# Application of the Modern Approach Canada v Kandola, 2014 FCA 85

\*\*Ignore the issue of standard of review – paras 29-45, 85-87\*\*

Malkiat Singh Kandola is a Vancouver-area truck driver and Canadian citizen who married an Indian woman. Sadly, it turned out that both of them were infertile and could never have their own biological children. They therefore turned to the modern technology of assisted human reproduction (“AHR”), specifically in vitro fertilization (“IVF”) that used the sperm and eggs from anonymous donors. Ms Kandola carried the child—later named Nanakmeet—to term in India where she resided.

Mr Kandola made a sponsorship application for his Indian wife to become a permanent resident in Canada. Citizenship and Immigration (“CIC”) discovered the child’s status when it requested DNA evidence of the child while processing her mother’s sponsorship application. Mr Kandola concurrently applied for citizenship for Nanakmeet, but her application for citizenship was denied on the basis that no genetic link existed between herself and her parents.

The Citizenship Officer (“the Officer”) based his decision on his interpretation of paragraph 3(1)(b) of the Citizenship Act, RSC 1985, c C-29 (“the Act”) which reads:

Persons who are citizens 3. (1) Subject to this Act, a person is a citizen if … (b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen …

The Officer’s reasons—communicated to Mr Kandola in a letter—were partly based on the jus sanguinis rule (“right of blood”) that he argued was embedded in, and animated the interpretation of, the relevant portions of the Act. On his interpretation, in order to grant citizenship to individuals born outside of Canada to a Canadian parent (what is termed “derivative citizenship”), Canadian law relies on a blood connection or direct genetic link between parent and child. Because Nanakmeet had no genetic bond with either Mr Kandola or her foreign birth mother, the Officer determined that derivative citizenship could not be granted and that the family would have to obtain citizenship for Nanakmeet through other routes.

The Kandolas appealed this decision to Federal Court (“FC”). In his decision (Kandola v Canada (Citizenship and Immigration), 2013 FC 336), Blanchard J quashed the Officer’s decision concluding that on his interpretation of the Act, no legal basis existed to refuse citizenship.

Blanchard J stated that the Officer erred in his interpretation of paragraph 3(1)(b) by requiring a genetic link with her Canadian parent. He came to this conclusion by interpreting the meaning of “parent” in paragraph 3(1)(b) and the correlative term “child” in section 2 of the Act.

The Minister of Citizenship and Immigration (“the Minister”) appealed to Federal Court of Appeal (“FCA”). Noël JA allowed the appeal and restored the Officer’s original decision. Although both courts adopted the modern approach to statutory interpretation, FCA preferred a

restrictive instead of a dynamic interpretive approach. Closely examining the difference between the English and French versions of the text, Noël JA determined that paragraph 3(1)(b) does indeed require a genetic link: a “child” born to a “father” presupposes that the “parent” directly contributed to the child’s genes.

Mainville JA dissented (the “Dissent”). He also examined the text of the French version of the Act, but came to the opposite conclusion. He concluded that, using relevant principles and statutory history, Nanakmeet should be deemed the child of her Canadian father because the Act uses the term “parent” in the legal, rather than the biological or genetic sense. He would have dismissed the appeal.

# Statutory Interpretation Guidelines

1. **Start with the modern principle.**
   1. Use it as a structure for your answer
   2. *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

*-* Driedger, 1974

***Re Rizzo and Rizzo shoes,* 1998** IACOBUCCI  J.

**Text, context, and purpose.**

**Text**

The wording of the provision

**Context**

Other parts of the act (not the provision)

**Purpose**

Check the pre-amble or intention of parliament in Hansard

1. **Label the tools and techniques** you've relied on
2. **Answer all answers of the exam**
   1. Do not end the judgement/analysis if 1 answer determines the case
   2. Answer all parts and assume that in the case your analysis is wrong, what would be the analysis of the other parts?
3. Rules:
   1. Corrigible mistakes
   2. Absurdity
   3. Exclusion rule
   4. Associated words rule
   5. Legislative would have said "rule"
   6. Horizontal coherence rule
   7. Purpose
      1. Extrinsic aids

# AG Case

**Question 1:**

Legal Professions Act

* Text
  + Ordinary meaning (DEFAULT. no suggestion for technical meaning)
  + Compare this to section 1 and 2 of the attorney general act
* Context
  + Provided is section 3 and 15 of the legal professions act to see where it applies.
  + If b is ensuring the … competence of all persons, then that would go to what the practice of law means and why you have a requirement for the practice of law
* Purpose
  + S.3 of the legal professions act.

