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## The Meaning of “Or”: Modern Approaches to Statutory Interpretation



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The meaning of the word “or” in a section of the Ontario *Securities Act*, R.S.O. 1990, c.S.5 is the sort of question designed for lawyers in ivory towers. Yet the way Courts approach the interpretation of words in a statute, even ones like “or”, has a serious effect on the parties’ rights in litigation.

A recent decision of the Ontario Court of Appeal, *Rooney v. ArcelorMittal S.A.*, 2016 ONCA 4347, per Hourigan J.A. (“*Rooney*”), illustrates the importance of a statute’s purpose and intent in giving effect to its meaning. In particular, *Rooney* confirms that when engaging in the exercise of statutory interpretation, Courts should place weight on the statute’s purpose, as opposed to the “plain meaning” of the statute’s words.

**Facts**

*Rooney* involved the interpretation of the word “or” under section 131(1) of the *Securities Act*.

Under this provision, security holders in a hostile take-over have a right of action against an

offeror of securities who makes misrepresentations in the take-over bid circular.

At issue in *Rooney* was whether the security holder has to make an election between suing the corporate offeror or suing the offeror’s directors and other individuals who approved the circular.

Everything in *Rooney* turned on the interpretation of the word “or”, as highlighted below:

131(1)

Where a take-over bid circular sent to the security holders of an offeree issuer as required by the regulations...contains a misrepresentation, a security holder may...elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

- (a) every person who at the time of the circular or notice, as the case may be, was signed as a director of the offeror;
- (b) every person or company whose

consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations... and

- (c) each person who signed a certificate in the circular or notice....[*emphasis added*]

Following a hostile take-over bid, the plaintiff security holders commenced a class action alleging that the circulars disclosed to them failed to include material information. Moreover, the plaintiffs claimed that the defendant's circulars were "replete with misinformation" about the business.

The plaintiffs commenced an action against the defendant under section 131(1), claiming that they received less for their securities than they otherwise would have absent the defendant's misrepresentations.

The defendant brought a motion to strike the plaintiffs' claim.

The defendant argued that under section 131(1), the plaintiffs were required to elect whether to sue the corporate offeror or, alternatively, to sue the directors of the offeror and signatories to the circular instead.

The defendant's argument was based on a plain reading of the word "or" under section 131(1). That is, the defendant argued that "or" had an exclusive meaning under section 131(1), such that the security holder has a choice to pursue a right of action for damages against the issuer of the securities or against the issuer's directors and underwriters,

but not against both. In other words, section 131(1) requires a security holder to choose whom to sue.

The motions judge adopted the defendant's approach and held that the security holder had to make an election under section 131(1) to sue the corporate issuer or the directors and signatories to the take-over bid circular, but could not sue both.

On appeal to the Court of Appeal, the Court reversed the motion judge's ruling. Justice Hourigan held that under the modern principle of statutory interpretation, a security holder was allowed to sue both the offeror and the offeror's directors and signatories.

### The Evolution From the "Plain Meaning" Rule

The Court of Appeal began by examining the history of statutory interpretation at common law.

In the 19th and early 20th centuries, the "plain meaning" rule was the prevailing method used by Courts to interpret a statute. This rule required that where there was no ambiguity, the words in a statute were to be interpreted "as they were written". This meant that even if the legislature's intent in drafting the legislation differed from the plain meaning of the words used, the latter prevailed.

However, as recognized in Elmer Dreidger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) and in the Supreme Court of Canada's leading decision in *Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R.

27, Courts began adopting what became known as the "modern principle of statutory interpretation":

Today there is only one principle or approach, namely, the words of an Act are to be read in their *entire context* and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [*emphasis added*]

The modern principle of statutory interpretation represents a significant shift away from the "plain meaning" rule. Under the modern approach, Courts look at the words of a statute in their context, considering such external factors as legislative intent, textual meaning, and legal norms, when interpreting a statutory provision.

### The Meaning of "Or" Depends on the Statute's Purpose

The Court of Appeal in *Rooney* ultimately held that the motion judge erred by adopting a "plain meaning" approach to section 131(1) of the Securities Act and by giving the word "or" in that section an "exclusive" meaning.

The Court noted that "or", as used in section 131(1), had an inclusive meaning instead. That is, the "or" meant that a plaintiff suing for damages could choose to sue the offeror, the offeror's directors and signatories, or both.

According to the Court, the motion judge's interpretation of section

131(1) failed to give effect to the purpose and policy underlying the *Securities Act*. In particular, as set out in the *Act* itself, the *Securities Act* is intended to protect investors from “unfair, improper or fraudulent practices” and to foster “fair and efficient capital markets” and confidence in the markets.

To interpret section 131(1) of the *Securities Act* to force an election between suing the offeror or the offeror’s directors means that one of these two parties will be immune from liability for their wrongdoing:

...If the motion judge’s interpretation is correct, this scheme [in the *Securities Act*] falls apart. What point is there in requiring the offeror’s directors and officers to sign a certificate affirming the integrity of the take-over

bid circular if s.131(1) forces a plaintiff into an election that could let those people off the hook? And what statutory purpose is served by forcing an innocent investor to choose which allegedly bad actor to sue? Why should a wrongdoer get a free pass?

If the plaintiff security holder were required to choose whom he or she will sue under the *Act*, they would be placed in an impossible situation. The corporate offeror could go bankrupt before the security holder would recover anything. On the other hand, if the security holder sues the offeror’s directors and signatories, the individual defendants “might make themselves judgment-proof”. According to the Court of Appeal, “[n]either scenario advances the cause of investor protection”.

Thus, section 131(1) had to be read as allowing the security holder to sue both the offeror and the offeror’s directors and signatories for damages.

### **The Importance of Statutory Purpose**

The decision in *Rooney* emphasizes an important aspect of modern statutory interpretation. Unlike in the past, Courts must have regard for the context in which the words of a statute are written. Key among the factors the Court should consider is the purpose and policy behind the statute they are interpreting.

In this way, the words of a statute are not static, but dynamic. Their meaning can change depending on why the statute was created and in order to give effect to the Legislature’s intent.