Voir p. 1-5 et 210

SULLIVAN ON THE CONSTRUCTION OF STATUTES

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by

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CHAPTER 1

Reading Words in Their Entire Context: An Overview of this Book

§1.1 The modern principle requires legislative texts to be read in their entire context. Most of this book is an attempt to flesh out what that means and what it entails: forming an initial impression of the words to be interpreted, reading legislative texts in light of the conventions relied on in drafting them, identifying admissible context and drawing appropriate inferences from context. However, the book also considers the operation of legislation (when it comes into force and ceases to be in force) and the rules governing the temporal, territorial and personal application of legislation.

§1.2 The purpose of this chapter is to provide an overview of the topics dealt with and their relationship to one another.

THE MODERN PRINCIPLE

§1.3 Chapter 2 is an analysis of Driedger's modern principle: its roots in the common law evolution of statutory interpretation, what the principle entails, how it differs from the plain meaning rule, why that is a good thing, its endorsement by the Supreme Court of Canada in the *Rizzo* case and its partial repudiation by that Court in *Bell ExpressVu*. The key difference between the modern principle and the plain meaning rule is that the former does not depend on a distinction between ambiguous and unambiguous texts. This is an unnecessary distinction that is impossible for courts to draw in a principled way.

INITIAL IMPRESSIONS OF MEANING

§1.4 Chapters 3 to 7 are about forming an initial understanding of the meaning of the text to be interpreted. Words in legislative texts are given either their ordinary meaning or a technical meaning; an important subclass of technical meaning is legal meaning. There is a presumption in favour of the ordinary meaning of the text, which is examined in detail in Chapter 3. That chapter also considers techniques for establishing and proving ordinary meaning, including the role of dictionary meaning. Chapter 4 sets out the circumstances in which words are given a legal or other technical meaning, indicates how such meanings are proven and reviews interpretive issues raised by statutory definitions and by terms such as "may/shall", "and/or" and "deems".

§1.5 Chapter 5 deals with establishing an initial understanding of meaning when the legislation is bilingual or both bilingual and bijural. In bilingual legislation, it is important to read both language versions to identify the shared meaning, which is presumed to be the intended meaning. However, when it comes to private law legal terminology in federal legislation, rather than seeking a shared meaning, it is important to respect the distinct meaning of such terminology in Quebec and in the common law provinces respectively.

§1.6 If the current meaning of a word differs from its original meaning, the courts must determine which meaning to adopt. Modern courts tend to favour a dynamic approach, allowing legislation to adapt to changing circumstances. However, there are circumstances in which original meaning more appropriately prevails. These issues are examined in Chapter 6.

§1.7 Chapter 7 considers the plausible meaning rule. Although it is sometimes permissible to reject or read down the ordinary meaning of a word, in principle the meaning adopted by a court must be plausible from a linguistic point of view. In practice, however, courts sometimes adopt a "strained" interpretation, that is, one that stretches the limits of plausibility.

How to Read Words in Context

§1.8 Having established an initial understanding of the words to be interpreted, the next step is to read them in context. However, before considering what the context is and how it is relevant, Chapters 8 to 12 describe the types of analysis relied on in statutory interpretation. The most important of these is probably textual analysis, dealt with in Chapter 8. In analyzing a legislative text, an interpreter must recognize that a statute is a distinct literary genre, which must be read in light of the conventions of legislative drafting that prevail in the enacting jurisdiction – ideally the conventions that prevailed at the time the legislation was enacted or revised. Part 1 of Chapter 8 reviews current Canadian drafting conventions while Part 2 looks at examples of their application.

§1.9 The words of a legislative text must also be read so as to promote the purpose of the legislation and avoid unintended undesirable consequences. Chapters 9 and 10 deal with purposive and consequential analysis.

§1.10 Textual, purposive and consequential analyses are appropriately brought to bear on every exercise in statutory interpretation.

§1.11 Chapter 11 describes the techniques used by courts to identify and resolve conflicts between legislative provisions. Chapter 12 describes the circumstances under which courts may fix mistakes or fill gaps in a legislative text. It also deals with the response of the courts to citizens' attempts, outside the context of taxation, to attract or avoid the application of legislation.

