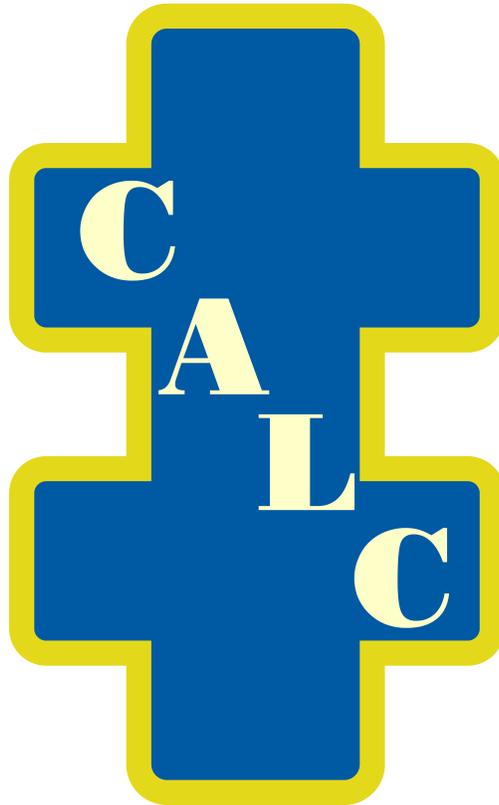


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October 2021 (Issue No. 2 of 2021)

THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 2 of 2021

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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Editor's Notes

Law-making is a serious and complex business involving the formulation and enactment of legislation. This issue of the *Loophole* illustrates the diversity of matters legislative counsel deal with, ranging from the political to the logical, and never far from the legal.

We begin with Charlie Feldman's analysis of the first two years of a new Canadian Government practice of publishing statements describing the potential effects bills in the Senate and House of Commons might have on constitutionally guaranteed rights and freedoms. The purpose of these statements "to inform" is laudable, but Mr Feldman raises questions about their effectiveness in practice.

The next article turns to the interpretation of legislation and the role of "legislative intent". Serge Durica explores how courts and academic commentators have conceived of this intent, critiqued it and attempted to discern it, particularly in Canada and the US. Is it a useless fiction or a helpful device? Mr. Durica provides a comprehensive commentary on this.

Matthew Waddington's article dives into a fundamental, but somewhat neglected, aspect of legislative drafting: logic. He provides an overview of its different forms and illustrates how it can and should be applied in drafting to avoid ambiguity and unintended consequences. His article may make your head spin, but then legislation sometimes does that.

Finally, Cathy Pagano takes us to the US Congress and the efforts of a new congressional committee to improve the functioning of a fractious legislative system that is all too often frozen by partisanship. The committee's mission is not only to improve law-making with technical innovations, but also to make Congress "more civil and more collaborative". This "impossible dream" is something to watch.

Finally, we conclude with Eamonn Moran's review of Peter Butt's new style guide for lawyers, a compendium of learning on legal writing of all kinds, including legislative drafting. Its aim is to help lawyers "cast off the fetters of an outmoded style" urging "a better style that communicates more readily to a modern readership." Mr. Moran's review provides a taste of what you will find in this book.

This is the second and final issue of the *Loophole* for 2021, a year that has presented many unprecedented challenges, notably for those working on legislative responses to the pandemic. With the postponement of the CALC Conference (which is the principal source of articles for the *Loophole*), I am grateful to the authors who have devoted their time and energy to write articles for this issue and hope they might inspire others to do likewise. I would also like to acknowledge the work of our editorial board members who have reviewed and edited the articles you see here. Their tireless efforts are invaluable.

John Mark Keyes
Ottawa,
October, 2021

Charter of Rights Statements: A New Practice Develops Growing Pains

Charlie Feldman¹



Abstract

Recent amendments to Canada’s Department of Justice Act require the Minister of Justice to table in Parliament for every government bill “a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the Canadian Charter of Rights and Freedoms.” This article explores the origins of these Charter statements and the parliamentary practices surrounding them. It notes that statements are not consistently tabled and the variety of tabling practices means that the statements may not always be available to inform parliamentarians during their consideration of legislation at all stages of the legislative process.

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¹ Charlie Feldman, BCL, LLB, LLM is a Parliamentary Counsel at the Senate of Canada. The views in this work are his own and not those of any employer. He would like to thank those who reviewed this piece for their helpful and insightful comments

Introduction

Canadian legislators often query whether the bills before them comply with the *Canadian Charter of Rights and Freedoms*, part of Canada's Constitution. As of December 13, 2019, amendments to the *Department of Justice Act* require the Minister of Justice to table in Parliament for every government bill "a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*."² The provision that requires them also sets out their purpose: "to inform members of the Senate and the House of Commons as well as the public of those potential effects."³

Although *Charter* statements are relatively recent in origin, they have made news in significant ways,⁴ and have even received attention from Canada's highest court.⁵ This article discusses the origins of *Charter* statements and provides observations on recent parliamentary experience with them.

Before *Charter* Statements

The *Canadian Charter of Rights and Freedoms* came into force on April 17, 1982.⁶ It is part of Canada's Constitution and sets out guaranteed rights and freedoms.⁷ In the early days of its existence, there were many questions about how the *Charter* might be interpreted and applied. In fact, in November 1982, the "Manual of Commentaries on the Charter of Rights and Freedoms" — a document "developed for the guidance and assistance of the legal officers of the federal Department of Justice upon the coming into force of the Charter on April 17, 1982" — was tabled in Parliament to provide guidance on these questions.⁸

Over the years, parliamentarians have queried whether bills are consistent with the *Charter* by asking questions of government and seeking opinions from outside groups and stakeholders. Often, questions in this regard are put to the Minister of Justice, who is also the Attorney General of Canada. It should be noted that the extent to which that actor is

² *Department of Justice Act*. R.S.C., 1985, c. J-2, s. 4.2(1).

³ *Ibid* at s. 4.2(2). It should be noted that the statements indicate they are not legal advice.

⁴ See, for example, front page coverage: Anja Karadeglja, "Liberals relent on internet bill: Social media posts will not be regulated, minister says," *National Post*, May 4, 2021, A1. See also Kady O'Malley, "What exactly is a Charter statement, and why are the Tories calling for a new one for C-10?" *iPolitics*, May 4, 2021 (online: <https://ipolitics.ca/2021/05/04/process-nerd-what-exactly-is-a-charter-statement-and-why-are-the-tories-calling-for-a-new-one-for-c-10/>).

⁵ Below n. 49.

