SESSION #2
Statutory Interpretation 101

Moderator: Voy Stelmaszynski, Ontario Labour Relations Board
Speaker: Professor Randal Graham, Faculty of Law – University of Western Ontario

What is statutory interpretation? What are we doing when we are interpreting a statute?

A case from the Supreme Court of Canada (the "SCC") that articulates the overall goal when we are interacting with legislation is *Perka v. The Queen*.

Perka v. The Queen, [1984] 2 S.C.R. 232

Facts of the Case

Mr. Perka and his friend were travelling from South America to Alaska by ship. While they were on that ship, they ran into some bad weather. The ship crashed and landed in BC. They did not intend to come to rest in BC; they only did so to save their lives. The problem is that there was marijuana on the ship. Mr. Perka was charged with importing marijuana into Canada.

Issues

There were two defences raised in this case, but the defence of importance for the purpose of our discussion is the botanical defence. (The other defence raised in this case was duress.) The legislation in question is the *Narcotic Control Act*, S.C. 1996, c. 19, making importation of Cannabis to Canada illegal. The question then is: what is Cannabis? According to the advice that Parliament sought from botanists in the late 1960s, if Parliament intended to prohibit all Cannabis, Cannabis means *Cannabis sativa* L. This became the definition of Cannabis in the *Narcotic Control Act*.

Perka was arrested and charged in the 1980s. By that time, botanists had changed their collective mind about the way they defined the Cannabis plant. By the end of the 1980s, there were three accepted categories of Cannabis plants: *Cannabis sativa* L, *Cannabis indica* Lam and *Cannabis ruderalis* Jan.

Just because the meaning of *Cannabis sativa* L has changed over time, does it mean that has the meaning in the *Narcotic Control Act* changed? Should the term "*Cannabis sativa* L" be interpreted in its ordinary meaning, or was the meaning of *Cannabis sativa* L set in stone at the time the *Narcotic Control Act* was created?

The Parties' Positions

At trial, Perka's lawyer argued that the Crown had not been able to prove beyond a reasonable doubt that the Cannabis plant in question was *Cannabis sativa* L. His argument was that while the Crown may have proved that there was marijuana (Cannabis) on Perka's ship, the *Narcotic Control Act* says Cannabis means *Cannabis sativa* L. There was a 66% chance, the argument went, that the marijuana in question was not *Cannabis sativa* L. The Crown, on the other hand, argued that Parliament's intention was to prohibit all marijuana. (The Crown was unable to examine the plant further because the evidence disappeared. Somehow 33 tons of marijuana went missing from evidence.)

The question then becomes one of timing. Perka's argument was based on the premise that the meaning of Cannabis was set by the time Parliament passed the *Narcotic Control Act*. The Crown, on the other hand, argued that the goal of statutory interpretation is to ascertain Parliament's intention and to give effect to that intention as it was established the day the *Narcotic Control Act* was created.

Held

Perka could not raise the botanical defence and was bound by the intention of Parliament. Although *Cannabis sativa* L no longer means *Cannabis sativa* L, *Cannabis sativa* L was interpreted to encompass all marijuana.

Analysis

Definition of Cannabis

The *Narcotic Control Act* provides that Cannabis "means" *Cannabis sativa* L. The word "means" is important. If the *Narcotic Control Act* stated that Cannabis "includes" *Cannabis sativa* L, this would be an expansive definition which may expand the definition to include something beyond what it ordinarily means, but allows the ordinary meaning of that phrase to remain in place. A "means" definition is an exclusive definition. It excludes all possible meanings but the one set out in the legislation. Because of the way the definition of Cannabis is drafted in the *Narcotic Control Act*, only *Cannabis sativa* L is Cannabis for the purpose of *Narcotic Control Act*.

Dynamic Interpretation vs. Originalism

Does meaning stay the same or evolve over time? We have two schools of thought:

1) Dynamic interpretation – meaning can evolve according to changing social reality; this is also known as the progressive or living tree interpretation.

2) Originalism – meaning is established at the moment that the law is created. Only Parliament has the constitutional authority to read meaning into the text of the legislation. Judges do not have that authority. All judges can do is to apply the law and to give effect to Parliament's intent. They play a passive role in law making.

