

# Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimization

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## **Abstract**

*In the last 20 years, Elmer Driedger's "modern principle" has emerged as THE expression of the Supreme Court of Canada's preferred approach to statutory interpretation. The authors examine this fundamental development in Canadian law, including the variable relations between Driedger's quote and the Court's use of it, the different circumstances in which the principle is invoked and its influence on the caselaw of other superior courts in the country.*

*Follows an appraisal of the impact of the "modern principle" on Canadian law. The principle is shown to serve three clearly different functions. It is used in the interpretation of statutes, it provides judges with a justification framework for interpretive decisions, and it is also instrumental in the legitimization of the*

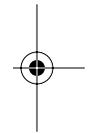
## **Résumé**

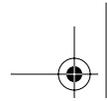
*Depuis les 20 dernières années, le «principe moderne» d'interprétation législative énoncé par Elmer Driedger s'est imposé comme LA référence en la matière à la Cour suprême du Canada. Les auteurs décrivent cette évolution fondamentale du droit canadien, s'arrêtant notamment aux relations variables entre le texte de Driedger et l'usage que la Cour en a fait, aux différentes circonstances dans lesquelles le principe est invoqué ainsi qu'à l'influence que le principe a pu avoir sur la jurisprudence des autres tribunaux supérieurs au pays.*

*Suit une évaluation de l'impact du «principe moderne» en droit canadien. Les auteurs distinguent trois fonctions du principe. Il se présente comme une méthode d'interprétation; il propose un cadre pour guider les juges dans la justification*

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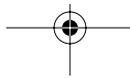


judicial function in statutory interpretation.

No doubt, the “modern principle” has brought about some advances in the law relating to statutory interpretation in Canada. However, the author reckons that it constitutes an over-simplified reflection of the actual practice of Canadian jurists, including judges. As a result, Driedger’s principle provides neither a valid method for interpreting statutes nor a suitable structure for the courts’ justification of interpretive decisions. One should not see in it more than a good starting point for statutory interpretation.

des décisions relatives à l’interprétation; il contribue à la légitimation des décisions judiciaires en matière d’interprétation législative.

Certes, le « principe moderne » a favorisé certains progrès dans le droit relatif à l’interprétation législative au Canada. Toutefois, les auteurs estiment qu’il s’agit d’une simplification exagérée de la démarche effectivement suivie par les juristes canadiens, y compris les juges. Par conséquent, le principe de Driedger ne peut ni constituer une méthode adéquate d’interprétation des lois, ni offrir aux juges un cadre satisfaisant pour la justification de leurs décisions en matière d’interprétation. Tout au plus peut-on y voir un point de départ valable pour toute démarche d’interprétation.

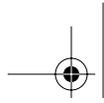


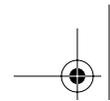


## Table of Contents

<b>Introduction</b> .....	135
<b>I. The “Modern Principle” Reconsidered and Exposed</b> .....	141
A. A Fresh Look at Driedger’s <i>Construction of Statutes</i> .....	141
B. A Survey of the Supreme Court of Canada Case Law .....	144
<b>II. The Legacy of the “Modern Principle” in Canada</b> .....	153
A. The Functions of the “Modern Principle” .....	154
1. Driedger Meant Meaning-Selection or Meaning-Justification?.....	156
2. Using Driedger More for Meaning-Selection or Meaning-Justification?.....	157
3. Legitimizing Interpretation with the “Modern Principle” .....	159
B. The Impact of the “Modern Principle” .....	162
1. Form.....	162
2. Substance.....	164
<b>Conclusion</b> .....	171







If professor Elmer Driedger of the Faculty of Law (common law), University of Ottawa, had been asked whether he expected his remarks on the “modern principle” of statutory interpretation to have any effect on the judiciary in Canada, he would have most likely remained humble, knowing perhaps better than anybody that no one may predict the ways of courts. There is a further question, probably more scholarly interesting and in any event surely less speculative, which is whether the popularity of the citation has been won at the price of the integrity of the author’s thoughts. If it has, it would certainly not be the first (nor the last) time. Was it not Karl Marx who once said: “All I know is I’m not a Marxist”<sup>1</sup>?

In the recent history of the Supreme Court of Canada, where a consensus on legal issues or on an approach to addressing them is anything but frequent, one exception is the “modern principle” of statutory interpretation. This celebrated doctrinal contribution comes from Driedger’s *Construction of Statutes*<sup>2</sup>, usually cited from the second edition of the book, which reads:

*Today 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.*<sup>3</sup>

A thorough search with the engine available on the website<sup>4</sup> of the Supreme Court of Canada reveals that, not only has this excerpt been referred to often, but it appears to be the most popular author’s citation ever<sup>5</sup>. Indeed, from its very first use in 1984, with *Stuart Investments Ltd. v. The Queen*<sup>6</sup>, up to the end of our studied period

<sup>1</sup> Karl Marx as quoted by Friedrich Engels in a letter dated 5 August 1890 to Conrad Schmidt.

<sup>2</sup> Elmer A. DRIEDGER, *The Construction of Statutes*, Toronto, Butterworths, 1974, at 67.

<sup>3</sup> Elmer A. DRIEDGER, *The Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, at 87.

<sup>4</sup> See [<http://www.lexum.umontreal.ca/csc-ccc/>].

<sup>5</sup> Especially in the last few years at the Supreme Court of Canada, that quote has become something of an *incantation* that is uttered before proceeding with the actual process of interpreting legislation.

<sup>6</sup> [1984] 1 S.C.R. 417 (hereinafter “*Stuart*”).

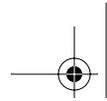




on 1 January 2006 (more than twenty years later), there were no less than 59 decisions by the Supreme Court of Canada<sup>7</sup> making refer-

<sup>7</sup> Beside the *Stuart* decision, the other 58 are: *Vachon v. Canada (Employment and Immigration Commission)*, [1985] 2 S.C.R. 417; *Canadian National v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Canada v. Antosko*, [1994] 2 S.C.R. 312; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (hereinafter "Régie des permis d'alcool"); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (hereinafter "Rizzo Shoes"); *R. v. Gladue*, [1999] 1 S.C.R. 688; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Best v. Best*, [1999] 2 S.C.R. 868; *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160; *Francis v. Baker*, [1999] 3 S.C.R. 250; *R. v. Davis*, [1999] 3 S.C.R. 759; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804; *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915; *R. v. Araujo*, [2000] 2 S.C.R. 992; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867; *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; *Sarvanis v. Canada*, [2002] 1 S.C.R. 921; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 (hereinafter "Bell ExpressVu"); *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Macdonell v. Québec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661; *R. v. Jarvis*, [2002] 3 S.C.R. 757; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45 (hereinafter "Harvard College"); *Markevich v. Canada*, [2003] 1 S.C.R. 94; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Parry Sound (District) S.S.A.B. v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157; *R. v. Blais*, [2003] 2 S.C.R. 236; *R. v. Clay*, [2003] 3 S.C.R. 735; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248; *Mosanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152; *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257; *R. v. Clark*, [2005] 1 S.C.R. 6; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563; *R. v. C.D.*, [2005] 3 S.C.R. 668; *Castillo v. Castillo*, 2005 SCC 83.





ences to Driedger's words<sup>8</sup>; three other cases<sup>9</sup> cited the third edition, *Driedger on the Construction of Statutes*<sup>10</sup>, by professor Ruth Sullivan, where the "modern principle" became the "modern rule" of statutory interpretation and was, in effect, recast in different terms<sup>11</sup>.

What is also worth emphasising is how Driedger's quote is used in all areas of the law and, in fact, in all facets of legal interpretation: from tax law<sup>12</sup> to human rights law<sup>13</sup>, from criminal law<sup>14</sup> to family law<sup>15</sup>, as well as to qualify legislation in constitutional challenges

<sup>8</sup> These cases referred to the relevant passage more often in a unanimous or majority set of reasons, although some references are in minority or dissenting opinions only; there are instances where more than one set of reasons quote Driedger. Finally, it is worth mentioning that in the large majority of cases, the Supreme Court judges actually used an excerpt of the whole or part of the passage in question; only a few times did they refer to the author without quoting him.

<sup>9</sup> See: *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119. In addition to these three cases, there were other instances where both the second and the third editions of the work were referred to, some with quotes some without: *Verdun v. Toronto-Dominion Bank*, *supra*, note 7; *Régie des permis d'alcool*, *supra*, note 7; *R. v. Gladue*, *supra*, note 7; *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra*, note 7; *Best v. Best*, *supra*, note 7; *65302 British Colombia Ltd. v. Canada*, *supra*, note 7; *Chieu v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 7.

<sup>10</sup> Ruth SULLIVAN, *Driedger on the Construction of Statutes*, 3rd ed., Toronto & Vancouver, Butterworths, 1994, at 131 and 132.

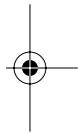
<sup>11</sup> See *infra*, note 156. For a defence and explanation of her reformulation, see: Ruth SULLIVAN, "Statutory Interpretation in the Supreme Court of Canada", (1998-1999) 30 *Ottawa L. Rev.* 175.

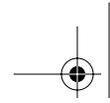
<sup>12</sup> See *Stuart*, *supra*, note 6; *Symes v. Canada*, *supra*, note 7; *Canada v. Antosko*, *supra*, note 7; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, *supra*, note 7; *Friesen v. Canada*, *supra*, note 7; *Schwartz v. Canada*, *supra*, note 7; *Alberta (Treasury Branches) v. M.N.R.*, *supra*, note 7; *Royal Bank of Canada v. Sparrow Electric Corp.*, *supra*, note 7; *65302 British Colombia Ltd. v. Canada*, *supra*, note 7; *Will-Kare Paving & Contracting Ltd. v. Canada*, *supra*, note 7; *Ludco Enterprises Ltd. v. Canada*, *supra*, note 7; *R. v. Jarvis*, *supra*, note 7; *Markevich v. Canada*, *supra*, note 7.

<sup>13</sup> See: *Canadian National v. Canada (Human Rights Commission)*, *supra*, note 7; *Canada (House of Commons) v. Vaid*, *supra*, note 7, para. 80, where Binnie J. for the Court even wrote: "Such interpretative principles apply with special force in the application of human rights laws" [emphasis added].

<sup>14</sup> See: *R. v. McIntosh*, *supra*, note 7; *R. v. Gladue*, *supra*, note 7; *R. v. Davis*, *supra*, note 7; *R. v. Araujo*, *supra*, note 7; *R. v. Clark*, *supra*, note 7; *R. v. C.D.*, *supra*, note 7.