⁶ Enacted as Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

⁷ For a high-level overview, see [Government of Canada, *Guide to the Canadian Charter of Rights and Freedoms*](#) (Ottawa, 2020)

⁸ Letter of Roger Tassé, Deputy Minister of Justice and Deputy Attorney General of Canada, in Department of Justice, "Manual of Commentaries on the Charter of Rights and Freedoms," 8 April 1982. Tabling in Journals of the Senate of Canada, 32nd Parl, 1st Sess, vol. 126, pt. 3 (23 November 1982) at 2580.

responsible for providing legal advice to Parliament has been the subject of recent academic commentary.⁹ However, the Federal Court of Appeal has been explicit in this regard: “It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament”.¹⁰

Prior to the *Charter*, experience with a required examination of legislation for rights compliance was limited primarily to the *Canadian Bill of Rights*,¹¹ which contains a provision requiring the Minister of Justice to examine government bills introduced in the House of Commons and federal regulations for their compliance and report to Parliament in the case of any inconsistency.¹² In 1985, a similar duty was enacted under the *Department of Justice Act* in respect of the *Charter*: the minister must examine government bills introduced or presented in the House and federal regulations and report any inconsistency.¹³

The *Canadian Bill of Rights* reporting provision has only ever produced one report of inconsistency,¹⁴ and none has ever been produced in respect of the *Charter* under the *Department of Justice Act*. On the parliamentary side, this has led to questions about whether examinations occurred because there was no subsequent report.¹⁵ Ultimately, a Department of Justice lawyer sued the Attorney General over the standard applied to determine whether proposed legislation is inconsistent with the *Charter*.¹⁶ As can be imagined, the case made waves in Parliament.¹⁷

9 Recent commentary includes Andrew Flavelle Martin, “The Attorney General’s Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*,” (2019) 52:1 *UBC L Rev* 201 at 217; Steven Chaplin, “The Attorney General Is Not the Legislature’s Legal Advisor,” (2020) 14 *Journal of Public and Political Law* 189; Andrew Flavelle Martin, “The Attorney General Is the Legislature’s Legal Advisor (Though Not Its Only Legal Advisor), Although That Role Is Admittedly Problematic and Should Probably Be Abolished: A Response to Steven Chaplin,” (2020) 14:3 *Journal of Public and Political Law* 62 and John Mark Keyes, “Loyalty, Legality and Public Sector Lawyers” (2019), 97-1 *Canadian Bar Review* 129 at 153. However, this discussion is not merely one of the past few years. See also Grant Huscroft, “Reconciling Duty and discretion: The Attorney General in the Charter Era” (2009), 34 *Queen’s LJ* 773 and Janet L Heibert, “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3:1 *New Zealand J Public Intl L* 63.

10 *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 (CanLII), [2019] 2 FCR 376 at 82.

11 *Canadian Bill of Rights*, SC 1960, c 44.

12 *Ibid.* at s 3.

13 Above n. 2 at s 4.1.

14 Sessional Paper 301/7-13. As explained in Elmer A. Driedger, “The Meaning and Effect of the Canadian Bill of Rights: A Draftsman’s Viewpoint,” *Ottawa Law Review*, 9-2 (1977) 303 at page 306:

In 1975 the Government introduced an amendment to the Feeds Act. It was amended in the Senate by a provision presuming guilt. When it returned to the Commons the Minister of Justice reported that the Senate amendment was an infringement of the Bill of Rights and it was deleted.

15 For an example of a written order paper question, see Q-513, 41st Parl, 2nd Sess.

16 *Schmidt v. Canada (Attorney General)*, 2016 FC 269 (CanLII), [2016] 3 FCR 477.

17 See in particular House of Commons, Standing Committee on Justice and Human Rights, 41st Parl, 1st Sess, 11 February 2013, No 58 at pages 6-10.

The Federal Court (at first instance) and Federal Court of Appeal both confirmed the government's approach – specifically, that a report to the House is required only “when proposed legislation is so constitutionally deficient, it cannot be credibly defended”.¹⁸ Leave to appeal was denied by the Supreme Court of Canada.¹⁹ While academic commentary on the case may continue,²⁰ the statutory provision and the government's approach to it remains as is. *Charter* statements are thus in addition to the requirement to certify certain bills and report their inconsistency to the House of Commons.

Charter Statements Begin

In April 2016, the government introduced legislation on medical assistance in dying and voluntarily tabled a backgrounder that included information on the *Charter* compliance of the bill.²¹ Tabled documents form part of the permanent parliamentary record and the tabling is recorded in the Journals of the relevant House. In Canadian practice, Ministers can table documents at will whereas consent is required for other parliamentarians to do so in most cases.²²

This document was the first in a line of voluntarily tabled information regarding *Charter* compliance. The voluntary tabling of statements occurred for certain government bills, mostly those tabled by the Minister of Justice. All statements were made available online on the website of the Department of Justice.²³

In June 2017, the government introduced legislation to make it mandatory for a statement on the *Charter* effects of all government bills introduced in Parliament.²⁴ In 2018, the legislation received royal assent.

18 Above n. 10 at 104.

19 *Edgar Schmidt v. Attorney General of Canada*, Leave to Appeal Denied April 4, 2019, Supreme Court Docket 38179.

20 Edgar Schmidt, “Why the FCA Decision in *Schmidt v Canada (Attorney General)* is Clearly Erroneous”, 2020 43-2 *Manitoba Law Journal* 149. Andrew Flavelle Martin, Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*, 2020 43-2 *Manitoba Law Journal* 19. Tom McMahon, “J'accuse: Justice Canada Minimizes Human Rights Every Single Day” (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802927. Keyes, above n.9.

21 Department of Justice, “Legislative Background: Medical Assistance in Dying (Bill C-14).” Sessional Paper No. 8525-421-11.

22 See [Rules of the Senate](#), Rule 14-1; [Standing Orders of the House of Commons](#), Standing Order 32.

23 <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html>.

24 Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 42nd Parl, 1st Sess.

Section 4.2 of the *Department of Justice Act* reads as follows in both official languages:

Charter statement	Énoncé concernant la Charte
4.2 (1) The Minister shall, for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown, cause to be tabled, in the House in which the Bill originates, a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the <i>Canadian Charter of Rights and Freedoms</i> .	4.2 (1) Pour chaque projet ou proposition de loi déposé ou présenté à l'une ou l'autre des chambres du Parlement par un ministre fédéral ou tout autre représentant du gouvernement, le ministre fait déposer, devant la chambre où le projet ou proposition de loi a pris naissance, un énoncé qui indique les effets possibles du projet ou de la proposition de loi sur les droits et libertés garantis par la <i>Charte canadienne des droits et libertés</i> .
Purpose	Objet
(2) The purpose of the statement is to inform members of the Senate and the House of Commons as well as the public of those potential effects.	(2) L'énoncé a pour objet d'informer les membres du Sénat, les députés de la Chambre des communes ainsi que le public de ces effets possibles.

Although a statement is required for every government bill introduced or presented in either House, there is no requirement in respect of the deadline by which the statement must be tabled. No similar statutory review obligation for private bills or bills introduced by non-government parliamentarians,²⁵ though bills of all these types may become law and be subject to challenge on grounds that they violate the *Charter*. For context, the majority of bills introduced in Canada's parliament are presented by non-government parliamentarians but the majority of bills receiving Royal Assent are government bills.²⁶

As noted above, the provision applies as of December 13, 2019, which was not long after the first session of the 43rd Parliament opened on December 5, 2019. The session ended with the prorogation of Parliament on August 18, 2020, and the second session began on September 23, 2020. Given the newness of the provision, the start of the parliament, and the initial confusion of the Covid-19 pandemic (which particularly affected the operations of the first session of the 43rd Parliament from mid-March 2020 until prorogation in August

²⁵ A full discussion of the various types of bills and associated parliamentary methods of Charter review can be found in Charlie Feldman, "Legislative Vehicles and Formalized Charter Review", [2016 25-3 Constitutional Forum 79](#).

