

A Consistent Inconsistency—An Interpretation of Sections 23 and 56(1) of the *Charter of Human Rights and Freedoms* of Québec

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Résumé de l'article

L'auteure soutient que les tribunaux interprètent les lois afin d'atteindre un but : la justice, dans l'espèce, tant entre les parties que par rapport aux principes du droit. Selon elle, cela explique le comportement erratique des tribunaux dans leur utilisation des méthodes ou règles d'interprétation. L'affaire *Attorney General of Québec c. 2747-3174 Québec Inc.* de la Cour suprême est analysée à la lumière de cette théorie et on voit qu'elle la corrobore.

Ce commentaire rend apparent le fait que dans ce pourvoi, tout en utilisant les différentes méthodes, les juges de la majorité parviennent à une interprétation large et ceux de la minorité, à une interprétation étroite de la *Charte des droits et libertés de la personne* du Québec. Néanmoins il est évident que dans les deux cas, les règles sont simplement le moyen d'atteindre le but : la justice entre les parties et par rapport aux principes du droit. Dans cette affaire, cela consiste à trouver un équilibre entre les intérêts contradictoires de l'État et ceux des citoyens conformément aux droits fondamentaux et notamment, à ceux de la *Charte des droits et libertés de la personne* du Québec.

Il est dans l'intérêt de l'État de confirmer la validité constitutionnelle des tribunaux administratifs qui jouent un rôle important dans l'exercice des pouvoirs de l'État. En revanche, les citoyens doivent être protégés des atteintes à leurs droits, notamment le droit à un tribunal indépendant et impartial lorsqu'il s'agit de déterminer leurs droits et obligations ou le bien-fondé de toute accusation portée contre eux. La Charte doit être interprétée afin que, tant dans sa portée que dans son contenu, l'interprétation ne conduise pas à l'usurpation par les tribunaux du rôle du gouvernement de gouverner.

L'auteure établit que les conclusions contradictoires de la majorité et la minorité sont davantage le résultat des différentes opinions des juges quant à la façon d'atteindre l'équilibre, que la conséquence des différentes règles d'interprétation qu'ils utilisent.

**A Consistent Inconsistency — An Interpretation
of Sections 23 and 56(1) of the
*Charter of Human Rights and Freedoms of Québec***

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ABSTRACT

The writer advocates the view that courts interpret statutes so as to achieve their aim; that being justice in the case : as between the parties and in respect of the law. This is identified as the common thread that explains the apparent erratic behaviour of the courts in their use of the various methods or rules of interpretation. The Supreme Court decision, Attorney General of Québec v. 2747-3174 Québec Inc., is analysed against the background of this theory and is seen to give support to it. The court is shown to use various rules of interpretation, which lead the majority to a wide, and the minority to a narrow, interpretation of the Charter of Human Rights and Freedoms of Québec. Yet it is clear that in both cases the rules are merely a means to an end : justice as between the parties and in respect of the law. In context of the case, this means establishing a balance between the competing interests of the State and the citizen that conforms to the law relating to fundamental rights and in particular, the Charter of Human Rights and Freedoms of Québec.

RÉSUMÉ

L'auteure soutient que les tribunaux interprètent les lois afin d'atteindre un but : la justice, dans l'espèce, tant entre les parties que par rapport aux principes du droit. Selon elle, cela explique le comportement erratique des tribunaux dans leur utilisation des méthodes ou règles d'interprétation. L'affaire Attorney General of Québec c. 2747-3174 Québec Inc. de la Cour suprême est analysée à la lumière de cette théorie et on voit qu'elle la corrobore. Ce commentaire rend apparent le fait que dans ce pourvoi, tout en utilisant les différentes méthodes, les juges de la majorité parviennent à une interprétation large et ceux de la minorité, à une interprétation étroite de la Charte des droits et libertés de la personne du Québec. Néanmoins il est évident que dans les deux cas, les règles sont simplement le moyen d'atteindre le but : la justice entre les parties et par rapport aux principes du droit. Dans cette affaire, cela consiste à trouver un équilibre entre les intérêts contradictoires de l'État et ceux des citoyens conformément aux droits fondamentaux et notamment, à

As far as the State is concerned, it has a vested interest in confirming the constitutionality of its many administrative tribunals, which play an essential role in enabling the State to discharge its responsibility to govern. Citizens, on the other hand, need to be protected from the violation of their rights, in particular the right to an independent and impartial tribunal in matters relating to the determination of their rights and obligations, or charges brought against them. The Charter must be interpreted so that, in its scope and content, it gives real protection, but, consistent with the separation of powers doctrine, the interpretation must not amount to a usurpation by the courts of the role of the government to govern.

The writer concludes that the opposing conclusions of the majority and minority are more a consequence of the difference in the opinion of the judges as to the manner in which the balance should be struck, as opposed to the rules of interpretation used by them.

ceux de la Charte des droits et libertés de la personne du Québec.

Il est dans l'intérêt de l'État de confirmer la validité constitutionnelle des tribunaux administratifs qui jouent un rôle important dans l'exercice des pouvoirs de l'État. En revanche, les citoyens doivent être protégés des atteintes à leurs droits, notamment le droit à un tribunal indépendant et impartial lorsqu'il s'agit de déterminer leurs droits et obligations ou le bien-fondé de toute accusation portée contre eux. La Charte doit être interprétée afin que, tant dans sa portée que dans son contenu, l'interprétation ne conduise pas à l'usurpation par les tribunaux du rôle du gouvernement de gouverner.

L'auteure établit que les conclusions contradictoires de la majorité et la minorité sont davantage le résultat des différentes opinions des juges quant à la façon d'atteindre l'équilibre, que la conséquence des différentes règles d'interprétation qu'ils utilisent.

TABLE OF CONTENTS

Introduction	381
I. Pre- <i>Québec Inc.</i> interpretation methods	383
II. Post- <i>Québec Inc.</i> interpretation methods	386
A. The majority opinion	387
1. The process of interpretation.....	387
2. The application of interpretation.....	391
B. The opinion of L'Heureux-Dubé J.	391
1. The process of interpretation.....	392
2. The application of interpretation.....	394
C. The effect of the interpretation	394
1. The validity of the reasoning.....	395
2. The value of the conclusions.....	401
Conclusion.....	402

INTRODUCTION

Despite much study and analysis of the decisions of the courts, a clear uniform theory of interpretation of legislation¹ is not readily discernable. In the first place there is a problem of terminology. The concepts used in the analysis are ambiguous and a cause of confusion: the word "interpretation" itself has several meanings;² the "intention of Parliament", essential to the traditional theory of statutory interpretation,³ has different senses;⁴ shades of distinction exist in interpretation theory among terms which, to the uninstructed, seem synonymous — for example, the clear sense of the words, their plain meaning, their ordinary meaning, their grammatical meaning, and the literal meaning. Moreover, the distinctions made between them by the writers do not always coincide.⁵

In addition, there seems to be a myriad of rules, variously called principles, methods, approaches or simply, rules. Their classification is as numerous as there are writers on the subject.⁶ These writers generally cover the same principles but arrange or group them differently. The rules are a combination of (i) stipulations as to the kind of meaning that should be attributed (ordinary, scientific, liberal, etc.), (ii) the way this meaning should be obtained (from usage or the dictionary, from immediate or total context), and often (iii) the value to be attached to it (whether it is

1. "Theory of interpretation" is here used to refer to both the normative standards which theorists attempt to establish, and the systematisation of the actual approach taken by the courts in interpretation of legislation.

2. P.-A. Côté identifies three: 1) the process of determining the meaning and scope of the rules set out in the enactment (in contrast to the application of those rules); 2) only that part of the foregoing process that is directed to provisions which are obscure and thus require special effort; 3) the result of the process of interpretation: P.-A. CÔTÉ, *The Interpretation of Legislation in Canada*, 2nd ed., Cowansville, Les Éditions Yvon Blais Inc., 1992, p. 3. Meanings 1 and 2 in particular cause ambiguity, importing confusion in the debate on the validity of the principle "if the statute is clear, it is not subject to interpretation", for example.

3. Traditionally, the goal of interpretation has been to find the intention of the legislature so that effect may be given to it.

4. It may refer to the meaning the author sought to give to the enactment, or, to the practical objective that was intended: see P.-A. CÔTÉ, *op. cit.*, note 2, p. 5; G.C. MCCALLUM JR., "Legislative Intent", (1965-66) 75 *Yale L. J.* 754-787.

5. Taking "ordinary meaning" for example, Driedger describes it in earlier editions as the meaning obtained from the word in its total context in the light of the purpose: E.A. DRIEDGER, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, pp. 5 *et seq.*; E.A. DRIEDGER, *Construction of Statutes*, Toronto, Butterworths, 1974, pp. 6 *et seq.* However in the latest edition of his work, it is described as the literal meaning in the immediate context: R. SULLIVAN, *Driedger on Construction of Statutes*, Toronto and Vancouver, Butterworths, 1994, p. 8. A similar definition was ascribed by Côté, who treats it as the "grammatical or literal meaning" derived from the word in its immediate context: see P.-A. CÔTÉ, *op. cit.*, note 2, pp. 215-255. Even within this common meaning ascribed by Côté and Sullivan, there is a shift in meaning: "ordinary" sometimes includes the technical meaning, and sometimes is used in contradistinction to it.

