Construction of Statutes

Second Edition

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BUTTERWORTHS
Toronto
1983

Construction of Statutes

Printed and bound in Canada by T. H. Best Printing Company Limited.

The Butterworth Group of Companies

Canada
Butterworth & Co. (Canada) Ltd., Toronto and Vancouver

United Kingdom
Butterworth & Co. (Publishers) Ltd., London

Australia
Butterworths Pty Ltd., Sydney, Melbourne, Brisbane, Adelaide and Perth

New Zealand
Butterworths of New Zealand Ltd., Wellington and Auckland

Singapore
Butterworth & Co. (Asia) Pte. Ltd., Singapore

South Africa
Butterworth Publishers (Pty) Ltd., Durban and Pretoria

United States
Butterworth Legal Publishers, Boston, Seattle and Austin
Mason Publishing Company, St. Paul
D&S Publishers, Clearwater

Canadian Cataloguing in Publication Data

Driedger, Elmer A., 1913-
Construction of statutes

(Canadian legal manual series)
"Table of cases" : p.
Bibliography: p.
Includes index.
ISBN 0-409-82803-3

1. Statutes - Canada. 2. Legislation - Canada.
3. Law - Canada - Interpretation and construction.
I. Title. II. Series.

KE265.D75 1983 349.71 C83-099119-0

CHAPTER 4

The Modern Principle of Construction

THE THREE "RULES"—MISCHIEF, LITERAL, GOLDEN

We see a fundamental difference between the statements in *Sussex Peerage* and *Grey v. Pearson* on the one hand and in *Heydon's Case* on the other.

The statements in *Sussex Peerage* and *Grey v. Pearson* are essentially principles of language applicable to all written instruments. Both these cases enunciate the same principle for ascertaining the expressed intention of the legislature, namely, that the words spoken by the legislature are to be read in their "grammatical and ordinary" or their "natural and ordinary" sense, and when so read they disclose the intention. To this must be added the qualification that if they reveal some disharmony in the words spoken by the legislature, then an unordinary grammatical structure or meaning of the words, but nevertheless a permissible one, may be adopted so as to produce harmony.

Heydon's Case deals, not with the meaning of words, but with the reason they were uttered. Not only the ideas expressed by words but also the reason why they were spoken bears on their meaning. Hence, *Heydon's Case* adds another factor to be taken into account in understanding the words of a statute, for there is always in every statute an underlying purpose, namely, to achieve an effective result.

We may now consider whether there are to-day three different rules or approaches: first, the rule in *Heydon's Case*, sometimes called the purpose approach; second, the so-called literal approach, for which *Sussex Peerage* is cited as authority; and third, the golden rule approach, by which is meant the subjective application of the qualification to the rule in *Grey v. Pearson.*

THE MISCHIEF RULE

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;[1]

[1] *Eyston v. Studd* (1574), 2 Plowd. 459, 75 E.R. 692; *Stradling v. Morgan* (1560), 1

> For everything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter and intent also.[2]

After reviewing a number of decisions from this period, Sedgwick says:[3]

> Here we find cases in numbers, and the numbers might easily be increased, where laws have been construed, not merely without regard to the language used by the legislator, but in defiance of his expressed will. Qualifications are inserted, exceptions are made, and omitted cases provided for, and the statute is in truth remolded, by the mere exercise of the judicial authority. It is in vain to seek for any principle by which these decisions can be supported, unless it be one which would place all legislation in the power of the judiciary. They are all condemned by the terse and expressive maxim, *divinatio est, non interpretatio, quae omino recedit a litera.*

The doctrine of equitable construction vanished at the end of the seventeenth century.[4] Beginning with the eighteenth century the judges refused to go beyond what Parliament had actually said, expressly or by necessary implication, and thus the literal doctrine, as enunciated in the *Sussex Peerage Case*, was born.

