

Outline for Law, Legislation,
and Policy

LAW 104 Y02

Professor Judy Fudge

by

Brian Eberdt

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Legislation Generally

Branches of Government

Legislative (makes the law)	Executive (administers the law)	Judiciary (interprets the law)
<ul style="list-style-type: none"> • HOC • Senate • Queen (GG) 	<ul style="list-style-type: none"> • Queen (GG) • Federal Cabinet 	<ul style="list-style-type: none"> • Queen • Court System

- typically, the executives introduce legislation
- ministers of the Cabinet look for a problem, then propose Acts
- Impact of the Charter (1982)
 - court had the authority to strike down Acts in conflict with the constitution
 - created a Constitutional Supremacy
- traditionally, the Senate will disapprove of proposed enactments
- regulations typically guide the process for enacting an Act
- “no taxation without representation”
 - only elected members can create money bills (i.e. not the Senate)
- provincial process is very similar, with the exception of the Senate

Subordinate Legislation

- legally binding *statutory instruments* and *administrative instruments* from the executive regarding how business is meant to be conducted
- there has been progressively more of these instruments since WWII
- they are more detailed than conventional legislation
- types: orders, decrees, rules, tariffs, by-laws, letters patent etc.
- administrative instruments are not binding but are still very important
 - guidelines, policy statements, manuals, etc.

Interpreting Legislation

- many of the BC Statutes that we look at will have been amended due the transition from an NDP government to a Liberal government
- generally, we look for definitions in the Regulations
- the Lieutenant Governor in Council is usually interpreted to be the executive

- Sullivan (at 4-7) illustrates numerous ways to “cheat” statutory interpretation

Example: The Election Act

- we see how even the highest levels of the legislative process can have highly different views of how statutes should be interpreted and what they were meant to do

Institutional Legitimacy

- Dworkin, among others, have suggested that law and politics should remain separate

- judges should not make law because they are not elected

Canada v. Mossop (1993)

- Brian Mossop lost at SCC (4:3)
- highlights court’s changing role in post-Charter era
- we see problems created by ambiguous language
- judges arguments are based around linguistics (family status) and institutional legitimacy (judiciary vs. legislature)
- the judges use the same approaches to arrive at contrasting results
-
- Lamer J.
 - argued *expressiounisestexlciusioalterius*
 - change to the Act in 1983 could have include same sex couples, but it didn’t, so it intentionally excluded them
 - states that a narrow reading would result in an absurdity
 - it’s Parliament’s role to change legislation, not the courts’
- LaForest J.
 - argues for traditional, ordinary meaning of family
- L’Heureux-Dubé J. (dissent)
 - she specialized in family law (affects her decision)
 - notes that it’s benefit conferring legislation, should be interpreted remedially
 - adopts “living tree” approach of legislative interpretation
 - makes an extensive textual interpretation, consulting dictionaries of multiple languages
 - defers to the Human Rights Tribunal decision
 - states that it is the judiciary’s responsibility to decide on an interpretation of “family status”
 - incorporates scheme of the act

Different Approaches to Legislative Interpretation

LITERAL/PLAIN/ORDINARY MEANING	CONTEXTUALIST	DYNAMIC	CONSEQUENTIALIST	PURPOSIVE
<ul style="list-style-type: none"> • insufficient grounds for objectivity • similar to the golden rule: if there's no ambiguity, no interpretation is required (see <i>R v. McIntosh</i>) • <i>Shaklee Canada v. Canada</i> displays an over-reliance on the ordinary meaning, when a purposive approach would have been preferable 	<ul style="list-style-type: none"> • legislative meaning should be derived from the greater scheme of the statute of which it is a part • the efficacy of the approach is determined by the amount of context (from differing sources) that is applied - Sullivan • see <i>R v. McGraw</i> at 4-14 (bodily harm) 	<ul style="list-style-type: none"> • legislation should be interpreted in a way that reflects contemporary societal values 	<ul style="list-style-type: none"> • pioneered by Neil Brooks • one must contrast the differing meanings of the potential interpretations • must also take into account the need for accessibility, certainty, and predictability 	<ul style="list-style-type: none"> • aims to interpret in a way that honours the intent of Parliament in drafting the legislation • set as precedent in <i>Re Rizzo & Rizzo Shoes</i> (1998) • often invoked by referencing Driedger's "Construction of Statutes" (2nd ed.) (1983)

