DRIEDGER ON THE CONSTRUCTION OF STATUTES, THIRD EDITION. By Ruth Sullivan. Toronto:Butterworths, 1994. Pp. 576. ($130.00).

No book on interpretation can meet the expectations of all prospective readers. Some will be looking for an up-to-date handbook of the various rules and sub-rules, to be employed as an adversarial tool in an interpretive practice that might be called pathological — interpretation if necessary, but not necessarily interpretation. Others will look for a full account of current scholarship and theories, including the post-modernist view that interpretation is not fundamentally rigorous or disciplined but is instead a simple exercise of power.

Professor Ruth Sullivan's third edition of *Driedger on the Construction of Statutes* will confound both of these expectations. This book is unquestionably scholarly, although it self-consciously claims to have avoided "the jargon of legal scholarship and linguistics".[1] From beginning to end it manifests a belief in a discipline of interpretation. Its discipline is that of a serious reader, drafter, and interpreter. When Professor Sullivan claims in the foreword to the third edition that this book is "written for the practising bar",[2] she does not mean those who would practise interpretation by leaving a book such as *Driedger* on the shelf until needed as a source of ammunition in adversarial argument. She means the practitioner who will reserve the time, and make it a priority, to read this book from cover to cover. This book is not tailored to the lawyer who *problematizes* interpretation; it is for those who recognize it as an essential and highly rewarding part of a lawyer's professional practice.

It is only by reading Professor Sullivan's third edition of *Driedger* all the way through that practitioners of interpretation will appreciate its full force, and its contribution to the interpretive *métier*. This is not a book to be taken piecemeal, at least not on the first reading. Its commitment to rigorous reading of statutes, and to a full appreciation of their context, is fundamental to Professor Sullivan's approach to interpretation. For example, in an important chapter on "How to Read Legislation", constructed around conventions of drafting, the reader profits from Professor Sullivan's experience as a legislative drafter. In this aspect, the third edition picks up and elaborates on a key feature of the first two, Driedger's firm view that the first step in interpretation is to read a legislative enactment in context.

In her treatment of "context", Professor Sullivan develops the emphasis on reading, in its broadest sense, in chapters on how to deal with the immediate text and adjacent or closely related provisions, in a major chapter on bilingual legislation, in a chapter on reading the enactment as a whole, and in a chapter on considering related legislation. The contextual analysis takes on greater scope in chapters dealing with related common law doctrine and in a major treatment of "the external context", which Professor Sullivan defines as including "the knowledge, beliefs, theories, data, assumptions, values, conventions, practises and norms that are drawn on by legislatures in formulating legislation and by interpreters in reading and applying it."[3] This approach of moving from the immediate context to the broad external one is laid out in a careful step-by-step methodology.

---

1 P. viii.

2 *Ibid.*

3 P. 195.

It is this emphasis on methodology, and discipline, and the consequent treatment of "rules" of interpretation as aids in a comprehensive interpretive process, rather than as discrete implements leading to mechanical results, that characterizes Professor Sullivan's approach throughout this book. It is an approach that will likely frustrate practitioners and students whose habits of interpretation tend to be pathological, rather than methodological. It is to Professor Sullivan's credit that this book is better suited for those who are in the profession of interpretation for the long haul than it is for the *ad hoc* problem-solvers. Perhaps its greatest contribution will be to convert some practitioners from being firefighters to being disciplined and even passionate readers of legislation in its broadest context.

In its emphasis on reading and its attention to context, Professor Sullivan's third edition continues the important core of E.A. Driedger's project in the first two. The 1974 first edition grew out of Driedger's work as a drafter (eventually as federal Deputy Minister of Justice and later as a pioneer of the legislation program at the University of Ottawa), and out of his commitment to make legislation an integral part of the professional practice of law. In particular, Driedger was committed to teaching students to be readers of legislation. Where Professor Sullivan's third edition departs from, and moves beyond, Driedger is in its less positivistic style as an interpreter and its more integrated approach to rules. Where Driedger favoured a restrictive judicial role, and adopted a more problem-solving approach to rules of interpretation, Professor Sullivan sees each exercise in interpretation as requiring a full reading and understanding of context, including an analysis of whether legislative purposes are achieved.