**Question 2:**

Does his appointment require the authorization of LSBC:

* Text
  + S.4 of constitution act, s27 of interp act, s15 of legal professional act, in light of s1 and 23 of the attorney gen act.
    - S.4 const says LT appoints the AG
    - S.27(2) gives law and duty to the LT
    - S1, 2 suggests that the AG has the powers regardless of whether or not he has LSBC approval
  + If the legislature had intended for the AG to be required to be a lawyer, then they would've said that the AG is required to do that in the legislation.
* Context
* Purpose
  + S 4 of const, and s 1 of AG act, the purpose is to give LT gov and counsel to choose who is going to be in the cabinet.

23.3(1)

# Six Principles of Canadian Public Law

1. Rule of Law
2. Constitutional Supremacy
3. Parliamentary Supremacy
4. Federalism
5. Separation of Powers
6. Judicial Independence

**Constitutional Supremacy:** The Constitution is always right, and no other rule or law can infringe against the rule Constitution.

**Parliamentary Supremacy**: The idea that a legislative body is supreme to all other government bodies including judicial or executive.

**Federalism**: A combination of federal and provincial governments.

**Separation of Powers**: (Functional) The courts have different roles in different areas of government, (Normative) Big concentrations of governmental power are dangerous and bad.

# Textualism:

**Reading Law – Antonin Scalia, Bryan A. Garner**

**The textualist will "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words**."[[2]](https://en.wikipedia.org/wiki/Textualism#cite_note-2) **The textualist thus does not give weight to**[**legislative history**](https://en.wikipedia.org/wiki/Legislative_history)**materials when attempting to ascertain the meaning of a text.** Textualism is often erroneously conflated with [originalism](https://en.wikipedia.org/wiki/Originalism), and was advocated by US Supreme Court Justices such as [Hugo Black](https://en.wikipedia.org/wiki/Hugo_Black) and [Antonin Scalia](https://en.wikipedia.org/wiki/Antonin_Scalia); the latter staked out his claim in his 1997 [Tanner Lecture](https://en.wikipedia.org/wiki/Tanner_Lecture): "[it] is the law that governs, not the intent of the lawgiver.

Textualism looks to the ordinary meaning of the language of the text, but it looks at the ordinary meaning of the *text*, not merely the possible range of meaning of each of its constituent *words* (see [Noscitur a sociis](https://en.wikipedia.org/wiki/Noscitur_a_sociis)):

The statute excludes only merchandise "of foreign manufacture," which [the majority says](https://en.wikipedia.org/wiki/Majority_opinion) might mean "manufactured by a foreigner" rather than "manufactured in a foreign country." I think not. Words, like syllables, acquire meaning not in isolation but within their context. While looking up the separate word "foreign" in a dictionary might produce the reading the majority suggests, that approach would also interpret the phrase "I have a foreign object in my eye" as referring, perhaps, to something from Italy. The phrase "of foreign manufacture" is a common usage, well understood to mean "manufactured abroad."

*K-Mart v. Cartier*, [486 U.S. 281, 319](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=486&invol=281#318) (1988) Scalia, J., concurring in part and dissenting in part.

As an illustrative example, Justice Scalia refers to a case in which the law provided for a longer sentence when the defendant "uses a firearm" "during and in relation to" a "drug trafficking crime." In the case, the defendant had offered to trade an unloaded gun as barter for cocaine, and the majority (wrongly, in his view) took this meeting the standard for the enhanced penalty. He writes that "a proper textualist" would have decided differently:

The phrase "uses a gun" fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.[[5]](https://en.wikipedia.org/wiki/Textualism#cite_note-Scalia.2C_2011-5)

Justice Scalia has also written:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated – a compatibility that, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

*Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) Scalia, J., concurring.

