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LAW 104 | law, legislation and policy

final outline | 2012-2013

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this outline uses the outlines of Christopher Scott and Jamie Myrah as sources

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**BRANCHES OF GOVERNMENT**

	<b>Legislative</b>	<b>Executive</b>	<b>Judicial</b>
<b>Role &amp; Function:</b>	Make laws (statutes) Drafts, debates & votes	Implement/administer laws Make laws (primarily subordinate/regulatory)	Interpret/apply laws Make common laws (case law/jurisprudence)
<b>Structure &amp; Positions:</b>	Monarch – GG (R.A.)   Parliament   Senate   House of Commons ----- Monarch – LG (R.A.)   Legislature	Monarch – GG/LG   PM/Premier   Ministers   Committees   Bureaucracy --- > (civil service)	Monarch (appointments)  <u>Court Systems::</u>  Supreme Court   Fed'l/Prov'l Courts*  Administrative Bodies (not courts)
<b>Accountability:</b>	The People (through elections)	Legislative Branch	Rule of Law - constitution
<b>Powers Limited by:</b>	Constitution (federalism/Charter/S 35)		
<b>Principles:</b>	Separation of Powers  Democratic Gov't  Parliamentary Sovereignty vs Constitutional Supremacy (esp. since the charter)	Separation of Powers  Responsible Government  Ministerial Responsibility	Separation of Powers  Judicial Independence
<b>Institutional Expertise:</b>	Balance multiple interests Appease different constituents	Drafting/implementing policy	Best at two-party disputes with simple facts rather than police

\* Court Systems:

- Federal Court of Appeal – Federal Court Trial Division
- Provincial Appellate (BC Court of Appeal) – Superior/Supreme Court – Provincial Courts

**PRINCIPLES**

- **Responsible Government** – PM & Cabinet require the confidence of the House of Commons; part of the “living constitution”
  - defeat on important legislation (i.e. budget, government spending) or a motion of no confidence (by opposition party) = less of right to govern

- part discipline - MPs of a party generally vote as a block
- rights of the legislature - scrutinize, debate, vote on proposed policies, question the government, demand explanations, etc.
- corresponding obligations of government - provide opportunities for scrutiny, account for its action before Parliament
  - standing orders - codification of these rights & obligations; rules that govern parliamentary procedure
- **Ministerial Responsibility** - obligation of a cabinet minister to explain/defend policies carried out in their name
  - constitutional law & parliamentary tradition
  - Section 54, CA, 1867 - gives exclusive right of cabinet to introduce measures re: raising/spending public revenue
    - requirement that legislation must originate in the elected House of Commons - “no taxation without representation”
  - combines strong executive authority & democratic accountability
    - MPs (particularly Ministers) must remain directly accountable for policy & major decisions (power of which is often passed to unelected officials)
- **Parliamentary Supremacy** - Parliament’s authority is superior to that of all other institutions of government
  - courts will not second guess Parliament’s right to pass any law - they are the embodiment of “popular will”
  - federal and provincial governments are supreme as long as they act within the spheres of constitutional authority (federalism)
- **Constitutional Supremacy** - has replaced Parliamentary Supremacy (unless no Charter or other constitutionally protected right is at issue and division of powers is respected)
  - Charter - applies to both federal & provincial governments and all matters under their authority
  - Section 52(1) (C.A. 1982) - “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
    - Charter, Section 33 - “notwithstanding clause” - also laws violating rights & freedoms to operate temporarily (max. 5 years)
  - courts have become important venues for the resolution of political issues; some groups may no bypass electoral/legislative politics (p. 1-9)
    - not necessarily more democratic/accessible than other forums for politics
- **Judicial Independence** - judges are to be free from any and all interference in their decision making
  - role of the judiciary is largely based on constitutional convention and statute law
- **Separation of Powers** - guarantees the special role of the judiciary to interpret the law and the meaning of the Constitution when disputes arise
  - relies on cultural norms, statute law & constitutional conventions (more than constitutional law)
  - Section 24 (C.A. 1982) - enforcement of the Charter shall be through the courts (check on the powers of Parliament/legislatures)

## LEGISLATIVE PROCESS

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

### Stage 1 - Creation of Legislative Policy

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

### Stage 2 - Drafting the Legislation

- **Drafting Team** - ministry's instructing officer, ministry solicitor, assigned Legislative Counsel
  - Instructing Officers - aka 'policy analysts'; link between the sponsoring ministry and the legislative drafter
  - Ministry Solicitor - brings significant expertise (see above)
  - Legislative Counsel - assigned drafter transforms policy into legislative form; must balance government's goals with need to maintain coherent/consistent legislation; applies the technical skills of statutory interpretation to help ensure that if the legislation goes to adjudication the interpretation will reflect the desired policy
    - assisted by legislative editors, publications staff (Office of Legislative Counsel)
- **Final Policy Review** - may return to GCC to review new policy issues, etc.