R v. McIntosh (1995) at 5-1

- judicial context: Lamer is about to retire, so he holds greater authority
- issue: whether or not s. 34(2) of the CC was meant to be applied to those who initiated an assault
- on its face, 34(2) puts fewer constraints on someone who actually causes death
- Lamer
 - there is an absurdity in the statute, but not an ambiguity
 - institutional legitimacy: it's not the SCC role to amend statutes
 - says it should not be necessary to go through the entire statute to determine whether there was a drafting error
 - states the penal legislation should be given the less punitive interpretation
- McLachlin (dissenting)
 - agrees that there is an absurdity
 - suggests that legislative history reveals that there is no ambiguity (it was a drafting error)
 - draws upon extensive context; marginal notes, previous versions
 - common sense appeal: SCC should not approve absurd results
 - adopts a consequentialist approach

Re Rizzo & Rizzo Shoes (1998) at 5-20

- issue: whether a company is responsible to pay severance and termination pay upon going bankrupt
 - does bankruptcy constitute termination on behalf of the company
- Iacobucci's Majority Decision – LLP Approved Argument Structure

Iacobucci's Majority Decision – LLP Approved Argument Structure

1. Rejects the plain meaning approach	respectfully criticizes how it was used in the Court of Appeal decision
2. Refers to popular academics	cites Driedger's <i>Construction of Statutes</i> (2 nd ed. 1983) and notes
3. Substantiates his broad context with the Federal Interpretation Act	justifies remedial interpretation and search for intent
4. Uses purposive interpretation	notes that it's benefit conferring legislation, drafted to protect employees
5. Uses absurdity doctrine	cites Sullivan and Coté to claim that interpretations resulting in absurdity should be avoided
6. Uses legislative history	points out an exception in the transitional clause, implying that it's the norm for companies to pay severance
7. Uses parliamentary debates	shows that the issue has been addressed in Hansard, in support of his interpretation
8. Characterizes the legislation as benefit conferring	supported by the purpose of the <i>Employment Standards Act</i>

9. Distinguishes the cases relied upon by the Court of Appeal	notes that they were decided before the amendment itself, making them inapplicable
10. Subsequent statutory repeals are remedial (s. 17 of the <i>Interpretation Act</i>)	the later deviation from his interpretation substantiates his interpretation as being subject to the statutes as they were at that time

- we see in this case how Driedger is used by LaMer and McIntosh (dissenting) to substantiate an opposing interpretation
- this case has set the precedent for modern statutory interpretation, in conjunction with reference to Elmer Driedger's "Construction of Statutes" 2 ed. (1983)
 - "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."
 - every argument should use this and touch on the three key elements
 - ordinary meaning
 - grammatical context
 - harmony with the scheme of the Act

Interpretation Acts

- every province has their own, applicable to provincial legislation
- *Federal Interpretation Act* applies to all jurisdiction, with respect to the application of federal legislation
- these will often refute common law assumptions

Relevant *British Columbia Interpretation Act* Sections

- s. 2 – "unless a contrary intention appears in the Act or in the enactment"
 - opens up the possibility of an exception to the application of any statute
- s. 2.3 – allows for a broad scope of the BCIA
- s. 4 – time of commencement and repeal
- s. 8 – "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
- s. 9 – allows for titles and preambles to assist in the interpretations of the Act's meaning and object
- s. 11(1)(a) – head notes are not part of the enactment
- s. 13 – "an expression used in a regulation has the same meaning as in the enactment authorizing the regulation"

Relevant *Federal Interpretation Act* Sections

- s. 3(1) – the interpretation act applies only subject to contrary intention

- s. 8(1) – recognizes Canada as a bijural jurisdiction
- s. 12 – every enactment is deemed to be remedial and should be given a broad interpretation with respect to its objects
- s. 13 – preamble is intended to be part of the enactment and should assist in interpretation of the meaning and object

Ordinary Meaning

- when interpreting statutes, we default to the ordinary meaning (as per Driedger) unless the terminology in question pertains to
 - i. specialized groups
 - ii. legal terms
 - iii. technical terms

Using Dictionaries

- dictionary definitions never prevail over statutory definitions, but can be useful

Components of a Statute

Purpose Clauses

- although useful, Sullivan points out that many Acts will contain multiple, contradicting purpose clauses, such as in the *Young Offenders Act*
- purpose clause comes after the title, whereas the preamble comes before

Marginal Notes

- no longer used in BC
- they're still used in *R v. Wigglesworth* to "guide" interpretation
 - this case was referenced on this issue in *R v. McIntosh*