6. P.-A. CÔTÉ, *op. cit.*, note 2, E.A. DRIEDGER, *Construction of Statutes*, 2nd ed., *ibid.*; R. SULLIVAN, *ibid.*; P. St. J. LANGAN, *Maxwell on the Interpretation of Statutes*, 12th ed., London, Sweet & Maxwell, 1969; are four of the major works generally cited in Canadian courts.

decisive, for example). All of the writers confess to presenting neither the only correct approach to classification, nor a comprehensive one. Even the legislature has contributed its own rules.⁷ The enactments themselves declare these rules to be supplemental, and capable of being ignored in the face of contrary intention.⁸

The other factor contributing to the appearance of an indeterminate number of rules, is the fact of the evolution of traditional rules. Writers are thereby induced to add new names, ironically, to avoid confusion. Thus for example, there is, on the one hand, the “grammatical or literal method” and on the other hand, the “the literal rule”.⁹ Both are based on the ordinary meaning of the word, but the former represents the modern approach, and the latter represents the traditional approach.¹⁰ The same distinction is recognised by another writer who uses instead the “ordinary meaning rule” to represent the modern approach, and the “plain meaning rule” to represent the traditional¹¹ approach.

In addition to the problem of terminology and the myriad of rules, there is a third problem that impedes a clear uniform theory of interpretation of legislation: that of changes in the normative standards in society. For example the traditional theory of parliamentary sovereignty has evolved somewhat, gaining ascendancy in the eighteenth century, but becoming less and less absolute in modern society. The advent of charters of rights and liberties, which impose limitations on the legislature, is one factor contributing to its present decline. The role of the court in interpreting legislation, as perceived by writers and the courts themselves, has undergone corresponding changes. These changes in the normative standards of society are manifested in changes in the relative importance given to the different approaches in a particular case — those based on the formulation of the law versus those based on the spirit. The ongoing debate of whether the spirit can prevail over the formulation of the statute is one example of the effects of this change in the normative standards.¹²

7. *Interpretation Act*, R.S.Q., 1982, c. I-16; *Interpretation Act*, L.C., c. I-21; *La Charte de la langue française*, R.S.Q., c. C-11; *Loi modifiant la Charte de la langue française*, L.Q., 1993, ch. 40; *Loi concernant le statut et l'usage des langues officielles du Canada*, L.C., 1988, c. 38; (up until January 1st, 1994) *Civil Code of Lower Canada*, art. 1-17; *Civil Code of Québec*, 1994, preliminary provision; *An Act Respecting the Implementation of the Reform of the Civil Code*, 1992, ch. 57; *Statute Revision Act*, 1974-75-76, c. 20.

8. *Interpretation Act*, R.S.Q., *id.*, s. 1; *Interpretation Act*, L.C., *id.*, s. 3. See for example *Herdmann v. Minister of National Revenue*, (1983) 48 N.R. 140 where the Federal Court of Appeal, on the basis of s. 3, moved away from the principle of interpretation in s. 28 of the *Federal Interpretation Act 1970*, by which “may” was to be construed as permissive.

9. This distinction is made in P.-A. CÔTÉ, *op. cit.*, note 2, pp. 215 *et seq.*

10. The difference is in the manner in which the ordinary meaning is obtained, and the weight given to it. In the traditional literal approach, that meaning, once clear, was decisive, and the court, could not continue the process of interpretation, using additional aids. In the modern approach, additional aids can be used, even though the ordinary meaning is clear, to determine whether there was any reason to reject this ordinary meaning.

11. R. SULLIVAN, *op. cit.*, note 5, p. 6.

12. See also note 19 below.

Ultimately however, it is the apparent inconsistent use of these rules by the court that is primarily responsible for making the area intractable. The decisions of the courts simultaneously provide the raw material for the systematisation of the methods used in practice, and information concerning changes in prevailing norms. Some of the more important ways in which the court is seen to be inconsistent are discussed below.

However, there is merit in the view that this apparent inconsistency belies a common approach by the court to interpretation: judges aim to achieve the result that is perceived as appropriate in the case with which they are seized; this being determined by their perception of the objectives of the statute at hand or the law in general, and the particular facts giving rise to the dispute. One could say that what determines the result, and the rules of interpretation relied on to get to this result, is the judge's perception of justice in the case: as between the parties and in respect of the law. This common thread has been identified in different terms by one writer,¹³ and is consistent with the conclusions of other writers as to the current methods of interpretation.¹⁴

In *Québec Inc.*¹⁵ the interpretation of sections 23 and 56(1) of the *Canadian Charter of [Human] Rights and Freedoms* by the Supreme Court of Canada does not represent any radical variation by the court in their *modus operandi*. The judges are seen to favour certain rules as opposed to others, differing among themselves, and with other courts. In this sense it is consistent in its inconsistency. More importantly however, no clear theory of interpretation is established; no rule is set as to the relative importance of the various rules. Yet the common thread referred to above is conspicuous. In this other sense therefore, there is a consistency in the apparent confusion. This will become clear upon examination of the decision against the background of the approach of the courts to interpretation in the past.

I. PRE-*QUÉBEC INC.* INTERPRETATION METHODS

The object of this section is not to summarize all the methods of interpretation, but merely to highlight some of the ways in which the courts uses them in an inconsistent manner. Generally it can be said that in respect of the approach to interpretation, judges contradict themselves. They also differ among themselves, with the writers and over time.

13. A.-F. BISSON, "L'interprétation adéquate des lois", in *Mélanges Louis-Philippe Pigeon*, E. CAPARROS (ed.), Montréal, Wilson & Lafleur Ltée, 1989, pp. 87-107.

14. P.-A. CÔTÉ, *op. cit.*, note 2, pp. 323-324, R. SULLIVAN, *op. cit.*, note 5, pp. 131-135.

15. *Attorney General of Quebec v. 2747-3174 Québec Inc.*, S.C. Québec, no. 24309, November 21st, 1996 (hereafter *Québec Inc.*).

Firstly, there is jurisprudential dogma,¹⁶ which is not generally seen reflected in treatises on statutory interpretation,¹⁷ that constitutional and quasi-constitutional enactments are interpreted in a specific manner. However, a review of the decisions of the courts have revealed no such special method of interpretation, whether from the point of view of the tools used or the results of the interpretation process.¹⁸ All the traditional tools of interpretation are seen to be used, and they lead to an interpretation which sometimes restricts, sometimes extends, the enactment.

At any one time, judges are seen to promote contrary opinions as to the relative weight to be attached to the rules. Bearing in mind that, as stated above, the relative weight given to the formulation, as opposed to the spirit or purpose of the enactment, is generally a function of the norms which prevail — from the judge's point of view, and the fact that changes in norms are gradual and subtle, this occurrence is not surprising.¹⁹

Sometimes judges state a rule and are seen, later in the same judgement, to apply a principle which squarely contradicts it. Sometimes a rule is deprecated, only to be heavily relied on in numerous subsequent cases.²⁰

The inconsistency between the judges' words and actions are manifested in another way. Historically, three main interpretation methods were advanced in the cases, each being presented as the *only* appropriate method of interpretation. These

16. This dogma is based on the "living tree approach" canvassed in the 1930 case of *Edwards*. See for example *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, p. 365. See also L.-P. PIGEON, "Texte inédit : Valeur et portée des interprétations jurisprudentielles", *op. cit.*, note 13, p. 41.

17. Except for the rule concerning the admissibility of parliamentary materials, no special rules are advanced in relation to constitutional enactments. They are discussed as merely another context for the application of some methods or rules which are applied in relation to statutes generally.

18. A.-F. BISSON, "La Charte québécoise des droits et libertés de la personne et le dogme de l'interprétation spécifique des textes constitutionnels", (1986) 17 *R.D.U.S.* 19-48. The writer proposes a simple, useful, classification of interpretation methods — (I) those based on the formulation of the law and its context, and (II) those based on the purpose, real or imagined, of the enactment — and demonstrates that in decisions in the first ten years of the existence of the Charter the courts have made use of tools related to all the methods included in each of the two groups. For this reason, it is thought that the examination, in this essay, of the interpretation of the Charter in *Québec Inc.* using the general interpretation theory, is valid.

19. See P.-A. CÔTÉ, *op. cit.* note 2, pp. 319-326, for discussion of the division among Canadian courts on "whether the text of a statute should be modified in order to make it consistent with its objectives, or whether it should be applied literally despite a contradiction with the purpose": *Id.*, p. 324. The writer notes the changes over the centuries in which side prevailed.

