed by Deputy Minister; submitted to Cabinet for review & approval
 - review by Cabinet operations
 - meeting between Minister & House Leader
 - meeting between House Leader & Cabinet - determine how to proceed/ prioritization of drafting process
- *Government Caucus Committee (GCC) Review* - either 'Natural Resources & Economy' or 'Social Development'
 - make policy recommendations; may require modifications

Stage 2 - Drafting the Legislation

- *Drafting Team* - ministry's instructing officer, ministry solicitor, assigned Legislative Counsel
 - *Instructing Officers* - aka 'policy analysts'; link between the sponsoring ministry and the legislative drafter
 - *Ministry Solicitor* - brings significant expertise (see above)
 - *Legislative Counsel* - assigned drafter transforms policy into legislative form; must balance government's goals with need to maintain coherent/consistent

legislation; applies the technical skills of statutory interpretation to help ensure that if the legislation goes to adjudication the interpretation will reflect the desired policy

- assisted by legislative editors, publications staff (Office of Legislative Counsel)
- *Final Policy Review* - may return to GCC to review new policy issues, etc.
- *Final Review of Draft Legislation* - Certificate of Readiness signed by sponsoring minister/delegate
 - Legislative Counsel provides draft to Cabinet Operations
 - sponsoring minister provides briefing note & section notes to Cabinet Operations
 - draft is reviewed by Legislative Review Committee (Cabinet ministers & MLAs)
- *Bill Preparation* - Office of Legislative Counsel prepares final Bill form
 - signed by Premier & L.G.; printed by Queen's Printer
 - coordination of First Reading by Government House Leader in consultation with Premier's Office & sponsoring minister
- *Special Budget Legislation Process* - for proposals to be introduced with annual Budget
 - initiated by Minister of Finance
 - reviewed & finalized by Treasury Board Staff
 - provide drafting instructions to Legislative Counsel with no RFL
 - draft is reviewed by ministry staff, Cabinet Operations, Legislative Counsel

Stage 3 - Enactment of a Law

- *Types of Bills*
 - *Public* - propose changes to the general law of the Province
 - *Government Bills* - implement government policy; drafted by Legislative Counsel (Bill 2-200)
 - *Member's Bills* - prepared by/for individual MLA (usually Opposition); no assistance from Legislative Counsel; constitutional restrictions (Bill M 201 - 400)
 - *Private* - limited in their application to particular individuals or organizations; provide additional power/benefits or relieve them from application of the general law
 - come to Legislative Assembly through a petition process under Standing Orders; proceed through special committee process (Bill Pr 401...)
- *Government Bills & Legislative Process*
 - *First Reading* - minister makes very brief general statement of intent; presentation only
 - *Second Reading* - debate of the general intent (not specifics of sections)
 - *Committee Stage* - "Committee of the Whole" (full Assembly without Speaker) - section-by-section debate; concludes with vote on Bill's title
 - each section is subject to separate debate & vote
 - House Amendments can be proposed; certain amendments may be rules out of order

- *Report Bill* - legislative “track changes”; shows accepted amendments using revision marking conventions
- *Third Reading* - vote resulting in recommitment (returned to Committee stage) or Royal Assent
- *Royal Assent* - when a Bill becomes part of BC law; given by the L.G. (through a nod)
 - Third Reading form becomes the statute
- *Commencement* - legal effect begins when the Act “comes into force”; specified in last section of an Act
 - date of Royal Assent (*Interpretation Act*) unless otherwise indicated
 - may be retroactive
- *Bill 1 - Special Case*
 - *An Act to Ensure the Supremacy of Parliament*
 - introduce of the Attorney General at the start of each Legislative Assembly
 - does not proceed past First Reading
 - purpose: to perpetuate the established right of Parliament, through its elected representatives, to sit and act without leave from the Crown (p. 1-42)

Note Re: Federal Legislative Process: see flowchart (p. 1-47)

- guided by the principles & general directions provided by the Office of the Privy Council
- constrained by constitutional considerations (i.e. division of powers, rule of law, Charter, Aboriginal and treaty rights, language rights, etc.)
- all three elements of Parliament - Crown, Senate, House of Commons - must assent to a Bill (draft Act) for it to become law
- money bills must originate in the House of Commons; non-money bills may originate in the Senate
- minister must present a Memorandum to Cabinet (to show why the legislation is necessary for achieving policy objectives) for approval for the Bill to be drafted by the Legislation Section of the Department of Justice

