



Statutory Interpretation in Canada

The Legacy of Elmer Driedger

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Part 1 – Introduction

Statutory interpretation in Canada has been powerfully influenced by the work of Elmer Driedger. For many years he was Deputy Minister of Justice for Canada and an adjunct Professor of Law at the University of Ottawa. In both capacities he worked to develop a new style of drafting for federal legislation in Canada and a new approach to statutory interpretation. He founded and taught a graduate program in legislative drafting at the University of Ottawa, which trained many of the legislative drafters currently working as legislative counsel for Canadian provincial and federal governments. An important part of his program was an in-depth study of the rules of statutory interpretation. Driedger was keenly aware of the close and complex interaction between drafting and interpretation. If law-makers are to achieve their desired results, legislation must be drafted having regard to how it will be interpreted by those who will apply it. Conversely, if interpretation is to give effect to the intentions of the law-maker, the legislative text must be read having regard to the conventions of legislative drafting, as well as the contexts in which legislation is conceived, prepared and operates.

Driedger's lectures on statutory interpretation at the University of Ottawa led to the publication in 1974 of *Construction of Statutes*.¹ In that text Driedger identified three dimensions of interpretation:

1. The meaning of legislation, whether clear or ambiguous.
2. The purpose of legislation, that is, the changes the law-maker hoped to effect by introducing legislation.
3. The consequences of applying legislation to particular facts.

He noted that these dimensions are reflected in the three competing “master rules” of interpretation: the literal meaning rule, the mischief rule and the golden rule.²

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1 EA Driedger, *Construction of Statutes*, 1974, Butterworths, Toronto.

2 These three rules were discussed and to some extent derided in an earlier article, which remains influential in Canada: see J Willis, “Statute Interpretation in a Nutshell” (1938) 16 *Can Bar Rev* 1. I find Willis’s “Nutshell” offers a very inadequate account of the current practice of interpreters.

Of the mischief rule he wrote:

“*Heydon’s Case* is an expression of the doctrine of ‘equitable construction’, which prevailed in the fifteenth and sixteenth centuries. In those days the intent of the statute was more to be regarded and pursued than the precise letter.”³

Of the literal rule he wrote:

“What came to be called the literal rule was a revolt against judicial legislation, and under it, the words of the Act were dominant. Judges refused to go outside the statute; they considered the object or purpose of the Act only ‘if any doubt arises from the terms employed by the legislature’ ... In other words, regard was had only to the words of the Act, and only if the ‘words in themselves’ were not ‘precise and unambiguous’ did the judges consider the object [or other extra-textual considerations]. This is what they meant by ‘literal construction’.”⁴

Driedger had considerable difficulty with the golden rule. He was alarmed by the possibility that judges might rely on the golden rule to substitute their own subjective views of good policy for those of the law-maker. Of the golden rule he wrote:

“Only when there is an ambiguity, obscurity or inconsistency that cannot be resolved by objective standards is it permissible to resort to subjective standards of reasonableness in order to avoid unreasonable consequences ... [I]t is not legitimate to use consequences as an excuse to place an unreasonable construction on words that can have only one reasonable grammatical construction.”⁵

Driedger’s particular contribution to statutory interpretation in Canada was to integrate these three rules into a single formula which he called “the modern principle”:

“Today there is only one principle or approach, namely, the words of the 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.”⁶

Since its initial appearance in 1974, this passage has been continually cited and relied on by Canadian courts. In 1998, in *Rizzo v Rizzo Shoes Ltd*, it was formally adopted by the Supreme Court of Canada as stating its preferred approach.⁷

3 EA Driedger, *Construction of Statutes* (2nd ed), 1983, Butterworths, Toronto, p 81.

4 *ibid*, pp 82–83.

5 *ibid*, p 86.

6 *ibid*, p 87.

7 See *Rizzo v Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27. In *Bell Express Vu Ltd Partnership v Rex* [2002] SCC 42 at [26], Iacobucci J wrote: “Driedger’s modern approach has been repeatedly cited by this court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd v The Queen* [1984] 1 SCR 536 at 578 per Estey J; *Québec (Communauté urbaine) v Corp Notre-Dame de Bon-Secours* [1994] 3 SCR 3 at 17; *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27 at [21]; *R v Gladue* [1999] 1 SCR 688 at [25]; *R v Araujo* [2000] 2 SCR 992, [2000] SCC 65 at [26]; *R v Sharpe* [2001] 1 SCR 45, [2001] SCC 2 at [33] per McLachlin CJ; *Chieu v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 84, [2002] SCC 3 at [27]. I note as well that, in the federal legislative context, this court’s preferred approach is buttressed by s 12 of the *Interpretation Act* 1985 RS c I–21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

Driedger's modern principle is obscure in a number of respects. Presumably, if something is part of the entire context, it is automatically admissible as evidence of legislative intent. But what is to be included in the "entire context"? What is meant by "intention of Parliament" apart from the "object of the Act"? What if the grammatical and ordinary sense of the legislative language is at odds with, rather than in harmony with, the object of the Act or the intention of Parliament? What if the grammatical and ordinary sense of the legislative language leads to absurd consequences? How do the common law norms embodied in the presumptions of legislative intent figure in the modern principle?

Although Driedger addresses these questions in his book, his explanations are rarely referred to. Most often the courts do not even acknowledge the questions, much less address them in a clear and systematic way. The result is somewhat disconcerting. On the surface it appears that Canadian courts have achieved a uniform, comprehensive and principle-based approach to statutory interpretation. In practice, however, there is considerable variation in the courts' approach and considerable confusion about a number of important issues, not least the role that judges may legitimately play in resolving statutory interpretation problems. Some judgments are rooted in textualism, some in intentionalism; some are pragmatic.⁸ Although there are real differences among these approaches, each purports to be an application of Driedger's modern principle and, therefore, to be justified.