<sup>15</sup> See: *Best v. Best*, *supra*, note 7; *Francis v. Baker*, *supra*, note 7.





(Charter<sup>16</sup> cases<sup>17</sup> or division of powers cases<sup>18</sup>), to interpret constitutional<sup>19</sup> or quasi-constitutional texts<sup>20</sup>, to construe delegated legislation like regulations<sup>21</sup> and by-laws,<sup>22</sup> to interpret transitional provisions in an enactment<sup>23</sup>; it was extended to Quebec civil law<sup>24</sup>

<sup>16</sup> *Canadian Charter of Rights and Freedoms*, in Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.) 1982, c. 11 (hereinafter “*Charter*”).

<sup>17</sup> See: *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra*, note 7; *R. v. Sharpe*, *supra*, note 7; *R. v. Clay*, *supra*, note 7; *Application under s. 83.28 of the Criminal Code (Re)*, *supra*, note 7.

<sup>18</sup> See: *R. v. Hydro-Québec*, *supra*, note 7; *Law Society of British Columbia v. Mangat*, *supra*, note 7.

<sup>19</sup> See: *R. v. Blais*, *supra*, note 7, where at issue was the *Manitoba Natural Resources Transfer Agreement*, which is incorporated as Schedule 1 to the *Constitution Act, 1930*, reprinted in R.S.C. 1985, App. II, No. 26. At para. 16, the Court wrote: “The starting point in this endeavour is that a statute – and this includes statutes of constitutional force – must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87”.

<sup>20</sup> See: *Lavigne v. Canada (Commissioner of Official Languages)*, *supra*, note 7, para. 25, where Gonthier J. wrote for the Court: “The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized to them as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation, defined by E.A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87”. See also: *Charlebois v. Saint John (City)*, *supra*, note 7, dealing with the *New Brunswick Official Languages Act*, S.N.B. 2002, c. O-0.5.

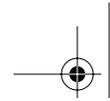
<sup>21</sup> See: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, *supra*, note 7, on the interpretation of patent regulations.

<sup>22</sup> See: *Montréal (City) v. 2952-1366 Québec Inc.*, *supra*, note 7, on the interpretation of a municipal by-law.

<sup>23</sup> See: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 7; as regards the applicability of the “modern principle” to transitional provisions, see para. 14 and 15.

<sup>24</sup> See: *Épiciers Unis Métro-Richelieu Inc., division “Éconogros” v. Collin*, *supra*, note 7, para. 21, where LeBel J. for the Court wrote: “However, this distinction between the approaches to interpreting civil law and statute law has become blurred as methods for interpreting legislation have evolved. The distinction is practically non-existent today, as statute law is no longer automatically given a narrow reading. This Court has discussed its preferred approach to interpreting legislation on numerous occasions”. He then refers to the “modern approach” and to case law citing Driedger.





in order to construe Civil Code<sup>25</sup> provisions and even once to help interpret a contract<sup>26</sup>. Professions of faith over the years vis-à-vis the "modern principle" include that it is the "prevailing and preferred"<sup>27</sup> or the "established"<sup>28</sup> approach, that it is the "appropriate and proper"<sup>29</sup> or the "traditional and correct"<sup>30</sup> approach; Driedger's words would indeed be a "definitive formulation"<sup>31</sup> which "best captures or encapsulates"<sup>32</sup> the approach, even the "starting point"<sup>33</sup> for statutory interpretation in Canada.

When extending the search to the country's other superior courts, one finds unequivocal confirmation of the extraordinary influence of the writings. The grand total of references to Driedger's "modern principle" up to mid-2005, in federal courts and in superior courts of the provinces and territories – whatever edition of *The Construction of Statutes* and be it a direct quote, a reference to the passage, or an indirect endorsement via a Supreme Court of Canada

<sup>25</sup> *Civil Code of Québec*, S.Q. 1991, c. 64.

<sup>26</sup> See: *Manulife Bank of Canada v. Conlin*, *supra*, note 9, para. 41, *per* L'Heureux-Dubé J. (dissent), where she wrote, before referring to the third edition of *Driedger on the Construction of Statutes*, *op. cit.*, note 10: "Therefore, the 'modern contextual approach' for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation".

<sup>27</sup> See: *Chieu v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 7, para. 27; *Sarvanis v. Canada*, *supra*, note 7, para. 24; *Bell ExpressVu*, *supra*, note 7, para. 26; *Alberta Union of Provincial Employees v. Lethbridge Community College*, *supra*, note 7, para. 25; *Application under s. 83.28 of the Criminal Code (Re)*, *supra*, note 7, para. 34; *Épiciers Unis Métro-Richelieu Inc., division "Économ-gros" v. Collin*, *supra*, note 7, para. 21; *Marche v. Halifax Insurance Co.*, *supra*, note 7, para. 54; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, *supra*, note 7, para. 96; *H.L. v. Canada (Attorney General)*, *supra*, note 7, para. 186.

<sup>28</sup> See: *Mosanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, *supra*, note 7, para. 19.

<sup>29</sup> See: *C.U.P.E. v. Ontario (Minister of Labour)*, *supra*, note 7, para. 106; *Parry Sound (District) S.S.A.B. v. O.P.S.E.U., Local 324*, *supra*, note 7, para. 41.

<sup>30</sup> See: *Lavigne v. Canada (Commissioner of Official Languages)*, *supra*, note 7, para. 25; *65302 British Columbia Ltd. v. Canada*, *supra*, note 7, para. 5.

<sup>31</sup> See: *Bell ExpressVu*, *supra*, note 7, para. 26; *Barrie Public Utilities v. Canadian Cable Television Assn.*, *supra*, note 7, para. 20 and 86.

<sup>32</sup> See: *Rizzo Shoes*, *supra*, note 7, para. 21; *R. v. Sharpe*, *supra*, note 7, para. 33; *Ludco Enterprises Ltd. v. Canada*, *supra*, note 7, para. 36.

<sup>33</sup> See: *Barrie Public Utilities v. Canadian Cable Television Assn.*, *supra*, note 7, para. 20; *R. v. Clay*, *supra*, note 7, para. 55; *Montréal (City) v. 2952-1366 Québec Inc.*, *supra*, note 7, para. 114.



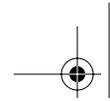


case resorting to Driedger – is astonishing, namely 724 references<sup>34</sup>. Beside the expected popularity of the “modern principle” with the statutory adjudicative body that are the federal courts, two pieces of statistics are worth pointing out. First, in absolute numbers and even more so in relative terms based on population, it is by far British Columbia which has been the most enthusiastic jurisdiction to resort to Driedger. Second, even if the different legal system in the civil law province of Quebec has not acted as a bar to the use of the quote, again especially in relative terms, it has occurred much less frequently.

The hypothesis here is that the “modern principle” of statutory interpretation has been utilised by the courts in Canada to fulfil a rhetorical function, that is to explain and justify in objective terms the interpretative decision; this role is distinct and separate from its other more obvious function, namely to provide an outline of methods that guide judges in the construction of statutes. It is argued that, in contrast with Driedger who merely intended the latter, the Supreme Court of Canada has attributed and given high importance to the former role of the quote in order to promote the legitimacy of the judicial role in construing the legislative norms adopted by Parliament, the elected body of Government. For this demonstration, it is first necessary to have a fresh look at the Driedger’s

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<sup>34</sup> The breakdown by jurisdiction is as follows: 188 references at the federal courts, that is 51 at the Federal Court of Appeal and 137 at the Federal Court (Trial Division); 77 references in Alberta, that is 23 at the Court of Appeal and 54 at the Queen’s Bench; 160 references in British Columbia, that is 60 at the Court of Appeal and 100 at the Supreme Court; 22 references in Manitoba, that is 14 at the Court of Appeal and 8 at the Queen’s Bench; 38 references in New Brunswick, that is 26 at the Court of Appeal and 12 at the Queen’s Bench; 31 references in Newfoundland and Labrador, that is 14 at the Supreme Court (Appeal Division) and 17 at the Supreme Court (Trial Division); 8 references in the Northwest Territories, that is 1 at the Court of Appeal and 7 at the Supreme Court; 39 references in Nova Scotia, that is 18 at the Court of Appeal and 21 at the Supreme Court; 62 references in Ontario, that is 21 at the Court of Appeal and 41 at the Superior Court of Justice; 5 references in Prince Edward Island, that is 2 at the Supreme Court (Appeal Division) and 3 at the Supreme Court (Trial Division); 31 references in Quebec, that is 13 at the Court of Appeal and 18 at the Superior Court; 59 references in Saskatchewan, that is 30 at the Court of Appeal and 29 at the Queen’s Bench; 4 references in Yukon, that is 1 at the Court of Appeal and 3 at the Supreme Court; and there has been no reference so far in Nunavut. These data may be found in a schedule to this paper, posted at: <http://www.droit.umontreal.ca/profs/stephane.beaulac/documents.html>.



contribution and to see what interpretive methods it has supported at the Supreme Court of Canada (Section I). The discussion then moves to the impact of the "modern principle" on the work of Canadian courts, having in mind the dual function of statutory interpretation arguments as well as the legitimacy concerns pertaining to the judicial process of construction (Section II).

## I. The "Modern Principle" Reconsidered and Exposed

Also analysing the "modern principle" of statutory interpretation, Ruth Sullivan made the following apposite remarks about the citation: "Over the years, however, it has come to mean different things to different judges, and little attention has been paid to what is apparently meant to Driedger"<sup>35</sup>. This is with what the discussion begins, namely an inquiry into the author's intention as regards the famous passage (Section A); then the survey of the decisions of the Supreme Court of Canada highlights how, in spite of the unfailing references to Driedger, there is a continuing lack of consistency in methods of construing statutes in our highest court (Section B).

### A. A Fresh Look at Driedger's Construction of Statutes

It is in a separate chapter of the *Construction of Statutes*<sup>36</sup>, entitled "The Modern Principle of Construction", that Elmer Driedger coins the expression. In fact, it is Chapter 4 of his book, which follows chapters on "The Ordinary Meaning"<sup>37</sup>, "Departure from the Ordinary Meaning"<sup>38</sup> and "Construction by Object or Purpose"<sup>39</sup>. More specifically, the excerpt always cited by courts appears at the end of that seven-page chapter, under the heading "Modern Principle", in concluding remarks that take less than half of a page. The passage follows a discussion of the three traditional rules of statutory interpretation in the common law tradition, namely the "Mischief Rule"<sup>40</sup>,

<sup>35</sup> R. SULLIVAN, *loc. cit.*, note 11, 215.