20. In *Daigle v. Tremblay*, [1989] 2 R.C.S. 530, pp. 553-554 the Supreme Court denounced the use of dictionaries to interpret the words of enactments, stating "A purely linguistic argument suffers from the same flaw as a purely scientific argument : it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being". However dictionaries continue to be heavily relied on, for example : see *R. v. Dunn*, [1995] 1 S.C.R. 226; *R. v. Heywood*, (1994) 174 N.R. 81; *Thompson v. Canada (Agriculture)*, [1972] 1 R.C.S. 385; *Committee for the Commonwealth of Canada et al. v. Canada*, (1991) 120 N.R. 241; *Baron et al. v. M.N.R.*, (1991) 122 N.R. 47; *Daycal Publishing Inc. v. Canada Post*, (1990) 103 N.R. 151. One writer has catalogued the cases decided within about a year and a half of the *Daigle* decision, in which both legal and ordinary dictionaries were referred to by the same judges : see Book Review by J. RHÉAUME, "CÔTÉ : Interprétation des lois, (2nd ed.)", (1991) 23 *Ottawa Law Review* 707.

were the literal rule,²¹ the golden rule²² and the mischief rule.²³ These rules were not however treated as mutually exclusive by the judges who were often seen, in reality, to use all, or any combination of them, in determining the interpretation of an enactment.

The rules themselves evolved over time, adding to the appearance of an absence of a clear uniform practice. The dividing lines between them became blurred: under the literal rule the context came to play a greater role in determining the meaning;²⁴ the purpose of the rule came to be seen as a valid part of the context, to which resort could be had not only in cases of ambiguity or absurdity;²⁵ and the purposive approach was considered by fewer persons as authorising liberties to be taken with the legislature's formulation of the enactment — it was used to understand the letter of the statute, instead of changing it to fit the spirit. Thus the

21. The literal rule required the judge to give the words of the Act a literal meaning, whatever the consequences. Once the meaning of the word was clear, or plain, the court could not look to the context or use other aids to add to or vary this interpretation. In cases of ambiguity, then the context could be taken into account. This use of the context differs from that made in the contextual approach in that in the former it was used merely to assist in choosing between what was regarded as various possible literal meanings (for example the word 'game' could mean either that which is hunted or that which is played) while in the latter, the emphasis was on obtaining the most suitable interpretation — defined the ambit — by having regard to contextual factors (for example whether in the circumstances, what is meant is a child's game or an outdoor game, or a game with cards, etc.). The statement by Chief Justice Tindal in *Sussex Peerage*, (1844) 11 Cl. & Fin. 85, p. 143, is considered as the classic statement of the literal rule:

My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary that to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer [...], is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to address".

22. The golden rule required that the judges give a meaning that would not cause absurdity. Its classic formulation is contained in the nineteenth century case of *Grey v. Pearson*, (1857) 6 H.L.C. 61; 10 E.R. 1216.

23. The mischief rule required the judge to give the words of the statute a meaning that would suppress the mischief and advance the remedy. It reflects the equitable construction of the 16th century when the letter of the statute was subordinated to its spirit. Relying on this rule, the court sometimes took liberties with the formulation of the enactment, adding words or creating exceptions, in general, filling in gaps in the enactment. The *locus classicus* for the expression of this rule is *Heydon's Case*, (1584) 3 Co. Rep. 7a. This mischief rule, which, to the extent that it countenanced what was considered a usurpation of the legislative power of the legislature, was denounced from the seventeenth century, is the basis of the modern day purposive approach: see R. SULLIVAN, *op. cit.*, note 5, pp. 36-37.

24. Courts more readily found that the meaning was not plain or clear and looked to the context more often than not.

25. In *ECG Canada Inc. v. M.N.R.*, [1987] 2 F.C. 415, p. 423, Rouleau J. stated: "There is no question that the literal approach is a well established one in statutory interpretation. Nevertheless, it is always open to the Court to look to the object or purpose of a statute, not for the purpose of changing what was said by Parliament, but in order to understand and determine what was said. The object of a statute and its factual setting are always relevant considerations and are not to be taken into account only in cases of doubt".

process of interpretation of a judge invoking one rule, often resembled that of one applying another; that is to say, similar factors were considered. The difference, if there was one, was merely the relative weight attributed to the different factors.²⁶

It is this blurring of the lines of distinction between the three main approaches that has caused the rise of a theory of a “modern approach” to statutory interpretation. Although the identification of the phenomena as a “modern approach” is relatively recent, the phenomena itself is seen from the beginning of the century.²⁷ The modern approach requires that the words of an Act be read in its 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.²⁸ Thus the three main approaches, the grammatical, the contextual and the purposive are used together. It is noteworthy that this modern approach merely catalogues (and dictates) a uniformity in the factors considered by the courts. It does not resolve the issue of the relative weight to be given to the factors. Where the different factors lead to conflicting conclusions, it is still up to the judge to weigh them and to base his final decision on any one or more of them.

II. POST-QUÉBEC INC. INTERPRETATION METHODS

The interpretation by the majority and minority will first be examined. We will look at the methods used as well as the application of those methods. Then the effect of this interpretation —, both the method and the application —, will be analysed from the point of view of the validity of the reasoning, and the value of the conclusions reached.

It is necessary to first summarize the facts giving rise to the suit. Two permits authorising the Respondent Corporation to operate a bar were revoked by the issuing authority, the Régie des permis d'alcool (the “Régie”).²⁹ This revocation was in exercise of a power given to the directors of the Régie by sections 75³⁰

26. There were nevertheless cases in which the judge called on one of the three approaches, as strictly formulated, to justify a particular interpretation. For example, in the unanimous decision of the Supreme Court in *R. v. Multiform Mfg. Co.*, (1990) 79 C.R. (3d) 390, p. 394, Lamer C.J. stated on behalf of the Court, “When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute”.

27. Lord Atkinson’s statement in *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, at p. 387 is cited by Driedger as an early expression of this modern principle: E.A. DRIEDGER, *op. cit.*, note 6, p. 87. Lord Greene’s statement in *Re Bidie, Bidie v. General Accident, Fire & Life Assurance Corp.*, [1948] 2 All E.R. 995, p. 998 (C.A.) is another such expression: see R. SULLIVAN, *op. cit.*, note 5, p. 3.

28. E. DRIEDGER, *ibid.*; see also R. SULLIVAN, *id.*, p. 131, for a reformulation of the concept.

29. This was replaced by the “Régie des alcools, des courses et des jeux” pursuant to the *Act respecting the Régie des alcools, des courses et des jeux and amending various legislative provisions*, S.Q. 1993, c. 39, before the appeal was heard on its merits by the Court of Appeal. The bodies were materially similar and so the parties proceeded with the suit.

30. Section 75 reads: “The holder of a permit must not use that permit in a manner that will disturb public tranquillity”.

and 86(8)³¹ of the *Act respecting liquor permits*, R.S.Q., c. P-9.1, (the "Act") to impose such a penalty, on the ground, *inter alia*, of disturbance of public tranquillity. This decision to revoke was reached after two hearings before two directors. During these hearings both the Respondent and the Régie were represented by counsel, witnesses were called and evidence adduced. The Respondent challenged this decision by way of evocation, requesting that s. 2 of the Act, which established the Régie be declared invalid on the basis that the Régie did not comply with the guarantees of independence and impartiality set out in s. 23³² of the *Canadian Charter of [Human] Rights and Freedoms*, R.S.Q., c. C-12 (the "Charter").

The Superior Court³³ held that s. 2 was *invalid*, because the Régie as established, violated the requirements of independence and impartiality. The court however, suspended the effect of the declaration of invalidity for a period of twelve months. On appeal, the Court of Appeal held that *only the reference to s. 75 in s. 86(8) of the Act was invalid*, declaring that those sections, and not s. 2 (which was held valid), were the source of the violation of the requirements of independence and impartiality.

The appellant having only appealed against the decision, the issue before the Supreme Court was whether the power to cancel permits on the ground of disturbance of public tranquillity under sections 75 and 86(8) of the Act was invalid as contravening section 23 of the Charter. The Supreme Court held that the *exercise of the power in this instance was invalid* since, owing to its structure at the material time, the Régie did not meet the requirements of s. 23. However they went on to find that none of the sections were the source of the violation of s. 23 and were all valid. The appeal was therefore allowed, the motion in evocation granted, and the decision of revocation quashed. The decision was unanimous but that of L'Heureux-Dubé J. was based on different reasons.

A. THE MAJORITY OPINION

1. The process of interpretation

The issue as stated was a matter of interpretation and involved two questions: (a) whether s. 23 of the Charter was applicable (the scope of the section), and (b) whether the requirements of impartiality and independence that it imposed were met (the content of the section).

The approach of Gonthier J., writing for the majority, is consistent with the present interpretation theory and practice. He comes to a conclusion using all three methods of interpretation (the literal method, the contextual method and the purposive approach), although, as it often happens, there is no express reference to them. It is possible nevertheless to identify in his reasoning, rules based on the for-

31. Section 86 reads: "The Régie may cancel or suspend a permit, if [...] (8) the permit holder contravenes any provision of sections 70 to 73, 75, 78 and 82, or refuses or neglects to comply with the requirements of the Régie contemplated in section 110".

32. Section 23 of the Charter reads: "Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him". By section 56, the word "tribunal" in that section "includes a coroner, a fire investigation commissioner, an inquiry commission, and any person or agency exercising quasi-judicial functions".