Note Re: the Relationship between Acts & Regulations:

- Parliament creates Acts; through Acts authorizes regulations
- regulations must conform to the limits established by the authorizing Act
- most legislative schemes require regulations to make them work; this interdependence means they should be developed together to ensure compatibility
- Governor in Council - usually authorized to make regulations
 - rationale for departure can be provided in the Memorandum to Cabinet
- the bill should establish a framework that limits the scope of regulation-making powers to matters appropriate for subordinate law-making delegates/processes
 - must not be unnecessarily wide
 - specific drafting authority is required for certain powers (see p. 1-50)
- important that bilingual & bicultural drafting apply to all federal laws

Problem of Meaning

Sources of Communication Breakdown:

- *ambiguity*
 - traditional sense of equivocation - multiple meanings not clarified
 - syntactic ambiguities - where it is unclear within the context which terms are modified by an included word/phrase
 - contextual ambiguities - caused by factors outside the communication (i.e. cultural practices, diversity of experiences)
 - assumptions about meaning made by the speaker/writer & the audience (coordination problem - each assuming the other is using a particular meaning)
 - temporal gap - new circumstances may arise between when the communication is 'sent' and received
- *elliptical communications*
 - speakers/writers make assumptions about their audience and omit mention in their communications of factors that should be taken for granted; they assume the gap will be filled
- *improper bivalence*
 - assumptions of analysis according to bivalent (i.e. true/false) criteria; audience may experience a spectrum
- *over-inclusiveness*
 - classification used by the rule-maker may be too broad to meet aims; unclear when the rule will promote/jeopardize the aims
- *under-inclusiveness*
 - classification used by the rule-maker may be insufficiently general to meet aims
- *vagueness*
 - rule-maker may use general terms based on assumptions that the audience will use particular criteria to make them more specific
- *miscommunication*
 - mistakes - unintentional omission/inclusions; misuse of words/phrases

Statutory Interpretation

Overview of SI Approaches

- *historical*
 - *Heydon's Case* (1584) - four considerations for all statutes:
 - the common law before the statute
 - the mischief being addressed (that wasn't addressed by the common law)
 - the remedy provided by Parliament
 - the true reason of the remedy
 - construction by judges should: suppress the mischief & advance the remedy; add force & life to the remedy according to the true intent of the makers of the Act (p. 3-1)
 - *strict vs. liberal construction*
 - strict - statutes which were penal or interfered with liberty or property rights of the subject (influenced by Locke, natural rights of man)
 - liberal - statutes which were remedial for the advancement of religion or for public benefit/utility
 - false dichotomy - 18th century became the era of strict construction
 - *Sussex Peerage Case* (1844)
 - if words are precise and unambiguous - their meaning is their natural and ordinary sense
 - if there is doubt - determine intention through what caused the of making the statute
 - *Grey v. Pearson* (1857)
 - grammatical and ordinary sense of the words should be adhered to unless it would lead to absurdity or inconsistency with the rest of the statute
- *Golden Rule*
 - plain meaning rule - interpretation is founded on the wording of the legislation alone
- *Driedger's Modern Principle*
 - "... 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."
 - goal of a contextual analysis - to determine meaning in the context of legislative intent

Overview of Interpretation "Rules"

- *rules about meaning*
 - *ordinary meaning rule* - legislature intended to use language in its ordinary grammatical sense; ordinary meaning should prevail over strained or technical meanings