In Part 2 of this article I briefly explore the beneficial impact that Driedger's modern principle has had on the practice of statutory interpretation in Canada. If it has not caused, it has at least supported a robust and increasingly sophisticated body of interpretive case law. This is one area where the Bench is ahead of the Bar in both knowledge and skill.

Part 3 looks at the shortcomings of the modern principle. The most serious of these, in my view, is its assumption that textual meaning can be harmonised with the purpose and scheme of the legislation, and with legislative intent. In cases that require adjudication, such harmony may be impossible. In fact, one needs a judge to hear and decide most cases precisely because the factors relevant to interpretation provide support for competing interpretations. A second shortcoming is that the modern principle focuses attention on certain types of interpretation issues, namely those involving disputes about the meaning of a text, and ignores others, such as gaps and mistakes or conflicting provisions. This has, on occasion, derailed proper analysis of the issue before the court. My final complaint about the modern principle is that it does not adequately delineate what is included in "the entire context".

8 To summarise, **textualists** make the meaning of the text the touchstone of interpretation and reject all extra-textual evidence of the appropriate outcome; **intentionalists** make legislative intent the touchstone of interpretation and therefore allow extra-textual evidence of legislative intent but reject reliance on judge-made norms; **pragmatists** believe that in every case judges should rely on text, evidence of legislative intent, and judge-made norms to resolve the statutory interpretation problem. These competing approaches to statutory interpretation are explored in more detail below.

Part 2 – The beneficial impact of Driedger’s modern principle

The modern principle parsed

To resolve an interpretation problem, the modern principle requires interpreters to go through five steps.⁹

1. **Determine the ordinary meaning of the contentious provision.** Ordinary meaning is the meaning that spontaneously comes to mind upon reading words in their immediate context. The immediate context consists of an *internal* and *external* element. The *internal element* is the *rest of the sentence in which words appear*. The *external element* is the *entire content of the interpreter’s mind*, including knowledge of language, shared knowledge of the world and personal knowledge and experience.
2. **Identify the doubtful words or expressions.** Those are words or expressions that might, but do not self-evidently, apply to the facts in question. Most legislative provisions have two parts: a legal fact situation and a legal consequence. The legal fact situation consists of the facts that have to be present and the conditions that have to be met before the legal consequence can operate. To determine whether a provision might apply to an actual fact situation, the first step is to identify the legal fact situation set out in the provision. The second step is to compare the legal situation to the actual situation, word by word, in order to identify possible areas of doubt.

Consider the following text and facts:

No person shall sleep in a public transportation terminal.

Any person who breaches this regulation is guilty of an offence and is liable to [a specified punishment.]

Angus is sitting on a bench inside a bus terminal waiting for a bus when he nods off over his newspaper.

The legal fact situation here requires a person; the person must engage in the act of sleeping; and the sleeping must occur in a transportation terminal. A comparison of the actual fact situation and the legal situation yields the following: Angus is clearly a person; and a bus terminal is clearly a transportation terminal; but it is not clear whether nodding off while reading counts as “sleep” for purposes of the rule. “Sleep” here could refer to any lapsing into an unconscious state of mind; alternatively, it could require a conscious choice to spend a period of time in a supine position in that state of mind. Therefore, the application of “sleep” to these facts is an area of doubt.

3. **Consider the “entire context” of the doubtful words or expression.** This includes (at least) the rest of the Act in which the words occur, related legislation (statutes in *pari materia*) and the statute book as a whole.

⁹ The modern principle has been parsed in various ways. What is set out in the text reflects my own reading of the principle.

4. **Consider the objects of the Act and the scheme devised by Parliament to achieve those objects.** Determine how the provision in question fits into the scheme and helps to promote the legislative purpose.
5. **Finally, consider the “intention of Parliament”.** At first glance, the reference to the “intention of Parliament” in the modern principle appears to be tautologous, and both courts and academic scholars have remarked on this point.¹⁰ But if one takes the trouble to read the whole of Driedger, the reference turns out to be sneaky rather than tautologous.

Here is what Driedger says about this aspect of interpretation:

“It may be convenient to regard ‘intention of Parliament’ as composed of four elements, namely:

1. The expressed intention — the intention expressed by the enacted words;
2. The implied intention — the intention that may legitimately be implied from the enacted words.
3. *The presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament.*
4. The declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.” (my emphasis)

The striking feature of this description is that it folds the entire body of common law legal norms, including the presumption that the legislature does not intend to produce absurd consequences, into the concept of legislative intent. Given that these aids to interpretation are relied on in the absence of evidence of actual intent, this characterisation is, at the least, surprising.

Repudiating textualism

In my view the most important thing about Driedger’s modern principle is that it is inconsistent with textualism, the approach to statutory interpretation based on the plain meaning rule. Under the plain meaning rule, if the meaning of a legislative text seems, upon first reading, to be clear or “plain”, the court must give effect to that plain meaning despite compelling evidence that the legislature intended something different or that adopting the plain meaning would violate important legal norms or otherwise lead to absurdity. A court may look to factors other than textual meaning only if the text to be applied is ambiguous. Under Driedger’s modern principle, ambiguity is not a prerequisite. Even if the text on initial reading seems plain, the interpreting court must nonetheless consider the entire context, including the purpose and scheme, and the intention of the legislature.