²⁶ Recent introduction and passage statistics can be found online: https://lop.parl.ca/sites/ParlInfo/default/en_CA/legislation/TableOfLegislation

2020),²⁷ this article will look at only the statements introduced during the second session. The second session ended with the dissolution of the 43rd Parliament on August 15, 2021.

In the second session of the 43rd Parliament, there were 41 bills that can be described as “introduced in or presented to either House of Parliament by a minister or other representative of the Crown”.²⁸ However, two of these bills may not have been intended to be caught by the provision, namely Bills C-1 and S-1, which are ceremonial bills introduced in the House of Commons and Senate respectively. Section 4.2’s requirement is triggered, however, because C-1 is introduced by the Prime Minister and S-1 is introduced by the Leader of the Government in the Senate who, despite not being a minister, is undoubtedly an “other representative of the Crown”. As such, one should expect 41 *Charter* statements (or at least 39) to have been tabled; however, only 34 statements are shown as tabled.²⁹

Charter Statements Tabled During the 43rd Parliament, 2nd Session

Bill	Date of Introduction	Charter Statement Date	Date Second Reading Started (in Chamber Where Introduced)	Days Between Introduction and Statement	Days Between Statement and Second Reading Start ³⁰
C-1	9/23/2020				
C-2	9/24/2020	9/28/2020		4	
C-3	9/25/2020	9/30/2020	10/2/2020	5	2
C-4	9/28/2020	9/30/2020	9/29/2020	2	-1
C-5	9/29/2020	11/2/2020	10/23/2020	34	-10
C-6	10/1/2020	10/27/2020	10/26/2020	26	-1
C-7	10/5/2020	10/21/2020	10/9/2020	16	-12
C-8	10/22/2020	12/10/2020	11/2/2020	49	-38
C-9	11/2/2020	11/6/2020	11/4/2020	4	-2
C-10	11/3/2020	11/18/2020	11/18/2020	15	0

²⁷ Generally speaking, Canadian legislatures in the early days of the pandemic sat less (if at all) or held single-day sittings to consider emergency and relief measures only. See Mike Morden, “Canadian Parliaments Respond to COVID-19,” [Canadian Parliamentary Review, vol. 43, no. 3 \(Autumn\) \(2020\)](#).

²⁸ Bills C-1 through C-36 and Bills S-1 through S-5.

²⁹ The website of the Department of Justice lists the statements and their tabling dates. See <https://www.justice.gc.ca/eng/csj-sic/pl/charter-charte/index.html>.

³⁰ Negative figures refer to tabling after the day on which 2nd reading debate began.

Charter Rights Statements: Growing Pains

C-11	11/17/2020	12/2/2020	11/24/2020	15	-8
C-12	11/19/2020	12/8/2020	11/25/2020	19	-13
C-13	11/26/2020	12/9/2020		13	
C-14	12/2/2020	1/26/2021	1/5/2021	55	-21
C-15	12/3/2020	2/23/2021	12/17/2020	82	-68
C-16	12/7/2020	12/7/2020	12/7/2020	0	0
C-17	12/7/2020	12/7/2020	12/7/2020	0	0
C-18	12/9/2020	12/10/2020	1/27/2021	1	48
C-19	12/10/2020	5/11/2021	3/8/2021	152	-64
C-20	2/3/2021	5/7/2021		93	
C-21	2/16/2021	4/27/2021	2/26/2021	70	-60
C-22	2/18/2021	6/11/2021	3/24/2021	113	-79
C-23	2/24/2021	6/23/2021		119	
C-24	2/25/2021	3/25/2021	3/8/2021	28	-17
C-25	3/25/2021	5/7/2021		43	
C-26	3/25/2021	3/25/2021	3/25/2021	0	0
C-27	3/25/2021	3/25/2021	3/25/2021	0	0
C-28	4/13/2021				
C-29	4/27/2021	4/28/2021	4/28/2021	1	0
C-30	4/30/2021	5/7/2021	5/5/2021	7	-2
C-31	6/10/2021				
C-32	6/15/2021				
C-33	6/17/2021	6/17/2021	6/17/2021	0	0
C-34	6/17/2021	6/17/2021	6/17/2021	0	0
C-35	6/22/2021				
C-36	6/23/2021				
S-2	10/27/2020	2/10/2021	11/5/2020	106	-97
S-3	12/1/2020	2/10/2021	12/3/2020	71	-69
S-4	4/30/2021	6/8/2021	5/6/2021	39	-33
S-5	5/25/2021	6/21/2021	6/15/2021	27	-6

As the above table illustrates, not all bills received *Charter* statements. Besides symbolic bills S-1 and C-1, there were no *Charter* statements tabled before dissolution for Bills C-28, C-31, C-32, C-35 and C-36. Further, among the statements tabled there was a wide variety in the timing of a statement's tabling relative to the bill's introduction.

For appropriation Acts (Bills C-34, C-33, C-27, C-26, C-17 and C-16), the statement was often tabled on the same day that the bill was introduced. This is understandable as the statement is the same for all such bills: "In reviewing the Bill, the Minister has not identified any potential effects on Charter rights and freedoms".³¹

But in respect of other legislation, the delay between introduction of the bill and tabling of a statement was as much as 152 calendar days, as was the case for Bill C-19, *An Act to amend the Canada Elections Act (COVID-19 response)*, introduced on December 10, 2020, and its statement, which was only tabled on May 11, 2021.³² Unlike the appropriations context, C-19 had numerous *Charter* considerations, including in relation to freedom of expression (section 2 of the *Charter*), the right to vote (section 3 of the *Charter*), the right to liberty (section 7), and equality rights (section 15). Given that this statement was tabled some 64 days after Second Reading began, one can query if the stated purpose of *Charter* statements to inform parliamentarians and the public was fully achieved in this case.

As the negative numbers in the far-right column show, it is far more likely for a statement to be received after debate at Second Reading has begun rather than before. In the extreme case, Bill S-2, the bill was introduced in the Senate in October 2020 and Second Reading debate began in early November 2020. However, the statement was not tabled until February 2021,³³ by which time the bill was before the House of Commons having passed the Senate. Again, one can query whether the stated purpose of *Charter* statements is met when the statement is tabled so long after debate has begun and, indeed, after the associated bill has already been passed by one House.

The *Charter* statement provision's silence on timing means that the requirement to produce a statement outlasts a bill's life in a particular parliamentary session. To that end, three statements were tabled in the second session for bills that had been introduced and passed in the first session. On January 26, 2021, the Minister of Justice tabled statements for Bills C-10, C-11, and C-12 from the first session,³⁴ even though all received royal assent on March 13, 2020. It is not clear from the record why the statements were tabled so long after the bills' introductions. With respect to the bills from the second session that did not have *Charter* statements tabled before dissolution, it would appear that these statements might yet

³¹ Example from C-33: <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c33.html>. Appropriations Acts would be unlikely to produce *Charter* effects in their conventional form.

³² Sessional Paper No. 8560-432-1232-29.

³³ Sessional Paper No. 2/43-582.

³⁴ See *Journals of the House of Commons*, 43rd Parl, 2nd Sess, January 26, 2021, at 465.

be tabled in the new Parliament, though their utility may be limited if the associated legislation is not re-introduced.