Head Notes

- s. 11 of the BCIA instructs us not to assign statutory weight to headings
- nevertheless, McLachlin J. uses them as a guide in *R v. Lohnes*
- *R v. Basarab* gives us the rule to not refer to headings unless they're ambiguous

Punctuation

- in *Craies on Statute law*, it's said
 - "Punctuation is disregarded in the construction of statutes..."
- this claim must be weighed in light of the consequences of an interpretation that ignores the punctuation, as in *R v. Jaagusta*
- Rogers and Aliant Contract Article shows punctuations' potential effect

Canada as a Bilingual Jurisdiction

- both French and English versions are of equal authority

- certain provincial jurisdictions (e.g. Ontario) are bilingual, but not all
- process for resolving conflict between French and English statutes, as outlined in *Medovarski v. Canada* (2005) at 6-39
 1. determine and adopt the shared meaning (which is typically narrower)
 2. consider whether this accords with Parliamentary intent

Canada as a Bijural Jurisdiction

- Québec uses the civil law as well the common law system
- thus, all federal legislation must apply to both systems, as stipulated in ss. 8.1 and 8.2 of the *IA*
- in *St-Hilaire v. Canada (Attorney General)* (2001) at 6-41, a woman was subject to differing civil and common law codes
 - Décaré J. sets out the complementarity principle: the civil code fills in the gaps left by federal legislation
 - this complimented resulted in St. Hillaire being unable to inheriting from her husband
- in order to reduce conflicts, there is an increasing convergence between common and civil law

Historical Context

Generally

- it's important to look at the circumstances that were present at the time of enactment

Legislative Evolution

- helpful to consider the form of legislation prior to its revisions to discover whether revisions whether the present legislation is
 - sloppy drafting
 - the result of an intentional change
- intent was successfully found in *Re Simon Fraser University and District of Burnaby* (1968)

Extrinsic Historical Parliamentary Materials

- have become more admissible since the institution of a Constitutional Democracy, but with varying weights (outlined on 6-53)
- as a result of this shift, there is persisting disagreement of the weight to assign different materials
- in *Re Firearms Act* (2000), Hansard was used controversially to assist in the determination of pith and substance

Contextual Hierarchy

Horizontal Coherence

- contextual interpretation requires reference to other statutes of the same legislature
- courts are under an obligation to not find inconsistency
 - in the event that they do, some statutes instruct the reader on how to resolve the conflict
- in *Levis (City) v. Fraternite de Policiers* (2007), one statute was deemed to have precedence over another because it was more recent

Vertical Coherence

- enactments should conform to “higher level” enactments in accordance with the following hierarchy
 - Constitution Acts and the Charter
 - Human Rights Acts
 - General Statutes
 - Subordinate Legislation
- International Law will be held either at an equal or higher level than the Charter
 - in general the provision of the international law should have been ratified in the Charter itself
- in *Baker v. Canada* (1999), l’HeureuxDubé ruled that Mrs. Baker could stay in Canada in light of international law
- note the Vienna Convention on the Law of Treaties at 6-69 instructing on how to interpret international treaties

Also remember

- statutory interpretation can make reference to prior judicial decisions and administrative interpretations

Common Law Principles of Interpretation

Principle	Latin Maxim	Meaning
Principle of Associated Meaning	noscitur a sociis	<ul style="list-style-type: none"> a word takes its meaning from surrounding words
Limited Class Rule	esjudem generis	<ul style="list-style-type: none"> a general phrase takes its meaning from the words (or list) that precedes it
Negative Implication Principle	expressiouniusestexclusioalterius	<ul style="list-style-type: none"> the mention of one thing excludes another thing
Uniformity of Expression	n/a	<ul style="list-style-type: none"> words in a statute won't shift their meaning

Common Law Presumptions

The Presumption Against Tautology (*ex abundanciautio*)

- one should avoid interpretations that imply redundancy
- can be countered by noting Parliament's habit of giving a surplus of caution

Presumption Against Retroactivity (dealt with later)

The Presumption Regarding Territorial Application

- a statute is presumed to operate only within its designated jurisdiction

Presumptions Regarding Individual Rights

- the legislature does not intend to infringe upon individual rights
- enactments are presumed to not have an adverse effect on personal security or well-being, freedom of commerce, access to the courts, or rights of natural justice