Nevertheless, *Heydon's Case* continues to be cited and applied to-day, and we have seen that it is still important and necessary to find the object of a statute.[5] But there is now a difference. At the time of *Heydon's Case*, the object was dominant, and judges freely changed the letter, by adding or subtracting, to fit the spirit. Today, the object of the Act is used to understand the letter; the words of the Act are read in the light of the object.[6]

THE LITERAL RULE

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 re-

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Plowd. 201, at p. 205a, quoted in *Cox v. Hakes* (1890), 15 A.C. 506, at p. 518. Corry, "The Interpretation of Statutes", Appendix I, *infra*, p. 256.

[2] *Stowell v. Lord Zouch* (1569), 1 Plowd. 353, 75 E.R. 536.

[3] Statutory Construction and Constitutional Law (2nd ed., 1874), p. 261.

[4] Corry, "The Interpretation of Statutes", Appendix I, *infra*, pp. 260-263; and see the remarks of Lord Shaw in *The Mostyn*, [1928], A.C. 57, at pp. 87-88; of Coleridge J. in *Gwynne v. Burnell* (1837), 7 Cl. & F. 572, at p. 607; and of Gale C.J.O. in *Reference re Certain Titles to Land in Ontario*, [1973] 2 O.R. 613, at pp. 624-626.

[5] *E.g., Re Xerox of Canada Ltd. and Regional Assessment Commissioner, Region 10* (1980), 115 D.L.R. (3d) 428, rev'd on other grounds (1981), 127 D.L.R. (3d) 511*n*; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] 1 All E.R. 810.

[6] *Fothergill v. Monarch Airlines*, [1981] A.C. 251, at p. 272.

fused 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"[7] or "if any doubt arises upon the words themselves".[8] Even in modern times judges have said that the object of the Act may be resorted to only where the language "presents a choice"[9] or "only where the meaning is not plain".[10] 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. This is what they meant by "literal construction".

It is clear that today, the words of the Act are always to be read in the light of the object of the Act. Thus, the two approaches, *Heydon's Case* and *Sussex Peerage*, have been combined into one. First, it was the spirit and not the letter, then the letter and not the spirit and now the spirit and the letter. "But we no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent," said Lord Denning, in *Engineering Industry Training Board v. Samuel Talbot (Engineers) Ltd.*[11] With this statement must be read the words of Lord Reid in *A.-G. for Northern Ireland v. Gallagher*[12] where he said:

> We can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge, but we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act.[13]

Today's doctrine is therefore still a doctrine of "literal" construction, but literal in total context and not, as formerly, literal in partial context only.

Except where a mistake is corrected or a meaning is given to senseless words, or where, in some cases, the two versions of a statute, English and French, must be reconciled, there is no such thing as a literal meaning as distinguished from some other meaning.

Thus, if the question is whether a word should be given its full unrestricted meaning or a restricted meaning, and the context dictates a restricted meaning, then the restricted meaning is the literal meaning.[14] If a sentence

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[7] *Sussex Peerage Case* (1844), 11 Cl. & F. 85, 8 E.R. 1034.

[8] *Warburton v. Loveland* (1832), 2 Dow. & Cl. 480, 5 E.R. 499.

[9] *Ellerman Lines v. Murray*, [1931] A.C. 126.

[10] *Worthington v. Robbins*, [1925] 2 D.L.R. 80; *Pardo v. Bingham* (1869), 4 Ch. App. 735, cited in *Acme Village v. Steele*, [1933] S.C.R. 47, at p. 50.

[11] [1969] 2 W.L.R. 464, at p. 466; and see *Nothman v. Barnet Council*, [1978] 1 W.L.R. 220.

[12] [1963] A.C. 349, at p. 366.

[13] See, *e.g.*, the approaches in *A.-G. v. Ernest Augustus (Prince) of Hanover*, [1957] A.C. 436 and in *Director of Public Prosecutions v. Schildkamp*, [1971] A.C. 1.