For whatever reason, the four government bills introduced in the Senate had their statements tabled on average far later than the 30 government bills in the House of Commons had their statements tabled (60.75 calendar days after introduction versus 33.2 calendar days).³⁵

The Content of Statements

As the provision described, a *Charter* statement is to “[set] out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*.” As explained by the then Minister of Justice,

The Charter statements are not intended to be legal advice and detailed as such. The purpose behind the Charter statements is to explain as much as we can to Canadians, to parliamentarians and to anyone that wants to read them, what are the potential impacts or where the Charter is engaged when a proposed piece of government legislation is introduced.³⁶

The Department of Justice website reiterates that *Charter* statements are not legal advice. In the course of developing legislation within the Government, it is clear that legal considerations are carefully canvassed.³⁷ When Cabinet considers legislation, the Minister of Justice is to “exercise his or her political judgement as a member of Cabinet, except when providing legal advice, which must be independent and non-partisan”.³⁸ However, the Minister is not understood to provide legal advice to Parliament³⁹ in part because Parliament is not their client and the Minister cannot compromise the solicitor-client privilege that is owed to Cabinet.⁴⁰

³⁵ Use of calendar days is an imperfect measurement because the Houses of Parliament do not sit on every calendar day. As well, it should be kept in mind that the sample size for Senate government bills with *Charter* statements (4 bills) is much smaller than that for House government bills (30 bills).

³⁶ Evidence, Standing Senate Committee on Legal and Constitutional Affairs, 42nd Parl, 1st Sess, June 20, 2018.

³⁷ See questions set out in “General Legal and Policy Matters: Legal Context” in Privy Council Office, [Guide to Making Federal Acts and Regulations](#), 2nd ed. (2001).

³⁸ See Department of Justice Canada Minister's Transition Book (2015), “Roles and Responsibilities of the Minister of Justice and Attorney General of Canada” online: <https://www.justice.gc.ca/eng/trans/transition/2015/tab2.html>

³⁹ See discussion of the role of the Minister of Justice and Attorney General of Canada vis-à-vis Parliament in the works of Chaplin, Flavelle, and Keyes above n. 9.

⁴⁰ In an exceptional recent case, Cabinet allowed a former Minister of Justice to provide evidence to a parliamentary committee despite cabinet confidences and, in so doing, expressly waved solicitor client privilege for that purpose. See Order in Council PC 2019-0105.

Charter statements have been critiqued for being quite spare in some instances.⁴¹ This is not surprising given that statements do not provide the legal advice that may have been prepared within Government and, as indicated by the current Minister of Justice (at the time of this writing), they are intentionally high level:

In keeping with their purpose, charter statements are drafted at a high level. They set out in an accessible way the potential effects a bill may have on the rights and freedoms guaranteed by the charter. Charter statements also explain considerations that support the constitutionality of a bill. ... A charter statement is not a legal opinion. It does not provide a comprehensive analysis of the constitutionality of a bill.⁴²

Importantly, the statements are not updated as a bill moves through Parliament. This created a novel scenario in relation to a controversial piece of legislation, Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*.

Briefly, Bill C-10 as proposed would have regulated certain internet communications, including over social media, thereby raising freedom of expression concerns.⁴³ While the bill was under consideration at Committee Stage, the House of Commons Standing Committee on Canadian Heritage adopted amendments in this particular area (and others). However, questions were raised about the amendments' potential impact on the bill's consistency with the *Charter*. Over the course of contentious meetings, the House of Commons committee studying the matter agreed to a motion that it would

- 1) Ask the Minister of Justice to provide a revised Charter Statement on Bill C-10, as soon as possible, focusing on whether the Committee's changes to the Bill related to content uploaded by users of social media services have impacted the initial Charter statement provided, in particular as relates to Section 2(b) of the Canadian Charter of Rights and Freedoms.
- 2) Invite the Minister of Justice, the Minister of Canadian Heritage accompanied by relevant department officials, and an expert panel consisting of one witness from each recognized party to appear before the Committee as soon as possible to discuss the

⁴¹ "The Charter Statement we got was very vague about broad economic impacts. That's not a test. What is the impairment that is being put here, and what is the imbalance that is being put here? Trying to minimize that imbalance is absolutely important." *Debates of the Senate*, 43rd Parl, 2nd Sess, 152:36, April 30, 2021, at 1340. "Indeed, the charter statements that the Minister of Justice has been releasing to date add very little, in my judgment, to the issues before the House. However, I suppose one can never fault too much information, even information that is of dubious utility." *Debates of the House of Commons*, 42nd Parl, 1st Sess, 148:249, December 11, 2017 at 16225.

⁴² Evidence, House of Commons Standing Committee on Canadian Heritage, 43rd Parl, 2nd Sess, May 18, 2021.

⁴³ Ian Burns, "'Unprecedented' Bill C-10 raises freedom of expression, net neutrality concerns: legal scholars," *The Lawyer's Daily*, May 19, 2021.

revised Charter statement and any implications of amendments made by the Committee to the Bill.⁴⁴

The committee was provided with a new “explanatory document” drafted by the Department of Justice.⁴⁵ The Minister of Justice spoke to both the *Charter* statement and explanatory document extensively at a subsequent meeting.⁴⁶ The minister stressed several times that the new document itself was not a *Charter* statement, as it was not prepared under the same provision of the *Department of Justice Act*.

Although Bill C-10 died on the Order Paper at dissolution with no further *Charter* statement developments, the bill’s procedural history may be of interest to *Loophole* readers. Briefly, time allocation was moved in the House relative to the committee’s deliberations, a relatively rare occurrence in Canadian parliamentary practice.⁴⁷ However, because the committee did not complete its clause-by-clause analysis of the bill before the House’s deadline, the Speaker struck many of the committee’s amendments, leading to sensational headlines in the media such as “Bill C-10 hits speed bump as Speaker voids dozens of ‘secret’ amendments”.⁴⁸

Non-Parliamentary Use

Subsection 4.2(2) of the *Department of Justice Act* states the purpose of *Charter* statements is to inform parliamentarians and the public. While parliamentary engagement can be inferred through the references on the parliamentary record to *Charter* statements, it is not clear how best to determine whether the statements are being used by the public. Statements have, however, been used by the courts.

Charter statements have been mentioned by the Supreme Court of Canada⁴⁹ though not much judicial guidance has been given about their use by the courts. As noted in a recent dissent, “The Attorney General’s view is not binding on us, but it is nonetheless telling.”⁵⁰ Certain judges appear to find that statements can be used in determining parliamentary intent: “I appreciate that a Charter Statement can be taken as some evidence of Parliament’s intent.”⁵¹

⁴⁴ Minutes of Proceedings, Standing Committee on Canadian Heritage, #32, May 10, 2021.

⁴⁵ Evidence, Standing Committee on Canadian Heritage, 43rd Parl, 2nd Sess, No 33, May 14, 2021 at 2.

⁴⁶ Above n. 42.

⁴⁷ It is far more common for time allocation to be moved relative to some stage of House debate: Second Reading, Report Stage or Third Reading. For some discussion see François Plante, “The Curtailment of Debate in the House of Commons: An Historical Perspective”, [Canadian Parliamentary Review 36:1 \(2013\)](#).

⁴⁸ Anja Karadeglija, “Bill C-10 hits speed bump as Speaker voids dozens of ‘secret’ amendments,” *National Post*, June 15, 2021.

⁴⁹ *R. v. Chouhan*, 2021 SCC 26.

⁵⁰ *Ibid.*, at 305.