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

### Stage 3 - Enactment of a Law

- **Types of Bills**
  - **Public** - propose changes to the general law of the Province
    - Government Bills - implement government policy; drafted by Legislative Counsel (Bill 2-200)
    - Member's Bills - prepared by/for individual MLA (usually Opposition); no assistance from Legislative Counsel; constitutional restrictions (Bill M 201 - 400)
  - **Private** - limited in their application to particular individuals or organizations; provide additional power/benefits or relieve them from application of the general law
    - come to Legislative Assembly through a petition process under Standing Orders; proceed through special committee process (Bill Pr 401...)
  - **Government Bills & Legislative Process**
    - First Reading - minister makes very brief general statement of intent; presentation only
    - Second Reading - debate of the general intent (not specifics of sections)
    - Committee Stage - "Committee of the Whole" (full Assembly without Speaker) - section-by-section debate; concludes with vote on Bill's title
      - each section is subject to separate debate & vote
      - House Amendments can be proposed; certain amendments may be rules out of order
    - Report Bill - legislative "track changes"; shows accepted amendments using revision marking conventions
    - Third Reading - vote resulting in recommitment (returned to Committee stage) or Royal Assent
    - Royal Assent - when a Bill becomes part of BC law; given by the L.G. (through a nod)
      - Third Reading form becomes the statute
    - Commencement - legal effect begins when the Act "comes into force"; specified in last section of an Act
      - date of Royal Assent (Interpretation Act) unless otherwise indicated
      - may be retroactive

- **Bill 1 - Special Case** - “An Act to Ensure the Supremacy of Parliament “
  - introduce of the Attorney General at the start of each Legislative Assembly
  - does not proceed past First Reading
  - purpose: to perpetuate the established right of Parliament, through its elected representatives, to sit and act without leave from the Crown (p. 1-31)

**Note Re: Federal Legislative Process: see flowchart (p. 1-35)**

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

**Note Re: the Relationship between Acts & Regulations:**

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

## PROBLEM OF MEANING

### Sources of Communication Breakdown:

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



## STATUTORY INTERPRETATION

### OVERVIEW OF SI APPROACHES

#### Historical

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

#### Golden Rule

- **Plain Meaning Rule**
  - interpretation is founded on the wording of the legislation alone

### THE DRIEDGER APPROACH

#### STATEMENT

- "... 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." - the "modern approach" - *Rizzo*
  - Incorporates the Contextual, Purposive, and Ordinary Meaning approaches.

#### APPLICATION

- **Grammatical and Ordinary Sense**
  - Only interpretations that the words may "reasonably bear" may be imposed - *McIntosh*
- **Entire Context**
  - Contextual Analysis

- Consider conditions at time of enactment and the present conditions – *C3000*
- **“Harmoniously with...”**
  - “the scheme of the Act”
    - e.g. Employee protection legislation – *Merk*
  - “the object of the Act”
    - e.g. Reconcile employee loyalty with the public interest – *Merk*
  - “the intention of Parliament”
    - e.g. To protect legitimate whistle-blowers – *Merk*

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#### THE CONTEXTUAL APPROACH

- Considers the following factors: - *Merk 15, C3000*
  - Economic and social realities the Act is meant to address
  - Statutory and regulatory framework existing around the Act
  - International treaties
  - Purpose and object of the entire Act
    - Includes the meaning of the Act, and internal consistency – *C3000?*
  - Purpose and object of the specific provision
    - Shared meaning of English/French version may be relevant - *Hasselwander*
  - Policy considerations

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#### THE PURPOSIVE APPROACH

- Attempt to determine legislative intent
- Considers the following factors:
  - Ordinary and grammatical factors:
  - Statutory context (i.e. examine the Act itself for intent)
  - Broader legislative framework (presume Legislature intended harmony)
  - Legislative history (e.g. Hansard)
  - “Mischief” rule (what mischief is meant to be addressed?)
  - Assume Legislature didn’t intend absurd, anomalous, or irrational results – *Merk*