In what will be seen by many as the centrepiece of the book, the "modern principle of interpretation", there is a self-conscious elaboration of Driedger's first and second editions. For Driedger, the "modern principle" required that "the words of an Act...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."[4] In the third edition, Professor Sullivan significantly expands the scope, and the function, of the "rule": *viz*,

> to determine the meaning of legislation in its total context, having regard to the purpose of the 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, 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.[5]

In effect, the third edition is much more than an updating of the first two editions of Driedger. It includes a thorough revising of some of Driedger's basic tenets, such as his approach to retrospectivity and his adoption of the distinction between objective and subjective absurdity. Moreover, the third edition includes a significant body of new or substantially elaborated material, such as that dealing with interpretation of treaties with aboriginal peoples, extra-territorial application of legislation or Crown immunity. Where the second edition devotes four pages to the interpretation of taxing legislation,

---

4 E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

5 P. 131.

the third edition addresses the subject in fifteen. The third edition devotes seventy pages to the "temporal operation" of statutes, questions of repeal, re-enactment, retroactive application and interference with vested rights.[6] This material picks up on a substantial body of scholarship that has emerged since the publication of the second edition, notably the work of Professor Pierre-André Côté.[7] Readers anxious to see whether Professor Sullivan takes sides in the famous debate between Driedger and Marguerite E. Ritchie[8] over the use of male-exclusive nouns and pronouns will find the point dealt with conclusively, and subtly, by the inclusion of the 1989 Drafting Conventions of the Uniform Law Conference of Canada as an appendix, including the admonition of article 3 against the use of sex-specific references.[9]

Professor Sullivan's book is more scholarly in its ambition than were the first two editions of Driedger. For example, it is comprehensive in its reference to judicial sources, at least from the Supreme Court of Canada. The book is not as systematic in picking up on scholarly and critical literature on interpretation as is the major existing Canadian work by Professor Pierre-André Côté.[10] There is an implication that more extensive reference to this literature would not have been appropriate in a book addressing itself to "the practising bar". It is to be hoped that Professor Côté's book demonstrates that this scholarship can be effectively incorporated into professionally oriented materials. To be fair, Professor Sullivan's book is not dismissive of the scholarly literature, and her overall approach is, as noted above, definitely academic.

A review of the third edition of *Driedger*, coming two decades after the publication of the first edition and ten years after the second, invites an assessment of the development of the discipline of interpretation in Canada. To put the matter simply, Professor Sullivan's third edition should be a cause for celebration, of the extent to which the *métier* has developed in the past twenty years, and a celebration of the significance of E.A. Driedger's work in starting this series. There is no question that judges, lawyers and scholars take interpretation more seriously today than was the case in the early 1970s. It is now common in judicial and administrative interpretations to see the serious working out of textual and contextual elements, along the lines elaborated by Professor Sullivan. This is due in some measure to the profile accorded to interpretation of the *Canadian Charter of Rights and Freedoms*.[11] But it is clear, as reflected in the third edition, that sophisticated exercises of interpretation can be found in all areas of public law. The most important advance in the *métier* since 1974 amounts to a change of

---

6 Pp. 485-552.

7 Professor Côté has developed a major scholarship on the operation in time of legislation, see: *The Interpretation of Legislation in Canada*, 2d ed. trans. K. Lippel & W. Schabas (Cowansville: Yvon Blais, 1992) at 83-170; "La position temporelle des faits juridiques et l'application de la loi dans le temps" (1988) 22 R.J.T. 207; "Contribution à la théorie de la rétroactivité des lois" (1989) 68 Can. Bar Rev. 60; "Le juge et les droits acquis en droit public canadien" (1989) 30 C. de D. 359; "L'application dans le temps des lois de pure procédure" (1989) 49 R. du B. 625. It is a measure of the development of this analysis, and of the contributions of Professor Côté in particular, that the International Association of Legal Methodology will hold its fourth international congress in Montreal in 1995, devoted to the theme: "Time and Law".

8 M.E. Ritchie, "Alice Through the Statutes" (1975) 21 McGill L.J. 685; Driedger's response appears as: "Are Statutes Written for Men Only?" (1976) 22 McGill L.J. 666.