⁵¹ *R. v. Ibanez*, 2020 BCSC 233 at 37.

Of course, that approach can be critiqued. A *Charter* statement is not crafted by parliamentarians, but rather by the government introducing the relevant legislation. To take it as conclusive evidence of Parliament's intent confuses the Executive Branch with the Legislative Branch of the Canadian government.

Furthermore, passage of the associated legislation is not a ratification of the statement. Indeed, the legislation could be amended but the statement itself would not change from the time of its tabling. To understand Parliament's views vis-à-vis the statement, one would need to look at the entirety of potential debates mentioning any particular statement — including committee debates in both the Senate and House of Commons — and even then one might not have any clear indication of where parliamentarians stood vis-à-vis the statement provided.

For their part, academics have also referenced *Charter* statements in their work.⁵² Of particular note, the analysis of the C-10 “explanatory document” drew particular ire from at least one scholar.⁵³ As well, at least one continuing education professional development program for lawyers has focused exclusively on *Charter* statements.⁵⁴

Commentary and Conclusion

Parliamentarians are now receiving more information about how bills engage the *Charter*, though it is not entirely evident that the Minister of Justice and parliamentarians all share the same conceptions of the exercise. Parliamentarians often complain about the lack of detailed analysis in statements, which may be explainable simply because the documents are not legal advice and, as the Minister has asserted, are purposely high level in nature. However, lack of detailed analysis could be seen as having the result of undermining the extent to which these statements fulfil their purpose as set out in the statute.⁵⁵ Whichever conception one has, the statements are produced under a statutory obligation, and Parliament is free to amend the statute as it considers appropriate to ensure that it receives the documentation it wishes to see.

As the data provided in this article regarding the second session of the 43rd Parliament demonstrate, there is such a wide variety of timing that one cannot really predict when a

⁵² For example, Danielle McNabb and Dennis J. Baker, “Ignoring Implementation: Defects in Canada’s ‘Rape Shield’ Policy Cycle,” [2021 36-1 Canadian Journal of Law and Society 23](#) at 33; and Vanessa A. MacDonnell, “Gender-Based Analysis Plus (GBA+) As Constitutional Implementation,” [2018 96-2 Canadian Bar Review 372](#) at 399.

⁵³ Michael Geist, “Failing Analysis: Why the Department of Justice ‘Updated’ Charter Statement Doesn’t Address Bill C-10’s Free Speech Risks,” May 14, 2021. Online at <https://www.michaelgeist.ca/2021/05/failing-analysis-why-the-department-of-justice-updated-charter-statement-doesnt-address-bill-c-10s-free-speech-risks/>.

⁵⁴ See https://www.cbapd.org/details_en.aspx?id=NA_BBDEC0418.

⁵⁵ The statements may serve unstated purposes as well. For example, those developing legislation within government may seek to dissuade certain decisions by noting that the issue would potentially be discussed in a public-facing *Charter* statement.

Charter statement might be tabled relative to a bill's introduction. While consistent with the letter of the law, since no timeframe is set in the relevant provision, this may not serve the purpose of the provision. That is, parliamentarians presumably most need the information when a bill is under consideration to be informed by it. The fact that in several cases the statement was only provided after the bill had passed raises profound questions about whether the purpose was served in those cases.

Of course, the data may be unfairly impacted by the COVID-19 pandemic and the consequences it had on legislative institutions and those responsible for assisting in the preparation of *Charter* statements within the Department of Justice.⁵⁶ Indeed, the process of legislative development changed in some cases, with extensive political consultations occurring before a bill was even introduced given the federal minority government context,⁵⁷ or public consultation and draft legislation publication occurring in atypical contexts.⁵⁸ It will be important to see whether *Charter* statement practice changes as the pandemic situation evolves.

While it is not clear how the statement's stated purpose of informing the public might be observed, it does appear that judges and academics are noticing the statements. As well, academic commentary on *Charter* statements appears to be of interest to parliamentarians.⁵⁹ It is assumed that further judicial consideration of statements will yield guidance on their appropriate evidentiary role in the judicial context, if any.

Courts should be mindful that parliamentarians may have not had the *Charter* statement when a particular decision was made, such as at committee or before a final vote to pass a bill. Further, they should consider that a *Charter* statement may not reflect a bill as amended. For their part, Parliamentarians should be mindful that the provision does not establish a timeline for the tabling of the statements – let alone great precision on the content of statements – and different Ministers of Justice may approach their obligations under section 4.2 differently.

Charter statements are but one input into Parliament. While they are important because of their provenance and thus may carry more weight, they are fundamentally no different from any other legal information that a group or individual assembles regarding a bill and

⁵⁶ While the transition to working from home should not have greatly impacted the preparation of statements, lawyers who might otherwise be involved in the process might have been called on for other pandemic-related matters. As an example of the pandemic's impact on legislative counsel at the Department of Justice, see Jurivision, "Legal responses to COVID-19: The unsung work of legislative drafters" online: <https://jurivision.ca/legal-response-covid-19-legislative-drafters/?lang=en>

⁵⁷ For discussion of a specific example, see Bill Curry and Robert Fife, "Liberals retreat on sweeping bill to allow them to tax and spend without Parliament's approval," *The Globe and Mail*, March 23, 2020.

⁵⁸ While it is common for there to be consultations on fiscal matters, the Department of Justice in May 2020 published draft legislative proposals in respect of legislation that would extend certain time and limitations periods under federal legislation, given that many such deadlines could not be met in the context of the pandemic. See <https://www.justice.gc.ca/eng/csj-sjc/pl/lp-pl/tlopa-ldap/en-ne.html>.

⁵⁹ A committee debated reinviting an academic critical of a *Charter* statement to testify, above n. 44.

provides to Parliament. As such, parliamentarians should remember that they have tools and resources to seek legal information and advice as they require and are not bound to take the Minister's word alone. Indeed, the ultimate authority to determine constitutionality rests with the courts, which themselves must be careful to consider *Charter* statements only in their appropriate context.

As a closing note, no Canadian provincial legislature appears to have followed in the federal parliament's footsteps by introducing a *Charter* statement-like process. However, the Canadian territory of Nunavut recently passed legislation requiring its Minister of Justice to produce a statement for every bill introduced in the assembly by a Minister that sets out both "the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*; and (b) the rights that are guaranteed to Nunavut Inuit under the Nunavut Agreement".⁶⁰ Further, Nunavut requires the Minister introducing a bill to produce a statement that sets out "the manner in which Inuit societal values are integrated into the provisions of the Bill".⁶¹ It is too soon to tell whether the practice under Nunavut's statement provisions will mirror the federal parliamentary experience with *Charter* statements presented in this article.

⁶⁰ *Legislation Act*, SNu 2020, c 15, sub 46(1).

⁶¹ *Ibid* at sub 46(2).

Rediscovering the Polar Star: A Close Look at Legislative Intent and Statutory Interpretation

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Abstract

This article examines the role of legislative intent in statutory interpretation. As the primary interpretive objective, legislative intent plays an important role in statutory interpretation. By framing the interpretive objective as a search for the intention of the legislature, legislative intent places the interpreter in a frame of mind that respects legal norms such as the separation of powers and legislative sovereignty. The goal of this article is to describe legislative intent, its tensions, and its role in modern statutory interpretation. In this article, I discuss topics such as understanding the concept of legislative intent, definitional issues, the relationship between legislative intent and the separation of powers, Driedger’s modern principle, the presumptions of legislative intent, and a typology of criticisms against the concept. Framing the objective of statutory interpretation as a search for legislative intent may not solve all the conundrums of statutory interpretation, but at least it tells us how to read statutes and what to think about as we interpret them.