- ordinary meaning may give way to technical meaning for legislation that deals with a technical subject and is addressed to a specialized audience familiar with the subject
 - *shared meaning rule* - presumption that the legislature intended the shared meaning in reading bilingual legislation (unless that meaning is unacceptable given legislative intent)
 - *principle of complementarity* - federal legislation is supplemented by civil law in Quebec and the common law in the rest of Canada; must be away of both legal systems when interpreting bijural legislation
 - *original meaning rule* - interpreters should adopt the meaning the legislation had at the time of enactment
 - *plausible meaning rule* - interpretation adopted must be one that the language of the text can plausibly bear
- *rules of application*
 - legislation doesn't apply extra-territorially
 - legislation doesn't apply retroactively
 - legislation doesn't interfere with vested rights
 - legislation - in most jurisdictions - doesn't apply to the Crown or it's agents
- *types of analysis*
 - *contextual analysis* - reads the text in regards to the Act as a whole along with the larger legal context (i.e. international law) and the 'external' context (i.e. social, political, economic & cultural conditions)
 - an interpretation that is consistent with context is preferred over one that is not (p. 3-6)
 - *textual analysis* - reads the text in light of legislation's distinct literary conventions
 - *purposive analysis* - reads the text in light of its purpose including the purpose of the whole Act and the provision being interpreted
 - *consequential analysis* - interpret considers the effects likely to flow from adopting a proposed interpretation
 - accepted - interpretations that lead to beneficial consequences
 - rejected as absurd - those that lead to irrational, unjust, unacceptable consequences
- *rules based on drafting conventions*
 - general convention: formal expository prose - grammatically correct sentences; lexicon and common sense of the education public
 - examples of special conventions:
 - presentation of sentences in numbered sections
 - prohibition on tautology and stylistic variation
 - repealed use of the same words/structures to signal particular meaning
 - the consistent expression rule - same words, same meaning
 - binding obligation = "shall" or "must"
 - something must be done in accordance with the regulations = "prescribed"

- *rules that introduce values into interpretation*
 - *presumptions of legislative intent* - interpreters should be slow to attribute meanings inconsistent with these presumptions
 - compliance with constitutional/international law and the values of the Charter
 - no intention to change the common law or violate Aboriginal rights
 - observation of the principles of fairness and natural justice
 - *doctrine of strict construction* - legislation that interferes with individual rights and freedoms
 - *doctrine of liberal construction* - legislation that confers benefits on subjects or advances social welfare

- *rules that permit judges to change the text*
 - legislative intent - distinguishes interpretation from amendment
 - *interpretation* - uses different words to clarify what the legislature intended to say; may include adoption of a strained interpretation or correction of a legislative drafting error
 - *amendment* - changes what the legislature intended to say
 - courts deny any jurisdiction to to expand the scope of legislation to fill gaps

- *rules governing the use of extrinsic aids*
 - *legislative source* - agreements the legislation is meant to implement; other legislation it's modeled on
 - *legislative history* - materials brought to the attention of the legislature during the legislative process (e.g. Ministerial statements, committee reports, background material, records of debates, etc.)
 - *legislative evolution* - successive amendments and reenactments from initial enactment until the time of application; subsequent evolution is not a legitimate aid
 - *expert opinion* - precedent, administrative opinion, scholarly legal publications, expert testimony
 - the weight and admissibility of materials depends on relevancy and circumstances... always evolving

- *rules dealing with overlap & conflict*
 - overlap (legislation-common law or two/more legislative provisions) is permitted in the absence of conflict
 - unless a provision(s) is believed to be intended to be exhaustive
 - conflict between two/more applicable & binding rules is unacceptable
 - one or more may be "read down" - interpreted narrowly to avoid the conflict
 - or conflict is resolved through *rules of paramountcy* (hierarchies of law based on their source):
 - legislation paramount over common law
 - federal legislation paramount over provincial legislation

- human rights legislation (Constitution & Charter) paramount over ordinary legislation
- statutes paramount over regulations (usually)

Sullivan’s Critique

Ruth Sullivan, *“The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation”*

	Plain Meaning	Legislative Intent
Method	<ul style="list-style-type: none"> • first impression meaning (spontaneously available through reading alone) • interpretation/contextual tools only applied when there's ambiguity (competent reader could plausibly read it more than one way) • judged by a competent reader 	<ul style="list-style-type: none"> • always starts with post-interpretation (no first impressions) • infer legislative intent through contextual analysis (textual - i.e. original or plain meaning rule & extra-textual - i.e. doctrine of presumed intent) • treats legislation as an ordinary speech act
Advantages	<ul style="list-style-type: none"> • certainty (public has fair notice) • formal equality (same law applied in the same way to the same effect for everyone) • reliance (proxy for strict construction; exercise of technical expertise) 	<ul style="list-style-type: none"> • makes courts look democratic (institutional roles - legislature is the only legitimate source of law) • positivism & certainty (laws as social rules enacted with authority) - rule of recognition: what the legislature enacts is law
Presumptions	<ul style="list-style-type: none"> • inherent meaning to words that is clear and certain • objectivity • court’s first responsibility is to give effect to the apparent meaning of the text whenever its meaning is plain 	<ul style="list-style-type: none"> • discoverable legislative intentions • relies on linguistic/cultural conventions - assumes the speaker is aware of the context in which the audience will interpret the text (“cooperative interpreter”)
Similarities	static meaning (words don't evolve with society) discoverable meaning (fixed & certain) positivism (‘mythology of western democracy’ & ‘rule of law heaven’)	

What does Sullivan see as cheating? Why do judges cheat?