¹⁰ See, for example, S Beaulac and PA Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimation” (2006) 40 *Thémis* 131 at 164. In *R v Jarvis* [2002] 3 SCR 757 at [77], the Supreme Court of Canada reformulated the modern principle so as to drop the reference to legislative intent as an element with which the ordinary and grammatical meaning must be harmonised.

Textualism claims that the *only* legitimate source of legislative intent is the ordinary meaning of the words found in the text. One can understand the appeal of this position. In principle, ordinary meaning is the meaning that is presupposed by the drafters, the meaning intended to be enacted by the legislature and the meaning that will be understood by those who must administer and comply with the statute. It is the single golden thread that ties legislative process to legislative enactment to the application and enforcement of legislation in particular cases. It is therefore the only truly legitimate source of interpretation. Only if this golden thread is broken may interpreters resort to default strategies, such as extra-textual evidence of legislative intent.

Textualism's claim is based on two assumptions, one about language and one about the proper role of the courts in a democracy. First, textualists assume that the ordinary meaning of words and word combinations constitute a fixed code, shared by everyone in a language community. This code enables authors to embody mental abstractions such as directives in a text and enables readers to extract the intended message simply by decoding the text. Modern linguists have acknowledged that, in practice, this model of communication bears little, if any, relation to reality.¹¹ The construction of meaning from a text is a complex, multi-faceted process. It involves assumptions about the origin of the text, the genre in which it is written, its author, its intended audience, its purpose, the cultural tradition in which it has operated and operates, and more.¹² By insisting that interpreters consult the entire context and achieve harmony between ordinary meaning, scheme, object and legislative intent, Driedger's modern principle indirectly acknowledges the real complexity of interpretation and, to that extent, repudiates the textualist assumption.

Secondly, textualists assume that the judicial role in interpreting a text is properly limited to discerning and declaring the intention of the legislature. If that intention is not self-evident from simply reading the text, then resort may be had to other plausible evidence. But resort must not be had to judicial notions of reasonableness, fairness or good policy unless all else seriously fails. Driedger's modern principle is inconsistent with this second textualist assumption as well. In so far as legislative intention is understood to include presumed intent, or alternatively, in so far as the entire context of a legislative provision is understood to include the common law tradition as part of the legal context, judicial notions of reasonableness, fairness and good policy are relevant factors in every interpretation endeavour. They are not to be dismissed as inferior considerations, relevant only when other factors fail to resolve the interpretation issue. Rather they are to be taken into account at the outset in the initial effort to determine the meaning of the text and whether it is ambiguous.

Another, related implication of the modern principle is that statutory interpretation involves *work* and outcomes require *justification*. Interpreters are not entitled to simply

11 For a discussion of relevant authorities, see R Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998–1999) 30 *Ottawa Law Review* 1–45.

12 For an analysis of these factors in the context of legislation, see F Bowers, *Linguistic Aspects of Legislative Expression*, 1989, University of British Columbia Press, Vancouver, pp 15–81.

read the text and declare that their personal linguistic intuition is what the legislature intended. Personal intuition must be tested against a range of considerations, which may or may not support the initial impression. The conclusion, often based on balancing competing considerations, must be justified by an account of the work the interpreter has done. The themes of work and justification are examined in more detail below.

Part 3 – Some shortcomings

Not every interpretation problem is about the meaning of legislative text

Driedger's modern principle offers a blueprint for determining the legal meaning of a legislative provision. But there is more to statutory interpretation than disputes about the meaning of the text. Sometimes the meaning is clear, but there is a gap in the legislative scheme and the question is whether the court can do anything about it. Sometimes there is overlap between a clear provision and the common law, and the issue is whether both apply. Many disputes are about the circumstances in which a court should update a statute or decline to apply a legislative rule even though its meaning appears to be clear. In short, determining the meaning of words in a legislative text is an important task of interpreters, a necessary first task, but it is only part of the work of interpretation.

Table 1 indicates the range of problems that arise in statutory interpretation and how they are addressed.

Table 1 – Statutory interpretation problems and approaches to their resolution

Type of problem	Type of argument to resolve problem
Ambiguous text	Disputed meaning
Evolving context	Static versus dynamic interpretation
Over-inclusive text	Non-application (This includes arguments about territorial and temporal application and immunities.)
Under-inclusive text	Incorrigible gap in legislative scheme, or fill by necessary implication, or supplement with common law rule or remedy
Contradictory or incoherent text	Corrigible mistake
Overlapping provisions	(No conflict): Overlap versus exhaustive code (Conflict): Paramountcy rule ¹³

In a **disputed meaning argument**, the interpreter claims that, properly interpreted, the provision in question has a particular preferred meaning. He or she must establish that

¹³ This account of the several types of argument available to interpreters, and the claims associated with each, is based on R Sullivan, "Statutory Interpretation in a Nutshell" (2003) 82 *Can Bar Rev* 51 at 64–65.

this interpretation is the ordinary meaning, an intended technical meaning, or at least a plausible meaning. If the legislation is bilingual, the interpreter must address both language versions.

For instance, in *Perrier Group of Canada Inc v Canada*,¹⁴ the court had to decide whether the carbonated water sold under the Perrier label was a “beverage” within the meaning of the *Excise Tax Act*. Perrier Group argued that “beverage” meant a manufactured drink, produced by mixing ingredients, and therefore excluded naturally carbonated water. The Minister of Revenue argued that “beverage” meant any liquid fit for human consumption and, therefore, included water. The court preferred the Minister’s understanding of the term.

In a **static versus dynamic interpretation argument**, the interpreter claims that the text should be interpreted as it would have been when the text was first enacted (static interpretation) or interpreted in light of current understanding of language and social conditions (dynamic interpretation).