If we adopt the dynamic interpretation in *Perka*, the court has the authority as interpreter of the legislation to recognize that meaning of the language has changed and people cannot rely on the ordinary language of the legislation to understand the legislative intent. That violates the rights of the accused. Therefore, the court must give effect to the new meaning and acquit Mr. Perka.

If we adopt the Originalist's approach, it means that Parliament made the law and the language of the act is nothing but evidence of Parliament's intent. The language is not the law, the intent is the law. Some concerns that one may have of the Originalist's approach are:

1) We have no evidence that Parliament knew or did not know about the changes in the definition of Cannabis. They might not have known the changes or did not foresee the need to amend it. Can we take Parliament's inaction as a desire to adopt the changing meaning or do we look at inaction of Parliament as saying that Parliament likes it the way it is?

2) The Originalist school of thought is clear in that the authority we are looking at is the actual voting members of the Parliament who passed the Act, not the assistant deputy who knows what the Act means. There is a little bit of a legal fiction with respect to legislative meaning when we say that legislators have turned their mind to the question. Parliament voting for the legislation might not have even read the Schedule of the *Narcotic Control Act*. Very few parliamentarians read the entire act for which they are voting, or have formed any sort of specific intent. The Originalists pretend that Parliament had intent.

3) Even if Parliament does have intent, is parliamentary intent usable, persuasive evidence of that intention? In a US case called *Burdeau*, a Congressman who voted for a statute was called to testify as to meaning of that statute. The Supreme Court of the United States held that he was only one Congressman out of the entire Congress and he could not have known the intent of the Congress as a whole. The Congressman had his own view on what the intent is, but that was his own view. Other people in the Congress had different views.

    - If that is good law, and we have adopted this in Canada, how do we prove Parliament's intent?

Perka is an easy case, as everyone on the planet knew the *Cannabis sativa* L encompassed all Cannabis at the time that the *Narcotic Control Act* was passed. That was the accepted meaning and did not change until the 1980s.

Purposive Interpretation vs. Strict Construction

Strict Construction: Parliament's ability to amend the language raises the issue of fairness to the accused. When we are interpreting criminal legislation or any legislation where liberty or property of an individual is at stake, the rule of strict construction applies. The rule of strict construction says if there are two possible interpretations, it should be interpreted in a way that gives rise to more acquittals than convictions. Parliament drafted the Act, had the ability to amend the Act, enforce the Act, and appointed judges to interpret the Act. The accused has none of that. The mechanism of levelling the playing field and promoting fairness is the doctrine of strict construction. This is also called the rule of lenity, giving effect to the more lenient interpretation when dealing with any statue that deprives the subject of liberty or property.

Purposive Interpretation: Section 64 of the Ontario *Legislation Act*, S.O. 2006, c. 21, Sched F or section 12 of the Federal *Interpretation Act*, R.S.C. 1985, c. I-21 give a statute a broad and liberal interpretation that best ensures the attainment of its objects.

You have strict interpretation on the one hand and purposive interpretation on the other. Depending on the rule of interpretation you select, you can get different meanings. Interestingly, the court in *Perka* did not mention the rule of strict construction at all. The court never acknowledged its existence. Instead, the court went with purposive interpretation and held that the only goal of statutory interpretation is to give the words of a statute the meaning intended by their original authors.

Application of Interpretative Theories

Courts do a pretty bad job openly reconciling all the conflicting rules. They tend to pick a rule but they do not articulate the reasons for ignoring the contrary rule that leads to the opposite conclusion. Further, they depart from the rule articulated in *Perka* all the time. The court never overruled *Perka*, but courts will ignore *Perka* if the outcome they are seeking is more sensible to it. It is difficult to track what the courts are doing. Happily, in most cases, courts are relatively consistent in saying that the touchstone of statutory interpretation is parliamentary intent.

Interpretative theories are themselves malleable. They all have tricks that you can play to give rise to different outcomes. So although you have allegiance to a particular theory of interpretation, it does not dictate the outcome you generate. What we see is result-oriented reasoning.