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Introduction

In a case called *Paterson*, the Supreme Court of Canada stated that “statutory interpretation entails discerning Parliament’s intent”.² *Paterson* was not the first case from the Supreme Court to characterize statutory interpretation as a quest to discover legislative intent. Despite centuries of history in the common law system, legislative intent remains elusive.

The goal of this article is to describe legislative intent, its tensions, and its role in modern statutory interpretation. As the primary objective of statutory interpretation, legislative intent grounds the interpretive process within a broader separation of powers narrative. I discuss the presumptions of legislative intent and their role in the legal system. I also provide a typology of historic and contemporary criticism of legislative intent. In offering a fulsome discussion of legislative intent, I hope to show how legislative intent, far from an archaic and misunderstood concept, is central to statutory interpretation.

Understanding Legislative Intent

The term “legislative intent” is often used in many ways, adding to its confusion and misunderstanding. At its most simplistic, the concept refers to the intention of a legislature in relation to one of its laws. When interpreting a statute, legislative intent asks: what did the legislature which passed this law intend? Discerning legislative intent can thus be described as the objective of statutory interpretation.

As the objective, legislative intent is the organizing principle of Canadian statutory interpretation. Understanding what legislative intent is (and is not) helps clarify some of the misunderstanding and confusion around debates in statutory interpretation.

Objectives and Approaches to Statutory Interpretation

Statutory interpretation is about understanding statutes. Legislative intent is an objective of statutory interpretation because it describes the goal of the interpretive inquiry. Sometimes referred to as “intentionalism”, legislative intent as an objective tells the story of statutory interpretation as a quest for the intent of the legislature. This is what the Supreme Court meant in *Paterson* when it said “interpretation entails discerning Parliament’s intent”.³

² *R v Paterson*, 2017 SCC 15 at para 31 [*Paterson*].

³ *Ibid.*

Legislative intent is not an approach to statutory interpretation. Rather, it is an objective. This distinction is crucial but frequently overlooked.

Discussions of statutory interpretation often fail to distinguish between an objective of statutory interpretation that defines the interpretive exercise, and an approach to statutory interpretation. When conflating *what* courts are after when interpreting statutes with *how* courts interpret statutes, we miss an important distinction. The result is a confused understanding of statutory interpretation that contributes to what Richard Helmholz has described as a “common contemporary opinion, shared by academics and many practicing lawyers...that neither judges nor teachers of law have produced an adequate theory of statutory interpretation.”⁴

Clarity begins with distinguishing between an objective of statutory interpretation and an approach to statutory interpretation. An objective of statutory interpretation explains what a court is after when it interprets a statute. In *CUPE*, Justice Binnie described legislative intent as the “polar star.”⁵ In contrast, an approach to statutory interpretation describes how the court attains the objective. The two concepts sound similar but are distinct. If the objective of statutory interpretation is the destination, then the approach to statutory interpretation is the route to it. Legislative intent is the destination and approaches like the modern principle and textualism are the different paths courts can take on their journey.

A major debate in statutory interpretation centres on which approach courts should take to arrive at the intent of the legislature. Generally, many scholars accept legislative intent as the objective of interpretation.⁶ Where disagreements arise, usually concern which factors courts may rely on to discern legislative intent and when it is appropriate to rely on them during the interpretive exercise.

The contrast between Driedger’s modern principle of statutory interpretation and textualism illustrates this debate, both in terms of the difference between objective and approach and the distinctions among approaches. While the modern principle and textualism agree on legislative intent as the object of interpretation, they differ greatly on which road to take to get there.

In Canada, the dominant approach to statutory interpretation is the modern principle, which was adopted by the Supreme Court of Canada in *Rizzo*.⁷ Under the modern principle, courts take a pragmatic approach to statutory interpretation. In *Vavilov*, the Court said the modern principle was adopted as the proper approach “because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the

⁴ Richard H Helmholz, “Statutory Interpretation - Then and Now” (2018) 41 Man LJ 1 at para 1.

⁵ *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149 [*CUPE*].

⁶ Stephane Beaulac & Pierre-Andre Côté, “Driedger’s “Modern Principle” at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) 40 RJT at 161.

⁷ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27; 1998 CanLII 837 (SCC) [*Rizzo*].

provision and the entire relevant context.”⁸ This entire context includes both intrinsic and extrinsic aids.

Under the modern principle, the text of the statute is one tool – albeit an important one – for uncovering the legislature’s intention.⁹ The text is the starting point, but not the finish. Alternative factors like purpose, legislative history, legislative evolution, and the broader statutory scheme, place the text of the statute within its broader and immediate context. This starting position comes from the recognition that the meaning of words can only be understood in context.

Textualism is another popular approach to interpretation. Sometimes referred to as “the plain meaning rule”, textualism asserts that intent is primarily ascertained through the words of the statute. According to the plain meaning rule, if the text of the statute is clear and unambiguous, a court must interpret the law as it is written. In the United States (US), the plain meaning rule has been called the “cardinal rule of statutory construction.”¹⁰

Over time, two types of textualism have developed: strict and soft. The difference between them is the degree to which the text of the statute has primacy over other indicia of intent. According to strict textualism, the text of a statute is the “sole legitimate interpretive source.”¹¹ For a strict textualist, the text of a statute is the exclusive interpretive source because the *actual* words of the statute are the only thing that is law. Legislative debates, Ministers’ speeches, and committee reports are off limits because they are not law. Strict textualism is described best by US Supreme Court Justice Oliver W. Holmes in “The Theory of Legislative Text”, where he said, “[w]e do not inquire what the legislature meant; we ask only what the statute means.”¹²

On the other hand, soft textualism views the text of the statute as the “best” guide to legislative intent. Unlike hard textualism, soft textualism does not prohibit the use of interpretive aids. Instead, soft textualists impose an ambiguity threshold. Alternative indicators of legislative intent, like legislative history, are only available to the interpreter in the event of ambiguity. In Canada, this rule is what the plain meaning rule described and instructed: that if the meaning of the text was plain, courts were bound to apply it.

While the modern principle and textualism are different, both share a common core. Both approaches accept legislative intent as the objective of interpretation. For the modern principle, this means making all indicia of intent available at the outset of the interpretive

⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 118 [Vavilov].

⁹ *R v Pandurevic*, 2013 ONSC 2978 at para 7 [Pandurevic].

¹⁰ Helmholz, *above* n. 4 at 7.

¹¹ Richard Ekins & Jeffrey Goldsworthy, “The Reality and Indispensability of Legislative Intentions” (2014) 36:1 *Sydney L Rev* at 340.

¹² Oliver Wendell Holmes, “The Theory of Legal Interpretation”, 12 *Harv L Rev* at 417.

process. For textualism, this means limiting the interpretive process to the only legitimate source of legislative intent: the text of the law. The difference between these two approaches can be boiled down to their implicit assumptions about the nature of statutes and the legislatures who enacted them. For the modern principle, as the Court noted in *Vavilov*, the assumption is that “[t]hose who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose.”¹³ For the textualist, however, the assumption is that “by giving the effect to clear textual meaning, a court automatically gives effect to the intentions of the legislature”¹⁴.

