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# The Trend Towards Purposive Statutory Interpretation : Human Rights At Stake

## **Abstract**

A clear trend has been identified in relation to the interpretation of statutes from a strict or literal approach towards a more purposive approach. This has even been the case for revenue law which for some time has been considered as a penal statute. This trend is evident in other tax jurisdictions, both civilian and common law. After comparing and contrasting the various arguments for and against the purposive approach, it has been concluded that this observed change should not be welcomed in relation to the taxation legislation. Such an approach poses a serious threat to the separation of powers, as the judicial arm would be able to read words into the legislation as they see fit. Even worse, however, is the threat to human rights, that is, the ability of the taxpayers to protect what is rightfully their own.

## **Keywords**

statutes, revenue law, legislation, revenue statutes, taxpayer

## **Cover Page Footnote**

BCom, BIT, MAcc (Bond). The author would like to thank Professor James Corkery, School of Law, Bond University for his assistance in preparing this paper.

## THE TREND TOWARDS PURPOSIVE STATUTORY INTERPRETATION: HUMAN RIGHTS AT STAKE

*By Tobias Lonquist\**

A clear trend has been identified in relation to the interpretation of statutes from a strict or literal approach towards a more purposive approach. This has even been the case for revenue law which for some time has been considered as a penal statute. This trend is evident in other tax jurisdictions, both civilian and common law. After comparing and contrasting the various arguments for and against the purposive approach, it has been concluded that this observed change should not be welcomed in relation to the taxation legislation. Such an approach poses a serious threat to the separation of powers', as the judicial arm would be able to read words into the legislation as they see fit. Even worse, however, is the threat to human rights, that is, the ability of the taxpayers to protect what is rightfully their own.

### Introduction

The approach to statutory interpretation has undergone immense change over the past couple of decades, particularly in relation to the interpretation of revenue statutes.<sup>1</sup> The change is said to be from a strict or literal approach (which has tended to favour the taxpayer), towards a more purposive approach (which tends to favour revenue). This shift has been viewed as quite bold, given that revenue statutes have for a long time been considered penal statutes and interpreted accordingly, that is, strictly and in favour of the taxpayer.

As with any criticism there are also praises, for example from Kirby J, in *FC of T v Ryan*:<sup>2</sup>

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1 A Mason, 'Taxation Policy and the Courts' (1990) 2 *CCH Journal of Australian Taxation*, (Issue 4) 40, 42.

2 (2000) 42 ATR 694, 715-716.

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In this last decade, there have been numerous cases in which members of this court ... have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature ... Even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose ... This court should not return to the dark days of literalism.

In effect, Kirby J is stating that today's preferred approach to interpreting legislation is that approach which promotes the purpose of the legislation, rather than one that does not. One can 'read words into' the legislation to ensure that its apparent purpose is more easily recognised and promoted when making judgement. Kirby J's final words imply that the courts should adopt this more purposive approach for all judgments and the literal approach be forgotten.

This article compares and contrasts the practicality of the different approaches to the interpretation of revenue statutes. It examines recent trends in legislative interpretation and considers the effectiveness and appropriateness of the purposive approach in today's courts. First, however, let us examine the various approaches that have been adopted in relation to statutory interpretation as a whole.

### **Approaches to statutory interpretation**

Generally, there are two schools of thought in relation to the interpretation of any statute – the literal and the purposive. The practice of statutory interpretation over the last few decades has shifted from literal to purposive, however the exact origins of each is difficult to determine.<sup>3</sup>

The literal approach (sometimes called a rule) was defined and explained by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.<sup>4</sup> It seeks the intention of the legislature through an examination of the language in its 'ordinary and natural sense ... even if we think the result to be inconvenient or impolitic or improbable'.

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3 Theodore FT Plucknett in *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1986) comments that research indicates that during medieval England the first interpretations looked at the intention of the law and the mischief they were designed to penalise. Then, during the reigns of Edward II and Edward III, there was an evident shift towards a stricter more literal approach. Despite this, the origins of each approach is not clearly stated.

4 (1920) 28 CLR 129, 161-2.