[14] *Supra*, p. 71.

is ambiguous, then there are two literal meanings, and the one chosen according to proper methods of construction is the literal meaning in the statute. If there is a conflict between two provisions and it is reconciled by giving a word a special meaning,[15] by adopting a permissible grammatical structure other than the perhaps more normal one,[16] by reading a special provision as an exception to a general provision, or by subtracting the subject-matter of one section out of another, then the meaning found is the literal meaning.[17] Where a conflict between two statutes is resolved by the application of the principle *leges posteriores priores contrarias abrogant*, or *generalia specialibus non derogant*, there is really not a modification of the grammatical and ordinary sense of the words of the statute; the grammatical and ordinary sense is the sense found after the conflict has been resolved.[18] These processes are not departures from the literal meaning; they are the steps taken to find the literal meaning.[19]

It is to be noted that in stating the qualification to his rule, Lord Wensleydale said that it was the *grammatical and ordinary sense* that might be modified—he did not say the *literal* sense.

Situations where there is an actual departure from the literal meaning are rather rare, but they do occur. Thus, in *Fleming v. Luxton*[20] the court read 10 as meaning 40; and in *R. v. Wilcock*[21] the court read "thirteen" George III as meaning "seventeen" George III. And there can also be said to be a departure from the "literal" meaning where words are ignored or changed or errors are corrected.[22] If a section is so garbled as to convey no meaning at all, then in giving it a meaning there is a departure, not from a literal "meaning", but from the words of the statute.[23] And if there is conflict between the English and French versions of a statute of the Parliament of Canada, the courts have departed from the "literal" meaning of one version, or even both, to give effect to the intention of Parliament as found by a reading of the two versions.[24]

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15 *Supra*, pp. 66-67.

16 *Supra*, pp. 67-69

17 *Supra*, pp. 70-71; *infra*, p. 226 *ff.*

18 *Infra*, p. 226 *ff.*

19 For a fuller discussion see E.A. Driedger, "Statutes: The Mischievous Literal Golden Rule" (1981), 51 Can. Bar Rev. 780.

20 (1968), 63 W.W.R. 522.

21 (1845), 7 Q.B. 317

22 *Reference re Alberta Bills*, [1938] S.C.R. 100; *Re Sally Tavens* (1942), 24 C.B.R. 44 and the cases there cited; *Sale v. Wills; Boisvert v. Wills; Armitage v. Wills*, [1972] 1 W.W.R. 138; *Wynn v. Skegness Urban District Council*, [1967] 1 W.L.R. 52; *R. v. McLaughlin* (1855), 8 N.B.R. 159; *Morris v. Structural Steel Co. Ltd.*, [1917] 2 W.W.R. 749; *Re Seizures Act* (1955), 16 W.W.R. 283; *R. v. Donald B. Allen Ltd.* (1975), 11 O.R. (2d) 271.

23 *Salmon v. Duncombe* (1886), 11 A.C. 627; *R. v. Vasey and Lally*, [1905] 2 K.B. 748.

24 See Chapter 9, *infra*.

THE GOLDEN RULE

The golden rule qualification does not permit a departure from the literal meaning in order to escape the consequences of the application of the statute that are considered to be absurd or unjust by subjective standards. Some judges in the late nineteenth century apparently sought to use Lord Wensleydale's words in *Grey v. Pearson* to overcome what they considered to be unbelievable results of the plain meaning of the words of the statute, as, for example, Lord Blackburn's oft-quoted statement in *River Wear Commissioners v. Adamson*[25] that

> we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience *so great as to convince the Court that the intention could not have been to use them in their ordinary signification*, and to justify the Court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear. [Italics mine.][26]

The test laid down by Lord Blackburn may well be construed as a subjective one, but, as we have seen, it has been rejected as such. Although this passage and *Grey v. Pearson* are frequently cited today, it is submitted that the test of absurdity has remained objective. The characteristics that justify a departure from the grammatical and ordinary sense, whatever they may be called, must now be in relation to what Parliament has said, and can be expressed by the word *disharmony*; that is to say, disharmony between provisions of the statute under consideration, between them and the intention, object or scheme of the Act, between provisions in two or more statutes or within the general law; they must lie within the words of the law and not in the consequences of their application. That this is now the view of modern judges is illustrated by *R. v. Mojelski*,[27] a prosecution under the Liquor Act, where the trial judge construed the word "conveyance" as meaning "public conveyance" because he felt that the unrestricted meaning would lead to an absurdity. On appeal Culliton C.J. disagreed, saying:

> In the section as enacted there is no ambiguity, no uncertainty, no conflict with any other section of the Act, nor is there repugnance to the general purview of the Act. Under these circumstances, in restricting the meaning

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[25] (1877), 2 A.C. 743, at pp. 764-765.