Charter Values Presumption

- the Charter is only meant to apply to government action, not between private litigants
- in *Bell ExpressVu Limited Partnership v. Rex* (2002), Iacobucci J. states that there must be an ambiguity before we make a Charter challenge
 - reminds us of the significance of s. 1
 - brings light to the difference between parliamentary supremacy vs constitutional democracy

Property Rights Presumptions

- legislation that interferes with the rights of a property owner should be interpreted in favour of the property owner
- note that property rights are not protected by the Charter

Criminal Law Presumptions

- if it can be shown that there is an ambiguity in the provision, it shall be interpreted in favour of the accused

Presumptions Regarding Taxation Statutes

- generally, judges will take a strict, constructionist approach, as shown by Iacobucci J. in *Ludco Enterprises v. Canada* (2001)
 - as an institutional legitimacy argument, he states that the creation of new rules for tax law should be created by Parliament
- note that, with ambiguities, judges may adopt a purposive interpretation (see *Imperial Oil Ltd v. Canada* (2006))

Presumptions in Municipal Law

- due to the absence of specific legal status, cities are often left with inadequate power
- in response to this, the provincial statutes that grant cities power are presumed to have a broad, remedial meaning

Presumptions with Professional Bodies

- as shown in *Laporte v. College of Pharmacists of Québec* (1976), these statutes are given a strict interpretation

Temporal Issues

- temporal operation – the lifetime of a statute
- four key events in the life of a statute
 - enactment
 - commencement (coming into force)
 - re-enactment
 - repeal
- unless expressed otherwise, the date of enactment will be the date of commencement

Amendments

- it must be considered whether the amendment is remedial or declaratory
 - dealt with by s. 37(2) – unless there was an ambiguity before, the amendment should be construed to be remedial

Repeal

- handled by section 35(1)
- s. 36(1)(a) states that, upon the repeal of section of a statute, common law does not fill in the gap unless otherwise indicated
- s. 35(1)(c) protects rights that might be affected by a repeal

Repeal and Replacement

- requires that s. 35 and 36 be read together

Presumption Against Vested Rights

- vested rights will not be affected by repeal or amendment
- can be considered as the common law analogue to s. 35(1)(c)
- can be rebutted by ambiguity
- in *Gustavson Drilling* (1977), Coté J. suggests that the presumption must be weighed against individual and social consequences
- in *Scott v. College of Physicians and Surgeons* (1992), we see the incorporation of an element of fairness, the plaintiff did all that he could have to ensure that his right had accrued

Temporal Application Problems

Temporal Options for Application



Foundations for the Presumption Against Retroactivity

- common law commitment to protecting private law rights
- rule of law
 - values of certainty, predictability, rationality, formal equality, and fairness
 - citizens must be able to know the law
 - there should be adequate notice for change

How to rebut retroactivity

- subject to contrary intent; s. 2(1) of the *BCIA*
- explicit expression by the relevant statute
- more recently, in order to achieve a public good (social value)

Retroactivity	Retrospectivity
Re-characterizes the nature of past events	“Attaches new consequences for the future to an event that took place before the statute was enacted.” <i>(Driedger)</i>

Retrospective Application

A party may characterize a statute as having *retrospective* application which will not engage the presumption against retroactivity...

EXCEPT

when the consequences of the amendment would attract harmful consequences to a prior event.

Thus, statutes which create positive consequences for a prior event or impose penalties that are related to, but not a consequence of, a prior event will be allowed unless otherwise indicated by the statute or parliament.

Sample Cases

Mackenzie v. British Columbia (Commissioner of Teachers' Pensions) (1992)

- widow sought some of her husband's teacher's pension upon his death
- despite the retroactive application explicitly expressed in the statute itself (suggesting she should get some of the pension) she did not
- it was found that such an interpretation would be absurd and against the intent
- from a consequentialist approach, such a granting of the pension would not be economically feasible (it had already been paid out)

Re Chafe and Power (1980)

- Chafe would be given Crown land if he made 25% of it cultivable in 5 years
- after this initial grant, the law was appealed so that the minister had discretionary power to give the land
- Goodridge J. ruled that because he had not met all the conditions, he did not have an accruing right

Trotter v. Canada (Attorney General) (2005)

- involved an amendment regarding the compensation of POW veterans
- the veterans are seeking retroactive compensation
- Strayer J. decided to allow for compensation (indirectly) keeping in mind the policy concerns and the fact that he had not been informed
 - thus the presumption was rebutted
- this should not be considered as precedent for cases involving vested rights