

TAX LAW FOR LAWYERS

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STATUTORY INTERPRETATION

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Outline

- 1) Language and interpretation in general
- 2) Recent statements of the Supreme Court of Canada about statutory interpretation

LANGUAGE AND INTERPRETATION IN GENERAL

English is Bizarre

- English is the dominant language of international business, tax, and tax treaties
- English is easier to learn than many other languages
- but English is bizarre

Examples

- the meaningless “do”
- “I am listening” or “I listen”
- “I am knowing” or “I know”
- “When do you listen to music?”
“I am listening to music from 8-9 p.m.”
or
“I listen to music from 8-9 p.m.”

Examples

- hedged positives (not unreasonable, not insignificant, not inconsistent)
- “boys will be boys”; “enough is enough”
- a blonde; a woman with blonde hair
- cut off the end of a ribbon; swim underwater
- mass nouns (“hair”, “gravel”)
- count nouns (“hairs”, “pebbles”)
- digital camera; digital cameras

Interpretation in General

- words are arbitrary associations between sound and meaning
- language allows words to be combined in different patterns infinitely
- language is wonderfully complex and flexible

The Meaning of Language

- the meaning of language is generally indeterminate
- words do not have a single, true, objective meaning
- all language requires interpretation

Ambiguity and Vagueness

- ambiguity and vagueness are the primary sources of the indeterminacy of language
- problems of ambiguity and vagueness are resolved by reference to context
- context means all relevant information, including purpose
- meaning of words is often clear – not absolutely, but in a particular context
- reference to plain meaning cannot resolve disputes about meaning

Ambiguity

Types of ambiguity:

- words with multiple meanings
 - “sanction,” oversight,” “execute”
- syntactical ambiguity
 - “I saw a man and a woman with a baby”
- situational ambiguity

Ambiguity

Supreme Court of Canada:

“I realize . . . agile legal minds could probably find an ambiguity in as simple a request as “close the door please ...”

- Is the meaning clear and plain, or ambiguous?
- What is a door?

Ambiguity

- “Wednesday’s meeting has been moved forward two days.”
- Has the meeting been moved to Monday or Friday?

Vagueness

- involves problem of classification
- application of words to particular situations

“No vehicles allowed in public parks.”

Vehicle (OED) — A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge etc.

Success of Ordinary Communication

- communication through language is usually effortlessly successful
 - not because words have plain meaning
 - because of shared cultural background, general knowledge, instinctive language skills, and assumed goodwill between speaker and listener

Woman: I'm leaving you.

Man: Who is he?

Success of Ordinary Communication

- no general rules for interpretation that we learned or were taught as children
- language is governed by rules, and we learn these rules without being taught
- we understand that language is purposive and context-dependent

Examples

- Load the wagon with hay.
- Load hay into the wagon.
- Fill the wagon with hay.
- Fill hay into the wagon.
- Pour milk into the glass.
- Pour the glass with milk.

Examples

- Klaus threw the ball to him.
- Klaus threw him the ball.
- Klaus lifted the box to him.
- Klaus lifted him the box.

Summary

- 1) language is incredibly flexible and complex
- 2) interpretation is always necessary
- 3) interpretation occurs naturally without any rules
- 4) interpretation of statutes is not different from interpretation of language in general
- 5) interpretation cannot be reduced to meaningful rules

In re Castiolini
[1891] QB 149

Stephen J.:

“ . . . it is not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you possibly can, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”

Difficult Definitions

- s. 123(1), Excise Tax Act:
 - “single unit residential complex means a residential complex that does not contain more than one residential unit but does not include a residential condominium unit”
 - applies for purposes of s. 121, this Part, and Schedules V to X

Difficult Definitions

- s. 256(1), Excise Tax Act:
 - “single unit residential complex includes (a) a multiple unit residential complex that does not contain more than two residential units”
 - applies for purposes of s. 256

Difficult Definitions

- “aircraft” means a machine or apparatus that can derive support in the atmosphere from the reactions of the air or from buoyancy but does not include an air cushion vehicle
- “ship” includes an air cushion vehicle

RECENT STATEMENTS OF THE SUPREME COURT OF CANADA ABOUT STATUTORY INTERPRETATION

The Modern Rule

“To-day there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”

- adopted in *Stuart Investments* case (1984)

Antosko v. Canada
[1994] 2 CTC 25 (FCA)

“This principle is determinative of the present dispute. While it is true that the courts must view discrete sections of the Income Tax Act in light of the other provisions of the Act and the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed.”

Friesen v. The Queen
[1995] SCJ No. 71

“The principle that the plain meaning of the relevant sections is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*.”

Friesen v. The Queen
[1995] SCJ No. 71

“ . . . The clear language of the Income Tax Act takes precedence over a court’s view of the object and purpose of a provision.

. . . .

Therefore, the object and purpose of a provision need only be resorted to when the statutory language admits of some doubt or ambiguity.”