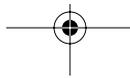
<sup>36</sup> E.A. DRIEDGER, *op. cit.*, note 3, at 81ff.

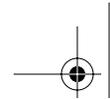
<sup>37</sup> *Id.*, at 1ff.

<sup>38</sup> *Id.*, at 47ff.

<sup>39</sup> *Id.*, at 73ff.

<sup>40</sup> *Id.*, at 81 and 82.





the “Literal Rule”<sup>41</sup> and the “Golden Rule”<sup>42</sup>. Driedger’s analysis includes, *inter alia*, the three most significant cases from the English common law associated with each of these rules, namely the *Heydon’s case*<sup>43</sup>, the *Sussex Peerage case*<sup>44</sup> and the case of *Grey v. Person*<sup>45</sup>, respectively.

It is of course very pertinent that the Driedger’s citation introducing the “modern principle” comes after a sort of summary of the three uncontested ways in which common law courts have dealt with statutes. It suggests that a proper interpretation shall take into account the object of the enactment (Mischief Rule), the words with which it is expressed (Literal Rule) and the harmony among its provisions and other statutes (Golden Rule); not one of them, or two of them, but all three aspects may be relevant and be taken into account. This statement is surely far from revolutionary though. Put another way, when the passage is placed in its original context of utterance, Driedger seems to have intended no more than a synopsis of the three classic rules of legislative interpretation.

Yet the Supreme Court of Canada has transformed Driedger’s thoughts into what appears to be a sweeping proclamation of the one and only approach that must be used in the construction of statutes. But reading *Construction of Statutes*<sup>46</sup> leaves the impression that the “modern principle” is not prescriptive in nature, but merely descriptive of the actual interpretive practice of the time. Evidence of this can be found in the sentence that immediately follows the quote, which reads: “This principle is expressed repeatedly by modern judges, as, for example [...]”<sup>47</sup>; then come references to previous decisions<sup>48</sup>. Also, proof that the passage in question was not meant to be comprehensive or conclusive in itself can be had

<sup>41</sup> *Id.*, at 82-84.

<sup>42</sup> *Id.*, at 85 and 86.

<sup>43</sup> (1584), 3 Co. Rep. 7a, 76 E.R. 637.

<sup>44</sup> (1844), 11 Cl. & R. 85, 8 E.R. 1034.

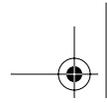
<sup>45</sup> (1857), 6 H.L.C. 61, 10 E.R. 1216.

<sup>46</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>47</sup> *Id.*, at 87.

<sup>48</sup> *Id.* The two cases are: *Westminster Bank Ltd. v. Zang*, [1965] A.C. 182, 222 and *R. v. Mojelski* (1968), 95 W.W.R. 565, 570. Then Driedger refers to, and also quotes from, another, older, case, *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, 387.





from the very last sentence with which ends this half-a-page final part of Chapter 4: "The remaining chapters [some 9 of them] 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"<sup>49</sup>. Thus the "modern principle" is obviously not the whole story.

Its mere restatement function is confirmed by the extended context of the work *Construction of Statutes*<sup>50</sup>. One example shall suffice, namely what the author writes at the beginning of Chapter 6, entitled "The Method of Construction", under the heading "The Steps":

*The decisions examined thus far indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:*

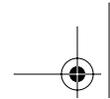
- 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).*
- 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.*
- 3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.*
- 4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.*
- 5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.<sup>51</sup>*

<sup>49</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, at 105.





Similarly to what he did at the end of Chapter 4, here Driedger elaborates upon the three traditional rules of statutory interpretation at common law. Indeed, in all five points, one can see references to the Mischief Rule, the Literal Rule and the Golden Rule, as well as suggestions by the author that all three factors, cumulatively, may be taken into account in the process of statutory interpretation.

Beside the acknowledgement that the classic rules are reiterated and affirmed, it seems that very little else could be definitively inferred from Driedger's comments about the "modern principle" and how courts should approach the construction of legislation. It would be difficult, for instance, to identify something that suggests in a meaningful way that the author favours a method that could be associated clearly with "textualism" (also known as "literalism")<sup>52</sup>, which focuses on the plain meaning of the legislative text. On the other hand, one would hardly be on firmer grounds to argue that the quote constitutes an endorsement of "intentionalism" (also known as "purposivism")<sup>53</sup>, which focuses on the intention of Parliament as found through the panoply of interpretive arguments. The confusion around what Driedger intended with his "modern principle" and, in particular, whether it can be legitimately used to support either of these methods might explain, at least in part, its popularity with our courts.

## **B. A Survey of the Supreme Court of Canada Case Law**

Looking at the decisions of the highest instance of the land, one is struck by the inconsistency of methods associated with Driedger, starting with the very first time the "modern principle" was invoked in the *Stuart* case<sup>54</sup>. The interpretative issue revolved around section 137 of the *Income Tax Act*<sup>55</sup>, which allowed tax reduction based on losses carry-forward, and was resolved in favour of the taxpayer.

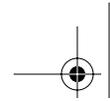
<sup>52</sup> For a good summary of the "textualist" or "literalist" schools, see: W.N. ESKRIDGE & P.P. FRICKEY, "Statutory Interpretation as Practical Reasoning", (1990) 42 *Stanford L. Rev.* 321, 340ff.

<sup>53</sup> For a good summary of the "intentionalist" or "purposivist" schools, see: *id.*, 325ff.

<sup>54</sup> *Supra*, note 6.

<sup>55</sup> R.S.C. 1952, c. 148.





In his discussion on how to approach fiscal legislation, Estey J. wrote the following:

*Professor Willis, in his article, supra, accurately forecast the demise of the strict interpretation rule for the construction of taxing statutes. 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. See Whiteman and Wheatcroft, supra, at p. 37.*

*While not directing his observations exclusively to taxing statutes, the learned author of Construction of Statutes (2nd ed. 1983), at p. 87, E.A. Driedger [sic], put the modern rule succinctly: 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.<sup>56</sup>*

What Estey J. meant by "plain meaning in a substantive sense" is unclear. Something is undisputable, however, namely the indication that strict construction has given way to purposive and contextual interpretation of legislation, be it fiscal or else. In spite of the expression "plain meaning", this approach is no doubt intentionalist<sup>57</sup>. Other references to Driedger in support of a non-textualist reading of statutes are found later in *Vachon v. Canada (Employment and Immigration Commission)*<sup>58</sup>, *Canadian National v. Canada (Human Rights Commission)*<sup>59</sup>, *Thomson v. Canada (Deputy Minister of Agriculture)*<sup>60</sup> and *Symes v. Canada*<sup>61</sup>.

It is in the same area of tax law that we witness a return to the old restrictive plain meaning rule of statutory interpretation, some

<sup>56</sup> *Stubart, supra*, note 6, 578 [emphasis added].

<sup>57</sup> This is an opinion shared by R. SULLIVAN, *loc. cit.*, note 11, 217.

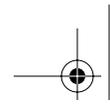
<sup>58</sup> *Supra*, note 7, where at issue was section 49 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. The reference to Driedger is at para. 48.

<sup>59</sup> *Supra*, note 7, where the Court had to interpret the *Canadian Human Rights Act*, S.C. 1976-77, c. 33. The reference to Driedger is at 1134.

<sup>60</sup> *Supra*, note 7, where at issue was section 52(2) of the *Canadian Security Intelligence Service Act*, S.C. 1984. The reference to Driedger is at 404, in the dissenting opinion of L'Heureux-Dubé J.

<sup>61</sup> *Supra*, note 7, where at issue were provisions of *Income Tax Act, supra*, note 55, providing for fiscal deductions for child care expenses. The reference to Driedger is at 744.





ten years later, in *Canada v. Antosko*<sup>62</sup>. In deciding whether a transaction came within the ambit of the tax deduction provided for at section 20(14) of the *Income Tax Act*<sup>63</sup>, Iacobucci J. referred to the key passage in the *Construction of Statutes*<sup>64</sup> and to the opinion of Estey J. in *Stuart*<sup>65</sup>, but added this:

*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 of 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: [cases omitted].*<sup>66</sup>

It seems that the old plain meaning rule, and with it the strict construction of fiscal legislation, have been brought back from their shallow graves. But were they really born-again? Not really, it would seem, if one considers the decision of the Supreme Court of Canada, the same year, in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*<sup>67</sup>. In this case, the following comments accompanied Driedger:

*In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction.*

[...]

*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 makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation*<sup>68</sup>.

<sup>62</sup> *Supra*, note 7.

<sup>63</sup> S.C. 1970-71-72, c. 63.

<sup>64</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>65</sup> *Supra*, note 6.

<sup>66</sup> *Canada v. Antosko*, *supra*, note 7, 326 and 327.

<sup>67</sup> *Supra*, note 7.

<sup>68</sup> *Id.*, 15-17.





These comments surely do not sound like textualist prose.

The oscillation between the two statutory interpretation methods, while references to Driedger remain constant, is confirmed in later decisions. The 1995 case of *Friesen v. Canada*<sup>69</sup>, again in tax law, saw Major J. clearly give a textual construction, after making these observations:

*In interpreting sections of the Income Tax Act, the correct approach, as set out by Estey J. in Stupart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 537, is to apply the plain meaning rule. ... The principle that the plain meaning of the relevant sections of the Income Tax Act is to prevail unless the transaction is a sham has recently been affirmed by this Court [cases omitted]<sup>70</sup>.*

Chronologically, it is interesting to note however that in between these two last cases, the Supreme Court handed down yet another decision in taxation, *Schwartz v. Canada*<sup>71</sup>, in which this time an intentionalist method was obviously favoured, with approving references to Gonthier J. in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*<sup>72</sup>, himself using Driedger.

Beside fiscal law, there are many other areas in which contradicting statements were made about the applicable interpretive method, all relying however on the same passage of *Construction of Statutes*<sup>73</sup>. In the criminal law case of *R. v. McIntosh*<sup>74</sup>, for instance, Lamer C.J. most clearly used the old plain meaning rule but yet appeared to endorse the "modern principle", as expounded through the five-step analytical scheme also developed by Driedger<sup>75</sup>. Another example is *Verdun v. Toronto-Dominion Bank*<sup>76</sup>, in which the majority spoke of the *Bank Act's*<sup>77</sup> plain meaning, yet resorted to Driedger's famous quote<sup>78</sup>; but as the minority opinion *per L'Heureux-Dubé J.* pointed

<sup>69</sup> *Supra*, note 7.