WHAT COUNTS AS CONTEXT

§1.12 In the first and second editions of this text, Driedger distinguished between the internal "literary" context and the external context, which was classified as factual, social, intellectual, legal and linguistic. The intellectual context referred to admissible extrinsic aids, the linguistic context to dictionaries. This classification is interesting because it is based not only on the type of material looked at but also on the use to which the material is put. The following account of context preserves this dual focus.

§1.13 The **literary context** consists of any legislative text that may be looked at for the purpose of carrying out a textual analysis. This includes the immediate context,[1] the Act as a whole, including its components, and the statute book as a whole. Literary context is based on the notion that statutes are a literary genre, with a distinct structure and purpose and a distinct set of drafting conventions. In this respect, at least, legislation resembles poetry.

§1.14 From a literary perspective, the components of an Act obviously form part of the Act as a whole. Historically, however, from a legal perspective they were considered to be external. The rules regarding their use in interpretation are still evolving and are dealt with separately in Chapter 13. Chapter 14 deals with the Act as a whole and the statute book as a whole.

§1.15 The **legal context** consists of the substantive law that may be looked at for the purpose of inferring legislative intent. It includes constitutional law, common law (along with the *Civil Code* in Quebec), related statute law and international law. On occasion it includes the law of a foreign jurisdiction. Importantly, it includes the presumptions of legislative intent, which continue to function as common law constitutional law.

§1.16 The legal context is relevant to statutory interpretation in primarily two ways. First, it is sometimes the source of legislation, as when common law rules or concepts are codified, legislation from another jurisdiction is relied on as a model or an international law convention is implemented. Second, it supplies the legal norms which inform statutory interpretation. These norms are relevant because they are part of the legal culture in which law makers as well as interpreters operate. They take both a positive and a negative form: courts presume that legislatures want to do the right thing, such as comply with constitutional limits on their jurisdiction or with Canada's international law obligations; they also presume that legislatures want to avoid violating constitutional norms such as rule of law — by expropriating property without compensation, for example, or enacting retroactive legislation.

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[1] The immediate context is as much of the text surrounding a word as is needed to make sense of the word. It is explained in Chapter 2.

§1.17 Chapter 15 deals with the concepts of presumed intent and strict versus liberal construction. It points out that both are ways to ensure that important legal norms are taken into account in the interpretive equation. It then looks at some examples, including strict construction of penal legislation, liberal construction of social welfare legislation and the presumptions of fault.

§1.18 Chapters 16, 17 and 18 deal with the relation between legislation and entrenched constitutional law, common law and international law respectively. While there is a clear hierarchy among these sources of law, the courts prefer to harmonize them when possible. Hence the presumptions of compliance with constitutional and international law and the presumption that the legislature does not intend to change the common law.

§1.19 Chapters 19 to 21 address types of legislation that have attracted special rules because of underlying legal norms: human rights legislation, legislation dealing with aboriginal peoples and fiscal legislation.

§1.20 It is sometimes suggested that the legal norms relied on in statutory interpretation do not form part of the context in which the legislative text must be read, that they are to be taken into account only if the text remains "genuinely" ambiguous after considering the purpose and context. There is no justification for this suggestion, and indeed none is offered by those who make the suggestion. Norms do in fact figure in the preparation and drafting of legislation and they have been part of the common law of statutory interpretation for centuries. To exclude them from consideration in the absence of genuine ambiguity is not only unjustified, but is also based on the false premise that it is possible to draw a bright line between ambiguous and clear texts or between genuine and specious ambiguity. Norms should be considered part of the legal context, although they should receive only as much weight as the circumstances warrant.

§1.21 The **external context** consists of the setting in which legislation was enacted– the social, economic, political realities that inform the legislation and the circumstances specifically addressed by the legislation. It also includes the setting in which the legislation was intended to operate and in fact operates. The key assumption here is that legislation is not an academic exercise. It is a response to circumstances in the real world and it necessarily operates within an evolving set of institutions, material circumstances and cultural assumptions. This context is dealt with in Chapter 22.