33. [1993] R.J.Q. 1877; 17 *Admin. L.R.* (2d) 69.

mulation of the text (used to refer to the literal and the contextual method), and the purpose of the text.

“Quasi-judicial tribunal”

In determining the scope of s. 23, he rejects the argument advanced by counsel, restricting the word “tribunal” in ss. 23 and 56, to mean bodies exercising *only* judicial or quasi-judicial functions. He does so by giving pre-eminence to considerations of purpose. The purpose of the section, and indeed of the Charter as a whole, is to entrench the citizen’s right to an impartial and independent tribunal. That, he feels, would be undermined by the restricted interpretation. In his opinion “tribunal” includes bodies, like administrative agencies, the quasi-judicial functions of which are ancillary to their main functions.

He rejects likewise the restricted meaning of “quasi-judicial functions” in the minority opinion,³⁴ that limits the scope of the section to “matters of penal significance”. This time however, he relies primarily on the formulation of the text. In his view, the words themselves are not so qualified in the section. Furthermore, other words in the immediate context suggest, on the contrary, that the requirements of s. 23 apply to both courts and quasi-judicial tribunals, and to both penal and civil matters.³⁵ In confirmation of his rejection of this interpretation, he relies on the purpose of the Charter as indicated by the legislative history of the section.³⁶

The meaning which he chooses to attribute is the ordinary (legal) meaning. As is usually the case with abstract terms, the interpretation is not clearly distinguishable from the application of the interpretation to the facts.³⁷ To establish this legal meaning he uses the general guidelines set out by Dickson J., speaking for the Supreme Court, in *Minister of National Revenue v. Coopers and Lybrand*,³⁸ and the words in close proximity in the section itself.³⁹ He confirms the meaning

34. Her restricted meaning of these words, “quasi-judicial in matters of penal significance” is discussed in more detail later in this essay.

35. *Québec Inc.*, *supra*, note 15, p. 14 (GONTHIER J.). He cites with approval Chevalier J. in *Syndicat canadien de la Fonction publique c. Conseil des services essentiels*, [1989] R.J.Q. 2648, whose argument was based on the wording of the sections.: *id.*, p. 10.

36. *Id.*, p. 14.

37. This difficulty has been previously recognised by the court: see *Robitaille v. American Bilbrite*, [1985] 1 R.C.S. 290. It sometimes leads judges to categorise as a finding of fact, what really is a finding of law: see *Canada v. Tucker*, [1986] 2 C.F. 329 where the judge said that the plaintiff had failed to prove “conduct”, when it was really a matter of interpretation, and so a question of law. The same error is made by L’Heureux-Dubé J. and is discussed in the following.

38. [1979] 1 S.C.R. 495, pp. 504-505, *id.* pp. 12-14.

39. In *Québec Inc.*, *supra*, note 15, p. 13, he concludes, “[...] no factor considered in isolation can lead to a conclusion that a quasi-judicial process is involved. Such a finding will instead be justified by the conjunction of a series of relevant factors in light of all the circumstances. However, s. 23 of the Charter clarifies the procedure to be followed somewhat. It states that every person has a right, ‘for the determination of his rights and obligations or of the merits of any charge brought against him’, to a public and fair hearing by an independent and impartial tribunal. This is an indication that the applicability of s. 23 depends, *inter alia*, on the possible impact of the decision on the citizen’s rights and obligations. This does not mean, however, that s. 23 must be complied with whenever a decision could affect a citizen’s rights. For it to be applicable, the procedure followed by the agency in question and the standard under which the decision was made must also have some of the characteristics proposed by Dickson J. in *Coopers and Lybrand*”.

resulting from the application of the general guidelines, with the meaning attributed to the words by other decisions of Québec courts.⁴⁰

“Independent and impartial”

In respect of the determination of the content of s. 23 a variety of arguments related to both the formulation of the law and its object can also be identified.

It is through an analogy with the *Canadian Charter of Rights and Freedoms*, a statute *in pari materia*,⁴¹ that Gonthier J., relying on authorities in respect of this Charter, establishes :

- (1) that impartiality and independence are distinct concepts : the former referring to “the state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case”, and connoting “the absence of bias, actual or perceived”; the latter referring to “a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees”;⁴²

in relation to impartiality in particular.

- (2) that the impartiality requirement has to be met, not only on an individual level, but on an institutional level as well;⁴³
- (3) that an institution in respect of which “a well-informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension of bias *in a substantial number of cases*”⁴⁴ does not meet the requirement of impartiality in s. 23 of the Charter.
- (4) that the factors deemed to inspire a reasonable apprehension of bias are not fixed, but vary, depending on the nature of the tribunal (court or administrative tribunal), and the particular circumstances; for example in the context of administrative tribunals, the nature of dispute to be decided, the other duties of the administrative agency and the operational context will all be relevant;⁴⁵

and in relation to independence in particular,

- (5) that independence is the complete liberty of individual judges to hear and decide the cases that come before them without any interference in fact, or attempted interference by any outsider, be it government, pressure groups,

40. *Id.*, p. 20.

41. Although the Canadian Charter is not by the same legislature, and the analogy of statutes *in pari materia* is based on the coherence of a legislature, its use as such is quite valid because both Charters protect similar rights, the fundamental rights and freedoms, and the Canadian Charter is applicable in Québec.

42. *Québec Inc.*, *supra*, note 15, at p. 21, citing with approval Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673, p. 685.

43. *Id.*, p. 22, citing with approval Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114, p. 140 who uses an argument of purpose : to achieve the object of the section, prohibiting factors that would lead to a reasonable apprehension of bias, the institution itself must be impartial; and of logic : “just as the requirement of judicial independence has both an individual and institutional aspect [...] so too must the requirement of judicial impartiality.”

44. *Id.*, p. 23, [emphasis in the original], adopting the test put forward by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, p. 394 which had become a well established principle following *inter alia*, *R. v. Lippé*, *ibid.*, and *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267.

45. *Québec Inc.*, *id.* p. 23, citing with approval Lamer C.J. in *R. v. Lippé*, *id.*, p. 142.

individuals or even another judge, with the way in which they conduct their case or make their decision.⁴⁶

- (6) that the three main (minimal) components of judicial independence are security of tenure, financial security and institutional independence;⁴⁷
- (7) that to meet the requirement of s. 23 the tribunal has to be reasonably perceived as independent;⁴⁸
- (8) that this term has a flexible meaning and did not require the same of the administrative body as for the court;⁴⁹
- (9) that independence is not required for its own sake, but as a guarantee of the absence of bias;⁵⁰
- (10) that security of tenure requires, not tenure for life, but the absence of tenure at the pleasure of the executive or other appointing authority.⁵¹

In a second application of the *noscitur a sociis* principle, the analogy this time being with the principles of natural justice, he (i) confirms point (4) above, (ii) establishes that the plurality of functions in a single administrative agency does not necessarily mean the existence of bias,⁵² (although, he adds, such plurality should not result in excessively close relations among employees involved in different stages of the process), and (iii) determines that a lack of separation of functions in a lawyer — in particular the prosecution and adjudicative functions — raises a reasonable apprehension of bias.⁵³ Again, the difficulty of distinguishing the interpretation from the application of the interpretation is manifest.

One notices that the meaning given to the terms “quasi-judicial tribunal”, “independent” and “impartial” are quite general. This is not surprising having regard, not only to their abstract nature, but also to the fact that s. 23 sets a normative standard. One notices also that underlying the reasoning throughout, is the recognition that the provision being interpreted is one establishing a quasi-constitutional guarantee of a fundamental right, and the belief that the section must be interpreted to afford real protection to individuals. It is also noteworthy that the concept of legislative intent, severely criticised by some writers,⁵⁴ is still alive and well.⁵⁵

46. *Id.*, p. 33, citing with approval Dickson C.J. in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, p. 69.

47. *Ibid.*, relying on *Valente v. The Queen*, *supra*, note 42.

48. *Ibid.*

49. *Id.*, p. 34, citing with approval *Valente v. The Queen*, *supra*, note 42, as well as *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, paragraph 83. He also noted that the Québec courts had also construed s. 23 as importing a degree of flexibility in relation to administrative bodies.

50. *Id.* p. 33, relying on *Valente v. The Queen*, *supra*, note 42.

51. *Id.* p. 36, citing with approval Le Dain J. in *Valente v. The Queen*, *supra*, note 42, p. 698.

52. *Id.*, p. 25, citing with approval L'Heureux-Dubé J. in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, pp. 309-310.

53. *Id.*, pp. 29-30, citing with approval, *inter alia*, Brooke J.A. in *Re Sawyer and Ontario Racing Commission*, (1979) 24 O.R. (2d) 673 (C.A.), p. 676.

