**Podcast 9 – Legislative Literacy – How to Interpret a Statute (2)**

**Professor Forcese**

Welcome back. In this 2nd installment of my conversation with John Mark Keyes we focus on the question of statutory interpretation. How is it that one is to read a statute?

So now you have a bill that has become an act or a statute. At this point, it’s very straight forward. You pick up the instrument and read and you know what the law is. Is it that straight forward?

**Professor Keyes**

It might be if you have a very simple law, but typically laws are not that simple. They on average, a new act probably takes 20 or 30 pages if not more. And of course if you look at some laws like the *Income Tax Act,* they consist of hundreds and hundreds of pages. An act of parliament. An act of the legislature can be fairly complex. Typically, it is because it’s dealing with some serious issues that need to be resolved at a federal, provincial or territorial level. Laws are there to try to make society as a whole function better. They deal with major question and problems that are coming up in the functioning of society. The law is there to help try to improve things, to correct problems that may exist. It’s really the complexity of those problems that determines the complexity of the law itself. In order to understand the law, you have to understand what the problem is as well. You have to work with many sides. Reading a statute, you could read it for pleasure reading, but very few people read statute for pleasure. They usually want to solve some real practical problem. What they’re doing with the statute is trying to understand it and apply it to some particularly situation that needs a legal solution.

**Professor Forcese**

So how do you do that. How do you read the statute?

**Professor Keyes**

The 1st step is as you say, reading. You look at the words of the statute. You pay close attention to what they’re saying. That’s always the first step in trying to do something with the statute or with the regulation for that matter. But just reading the words is generally not enough. Maybe just to step back from that, I’ll try to give you an explanation of why just reading words and jumping to conclusions is probably not a good thing.

A law is doing two things. First of all, it’s try to communicate the will of the legislature, the legislature being democratically elected representatives of the people. Who have decided that things should be a certain way. First and foremost, that law is trying to communicate something about what the law is. But the law itself is not necessarily complete. Because we live in a country where those words form a basis for understanding what the law is and so, that written law is more than just a communication from parliament. It is a source of trying to understand what that law is. And once parliament and the legislatures have passed the bill, once it’s been given royal assent, their job is over in terms of how that law applies. At that point it’s going into an interpretive process. A legal process, which looks at the words of that statute. But it looks at it in a broader context of legal interpretation and approaches to interpretation. Because the law also has to form a sound basis for people to understand what their legal obligation are. It has to be a reliable source of what that is.

One of the features of our system of government is that we have a system of the rule of law. The rule of law is a relatively stable body of law that doesn’t change from day to day. Doesn’t change with the winds of government ministers. People can read the law and rely on it. That’s the other fundamental feature of laws is that they are a source of trying to understand the law in and of themselves. Quite apart from the fact that a Member of Parliament or legislature may have given their assent to the law.

Really the whole business of interpreting and applying laws. It’s a composite exercise. It’s not just reading the words that have been approved by parliament. It’s also trying to understand what they man in and of themselves in the context which the courts interpret the law.

**Professor Forcese**

Presumably if the task is to construe the law within the context of all the considerations you’ve raised there are maxims or principles or rules that might be available to an aspiring lawyer trying to understand what these words mean. Is that so? And what would those rules be?

**Professor Keyes**

You’re right. There is a very well developed body of law on how you interpret law. The courts have an act that for a very long time, statutes go back to the middle ages. Through all of that period our legal system has developed ways of interpretation that start with reading the words but take into account other things. They have also developed a series of approaches, sometimes called rules of interpretation that they very often apply to try to understand what the meaning of that law is, what is really the content of the law.

One of the best encapsulations of the approaches that the courts have taken is one that was put together by Elmer Driedger. He was a former legislative drafter; he was also a former deputy minister of justice. He also did a great deal of teaching here at the University of Ottawa. He taught the first courses in statutory interpretation in the 1950s and 60s. He taught approaches, rules to interpretation. He did a lot of thinking about what they are. He boiled it down to a particular approach that he called the modern approach to interpretation. That has now become accepted as the key approach that courts should take in trying to understand what legislation means. In the first edition of his book on the construction of legislation, he formulated that approach to interpretation in the following way. He said the words of an act are to be read, so yes you start off with reading, 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. That formulation is the modern rule, is probably the most frequently cited approach in the courts in Canada. Hundreds and thousands of times. Including in the Supreme Court of Canada. His modern rule of instruction is the touchtone, the starting point that courts in Canada use today to interpret legislation. It’s really a synthesis of all of those other individual rules of interpretation. Rolled up into that relatively pithy phrase.

**Professor Forcese**

It seems quite abstract. How does it work in practice?

**Professor Keyes**

Let’s start by unpacking the various elements. There are a number of elements to it. Each of them is really important. They all work together. The first starting point is the words of the act. The words are the primary vehicle for conveying meaning, but you will always start by reading them very carefully. You have to recognize that individual words have different meanings. If you look at a dictionary. You typically find a half a dozen different meanings for individual words and sometimes those meanings are very different. The question then is when you’re reading words is which meaning is the right meaning here. How do you arrive at that meaning? That’s why you move on to talk about the other elements of this approach of interpretation.