9 P. 554.

10 *The Interpretation of Legislation in Canada*, *supra* note 7.

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

generation: from a generation in which a preponderance of lawyers practised interpretation as the application of discrete rules to mill or distill meaning from ambiguous phrases to a generation in which a preponderance of lawyers, or at least of judges, practise interpretation as Professor Sullivan would have them do it. The third edition of Driedger will undoubtedly give further impetus to that generational shift.

There may be a temptation, in looking back at the first edition of Driedger and comparing it with the third edition from the vantage point of 1995, to underestimate the significance of E.A. Driedger's initiative in publishing the first two editions, perhaps even to see those efforts as naive. However, when those contributions are seen in a longer term perspective, Driedger's work is almost pioneering. When the first edition appeared in 1974, there was not a large body of Canadian scholarly writing about interpretation. Following a burst of work in the 1930s by scholars animated by a "New Deal" enthusiasm for public policy and the rising significance of legislation and regulations, interpretation had gone in to something of an eclipse. Common law students in the 1970s were still studying John Willis' "Statute Interpretation in a Nutshell",[12] typically as a guide to the rules of judicial interpretation, notwithstanding the fact that it was written in the 1930s as an impertinent *cri du cœur* against practices of judicial interpretation that Willis considered to be hostile to legislation and the administrative state.[13] Driedger's 1974 first edition includes as an appendix J.A. Corry's remarkable 1936 article "Administrative Law and the Interpretation of Statutes".[14] What is even more remarkable than the quality of Corry's article is that it was still the best such work in 1974 despite the passage of almost forty years. From 1940[15] until the publication of *Construction of Statutes* in 1974, Driedger was responsible for the majority of legal writing on interpretation in Canada.[16] It is striking that, with a virtual handful of legal academics

---

[12] J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

[13] In *The Parliamentary Powers of English Government Departments* (Cambridge: Cambridge University Press, 1933) at 51, Willis complained of the tendency of courts to view legislation "through the fog of the common law." In a 1935 article, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and The Functional" (1935-36) 1 U.T.L.J. 53 at 60, Willis protested against the strict construction of statutes, and blamed the practice of interpreting legislation "against the background of a common law whose assumptions are directly opposed to those of modern legislation." For a reflection on Willis' work and an appreciation of the context in which Willis produced his 1930s contributions, see R.C.B. Risk, "John Willis — A Tribute" (1985) 9 Dalhousie L.J. 521.

[14] J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1935-36) 1 U.T.L.J. 286.

[15] Another New Deal contributor to scholarship on interpretation was Bora Laskin, see: "Interpretation of Statutes: Industrial Standards Act" (1937) 15 Can. Bar Rev. 660; and "The Protection of Interests by Statute and the Problem of 'Contracting Out'" (1938) 16 Can. Bar Rev. 669. Also see the important review of civil law interpretive methodology by P.B. Mignault, "Le Code civil de la province de Québec et son interprétation" (1935-36) 1 U.T.L.J. 104; E.R. Hopkins, "The Literal Canon and the Golden Rule" (1937) 15 Can. Bar Rev. 689; V.C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. 77; and G.D. Sanagan, "The Construction of Taxing Statutes" (1940) 18 Can. Bar Rev. 43.

[16] Driedger's works include: "Legislative Drafting" (1949) 27 Can. Bar Rev. 291; "A New Approach to Statutory Interpretation" (1951) 29 Can. Bar Rev. 838; "The Retrospective Operation of Statutes" in J.A. Corry, F.C. Cronkite & E.F. Whitmore, eds., *Legal Essays In Honour of Arthur Moxon* (Toronto: University of Toronto Press, 1953) 3; *The Composition of Legislation* (Ottawa: Queen's Printer and Controller of Stationery, 1957); "Subordinate Legislation" (1960) 38 Can. Bar Rev. 1; and *Legislative Forms and Precedents* (Ottawa: Queen's Printer and Controller of Stationery, 1963). The other substantial contributor during this period was L.-P. Pigeon: "L'élaboration des lois" (1945) 5 R. du B. 365; *Rédaction et interprétation des lois* (Quebec: Legislative Library, 1965); and "The Human Element in the Judicial Process" (1970) 8 Alta. L. Rev. 301.