<sup>70</sup> *Id.*, para. 10 and 11. Quoted in *Alberta (Treasury Branches) v. M.N.R.*, *supra*, note 7, 14.

<sup>71</sup> *Supra*, note 7.

<sup>72</sup> *Supra*, note 7.

<sup>73</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>74</sup> *Supra*, note 7, para. 21.

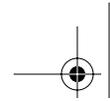
<sup>75</sup> *Supra*, note 51 and accompanying text.

<sup>76</sup> *Supra*, note 7.

<sup>77</sup> S.C. 1991, c. 46.

<sup>78</sup> *Verdun v. Toronto-Dominion Bank*, *supra*, note 7, para. 22.





out<sup>79</sup>, the method that all concerned adopted was encompassing much more than the legislative text. Justice L'Heureux-Dubé herself, who was the main proponent of intentionalism during her tenure at the Supreme Court of Canada, seems to have mistaken in *Régie des permis d'alcool*<sup>80</sup> when she associated Driedger with the plain meaning rule, yet relied on the “modern principle” to describe the applicable method in statutory interpretation.

It is in the unanimous decision of *Rizzo Shoes*<sup>81</sup> that a second breath was given to the method of construction that looks not only at the legislative text, but at all evidence of the intention of Parliament. In discussing how to interpret statutes – here provisions of Ontario *Employment Standards Act*<sup>82</sup> – Iacobucci J. mentioned authors in the discipline<sup>83</sup> and opined thus: “Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone”. Then came the usual reference to the second edition of the work. This case was relied upon in many subsequent decisions, along with the “modern principle” and sometimes along with the applicable interpretation acts<sup>84</sup>, as authority for the proposition that judges should go beyond legislative text and consider the object and context of the statute at issue. These judgments include *R. v. Gladue*<sup>85</sup> (unanimous), *Winko v. British Columbia (Forensic Psychi-*

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<sup>79</sup> *Id.*, para. 6.

<sup>80</sup> *Supra*, note 7, para. 152.

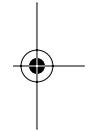
<sup>81</sup> *Supra*, note 7.

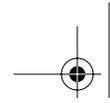
<sup>82</sup> R.S.O. 1980, c. 137.

<sup>83</sup> These authors are Ruth SULLIVAN, with the 3rd edition of *Driedger on the Construction of Statutes*, *op. cit.*, note 10, and with her other book, *Statutory Interpretation*, Concord, Ont., Irwin Law, 1997, as well as Pierre-André CÔTÉ, *The Interpretation of Legislation in Canada*, 2nd ed., Cowansville, Éditions Yvon Blais, 1991.

<sup>84</sup> In *Rizzo Shoes*, *supra*, note 7, para. 22, Iacobucci J. cited section 10 of the Ontario *Interpretation Act*, R.S.O. 1980, to further support a broad and liberal construction of the legislation under scrutiny. At the federal level, the relevant provision is section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21., which provides: “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”.

<sup>85</sup> *Supra*, note 7, para. 25 and 26.





*atric Institute*<sup>86</sup> (minority), *Best v. Best*<sup>87</sup> (dissent), *Winters v. Legal Services Society*<sup>88</sup> (dissent), *Francis v. Baker*<sup>89</sup> (unanimous), and *R. v. Davis*<sup>90</sup> (unanimous).

It took no more than a year after *Rizzo Shoes*<sup>91</sup>, however, for the Supreme Court of Canada to revert to its internal division about statutory interpretation and, along with it, the contradictory utilisation of the "modern principle". Indeed, in the taxation case of *65302 British Columbia Ltd. v. Canada*<sup>92</sup>, the association between intentionalism and Driedger was found only in the minority judgment<sup>93</sup>, while the majority returned to a discourse of textualism after the usual borrowing from the *Construction of Statutes*<sup>94</sup>. The swing-back of the pendulum was obvious when Iacobucci J. wrote: "However, this Court has also often been cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language"<sup>95</sup>. The split decision, also dealing with fiscal legislation, in *Will-Kare Paving & Contracting Ltd. v. Canada*<sup>96</sup> is another case on point. While, on the one hand, the dissent resorted to Driedger as applied in *Rizzo Shoes*<sup>97</sup> and stressed the object and context of the enactment<sup>98</sup>, on the other hand, the majority echoed the plain meaning rule and referred to Driedger and the contradictory tax case law, holding that: "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"<sup>99</sup>.

<sup>86</sup> *Supra*, note 7, para. 123.

<sup>87</sup> *Supra*, note 7, para. 139.

<sup>88</sup> *Supra*, note 7, para. 47.

<sup>89</sup> *Supra*, note 7, para. 34.

<sup>90</sup> *Supra*, note 7, para. 42.

<sup>91</sup> *Supra*, note 7.

<sup>92</sup> *Supra*, note 7.

<sup>93</sup> *Id.*, para. 5., *per* Bastarache J.

<sup>94</sup> E.A. DRIEDGER, *op. cit.*, note 3.

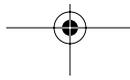
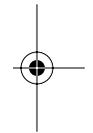
<sup>95</sup> *65302 British Columbia Ltd. v. Canada*, *supra*, note 7, para. 50.

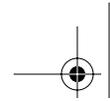
<sup>96</sup> *Supra*, note 7.

<sup>97</sup> *Supra*, note 7.

<sup>98</sup> *Will-Kare Paving & Contracting Ltd. v. Canada*, *supra*, note 7, para. 32.

<sup>99</sup> *Id.*, para. 54.





In the area of criminal law, the “modern principle” returned to being utilised as the basis for a broad and liberal interpretation that includes the text, but also the object and context of the statute, in the unanimous decision of *R. v. Araujo*<sup>100</sup>. Again in criminal law, same story in *R. v. Sharpe*<sup>101</sup>: “[Driedger] recognizes that statutory interpretation cannot be founded on the wording of the legislation alone<sup>102</sup>”. Such a non-textualist take on the “modern principle” was also favoured in *R. v. Ulybel Enterprises Ltd.*<sup>103</sup> (fisheries), *Ludco Enterprises Ltd. v. Canada*<sup>104</sup> (taxation), *Chieu v. Canada (Minister of Citizenship and Immigration)*<sup>105</sup> (immigration) and *Sarvanis v. Canada*<sup>106</sup> (Crown liability).

The next significant judgment was *Bell ExpressVu*<sup>107</sup>, in which a unanimous Supreme Court of Canada gave yet again confusing signals. First, Iacobucci J. did the technical routine of referring to Driedger and to the federal *Interpretation Act*<sup>108</sup>, as well as attempting a list of the case law that resorted to the “modern principle”<sup>109</sup>, all pointing towards the intentionalist method. But then came the discussion on ambiguity and how some interpretive arguments may be employed only if there is such problems<sup>110</sup>, language that borrows directly from the plain meaning rule and the textualist method. In the end, however, this decision is one of those that went further than the mere legislative text. Another interesting case is *R. v. Jarvis*<sup>111</sup>, which relied on Driedger but reformulated his “modern principle”, obviously in terms focussing equally on the text, object and context of the enactment<sup>112</sup>.

<sup>100</sup> *Supra*, note 7, para. 26.

<sup>101</sup> *Supra*, note 7.

<sup>102</sup> *Id.*, para. 33.

<sup>103</sup> *Supra*, note 7, para. 28.

<sup>104</sup> *Supra*, note 7, para. 37.

<sup>105</sup> *Supra*, note 7, para. 27.

<sup>106</sup> *Supra*, note 7, para. 24.

<sup>107</sup> *Supra*, note 7.

<sup>108</sup> *Supra*, note 84.

<sup>109</sup> *Bell ExpressVu*, *supra*, note 7, para. 26.

<sup>110</sup> *Id.*, para. 28-30.

<sup>111</sup> *Supra*, note 7, para. 77.

<sup>112</sup> See *infra*, note 160 and accompanying text.



As soon as the ink of that nice judicial pronouncement was dry came another hard case that saw the Supreme Court of Canada split on the construction of statutory language found in section 2 of the *Patent Act*<sup>113</sup> in the so-called "mouse case", that is *Harvard College*<sup>114</sup>. This time, however, the majority and the dissent did not disagree in substance on the interpretive method advocated in the *Construction of Statutes*<sup>115</sup>; both opinions stayed away from plain meaning arguments and took into account a variety of interpretive elements<sup>116</sup>. The justices just failed to reach the same conclusion at the end of the day. A similar situation is found in *Barrie Public Utilities v. Canadian Cable Television Assn.*<sup>117</sup>, where both the majority and the dissent gave the same spin to the "modern principle"<sup>118</sup>. The Driedger-intentionalist association also took place in *Markevich v. Canada*<sup>119</sup>, *C.U.P.E. v. Ontario (Minister of Labour)*<sup>120</sup>, *Parry Sound (District) S.S.A.B. v. O.P.S.E.U., Local 324*<sup>121</sup>, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*<sup>122</sup>, *Alberta Union of Provincial Employees v. Lethbridge Community College*<sup>123</sup>, *Mosanto Canada Inc. v. Ontario (Superintendent of Financial Services)*<sup>124</sup>, *R. v. Clark*<sup>125</sup> and *Canada (House of Commons) v. Vaid*<sup>126</sup>.

<sup>113</sup> R.S.C. 1985, c. P-4.

<sup>114</sup> *Supra*, note 7. This case is further discussed in Section II.B.2, *infra*, notes 181-188 and accompanying text.

<sup>115</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>116</sup> The majority in *Harvard College*, *supra*, note 7, referred to Driedger and stated the applicable method of statutory interpretation at para. 154, while the dissent did the same at para. 11.

<sup>117</sup> *Supra*, note 7.

<sup>118</sup> The majority referred to Driedger's citation in stating its approach to interpreting s. 43(5) of the *Telecommunications Act*, S.C. 1993, c. 38. (see *id.*, para. 20); Bastarache J., in dissent, resorted to the key passage in discussing the proper deference to give to the administrative board decision, an unprecedented use of the "modern principle" (see *id.*, para. 86).

<sup>119</sup> *Supra*, note 7, para. 12.

<sup>120</sup> *Supra*, note 7, para. 106.

<sup>121</sup> *Supra*, note 7, para. 41.