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This method was also preferred, even if it produces ‘anomalies or inconveniences’.<sup>5</sup> Judges have explained that the ‘courts can not depart from the literal meaning of words merely because the result may ... seem unjust’<sup>6</sup> or even ‘lead to a manifest absurdity’.<sup>7</sup>

A middle approach between the literal and purposive approaches placed a limitation on the use of the literal rule – this became known as the ‘golden rule’. It prohibited the use of the literal approach if it ‘lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid absurdity and inconsistency, but no farther.’<sup>8</sup>

A further limitation to literal interpretation is the ‘mischief rule’. Established in *Heydon’s Case*,<sup>9</sup> it was applied by determining the purpose of the Act, or the particular provision in question (the ‘mischief’ with which it was intended to deal), and by adopting an interpretation of the words which was consistent with that purpose. While it is probable that the mischief rule was established long before the literal approach, it was generally accepted in recent times that this approach applies only when an attempt to apply the literal approach produced an ambiguity or an inconsistency.<sup>10</sup> The mischief rule is considered by some judges and academics to be the purposive approach. However, more recent cases involving statutory interpretation suggest that the purposive approach merely had its origins in the mischief rule, and is much wider in its application, as seen in *Cooper Brookes (Woollongong) Pty Ltd v FC of T*.<sup>11</sup>

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5 *Hepples v FCT* (1991-1992) 173 CLR 492, 535-6; 91 ATC 4808, 4833 per McHugh J.

6 *CPH Property Pty Ltd & Ors v FC of T* 98 ATC 4983, 4996 per Hill J.

7 Per Lord Esher in *R v The Judge of the City of London Court* [1892] 1 QB 273, 290.

8 Per Lord Wensleydale in *Grey v Pearson* (1857) 6 HLC 61 at 106; 10 ER 1216, 1234.

9 (1584) 3 Co Rep 7a at 7b; 76 ER 637, 638.

10 See Dawson J in *Mills v Meeking* (1990) 91 ALR 16, 30-31.

11 81 ATC 4292. Here Mason and Wilson JJ stated: ‘when the judge labels the operation of the statute as absurd, extraordinary, capricious, irrational or obscure he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. *But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions*’. (Emphasis added).

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The principles of statutory interpretation outlined above prescribe the outer boundaries of interpretation and leave considerable flexibility for the judge to 'dip into' these so called rules, as it suits their immediate needs. Despite this suggestion, it is evident that some judges have adopted consistent policies of interpretation.<sup>12</sup>

### **The trend towards purposive statutory interpretation**

The move away from literalism began over three decades ago. In 1969, the Law Commission of England and Wales, together with the Scottish Law Commission, recommended the adoption of a purposive approach to the construction of statutes.<sup>13</sup> The literal approach to revenue statutes had reached its height in Australia in the late 1970s and early 80s under the courts of Barwick CJ, an advocate for liberalism and commercial enterprise. The Whitlam government, at that time, was becoming weary of the tax evasion schemes that were becoming widely practised as a result of the strict approach to interpreting the legislation and therefore strengthened the movement towards a more purposive approach.

By 1981 the move towards the purposive approach in Australia was quite apparent after the Commonwealth government introduced section 15AA of the *Acts Interpretation Act* (Cth). This section effectively set in concrete the purposive approach. It provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Similar provisions have been enacted for individual State Acts Interpretation statutes.

It is important to note that this section does not require that the purposive approach always be adopted. It is merely stating that if more than one construction is available, then the one which would promote the purpose of the act would be preferred to any other. Another important fact, which was pointed out in *Mills v Meeking*,<sup>14</sup> is that the

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12 For example Murphy J of the High Court (from 1975-1986) favoured the purposive approach and Barwick CJ (from 1964-1981) favoured the literal approach.

13 *The Interpretation of Statutes*, Law Com. No. 21 (1969).

14 Above n 10, when Dawson J, in speaking of a provision in terms almost identical to s 15AA: 'The approach required by [s 15AA] needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction'. This point was presented by Robert Allerdice in 'The Swinging

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provision does not require any ambiguity or inconsistency for its operation, and in this respect it can be differentiated from the mischief rule. It is clear then that the drafting of this provision was a considerable step towards a 'pure' purposive approach.