in Canada during the 1930s, there was such a prolific and sophisticated scholarship, while there was such a downturn during the 1950s and 60s at a time of substantial expansion in university law faculties. Whatever the explanation for the relative lack of production following a promising start in conjunction with the New Deal, it is important to appreciate E.A. Driedger's substantial contributions through this period when university-based scholarship on interpretation was in virtual eclipse.[17]

By comparison with the starting points that accompanied the publication of Driedger's first edition in 1974, the scholarship and practice of interpretation in Canada has come a long way in twenty years. A review of works cited by the Supreme Court of Canada in the period 1985-90 indicates that Pierre-André Côté ranked fifth among authors most commonly referred to and that Driedger was sixth.[18] In an assessment of the administrative law jurisprudence for the 1990-91 term, I observed: "It is particularly encouraging, as has been said at several points in this essay, to see the interpretive sophistication of the Court. It is notable that there are very few references to legislative intent, and even fewer references to rules of interpretation in the 1990-91 cases. Instead, the Court has turned to a full textual analysis, assisted by an understanding of the policy context."[19]

So judicial interpretation has advanced from its anti-legislation, rule-centered analysis of the 1930s, and we have a sizeable body of Canadian-based scholarly writing. Those are considerable accomplishments, and they are amply reflected in Professor Sullivan's third edition of *Driedger*. The question I retain at the end of the day is whether, or how, these advances are translated in legal education or in the practice of law. At a 1986 panel on the teaching of legislation in Canadian law faculties, Professor Hudson Janisch took the view that a natural propensity to perpetuate common law methods of teaching law, and of knowing the law as scholars, is antithetical to the effective teaching of legislation.[20] How do we get from an account of judicial approaches to interpretation, based almost entirely on the study of reported judgments, to a comprehensive treatment of legislation that includes the elaboration (a civil law term for legislative process), drafting and implementation phases? This is a big question, and one that may not excite much interest in a general climate of common sense revolutions and congressional contracts to roll back the state. Neither is it a question that I lay at the door of Ruth Sullivan, or E.A. Driedger. They have brought us a long way in developing a modern

---

[17] In a 1960 address to a joint meeting of British, American and Canadian law teachers, John Willis noted that law-review writing on specifically Canadian administrative law was "almost non-existent" and offered the explanation/critique that the subject matter lay "outside the realm of law report law and in the shadowy and arduous borderland between law, political science and public administration, where you have to use your feet as well as your head.": J. Willis, "Administrative Law in Canada" (1961) 39 Can. Bar Rev. 251 at 253. For a mid-1970s critique of a general deficiency in Canadian legal scholarship, see E. Veitch and R.A. MacDonald, "Law Teachers and Their Jurisdiction" (1978) 56 Can. Bar Rev. 710.

[18] V. Black & N. Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16 Dalhousie L.J. 377 at 390.

[19] H.W. MacLauchlan, "Developments in Administrative Law: The 1990-91 Term" (1992) 3 Supreme Court L.R. 29 at 70. See the same theme advanced in H.W. MacLauchlan, "Developments in Administrative Law: The 1989-90 Term" (1991) 2 Supreme Court L.R. at 4-5 and 81-82.

[20] H.W. MacLauchlan, T.G. Ison, H.N. Janisch and P.-A. Côté, "The Teaching of Legislation in Canadian Law Faculties" (1987) 11 Dalhousie L.J. 255 at 274. Professor Côté's assessment of curriculum and teaching in civil law faculties was markedly more upbeat than the account offered by Professors Ison and Janisch of developments in common law faculties.

account of judicial interpretation, an account which profits from their experience as legislative drafters.

However we proceed in meeting the outstanding challenges for legal education and practice in relation to legislation, Professor Sullivan's book will stand as a benchmark. The challenge now is for those lawyers who adhere to the "firefighting" approach to legislation to sit down and read Professor Sullivan's third edition from cover to cover (and then do the same with Professor Côté's book), and to become legislative interpreters as a matter of course rather than as resolvers of discrete problems. Only when they have done so will they know where they fit in terms of the "generational shift" that is claimed to have taken place between the first and third editions of Driedger.

*H. Wade MacLauchlan**

* Dean, Faculty of Law, University of New Brunswick.