[26] Lord Blackburn merely repeated what he said in *Allgood v. Blake* (1873), L.R. 8 Ex. 160, a wills case, substituting "statute" for "will". It is one thing to fill in a gap for a deceased testator or correct what he said in order to settle an estate; it is another matter to "correct" Parliament.

[27] (1968), 65 W.W.R. 565, at p. 570, rev'g (1967), 60 W.W.R. 355; reaffirmed by Culliton C.J. in *R. v. Boylan*, [1979] 3 W.W.R. 435.

> of the word "conveyance" to "public conveyance" the learned judge was re-writing the section to comply with what he thought to be more reasonable.

To the same effect are the words of Lord Reid in *Westminster Bank Ltd. v. Zang*[28] where he said:

> But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous—if they are reasonably capable of more than one meaning—or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question. But beyond that we cannot go.

If the meaning is clear, the consequences of the application of the words to specific facts are immaterial. Yet, in reading a statute one cannot help thinking about the practical application of the statute. Thus in *Escoigne Properties Ltd. v. Inland Revenue Commissioners*[29] Lord Denning said that in understanding a statute he considered specific instances. And in considering consequences a judge may well be "startled". But mere disbelief that Parliament meant what it said is no justification for straining or mutilating the language of the statute in order to escape the plain meaning.[30] It is submitted that the proper role of the judge at this stage, if he finds the words "unbelievable", is to take another look and see if the legislature actually said what it appears to have said.[31] 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.[32] In these circumstances consequences may legitimately be regarded in making a choice between two reasonable alternatives;[33] but it is not legitimate to use consequences as an excuse to place an unreasonable construction on words that can have only one reasonable grammatical construction.

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[28] [1965] A.C. 182, at p. 222; also in *Fleming v. Associated Newspapers Ltd.*, [1971] 2 All E.R. 1526, at p. 1531.

[29] [1958] 1 All E.R. 406, at p. 414.

[30] See, *e.g.*, *Duport Steels Ltd. v. Sirs*, [1980] 1 All E.R. 529.

[31] *E.g.*, *Hartnell v. Minister of Housing and Local Government*, [1965] A.C. 1134, at p. 1157.

[32] This statement was approved by Culliton C.J. in *R. v. Boylan*, [1979] 3 W.W.R. 435, at p. 441; see also *Richards v. McBride* (1881), 8 Q.B.D. 119; *Fry v. Inland Revenue Commissioners*, [1959] 1 Ch. 86.

[33] It is always proper to construe ambiguous words in light of the reasonableness of the consequences. *Per* Lord Reid in *Gartside v. Inland Revenue Commissioners*, [1968] A.C. 553, at p. 612; *Fry v. Inland Revenue Commissioners*, [1959] 1 Ch. 86 *per* Romer L.J., at p. 105.

THE MODERN PRINCIPLE

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. This principle is expressed repeatedly by modern judges, as, for example, Lord Reid in *Westminster Bank Ltd. v. Zang*,[34] and Culliton C.J. in *R. v. Mojelski.*[35] Earlier expressions, though in different form, are to the same effect; Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island*[36] put it this way:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

The remaining chapters of this work seek to explain how an Act is to be so read and how problems that may be encountered on the way are to be solved.

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[34] [1965] A.C. 182, at p. 222.

[35] (1968), 65 W.W.R. 565, at p. 570, *supra*, pp. 85-86. See also *Cash v. George Dundas Realty Ltd.*, (1973), 1 O.R. (2d) 241.

[36] [1921] A.C. 384, at p. 387; and see also *Nothman v. Barnet Council*, [1978] 1 W.L.R. 220.