Intent and Meaning

Sometimes, the goal of statutory interpretation is described as discovering the meaning of the words used in a statute. Under this formulation, the goal of the interpreter is to analyze the text of the statute and determine, to use an example, what (where there is no definition in the statute) “conveyance” means under s 320.14 of the *Criminal Code*, “motor vehicle” under s 3 of the *Highway Traffic Act*, or “terminate” under s 40 of the *Employment Standards Act*.¹⁵ This formulation, however, is incomplete. It is not sufficient to say that the goal of statutory interpretation is to discover the meaning of statutory text.

Formulated generally, the search for “meaning” is meaningless unless one first determines which meaning one means. Meaning, after all, is contextual. Words can, and do, have many meanings. Framing the objective of statutory interpretation as the search for meaning *simpliciter* begs the question: should the interpreter find the meaning that does the most justice to the weaker party; or the meaning that benefits the wealthy party; or the meaning that aligns with that reader’s personal sense of fairness?

Meaning must be constrained. The objective of statutory interpretation is to discover the meaning of statutes that the legislature intended: *ie*, the intended meaning. This is what is meant by legislative intent. It is not enough to simply find what “conveyance”, “motor vehicle”, or “terminate” mean. One must dig deeper to discover what the legislatures who passed those provisions into law meant by those words. As the Quebec Superior Court stated in *Watson*, “[t]he duty of the Courts is not philosophical; it is not to find the meaning of words; it is to find the meaning of statutes.”¹⁶

¹³ *Vavilov*, above n. 8 at para 118.

¹⁴ Ruth Sullivan, “Some Problems with the Shared Meaning Rule as Formulated in *R v Daust* and the Law of Bilingual Interpretation” (2010) 42 *Ottawa L Rev* at 84.

¹⁵ *Criminal Code*, RSC 198, c C-46; *Highway Traffic Act*, RSO 1990, c H.8; *Employment Standards Act*, 2000, SO 2000, c 41.

¹⁶ *Watson v Maze*, 1898 CarswellQue 450, 15 Que SC 268 [*Watson*].

Definitional Issues

Two issues emerge when trying to define legislative intent. The first issue is determining whether the intent of the legislature is fact or fiction. The second issue is defining whose intent courts are to discern when interpreting statutes.

Fact or Fiction

A major tension within legislative intent is the question of whether legislative intent is fact or fiction. Scholars and judges disagree over this. While some theorists maintain that legislative intent exists and can be discovered through the interpretive process, others see it as a judicial construction. It is important to note here that whether legislative intent is fact or fiction is not necessarily a criticism of the concept. Though critics of legislative intent often view it as a judicial construction, there are some theorists who view legislative intent as a “necessary fiction”. These criticisms are discussed in detail in later sections of this article. For now, the debate really boils down to whether an institution like the legislature, comprised of many individuals, can have a discoverable common intent.

For legal realists like John Willis who viewed legislative intent as a fiction, the notion of legislative intent was nonsensical.¹⁷ How could a text, drafted by one group of individuals and passed into law by a process composed of many persons contain within it a single intent? For Willis, “[t]he expression [legislative intent] does not refer to actual intent – a composite body can hardly have a single intent: it is at most only harmless, if bombastic, way of referring to the social policy behind the Act.”¹⁸ For Willis, judges who purported to uncover an imbedded intent, hidden in the statutory text by the legislature that passed the Act, through a rigorous process of judicial interpretation were doing no such thing.

On the other side are those who argue that legislative intent is real. These scholars refute the idea that a common intention is nonsensical. For thinkers like Gerald C MacCallum, lawmaking is an instrumental process aimed at directing change.¹⁹ The words the lawmaker uses in the statute are “the instruments by means of which he expects or hopes to effect these changes.”²⁰ For these scholars, intent of a group of people passing laws is as real as the intent of a group of people engaged in any other activity. Here, MacCallum uses the example of two men rolling a log towards the riverbank. In posing the question “*is it possible for two or more men to have a single intention*”, MacCallum challenges his opponents to answer

¹⁷ John Willis, “Statute Interpretation in a Nutshell” (1938) 16:1 Can Bar Rev at 3.

¹⁸ *Ibid.*

¹⁹ Gerald C MacCallum, “Legislative Intent” (1966) 75 Yale Law Journal at 758

²⁰ *Ibid.*

why we cannot truthfully say in the simple case of two men rolling a log toward the river bank with the purpose of floating it down the river that there is at least one intention both these men have – *viz*, to get the log to the river so that they can float it down the river.²¹

In a forceful defence of legislative intent in their article, “The Reality and Indispensability of Legislative Intentions”, Ekins and Goldsworthy reject arguments that legislative intent is “a conclusion reached about the proper construction of the law in question and nothing more.”²² For Ekins and Goldsworthy, the search for legislative intent is a quest for an objective intention, namely, “whatever a reasonable audience would infer, from the publicly available evidence, was the author’s ‘subjective’ intention.”²³ In the context of legislative intent, this subjective intention was not the intent of a particular lawmaker, but rather the subjective intention of the entire legislature.

For those who argue that legislative intent is real, the fact that we may never arrive at a truly accurate representation of a legislature’s intention is no more an argument against the existence of intent than the fact that a picture can never truly represent its subject is no argument against the existence of the subject.

In rejecting the argument that legislative intent is a fiction, Ekins and Goldsworthy reference what they call “common sense perceptions of legislative intention.”²⁴ For Ekins and Goldsworthy, the idea of an intention imbedded in the law sits in our minds whenever we read a statute. Ekins and Goldsworthy point to how we use this common sense fact of legislative intent to understand different concepts in statutory interpretation. With no legislative intent, these concepts make little sense.

Sometimes, legislative intent is referenced in statutes. Statutes reference legislative intent when they contain phrases such as “this Act is not intended to...” or “Nothing in this Act is intended to...”. While this practice of including intent within the statute is less popular in Canada, there are a few examples where statutes reference intention. For example, s 50(1) of British Columbia’s *Creditor Assistance Act* reads: “This Act is not intended to interfere with, but is intended to be subject to, the insolvency laws in force in British Columbia.”²⁵ A similar reference to legislative intent is also made in the *Kanesatake Interim Land Base Governance Act*.²⁶ In the section relating to Aboriginal and treaty rights, the provision reads

This Act does not address any aboriginal or treaty rights of the Mohawks of Kanesatake. **Nothing in this Act is intended** either to prejudice such rights or to

²¹ *Ibid* at 764.

²² Ekins, “Indispensability of Legislative Intentions”, *above* n. 11 at 41.

²³ *Ibid* at 48.

²⁴ *Ibid* at 51.

²⁵ *Creditor Assistance Act*, RSBC 1996, c 83.

²⁶ *Kanesatake Interim Land Base Governance Act*, SC 2001 c 8.

represent a recognition of such rights by Her Majesty in right of Canada [emphasis added].²⁷

Ekins and Goldsworthy also reference the concept of drafting errors. The concept of drafting errors in statutory interpretation, like other textual presumptions, speak to how legislation is drafted, and they are based on how the legislature usually arranges the text to communicate intention. According to Ekins and Goldsworthy, the concept of drafting errors does not make sense if there is no such thing as legislative intent.²⁸ A drafting error refers to an error in the text of a statute – a legislative typo. The idea of drafting errors relies on the presumption that legislatures do not make slips of the pen.²⁹ Only in saying that the words of the statute do not reflect what the legislature intended does the idea of typos make sense.