- form of misrepresentation
- judges present as if their hands are tied rather than acknowledging the choices they have
 - plain meaning - “the text made me do it”
 - contextual approach - “the legislature made me do it”
- discourages judges from probing/discussing the real basis for their decisions
- allows them to avoid responsibility for outcomes
- provides reassuring rhetoric and justifies their work

Sullivan’s solution?

- judges should acknowledge their responsibility and attempt to explain/justify their choices
- don’t demand the impossible; acknowledge that legislative text and legislative intention are incomplete sources of law - interpretation (choice/discretion) is needed to complete the job
- focus on what we can reasonably expect from our interpreters
- democratically legitimate option
 - legitimate law is co-extensive with legislation made by elected representatives
 - democracy - government in accordance with a constitution; elected legislature is one of several necessary institutions
 - resolution of interpretation disputes by judges is a highly democratic exercise - allows the subject to participate directly in the law-making process by arguing about how particular rules should apply
 - instead of denying the role of context (by equating rule of law with the application of pre-fixed rules by a-political automatons) try to understand how it works and its implications
 - diversify judges to guard against bias
 - make judges accountable to the diversity of Canadian society (rather than dismissing different assumptions/interests/perspectives as bias or “special interest”
- reject the idea that this would mean that courts could do whatever they want
 - its possible for additions to/departures from legislative texts/rules to be justified in a legally acceptable way
 - legal justification is democratic & legitimate
 - the outcome is justified in a legally acceptable way if judges use techniques that are recognizably legal and appeals to plausible (not necessarily traditional) legal norms
 - free judges to do the work on interpretation - trying to understand the text and the intention; working out implications; adapting rules to varied/ changing circumstances; ensuring legal values (constitutional and from the evolving common law) are respected (p. 3-75)

PMR Tricks	FLI Tricks
<p><i>#1 Artful Text Selection</i></p> <ul style="list-style-type: none"> • identification of text-to-be-interpreted • alternative texts may favour different outcomes • judge may not explain basis for their choice (or acknowledge a choice has been made) • <i>R. v. McGraw</i> 	<p><i>#1 Presume That Nothing Worth Mentioning Has Changed</i></p> <ul style="list-style-type: none"> • if legislation is ordinary speech act (purposive attempt to communicate particular meaning) then meaning is fixed at time of enactment - faithfulness to intention requires discovering original meaning • lack resources; impossible to apply • current meaning is presumed to be the same as original meaning
<p><i>#2 Elastic Co-Text</i></p> <ul style="list-style-type: none"> • amount of surrounding text the reader uses to determine first impression meaning and whether it's plain • ranges from nothing at all to the entire section • size of co-text often affects meaning & judgements about ambiguity - the more you have the easier it is to narrow down the possible meanings of a text • <i>R. v. McIntosh; Ontario v. C.P. Ltd.</i> 	<p><i>#2 More Meaning Games</i></p> <ul style="list-style-type: none"> • original meaning as <i>connotation</i> (abstract/dictionary meaning) or <i>denotation</i> (facts to which the words were applied) • “original meaning” can provide significant choice • <i>Hills v. Canada</i>
<p><i>#3 Shifting Meaning Game</i></p> <ul style="list-style-type: none"> • shifting, inconsistent ways of referring to meaning: dictionary, literal intended, audience-based, applied, etc. • dictionary meaning may or may not be supplemented by other analysis (textual, contextual, purposive) • ensures significant discretion in determining first impression meaning 	<p><i>#3 Distinguish Sloppy Drafting From Legislative Error</i></p> <ul style="list-style-type: none"> • correcting errors attributed to the inattention or lack of skill of the drafter is acceptable - brings the legislation in line with the intended meaning • correcting errors/anomalies the legislature is responsible for is not acceptable - curing legislative oversight is amending and impermissible (separation of powers) • <i>R. v. McIntosh</i>