For instance, in *Harvard College v Canada (Commissioner of Patents)*,¹⁵ the issue was whether the so-called oncomouse was an “invention” within the definition of the *Patent Act*, which included “any new and useful art, process, machine, manufacture or composition of matter”. Even though a genetically-altered mouse could be thought of as a “composition of matter”, the majority held that Parliament had not contemplated the patenting of higher life forms when it drafted the definition of “invention”. Such a “radical departure from the traditional patent regime” could not be effected through interpretation but required legislative intervention.

In a **non-application argument**, the interpreter identifies a reason not to apply a provision to the facts even though, given its ordinary meaning, it would otherwise apply. A provision may be “read down” in this way for any number of reasons: to promote legislative purpose; avoid absurdity; or comply with presumed intent, including, in particular, the presumptions against retroactive application and interference with vested rights.

For example, in *Re Vabalis*,¹⁶ a married woman applied to change her name from Vabalis to Vabals under Ontario’s *Change of Name Act* 1980. Section 4(1) of the Act provided as follows:

“A married person applying for a change of surname shall also apply for a change of the surnames of his or her spouse and all unmarried minor children of the husband or of the marriage.”

Since Ms Vabalis had not adopted her husband’s name when she married, applying this provision to her would have required her husband, whose surname was different, to

14 [1996] 1 FC 586 (CA).

15 [2004] 4 SCR 45.

16 (1983) 2 DLR (4th) 382 (Ont CA).

change his name to Vabals. The court held that this requirement was absurd and should be limited to married applicants who have the same surname as the spouse. In effect, the court narrowed the scope of the provision by reading in words of qualification:

“A married person applying for a change of surname *who has the same surname as his or her spouse* shall also apply for a change of the surname of the spouse.”

In an **incurable gap argument**, the interpreter claims that the legislation, as drafted, cannot apply to the facts even though, given its purpose, it probably should apply. Whether this omission is deliberate or inadvertent, the court has no jurisdiction to fill a gap in a legislative scheme or otherwise enlarge the scope of legislation.

Thus, in *Beattie v National Frontier Insurance Co*,¹⁷ an insured claimed no fault accident benefits under Ontario’s statutory scheme. Under the regulations, a claimant who was driving the vehicle at the time of the accident was ineligible for certain benefits if:

- the claimant knew the vehicle was uninsured;
- the claimant did not have a valid driver’s licence; or
- the claimant was operating the vehicle without the owner’s consent.

In addition, s 30(4) of the relevant Act provided that, if the claimant “was engaged in ... an act for which [he or she] is charged with a criminal offence”, the insurer was obliged to hold in trust any amounts payable under the scheme:

“until the charge is finally disposed of, at which time the amounts:

- (c) shall be returned to the insurer, if the [claimant] is found guilty of the offence ...; or
- (d) shall be paid to the [claimant], if ... not found guilty...”

Beattie was found guilty of impaired driving. He conceded that, under s 30(4)(c), the benefits paid into trust pending his conviction had to be returned to the insurer. However, he claimed post-conviction benefits on the grounds that there was nothing in the legislation that prevented him from receiving those benefits.

The court reluctantly agreed. Although it was clear that the law-maker had intended to deny benefits to a person in Beattie’s position, there was a gap in the legislative scheme. Section 30(4) dealt exclusively with benefits payable before disposition of the charge, but there was nothing in the Act or regulations denying a claimant access to benefits once he or she was convicted of an offence.

In a **necessary implication argument**, the interpreter claims that a person or body has the authority to do something that is not expressly mentioned in the legislation, but is necessary if the person or body is to carry out the functions that are expressly assigned.

In *Bell Canada v CRTC*,¹⁸ for example, the court held that the Canadian Radio-Television and Telecommunications Commission had the power to retroactively revise its interim orders even though such a power was not expressly conferred. The court noted that

17 (2003) 68 OR (3d) 60 (CA).

18 [1989] 1 SCR 1722.

the powers conferred on the Commission were given to ensure that telephone rates and tariffs are, at all times, just and reasonable. From this it followed that “the power to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.”¹⁹

In a **supplementation argument**, the interpreter concedes that the legislation as drafted does not apply but claims that the common law does apply so as to supplement the under-inclusive legislation. Supplementation arguments are generally successful when the court relies on its *parens patrie* jurisdiction or its inherent jurisdiction to control its own process.

For example, in *Beson v Director of Child Welfare for Newfoundland*,²⁰ the court acknowledged that, although the province’s *Adoption of Children Act* created various appeals to the Adoption Appeal Board, it did not provide for an appeal in the circumstances of the case. Wilson J wrote:

“If the Besons had indeed no right of appeal under the statute ... there is a gap in the legislative scheme which the Newfoundland courts could have filled by an exercise of their *parens patriae* jurisdiction.”

In a **corrigible mistake argument**, the interpreter claims that the provision in question contains a drafting mistake, which must be corrected before determining whether the provision applies to the facts. He or she must establish what the legislature clearly intended and what the text would have said had it been properly drafted. This problem arises quite often in interpreting bilingual legislation when the two versions say different things.

In *Morishita v Richmond (Township)*²¹ the court had to interpret a provision in a municipal by-law that referred to s 4 of the same by-law. Since the reference to s 4 was incoherent, while the reference to s 5 made good sense, the court concluded that the law-maker had intended to refer to s 5 and it interpreted the by-law accordingly.

In the absence of conflict, if two or more provisions apply to the same facts, each is to be applied as written. Although not articulated as such, the courts work with a **presumption of overlap**. Any law, whether common law or legislation, which could apply is presumed to apply in the absence of evidence to the contrary.