The first one is reading it in its entire context. Context plays a critical role in understanding what people mean when they use words. We use it all the time. It’s a way of making verbal communication more efficient. We use this especially in speech, but it also comes up in written communication as well.

A lot of things don’t have to be said and that’s what is formed by the context. As we’re talking here Craig about things, I’m not being as explicit about what I’m doing because we have an understanding of what we’re trying to accomplish here. We are preparing an audio presentation on statutory interpretation for students who would be beginning their studies at the University of Ottawa. That’s the context, but what we’re talking about, if the context were different. Something we were going to be broadcasting generally to the world at large or if it’s something that we wanted to present to students at the high school level or some other forum we would be adjusting what we were talking about. We wouldn’t be saying things in the same way because the context would be shaping what we’re doing. It’s the same with all communication.

There’s a certain context around that communication and with the legislative communication some of the features of that context are things like an interpretation act or the drafting conventions that are typically used to draft legislation in Canada. Every jurisdiction has an interpretation act. Which contains a whole series of rules of interpretation and they often contain definitions of key words. For example, in the *Federal Acts* there would be a definition of Governor in Council. And that’s a phrase that is repeated in countless legislation. But you never see it defined anywhere except for the interpretation act. Basically the Governor in council is another word for the cabinet. When legislative powers are being delegated in an act of parliament. They are very often given to the Governor in Council.

When you read that in a statute, you have to read it with an understanding that the Governor in Council is really the cabinet advising the Governor General. That’s the context for reading those words and understanding what they mean.

I mentioned a moment ago, there are a series of drafting conventions that have been developed by an organization called the Uniform Law Conference of Canada. It’s a federal-provincial body that meets to try to develop model legislation that can be enacted across the country. One of the things it did was it tried to also develop a more uniform approach to the drafting of legislation. They deal with things like the numbering system for legislation. It may seem like a trivial dimension to legislation, but actually numbering is a critical feature to the usability of legislation. One of the things that we do with legislation is we talk about it. A numbering system makes it easy to pinpoint what you’re talking about. It makes it easier to follow through to locate where you are. Things like that numbering system are part of the drafting conventions that have been adopted in Canada. To make legislative text easier to use.

That’s part of this general context for legislation.

The second element that Driedger talked about was the grammatical and ordinary sense. This is another absolutely critical feature of interpretation that has some very profound basis. One of the things Driedger argued for successfully, because it’s been accepted by the courts, is that there’s no specialized language for legislation. Laws are for the people and laws use the language of the people. The ordinary grammatical sense of language. They’re not creating some new language; they’re using the language that is used generally. That is a reflecting of the need for law to be understood by people. The law is for people. It should be written in a language they understand. In interpreting the law. You’re looking for a natural sense. You’re assuming that the way the words are used is the way that other native speakers would use those words. You’re looking at the ordinary rules of grammar. You’re looking at what meanings are conventionally attached to words. You may look to a dictionary to see what ordinary usage is. That’s the dominant approach to interpreting legislation.

It’s not to say that sometimes the legislature may give some specialized meanings to words. It may create some specialized rules of interpretation, but the foundation of interpretation is really the ordinary language and rules of grammar.

**Professor Forcese**

Driedger talks about whole bunch of an extraneous consideration above and beyond the immediate context. What is he talking about really in that sense?

**Professor Keyes**

Right. He talks about really some more elements of context that are above and beyond just the particular words that you may be interested in. The first one of these was what he called the scheme of the act. His point is that when you read a particular section or paragraph or legislation, you’re not reading it in isolation from the rest. What you’re reading is part of a whole. It has a function, a purpose that is part of a larger function and purpose of the rest of that legislation. You really need to read it in conjunction with the other of legislation.

Sometimes this is very clear when you’re reading legislation. You see cross references in one section to another section of the act. That’s an indication that you can’t read the section alone. You really need to make sure you’re aware of that other section. Another demonstration of how integrated the various components of the statute are the definition section. Most legislation begins with a series of definitions. Defined terms. Words or phrases that are used throughout the rest of the legislation and at the very beginning a series of meanings is attached to them. Sometimes those meanings are necessary to make it clear, which of the ordinary meanings is intended. Or sometimes a somewhat special meaning may be given to it. Those definitions have to be read into all of the rest of the legislation. When you’re reading a section later on. If it uses one of these defined words, you have to read that definition into that section as well. That’s part of the scheme of the act, the statutory context that you have to bring to bear when you’re reading a particular set of words that might be of interest.

The next two elements are somewhat related, the object of the act and the intention of parliament. The intention of parliament is an indication of what parliament is trying to accomplish. What’s the legislature trying to accomplish because that objective may help you to understand exactly how these words can be understood and how exactly they’re to be applied.