PMR Tricks	FLI Tricks
<p><i>#4 It Must Be Plain To You If It's Plain To Me</i></p> <ul style="list-style-type: none"> • distinguishing between plain & ambiguous meaning requires a judgement of whether a text can plausibly bear more than one meaning • this is a purely linguistic judgement; generally ignores empirical evidence of ambiguity • <i>Ontario v. C.P. Ltd.</i> 	<p><i>#4 Presume That The Legislature Wants What You Want</i></p> <ul style="list-style-type: none"> • doctrine of presumed intent • Driedger's <i>Construction of Statutes</i> (2nd edition) - four elements re: intention - expressed intention; implied intention; <u>presumed</u> intention; declared intention • presumed intention - the intention the courts will impute on Parliament in the absence of an indication to the contrary • has no real limit - covers whatever values/policies the court sees fit to attribute to the legislature
<p><i>#5 Inherent Meaning Illusion</i></p> <ul style="list-style-type: none"> • text may be fixed but context cannot be - presuming fixed meaning regardless of the knowledge/ expectations of readers has been discredited in linguistics • context includes the linguistic and social conventions and broader cultural assumptions of the reader • "reciprocity of perspective" - take for granted that readers share the experience (Schultz, p. 3-66) • doesn't preclude effective communication; requires acknowledgement of the complexity and uncertainty that is inevitable 	<p><u>Conclusion</u> - legislative intent is meaningful & plays an important role but it is not the only consideration in statutory interpretation</p> <ul style="list-style-type: none"> • court should follow the legislature when it's possible to draw compelling inferences about intended purpose • court needs to recognize the limitations of FLI • the pretense that judges don't make law undermines judicial credibility • if anything can be imputed to the legislature there is no meaningful distinction between legislative and judicial intent

PMR Tricks	FLI Tricks
<p><i>#6 Abandoning Ship</i></p> <ul style="list-style-type: none"> • abandoning the rule if plain meaning is going to take the court where it doesn't want to go (regardless of the other tricks) • lots of examples in the case law where PMR is applied - or not - by the same judges • Lamer C.J. - <i>R. v. McIntosh & R. v. Michaud</i> • Iacobucci J. - <i>Canada v. Antosko & Rizzo v. Rizzo</i> • Major J. - <i>Canada v. Friesen & Canada v. Schwartz</i> 	
<p><u>Conclusion</u> - PMR is undermined by:</p> <ul style="list-style-type: none"> • arbitrary text selection • elastic definition of co-text • shifting & uncertain conceptions of meaning • highly subjective judgements about plausibility • reliance on a discredited view of language • lack of commitment to the rule itself 	

Statutory & Common Law Principles

Approaches to Defining Words

- *ordinary meaning* - usual meaning of words by a “reasonable person” of average intelligence & general knowledge/background
 - in the context of specialized statutes - the reasonable person is presumed to have specialized knowledge
 - presumes words aren’t used in any unusual/technical way - except *legal* words (i.e. “assault” in tort law)
- does the statute or a related statute provide a definition?
- *dictionaries* - can be used but definitions may not be determinative
 - weight given to dictionary definitions will vary
 - dictionaries don’t take context into consideration; may provide multiple definitions; may vary from source to source
 - *Shaklee Canada Inc v. Canada* - judge uses his own view of personal meaning to define “food”
 - dictionaries are of limited value
 - *Regina v. Riddell et al.* - statute has no definition for “smuggling”; dictionaries leave the issue unresolved
 - *rule of effectivity* - every word in a statute is there for a specific reason and has meaning (i.e. ‘or’ / ‘and’)

Interpretation Acts: Purpose & Provisions

- *Interpretation Acts* - establish certain presumptive rules/statutory conventions
 - *BC Interpretation Act*, R.S.B.C. 1996, c. 238 (*BCIA*)
 - *Interpretation Act*, R.S. 1985, c. I-21 (*Interpretation Act (Canada)*)
 - found in all Canadian jurisdictions
- application - *BCIA*, s. 2; *CIA*, s. 3
 - applies to all enactments (including the IA) unless a contrary intention can be found in relation to the particular piece of legislation being interpreted - the “wiggle room”
 - doesn’t trump common law rules of construction unless they are inconsistent with the IA)
- harmony with the Modern Principle - *BCIA*, s. 8; *CIA*, s. 12
 - enactments should be construed as remedial (intending a remedy/cure) and given “fair, large and liberal construction and interpretation”
 - rejects the common law principle of strict construction (i.e. for penal, taxation statutes)
- stylistic conventions/techniques...
 - tense - legislation is read to be “always speaking” and the expressions in the present tense are applied to circumstances as they arise (*BCIA*, s. 7; *CIA*, s. 10)
 - enactments evolve and remain in the present tense