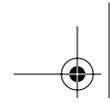
<sup>122</sup> *Supra*, note 7, para. 8.

<sup>123</sup> *Supra*, note 7, para. 25.

<sup>124</sup> *Supra*, note 7, para. 19.

<sup>125</sup> *Supra*, note 7, para. 43.

<sup>126</sup> *Supra*, note 7, para. 80.



More recently, it is in constitutional interpretation and in constitutional challenges under the *Charter*<sup>127</sup> that the “modern principle” was translated into a broad and liberal method to read statutes, one which encompasses text, object and context. It was the case in *R. v. Blais*<sup>128</sup> and *Application under s. 83.28 of the Criminal Code (Re)*<sup>129</sup>. In this area as in all the others, however, the spectres of the plain meaning rule and, with it, the preliminary requirement of ambiguity that conditions the use of all available interpretative arguments, are never far away. In *R. v. Clay*<sup>130</sup>, for instance, the majority reverted to the spirit of textualism when, with Driedger’s citation, Iacobucci J. referred to his statement in *Bell ExpressVu*<sup>131</sup> and categorically held that: “Here there is no ambiguity”<sup>132</sup>. The process of interpreting the legislative regime of the *Narcotic Control Act*<sup>133</sup> was then cut short, examining only the language used in the relevant provisions. Just last December, the lack of legislative ambiguity was the justification to reject *Charter*<sup>134</sup> values as an interpretative tool in *Charlebois v. Saint John (City)*<sup>135</sup>, dealing with the quasi-constitutional enactment that is *New Brunswick Official Languages Act*<sup>136</sup>. Driedger was invoked,<sup>137</sup> but so was Iacobucci J. in *Bell ExpressVu*<sup>138</sup>, which was relied upon by Charron J. for her comment *in fine*: “Absent any remaining ambiguity, *Charter* values have no role to play”<sup>139</sup>.

The whole struggle between plain meaning and intentionalism, with or without the preliminary requirement of ambiguity, is still very much ongoing, as the latest decision of the Supreme Court of Canada on intellectual property testifies. In *Bristol-Myers Squibb Co.*

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<sup>127</sup> *Supra*, note 16.

<sup>128</sup> *Supra*, note 7, para. 16.

<sup>129</sup> *Supra*, note 7, para. 34.

<sup>130</sup> *Supra*, note 7.

<sup>131</sup> *Supra*, note 7.

<sup>132</sup> *R. v. Clay*, *supra*, note 7, para. 56.

<sup>133</sup> R.S.C. 1985, c. N-1.

<sup>134</sup> *Supra*, note 16.

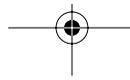
<sup>135</sup> *Supra*, note 7, in the reasons for the majority of 5 (4 justices dissenting) *per* Charron J.

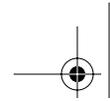
<sup>136</sup> *Supra*, note 20.

<sup>137</sup> *Charlebois v. Saint John (City)*, *supra*, note 7, para. 10.

<sup>138</sup> *Supra*, note 7, para. 62.

<sup>139</sup> *Charlebois v. Saint John (City)*, *supra*, note 7, para. 24.





v. *Canada (Attorney General)*<sup>140</sup>, Binnie J. for the majority construed the legislation having regard to all the interpretative elements suggested by Driedger. On the other hand, although wrapping himself with the "modern principle" cloth and invoking context and purpose, the dissent *per* Bastarache J. warned that: "Contextual interpretation does not justify departures from ordinary rules of statutory interpretation; in particular, reading in words cannot be justified in the absence of a demonstrable ambiguity"<sup>141</sup>. If it is one, the consolation seems to reside in the apparent common willingness, always, to adopt a progressive method of construction, which Driedger's would epitomise.

This tango is certainly bound to continue unabated, however, especially given that the people on our highest court are not even coherent in the interpretative method they individually favour. Witness how just months after the later case the same Binnie J., this time dissenting in *Montréal (City) v. 2952-1366 Québec Inc.*<sup>142</sup>, was rebuked by the majority: "Although he claims to follow the modern approach to the interpretation of legislative provisions, Binnie J. actually relies on the literal interpretation"<sup>143</sup>. Which he did indeed, unashamedly speaking simultaneously of "modern principle" and legislative ambiguity, holding solemnly and in all seriousness that "the legislators intended what they said"<sup>144</sup>. A few weeks yet and Binnie J. reverted back to a broad and liberal method of construction in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*<sup>145</sup>, where for the majority he recalled Driedger and, without any allusion to ambiguity, considered fully the text, context and purpose of the labour legislation at issue.

## II. The Legacy of the "Modern Principle" in Canada

The continuing want of uniformity in methods does not affect in any way a basic undeniable observation, namely that the "modern

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<sup>140</sup> *Supra*, note 7.

<sup>141</sup> *Id.*, para. 103.

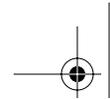
<sup>142</sup> *Id.*, para. 13.

<sup>143</sup> *Id.*, para. 13.

<sup>144</sup> *Id.*, para. 115.

<sup>145</sup> *Supra*, note 7.





principle” is THE approach to statutory interpretation adopted at the Supreme Court of Canada and, following its lead, in the other superior courts of this country. This being so, the time has certainly come to assess the impact Driedger really has had on the work of our highest court. Sure, words such as “modern”, “contextual” or “purposive” suggest sophistication. But is this terminology more than a clever repackaging of traditional ways of doing things?

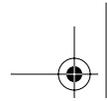
The answer to this question is made difficult because the principal functions that Canadian courts discharge on a daily basis are fundamentally ambiguous. Driedger’s principle, as it appears in the decisions of the Supreme Court of Canada, may be viewed as the expression of the method that is, in fact, followed by the judiciary in reaching a decision on a question of statutory interpretation. Or it may be viewed as providing courts with a framework for the justification of an interpretive decision. Or, again, it may be viewed both as an indication of a recommended method for reaching a decision and as providing a framework for the judicial justification of that decision.

Accordingly, the main functions courts fulfill when interpreting legislation must be examined (Section A), before assessing the impact of Driedger’s “modern principle” on the methodology of construction (Section B).

### **A. The Functions of the “Modern Principle”**

When a court is faced with a question of statutory construction, it will normally come across the principles that have been developed over centuries concerning the goals of interpretation, the factors that are to be considered in interpreting enactments and the various presumptions which may influence the decision and its justification. The task of the judiciary can be analysed as consisting, first, in choosing between opposite meanings, thus selecting the one that represents the “true meaning” of an enactment, or its “best” or “preferable meaning”. This decision having been made, a second process then begins, namely the process of justifying the interpretation in a written opinion<sup>146</sup>. Principles of statutory interpretation play a role

<sup>146</sup> On this distinction, see: Robert S. SUMMERS, “On Method and Methodology”, in D. Neil MacCORMICK and Robert S. SUMMERS (eds.), *Interpreting Statutes: A Comparative Study*, Brookfield, Dartmouth Publishing, 9, at 16-18 (1991).



at both the meaning-selection phase and the meaning-justification phase of the process<sup>147</sup>.

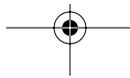
At the meaning-selection stage, the judge hears submissions from the parties, submissions that are in large part based on principles of interpretation. Those principles determine the goal or goals of the interpretive process as well as the legitimate means to pursue these goals, *i.e.* what factors should be considered and, in cases of doubt, what solutions are presumptively preferable. Having in mind these conflicting submissions – referring to legislative intent, ordinary meaning, context, purpose, history, consequences, authorities, presumptions, and so on – the judge then decides which meaning should be favoured.

Once that decision is made, an entirely different process begins, that of justifying the interpretation, generally in a written opinion. This stage is anything but a simple narration of the mental process by which the judge arrived at his or her interpretive decision. The goal is not to describe but to justify. Whereas the meaning-selection stage ends with a decision as to the appropriate meaning, the meaning-justification stage starts with that interpretation and aims at demonstrating that it is preferable to any other. And while at the meaning-selection stage, the judge considers all the valid reasons that may be relevant to the choice at hand, at the meaning-justification stage, the practice in Canadian courts is generally to highlight only those reasons which support the judge's choice of meaning. The reasons that run against this choice are either not mentioned or summarily discounted. It is noteworthy, finally, that the meaning-selection stage involves indeed a private intellectual process, one taking place in the secrecy of the judge's mind, whereas the meaning-justification stage involves a public intellectual process, which constitutes an "authoritative public justification of interpretational decisions"<sup>148</sup>.



<sup>147</sup> On the distinction between the heuristic and the rhetorical functions of the principles of statutory interpretation, see: Pierre-André CÔTÉ, *The Interpretation of Legislation in Canada*, 3rd ed., Toronto, Carswell, 2000, at 37-41.

<sup>148</sup> R.S. SUMMERS, *loc. cit.*, note 146, 18.





### 1. Driedger Meant Meaning-Selection or Meaning-Justification?

When a judge uses the word “interpretation” or “construction”, it is often unclear whether he or she is referring to the process of assigning meaning to a legislative text or to the subsequent activity of justifying that meaning in a written opinion. Although “interpretation” and “construction” suggest the ascertainment of a legal rule taking the enactment as a starting point, they are sometimes used to refer to the justification of the selected meaning.

A good illustration of this dual utilisation of “interpretation” or “construction” is found in *Law Society of Upper Canada v. Skapinker*<sup>149</sup>. This is the first decision by the Supreme Court of Canada dealing with the interpretation of the *Charter*<sup>150</sup>. In the course of arguments, the parties had referred the Court to historical material retracing, in particular, the parliamentary discussions surrounding the adoption of section 6 of the *Charter* and those documents were accepted. Presumably, the Court had considered them in arriving at its decision, but it preferred not to make use of this extrinsic evidence in justifying its conclusion. This is how Estey J. explained the Court’s position:

*The Court on this appeal received this historical material. I have not found it necessary to take recourse to it in construing s. 6, and therefore, I do not wish to be taken in this appeal as determining, one way or the other, the propriety in the constitutional interpretive process of the admission of such material to the record.*

It seems clear from the context that the word “construing” is used here to refer to the process of justification of an interpretation in a written opinion rather than to the process of determining the true or best meaning of an enactment.

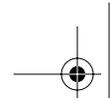
Going back to Driedger’s “modern principle”, is it to be understood as indicating the proper approach to the determination of the true meaning of legislative texts or is it addressing the issue of the appropriate way to justify conclusions on matters of statutory interpretation? Is it a narrative directed at all interpreters of statutes, including the courts, containing the preferred approach to interpret

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<sup>149</sup> [1984] 1 S.C.R. 357.