What are the typical types of arguments that courts want you to address when you are arguing compliance with s.64 of the *Interpretation Act*?

A case that illustrates how judges go about doing this is the *Ontario Mushroom* case.

Re Ontario Mushroom Co. Ltd. and Learie (1977), 15 OR (2d) 639 (HC)

Facts

The *Employment Standards Act*, R.S.O. 1970, c. 147 contains provisions for minimum wage. One of the Regulation under the *Employment Standards Act* provides that minimum wage is not applicable to:

> (f) a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, pigs, cattle, sheep and poultry

Mushrooms are not listed there. The mushroom growers wanted minimum wage. The employers argued that they are vegetable growers i.e. mushrooms are vegetables. Mushroom being vegetables suggests that mushroom growers are exempted from the minimum wage provision.

Issues

Is a mushroom a vegetable? (The issue has been phrased as “is a mushroom a vegetable?” rather than “is a mushroom a vegetable for the purpose of the *Employment Standards Act*?” The ESA Designee seemed to be the only person who asked the right question. The court seems to have forgotten that they were dealing with a statute.)

Analysis

Ignoring context, on a common reading, is a mushroom a vegetable? Technically speaking, a mushroom is a fungus, and therefore not a vegetable. However, considering context, if you order a pizza saying that you don’t want any vegetables, but there are mushrooms on it, do you think the pizza person got it wrong? If you go to a grocery store and ask your local stock boy/girl where you can find mushrooms and he/she says the vegetable aisle, would you correct them? Are they wrong in placing mushrooms in the vegetable section? Or is it how the language is used in that context? The labels that get placed on things in a grocery store actually speak volumes about the assumptions that people make.

In Pari Materia

For the purposes of *Employment Standards Act*, would it be fair to say that mushrooms are vegetables? An important question to ask is whether we consider vegetable farming similar to mushroom farming. This question is enshrined in the Latin maxim *in pari materia*, which means that two statutes on the same subject matter should be construed similarly. Is the *Employment Standards Act* legislation relating to employment or farming? Unfortunately, no one in any level of the *Ontario Mushroom* case asked that question. No one talked about *Perka*, which is important for the analysis of what is now s. 64 of the Ontario *Legislation Act*.

Exceptions

Another common law rule of interpretation is exceptions to the general rule are usually to be construed narrowly (except when they aren't).

Loquitur vulgus

One of the arguments at the Superior Court level was another maxim of interpretation: *loquitur vulgus*, meaning to speak in a vulgar way, to use common language, and to give effect to meaning that most people would understand. This is an interesting maxim to invoke when the goal of statutory interpretation is to give effect to the legislative intent. How do we reconcile the two?

Generalia specialibus non derogant

Another rule of statutory interpretation is *Generalia specialibus non derogant:* general words do not derogate from specific ones.

Mischief Rule

Let's change the focus on our inquiry. What if you find a statue that says no one should deposit vegetable matter into a public dumpster? You are seen creeping down to the public dumpster with a bag of mushrooms. Have you violated the statute? An argument for convicting you is that a mushroom is a vegetable. What about the rule of strict construction? Assuming that your liberty is at stake, there are two possible interpretations. Can we assume that we are going to interpret the statute strictly in favour of the accused? What about Parliament's intention? It gets trickier when Parliament knows about strict interpretation. Can we assume because Parliament knows we are going to interpret the statute strictly in favour of the accused, we are giving effect to Parliament's intent given that Parliament understands the rules we are bringing to bear?

How do we determine the purpose of a statute? One way to ascertain the goal of a piece of legislation is the mischief rule of interpretation. Under this approach, we look at the common law before the Act was created, the mischief that the common law created or did not remedy, the legislative remedy Parliament proposed and the reason for that remedy.

Using the mischief rule, someone will inevitably argue that mushrooms dumped into a public dumpster pose the same health risks as vegetables being dumped into the dumpster. Given they pose the same risks, we ought to define mushrooms as vegetables.