Friesen v. The Queen [1995] SCJ No. 71

“It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court’s view of the object and purpose of the provision. ... [The *Antosko* case] is simply a recognition that ‘object and purpose’ can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.”

- quoting P. Hogg, *Notes on Income Tax* (3rd ed. 1994)

Friesen v. The Queen
[1995] SCJ No. 71

“In interpreting sections of the Income Tax Act, the correct approach, as set out by Estey J. in *Stuart Investments Ltd. v. The Queen*, [1984] 1 SCR 536, is to apply the plain meaning rule.”

Stubart Investments Ltd. v. The Queen —
84 DTC 6305 (SCC)

“ . . . Gradually, the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable.”

Corp. Notre-dame De Bon-secours —
[1995] 1 CTC 241 (SCC)

“The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision.”

The Teleological Approach

- The interpretation of tax legislation should follow the ordinary rules of interpretation;

The Teleological Approach

- A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

The Teleological Approach

- The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

The Teleological Approach

- Substance should be given precedence over form to the extent that is consistent with the wording and objective of the statute;
- Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

Piggott Project v. Land-Rock Resources — [1996] 1 CTC 395 (SCC)

Cory J.:— “. . . Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. . . agile legal minds could probably find an ambiguity in as simple a request as “close the door please” . . . Even if the ambiguity were not apparent . . . in order to determine the clear and plain meaning of the statute it is always appropriate to consider the ‘scheme of the Act, the object of the Act, and the intention of Parliament.’”

65305 British Columbia Ltd. v. The Queen
— [1999] 3 SCR 804 (SCC)

Iacobucci J.:

“This Court has on many occasions endorsed Driedger’s statement of the modern principle of statutory construction: ‘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 rule is no different for tax statutes.”

65305 British Columbia Ltd. v. The Queen
— [1999] 3 SCR 804 (SCC)

Iacobucci J.:

“However, this Court has also often been cautious utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language.” [citing *Antosko*]

65305 British Columbia Ltd. v. The Queen
— [1999] 3 SCR 804 (SCC)

Iacobucci J.:

“In discussing this case [*Antosko*], Hogg and Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that ‘[I]t would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court’s view of the object and purpose of the provision.’ . . .”

65305 British Columbia Ltd. v. The Queen
— [1999] 3 SCR 804 (SCC)

Iacobucci J.:

“ . . . This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex, and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.”

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Major J.:

“Referring to the broader context of private commercial law in ascertaining the meaning to be ascribed to language used in the Act is also consistent with the modern purposive principle of statutory interpretation”

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

“This Court has frequently endorsed the ‘plain meaning’ rule of interpretation. . . . This is not to say that the ‘plain meaning’ is to be applied by a court oblivious to the context.”

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

“The emphasis on purposive interpretation in *Bon-Secours* is occasionally portrayed as somewhat out of step with the modern plain meaning rule (see B.J. Arnold), but I don’t think this observation is correct.”

Will-Kare Paving v. The Queen [2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

“The Court held that where, after going through the *Stuart* analysis, a court concludes that the words themselves do not disclose a ‘plain meaning,’ other interpretive tools must necessarily gain in influence, including the context of the statute, its objective and the legislative intent.”

Will-Kare Paving v. The Queen [2001] 1
SCR 915 (SCC)

Binnie J. (dissenting):

“The primary rule of statutory interpretation is to ascertain the intention of Parliament. Where the meaning of the words used is plain and no ambiguity arises from context, then the words offer the best indicator of Parliament’s intent . . .

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

. . . No doubt the statement that words have a ‘plain meaning’ is itself a conclusion based on a contextual analysis. However, once the tools of interpretation have been deployed and the issue considered from the different perspectives identified by Professor Driedger, if the result of that exercise is the conclusion that the meaning of the words used by Parliament is plain, then effect must be given to them.”

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

“The strength of the ‘plain meaning’ rule is its recognition that it is the words of the provision themselves that constitute the vehicle used by Parliament to convey its intention to the people who are trying to assess their rights and tax liabilities under the Act. . . .

Will-Kare Paving v. The Queen
[2001] 1 SCR 915 (SCC)

Binnie J. (dissenting):

“ . . . Whatever might have been said about the original ‘plain meaning’ rule, I do not think that the modern plain meaning rule spelled out in *Stuart Investments* is fairly subject to these criticisms.”

Singleton v. The Queen [2001] SCC 61

LeBel J. (dissenting):

“The words-in-total-context approach steers a middle course between the pure teleological method . . . in *Corp. Notre-Dame de Bon-Secours* and Major J.’s focus on the ‘plain meaning’ of the statute in *Friesen* . . . The words-in-total-context approach ensures that clear statutory language is not overlooked in order to carry out a broad statutory purpose more effectively.”

Singleton v. The Queen [2001] SCC 61

LeBel J. (dissenting):

“Cory J.’s understanding of the ‘plain meaning’ approach in *Alberta (Treasury Branches)* is peculiar but telling. By turning to the total context of the statute in order to determine the ‘plain meaning’ of statutory language, he shows that the meaning of statutory language is at times clear only in a particular context.