<sup>150</sup> *Supra*, note 16.





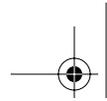
acts or is it a narrative speaking to a much smaller audience, made up only of the members of the judiciary, containing the preferred way of justifying an interpretive decision?

If one considers Driedger's own expression of the "modern principle" examined in Section I.A, it is absolutely clear that it was meant to deal with the ascertainment of meaning, not justification. It was published in a legal manual and echoed the author's lectures at the University of Ottawa. In no way is it addressed to judges or does it deal with the drafting of interpretive decisions. Moreover, suggesting that the three traditional "Rules" (Mischief Rule, Literal Rule, Golden Rule) were not in themselves real rules, but were simply three interpretative tools always available in ascertaining the meaning of enactments was not a new proposition when *The Construction of Statutes* was published in 1974, even less so at the time of the second edition in 1983. As early as 1938, John Willis can be credited of the idea, which is found at the very first page of his classic *Statute Interpretation in a Nutshell*, an article clearly dealing with interpretation in the usual sense, *i.e.* the ascertainment of meaning in an enactment<sup>151</sup>.

## 2. Using Driedger More for Meaning-Selection or Meaning-Justification?

While the function of the "modern principle" was unambiguous under Driedger's pen, the same can hardly be said since it has been borrowed by the Supreme Court of Canada. The survey of the case law in Section I.B, we submit, reasonably supports the argument that Driedger's quote is *presented* by the Court as a principle for meaning-selection while it is *utilised* by the Court as a framework for meaning-justification. The Court is thus addressing simultaneously, on the one hand, all interpreters by advocating a general

<sup>151</sup> John WILLIS, "Statute Interpretation in a Nutshell", (1938) 16 *Can. Bar Rev.* 1, at 1: "Look closer and you will see that there is not one single approach, but three; (i) 'the literal rule', (ii) 'the golden rule', (iii) 'the mischief rule'. Any one of these approaches may be selected by your court : which it does decide to select may, in a close case, be the determining element in the decision. Your guess should therefore be based on an application of all three approaches: you should not be misled by *Craies* or *Maxwell* into thinking there is only one to consider" [footnotes omitted]. See also, to the same effect: THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, *Report on the Interpretation of Statutes*, London, H.M.S.O., 1969, at 17.



approach to the actual finding of legislative meaning and, on the other hand, the members of the judiciary by indicating the preferred way of drafting judgments dealing with statutory interpretation.

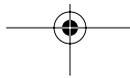
Given that the ordinary sense of “interpretation” or “construction” refers to the process of ascertaining the meaning of a text, it is reasonable to think that the function the Supreme Court of Canada wants to give to the “modern principle” is to indicate what is, in its view, the “preferred”, “established”, “proper”, “prevailing”, “appropriate” approach to meaning-selection<sup>152</sup>. But often, Driedger’s quote also seems to provide the Court with a standardized outline or framework for drafting judgments involving questions statutory interpretation. The fact of the matter is that expressions taken straight from the excerpt at hand – such as “grammatical and ordinary sense”, “context”, “scheme of the Act” and “object of the Act” – appear in a good number of opinions as headings that structure the Court’s justification of the meaning it has selected<sup>153</sup>.

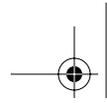
What speaks loud and clear about this point is that the Supreme Court of Canada, on more than one occasion, has felt it necessary to mention that one needs not consider slavishly all the elements suggested in Driedger’s formulation of the “modern principle”. In *Chieu v. Canada (Minister of Citizenship and Immigration)*, for instance, Iacobucci J. writes:

*While the interpretive factors enumerated by Driedger need not be applied in a formulaic fashion, they provide a useful framework through which to approach this appeal, given that the sole issue is one of statutory interpretation. However, I note that these interpretive factors are*

<sup>152</sup> For example, see the numerous “professions of faith” by the Supreme Court of Canada highlighted above, *supra*, notes 27-33 and accompanying text.

<sup>153</sup> One of the most striking illustrations is *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, *supra*, note 7, where Deschamps J., after citing Driedger, writes, at para. 19: “I will examine each of these factors in turn, first with the background context”. The opinion then contains the following headings: “A. Historical Context”; “B. Grammatical and Ordinary Sense”; “C. Scheme of the Act”; and “D. Object of the Act”. Similarly, see: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, *supra*, note 7, para. 18, and the headings that follow, as well as *R. v. C.D.*, *supra*, note 7, para. 27, and the headings that follow.





*closely related and interdependent. They therefore need not be canvassed separately in every case.*<sup>154</sup>

It is reasonable to argue that this last remark concerns the drafting of judgments, not interpretation proper. As a *caveat*, it is rather useless if it is directed at interpreters of legislation in general, but it becomes crucial when it is addressed to judges, telling them they need not refer in all cases to each and every element enumerated in the "modern principle". There are at least three good reasons for this. First, following too closely Driedger's formulation in judgment drafting would lead to repetitious opinions. For example, once a judge has examined the ordinary meaning, the object of the Act, its scheme and its context, there is not much use for a further discussion of the intention of Parliament. Second, reference to a given element, say the object of the act, may be of some help in a majority of cases, but not in all cases. Finally, and most importantly, from a rhetorical perspective, it may not be advisable to canvas the "grammatical and ordinary sense" of a word, for example, if the court has decided that this element should give way to other interpretive arguments<sup>155</sup>.

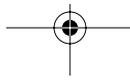


### **3. Legitimizing Interpretation with the "Modern Principle"**

If the "modern principle" prescribes a general approach to questions of statutory interpretation while at the same time providing the courts with a framework for the justification of interpretive decisions, one might ask which one of these two functions is the dominant one. In our view, Driedger's quote is overwhelmingly used for the purpose of justifying interpretive decisions, which in turn is done in an attempt to legitimize the courts role in that regard. Its meaning-selection function is but a secondary one.

<sup>154</sup> *Chieu v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 7, para. 28. To the same effect, see: *Bell ExpressVu*, *supra*, note 7, para. 31; *Alberta Union of Provincial Employees v. Lethbridge Community College*, *supra*, note 7, para. 27; *Marche v. Halifax Insurance Co.*, *supra*, note 7, para. 55; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, *supra*, note 7, para. 96; *H.L. v. Canada (Attorney General)*, *supra*, note 7, para. 187.

<sup>155</sup> In cases where the Court feels that the ordinary meaning should not be determinative, either the "modern principle" is not mentioned at all (see: *R. v. Money*, [1999] 1 S.C.R. 652) or the "grammatical and ordinary sense" is not discussed (see: *Rizzo Shoes*, *supra*, note 7).





One piece of evidence is how the Supreme Court of Canada has continued to refer to Driedger's second edition of *The Construction of Statutes* even though professor Ruth Sullivan, in the third edition of the book, expressed the contemporary methodology in a way which reflects the current interpretive practice much better than the idealized conception embodied in the original version of the "modern principle," favoured by the Court<sup>156</sup>. Why does it prefer a less realistic description of how legislative meaning is and should be determined<sup>157</sup>? The answer seems to be that, even though the first formulation of the "modern principle" is inferior to Ruth Sullivan's reformulation, as a description of the actual interpretive practice of Canadian legal actors (especially judges), it is considered superior by the Supreme Court of Canada because it is more *convenient* in terms of justification and, more importantly, in terms of legitimization of the judicial interpretive decisions. Having a choice between candour and legitimacy, the Court has clearly opted for the latter<sup>158</sup>.

Unsurprisingly, the Court's conception of the proper role of a judge in construing statutes reflects the traditional view, namely that the one and only objective of legislative interpretation is the ascertainment of the legislative will. Driedger's "modern principle", accordingly, would rest on a theory of construction based on the original intention of Parliament. Whereas in the realm of the common law (*i.e.* judge-made-law), courts see themselves as responsi-

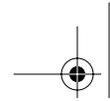
<sup>156</sup> R. SULLIVAN, *op. cit.*, note 10, at 131 and 132:

*There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.*

<sup>157</sup> Professor Sullivan's 3rd edition of *The Construction of Statutes* has been cited but a few times, only in dissenting opinions and mostly by L'Heureux-Dubé J. See *supra*, note 9.

<sup>158</sup> On the possible conflict between legitimacy and candour in statutory interpretation, see: N.S. ZEPPON, "Judicial Candor and Statutory Interpretation", 78 *Georgetown L.J.* 353 (1989-1990).





ble for the evolution and adaptation of legal norms, when it comes to statute law, their role is presented as being much more limited. Since "[s]tatutory enactments embody legislative will", Iacobucci J. wrote in *Bell ExpressVu*, "when a statute comes into play during judicial proceedings, [the courts] are charged with interpreting and applying it in accordance with the sovereign intent of the legislator"<sup>159</sup>.

In *R. v. Jarvis*, the "modern principle" has thus been rephrased in order to embody this quite narrow view of the nature of the interpretive task of courts:

*The approach to statutory interpretation can be easily stated: one is to seek the intention of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the statute.*<sup>160</sup>

In adopting a conception of interpretation which is limited to the discovery of a meaning which is already there, imbedded in the text, the Court undoubtedly seeks to project an image of judicial restraint and neutrality in the face of the sovereign will of the legislator. Driedger's formulation is perfectly suited for this purpose; Sullivan's reformulation is not. Professor Sullivan, rightly so, writes that the interpreter should be mindful of the consequences of the proposed interpretation and suggests that the question of whether or not a given interpretation produces a just and reasonable outcome is as legitimate as the inquiry into the collective mind of the Parliament. It is certainly felt, quite unfortunately, that such interpretative arguments should not be explicitly endorsed by courts.

The Supreme Court of Canada's insistence on sticking with the second edition of *The Construction of Statutes* can thus be considered as a manifestation of a certain kind of rhetorical caution. It is surely not pure coincidence that 1984 is the year the Court referred to Driedger's treatise for the first time (in the *Stuart*<sup>161</sup> case) as well as the year of the first *Charter*<sup>162</sup> interpretation case (*Law Society of Upper Canada v. Skapinker*<sup>163</sup>). With respect to the *Charter*, the

<sup>159</sup> *Bell ExpressVu*, *supra*, note 7, para. 61-62.

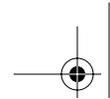
<sup>160</sup> *R. v. Jarvis*, *supra*, note 7, para. 77.