- reconciled with the common law principle of Parliamentary intent by presuming that Parliament intended enactments to evolve with the times
- singular/plural - singular may include the plural and vice versa depending on the context (*BCIA*, s. 28(3); *CIA*, s. 33(2))
- definitions - in addition to definitions provided in statutes the *BCIA* and the *CIA* provide rules of interpretation and further definitions for statutes that apply in their respective jurisdictions
 - definitions apply to the entire enactment unless a contrary intention appears (*BCIA*, ss. 12-13; *CIA*, ss. 15-16)
 - statutory definitions apply to all grammatical forms of a word (*BCIA*, s. 28(4); *CIA*, s. 33(3))
 - there are a number of definitions that apply to all enactments unless a contrary intention appears (*BCIA*, s. 29; *CIA*, s. 35)
- gender - gender specific terms include both genders and include corporations (*BCIA*, s. 28(2); *CIA*, s. 33.1)
- referential incorporation - the drafting technique of 'pulling' (incorporating) the provisions of one statute (secondary statute - i.e. *Water Act*) into another (primary statute - i.e. B.C. *Environmental Management Act*)
 - *BCIA*, s. 44 - "If an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable."
 - applies when there is general terminology in the "secondary" statute that won't accord with the "primary" statute or where irrelevant portions are unavoidably incorporated
 - when there are changes to the "secondary" statute...
 - repealed & replaced - change is ambulatory and applies to the "primary" statute (*BCIA*, s. 36(1)(f); *CIA*, s. 44(h) - similar)
 - repealed (& not replaced) - the 'old' definition continues to apply to the "primary" statute (*BCIA*, s. 36(1)(f); *CIA*, s. 44(h) - similar)
 - amended - amendment is ambulatory and applies to the "primary" statute (*BCIA*, s. 32; *CIA*, s. 40(2) - similar)
 - note - there are numerous cases where the courts have concluded that an amendment is not ambulatory; treated like a repeal - original meaning prevails; justified by arguing that the circumstances indicate a 'contrary intention' under *BCIA*, s. 2(1)
- powers - typically set out ancillary powers that may be exercised by public officers designated under a statute
 - appointment of public powers (*BCIA*, s. 22; *CIA*, s. 24 - with different powers)
 - delegation of powers (*BCIA*, s. 23; *CIA*, s. 24(2) - different terms)
 - exception where a Minister is authorized under a statute to make regulations (*BCIA*, s. 23(5); *CIA*, s. 24(3))
- computation of time periods -
 - definitions - 'holiday'; 'month'; 'year'
 - calculation - *BCIA*, s. 25; *CIA*, ss. 26-30
 - general rule - first day excluded; last day included (*BCIA*, s. 25(5))

- exception - both first & last day excluded - triggered by the “magic words” (*BCIA*, s. 25(4))
- holidays - general rule in calculating a time period is that you include holidays (i.e. Sundays); could be argued as inappropriate in some circumstances (i.e. re: mail)
- expiration on a holiday - deadline moves to the next day that isn’t a holiday (*BCIA*, s. 25(2)); re: a business office - moves to the next day the office is open (*BCIA*, s. 25(3))
- calculating age - a person reaches a particular age expressed in years at the start of the relevant anniversary of their birth date (*BCIA*, s. 25(8); *CIA*, s. 30)