The words aren’t put together on a random basis. Laws are passed to achieve something, some socially desirable goal. Having an understanding of that goal is often very helpful. Particularly when the words that were used are of a very general nature. Legislation sometimes uses fairly specific words. Sometimes it uses very general words. A word like reasonable. Reasonable is probably one of the most frequently used words in legislation. What does reasonably mean? If you go to a dictionary, it’s not going to tell you what reasonable means. It will get you in the ball park but it is not going to be terribly helpful. To understand what reasonable means. You need to understand what the act is about. Because reasonable is what is reasonable to accomplish the objective of this legislation. Understanding that objective is critical to understanding what reasonable means in that particular context.

Of course, there are all sorts of other general words used in legislation. It’s in those circumstances where having an understanding of the objectives of the act of parliament is helpful. But you also have to recognize that the object of the act and the intention of parliament may or may not be altogether clear either. Some legislation begins a statement of the objects of the act. Or it may begin with a preamble, which is an another way parliament tries to give a sense of what they’re accomplishing. Those statements themselves may be fairly general in nature. One difficult is that sometimes in a preamble those statements of objects themselves may not be entirely consistent. They may be going in slightly different directions. So which one of the objects is the one you’re supposed to use?

There’s a certain amount of judgement that’s left to the reader to try to come to a conclusion of what the objects are. And then if you go to the concept of the intention of parliament, in many ways that’s an even more difficult concept. Intention at its root, is something that is a very human quality. It is something that is in the mind of individuals when they do things. But a law is not made by an individual. Statutes are made by Members of Parliaments and Senators Federally. And by members of the assembly in provincial and territorial assemblies. And so they are made by a group of people.

Well what’s the intention of the group of people? How do you understand what their intention is? Really in the context of interpreting legislation. The intention of parliament is a somewhat artificial concept. It’s there to help you try to understand what might be meant here buy you can’t take it literally. What courts have done is try to extract that intention from things like what the Member of Parliament, or Minster said when they introduced the bill. Or they may try to extract it from some of the study papers or some of the evidence that might be presented to a committee as its deliberating on a bill. Or they may try to extract it from the debates, the things that Members of Parliament said. But those are just indications of what the intention might be. It’s rare to find in any of them, some definitive statement of what the intention is.

**Professor Forcese**

It sounds like statutory interpretation is more art than science. That some of these indicators can point to different directions in more complex cases at least. Is that true?

**Professor Keyes**

It is. There is definitely an artistic judgemental quality to it but it is not entirely random either because you’re still working within the context of words that are used, words that have meaning. In the context of a language that has rules of grammar and certain rationale that underpins legislation. That is indicated by what you can understand in terms of the purposes and the intention of legislation.

Yes, there is a certain judgement to understanding the meaning of legislation, but that’s not to say that we live in an Alice and Wonderland world where you can just give any meaning you want to the words.

One difficulty though is that this artistic quality gives is that different people may arrive at different conclusions about what the meaning of a piece of legislation is. The way that is resolved in our legal system is that the courts are the ultimate bodies that decide on the meaning of legislation. You have the legislatures, parliament that decide on what the words are going to be, but what they mean is really a decision for the courts to make.

When people disagree about what the meaning of those words are and that again is a fundamental feature of our system of law, of the rule of a law. That you have a law that originates from the democratic process, but it’s never subject to an interpretive process, but is controlled by the courts. It’s really the checks and balances of our system of government, this is how they operate.

We were talking a few minutes ago about why the courts have developed rules and approaches because they are the final interpreters of the meaning of legislation. Of course, that’s not to say that after a court has made a decision on legislation, that the legislature can’t go and change the words. In fact, that very often happens. The courts may arise at a decision about what something means and the legislature may decide no that’s not really what we wanted. So they change the law. And then you have a new set of words and then the question may be well, did those words capture what the legislature wanted to capture. Ultimately it’s up to the courts to decide that.

We spend a lot of time looking at what courts say about the meaning of legislation but you also have to recognize that most interpreters of legislation are not courts. For the most part, legislation operates without the intervention of a court, say what particular words mean. Courts intervene when there’s a serious problem. And happily with most legislation it is interpreted without the need to have the courts involved. It’s interpreted first of all by the people who may be affected by it. They may get legal advice as to what things mean, but in an ideal world they should be able to read the legislation written in the ordinary language, using ordinary grammar. They should be able to get an ordinary understanding of legislation from that.

But also words are interpreted by the government agencies that have to administer the law. Over the last few years, particularly you see more and more the role of these agencies preparing guidance, documents, and brochures, and policy statements, interpretation bulletins, things to help citizens understand what the law is about. In fact, it’s through those kinds of ways that probably most people get an understanding of what the law is. They read a brochure, a publication that is a statement of what the law is and so their understanding of the law is built on the basis of basically that advice that’s given by others. But they don’t always accept that advice and ultimately, if they think that the government is wrong in its interpretation, they can’t challenge it in court. It’s up to the court to have the last word.

**Professor Forcese**

Thanks very much Professor Keyes

**Professor Keyes**

You’re very welcome