<sup>161</sup> *Supra*, note 6.

<sup>162</sup> *Supra*, note 16.

<sup>163</sup> *Supra*, note 149.





Court has not even tried to conceal the fact that it was entrusted with a mandate involving difficult and important policy choices and it has not shied away from that responsibility. With regard to non-constitutional enactments, however, 1984 marks the beginning of an era of apparent judicial restraint, as if it wanted to downplay the importance of the policy-making role it has to assume, inevitably, when it construes such ordinary legislation.

To the question “What is the function of the ‘modern principle’ as it is used by the Supreme Court of Canada?”, the answer is that it prescribes a general approach to issues of statutory interpretation, while at the same time providing the courts with a framework for drafting opinions justifying interpretive decisions. Of the two functions, the rhetorical one dominates the heuristic one because Driedger’s quote creates the net impression that statutory interpretation implies simply the discovery or declaration of something which is *already there*, that the solution owes nothing to the court’s policy choices and is entirely determined by the intention of Parliament.

Now that the functions on the “modern principle” have been identified, the paper examines if Driedger’s *doctrine* has meant progress for the law of statutory interpretation, as laid down by the Supreme Court of Canada.

## **B. The Impact of the “Modern Principle”**

The “modern principle” has now been the Supreme Court of Canada’s preferred approach to statutory interpretation for over 20 years and it seems appropriate at this point to attempt an assessment of its contribution to the evolution of the law of this country. The principle has certainly brought about some changes for the better, but it is riddled with so many difficulties that it is justified to ask whether the price for progress has been worth it. These problems relate both to form and to substance.

### **1. Form**

Some difficulties with the actual terms “modern principle”, coined by Driedger, stem from the fact that they have been divorced from their context, thereby altering their meaning significantly. Other





problems are linked to the author's choice of words. For the sake of convenience, here is again the famous quote:

*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.*<sup>164</sup>

The expression "modern principle", when taken out of the context of utterance, can be misleading. As it was pointed out in Section I.A, one should bear in mind that in his book, Driedger contrasts the method he is promoting with the Mischief Rule (formulated in the sixteenth century) as well as the Literal Rule and Golden Rule (from the nineteenth century). The term "modern" in this context should be understood in a relative sense, and we are quite confident that an early twentieth century judge could easily have subscribed to Driedger's formulation. Indeed, one of the authorities cited in support of the "modern principle" is a 1921 judgement of the Privy Council<sup>165</sup>.

Out-of-context use of the term "modern" by the Court might suggest that the method in question corresponds to contemporary notions of interpretation, but this is not the case. Rather, the approach at hand is entirely traditional and, given its basic flaws, would find but lukewarm support in legal circles, particularly in academe<sup>166</sup>. Justice Gonthier was undoubtedly right in *Lavigne v. Canada (Office of the Commissioner of Official Languages)* when he wrote that Driedger's method was the "traditional approach to the interpretation of legislation"<sup>167</sup>.

Furthermore, the words "there is only one principle or approach", when taken out of context, suggest that the "modern principle", in and by itself, says all that needs to be said about the appropriate approach to the interpretation of statutes. Again, this is the result of taking the author's words out of their original context. When Driedger writes that "there is only one principle or approach", he

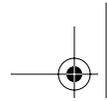
<sup>164</sup> E.A. DRIEDGER, *op. cit.*, note 3.

<sup>165</sup> *Victoria City v. Bishop of Vancouver Island*, *supra*, note 48.

<sup>166</sup> See, for instance: R. SULLIVAN, *loc. cit.*, note 11.

<sup>167</sup> *Supra*, note 7, para. 25 [emphasis added].





means simply that there is one approach as opposed to three approaches (corresponding to the Literal Rule, Mischief Rule, Golden Rule). As mentioned in Section I.A, the three so-called “Rules” are to be fused into only one single approach combining the elements of these three traditional ideas. It does not follow that Driedger can be said to mean that this approach encompasses *all* that needs to be said about the appropriate way to interpret statutes. In fact, his less-than-half-a-page “modern principle” at the end of a seven-page chapter in a treatise that counts 249 pages cannot be the whole story. It is somewhat ironic, therefore, that the words written by the man who insisted so much on the importance of a contextual approach have themselves been taken out of context and given a meaning that is materially different than intended!

Other problems result from the manner in which the “modern principle” has been formulated. It is not surprising, as seen in Section II.A.3, that Major and Iacobucci JJ. opted to reword it in *R. v. Jarvis*<sup>168</sup>. Driedger’s formulation is repetitive, if not redundant. It wrongly places the intention of Parliament, which pertains to the goals of construction, on the same plane as the meaning of words, the scheme of the act and its objects, all of which refer to the means by which such an intent is determined. Furthermore, Driedger’s text suggests that a legislative interpretation is admissible only if it meets all of the proposed elements which are: (i) the ordinary sense; (ii) the scheme of the act; (iii) the object of the act; and (iv) the intention of Parliament. In reality, the first three are not criteria that all have to be met in the process of interpretation, but are only factors that may be considered in ascertaining intention. Ordinary sense must have to be discarded, for instance, in order to achieve the object of an act or to ensure its internal consistency.

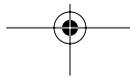
All in all, these shortcomings are of fairly minor significance, as they pertain only to issues of form. However, Driedger’s “modern principle” may be the subject of more fundamental criticisms, with respect to its substance.

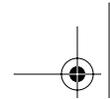
## 2. Substance

There has certainly been progress made in Canadian statutory interpretation that has resulted at least in part from the promotion

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<sup>168</sup> *Supra*, note 7, para. 77.





of the "modern principle". To start with, Driedger's formulation places greater emphasis on the idea that the meaning of an act does not result solely from the conventional or usual meanings of its words. In *Rizzo Shoes*, Iacobucci J. opined along these lines and wrote: "[S]tatutory interpretation cannot be founded on the wording of the legislation alone"<sup>169</sup>. Similarly, Bastarache and LeBel JJ. expressed this concern in *Macdonell v. Quebec (Commission d'accès à l'information)*<sup>170</sup>. As the case law survey in Section I.B demonstrated, however, it is difficult to reconcile such statements with those found in other decisions at the Supreme Court of Canada, reminiscent of the plain meaning rule<sup>171</sup>.

A second positive consequence of Driedger's writings is worth noting, namely that the "modern principle" encourages the consideration of the legislative object as a factor in interpretation. This idea is not new though. Indeed back in 1849, the *Interpretation Act* of the Province of Canada already contained a reference to the object of an act<sup>172</sup>, as would all subsequent interpretation acts. Having said that, it is only with the consecration of the "modern principle" that the consideration of the object, be it of the act as a whole or of the particular provision at issue, has become standard procedure in Canadian courts' process of construction<sup>173</sup>.

On the other hand, what the Supreme Court of Canada has made of Driedger's quote is problematic from a substantive standpoint, in terms of both meaning-selection and meaning-justification. As the expression of a method of construction, the difficulty with the "modern principle" is not what it says, but rather what it fails to say. It provides what is in effect a gross over-simplification of a complex process, whether one considers the goals or the means of statutory interpretation.

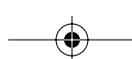
<sup>169</sup> *Rizzo Shoes*, *supra*, note 7, para. 21.

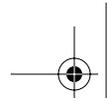
<sup>170</sup> *Supra*, note 7, para. 67: "[T]he interpretation of an Act cannot be based simply on its wording".

<sup>171</sup> As Ruth Sullivan wrote in the fourth edition of *The Construction of Statutes*, the plain meaning rule is totally inconsistent with the "modern principle", which requires a consideration of context in all cases. See: Ruth SULLIVAN, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Toronto, Butterworths, 2002, at 9.

<sup>172</sup> (1849) 12-13 Vict. C. 10, s. 5(28).

<sup>173</sup> See: Ruth SULLIVAN, "Statutory Interpretation in a New Nutshell", (2003) 82 *Can. Bar Rev.* 51, 54 and 55.





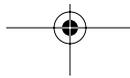
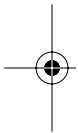
According to what Driedger is deemed to say, the one and only *goal* of statutory interpretation recognised by the Supreme Court of Canada is the ascertainment of the intention of Parliament<sup>174</sup>. While there is no denying the central role of this construct in statutory interpretation<sup>175</sup>, fidelity to legislative intent is very far from being the one and only value involved in the determination of meaning in statutory texts. Many factors regularly considered by interpreters could not be rationally justified if legislative intent were the only goal. It is so for arguments based on authorities, especially judicial cases interpreting a given provision: they were not known to the legislator and cannot be said to reveal in any way its intention. The relevance of previous interpretive decisions rests on considerations of fairness, predictability and stability of the law, rather than fidelity to legislative intent. A recent case showing the multifaceted goals in construction is *R. v. Daoust*<sup>176</sup>, where the Supreme Court of Canada rejected an interpretation which, in its opinion, would represent the intention of Parliament because that will was not reflected in the linguistic version of a criminal statute corresponding to the language of the accused. Here again, considerations of fairness and predictability trumped the search for legislative intent.

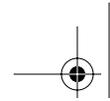
As for the *means* by which the goals of statutory interpretation can be reached, the “modern principle” singles out four of them: (i) the “entire context”, (ii) the “grammatical and ordinary sense” of words, (iii) the “scheme of the act” and (iv) the “object of the act”. Again, these elements are no doubt important in the interpretive process, but this list leaves out many other material aspects, some of which are fundamental. Presumptions of intent, which abound in statutory construction, are not mentioned; neither are authorities, or cases in particular, which any experienced legal practitioner will normally consider and research before arguing a file involving statutes. Also, principles requiring a “fair, large and liberal construction” or, conversely, calling for a “strict construction” are ignored in the quote. The consequences of a proposed interpretation are conspicuously absent from Driedger’s outline, even though case law

<sup>174</sup> *R. v. Jarvis*, *supra*, note 7, para. 77, cited in *Épiciers Unis Métro-Richelieu v. Col-lin*, *supra*, note 7, para. 21.

<sup>175</sup> L.M. SOLAN, “Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation”, March 2004 [<http://ssrn.com/abstract=515022>].

<sup>176</sup> [2004] 1 S.C.R. 217.





shows that adjudicators are not indifferent to the practical results that flow from the interpretation of statutes<sup>177</sup>. Finally, there is no mention of policy considerations, so crucial at the Supreme Court of Canada.