As stated by Kirby J, the last decade has seen numerous cases in which the purposive approach has been favoured, and indeed stated as the method that should be preferred. In *Pepper (Inspector of Taxes) v Hart*,<sup>15</sup> the result of which was to impact all areas of statute law, Lord Griffiths stated:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.<sup>16</sup>

Then four years later, Lord Cooke of Thorndon, in *IRC v McGuckian*<sup>17</sup>, stated:

in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation ... If the ultimate question is always the true bearing of a particular taxing provision on a particular set of facts, the limitations cannot be universals. Always one must go back to the discernable intent of the taxing Act.

There have been numerous other cases in which the judiciary has promoted the use of purposive interpretation in preference to the literal approach, both related and non-related to revenue,<sup>18</sup> and this despite the common adoption of the literal approach throughout the 1970s and early 80s. Today's legal system has clearly adopted the purposive approach to statutory interpretation, that is, an approach that 'advances and does not frustrate or defeat the ascertained purpose of the legislature', as suggested by Kirby J.<sup>19</sup>

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Pendulum: Judicial trends in the interpretation of revenue statutes' (1996) 19(1) *University of NSW Law Journal* 171.

15 [1993] AC 593.

16 *Ibid* 617.

17 [1997] 1 WLR 991, 1005.

18 See *Cooper Brookes (Woollongong) Pty Ltd v FC of T* 81 ATC 4292; *Cole v Director-General of Department of Youth and Community Services* (1987) 7 NSWLR 541, 549 per McHugh JA; *KP Welding Construction Ltd v Herbert* (1995) 102 NTR 20, 40-41.

19 Above n 2.

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The practice by judges of 'reading words into the legislation' is evident throughout Australian common law.<sup>20</sup> In *Newcastle City Council v GIO General Ltd*,<sup>21</sup> it was stated by the High Court that their addition of words was in accordance with the purpose of the Act as expressed in the Act's preamble.<sup>22</sup> Furthermore, in a Draft Taxation Ruling,<sup>23</sup> the Tax Commissioner ruled it was appropriate to read words into a tax act when failing to do so would result in an 'incongruous result'. The support of such a practice is expected from the Tax Commissioner. Despite the wide spread practice, the judicial arm is divided as to its use. Gibson LJ, for example, states, 'the courts function is to interpret the legislation and not legislate under the guise of interpretation',<sup>24</sup> and he concludes that it would be 'impermissible' for the court to write in words that some may conjecture parliament to have intended. In fairly recent cases, *TLC Group LP v Comptroller of Stamps*<sup>25</sup> and the Federal Court case *Australian Tea Tree Oil Research Institute v Industry Research & Development Board*,<sup>26</sup> the Courts refused to read words into a statute. Before considering why such a practice would be impermissible and the practicality of the purposive approach in interpreting the taxation legislation, what are the approaches of other jurisdictions?

### An international perspective

The dominant approaches in the European Court of Justice (ECJ) have been the contextual and the teleological.<sup>27</sup> The contextual approach requires the judiciary to take the provision in question in its context and interpret it in relation to its parallel provision in the Community Law. The teleological approach requires the judiciary to base a decision 'on the purpose or object of the legislation appropriate for Community legislation where the reasons for the adoption of a particular provision, along with its objectives, are to be found in the legislation itself.'<sup>28</sup> Both approaches clearly sway towards a more purposive approach than the literal approach.

20 See *Harrison v Nairn Williamson* [1976] 1 WLR 1161; *Marren v Ingles* [1980] 1 WLR 983; *FC of T v Ryan* (2000) 42 ATR 694; *Sweet v Parsley* [1970] AC 132.

21 [1997].

22 *Ibid*, per McHugh J.

23 TR 2002/D 10.

24 *Frankland v IRC* [1997] STC 1450, 1455.

25 [1989] (Vic).

26 [2002] FCA 1127.

27 Natalie Lee, 'A Purposive Approach to the Interpretation of Tax Statutes?' (1999) 20(2) *Statute Law Review* 131, this was the conclusion reached by L Neville Brown and T Kennedy in *The Court of Justice of the European Communities* (4th Ed 1994) 321.

28 *Ibid*.