54. A.C. HUTCHINSON, *Dwelling on the Threshold*, Toronto Carswell, 1988; H.W. MACLAUGHLAN, “Judicial Review of Administrative Interpretations of the Law: How Much Formalism Can We Reasonably Bear?”, 36 *U.T.L.J.* 242; R.A. MACDONALD, “On the Administration of Statutes”, (1987) 12 *Queen's L.J.* 489. See also for discussion P.-A. CÔTÉ, *op. cit.*, note 2, pp. 5-13 where the view is advanced that the search for legislative intent is an integral and vital part of the Canadian legal community; that “[i]f the concept of legislative intent did not exist, we would have to invent it”, *Id.*, p. 13.

55. See for example, *Québec Inc.*, *supra*, note 15, pp. 14-15.

2. The application of interpretation

Having interpreted the words “quasi-judicial tribunal” to include administrative bodies, Gonthier J. concludes that the section applies to them generally, and the Régie in particular, when they are exercising quasi-judicial functions.

As previously stated, the meaning attributed to “quasi-judicial” is distinguishable from the application of that interpretation only with difficulty. Gonthier J. completes the determination of the ordinary meaning of the words, only in applying the general guidelines referred to above, to the particular facts. Thus instead of making a general comprehensive statement as to what constitutes a quasi-judicial act, he concludes that, in view of (i) the possible significant impact of the revocation on the livelihood of the permit holder, (ii) the fact that the decision is made only after a hearing in the course of which witnesses may be heard, exhibits filed and submissions made — a process similar to that of a court — and (iii) the fact that a decision to cancel a permit on the ground of disturbance of public tranquillity results from the application of pre-established standards to specific facts adduced in evidence, and is a final judgment protected by a privative clause, the decision to cancel a permit on this ground of disturbance of public tranquillity is a quasi-judicial act, within the scope of section 23.

The interpretation of Gonthier J. as to the meaning of s. 23 in terms of its content leads him to conclude that the facts that (a) it was possible that the same lawyer advise the directors (who had no legal training themselves) and make submissions to them, and (b) it was possible for a particular director to decide to hold a hearing following the investigation, and participate in the decision-making process, there was an excessive overlapping of functions which would cause an informed person to have a reasonable apprehension of bias.

Being of the view that none of these factors were the cause of the constituting legislation, he deems the Act valid.

This conclusion as to the independence of the Régie is similarly confined to the specific facts and circumstances surrounding the case before him. He reasons that, because in this instance the directors could be dismissed only for cause, and since there was no evidence showing that the executive could control the administrative decisions that bear directly and immediately on the exercise of the judicial function (as opposed to merely a general supervisory role) the Régie satisfied the requirement of independence. As with the requirement of impartiality, no general definition for what constitutes independence is given.

B. THE OPINION OF L’HEUREUX-DUBÉ J.

L’Heureux-Dubé J. concurs with the majority. She decides that in respect of the decision to revoke the two permits, the Régie did not meet standards of independence and impartiality that are required of it. However she comes to this decision solely on the basis of administrative law. She rejects the interpretation of the Charter by which her colleagues deem it applicable to the instant case. This section will examine the manner in which she reaches this narrow interpretation of the Charter, and summarize her administrative law arguments which lead her, in the end, to concur with the majority.

It is not proposed to discuss the “the common law’s applicability in Public Law” of Québec, nor “the methodology of legal analysis in Administrative

Law”, both of which were treated by her as preliminary questions.⁵⁶ These are not considered relevant in the context of this essay.

1. The process of interpretation

In contrast to the opinion of the majority, the method of interpretation adopted by L’Heureux-Dubé J. is expressly stated. After demonstrating the existence of a “modern approach” — a synthesis of contextual approaches that reject the plain meaning approach⁵⁷ — to interpretation, she purports to follow it closely. The result is a legalistic reasoning process and bizarre conclusions.

As was done with the majority opinion, her interpretation of the scope of ss. 23 and 56(1) of the Charter will be examined, and then that in relation to the content of the requirement of independence and impartiality.

“Quasi-judicial tribunal”

L’Heureux-Dubé J. rejects the interpretation of “quasi-judicial tribunal” as “every quasi-judicial tribunal”. Her criticism is that this interpretation is not the result of “formal interpretative analysis”. It results, she contends, from the application of the “plain meaning rule”; a rule which, she further argues, was *the* method used in the past, but is invalid in modern interpretation theory.

Using — what can only be described as — a combination of the *eiusdem generis* rule⁵⁸ and the principle of *noscitur a sociis*, she restricts the meaning of “quasi-judicial” to “*quasi-judicial matters of penal significance*”.⁵⁹ She reasons that two of the four terms listed in s. 52(1) relate to matters of penal significance only, and so the other two terms should be so restricted, otherwise they would be “inconsistent in light of the *noscitur a sociis* rule and therefore logically, semantically and grammatically inconsistent”. Exactly what is meant by “quasi-judicial matters of penal significance” is not clearly stated, with damaging consequences, as will be shown later.⁶⁰

She confirms this interpretation of “quasi-judicial” functions derived from the immediate context, with that suggested by (a) the broader context (Chapter III of Part I of the Charter in which s. 23 is found), (b) the context of the statute as a whole, (c) the legislative evolution, and (d) the external context. Her

56. *Id.*, at paragraphs 76-104.

57. *Id.*, paragraph 160.

58. Although the *eiusdem generis* rule may be considered as an application of the *noscitur a sociis* principle, the restricting of the meaning of a broad term on the basis of a common denominator in a list of preceding terms, is more accurately the application of the *eiusdem generis* rule.

59. *Québec Inc.*, *supra*, note 15, p. 57. She also uses the meaning “quasi-judicial in areas of penal significance”: see p. 74. These two meanings will be further discussed later in this essay in the section on the validity of the reasoning.

60. “I believe”, she says, “that this category includes at least purely penal concepts, that is, fines and imprisonment. Without defining the scope of those concepts conclusively here, I think that this category *probably* also includes all matters of penal significance, including certain aspects of professional disciplinary law, certain immigration decisions and concepts related to search and seizure”: *Québec Inc.*, *supra*, note 15, p. 57-58 [emphasis added]. The adverse consequences of this failure to clarify the concept will be shown below.

arguments, examined more closely in the following section, may be briefly stated as follows :

- (a) Chapter III of Part I of the Charter contains only penal matters and it would be bad drafting to include non-penal matters with the penal matters;⁶¹
- (b) The inclusion of non-penal matters in this section would result in internal incoherence in the Charter, and be contrary to the virtually irrebuttable presumption of coherence of the legislature.⁶²
- (c) The third paragraph in the section as originally drafted included “family class”,⁶³ because this class is of a penal nature; or alternatively, the class is non-penal and was removed in the subsequent amendment of the Charter because it did not belong in this penal section.
- (d) Having regard to the provisions protecting the similar right in existing Charters,⁶⁴ the legislature would have used clearer words if it really intended s. 23 to apply to both criminal and civil spheres.⁶⁵ (She relies here on the presumption that the legislature is known to have had knowledge of all the relevant law.)

She concludes therefore that section 23 interpreted in context, is restricted to matters of penal significance. The instant case, being one in administrative law, the non-penal sphere, the Charter is not applicable.

“Independent and impartial”

Having however determined that (i) quasi-judicial bodies had a duty to act in accordance with natural justice, and administrative bodies had a duty to act fairly,⁶⁶ (ii) that both natural justice and the duty to act fairly required adherence to the common law principle of *nemo iudex in propria sua causa debet esse*,⁶⁷ and (iii) that this principle includes the duty to be impartial, she determines that the Régie is nevertheless subject to a duty to act impartially. Consequently, she sets

61. *Id.* pp. 58-59.

62. *Id.* pp. 60-66.

63. This section reads as follows : “[The tribunal] may also sit *in camera* in the interests of children, particularly in matters of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity”.

64. To demonstrate the incoherence, she explains that the Commission des droits de la personne and the Charter itself which establishes it, may give rise to an application under the Charter itself, to strike the Charter down; that being so because the Charter makes provisions for hearings by the Commission which do not conform to section 23, in that they are not public; in addition, a great many administrative tribunals may be subject to challenges on the same ground. See below notes 65 and 79-82.

65. 1948 — *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc.A/810, at 71, art. 10; 1950 — *European Convention on Human Rights*, 213 U.N.T.S. 222, art. 6(1); 1690 — *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2(e) and (f); 1966 — *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 172, art. 14(1).

66. *Québec Inc.*, *supra*, note 15, pp. 22-23, relying, in respect of quasi-judicial bodies, on *Alliance des professeurs catholiques de Montréal v. Labour Relations Board of Québec*, [1953] 2 S.C.R. 140, p. 154 (*per* RINFRET C.J.); *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; and in respect of public bodies, on *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.

67. *Québec Inc.*, *id.*, pp. 23-24, citing, in relation to natural justice, DUSSAULT and BERGEAT, *Administrative Law : A Treatise*, vol. 4, 2nd ed., 1990, p. 296, and in respect of the duty to act fairly, *re H.K. (An Infant)*, [1967] 2 Q.B. 617, p. 630, and *Energy Probe v. Atomic Energy Control Board*, [1985] 1 S.C.R. viii, *per* MARCEAU J.A.

out, as did her colleagues, to interpret and apply the requirement of “independence” and “impartiality”.