In an **exhaustive code argument**, the interpreter concedes that the overlap between legislative provisions or between legislation and the common law does not create a conflict, but claims that a particular Act or provision was meant to apply exhaustively, to the exclusion of other law, whether statutory or common law.

Thus, in *Gendron v Supply & Services Union of PSAC*,²² the issue was whether a union member could bring an action against the union for breaching the common law duty of

19 [1989] 1 SCR 1722 at 36.

20 [1982] 2 SCR 716.

21 (1990) 67 DLR (4th) (BCCA).

22 [1990] 1 SCR 1298.

fair representation. The court ruled that the duties owed by unions to union members were set out in the *Canada Labour Code* and, on this issue at least, the statute was meant to be an exhaustive code, displacing recourse to the common law.

In a **paramountcy argument**, the interpreter claims that there is a conflict between two provisions or between a provision and the common law, and that one takes precedence over the other on the basis of some principled reason; for example, legislation prevails over the common law or the specific prevails over the general.

In *Insurance Corporation of British Columbia v Heerspink*,²³ Heerspink challenged the statutory right of an insurance company to terminate an insurance contract upon giving 15 days notice without establishing any cause. British Columbia's *Human Rights Code* provided that persons could not be denied a "service ... customarily available to the public ... unless a reasonable cause exists for such denial ...". Reconciling this apparent conflict, Lamer J (as he then was) wrote (at 178):

"When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in the jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have, through their legislature, clearly indicated that they consider that law and the values it endeavours to buttress and protect are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises."

Obviously the types of argument surveyed above are not mutually exclusive. The problems that arise in applying legislation to a given set of facts can often be framed in more than one way. How a problem is framed can often affect the outcome of a case.

The role of context in statutory interpretation

Driedger's modern principle says that "the words of an Act are to be read in their entire context". Later in his book he explains what context consists of²⁴ but his explanation is usually ignored. This issue turns out to be important in the practice of statutory interpretation in Canada. Everyone agrees, following Driedger, that interpreters must not pronounce on the meaning of a legislative text until the ordinary meaning has been

23 [1982] 2 SCR145.

24 Driedger, op cit n 3, pp 107–108: "Context, then, can be classified as follows. There is Internal Context and External Context. Internal Context is everything contained within the four corners of the Act, and in turn may be divided into Literary Content and Non-Literary Context. The Literary Context consists of the Verbal Context, ie, the grammatical structure, and the Substantive Context, ie the law enacted by the Act. The Non-Literary Context includes what is contained within the Act, but is not part of the actual text of the law, as, for example, the long title, headings, preambles. External Context is the setting of the Act and will here be considered under the headings Social, Legal, Language and Intellectual Contexts." Driedger regards the legal context as a category of the External Context. He writes at p 158: "The general body of the law — statutes and judicial decisions — are included in external context. Law outside the statute under consideration may not be relevant; *but it may always be looked at* and if it is relevant it may have a bearing on the construction of the statute" (my emphasis). Interestingly, Driedger includes legislative evolution as part of the external context. By "legislative evolution" he means the successive versions of a legislative provision, including both re-enactment and amendment, from its initial enactment to the version in force when the relevant facts occurred.

tested against the entire context, and that interpreters must not pronounce the text to be plain or ambiguous until the examination of context is complete. On such an approach the definition of context is crucial. The narrower the definition, the more that is potentially excluded from consideration if, after taking into account the context, the meaning is said to be clear and the plain meaning rule is invoked.

Literary context

Most interpreters would agree that legislative provisions must be read:

- 1 in the context of the Act as a whole (or the regulations and Act together);
2. in the context of statutes *in pari material* (related or interacting legislation); and
3. in the context of “the statute book” (the entire body of legislation in force within a jurisdiction).²⁵

These contexts are both literary and legal. An Act is a distinct literary genre, like a sonnet or a play. Like poets and playwrights, legislative drafters are constrained by a number of conventions, which interpreters rely on in determining the intended meaning of the text. The first and most fundamental convention of legislative drafting is ordinary language use. Drafters choose their words and arrange them in sentences using the same lexicon and grammar, and relying on the same knowledge, as the public that is governed by the legislation. In legislation like the *Criminal Code*, this is the general public, the “average person” on the street.²⁶ In legislation aimed at a specialised audience — manufacturers of aircraft, for example — this is a limited segment of the public with specialised knowledge and a technical vocabulary. In either case, the idea is to use language that conforms to the standards of usage of competent speakers within the audience addressed.

This fundamental idea underlies a number of interpretation rules, including the ordinary meaning rule, the technical meaning rule and the plausible meaning rule:

- **Ordinary meaning rule:** the meaning that spontaneously comes to the mind of a competent reader upon reading the legislative text is *presumed* to be the meaning intended by Parliament. This meaning governs unless the evidence suggests some other meaning was intended.²⁷

25 Strictly speaking, the statute book includes enacted legislation that has not yet come into force.

26 In fact, of course, the average person or the general public is a convenient fiction. The audience to which legislation is addressed, particularly legislation like the *Criminal Code*, is diverse in terms of culture, gender, race, and the like. These differences undermine traditional assumptions about “common” meaning and “common” sense.

27 Notice the difference between the *presumption* in favour of ordinary meaning and the plain meaning *rule*. The former is rebuttable; the latter is not. The former can accommodate the reality that language is more or less clear, and that the degree of clarity can shift as the context is narrowed or enlarged; the latter forces the interpreter to declare a text to be clear or ambiguous in some arbitrarily chosen context. When the plain meaning rule was first articulated in the *Sussex Peerage Case*, the only permissible context was the “internal” context (the words of the Act, excluding titles, preambles and the like). In some applications of the plain meaning rule in Canada, to determine whether the meaning is clear the courts have looked at the provision to be interpreted in isolation from everything else. In other applications, the courts have looked at the Act as a whole, including scheme and purpose, but excluding legal context and presumed intent — all in the name of Driedger’s modern principle.