Singleton v. The Queen [2001] SCC 61

LeBel J. (dissenting):

“It is a basic axiom of all textual interpretation that meaning is context-dependent. Some statutory language might appear to be obvious in its meaning independent of context. This is not, however, because context plays no part in interpreting the words used. Rather, it is simply because the context is so predictable that we need not pay it any special attention. Nevertheless, it plays a central role in our understanding of the words used.”

Singleton v. The Queen [2001] SCC 61

LeBel J. (dissenting):

“If the ‘plain meaning’ approach is to make any sense at all, surely it cannot mean that we are always to ignore context when interpreting statutory language. Rather, it must be understood to say that although context is always important, sweeping considerations of general statutory purpose cannot outweigh the specific statutory language chosen by Parliament. It is an acknowledgement that Parliament’s purposes can be complex.”

Singleton v. The Queen [2001] SCC 61

LeBel J. (dissenting):

“Rather than finding a single purpose for the Act as a whole and using it to interpret the clear language of specific provisions, we should use such broad purposes only as a context to help elucidate the meaning of the specific statutory language. Understood in this way, it is not inconsistent with the basic thrust of the words-in-total-context approach.”

The Queen v. Canada Trustco (SCC)

“As a result of the *Duke of Westminster* principle ... Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way.”

The Queen v. Canada Trustco (SCC)

“However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.”

The Queen v. Canada Trustco (SCC)

“The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently.”

The Queen v. Canada Trustco (SCC)

- does TCP approach apply generally or only under GAAR?
- according to the Supreme Court, the effect of the GAAR is that “the literal application of provisions of the Act may be seen as abusive in light of their context and purpose” (paragraph 1)

The Queen v. Canada Trustco (SCC)

- the GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act (paragraph 16)

The Queen v. Canada Trustco (SCC)

“The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities.”

The Queen v. Canada Trustco (SCC)

“ ‘After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language.’ See P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.”

Mathew v. The Queen (SCC)

“There is an abiding principle of interpretation: to determine the intention of the legislator by considering the text, context and purpose of the provisions at issue. This applies to the *Income Tax Act* and the GAAR as much as to any other legislation.”

Mathew v. The Queen (SCC)

“We add this. While it is useful to consider the three elements of statutory interpretation separately to ensure each has received its due, they inevitably intertwine. For example, statutory context involves consideration of the purposes and policy of the provisions examined. And while factors indicating legislative purpose are usefully examined individually, legislative purpose is at the same time the ultimate issue – what the legislator intended.”

Mathew v. The Queen (SCC)

“The basic rules of statutory interpretation require that the larger legislative context be considered in determining the meaning of statutory provisions. This is confirmed by s. 245(4), which requires that the question of abusive tax avoidance be determined having regard to the provisions of the Act, read as a whole.”

Placer Dome v. Ontario (Minister of Finance) (SCC)

LeBel J.:

- endorses modern rule
- because tax provisions are precise and detailed, “greater emphasis has often been placed on textual interpretation”
- “Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process”

Placer Dome v. Ontario (Minister of Finance) (SCC)

LeBel J.:

“[w]here the words give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role . . . in order to resolve explicit and latent ambiguities in taxation legislation, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.”

Placer Dome v. Ontario (Minister of Finance) (SCC)

LeBel J.:

“The interpretive process is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. A reference to the purpose of the provision ‘cannot be used to create an unexpressed exception to clear language’” [quoting Hogg, Magee and Li]

The Queen v. Imperial Oil Limited [2006] SCC 46 (SCC)

LeBel J.:

“Despite this endorsement of the modern approach, the particular nature of tax statutes and the peculiarities of their often complex structures explain a continuing emphasis on the need to carefully consider the actual words of the ITA, so that taxpayers can safely rely on them when conducting business and arranging their tax affairs. Broad considerations of statutory purpose should not be allowed to displace the specific language used by Parliament.”

The Queen v. Imperial Oil Limited [2006] SCC 46 (SCC)

LeBel J.:

“This Court recently reasserted the key principles governing the interpretation of tax statutes” [referring to *Canada Trustco* and *Mathew*] . . . On the one hand, the Court acknowledged the continuing relevance of a textual interpretation of such statutes. On the other hand, it emphasized the importance of reading their provisions in context, that is, within the overall scheme of the legislation, as required by the modern approach.”

Lipson v. The Queen
[2009] 1 CTC 314 (SCC)

- SCC confirms unified textual, contextual and purposive approach
- “This approach is, of course, not unique to the GAAR”
- “. . . necessary to determine the intention of the legislator by considering the text, context and purpose of the provisions at issue”

Summary

- Supreme Court's approach to statutory interpretation is incoherent
- Supreme Court likes labels
- plain meaning rule is wrong
- use Supreme Court statements as rhetorical devices, not as keys to unlocking meaning