Textualists do not, generally, accept the authority of the Courts to "refine" statutes:

Even if we were to assume, however, contrary to all reason, that every constitutional claim is [*ipso facto*](https://en.wikipedia.org/wiki/Ipso_facto) more worthy, and every statutory claim less worthy, of judicial review, there would be no basis for writing that preference into a statute that makes no distinction between the two. We have rejected such judicial rewriting of legislation even in the more appealing situation where particular applications of a statute are not merely less desirable but in fact raise "grave constitutional doubts." That, we have said, only permits us to adopt one rather than another permissible reading of the statute, but not, by altering its terms, "to ignore the legislative will in order to avoid constitutional adjudication."

[*Webster v. Doe*](https://en.wikipedia.org/wiki/Webster_v._Doe), [486 U.S. 592, 619](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=486&invol=592#619) Scalia, J., dissenting.

# Interpreting the Constitution: Living Tree vs Original Meaning

Ian Binnie, October 1, s007

Of course, the original meaning of the text, if it can be ascertained, should be taken into account. No one argues that it should not be. The issue is whether the framers intended a “frozen rights”  approach to our political institu­ tions and our rights and freedoms. Is the Constitution a liv­ ing tree or a dead tree? Justice Scalia will point out that if a majority of the people don’t like their rights frozen, they can amend the Constitution. For 115 years of our history we had no power to amend our Constitution, and once we got an amending formula it became clear that if there is one thing Canadians dislike more than judicial impudence it is an endless series of constitutional conferences. In the United States, the last successful attempt to amend the Constitution was in 1992; the amendment addressed the procedure governing raises in congressional pay. The amendment was actually proposed in 1789, a gestation peri­ od of 218 years.

**Firstly, a frozen rights theory misconceives the nature of our Constitution and our government institutions, and our history, all of which are very different from those of the United States**. Secondly, supporters of “original meaning” in Canada ignore the lessons of some of the less glorious episodes in our constitutional history, including the Persons’ Case, where the courts in Canada embarrassed themselves by holding, in accordance with the “original meaning

“ of section 32 of the Constitution Act, 1867, that women were not quali­ fied for appointment to the Senate because they were not ”qualified per­ sons.”   Thirdly, the argument about “original meaning” is at bottom an argument about judicial legitimacy.

Of course, if a constitutional provision is clear and unambiguous, it is simply applied according to its terms. Section 4 says that elections must be held at least every five years. This sort of provision gives very clear guidance. But most constitutional provisions are written in very general language, which can be interpreted in different ways, especially when read with other provisions in the Constitution. Expressions like cruel and unusual punishment” undoubtedly mean something different in 2007 than they did in 1867 or 1791.

My fourth proposition is that the living tree approach has served Canada well. This certainly does not mean that people agree with the Supreme Court in all its decisions. On occasion they are highly controversial, but over the long haul it seems that people agree the courts are doing their job, and that **our Constitution should be interpreted in light of all our experience as a country over the past 140 years, not just what was known to the colonial statesmen who met at Charlottetown and Quebec in 186**4. I mentioned earlier that if the plan of government envisaged by the Constitution Act, 1867 had been implemented according to its “original meaning”  it would have resulted in a degree of centralization in Ottawa that would have threatened the country’s future existence.

# Judicial perspectives on statutory interpretation

Evan Bell

Statutory language and the need for interpretation

**Communication**

Statutory interpretation is necessary because language is an imperfect instrument of communication.11 It is in the nature of language that words have nuances and shades of meaning and these do not disappear when words are used in statutes.12 Precision of expression is illusory. The more detailed the linguistic formulae which are used, the more scope there is for argument about their boundaries.

**The drafting process**

Statutory interpretation may also be necessary because of inadequate drafting. In R (on the application of Noone) v Governor of Drake Hall Prison and another,21 Lord Phillips criticised legislation on the basis that the draftsman had been too economical with his language to make his intention readily apparent.