Using the same authorities as did the majority, she determines the meanings of the words by juxtaposing the two concepts (yet another application of the courts of the adage that the legislature “*ne parle pas pour ne rien dire*”), allowing the context to shape and colour their meaning. The meaning she attributes is therefore similar to that of the majority: (i) independence, though distinct, is not an end in itself; it is important because it is necessary (but not sufficient) for impartiality, (ii) it varies depending on the tribunal, having a slightly different meaning in the case of the courts as opposed to tribunals, because of the necessarily closer relationship between the tribunals and the Executive, and (iii) impartiality is a dichotomy, because the factors which could lead to a reasonable apprehension of bias differ in criminal and civil cases.⁶⁸ The test she advances is similar to that of the majority: “Would the administrative agency cause an informed person to have a reasonable apprehension of bias in a substantial number of cases?”

However, she does not complete the interpretation process. She adopts Gonthier J.’s meaning and application of impartiality in the context of the present case, treating it as a finding of fact.⁶⁹

Having thus concluded that the Régie is not impartial, she exercises judicial restraint, and does not decide on the content of the requirement of independence.

2. The application of interpretation

On the basis of her interpretation of s. 23 as applying only to “quasi-judicial matters of penal significance”, L’Heureux-Dubé J. concludes in a summary fashion, that the revocation of the two permits is “clearly” within the non-penal sphere.⁷⁰ She concludes therefore that “in the case of the bar the Régie des alcools *did not make a quasi-judicial decision in the ‘matters of penal significance’ category*, [and] the Charter is not applicable”.

Her adoption of the interpretation and application by Gonthier J. of impartiality, results in a finding that, in the case before the court, the Régie is biased.

C. THE EFFECT OF THE INTERPRETATION

This interpretation of the Supreme Court of sections 23 and 56(1) has consequences, not only for interpretation theory generally, but for administrative and constitutional law as well.

The effect or the consequences of the decision for interpretation theory, administrative law and constitutional law, depends on the validity of the reasoning of the judges and the value of the opinions.

68. The interpretation of a term by reference to the norms of the business or sphere is one of the means the court is seen to resort to in dealing with abstract terms.

69. *Québec Inc.*, *supra*, note 15, p. 25.

70. *Id.*, p. 58.

1. The validity of the reasoning

The reasoning in the majority opinion exemplifies the type of interpretation process contemplated by the existing rules and methods of interpretation. It is sound in logic, takes the pertinent matters into consideration, and the weight given to the relevant factors is reasonable and justifiable. It is reasonable to give s. 23 the meaning that would give real protection to individuals.⁷¹ Moreover, it is justifiable, having regard to the growth in the number of administrative agencies, and the increase in the matters affecting the rights and obligations of individuals, that are dealt with by bodies outside the main court structure. The reliance placed on the Canadian Charter in determining this meaning is legitimate.⁷²

However, one may find fault with the conclusions reached by the court. It can be argued that it is not consistent to deem invalid as contrary to the Charter, acts or practices which conform to certain legislation, without holding the legislation itself also invalid. The conclusion, nevertheless has the merit of giving the injured party the redress which it deserves, without grievous injury to the administrative tribunals.

On the other hand, the validity of the reasoning of L'Heureux-Dubé J. is questionable. It is defective in many respects.

First of all on the matter of the "plain meaning rule", L'Heureux-Dubé J. says at paragraph 152, that a "model for the jurist [...] has been prescribed by [the Supreme Court] since the Canadian Charter of Rights and Freedoms was enacted in 1982. In the past, this Court relied on the so-called 'plain meaning rule' methodological approach [...]". The accuracy of this proposition is doubtful. Firstly, insofar as the approach to which she refers is merely a combination of the three approaches and affords no direction to the judge of the relative weight of the factors considered, it is questionable whether it can be properly called a "model" for the jurist faced with the task of interpreting a statute.

Secondly, the approach has not been prescribed, being rather the conclusion drawn from empirical facts. Neither does it have its origins in the Supreme Court, exclusively.

71. In *R. v. Big M Drug Mart Ltd.*, (1985) 18 D.L.R. (4th) 321, pp. 359-60 (S.C.C.), Dickson C.J.C. stated in respect of the Canadian Charter, "The meaning of a right or freedom guaranteed by the Charter is to be ascertained by an analysis of the purpose of such a guarantee; it is to be understood, in other words, in light of the interests it was meant to protect [...]". This opinion of Dickson C.J.C. is generally recognised as an accurately stating the considerations involved in the interpretation of the Charter. See for example: R. SULLIVAN, *op. cit.*, note 5, pp. 32 and 43; P.-A. CÔTÉ, *op. cit.*, note 2, p. 414; B. WILSON, "Building the Charter Edifice: The First Ten Years", in G.-A. BEAUDOIN, ed., *The Charter: Ten Years Later*, Cowansville, Les Éditions Yvon Blais Inc., 1992, pp. 93-98, p. 94.

72. The Canadian Charter and the Québec Charter are both applicable in Québec. They cover the same ground for the most part. Actually many jurists have expressed the hope that with the adoption of the Canadian Charter, a constitutional document, the courts would be influenced by its interpretation, in their interpretation of the Québec Charter, a quasi-constitutional document: *Johnson v. C.A.S.*, [1984] C.A. 61, p. 69, *per* BISSON J.; J.-F. KEABLE, "Les tribunaux administratifs et organismes de régulation et les exigences de la Charte en matière d'indépendance et d'impartialité (art. 23, 56.1 de la Charte québécoise)", in *Application des Chartes des droits et libertés en matière civile*, Cowansville, Les Éditions Yvon Blais Inc., 1988, p. 261.

Thirdly, the use of multiple approaches is not new. As was shown above,⁷³ the use of a combination of approaches was seen since at least the beginning of the present century. The excerpt of the judgment which the learned justice cites, contradicts the contention that this modern approach is a recent phenomena.⁷⁴ Furthermore, in its quest for giving effect to the purpose of the statute, this modern approach merely authorises explicitly, what could be found implicitly in previous decisions,⁷⁵ and that, long before the coming into force of the Canadian Charter.

Fourthly, the Supreme Court (or any other court for that matter) did not rely only on the so-called “plain meaning rule” alone in the past. The problem, which the learned justice acknowledges, is that the courts are not consistent in the approaches that they use.

The second defect, which is considered the most debilitating, is the vacillation between two meanings of the term “quasi-judicial”: “quasi-judicial in matters of penal significance” and “quasi-judicial in areas of penal significance”. According to the first, it is the *matter in question* which must be of penal significance for section 23 to apply. According to the second, it is the *area* which must be of penal significance. The first meaning is used in paragraphs 196-200 of her opinion to lead to the conclusion that since the decision to revoke the permits is not a matter of penal significance (as opposed to decisions imposing “fines or imprisonment, [...] certain aspects of professional disciplinary law, certain immigration decisions and concepts related to search and seizure”), section 23 does not apply. The second meaning is used in paragraphs 227-234 to lead to the conclusion that “the ‘family’ class⁷⁶ [...] seems, by its very nature, to be part of the hearings ‘of penal significance’ because of the potential impact on the persons involved in such cases (for example the *possibility* of being found in contempt of court, and sanctions such as seizure pursuant to a support order.) [emphasis added]”.

The equivocation in the interpretation of “quasi-judicial” leads to contradictions in her reasoning. Thus *any* matter of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity (*i.e.* the whole of the “family” class) is a matter of penal significance because of the potentially great impact of a decision in *some* of those matters. Yet the great impact of the decisions of many administrative tribunals, not to mention the great impact in the case before the court, did not lead to the same conclusion. As a matter of fact, the applicability of the Charter to administrative tribunals and the Régie in particular was decided without any reference to the potential impact of its decisions.

Moreover, the test stated in her summary does not accord with either of the meanings of the concept of “matters of penal significance”. She states, at paragraph 251, that to determine whether a matter is “of penal significance” one must ask the question, “is the impact of the administrative agency’s decision on the persons involved significant enough to warrant procedural protection as broad as that

73. See note 27 above and text.

74. An excerpt from *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, p. 578, part of which is as follows: “[...] Earlier expressions [of the principle], though in different form are to the same effect”.

75. See for example A.-F. BISSON, *loc. cit.*, note 13.

76. Referring to all matters of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity.

provided for in Chapter III of Part I of the Charter?⁷⁷ If so, the agency in question falls within the category created by s. 56(1), and s. 23 applies [...]”. A similar test is stated at paragraph 262. This differs from the “family” class rationale because it is each decision which will be categorised as penal or non-penal, and not decisions of administrative agencies generally. It differs from the test applied in respect of the decision to revoke permits because the categorisation of that decision was done, on the basis that it was “clearly in the non-penal sphere” without regard to the impact of the decision.