- **Technical meaning rule:** when legislation deals with a specialised subject and uses language that people governed by the legislation would understand in a specialised way, that specialised understanding is preferred over ordinary usage.
- **Plausible meaning rule:** if the ordinary meaning is rejected to give effect to the actual or presumed intentions of the legislature, the meaning adopted must be one the words are capable of bearing.

While drafters observe the conventions of ordinary language use, they also rely on conventions that reflect the special status and function of legislation. For example, they write in a formal and impersonal style and avoid figurative or decorative language. They choose language with unusual care and use it consistently, without stylistic variation. They say things in a straightforward fashion, using as few words as possible. They avoid repetition and redundancy. These conventions form the basis for the following presumptions relied on in analysing legislative text:

- **Straightforward expression:** The legislature chooses the clearest, simplest and most direct way of stating its meaning; it says what it means and means what it says.
- **Uniform expression:** The legislature uses the same words and techniques to express the same meaning, and different words and techniques to express different meanings.
- **No tautology (“the legislature does not legislate in vain”):** There are no superfluous words in legislation; every feature of the text has a meaningful role in the legislative scheme.
- **Internal coherence:** All the provisions of a legislative text fit together logically and work together coherently to achieve the purposes of the legislature.

These presumptions are in turn the basis of several standard interpretation rules, including:

- **Implied exclusion (expressio unius est exclusio alterius):** If something is not mentioned in circumstances where one would expect it to be mentioned, it is impliedly excluded.
- **Associated words (noscitur a sociis):** The meaning of a word is affected by the other words to which it is linked in a sentence
- **Limited class (ejusdem generis):** When general language follows a series of more specific terms, the class of things referred to by the general language may be read down to refer to a narrower class of things to which the specific terms all belong.
- **Counterfactual implication:** If the legislature had meant x, it would have said y, as it does elsewhere in the statute book. Since it did not say y, it must have meant something different.

Legal context

Driedger points out that the statute book is also a legal context. Insight into the policies and goals that legislation is designed to implement and into the means chosen to

achieve the desired outcomes can be derived from examining the Act, related statutes and the statute book.

Driedger does not discuss the other legal contexts in which legislation is drafted and operates, namely entrenched constitutional law, common law and international law. He prefers to treat these aspects of legal content as presumptions of legislative intent. There are many such presumptions relied on by Canadian courts:

- Strict construction of penal legislation.
- Strict construction of legislation that interferes with individual rights.
- Strict construction of exceptions to the general law.
- Liberal construction of human rights codes.
- Liberal construction of remedial legislation.
- Liberal construction of social welfare legislation.
- Liberal construction of legislation relating to Aboriginal peoples.
- Presumed compliance with constitutional law and Charter values.²⁸
- Presumed compliance with the rule of law.
- Presumed compliance with international law.
- Presumed continuation of common law.
- Presumed non-interference with common law rights.
- Presumption that the legislature does not intend to exacerbate female poverty.
- Presumption against the extra-territorial application of legislation.
- Presumption against the retroactive application of legislation.
- Presumption against the retrospective application of legislation.
- Presumption against interference with vested rights.
- Presumption against applying legislation to the Crown and its agents.

It is also presumed that the legislature does not intend its legislation to produce absurd consequences. The following are well recognised forms of absurdity that the legislature is presumed to avoid:

- Irrational distinctions (treating like things differently or different things the same).
- Irrational, contradictory or anomalous effects.
- Defeating the purpose of the legislation.
- Undermining the efficient application of legislation.
- Violating norms of justice or fairness.

One of the issues that the modern principle leaves unresolved is whether these presumptions of legislative intent are applicable in the absence of ambiguity. On a textualist approach, the answer clearly is no. The court must rely on legislative text alone to resolve an interpretation problem and, *only if that approach fails to resolve the problem* is it then permissible to look at presumptions of legislative intent. On a

²⁸ Charter values refers to the values embodied in the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Canadian Act 1982*, being Sch B to the *Canadian Act 1982* (UK), c 11.

pragmatic approach, the answer clearly is yes. On that approach, a court must look at *everything* that is relevant to resolve an interpretation problem, including external evidence of legislative intent and judge-made legal norms, even if the text seems clear. The approach adopted by Driedger hedges on this issue. He excludes judicial norms from the “entire context”, where one would expect them to figure prominently, but includes them under the rubric of “intention of Parliament”, where one would not expect to find them at all.

Unfortunately, Driedger’s eccentric handling of judicial norms has opened the door to the re-emergence of textualism. The judgment of the Supreme Court of Canada in the *Bell Express Vu* case is a good illustration.²⁹ As has become customary, the court began by reciting and endorsing Driedger’s modern principle. It then carried out both textual and purposive analyses taking into account the statute book as a whole and the consequences of competing interpretations. The court’s analysis is exemplary — in so far as it goes. But even though the court embraces the modern principle, its concept of “entire context” is curiously limited:³⁰

“[Driedger’s modern] approach recognises the important role that context must inevitably play when a court construes the written words of a statute...

Other principles of interpretation — such as the strict construction of penal statutes and the ‘Charter values’ presumption — only receive application where there is ambiguity as to the meaning of a provision...