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#### AIDS IN STATUTORY INTERPRETATION

- **Legislative Evolution:** Previous versions, amendments, and transitional provisions can indicate legislative intent. - *Rizzo*
  - Note *BCIA* s 37 and *CIA* s.45(2) – amendment does *not* mean change in meaning!
  - In the past, amendment *did* mean a change in meaning. – *Re SFU*
- **Legislative History:** Extrinsic history may be considered. Listed with decreasing weight:
  - Briefing notes
  - Alternative draft versions
  - House Committee reports – *C3000*
  - Hansard (“frail” evidence) – *Rizzo*
  - Government publications, press releases, etc. – *Firearms Reference*
  - Anything that’s “relevant & reliable”, so long as not assigned “undue weight” – *Firearms*
- **Type of Statute:** Although all statutes are subject to *BCIA* s 8 (*CIA* s 12), this takes effect in different ways, depending on the type of statute:

- **Human Rights:** To be given fair/large/liberal interpretations as will best ensure the attainment of their objects. - *Jubran*
  - “Quasi-constitutional” and of a “special nature” – *Jubran*
- **Benefit-Confering:** “Broad and generous interpretation”. Any doubts are resolved in the claimant’s favour. – *Merk*
- **Penal:** Strict construction; doubts to be resolved in favour of the accused. – *McIntosh*
  - Only applies if there are legitimate doubts as to meaning, and can be overridden if the consequences are contrary to the purpose of the enactment. – *Merk*
- **Regulatory:** Consider “all relevant circumstances” for type of interpretation – *Merk*
  - Strict construction is of “limited value” – *Merk*
- **Tax Statutes:** Broad purposive considerations are secondary to the specific language used. It is Parliament’s intent for people to be able to rely on the wording. – *Imperial Oil*
  - Driedger applies, but courts must be wary of “judicial innovation”. Try to avoid finding “unexpressed legislative intentions” (textual approach?) – *Ludco*
- **Provincial Statutes Granting Powers to Municipalities:** If supported by text, apply a broad and purposive construction. Grant broad authority over generally-defined matters. – *United Taxi Drivers*
- **Dictionaries:** May be used (with caution) – *Riddell, McIntosh (dissent)*
  - Dictionaries are of “limited value” – *Shaklee*
- **Components of the Act:** Outside of substantive provisions, there are many parts of an Act which may be considered for determining intent, of varying utility:
  - **Title:** Part of the Act, may be used to clarify meaning. – *Lane, CCCan*
  - **Purpose Section:** Overridden by conflicting substantive provisions. – *National Farmers*
  - **Preamble:** Assists in finding context, resolving ambiguity. *Not* determinative. – *Re Anti-Inflation Act, Lohnes*
  - **Definitions:** Pay attention to the use of “means” vs. “includes”; also check French!
    - **“Means”:** The definition is exhaustive (excludes any meanings not listed).
    - **“Includes”:** The definition also includes the ordinary meaning, possibly others.
    - **When comparing with French:** Take the common, more restrictive meaning. – *Daoust*
  - **Headings:** Useful for clarifying doubtful or ambiguous expressions. – *Lohnes, Basaraba*
  - **Marginal Notes:** Generally accorded “weak” (*Wigglesworth SCC*), or “no” (*Basaraba MB QB*)
  - **Punctuation:** Disregarded in interpretation (*Jaagusta*) or paid “little attention” – *Popoff*
  - **Schedules:** Less weight than substantive text – *Houde*
  - **Bilingualism:** See “shared meaning” under Rules of SI, below.