If the reasoning had been consistent, that is to say, had “matters of penal significance” been accorded the same significance in the administrative “class” as it was given in family class, the learned justice would have had to come to the conclusion that the Charter was applicable. After all, although there is not the possibility of being found in contempt of court, the impact of a decision by an administrative agency is in some cases as significant as the impact of a penal sentence. Actually, she would have had to reach that conclusion even had she applied the other test stated in paragraph 251 of her opinion. The impact of the decision in question itself — the inability to earn a livelihood by operating a business — was as great as a penal sentence. It is noteworthy that this test is similar to what Gonthier J. applied to come to the conclusion that the Charter was applicable.

The third defect is that the learned justice fails to give any convincing justification for the restriction of the term “quasi-judicial” by introducing the concept of “matters of penal significance”. An examination of her arguments based on the context (*noscitur a sociis* principle) and those based on the purpose (legislative evolution) will illustrate this.

The contention that this restriction is necessary to conform to the *noscitur a sociis* rule is invalid. This Latin adage does not embody a *rule* that must be adhered to even in the face of contrary indications in the general environment of the legislature. Rather, it is merely a *guide* for the meaning of a word in recognition of the fact that words do not exist in a vacuum, but derive their meanings from their surroundings. Even when properly used, this tool could lead to incorrect interpretations, for example if it causes the interpreter to ignore the contrary indications in the legislature’s surroundings. For this reason it is deemed a good servant but a poor master. When used badly however, it can lead to interpretations that are perverse. With due respect to the learned judge, it is submitted that she used the principle of *noscitur a sociis* badly.

The immediate context :

It is recognised that the adage can be used to restrict the meaning of a word in an enumeration. However the restriction imposed by the learned justice is not justifiable, whether on the basis of *noscitur a sociis* or the other principles of interpretation. The items in section 56(1) in respect of which a common denominator had to be found were : (1) a coroner (2) a fire investigation commissioner, (3) an inquiry commission, and (4) any person or agency exercising quasi-judicial functions. The most obvious common denominator is that these are all persons or bodies outside the main court structure, which may determine the rights and obligations or the merits of any charge brought against an individual. This common denominator also has the

77. According to her the impact sufficient to warrant such protection if it is similar to the impact of a penal sentence. *Québec Inc.*, *supra*, note 15, p. 68.

merit of being logical and rational. The implication is that "tribunal" is defined to include all bodies which are a potential source of violation of the individual's right to a fair hearing which s. 23 seeks to guarantee. This was passed over in favour of a narrower meaning which has the sole merit of conforming with the rest of the learned justice's opinion. It incorrectly focusses on finding a common denominator based on the *nature* of the matters heard by the persons mentioned, instead of simply the common denominator based on the persons mentioned.

The broader context of s. 23 :

Contrary to what the learned justice states, Chapter III of Part I of the Charter does not suggest that "quasi-judicial" is used to refer exclusively to penal matters. It may be true that this Part refers to mainly criminal matters, but that in itself does not exclude the possibility of the inclusion of matters of a non-penal nature. The learned justice erred in concluding that it did. The occurrence of such "bad drafting", as the learned justice contends it would be, is not outside the realm of possibility as is shown by the charters of the United Nations, the European Union, and Canada,⁷⁸ to use the same charters cited by the learned justice herself later in her reasoning.

The context of the statute as a whole :

The argument that the Commission des droits de la personne, together with the Charter which establishes it,⁷⁹ can be the subject of a Charter application under section 23 (because this Commission is empowered to conduct its proceedings in private) is wrong, for the reason pointed out by Gonthier J. in the majority opinion.⁸⁰ The proceedings of the Commission are not subject to section 23. This section applies to hearings which *determine* the rights and obligations or the merit of any charge brought against an individual. The proceedings of the Commission is not concerned with the *determination* of rights and obligations. It has a discretion to act whether it should act in favour of a victim.

In any event, the requirement of a public hearing is not absolute. Section 23 itself recognises two broad exceptions: interests of morality or public order. Certainly, as with the independence of the judiciary, the exigencies of the administrative agencies may be taken into account to determine the content of that requirement as far as these bodies are concerned. Or else the challenged provision allowing a hearing which is not public may simply be expressly stated to apply, "notwithstanding section 23 of the Charter".

The external context :

This argument based on a comparison with other charters is particularly weak. She contrasts on the one hand, the distinction made by the *European Convention of Human Rights* ("in [...] civil [...] or [...] criminal"),⁸¹ that made by the *Inter-*

78. See note 61 above.

79. Section 57 of the Charter.

80. *Québec Inc.*, *supra*, note 15, pp. 14-15.

81. The complete text of article (1) is as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

national Covenant on Civil and Political Rights (“ [...] criminal [...] or [...] suit at law”⁸²), and the separation of the paragraphs in the *Canadian Bill of Rights*,⁸³ with, on the other hand, the wording of section 23 of the Québec Charter. The latter section not having used the words “civil” and “criminal”, nor two separate paragraphs, was deemed by her, to indicate an intention on the part of the legislature, that section 23 not be applicable to both the penal and the non-penal sphere.

In the first place, the use of “rights and obligations” and “charges” have the same effect as “civil” and “criminal”. Furthermore the Declaration of the United Nations, which she admits as applying to both civil and criminal, is less clear, or at best, as clear, as the Québec Charter, in making the distinction. Instead of the “rights and obligations” and “criminal charge” of the former, the latter removed the word “criminal” and maintains “rights and obligations” and “charges”. This brings us to the second point.

In the second place, she contends that the formulation of the provisions in the Charter either use the words “criminal” and “civil”, or two separate paragraphs if it is intended to apply to both criminal and civil spheres. The Declaration of the United Nations, to which the Québec Charter is most similar, and which disproves this contention, is conveniently left out of this part of the argument.⁸⁴

In the third place, if she is correct, and section 23 relates to only criminal matters, then that would mean that, contrary to what she concluded earlier, it would not relate to family matters. Yet another contradiction caused by the equivocation in the meaning of “penal” and “non-penal”. Here she equates it with “criminal” and “civil” respectively. Previously this was not the case.⁸⁵

In respect of the legislative evolution of the section, the argument appears specious. She contends that the family class, for which special provision was made in paragraph 3 of the section as originally drafted, is penal! This strange result is defended in the following terms, “[M]atters ‘of penal significance’ may exist in any area of the law, be it property and civil rights, public law, criminal law or some other area”. What of administrative? As an alternative argument, she declares that if this class were non-penal — a view for which she expresses doubts — then that was the reason for its removal: it did not belong in a section that was penal! The possible desire of the legislature to group this essentially procedural rule with other procedural rules in the *Code of Civil Procedure* was not contemplated by the learned justice.

82. The full text of article 14(1) is as follows: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

83. Ss. (e) and (f) read: [...] no law of Canada shall be construed or applied so as to (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations: (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause [...]

84. *Québec Inc.*, *supra*, note 15, at p. 72. At page 73 she asks, “If the Quebec legislature had really intended to make s. 23 applicable to both ‘non-penal’ and ‘penal’ matters, would it not have been much simpler for it to use the explicit wording of the *three* provisions?” [emphasis added].

85. To illustrate the shift in meaning one only has to look at the following statement made at page 69, “[...] matters ‘of penal significance’ may exist in any area of the law, be it property and civil rights, public law, criminal law or some other area”. “Penal” is definitely not equivalent to “criminal” here. Neither is it so equivalent when she advances the view that when the court hears civil rights cases, the hearing has penal significance, and thus the Charter applies. See *id.*, p. 76.

Moreover, this conclusion is based on a principle opposite to that which she cites in support of it. At the beginning of the inquiry into the legislative history of the section she states a common law principle that the "interpretation principle [that legislative history may be used to interpret a statute] is based on the presumption that changes to legislation are intended to effect substantive change in the law". The argument that the family class was transferred elsewhere because it did not belong in s. 23 suggests however that the amendment was made merely to improve its form.

Furthermore, this common law presumption is not absolute, and has been consistently losing ground of late. The possibility of amendment for merely formal reasons is increasingly recognised. The force of the presumption is especially weak now that there is legislation expressly contradicting it.⁸⁶

In the matter of the interpretation of the requirements of independence and impartiality, it is submitted that the treatment of impartiality as a question of fact is incorrect. It is true that for abstract terms it is difficult to distinguish the interpretation of the law from the application of the facts; but in cases such as this, where the legislation is in terms of broad normative standards, it is the duty of judges, in their role as arbiters of the law, to give these broad statements the fullness of their meaning in specific circumstances. This is especially true in the case of the Charter, whether that of Québec or of Canada.

Her reasoning on the whole suggests that a rule of interpretation should determine the result. This does not conform with the prevailing view of the approaches as guides, illuminating the various paths, from which the judge makes a choice. As Côté observes, "In more complicated cases, two distinct methods may lead to different interpretations, and the interpreter must then make a decision. Although he may invoke the guidelines upon which the interpretation is based, it is not the guidelines that determine the result, as Chief Justice Laskin observed, but rather the result that leads the interpreter to favour certain guidelines over others. In difficult cases, none of the guidelines, even those that have earned the status of 'rules', is sufficient to determine the outcome".⁸⁷

It has been stated elsewhere that, "The three so-called rules which have been described above do not call for criticism if they are to be regarded simply as convenient headings by reference to which the different approaches of the courts to problems of interpretation may be described. They are less satisfactory, when they [...] are used to justify the meaning given to a provision. In our view, the ultimate function of a court in the interpretative process is not simply to decide whether it is bound to follow a literal interpretation on the one hand or to adopt on the other an interpretation reached in the light of the golden or mischief rules. It is rather to decide the meaning of the provision, taking into account, among other matters, the light which actual language used, and the broader aspects of legislative policy arrived at by the golden and mischief rules throw on that meaning".⁸⁸

86. *Interpretation Act*, L.C., *supra*, note 10, s. 45(2): the amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or has been considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended. See also, P.-A. CÔTÉ, *op. cit.*, note 2, p. 353.

