

## THE EFFECT OF PROCEDURAL AND SUBSTANTIVE CHANGES IN THE LAW

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Once again, research performed during the course of my practice has led to another brilliant article for our newsletter.

Whenever existing laws are modified or amended, a question is raised as to whether the change applies immediately to both past and future fact scenarios, or only those arising after the amendments come into force. Recent changes in the law in my area of practice sparked debate among the various practitioners: are the changes applicable to all ongoing claims, or just those claims arising after the enactment of the changes?

In my opinion, the first place to start is *Driedger on the Construction of Statutes*.

Generally, it is presumed that new law has immediate and general application. In the words of Prof. Sullivan:

There is no presumption against the immediate and general application of legislation. On the contrary, such application is presumed; it is the failure to apply legislation immediately and generally to all the facts that come within its apparent scope that requires explanation and justification.<sup>1</sup>

This is not to say that all new law will apply to all facts immediately. Other presumptions, such as the presumption against retroactive application and the presumption against interference with vested rights, operate to prevent the application of new law to past facts or accrued rights. In determining whether the application of new law is retroactive or not, Prof. Sullivan offers the following examples:

Suppose that on 1 January 1990 a provision came into force making it an offence for any person to sell tobacco products. To apply this provision to sales of tobacco occurring on 31 December 1989 would be a retroactive application of the provision...To apply the provision to transactions occurring on or after 1 January 1990 would be prospective.

Suppose that on 1 January 1990 a provision came into force making it an offence for the owner of a car to leave it parked on a designated street for more than forty-eight hours...to apply it in respect of parking that began at noon on 31 December 1989 and ended forty nine hours later would be prospective. This would be an immediate and general application of the provision to a continuing fact. The application would be immediate, in that the provisions came into force, and it would be general, because it applied to *all* existing parking, not just to parking beginning on or after 1 January.<sup>2</sup>

<sup>1</sup> Ruth Sullivan, *Driedger on the Construction of Statutes*, 3<sup>rd</sup> ed. (Toronto: Butterworths, 1994) at 517.

<sup>2</sup> Ruth Sullivan, *Statutory Interpretation*, (Concord, ON: Irwin Law, 1997) at 186-87.

Dickson J. outlined the presumption that new law is not intended to interfere with vested rights in the 1977 Supreme Court of Canada decision in *Gustavson Drilling (1964) Ltd. v. M.N.R.*:

The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction...The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective [retroactive] or prospective...A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms.<sup>3</sup>

However, neither the presumption against retroactive application of new law nor the presumption that new law is not intended to interfere with vested rights apply to procedural provisions,<sup>4</sup> as such provisions are presumed to have immediate application to both pending and future facts.<sup>5</sup>

Again in the words of Prof. Sullivan, the presumption can be formulated a number of ways:

1. Persons do not have a vested right in procedure;
2. The effect of a procedural change is deemed to be beneficial for all;
3. Procedural provisions are an exception to the presumption against retroactivity; and
4. Procedural provisions are ordinarily intended to have an immediate effect.<sup>6</sup>

As such, the issue then becomes whether a new provision is procedural in nature, or whether it is substantive.

A provision is procedural if it:

governs the methods by which facts are proven and legal consequences are established in any type of proceedings...it must be determined in the circumstances of each case. A provision may be procedural as applied to one set of facts, but substantive as applied to another. To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce unjust results.<sup>7</sup>

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<sup>3</sup> [1977] 1 S.C.R. 271 at 282.

<sup>4</sup> *Supra* note 2 at 508.

<sup>5</sup> *Ibid* at 543.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* at 544-5.

Thus, if a provision 1) governs the methods by which facts are proven and legal consequences are established in any type of proceedings and 2) does not interfere with any substantive rights or liabilities of the parties or produce unjust results, then it is procedural in nature and thus, immediately applicable. However, it is important to note that this determination may produce different results when applied on a case-by-case basis.