**Generalised language**

Statutory interpretation is also required because, given the inﬁnite variability of conduct, it is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges to interpret laws of general application and decide whether they apply to the facts before the court in a particular case.27 Even the most detailed legislative provision cannot purport to address speciﬁcally all situations that might potentially be affected or caught by its reach.

**Strategic ambiguity**

Statutory interpretation may also be necessary because the language used may have been the result of political compromise. As in diplomacy, the essence of a successful formula may be that both sides can think that they have won their point because it can be interpreted either way.

**Interpretation**

There have been ﬂuctuations in the degree of emphasis which the courts have given, on the one hand, to a literal interpretation of words and, on the other, to the context, subject matter and purpose of legislation. Although it would be historically false to think of the search for the purpose of an enactment as a modern insight into statutory construction, **courts have in recent decades emphasised a movement away from a literal or semantic approach to statutory construction and towards a contextual and purposive approach.**

The purposive approach is ‘a more expansive approach to the search for meaning’ which gradually overtook and displaced the older approach, which tended, though never in an absolutely rigid way, to insist that a court could not look beyond the text in interpreting a statute.

## Text as the starting point

The correct starting point for any analysis of a problem of statutory interpretation is the language of the statute itself. The text is the anchor for the judicial task and ultimately it is the text of the statute which governs.53 Hence the ﬁrst step in a question of statutory interpretation is always an examination of the language of the statute itself54 and the primacy of the text is the ﬁrst rule of interpretation for a judge considering any point of interpretation.55 Extrinsic materials are therefore subordinate to the text itself.56 It is a mistake for courts to begin their search for the meaning of the law with judicial elaborations, ministerial statements or historical considerations.57 It is a fundamental principle of interpretation that the text is the primary source of interpretation and that other sources are subordinate to it.58 The judicial obligation is to begin the ascertainment of the applicable law by analysing the text in issue.59

**Natural and ordinary meaning**

As Gibbs CJ observed, it is not unduly pedantic to begin with the assumption that words mean what they say.64 The courts take as their starting point in the interpretation of statutes the ordinary and grammatical sense of the words. This rule is dictated by elementary considerations of fairness since those who are subject to the law are entitled to conduct themselves on the basis that it has meaning and effect according to ordinary usage.65 By giving the words their natural and ordinary meaning, judges help to prevent the growth and multiplication of reﬁned and subtle distinctions in the law’s use of common English words. Nothing is more confusing and more likely to bring statute law into disrepute than a proliferation of special meanings through judicial interpretation, when parliament has not expressly enacted any

**Interpretation clauses**

Although they have a relatively short and somewhat chequered history, interpretation clauses are an established and important feature of statute law

**Interpretation Acts**

Interpretation Acts set out certain working assumptions according to which legislation is framed by parliament.85 They have been traditionally designed to provide meanings of frequently used terms. Of course even Interpretation Acts require interpretation and a court may consider that an Interpretation Act deﬁnition ought only to be applied unless it is clear from the context that it cannot be sensibly applied.

**Dictionaries**

To determine the meaning of an undeﬁned word, judges may examine its dictionary meaning. As a result of these difﬁculties, judges have often been cautious about the use of dictionaries in statutory interpretation. Mahoney JA said that the **meaning of the words used in a statute was not merely the sum of the individual meanings of the words used, ascertained from dictionaries**, (Provincial Insurance Australia Pty Limited v Consolidated Wood Products Pty Limited (1991) 25 NSWLR 541) and commented that a word is the skin of a living thought, and it is that thought which the court must ascertain and apply.

