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Law, Legislation and Policy

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Approaches to Statutory Interpretation

Overview

- The Driedger approach is the “modern approach” (Rizzo, Merk)
- It incorporates the Contextual, Purposive, and Ordinary Meaning approaches.
- Other approaches have been included for completeness and example.

The Driedger Approach

Statement

- “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.” – Driedger, *Construction of Statutes* (2nd ed. 1983). (Rizzo, Merk, C3000)

Application

- “Entire context”
 - Contextual analysis (see below)
 - Consider conditions at the time of enactment and the present conditions (C3000)
- “Grammatical and ordinary sense”
 - Only interpretations that the words may “reasonably bear” may be imposed (McIntosh)
- “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 whistleblowers. (Merk)

The Contextual Approach

- Considers the following factors: (Merk [15], C3000)
 1. Economic and social realities the Act is meant to address.
 2. Statutory and regulatory framework existing around the Act.
 3. International treaties.
 4. Purpose and object of the entire Act.
 - Includes the meaning of the Act, and internal consistency (C3000)
 5. Purpose and object of the specific provision.
 - Shared meaning between English and French versions may be relevant (C3000)
 6. Policy considerations.

The Purposive Approach

- Attempt to determine legislative intent.
- Considers the following factors: (C3000)
 - Ordinary and grammatical meaning.
 - Statutory context (i.e. examine the Act itself for intent)
 - Broader legislative framework (presume Legislature intended harmony) (C3000 [54])
 - Legislative history (e.g. Hansard)
 - “Mischief” rule (what mischief is meant to be addressed?) (Heydon’s Case)
 - Assume Legislature didn’t intend absurd, anomalous, or irrational results. (Merk)

Aids in Statutory Interpretation

- Decreasing Weight


- **Legislative Evolution:** Previous versions, amendments, and transitional provisions can indicate legislative intent. (Rizzo)
 - Note *BCIA* s. 37 and *CIA* s. 45(2) – amendment ≠ change in meaning!
 - Historically, amendment = 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 [35])
 - Government publications, press releases, etc. (Firearms Reference)
 - Anything that’s “relevant and reliable”, so long as it is not assigned “undue weight” (Firearms Reference)
 - **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 such fair/large/liberal interpretation 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 [21])
 - **Penal:** Strict construction; doubts to be resolved in favour of the accused. (McIntosh [38])
 - 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 [33])
 - **Regulatory:** Consider “all relevant circumstances” for type of interpretation. (Merk [33])
 - Strict construction is of “limited value” (Merk [33])
 - **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* [10])
- **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; Gould, CCCan*)
 - **Purpose Section:** Overridden by conflicting substantive provisions(*National Farmers Union*)
 - **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! (*C3000*)
 - **“Means”:** The definition is exhaustive (excludes any meanings not listed).
 - **“Includes”:** The definition also includes the ordinary meaning, possibly others.
 - **Headings:** Useful for clarifying doubtful or ambiguous expressions. (*Lohnes, Basaraba, Wigglesworth*)
 - **Marginal Notes:** Generally accorded “weak” (*Wigglesworth, SCC 1987*) or “no” (*Basaraba, Man QB 1975*) use.
 - **Punctuation:** Disregarded in interpretation (*Jaagusta*) or paid “little attention” (*Popoff*)
 - **Schedules:** Less weight than substantive text (*Houde*)
 - **Bilingualism:** See “shared meaning” under Rules of Statutory Interpretation, below.

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)
 - This is 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 [33])
- **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 [27])
- **Absurdity:** Two (similar) characterizations accepted by the courts:
 - Côté gives four grounds (affirmed by the court): (Rizzo [27])
 1. Ridiculous or frivolous consequences
 2. Extremely unreasonable or inequitable
 3. Illogical or incoherent
 4. 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 defeat the purpose of a statute or render some aspect of it pointless or futile.” (Rizzo [27])
- **Effectivity:** No words in an enactment are redundant or unnecessary. (McDiarmid Lumber, Riddell, Sharpe)
 - **Counter-Argument:** It is possible that the Legislature has thrown in unnecessary words “*ex abundanti cautio*” (“out of excessive caution”) (Children’s Aid)
- *noscitur a sociis* • **Associated Meaning:** Words linked by “and” or “or” should be interpreted as having common features. Thus, narrow terms limit adjacent broader terms. (McDiarmid Lumber)
- *ejusdem generis* • **Basket Clause:** General terms have their meaning narrowed by specific terms preceding them. (Rascal Trucking)
- *expressio unius est exclusio alterius* • **To Express One Thing Is To Exclude Another:** 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”. The converse also holds. (Schwartz)
 - Regulations under that statute are also assumed to share that meaning.
 - This is a presumption, not a rule; circumstances may demonstrate contrary intent (Schwartz)
- **Shared Meaning:** For bilingual legislation, adopt the narrower meaning. (C3000, Riddell)
 - This is refined in *Medovarski* into a two-step test: (Medovarski)
 1. Find the shared (i.e. more restrictive) meaning.
 2. *If consistent with legislative intent*, adopt that meaning.

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 (select most recent)
 - Supplement the Driedger approach with the presumption that Parliament intended to enact legislation that conforms with the *Charter*. (Sharpe, SCC 2001)
 - Only apply *Charter* values in interpretation when there is an ambiguity of meaning (i.e. if it appears to conflict, there’s no presumption won’t save it) (Bell ExpressVu, SCC 2002)

These rules are in conflict, use Bell

Other Legislation

- In general, conflicts are resolved according to the following rules (taken from CP 4-64/65):
 - Constitution > All other legislation
 - Human Rights > General Legislation
 - Human rights legislation is “quasi-constitutional” (Jubran)
 - Federal > Provincial
 - In some cases, federal regulations 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 the statute is “on the books”

Temporal Application

- Four types of temporal application:
 - **Retroactivity:** The *past* legal effect of a *past* event 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:
 1. Beneficial
 2. In the public interest
 3. 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 *ongoing* event is altered. (Bellechase)
 - As with retrospectivity, won't be applied if it interferes with a vested 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 ongoing event which will culminate in acquiring a right) when the law changes, 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 (Gustavson Drilling, Scott)
- A right is “accruing” if its conferral is “inevitable” (i.e. it certainly would have been 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 authorizes “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*)
 1. Beyond the powers delegated by the enabling Act
 2. Inconsistent with the statutory purpose of the enabling Act
 3. Discriminatory in a manner not authorized by the enabling Act
 4. Repugnant to other provincial legislation (esp. the *Human Right Act*, in B.C.)
- Statutes are presumed to apply to everyone; unless authorized by the enabling Act, a regulation may not exclude (or include?) people. (Authorization may be necessarily implicit) (*Anti-Poverty*)
- Parliament may delegate authority to repeal 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

Topic	<i>BCIA</i> Section	<i>CIA</i> Section
Definitions (for the <i>IA</i>)	1	2
Enactment Always Speaking	7	10
Enactment Remedial	8	12
Preamble	9	13
Title	9	-
Marginal Notes and References to Former Enactments	-	14
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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/Accrued/Accruing 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)

*See *CIA* s. 37 for the construction of “year”

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<i>Basaraba</i>	<i>R. v. Basaraba</i>	Man QB 1975	Heading. Intimidate trade unionists	4-31
<i>Bellechase</i>	<i>Bellechase Hospital... v. Pilotte</i>	SCC 1975	(No brief) Immediate application.	5-11
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<i>Heydon's Case</i>	<i>Heydon's Case</i>	UK 1584	Mischief rule	3-1
<i>Hodge v. R.</i>	<i>Hodge v. R.</i>			
<i>Imperial Oil</i>	<i>Imperial Oil Ltd. v. Canada</i>	SCC 2006	Textual interp. of tax Acts.	4-104
<i>Jaagusta</i>	<i>R. v. Jaagusta</i>	BC Prov Ct. 1974	Punctuation. Searching non-dwellings.	4-35
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