87. P.-A. CÔTÉ, *op. cit.*, note 2, p. 212.

88. *Id.*, citing *Report on the Interpretation of Statutes* of the Law Commission and the Scottish Law Commission, London: H.M.S.O., 1969, no. 29, p. 17.

These comments, made in respect of the classical rules, is just as valid for the “modern approach”. It is not of paramount importance that “rules” of interpretation, like *noscitur a sociis*, remain inviolable at the cost of other indicators in the environment of the meaning of the term.⁸⁹ They are not masters to be followed blindly, but are rather servants, to be used prudently.

2. The value of the conclusions

The majority opinion represents yet another interpretation of the Charter, whether of Québec or of Canada, where the purpose is regarded as paramount, and its provisions are interpreted liberally. As noted earlier, although this is often the case, sometimes such an approach has led to a restrictive interpretation.⁹⁰ What is also significant about the majority opinion, is the fact that the Québec Charter is given an interpretation that is consonant with the interpretation of the Canadian Charter. Thus the hope expressed by some, that the Canadian Charter will assist in the interpretation and application of the Charter of Québec is fulfilled in this decision.

Gonthier J. commences his opinion that the appeal provides “an opportunity to clarify the scope of the requirements imposed on administrative tribunals by s. 23 of the Charter”, taking into the account the balance that has to be maintained between the “imperatives of administrative convenience and the principles of impartiality and independence which cannot readily be compromised”.⁹¹ This statement hints at both the constitutional law issue of the role of the court as an arbiter between the State and individuals, and the administrative law issue of determining the conditions which have to be satisfied in order for an administrative tribunal to be “independent and impartial”.

The result of the decision does not compromise the guarantee of independence and impartiality, placed in the Charter for the benefit of individuals. It instructs those responsible that the practice or the possibility of having lawyers and directors exercise multiple functions is unacceptable. It manages to do so without undermining the whole administrative system of the State by declaring invalid, the legislation constituting them. This approach contrasts that used of late by the courts, including the judge at first instance, of getting around the consequences of invalidating a statute by suspending the operation of the decision.⁹²

However the court declined to state what measures were necessary to separate the lawyers and the directors at different stages of the process in order to satisfy the requirements of section 23. Neither does it state what must be avoided in adminis-

89. The interpretation of L'Heureux-Dubé J. leaves citizens without the quasi-constitutional guarantee of an independent and impartial tribunal in “non-penal” matters when it is one of the fundamental rights usually given constitutional protection, and it was within the usual meaning of the words used by the legislature. She chose to reject this meaning because it had not been the subject of “formal interpretation analysis”, and to sacrifice it to keep the *noscitur a sociis* “rule” sacrosanct.

90. See generally, A.-F. BISSON, *loc. cit.*, note 18.

91. *Québec Inc.*, *supra*, note 15, p. 1.

92. This approach was first seen in *Manitoba Language Reference*, [1985] 1 S.C.R. 721, where the consequences of the declaration of invalidity would have been to invalidate all laws passed in the province of Manitoba since 1890. It has since been used in for example, *R. v. Mercure*, [1988] 1 S.C.R. 234; *R. v. Paquette*, [1990] 2 S.C.R. 1103; *Sinclair v. Québec*, [1992] 1 S.C.R. 579.

trative tribunals generally so as not to violate the requirement of impartiality. Similarly in respect of independence, the court avoids ruling on all three aspects in relation to the status of the directors, or the structure of the Régie. It confines itself to those challenged, that is, "security of tenure" and "institutional independence", leaving out "financial security". The legislature is therefore not given specific directives as to what must be done to ensure that the Régie, or any administrative tribunal for that matter, satisfies the constitutional requirement of independence and impartiality.

Although generally the *ratio decidendi* of a decision of a court is based on the majority opinion,⁹³ sometimes dissenting opinion has some value; its compelling logic recommends itself to other judges and propels it into the position of the majority of judges in a future court. However, it is doubtful that this will be the case with the minority opinion of L'Heureux-Dubé J. The "modern approach" advocated by her, is really just a recent acknowledgement of a long existing practice. Furthermore, there are numerous defects in the reasoning.

In addition, insofar as the result is that the right to an independent and impartial tribunal in the Charter is not put on the same footing as the analogous pre-existing fundamental right, it is against the prevailing view that the Charter guarantees the same fundamental rights, albeit not all of them.⁹⁴ The fact that use is made of the same cases as the majority to determine the content of independence and impartiality, cases based on the Canadian Charter, suggests that the learned justice came to the conclusion, that the guarantee in the Charter does not cover administrative tribunals (in contrast to the right in natural justice), merely to achieve her aim : to exclude the applicability of the Charter and so avoid adverse consequences for the State.

CONCLUSION

This decision, like others before it, interprets in general terms, the scope and content of the requirement of independence and impartiality guaranteed in a constitutional or quasi-constitutional document. The necessity thus created, of proceeding on a case by case basis, in interpreting the requirement imposed on administrative tribunals, is not necessarily an evil. The balance that has to be maintained between the proper functioning of the administrative tribunals and the individual's fundamental right to have its rights judged by an independent and impartial body is a delicate one. The case by case basis enables the court to strike a correct balance, giving the tribunal more leeway in certain circumstances and less in others, while maintaining the integrity of the right to an independent and impartial tribunal. Public confidence in the justice system is thereby promoted, without crippling the system of administration. In addition, by setting minimum standards, the courts give guidance to the legislature as to what is essential, as opposed to what is best, and so does not usurp the role of the latter as the framers of policy.⁹⁵

93. L.-P. PIGEON, *loc. cit.*, note 16.

94. In *R. v. Big M Drug Mart Ltd.*, *supra*, note 71, Dickson J. states that to interpret the Charter, one should not proceed merely on the strict wording chosen to articulate the right but by reference "to the character and larger objects of the Charter itself" and "to the historical origins of the concepts enshrined". He also emphasizes that the interpretation of rights and freedoms should be a generous rather than a legalistic one.

95. For this view on the role of the court see, J.C. TAIT, "The Tenth Anniversary of the Charter", in G.-A. BEAUDOIN, ed., *op. cit.*, note 71, pp. 17-39.

In respect of interpretation theory, the decision confirms that there is indeed a common thread running through the mismatched patterns that constitutes the fabric of the jurisprudence.⁹⁶ The interpretation given by judges is inspired by their idea of “justice” in the case : as between the parties and in respect of the law (from the point of view of the legislation under consideration or the law in general).

In this case the court was unanimous as to what constituted justice between the parties : the revocation of the permits violated the fundamental rights of the respondent. However the minority disagreed with the majority as to the object to be sought in resolving the law : the former aimed at avoiding hardship to the State; the latter aimed primarily at ensuring that real protection was afforded by this piece of legislation which is supposed to *guarantee* rights. It is this similarity in the perception of justice between the parties, and this difference in respect of justice to the law, that led to (a) agreement on the meaning of independence and impartiality, and (b) disagreement as to the scope of the Charter. It was not whether the “plain meaning approach” or the “modern approach” was used. This observation confirms the views of the writers referred to above.

This orientation to the task of interpretation, it is believed, is not objectionable *per se*. The value of judges is their understanding of the law; how the latter, on the whole, regulates the interaction between individuals, and the relationship between the individual and the State, and what part the particular legislation in question plays. What is undesirable, is hiding behind the rules of interpretation instead of openly acknowledging the true basis of the decision : the judge’s perception of the ends of the law. This subterfuge inhibits the constructive criticism of the judgements and the proper development of the law. For example, in critiquing the opinion of L’Heureux-Dubé J. in this case, one may focus solely on the validity of the modern approach. However it is rather the validity of the concern to avoid hardship to the State, that should be evaluated.

A last comment on a matter which is cause for concern. L’Heureux-Dubé J. rejected the meaning of the terms in s. 23 of the Charter regarded as accurate by many jurists because it was not based on “formal interpretative analysis”. If this approach were to be adopted by the Supreme Court, the law would be the exclusive purview of the courts. It would be removed from the reach of the populace and the other jurists : those to whom it is addressed, those who devote their careers to the study of it, and those who are trained to give guidance to persons in their affairs with each other on the basis of it. In short, the proper functioning of the legal system would be undermined. It would be as if the law were expressed in latin.

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96. Modifying the analogy of Denning J. in *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K.B. 481, p. 499 where he states that although the judge cannot change the fabric of the law he can iron out the creases.