**Punctuation**

Punctuation is another tool used in the determination of legislative intent.109 Lord Lowry expressed this strongly when saying that not to take account of punctuation disregarded the reality that literate people such as parliamentary draftsmen punctuate what they write, if not identically at least in accordance with grammatical principles. However caution needs to be attached to judicial recourse to punctuation. As Fosket J indicated, there is often no universal agreement about the circumstances in which a particular punctuation mark is or is not appropriate: views differ and conventions change. Skrzypczak v Circuit Court in Poznan, Poland [2011] EWHC 1194 (Admin)

## Context

**A universal truth**

Interpretation involves more than a blinkered focus solely on the words used.117 It is a universal truth that words can only be understood in relation to the circumstances in which they are used.118 Viscount Simonds said that ‘**words, and particularly general words, cannot be read in isolation; their colour and content are derived from their contex**t’.119 They are not to be taken out of the sentence, deﬁned separately and then put back again into the sentence with the meaning which a judge has assigned to them.120 As Gleeson CJ has observed, there are some words and concepts that have no meaning, or no single meaning, apart from their context. Resort to a dictionary may disclose a range of possible meanings, but the choice between those possibilities may depend entirely on context.121 To the same effect, Lamer J said that, without going so far as to say that a word has no meaning in itself, its real meaning will depend on the context in which it is used.122

**Context of the whole legislation**

Statutory interpretation is a ‘holistic endeavour’ that requires consideration of a statutory scheme in its entirety.132 As Kirby J said, **the reading of contested statutory language must take place in the context of the entire section in question, the surrounding part of the Act and other relevant provisions of the statute, read as a whole**.133 Lord Davey said that every clause of a statute should be construed with reference to the context and other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to that subject matter.

**A broader context**

A number of judges have indicated that a broader context must also be considered. Lord Steyn, who famously said that in law context was everything, suggests that legislative language can only be understood against the backcloth of the world to which it relates.

**Context as purpose**

In considering context, many judges use the term in an even wider sense so as to embrace purpose. In CIC Insurance Limited v Bankstown Football Club Limited,145 the High Court of Australia said that the modern approach to statutory interpretation uses context in a wide sense to include such things as the existing state of the law and the mischief which one may discern the statute was intended to remedy

## Purpose

The object of statutory interpretation is to ascertain the meaning which parliament intended. However, the grammatical meaning of a provision is not always the meaning which parliament desired the statute to have.

The Act’s long title may contain a useful statement of its purpose. Similarly, a statement of purpose at the commencement of a particular part may provide a useful aid in resolving which of the two possible meanings is intended.160 Sometimes, statutory objectives appear in the Act itself, but are expressed at such a level of generality as to be of limited assistance in solving speciﬁc interpretational problems.161 The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identiﬁed by reference to common law and statutory rules of construction.162 Thus, as McHugh J said, **if the purpose of a statute and the means of its achievements are not declared, they can only be determined by examining the statute as a whole.**

**The literal meaning of the legislative text is the beginning, not the end, of the search for the intention of the legislature**.( Kelly v R [2004] HCA 12 (McHugh J).) A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature’s intent. **The judicial task is to breathe life, and generously so, into the particular statutory provisions before the court.**182 As Tanner and Carter describe: ‘**Text is enlarged by purpose, and purpose is constrained by text’**

**Legislative intention**

Judges attempting to determine the purpose of a legislative provision occasionally refer to legislative ‘intention’. The concept of intention expresses the constitutional relationship between the legislature and the judiciary. When judges invoke it, they are acknowledging the supremacy of statute over common law and the reality that legislators, and those assisting them, do not always express their meaning clearly when signing off on legislative text. ‘Legislative intention’ is, thus, more than a polite ﬁction.

**Purpose and consequences**

The interpretative task includes adopting a meaning that can be justiﬁed by producing an outcome which is reasonable and just.207 Courts operate in the context of speciﬁc fact situations which may not have been anticipated by legislators. Accordingly, they must seek to reconcile the text and the legislative objectives with a result that is perceived to be fair and just in the particular circumstances of an individual case.208 In Bapoo v Co-operators General Insurance Co.,209 Laskin J stated that avoiding unjust or unacceptable results was an essential part of the court’s task in interpreting statutory language.

**The use of extrinsic materials**

Legislation may be ‘so full of ambiguities, gaps and conﬂicts that often a judge has to reach beyond the statute to seek a solution to the problem at hand’.216 In determining legislative intention, the courts have recourse to some aids found outside the statute. It has long been established that the courts may look outside a statute in order to identify the mischief parliament was seeking to remedy