

Interpreting Taxing Statutes # 44 – Updating construction

Acts are usually regarded as 'always speaking'. Here, it is presumed that the legislature intends the court to apply a construction that allows for changes that have occurred since the Act was initially framed.¹

SYNOPSIS

Updating construction

- Generation gap
- Interpreter to apply updating construction
- Presumption for updating construction

Is the Act always speaking?

Acts to which an updating construction is not applied

Changes in the grammatical meaning of words

Updating construction

Generation gap: Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life on its own. Although the language originally used endures as law, its current subjects may find that the law more and more ill-fitting. Viewed like this, an Act resembles a vessels lunched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they copy as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at. ²

Interpreter to apply updating construction: The legislature, in the wording of an enactment, is expected to anticipate developments over time and drafters will try to foresee the future,

¹ Bennion 2020 s 14.1

² Bennion 2020 p 503

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and allow for it in the wording. However, the court may apply an updating construction even if the drafter's efforts in this regard have not been successful. <sup>^3</sup>

**Presumption for updating construction:** The legislature may be taken to intend that an enactment (other than one whose meaning and application are, exceptionally, fixed in time) should be applied at any future time in such a way as to give effect to its original intention, making allowances for any relevant changes that have occurred since the Act's passing. <sup>^4</sup>

### Is the Act always speaking?

As aforementioned, Acts are generally to be regarded as always speaking, and an updating construction accordingly be applied to them. Said as follows:

‘It is undoubtedly true that there are statutes where the correct approach is to construe the legislation as if one were interpreting it the day after it was passed: The Longford (1889) 14P.D. 34. Thus in The Longford the word “action” in a statute was held not to be apt to cover an Admiralty action in rem since when it was passed the Admiralty Court “was not one of His Majesty’s Courts of Law:” see pp. 37, 38. Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that “An Act of Parliament should be deemed to be always speaking”: Practical Legislation (1902), p. 83 ... In cases where the problem arises it is matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day

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<sup>3</sup> Bennion 2020 p 503

<sup>4</sup> Bennion 2020 p 503

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conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the ‘always speaking’ variety ...’⁵

Acts that are interpreted historically (that is, to which the updating principle does not apply) as falling within ‘the exceptional category’.⁶ Said as follows:

‘It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied differ significantly from those which existed when the law was made—as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked “is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?” the answer must generally be “no”. A “historical” approach of that kind would usually be perverse and would defeat the purpose of the legislation.’⁷

Acts to which an updating construction is not applied

Historical construction: Exceptionally, the legislature may intend an Act to be applied in the same way whatever changes might occur after its passing. It is to such an Act, and not to other Acts, that the oft-quoted words of Lord Esher in *The Longford*

⁵ In *R V Ireland* (1998) 1 AC 147 cited in Bennion 2020 p 504

⁶ *R (Quintavalle) v Secretary of State for Health* (2003) UKHL 13 cited in Bennion 2020 p 504

⁷ *R (on the application of ZYN) v Walsall Metropolitan borough Council* (2015) 1 All ER 165 cited in Bennion 2020 p 504

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 (1889) 14 PD 34 apply: ‘the Act must be construed as if one were interpreting it the day after it was passed’. Thus, in *Colchester (Lord) v Kewney* (1866) LR 1 Exch 368 it was held that the statute 39 Geo 3 c 6 (1798) s 25 which exempted “any hospital” from the land tax, was intended by Parliament to apply only to hospitals which were in existence at the time the Act was passed.

**Ground for historical construction:** The presumption however is that an updating construction is to be applied to an Act, since that is the nature of statute law: an Act is always speaking. So, there must be some reason adduced on account of which the legislature is taken to depart in a particular case from this principle. For example,

‘Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted.’<sup>8</sup>

**Historical construction for Act of contractual nature:** One reason for not applying an updating construction is where the Act is of the nature of a contract. So, if an Act can be said to form or ratify a contract its meaning cannot properly be ‘developed’ in the usual way.

**International convention:** An obvious example is an Act implementing an international convention. The convention itself may be subject to ‘development’ but that is another matter.

**Compact:** The Tenures Abolition Act 1660 was of the nature of compact between the King and his people in England and Wales, and thus does not extend to after-acquired overseas territories of the crown. Said as follows:

“It seems...strained to suppose that such an Act, recording a compromise between the King of England and his people, the

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<sup>8</sup> *R v Ireland* (1998) 1 AC 147 cited in Bennion 2020 p 505

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main object of which was the abolition of certain peculiarities of our insular medieval land tenure was intended to apply to a vast tract of country thousands of miles away... [to] people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them.”⁹

Private Act: A private Act (ie an Act resulting from a private Bill) is an obvious example of an Act which is the nature of contract, accordingly an updating construction is unlikely to be applied to such Acts. It has been held that a private Act conferring on the promoters, exemption from “**all taxes whatsoever**” applied only to taxes in force at the time of its passing.¹⁰

Changes in the grammatical meaning of words

Where the grammatical meaning of a word in an Act has changed since that Act was passed, it is necessary to take account of this when interpreting the Act. The correct approach is to ascertain the meaning of the word at the time the Act was passed, and to construe the Act accordingly.¹¹

⁹ A-G for Alberta v Huggard Assets Ltd (1953) AC 420 cited in Bennion 2020 p 505

¹⁰ Perchard v Heywood (1800) 8 Term Rep 468 cited in Bennion 2020 p 505

¹¹ Bennion 2020 p 505-506