These shortcomings will obviously affect not only the meaning-selection phase of the judicial interpretive process, but also the meaning-justification phase. Reasons for judgment based on the context, the ordinary sense, the scheme or objects of the act are undoubtedly legitimate and they can be convincing, but many other reasons, as legitimate and potentially convincing, are left out. If the Supreme Court of Canada wishes to refer to them, it has to do so outside the framework propounded by Driedger. It is the situation for arguments based on authorities such as judicial decisions, as well as for presumptions of intent; more importantly, it is the situation for policy considerations, including those pertaining to the practical consequences of rival interpretations<sup>178</sup>.

The truth of the matter is that the fundamental flaw with the "modern principle" is the theory of interpretation on which it is grounded, a theory centred around the original intention of Parliament. Interpretation is deemed to be all about finding something which is "already there", that is the legislative intent. What was once said about theories in human activities by professor Henry Mintzberg may be apposite to recall here, namely that one should not ask whether or not such theories are true, but rather whether or not they are useful<sup>179</sup>. The history of science teaches us that an outmoded theory that has been proved inaccurate may still continue to be used for some specific purposes if it provides good service. The theory of "universal relativity", for example, has supplanted Newton's laws of physics, but scientists continue to refer to these laws in certain circumstances, because they maintain their usefulness.

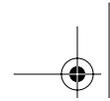
Professor Mintzberg illustrates his point with what he calls the "flat earth theory". For a long time this theory, obsolete for generations now, was the basis of the human understanding of the world.

<sup>177</sup> P.-A. CÔTÉ, *op. cit.*, note 147, at 443ff. It is interesting to note that the Nova Scotia *Interpretation Act* not only allows for consideration of the consequences of an interpretation but actually requires it: R.S.N.S., c. 235, par. 9(5)f.

<sup>178</sup> See: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, *supra* note 7, para. 50-54.

<sup>179</sup> See interview in *La Presse* daily newspaper, April 23, 1999, C1.





However, the “flat earth theory” maintains its utility and has in a sense survived to this day. Consider a flight from Montreal to London. The pilot must plan such a flight based on a conception of the earth that is round, otherwise the aircraft would end up in outer space. However, during a landing at Heathrow, the overly complicated “round earth theory” is of no use. The pilot will have an easier time landing if he or she thinks in terms of a flat earth.

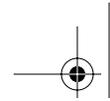
The theory of construction based on the original intention of Parliament that forms the basis of Driedger’s “modern principle” is to interpretation, we argue, what the “flat earth theory” is to aviation in Mintzberg’s example. It is an outdated conception that fails to do justice to the complexity of the process of legislative interpretation. Yet the reasoning has remained because, in spite of its faults, it is still extremely useful. First, it may serve as a suitable interpretive strategy for the simpler cases, which indeed dominate the daily construction of legislation. If one tries to determine the intent of a lawmaker by assessing the ordinary sense of words and their meaning in context, particularly with respect to other provisions of the law and its objects, one arrives most of the time at the best meaning.

Second, the notion of Parliament’s original intent may serve judges as the basis for justifying their interpretive choices, thereby making their decisions appear to be mere mirrors of the will of the elected assembly. Pursuant to the traditional theory, the judge simply assumes the role of “the mouth that pronounces the words of the law”, to quote Montesquieu<sup>180</sup>. The “modern principle” lets judges attribute to Parliament the solution they select, which furthers the impression that judicial decision-making and justice are impersonal. However, the theory appears less practical in hard cases, those that judges may encounter all the more often. Such cases involve circumstances in which the law is ambiguous or is vague, those involving under- or over-inclusive provisions, those in which the text is to be applied to circumstances that were not anticipated at the time it was drafted, and those into which some errors seem to have slipped.

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<sup>180</sup> Taken from his classis work, C.-L. de S. MONTESQUIEU, *De l'esprit des loix*, London, n.b., 1757.





*Harvard College*<sup>181</sup> clearly illustrates the difficulties associated with applying the "modern principle" to hard cases. The Supreme Court of Canada handed down a ruling on the possibility of patenting a mouse that was genetically modified for the purpose of cancer research. The Court had to decide if the terms "manufacture" or "composition of matter" used in section 2 of the *Patent Act*<sup>182</sup> could be interpreted as designating a transgenic mouse and, more generally, higher forms of life obtained through genetic manipulation. This issue was quite controversial and the case proved to be extremely difficult, as illustrated by the division in opinion among the judges who ruled on the matter at the federal courts and at the Supreme Court of Canada<sup>183</sup>.

Justice Bastarache wrote for the majority, which ruled against awarding the patent. He chose to set his reasons within the framework of the "modern principle"<sup>184</sup> and the traditional theory of interpretation. In his reasons, there were 36 references to the intent or will of Parliament. Two difficulties arise out of the reliance on Driedger. To begin with, the essence of the majority's opinion boils down to highlighting different kinds of difficulties (ethical, environmental, social, economic) that would result from the decision supporting the patentability of the transgenic mouse and, more generally, of higher forms of life<sup>185</sup>. These arguments are classic; they used to be captured in the Latin phrase "*ab inconvenienti*". These factors concern the problems brought about by the interpretation the judge wishes to avoid.

Now, where do such arguments fit within the framework set out by the "modern principle"? Recall, once more, the formulation: "[...] 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"<sup>186</sup>. There is simply no place in this formulation for consequential arguments or policy considerations. Lacking a better solution, Bastarache J.

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<sup>181</sup> *Supra*, note 7.

<sup>182</sup> *Supra*, note 113.

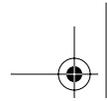
<sup>183</sup> A total of thirteen judges ruled on this matter; seven were opposed to awarding a patent, six were in favour.

<sup>184</sup> *Harvard College*, *supra*, note 7, para. 154.

<sup>185</sup> *Id.*, para. 167-183.

<sup>186</sup> E.A. DRIEDGER, *op. cit.*, note 3, at 87.





grouped them under the heading “The Scheme of the Act”. However, the expression does not really refer to the consequences of legislative interpretation. Rather, the “scheme” relates to the manner in which different portions of an act interact; this is what dictionary definitions, as well as Driedger himself<sup>187</sup>, explain. Accordingly, *Harvard College* illustrates how the “modern principle” does not do justice to the Canadian interpretative practice, a practice that recognizes a major role to choices in construction and to the actual consequences of interpretation.

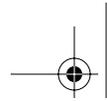
Reference to the intention of Parliament in this case raises another difficulty. The majority stated that the many problems posed by awarding patents for higher forms of life suggest that lawmakers had not intended for patents to be awarded in this manner. This point<sup>188</sup> actually gives pause for thought when one considers that the definition of the word “invention” in the *Patent Act* essentially dates back to 1869, a time at which no one could have anticipated the development of genetic engineering, let alone the wide range of difficulties that would be posed by such technological progress. Invoking the original will of Parliament in this situation is not totally convincing, to say the least.

In reality, although Bastarache J. for the majority of the Court said he was trying to determine legislative intent, in yielding to the traditional rhetoric, he actually (and quite legitimately, one should add) appeared to be seeking a satisfactory response to the issue of patentability of higher forms of life. Such a response certainly ought to take into account the text of the act, its scheme and its objects. However, it should also give a lot of weight to the practical consequences flowing from the selected solution, with respect to certain social goals such as insuring human dignity, encouraging scientific research, fostering Canada’s competitive role in this field, and protecting the environment. The decision in *Harvard College*, which was essentially guided by policy considerations, is presented as if it could have been directly taken from the text of the act and inferred from the intention of Parliament. This approach represents an unfor-

<sup>187</sup> *Id.*, at 3: “[T]he relation of the various provisions of a statute to each other”.

<sup>188</sup> It is particularly evident in the majority’s reasons in *Harvard College*, *supra*, note 7, para. 167: “In my view, the fact that the *Patent Act* in its current state is ill-equipped to deal appropriately with higher life forms as patentable subject matter is an indication that Parliament never intended the definition of invention to extend to this type of subject matter”.





tunate gap between what the Court claims to do and what it actually does.

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For over 20 years now, the "modern principle" has been presented by the Supreme Court of Canada as THE approach to statutory interpretation and the pronouncements have had a definite influence in the way all Canadian courts justify interpretive decisions, albeit not necessarily on the way they actually determine statutory meaning. We have argued in this paper, however, that the "modern principle" fails to provide courts with a satisfactory strategy, either for selecting or for justifying the meaning of statutes.

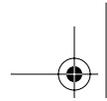
As a *method of interpretation*, Driedger's quote remains inadequate and wanting in that it fails to reflect accurately some fundamental elements of the process by which Canadian legal actors, including judges, ascertain legislative meaning. The construction of statutes constitutes such a complex process, especially in the harder cases that tend to end up in courts, that it is extremely difficult to state the proper approach to interpretation in but a few words, if it can be done at all. As professor Robert Summers wrote: "[I]t is at best unlikely that a clear and generally acknowledged set of positive rules governing interpretation exhaustively and authoritatively could be formulated for any system of law today"<sup>189</sup>. At most, Driedger's quote provides a valid *starting point*<sup>190</sup> for statutory interpretation, but it cannot define, in and by itself, the approach to follow in all cases.

As a *framework for justification* of interpretive decisions, the "modern principle" encourages a style of judgement which is rather formal: the expression of substantive reasons or policy considerations for deciding a case one way or another has little or no place in the process. One understands the reasons behind the rhetorical caution felt appropriate by many judges in discharging the delicate function of statutory construction. Essentially, the judiciary seeks

<sup>189</sup> R.S. SUMMERS, *loc. cit.*, note 146, 15.

<sup>190</sup> Perhaps *signe des temps*, this expression "starting point" was actually used on quite a few occasions lately, in *R. v. Blais*, *supra*, note 7, para. 16; *R. v. Clay*, *supra*, note 7, para 55; and *Montréal (City) v. 2952-1366 Québec Inc.*, *supra*, note 7, para. 114.





legitimacy in projecting an image of fidelity to the will of the elected body of Government that is Parliament. One may ask, however, if it is not time for Canadian courts to water down the traditional rhetoric of statutory interpretation and to openly acknowledge that the construction of legislation may involve something more than the mere “discovery” of an intention which would be “already there”.

It may require courts, especially at the appellate level, to act in a creative manner in order to clarify or supplement legislative provisions, or even to make the necessary adjustments to have them address an unforeseen or changing social reality. We trust that the day will come when the justification of judicial interpretive decisions in this country acknowledges more openly this simple fact, rather than try to obscure it.