What, then, in law is an ambiguity? To answer, an ambiguity must be ‘real’ ... The words of the provision must be ‘reasonably capable of more than one meaning’ (*Westminster Bank Ltd v Zang* [1966] AC 182 (H.L.) at p 222, *per* Lord Reid). By necessity, however, one must consider the ‘entire context’ of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J’s statement in *Canadian Oxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743 at [14], is apposite:

‘It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids’ (emphasis added), to which I would add, ‘including other principles of interpretation’...’.

It is clear from these passages that the court does not regard either the presumptions of legislative intent or traditional “extrinsic aids” as part of the “entire context” of a legislative provision. It offers no justification for these exclusions.

Later in *Bell Express Vu*, the court focuses on a presumption that is heavily relied on in Canadian interpretive practice; namely, presumed compliance with Charter values. The court says at [62]:

“Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial

29 *Bell Express Vu Ltd Partnership v Rex* [2002] 2 SCR 559.

30 *Bell Express Vu Ltd Partnership v Rex* [2002] 2 SCR 559 at [27]–[29].

proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that ‘it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not’ ... it must be stressed that, to the extent this court has recognised a ‘Charter values’ interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, that is, where a statutory provision is subject to differing, but equally plausible, interpretations.”

I certainly agree that it would be a mistake to rely on presumed compliance with the Charter to the exclusion of other considerations. Too often counsel rely on the presumptions of legislative intent in lieu of — instead of *in addition to* — the hard work of textual and purposive analysis. However, in my view, it is equally a mistake to exclude Charter values and other aspects of legal context from the “entire context” in which the meaning of a legislative text is determined. The legal norms embodied in the presumptions of legislative intent are certainly known to the lawyers who draft statutes, and they are explained to legislatures, particularly to members of the Legislative Committees that review proposed legislation during the enactment process. As for regulations, they are systematically reviewed for compliance with the presumptions of legislative intent under the *Statutory Instruments Act*. To this extent, they are justifiably treated under the heading “intention of the Parliament”.

More importantly, these aspects of legal context are inevitably and unavoidably part of what a legally trained interpreter relies on in inferring legislative intent. Once a person has operated within the legal tradition for a while, he or she internalises the assumptions on which the tradition is based and necessarily brings these assumptions to their reading of a legal text. To suggest that these aspects of context play no role in determining whether a text is plain or ambiguous — to suggest that they should be referenced only if a provision is first found to be ambiguous — strikes me as both unrealistic and counter-productive.

A better approach is illustrated by the majority judgment of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*.³¹ This case is important for a number of reasons. It clarifies the duty of procedural fairness owed by administrative decision-makers, including a duty in some circumstances to provide written reasons for decision; it clarifies the standard of review applicable to discretionary decisions; it confirms that in Canada the doctrine of legitimate expectations is confined to procedural rights; and it addresses the role of international law in the exercise of discretion. Writing for the majority, L’Heureux-Dubé J points out:

“... there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans ... :

‘The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where

31 [1999] 2 SCR 817.

it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.³²

... discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society and the principles of the Charter."³³

The points made here are important. Firstly, there is no sharp distinction to be made between plain and ambiguous text, nor between the interpretation of provisions and the exercise of powers granted by a provision. Rather, interpreters have more or less discretion, the limits of which are fixed by the language of the text, which is more or less clear, more or less precise and more or less complete. Secondly, legal text must be read in the context of the evolving legal tradition of which it forms part. This tradition includes the rule of law, administrative law values, Charter principles and (of increasing importance) international law.

One of the issues in *Baker* was the relevance of the Convention on the Rights of the Child, an international agreement ratified by Canada but not yet implemented. L'Heureux-Dubé wrote:

"Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interest of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute ... I agree ... that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R Sullivan, *Driedger on the Construction of Statutes* (3rd ed 1994), p 330:

'[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*'³⁴

While L'Heureux-Dubé J does not suggest that discretion *must* be exercised in accordance with international law, she rightly points out that because international law forms part of the operating context in which legislation is interpreted, it is appropriate for interpreters and decision makers to take it into account. International law is a legitimate, relevant and important source of legal norms, along with the entrenched Constitution and the common law. Such norms are relevant in helping to resolve every interpretation problem.

32 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [54].

33 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [56].

34 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [69]–[70] (emphasis added).

It is worth noticing why a court might resist including these aspects of legal context. It is because they do not emanate from the legislature, but rather from the Constitution as interpreted by the courts, from judge-made norms, and from international law. Since Parliament does not control these sources of law, the issue of legitimacy inevitably arises. In a democracy, the legislature is elected and its output expresses the will of the people, or at least a significant number of them. Judge-made law is created by an unelected elite, and international law is established through the actions of the executive branch (as well as foreign states). If a court thinks its only role is to give effect to the intention of the legislature, it is easy to see why these other considerations might be disregarded.

In my view, the intentionalist approach embodies an unduly limited conception of the role of the courts in statutory interpretation, one that ignores their duty to mediate between an abstract text (enacted in ignorance of how the future might unfold) and the facts of a particular case. Sometimes the legislature anticipates a particular fact situation and discusses it during the passage of the bill. In such cases, if interpretation rules allow, a court can review the discussion and apply the solution that the legislature intended. More often, however, the facts before the court have not been specifically contemplated by the legislature. In such cases, in my view, the court must effectively “complete” the legislative process by devising a solution that is appropriate: one that takes into account the text, evidence of legislative intent and the legal norms embodied in constitutional law, international law and common law.

External context

External context is generally taken to refer to the circumstances existing when the legislation to be interpreted was first conceived. Most often, it is examined within the framework of *Heydon’s Case*:³⁵ What was the mischief — the unacceptable state of affairs — that the legislature needed to correct? Since the coming into force of the Charter, Canadian courts have also begun to look at the context in which the legislation operates from time to time. They are interested in how the denial of fundamental rights and freedoms might affect the daily life of citizens. They are also interested in the so-called operational context: Who administers the legislation, the context in which it is administered, the remedies available, and the like.