§1.22 Extrinsic aids are things outside the legislative text, such as legislative evolution and legislative history that provide direct or indirect evidence of legislative intent. Although few extrinsic aids were admissible when Driedger first formulated the modern principle, they are now generally considered part of the entire context of a legislative text. They are dealt with in Chapter 23.

THE OPERATION AND APPLICATION OF LEGISLATION

§1.23 The operation of legislation refers to the events in the life span of a provision, whether it is part of a statute or a regulation. There are four possible events: enactment, coming into force, re-enactment and repeal. The rules of operation determine the legal significance of these events. The application of legislation refers to the relationship between an enactment and the facts that come within its scope. The rules of application delineate the territory to which the enactment applies, the persons who must obey it and the facts that are subject to its temporal operation. These rules take the form of presumptions of intent that are grounded in legal norms such as territorial sovereignty and rule of law. They could therefore be considered part of the legal context, which was the approach Driedger took. However, the temporal and territorial application rules in particular are more than vehicles for introducing legal norms into the interpretive process. They address complex practical problems that arise in situating legislation in time and space. Because of their complexity, these problems attract a good deal of scholarly analysis and produce a great deal of confusion. Operation and application are therefore dealt with in the final chapters of the book.

§1.24 It would make sense in a book on statutory interpretation to address the issues of operation and application at the outset. However, Driedger structured his editions around the modern principle and it has continued to hold pride of place in subsequent editions.

§1.25 Chapter 24 describes the legal effects of enactment, coming into force, re-enactment and repeal and considers how these events operate in the context of amendment, implied repeal, statute consolidation and revision and codification.

§1.26 Chapter 25 deals with the presumptions against the retroactive and retrospective application of legislation and interference with vested rights. It traces the evolutional of transitional law in Canada and explores the sources of confusion in current Canadian law. Chapter 26 deals with the presumption against the extra-territorial application of legislation. Chapter 27 deals with the presumption of Crown immunity.

> Had Parliament wanted to declare that "other counsel" means only unpaid persons, it would have said so by using distinctive terms....[26]

§8.21 ***Presumption of orderly and meaningful arrangement.*** It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.

§8.22 Reliance on this presumption is illustrated in the dissenting judgment of La Forest J. in *R. v. Finta*.[27] One of the issues facing the Court in *Finta* was whether s. 7(3.71) of the *Criminal Code* created an offence or merely extended the territorial jurisdiction of Canadian courts. The section provided that

> Notwithstanding anything in this Act or any other Act, every person who ... commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada would constitute an offence ..., shall be deemed to commit that act or omission in Canada....

La Forest J. concluded that the section did not create an offence, but merely overcame the effect of s. 6(2) limiting the jurisdiction of Canadian courts to acts or omissions in Canada. He wrote:

> Parliament's intention to confine itself to a rule governing the application of offences is also evident from the position of s. 7(3.71) in the *Code*. It appears, I repeat, in Part I of the *Code*, which is appropriately titled "General". No offence is created in that Part. It deals, as its name implies, with interpretive matters, application, enforcement, defences and other general provisions. Offences are dealt with in other parts of the *Code*, and are usually entitled as such, among others "Part II. Offences Against Public Order", "Part VIII. Offences Against the Person and Reputation", "Part IX. Offences Against Rights of Property", and so on. One should assume some minimal level of ordering in an Act of Parliament. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.[28]

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26 *Ibid.*, at paras. 64-65. See also *R. v. Bouvier*, [2011] S.J. No. 463, 2011 SKCA 87, at para. 21 (Sask. C.A.); *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 75 (Alta. C.A.), *per* Ritter J.A.: "If the Legislature intended retaliation to have the same meaning as discrimination, it chose a strange way of expressing that intention. It would have been sufficient to merely list previous complaints as a prohibited ground of discrimination rather than setting up a separate subsection within the legislation to deal with the issue."

27 [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 (S.C.C.).

28 *R. v. Finta*, [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701 at para. 35 (S.C.C.). See the dissenting judgment of L'Heureux-Dubé J. in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919, at paras. 201-204 (S.C.C.), where she relied on this presumption to conclude that the term "tribunal" in s. 23 of *Quebec's Charter of Human Rights and Freedoms* was limited to tribunals exercising penal jurisdiction. She wrote at para. 202-203: