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Book Review: Construction of Statutes, Second Edition, by E. A. Driedger

Graham Parker
Osgoode Hall Law School of York University

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Construction of Statutes. Second Edition. By E.A. DRIEDGER. Toronto: Butterworths. 1983. Pp. xvi, 385. (\$60.00). *Statute Law.* By Francis Bennion. London: Oyez. 1983. Pp. xxii, 276. (£10.00)

The dichotomous state of the literature on statutory interpretation provides an accurate assessment of the health of that branch of legal learning. Those who claim to have the potions to nurse the legislative patient back to health do not seem to have a very clear idea of the disease. The other side claims to understand the disease but they offer no remedies. On the

⁷ P. 275.

* W.R. Lederman, Q.C., of the Faculty of Law, Queens University, Kingston, Ontario.

one hand, we have the text books used by practitioners and courts; Maxwell¹ is the most comprehensive but it is a mass of contradictions and, as is the case with a book of proverbs, any user can find some maxim or Latin tag to suit his or her purpose. On the other hand, there is a very large periodical literature; every student of the law seems convinced that he or she has the definitive word on the subject. The text book approach is an application of black letter law in the system of case precedent. The writers of learned articles are talking about jurisprudence or judicial process. The two groups do not seem to communicate.

Driedger certainly falls into the black letter text book class. The author is very respected both in this country and overseas. A reading of his useful book does not reward us with a sense of purpose or the presence of a cohesive philosophy of statutory interpretation. The book is a useful source for "proverbs" of statutory interpretation and although Driedger attempts more than that, he fails to convince. When compared with Dickerson,² Driedger's book seems rather lacking in cohesion in the sense that there is little attempt to tackle the problem of a systematic interpretation. I mean no disrespect to Driedger who has laboured for years as the solitary prophet of statute law (at least since Read, Willis and Corry Canadians have paid less attention to the subject).³ I also know that in teaching statutory interpretation, it is very seductive to spend most of the classroom time on interesting cases and on the maxims because by those means the teacher and students can play lawyers' games with words, fine distinctions and nit-picking. I think Dickerson has moved from there and has started to ask questions about the meaning of meaning and about the paucity of lawyers' knowledge about Language, their stock-in-trade. Bennion also points out that case law precedent is an inductive process while the "processing" of statutes is a deductive one. Of course, it is impossible to avoid discussions about the difference between "may" or "shall", "means" and "includes", and "and" and "or", but we must move on from there. Driedger (and Bennion) both point out the three basic "rules"—Literal, Golden and Mischief—are no longer viable and we are now merely looking at the intention of the legislator. This is not very useful if all that is achieved is an attempt to reconcile case law because reconciliation of case law is irrelevant.

What are the courts or the lawyers doing when they are faced with a problem of interpretation? Of course, part of the problem is that eighty or ninety *per cent* of lawyers or judges in this country have never studied statutory interpretation in a formal way. When they switch from the

¹ P.B. Maxwell, *The Interpretation of Statutes* (12th ed., 1969).

² F.R. Dickerson, *The Interpretation of and Application of Statutes* (1975).

³ John Willis, *Statute Interpretation In a Nutshell* (1938), 16 *Can. Bar Rev.* 1; J.A. Corry, *Administrative Law and the Interpretation of Statutes* (1935), 1 *Univ. of Tor. L.J.* 286; H.E. Read, J.W. MacDonald, *Cases and Other Materials on Legislation* (1948).

familiar law reports and have to read statutory language, their eyes glaze over in rather the same way that an avid reader of prose has great difficulty switching to poetry.

In the past decade or so, there has been a change in judicial style. This may have been caused by an improvement in judicial appointments, more adept or ardent advocacy, increase in legal aid or improvements in legal education. One sees less of the scissors-and-paste style of judgment. The courts are less slavish in their exaggerated respect for the House of Lords. They are more willing to quote the documents of the law reform commissions and the learned works of living authors, including Canadian authors. The judges are more open in their discussion of policy. While these changes may have resulted in an enriched Canadian legal culture, it does not appear to have affected many cases of statutory interpretation. The most obvious example is the judicial approach to the Literal Rule. This alleged rule of interpretation is meaningless *in vacuo*. If a section or a phrase in a statute is in dispute, it should be obvious that the literal or ordinary meaning does not exist in the minds of the parties for the simple reason they are now arguing over the meaning of the same words. Of course the words cannot be read in a vacuum. They must be read in the context whether that means one applies *ejusdem generis*, or *noscitur a sociis*, the mischief rule or examines legislative history. Any of these approaches would be an improvement on a mindless resort to some dictionary, whether non-descript or authoritative.

What do our two authors say about the Literal Rule? In his first edition in 1974, Driedger had said that there was now only one approach: "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".⁴ Bennion is not very impressed; he described that statement from Driedger as saying everything and saying nothing.⁵ In the new edition, Driedger says "[t]oday's doctrine is therefore still a doctrine of "literal" construction but literal in total context and not, as formerly, literal in partial context only".⁶ This is not really very helpful.

Does Bennion offer us anything better? He suggests that we must develop new methods of interpretation and suggests a Processing Act which would include the following provisions:⁷

- 5.(2) the intention is primarily to be derived from the legislative text itself (including any source referred to in the text).
- (3) the court may refer to any other source in addition if it thinks fit to do so having regard to the requirements of justice, including —

⁴ E.A. Driedger, *Construction of Statutes* (1st ed., 1974), p. 67.

⁵ Bennion, p. 94.

⁶ Driedger (2nd ed., 1983), p. 87.

⁷ Bennion, p. 305.

- (a) the desirability of persons being able to rely on the meaning conveyed by the text itself, and
- (b) the need to avoid prolonging legal proceedings without compensating advantage.
- (4) The court shall have regard, so far as may be relevant, to the procedures by which, in accordance with constitutional practice, the text may be taken to have been created and validated as law.

Bennion argues quite rightly that the judges do make the law. It is simply a legal fiction to think otherwise but he is suggesting that we should try to regularise this process. I do not gain much solace from Bennion's model Processing Act. Driedger does not pay much attention to this question. Dickerson is emphatic in saying that he wants judges to solve interpretative problems by cognition before they resort to creation. Dickerson does pay some attention to the problems of language and communication and I find that lacking in Driedger and, to a large extent, in Bennion despite his elaborate process of "processing".

At the very least we should be able to develop some fairly straightforward rules about the use and meaning of such words as "shall" and "may", "and" and "or", etc. Would it be very difficult to formulate a protocol for the use (or prohibition) of dictionaries, law or otherwise? Is it beyond our ken to draft rules for the proper and improper use of judicial notice, previous versions of statutory language, Hansard and royal commission reports? In other words, we should fight problems of statute law with statute law. Bennion makes some tentative steps in that direction. He is aiming at some kind of synthesis. While Driedger gives us much valuable information, his book lacks this vision.

GRAHAM PARKER*

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*Graham Parker, of Osgoode Hall Law School, York University, Downsview, Ontario

¹ (1969).