Components of a Statute

- titles - are part of an enactment (*BCIA*, s. 9)
 - give consideration to titles but nothing is determinative; they are part of a contextual analysis
 - *R. v. Lane* - given little weight (re: “*An Act for the Suppression of Slot Machines and Other Gambling Devices, ... Slot Machines*”)
 - *Committee for the Commonwealth of Canada v. Canada* - given more weight - precedent (re: provisions under “*Government Airport Concession Operations Regulations*”)
- purpose statements - part of a purpose analysis but does not preclude looking elsewhere in the enactment
 - purpose analysis - looking at the purpose of the overall enactment or of the contested provision (will likely include the purpose statement)
 - scheme analysis - looking at the rest of the words within the enactment to construe meaning/intent; considers the contested provision in light of other provisions in the enactment
 - if looking to the meaning of a *particular* word within the purpose statement to determine the meaning of a word elsewhere it’s a scheme analysis
 - multiple and competing statements regarding purpose within an enactment need to be balanced
 - when a purpose statement conflicts with a more substantive provision the substantive provision generally prevails (p. 4-20)
 - authority granted under an enactment should be in accordance with the purpose statement or the purpose of a provision
- preamble - are part of an enactment (*BCIA*, s. 9; *CIA*, s. 13)
 - provides context/guide re: purpose - may be expressive, symbolic
 - *Re Anti-Inflation Act* - preamble indicates the introduction of a far-reaching program of “national concern”
 - when a preamble conflicts with a more substantive provision the substantive provision generally prevails
- definitions - may be included for substantive or stylistic reasons
 - may provide some scope or precision to a potentially ambiguous term
 - may give an unusual or artificial meaning to a term
 - may provide for more readable text (less repetition of explanations)

- may refer to any other legislative definition for guidance; greater weight is given when it deals with the same subject matter
 - may apply in situations of concurrent legislative jurisdiction (i.e. environmental issues)
 - “means” - connotes closed/exhaustive ‘list’
 - “includes” - connotes open/non-exhaustive ‘list’
 - may be intentional ambiguity when regulating a new area of activity
- headings & marginal/headCIA notes - not considered part of an enactment (*BCIA*, s. 11; *CIA*, s. 14)
 - for guidance/reference only; may be part of an overall analysis; definitely not definitive
 - *R. v. Lohnes* - headings may be used (weak) as an intrinsic aid in interpreting (intent) in ambiguous statutes
 - *R. v. Wigglesworth* - also may be used but with even less weight
 - *Charter* case - could be argued that the *CIA* doesn’t apply (superior to statutes)
- punctuation - the meaning of a portion of text will be influenced by the punctuation contained within it
 - *R. v. Jaagusta* - ordinary meaning (based on comma placement) would indicate that reasonable grounds are only required for search of a dwelling house
 - goes against the common law tradition requiring reasonable grounds for searching persons
 - the presumption is that the legislature knows the common law and will be explicit in overturning it; won’t turn on a comma!
 - *R. v. Popoff* - "The rule adopted in the courts is, I think, to pay little, if any, attention to punctuation" (Stuart J. in *Medicine Hat v. Hawson*)
- schedules/appendices - are part of the statute (not subordinate); may ‘house’ forms or other administrative details
 - the Act is given more weight - especially if there's a conflict - however they may be employed for interpretation purposes

Summary of Midterm Concepts & Process

Key Principles of a Contextual Analysis

Sources:

- Driedger's Modern Principle
 - Common Law Principles
- Interpretation Acts

Principles:

- **Ordinary Meaning** - plain meaning (audience); dictionaries; Interpretation Acts; context/scheme analysis; purpose/legislative intent (Hansard)
- **Scheme Analysis** - looking within the context of the Act (other words/sections) to construe meaning/intent
 - title; purpose statement; preamble; marginal notes...
 - rule of effectivity (*Riddell*) - every word is there for a reason
 - consequentialist reasoning - absurdity principle; anomalous results; policy...
- **Purpose Analysis** - object of the statute/provision (penal/benefits-conferring); mischief/remedy
 - legislative history (Hansard); general history; social context/policy...
 - title; purpose statement; preamble; marginal notes...

Goal:

- To determine legislative intent in by considering the broader (historical, social) context and the specific context of the statute (scheme, etc.)
- Applying different principles results in different outcomes

Application of Principles to Case Law

SEE APPENDIX

Process:

- specify the statute & contested provision (what's not in question?)
- quote Driedger (*Rizzo*); identify the 'remedial' principle from the relevant Interpretation Act
- I.R.A.C. analysis - be methodical; cite/quote relevant precedents
 - identify the issue
 - articulate the rules/principles
 - application to the facts - repeat the principles; consider both sides of the argument (most substantial part of the analysis)
 - conclusion - be succinct; conclusions matter!