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In New Zealand the trend in statutory interpretation has been similar to that of Australia. There have been shifts in the old presumptions that prescribed that certain Acts, in particular criminal and tax Acts, must be strictly construed in favour of the individual. Thus in one New Zealand case where compensation paid by the Crown was treated as income, Cook J said:<sup>29</sup>

if this be alleged to be too bold an approach to statutory interpretation, I can only say that it seems to me manifestly in accord with the intention of Parliament evinced by the subsection as a whole.

In the civil jurisdictions of Canada the use of the purposive approach is not novel. It has been applied for quite some time, with Nathan Boidman CA and Bruno Ducharme<sup>30</sup> noting that the Supreme Court of Canada has not expressly resorted to the literal approach since 1955.<sup>31</sup> Moreover, a method of construction is expressed by EA Driedger in *'The Construction of Statutes'*<sup>32</sup> which would serve to oust entirely the literal rule. The use of the purposive approach in Canada has been seen in numerous cases.<sup>33</sup> In the United States however, such an approach is not as evident.<sup>34</sup>

With specific reference to Europe, New Zealand and especially Canada, it can be generally concluded that most tax jurisdictions are either heading towards a pure purposive interpretation system or have been there for quite some time (as is the case of Canada). But is this a wise move? Is the purposive approach effective and appropriate in the tax sphere?

### **The appropriateness of the purposive approach**

Various technical difficulties arise when attempting to apply the purposive approach to statutory interpretation. Here, the question arises, how does one know what the

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29 *Duff v Commissioner of Inland Revenue* [1982] 2 NZLR 710, 716.

30 *Members of the Bar of Quebec*.

31 In their book *Taxation in Canada: Implications for Foreign Investment* (1985) and making specific reference to the case *MNR v Sheldons Engineering Ltd* 55 DTC 1110.

32 (1974).

33 See *Allied Farm Equipment v MNR* 73 DTC 5036; *Harel v The Deputy Minister of the Province of Quebec* 77 DTC 5438; *No 473 v MNR* 57 DTC 559; *McMahon v MNR* 59 DTC 1109; *Sunbeam Corporation (Canada) Ltd v MNR* 63 DTC 1390; *Home Oil Company Ltd v MNR* 55 DTC 1148.

34 See *City Council of Augusta v Mangelly*, 254 SE2d 315, 322 (1979) ('[w]e have here...overly strict constructionalism resulting in constitutional amendments upon constitutional amendments for which this court is famous.').

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intention of parliament is? This question, as suggested by Natalie Lee,<sup>35</sup> raises difficulties at two levels – theoretical and practical. First, on a more theoretical level is whether such a thing as 'parliamentary intention' can exist. Natalie Lee points out that parliament is made up of more than one person, and it is questionable whether two or more people, with differing opinions, can share the same mental state of mind. Moreover, she recognises that not all of these people will have voted in favour of the Bill to be enacted; it may not have been their intention that the Act in its present form should have even been passed appearing on the statute book. It is therefore apparent that we cannot possibly know precisely whose intention is being sought.

Further, even if parliamentary intention did exist, who is to say that one could determine such an intention, or that different people would agree upon such an apparent intention or purpose? If one studies the nature of human communication it is clear that different people, however honestly and reasonably they attempt to find the meaning of the same document, can reach different interpretations.<sup>36</sup>

The second difficulty Natalie Lee raises, which is more practical, is that it may well be that the words used in the statute do not enable an interpreter to detect any purpose.<sup>37</sup>

A further impracticality lies in the fact that common-law judges will, under the guise or even the delusion of pursuing unexpressed legislative intents, pursue their own objectives and desires, extending their lawmaking activities from the common law to the statutory field. If judges are told to decide on the basis of what the legislature meant, rather than what is said, and there is no necessary connection between the two, then surely there is the potential of the judge favouring his own intention, as it suits.

The criteria for evaluating a taxation system include those of equity and fairness<sup>38</sup> and the observance of taxpayer rights. Surely, then, we must consider the equity and fairness of the purposive approach to interpreting the tax statutes. In the past, equity,

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35 Above n 27, 136.

36 Per Bryson J, 'Statutory Interpretation' (1992) 8(3) *Australian Bar Review* 185.

37 Such a difficulty was declared in *BP Oil Development Ltd v CIR* (1991) 64 TC 498, 532 and was also evident in *Frankland v IRC* [1997] STC 1450 and *Pepper v Hart* (above n 15).

38 See the Ralph Committee, Discussion Paper, *Review of Business Taxation, A Strong Foundation – Establishing objectives, principles and processes*, November 1998, Overview, para 3.9.

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used in assessing a tax system, has referred to 'horizontal'<sup>39</sup> and 'vertical'<sup>40</sup> equity. Equity or fairness also depends on or encompasses clarity and certainty. For the reasons given above, in relation to the difficulty in determining parliamentary intention, it is most probable that the adoption of a pure purposive interpretation system would result in inconsistency. Furthermore, accountants, lawyers and individual taxpayers would be expected to guess what meaning a judge will read into a provision when completing a tax return. A purposive regime militates against clarity or consistency.

Contrary to these inefficiencies there are also valid points in favour of the purposive approach. It is suggested that it will make the legislation 'more readily accessible; make it easier to see how the law applies ... and should make for shorter legislation.'<sup>41</sup> Shorter legislation – now there's an admirable trait!

The inappropriateness of the purposive approach to interpreting revenue statutes has been presented. What arguments are there favouring the literal approach?

From a practical point of view, one can question the validity and necessity of legal drafting and the words chosen if they are not used and not given their ordinary meaning. Surely it is only just for society to be governed by legislation which means what it actually says. Such a point is expressed by Deane J in *Hepples v FCT*<sup>42</sup>:

the least that such a taxpayer is entitled to demand of government is that, once the relevant provisions are finally identified, a legislative intent to impose a tax upon him or her in respect of a commonplace transaction will be expressed in clear words...

Furthermore, while taxes are arguably a necessity in any modern society, the status of income tax has long been accepted as a punitive measure. Taxes have the effect of confiscating one's right to property and hence liberty. The revenue statutes constitute penalties imposed by the state which encroach on a citizen's liberty, that is, their right to prosper from free enterprise. Given that there exists no doctrine in the courts to support the notion that there is a duty to contribute to the upkeep of the state through tax, and given there exists a right to avoid but no duty to pay taxes, it seems most appropriate that before the state confiscates a taxpayer's liberty it should make its grounds for doing so crystal clear. For this very reason tax laws should be

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39 People in similar positions should be treated similarly.

40 People in different positions should be treated differently.

41 Inland Revenue, *Tax Law Rewrite: The Way Forward* (July 1996) ch 2, para 3.9.

42 Above n 5.

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construed in highly technical terms, without regard for the purpose they were designed to serve, just as criminal penalties, which similarly impose a restriction on one's liberty, are construed.

### Conclusion

We have experienced significant changes over the interpretation of revenue statutes. This change from literal to purposive approaches has had significant effect on our legal system. So much so that the powers of the legislative and judicial arms are beginning to converge. Parliament has enacted laws telling the judicial branch how they must interpret legislation, and the judicial arm can read words into legislation (as suggested by Kirby J) to promote what they believe is the apparent purpose of the legislature, when, in fact, unrestrained by obedience to the specific words of the statute, they could be promoting their own policy agenda. As stated by Bryson J, in relation to statutory interpretation and the purposive approach, 'what is at stake is the separation of powers and respect by the judicial branch of government for the powers of the legislative branch.'<sup>43</sup> More so it must be realised that '[w]e are to be governed not by Parliament's intentions but by Parliament's enactments'.<sup>44</sup> It is clear that although the purposive approach may result in some benefits, its application brings with it significant difficulties and problems. The greatest threat is to the taxpayer's rights. Contrary to recent cases, the practice that should be adopted by a judge when a tax provision is absurd or does not make sense is to read the provision strictly and in favour of the taxpayer, and the responsibility should rest with the legislature to amend the provision.<sup>45</sup> It can work injustice to adopt a pure purposive approach to the interpretation of the revenue statutes in the manner suggested by Kirby J and some others. Such a practice brings with it a greater threat – to basic human rights. The approach that should be adopted is the literal approach – the approach that will enable the taxpayers to protect what is rightfully theirs.

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43 Above n 36.

44 Per Lord Scarman in 418 HL Official Report Col 65 (9 March 1981).

45 This general right is proposed by Duncan Bentley, 'An Overview of Taxpayers' Rights' in *Taxpayers' Rights: An International Perspective*, (1998) 40.