Noscitur a sociis

An important technique of statutory interpretation is captured by the maxim *noscitur a sociis*, the immediate context rule, which means "know a thing by its associate." The meaning of a word changes when it is associated with another word. For example, if you say "you have a chip on your shoulder," that statement evokes one meaning; However, if you say "you have a chip on your shoulder, and a fish" the meaning of the word "fish" changes the meaning of the word "chip" in this context. It sounds like you may have had a rambunctious lunch (a food fight?) as opposed to the expression of having a chip on one's shoulder.

Dictionaries

Returning to the arguments used in the *Ontario Mushroom* case, Southey J. in dissent decided that mushrooms are not vegetables. Justice Southey looked up the meanings of a number of words including "vegetable," "herbaceous," "mushroom," and "fungus" and went through technical definitions of these words. He concluded that "a mushroom is not, strictly speaking, a vegetable."

The Ontario Superior Court held that mushrooms are vegetables. Reid J. for the majority was troubled by Justice Southey's approach in relying on dictionary definitions to decide that mushrooms are not vegetables. Why should authors of dictionaries be allowed to breathe life into legislation? We can't just boil law down to battles of dictionaries. This argument forms most of the judgment in the *Ontario Mushroom* case.

Common Meaning/Personal Experience

Reid J. said mushrooms are vegetables in reference to his experience with vegetables. However, he was careful not to place too much emphasis on personal experience when determining whether mushrooms are vegetables because there is inherent bias in one's experience. However, Justice Reid was trying to do something more sophisticated: he referred to the *common view* that mushrooms have been characterized as vegetables.

Justice Southey did not agree. He said that since we are dealing with legislation, we have to give it a more technical meaning.

Why are we relying on one category of meaning over other? Is the *Employment Standards Act* a more technical statute?

Appeal to Authority

What do experts think about the meaning of mushrooms and vegetables? A number of experts testified in the *Ontario Mushroom* case. The President of Ontario Mushroom Co. Ltd., the manager of Meadowglen Mushroom Farms, and the general manager of Maple Leaf Mushroom Farms all gave testimony to the effect that mushrooms are vegetables.

When dealing with appeal to authority, however, it is important to consider the inherent bias of the individual. These people had a financial stake in saying that mushrooms are vegetables. If mushrooms are vegetables, they are not caught by the minimum wage provision, and they would not have to pay their employees minimum wage.

Legislative Context

An important form of analysis is called *expressio unius est exclusio alterius*, the exclusion in one place implies the exclusion in the other (or the expression in one place implies the exclusion in the other). This relates to two important presumptions in statutory interpretation: the presumption of consistent expression and the presumption of no extraneous words.

By way of example, section 5 of the *Employment Standards Act* deals with overtime and essentially provides that everyone is entitled to overtime except for vegetable farmers and mushroom growers. The argument is that in section 5, we consider mushrooms and vegetables separately. The presumption of no extraneous words suggests that the drafter would not invent the word "mushroom" if it is captured by the word "vegetable." That means vegetables cannot possibly include mushrooms. The presumption of consistent expression says that vegetable means the same thing in section 5 and section 6. If that is the case, since vegetables do not include mushrooms in section 5, they should not include mushrooms in section 6.

That is the argument put forth by the Designee in the *Ontario Mushroom* case. The majority of the court, however, said that every subsection in this Act is its own comprehensive code. The majority's approach on this issue is inconsistent with principles of statutory interpretation.

Purpose of Legislation

This goes back to the technique of purposive interpretation. Why might we treat farmers differently from line makers who make cars? Perhaps the work is seasonal and workers are paid in part by room and board. Ordinary pay provisions do not bear in mind some of these special circumstances. However, mushrooms are grown indoors. If mushroom growers work from 9 a.m. – 5 p.m., that looks a lot more like an ordinary industry that should be governed by the standard provisions of the *Employment Standards Act*.

Conclusion

The goal of statutory interpretation should be to use interpretative techniques in the most persuasive way possible. To the extent that there are contradictory principles, do your best to reconcile them and admit where there is a problem. Be open about your logic, grapple with logical issues in the legislation itself and render interpretation in a way that makes the most sense to demonstrate that statutory interpretation is based on sound reasoning and clarity of thought.