In my view, the courts do well to examine contemporary as well as historical context. When legislation is enacted with an eye to regulating an activity for the indefinite future, an interpreter can fairly presume that the legislature intended its rules to be adapted to evolving circumstances, circumstances the legislature could not have predicted with any degree of certainty, in an appropriate way.

More subtly, as indicated above, the external context includes the content of each interpreter’s brain. This is a vast context, whose importance cannot be over-estimated. To the extent members of a community share this context, interpretation will be the same

35 (1584) 3 Co Rep 7a; 76 ER 637.

for them. But in so far as members of a community bring different assumptions, “scripts”, and values to the text, shared interpretation cannot be assumed and, consequently, “plain meaning” cannot be assumed. An interpreter may feel confident that he or she clearly understands the words of the text, and there is no ambiguity to be resolved; but the basis on which the interpreter prefers her understanding over competing understandings needs to be addressed. It is not self-evident that the linguistic intuitions of judges should trump the intuitions of other language users.

Harmonisation

In an ideal world, there would never be tension between the textual meaning of legislation, its purpose and scheme, and the context in which the legislation is applied. In fact, these indicators of legislative intent are often fairly clear and work together to point to a particular outcome. Such cases are easy and rarely find their way to tribunals or courts. It is the hard cases that give rise to litigation. They are cases in which the indicators of legislative intent are uncertain or, worse still, point in contradictory directions. For example, the meaning of the text may appear to be plain and support one outcome, but the apparent purpose of the text or its legislative history supports another. While most cases that come before tribunals and courts are hard, Driedger’s modern principle does not acknowledge this problem and offers no guidance on how to resolve it. My own view of how this problem should be resolved, set out below, is a version of “pragmatism”. My commitment to pragmatism is partly ideological, but there is no doubt that in practice, despite their ideological commitments, Canadian appellate courts follow a pragmatic approach.³⁶

In hard cases, when the factors identified by Driedger as relevant to statutory interpretation do not all point to a single answer, the tribunal or court is forced to weigh and choose. It must devise an outcome that, in its opinion, is appropriate in the circumstances. An appropriate outcome is one that can be justified in terms of:

- (a) Its linguistic plausibility: that is, its compliance with the legislative text.
- (b) Its efficacy: that is, its promotion of legislative intent.
- (c) Its acceptability: that is, its accordance with accepted legal norms.

If the legislative text seems clear — if its meaning appears to be “plain” — a court appropriately assigns significant weight to this apparent meaning. The clearer it is, the greater the weight it receives. The weight accorded to the text is also affected by factors such as the following:

- how the text is drafted and, in particular, how detailed it is — how concrete and precise the language is;

³⁶ I have argued elsewhere, and continue to believe, that the *practice* of Canadian courts is exemplary but the *rhetoric* employed by the courts — their explanation of how they resolve interpretation disputes — is not. For a detailed examination of this discrepancy, see R Sullivan, “Statutory Interpretation in the Supreme Court of Canada” (1998–1999) 30 *Ottawa Law Review* 175.

- the audience to which it is addressed — whether the public in general, a narrow and specialised section of the public or those charged with the administration of the legislation;
- the subject matter of the legislation; and
- the importance of certainty and predictability in the context.

If the text is precise and addressed to a specialised audience that would understand it in a certain way and reasonably rely on that understanding, then the apparent meaning of the text appropriately receives significant weight. If the consequences of rejecting that meaning would create serious and harmful uncertainty, it appropriately receives greater weight. For example, in penal and fiscal matters, for rule of law reasons, the courts place greater weight on the text.

Similarly, if the legislature's intention seems clear and relevant to the problem at hand, a court appropriately assigns it significant weight. How much weight depends on:

- where the evidence of legislative intent comes from and how cogent and compelling it is; and
- how directly the intention relates to the circumstances of the dispute to be resolved.

If the intention is set out in a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor receives greater weight.

Finally, courts are concerned by violations of rationality, coherence, fairness and other legal norms. The weight attaching to this factor depends on considerations such as:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law;
- the seriousness of the violation;
- the circumstances and possible reasons for the violation; and
- the weight of competing norms.

If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor receives significant weight. Conversely, if there are equally important norms that point in a different direction, this factor receives less weight.

Conclusion

There is no doubt that Elmer Driedger had a major and entirely positive impact on the drafting of legislation in Canada. Since his death, Australia has taken the lead in the reform of legislative drafting and Canadian drafters have followed Australian innovations in this area with great interest. Driedger's impact on statutory interpretation in Canada is, however, more difficult to assess. Through no fault of his own, his contribution has been largely reduced to his "modern principle," the obscurity of which has lent itself

to abuse. The modern principle has been used in Canada to justify every possible approach to interpretation and, more importantly, has been used as a substitute for real justification.

In my view, Canadian courts in practice adopt a pragmatic approach to interpretation, along the lines set out above. They may not acknowledge what they are doing, but the evidence of pragmatism is striking, even among the most doctrinaire of judges. The challenge for Canadian courts is to bring their rhetoric in line with their practice. Unfortunately, Driedger's modern principle does not rise to this challenge. I would urge Australian courts to avoid formulae like Driedger's and simply do their best to explain, fully and explicitly, the considerations that have led them to their preferred interpretative outcome, including not only textual considerations and evidence of legislative intent but also the existing rich legal context, which comprises the norms embodied in entrenched Constitutional law, common law and international law.