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## RULES OF STATUTORY INTERPRETATION

- **Plain Meaning:** When words are “clear”, apply the obvious meaning.
  - Formerly the “Golden Rule” of statutory construction – *McIntosh*
  - Now “incomplete” and of secondary importance – *Rizzo*
- **Strict Construction:** For penal provisions, the interpretation most favourable to the accused should be selected. – *McIntosh*
  - Only applicable when a Driedger analysis yields multiple interpretations - *Hasselwander*
  - Can be overridden if the consequences are contrary to the purpose of the enactment – *Merk*

- **Anomalous Results:** Interpretations with irrational results should be rejected. – *Merk*
  - Applies especially when persons “deserving of better treatment receive worse treatment or vice versa” – *Sullivan, Merk*
- **Absurdity:** Two similar characterisations accepted by the courts:
  - Cote gives four grounds (affirmed by court): - *Rizzo*
    - Ridiculous or frivolous consequences
    - Extremely unreasonable or inequitable
    - Illogical or incoherent
    - Incompatible with other provisions or with the object of the enactment
  - Sullivan also notes that “a label of absurdity can be attached to interpretation which defeats the purpose of a statute or render some aspect of it pointless or futile” – *Rizzo*
- **Presumption Against Tautology:** Repetition of words is there for a reason – *CHRC*
  - Legislature is presumed not to be redundant.
- **Effectivity:** No words in an enactment are redundant or unnecessary – *McDiarmid, Sharpe*
  - Counter-argument: It is possible that the Legislature has thrown in unnecessary words “*ex abundanti cautio*” (out of excessive caution) – *Children’s Aid*
- **Associated Meaning (*noscitur a sociis*):** Words linked by “and” or “or” should be interpreted as having common features. Thus, narrow terms limit adjacent broader terms. – *McDiarmid*
- **Basket Clause (*eiusdem generis*):** General terms have their meaning narrowed by specific terms preceding them. – *Rascal Trucking*
- **To Express One Thing is to Exclude Another (*expression unius est exclusion alterius*):** If a statute mentions one or more items specifically, comparable (unmentioned) items are assumed to be excluded – *Children’s Aid*
  - This rule is a “dangerous master”, and is subject to a number of counter-arguments:
    - “*ex abundanti cautio*” (out of excessive caution), as with effectivity
    - Express reference may be necessary/appropriate for some items, but not others
    - In some circumstances it is more appropriate to require explicit exclusion
- **Uniformity of Expression:** “Words used by Parliament are deemed to have the same meaning throughout the same statute”. – *Schwartz*
  - Regulations under that statute are also assumed to share that meaning
  - Presumption, not a rule; circumstances may demonstrate contrary intent – *Schwartz*
- **Shared meaning:** For bilingual legislation, adopt narrower meaning, so long as consistent with legislative intent – *Riddell*
  - This is refined in *Medovarski* into a two-step test:
    - Find the shared (more restrictive) meaning.
    - *If consistent with legislative intent*, adopt that meaning.

**SULLIVAN’S CRITIQUE**

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

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

- **What does Sullivan see as cheating? Why do judges cheat?**
  - form of misrepresentation
  - judges present as if their hands are tied rather than acknowledging the choices they have
    - plain meaning - “the text made me do it”
    - contextual approach - “the legislature made me do it”
  - discourages judges from probing/discussing the real basis for their decisions
  - allows them to avoid responsibility for outcomes
  - provides reassuring rhetoric and justifies their work
- **Sullivan’s solution?**
  - judges should acknowledge their responsibility and attempt to explain/justify their choices
  - don’t demand the impossible; acknowledge that legislative text and legislative intention are incomplete sources of law - interpretation (choice/discretion) is needed to complete the job
  - focus on what we can reasonably expect from our interpreters
  - democratically legitimate option
    - legitimate law is co-extensive with legislation made by elected representatives
    - democracy - government in accordance with a constitution; elected legislature is one of several necessary institutions

- resolution of interpretation disputes by judges is a highly democratic exercise - allows the subject to participate directly in the law-making process by arguing about how particular rules should apply
- instead of denying the role of context (by equating rule of law with the application of pre-fixed rules by a-political automatons) try to understand how it works and its implications
  - diversify judges to guard against bias
  - make judges accountable to the diversity of Canadian society (rather than dismissing different assumptions/interests/perspectives as bias or “special interest”)
- reject the idea that this would mean that courts could do whatever they want
  - it’s possible for additions to/departures from legislative texts/rules to be justified in a legally acceptable way
    - legal justification is democratic & legitimate
    - the outcome is justified in a legally acceptable way if judges use techniques that are recognizably legal and appeals to plausible (not necessarily traditional) legal norms
    - free judges to do the work on interpretation - trying to understand the text and the intention; working out implications; adapting rules to varied/ changing circumstances; ensuring legal values (constitutional and from the evolving common law) are respected

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## PLAIN MEANING RULE TRICKS

### 1) Artful Text Selection

- identification of text-to-be-interpreted
- alternative texts may favour different outcomes
- judge may not explain basis for their choice (or acknowledge a choice has been made)

### 2) Elastic Co-Text

- amount of surrounding text the reader uses to determine first impression meaning and whether it’s plain
- ranges from nothing at all to the entire section
- size of co-text often affects meaning & judgments about ambiguity - the more you have the easier it is to narrow down the possible meanings of a text
- *McIntosh*

### 3) Shifting Meaning Game

- shifting, inconsistent ways of referring to meaning: dictionary, literal intended, audience-based, applied, etc.
- dictionary meaning may or may not be supplemented by other analysis (textual, contextual, purposive)
- ensures significant discretion in determining first impression meaning

### 4) It Must Be Plain To You If It’s Plain To Me

- distinguishing between plain & ambiguous meaning requires a judgment of whether a text can plausibly bear more than one meaning
- this is a purely linguistic judgment; generally ignores empirical evidence of ambiguity • *Ontario v. C.P. Ltd.*

### 5) Inherent Meaning Illusion

- text may be fixed but context cannot be - presuming fixed meaning regardless of the knowledge/ expectations of readers has been discredited in linguistics
- context includes the linguistic and social conventions and broader cultural assumptions of the reader
- “reciprocity of perspective” - take for granted that readers share the experience
- doesn’t preclude effective communication; requires acknowledgement of the complexity and uncertainty that is inevitable

**6) Abandoning Ship**

- abandoning the rule if plain meaning is going to take the court where it doesn't want to go (regardless of the other tricks)
- lots of examples in the case law where PMR is applied - or not - by the same judges
- Lamer C.J. - R. v. McIntosh & R. v. Michaud
- Iacobucci J. - Canada v. Antosko & Rizzo v. Rizzo
- Major J. - Canada v. Friesen & Canada v. Schwartz

**7) Non-Textual Evidence**

- courts can look at extra-textual evidence of legislative intent (purpose/consequences /extrinsic aids) to support plain meaning – but cannot be used to vary/contradict plain meaning (heads win/tails win)

**8) Conclusion - PMR is undermined by:**

- |  |   |
|--|---|
| • shifting & uncertain conceptions of meaning    | • elastic definition of co-text         |
| • highly subjective judgments about plausibility | • arbitrary text selection              |
| • reliance on a discredited view of language     | • lack of commitment to the rule itself |

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**FIDELITY TO LEGISLATIVE INTENT TRICKS**

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**1) Presume That Nothing Worth Mentioning Has Changed**

- if legislation is ordinary speech act (purposive attempt to communicate particular meaning) then meaning is fixed at time of enactment - faithfulness to intention requires discovering original meaning
- lack resources; impossible to apply
- current meaning is presumed to be the same as original meaning

**2) More Meaning Games**

- original meaning as connotation (abstract/dictionary meaning) or denotation (facts to which the words were applied)
- “original meaning” can provide significant choice - *Hills v. Canada*

**3) Distinguish Sloppy Drafting From Legislative Error**

- correcting errors attributed to the inattention or lack of skill of the drafter is acceptable - brings the legislation in line with the intended meaning
- correcting errors/anomalies the legislature is responsible for is not acceptable - curing legislative oversight is amending and impermissible (separation of powers)
- *McIntosh*

**4) Presume That The Legislature Wants What You Want**

- doctrine of presumed intent
- Driedger's Construction of Statutes (2nd edition) - four elements re: intention - expressed intention; implied intention; presumed intention; declared intention
- presumed intention - the intention the courts will impute on Parliament in the absence of an indication to the contrary

**5) Conclusion**

- legislative intent is meaningful & plays an important role but it is not the only consideration in statutory interpretation
- court should follow the legislature when it's possible to draw compelling inferences about intended purpose
- court needs to recognize the limitations of FLI
- the pretense that judges don't make law undermines judicial credibility
- if anything can be imputed to the legislature there is no meaningful distinction between legislative and judicial intent
- has no real limit - covers whatever values/policies the court sees fit to attribute to the legislature

## FORMING YOUR ANSWER USING THE DRIEDGER APPROACH

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### IRAC APPROACH

- **Issue**
  - Identify the issue. What is the statute, legislation, specific section, judgment call.
- **Rule Principle**
  - Modern approach. Relevant interpretation act. Remedial in nature.
- **Analysis/Application**
  - Most of the marks are here.
  - Bulk of your answer.
  - Take law as you've heard it; apply it. Step by step.
- **Conclusion**
  - What the scheme favours.
  - Overall legislation shows...
  - How would the judge conclude here (answer at end, one sentence).
    - Rarely can you say anything with 100% certainty.

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### HOW TO ANSWER

- **Should be candid, expansion of judicial role.**
  - Critics think judges should just be more candid about their decision process.
- **Subheadings for application of the law.**
  - **Grammatical and Ordinary Meaning**
  - **Scheme**
  - **Purpose**
  - **Legislative Evolution**
  - **Legislative History**
  - **Public Policy/Consequences**
  - **Presumption Against Tautology**
- **Do you have to present best arguments first?**
  - If it asks what is the best position.
  - If it asks you to act like a judge.
  - Will have to organise answer according to the heading above.
- **Answer:**
  - Organise by each element of contextual approach at a time.
  - At the end, have a general conclusion about the balance of factors.
    - "... favours party A's conclusion"
  - Right jurisdiction for Interpretation Act
  - Mention what courts often mention in opening remarks, remedial provision of the relevant statute (of *BCIA*)
  - **Must say that the Modern Approach must be applied:**
    - "Today there is only one principle or approach, names, 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." – *Rizzo*, para 21



## HORIZONTAL, VERTICAL, AND INTERNATIONAL COHERENCE

### HORIZONTAL COHERENCE

- **Presumption:** Driedger's principle causes courts to presume "a harmony, coherence, and consistency between statutes dealing with the same subject matter", even if the statutes are from different levels of government. – *Ulybel*
  - Indeed, Acts are coloured by other Acts within the larger statutory scheme. – *Bell ExpressVu*
- When two provisions are in conflict, resolve the conflict in favour of: - *Levis*
  - The more specific provision.
  - The more recent provision.
  - An old and specific provision over a new and general provision.

### VERTICAL COHERENCE

#### THE CHARTER

- If an Act has multiple interpretations, prefer those consistent with the *Charter* over those that are not (i.e. interpret as *consistent with* and *subordinate to* the *Charter*) – *CCCAn*
- **Presumption of Conformity with the Charter:** Multiple views (in conflict, use Bell)
  - Supplement the Driedger approach with the presumption that Parliament intended to enact legislation that conforms with the *Charter*. – *Sharpe*
  - Only apply *Charter* values in interpretation when there is an ambiguity of meaning (i.e. even if it appears to conflict with *Charter* values, can only use that to interpret if there is genuine ambiguity) – *Bell ExpressVu*

#### OTHER LEGISLATION

- In general, conflicts are resolved according to the following rules (taken from CP 4-93/94):
  - Constitution > All other legislation
  - Human Rights > General legislation
    - Human Rights legislation is "quasi-constitutional" – *Jubran*
  - Federal > Provincial
    - In some cases, federal regulations will prevail over provincial statutes.
  - Statutes > Regulations
  - Regulations > Schedules

#### INTERNATIONAL COHERENCE

- International human rights law plays an "important role" in aiding interpretation of domestic law. – *Baker*
- "The legislature is presumed to respect the values ... enshrined in international laws, both customary and conventional... [I]nterpretations that reflect these values are preferred." – *Baker*

## TEMPORAL OPERATION AND APPLICATION

### TEMPORAL OPERATION

- The period of time between an Act coming into force and being repealed
  - i.e. the period of time during which where the statute is “on the books”

### TEMPORAL APPLICATION

- **Four types of Temporal Application**
  - **Retroactivity:** The *past* legal effect of a *past* even is altered – *MacKenzie*
    - Statutes are not to be construed as having retroactive application unless this is required by the language of the Act (either expressly or by necessary implication) – *Gustavson Drilling, MacKenzie*
  - **Retrospectivity:** The *future* legal effect of a *past* event is altered. – *MacKenzie*
    - The presumption against retrospectivity is weaker than the one against retroactivity (but is rebutted in the same manner).
    - The presumption does not apply if the legislation is:
      - Beneficial
      - In the public interest
      - Purely procedural in nature
    - Won't be applied if it interferes with a vested right (and the language doesn't require it) – *Gustavson Drilling*
  - **Immediate Application:** The *future* legal effect of an *on-going* event is altered.
    - As with retrospectivity, won't be applied if it interferes with a vest right (and the language doesn't require it). – *Gustavson Drilling*
  - **Prospectivity:** The *future* legal effect of a *future* event is altered. – *MacKenzie*

### VESTED AND ACCRUING RIGHTS

- **Presumption:** A repeal or amendment does not affect acquired/accrued/accruing rights or privileges. If a right is *accruing* (i.e. there is an on-going event which will culminate in acquiring a right) when the law change, the *old* law applies. – *BCIA s 35(1)(c)*
- “The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued” – *Gustavson Drilling*
- A right is “accruing” if its conferral is “inevitable” (i.e. it certainly would have conferred). – *Scott*

## SUBORDINATE LEGISLATION

- Parliament and the Legislatures have supreme authority within their spheres, and may delegate their legislative powers. – *Hodge v. R.*
- Members of the executive may introduce subordinate legislation under an enabling Act (which has the force of law), or they may introduce policies (internal rules; not law).
- See *CIA* s 2(1) and *BCIA* s 1 for definitions of “regulation: and “enactment”
  - Regulations are included under “enactment”
- For a member of the executive to make subordinate regulations, this power must be conferred within the “four corners” of the enabling Act.
  - If the power isn’t granted explicitly, consider *Friends of the Oldman River*:
    - Act authorises “guidelines” (found to be a neutral term; doesn’t support or negate regulatory power). These guidelines must be:
      - Formally enacted by order.
      - Promulgated (formally announced).
      - Approved by the Governor in Council.
    - This is sufficiently formal to suggest that these “guidelines” are regulations.
    - Also consider the guidelines themselves; the use of mandatory language suggests regulation as opposed to policy.
      - Here, the repeated use of “shall” suggests a regulation.
- There are (at least) four grounds for invalidity of a regulation: - *Anti-Poverty*
  - Beyond the powers delegated by the enabling Act
  - Inconsistent with the statutory purpose of the enabling Act
  - Discriminatory in a manner not authorised by the enabling Act
  - Repugnant to other provincial legislation (esp. the *Human Rights Act*, in BC)
- Statutes are presumed to apply to everyone; unless authorised by the enabling Act, a regulation may not exclude people. (Authorisation may be necessarily implicit) – *Anti-Poverty*
- Parliament may delegate authority or supersede statutory provisions by means of subordinate regulation (including provisions of other Acts). This intention must be clear and express. – *Waddell*
  - Such delegation is *not* unconstitutional (not tantamount to abdicating authority). – *Gray*

## OTHER RULES

### REFERENTIAL INCORPORATION

- When Statute A uses a definition in Statute B, A is *referentially incorporating* that definition.
- If B is then amended or repealed, the *BCIA* (and *CIA*) define the effect on A:
  - **B amended:** The definition used by A incorporates any amendment to the definition. *BCIA* s 32
  - **B repealed and replaced:** A uses the new definition provided in the replacement of B. – *BCIA* s 36(1)(f)
  - **B repealed:** The definition in B at the moment of repeal survives, and A continues to referentially incorporate it. – *BCIA* s 36(1)(f)

### JUDICIAL REDRAFTING AND “READING IN”

- The Driedger Approach allows this, but we’ve only seen it in the *McIntosh* dissent.
  - No precedent or statutory authority for the application of this “rule”.
- A judge may “read in” words not in the text if the following are true of the provision:
  - There is *manifest absurdity* (in the unrevised text).
  - There is a *traceable error* (may apply legislative history to find this).
  - There is an *obvious correction*.

### RELEVANT INTERPRETATION ACT PROVISIONS

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Enactment remedial	8	12
Preamble	9	13
Title	9	-
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Head notes not part of Act	11	-
Definitions have effect throughout Act	12	15(1)
Regulations use definitions of enabling Act	13	16
Calculation of Time	25	26-30
Deviations from prescribed form	28	32
Gender, use of plural/singular, various grammatical forms interchangeable	28	33
Definitions (for all Acts)	29	35
Referential incorporation (Amendments)	32	-
No revival upon repeal	35(1)(a)	43(a)
Repeal does not affect acquired/acrued/acruing rights	35(1)(c)	43(c)
Repeal and replace (incl. referential incorporation)	36(1)(f)	44(h)
Amendments don’t imply a change in law	37(2)	45(2)
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