Whether legislative intent is fact *or* fiction is a hard question. Like Schrodinger's cat, legislative intent is both fact *and* fiction. At a distance, arguments that legislative intent exists are persuasive. For example, MacCallum's reference of log-rolling shows how more than one individual can share a common intention. Surely the idea of a common intention cannot be nonsensical. Criminal law accepts the existence of common intention every time it convicts offenders based on party liability where the Crown proves a common intention between two or more persons beyond a reasonable doubt.³⁰ Ekins and Goldsworthy also make a compelling case. Surely the text of a statute must embody some intent when the statute references that intent. Additionally, the fact that legislation was enacted in the first place must point – at minimum – to an intent to enact the statute.

These arguments lose their persuasiveness the more complex and technical cases become. In complex and technical cases legislative intent is fact and fiction at the same time. While one can say that in the easy case of two people rolling a log to the riverbank that there is one intention, matters of statutory interpretation are not always easy. In complicated cases, one can find the legislature's *actual* intent to change the law, whether it is the intent to create an administrative body or expand the scope of an offence. At the same time, whether the legislature *actually* intended the body to have the power to make X order or whether the legislature intended the offence to apply in Y case might be entirely fictitious. In complicated cases, legislative intent is more than one dimensional.

Whose Intent Is It?

Flowing from the discussion of fact or fiction is a related question of whose intent legislative intent references. Most legal thinkers, including the Supreme Court, agree that legislative

²⁷ *Ibid.*

²⁸ Ekins, "Indispensability of Legislative Intentions", *above* n. 11 at 54.

²⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2014) at 172.

³⁰ *Criminal Code*, RSC 1985, c. C-46, s 21.

intent is not the subjective intent of an individual lawmaker.³¹ Apart from this consensus, different scholars propose alternative targets for legislative intent. Elmer Driedger is said to have identified legislative intent with the intent of the drafters.³² Judge Learned Hand is said to have suggested legislative intent as identified with the intention of legislative committees.³³ For others like Reed Dickerson, legislative intent refers to the intent of those lawmakers conversant with the bill.³⁴ The panoply of competing definitions is likely the source of confusion over legislative intent and presents the biggest challenge to conceptual clarity.

For example, Ekins and Goldsworthy associate legislative intent with the idea of a plan. Instead of something courts constructed after the fact, Ekins and Goldsworthy argue that intentions are plans.³⁵ Intentions are not exclusive to a single person. Intentions, for Ekins and Goldsworthy, are

[p]lans that persons adopt as means to ends they seek. The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that they want to reach.³⁶

Ekins and Goldsworthy define legislative intent as a plan held in common among members of a group. “In enacting a statute” Ekin and Goldsworthy argue “the legislature promulgates (utters) a statutory text that makes clear to the community at large how it – the legislature – has chosen to change the law.”³⁷ Legislative intent refers to the legislature as a collective.

Reed Dickerson also focuses on the legislature as a collective but uses the term “corporate legislative intent.”³⁸ Dickerson also views legislative intent as an objective to be inferred.³⁹ Although a legislative body is comprised of many individuals, it “has no separate psyche, its activities display the characteristics of intentional behaviour guided by an aggregate motivation.”⁴⁰ As Dickerson notes,

[h]ere, it would seem appropriate to say that the legislative intent of the participating legislators is to adopt or acquiesce in the legislative intent manifested

³¹ *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649 (SCC) at para 17 [Delisle].

³² MacCallum, *above* n. 19 at 781.

³³ *Ibid.*

³⁴ Reed Dickerson, “Statutory Interpretation: A Peek Into the Mind and Will of a Legislature” (1975) 50 *Ind L J* at 221.

³⁵ Ekins, “Indispensability of Legislative Intentions”, *above* n. 11 at

³⁶ *Ibid* at 61.

³⁷ *Ibid* at 66

³⁸ Dickerson, “Statutory Interpretation”, *above* n. 34 at 212.

³⁹ *Ibid* at 213.

⁴⁰ *Ibid.*

by the bill when viewed in its proper legislative setting or to adopt or acquiesce in the actual intent of the draftsman.⁴¹

MacCallum describes legislative intent as the “intent of a collegiate legislature”.⁴² In describing legislative intent, MacCallum outlines two models: the majority model and the agency model. Under the majority model, intent means the intent of the majority that passed the Bill.⁴³ Although members who voted against the law are part of the legislature, the majority model excludes those members who voted against the law.

In contrast, under the agency model, intent is the intent of persons with various responsibilities delegated to them by the legislation.⁴⁴ Similar to the views of Driedger and Hand, this could include the intent of drafters and committee chairs.⁴⁵ The intentions of these individuals becomes the intent of the legislature because these are the intentions that “the legislature stood behind, wished us to attend to, wished us to regard as authoritative as their own – indeed, wished us to regard *as* their own.”⁴⁶

These different views all refer to an aspect of the legislative process. Lawmaking is a complex activity, composed of different individuals, with different intentions, each working towards one goal: making law. Determining which intent is elevated to the status of “legislative intent” is no easy task. The presence of these different intentions, each pointing to a truth of the legislative process, explains why legislative intent is so elusive. The question of whose intent legislation intent refers to depends on who is asked.

Defining the legislature for the purpose of intent is more difficult in Canada. Parliament is not one institution. The presence of the House of Commons and the Senate add to the complexity. An often-forgotten part of Parliament is the Queen. As Steven Chaplin notes, “[a]t the federal level the legislature, Parliament, is composed of the Queen, as represented by the Governor General, the House of Commons and the Senate acting together.”⁴⁷ This collective institution, two parts of which are composed of groups of people, add to the conceptual challenges of defining the contours of legislative intent.

In addition to this, Parliament is not eternal either but “ceases to exist at its dissolution.”⁴⁸ “Legislation passed in one Parliament is not the work...of subsequent Parliaments.”⁴⁹ The

⁴¹ *Ibid* at 211.

⁴² MacCallum, *above* n. 19 at 781.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 781.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

⁴⁷ Steven Chaplin, “Hey Court, It’s Me, the Legislature, Speaking - Can You Hear Me?: Towards a True Dialogue between Courts and Legislatures” (2020) 13 J Parliamentary & Pol L 225 at 237.

⁴⁸ *Ibid* at 237, n. 53.

⁴⁹ *Ibid*.

presence of compounding amendments to an historic statute could make discerning between intentions a challenge as each new intent builds over time on top of one another like a snowball rolling down a hill.

Legislative Intent and the Separation of Powers

Legislative intent grounds statutory interpretation: it constructs the home where statutory interpretation resides based on the separation of powers. As an objective of statutory interpretation, legislative intent relies on a separation of powers narrative where legislatures make statutes and courts interpret them. In giving effect to the intention of a legislature a court interpreting a statute fulfills its constitutional role.

How we understand interpretation has evolved alongside our theories of state power. Today, power is divided between different groups with different roles, one of which is to interpret the law. This separation was not always the case. During eras of consolidated power and absolute rulers in Europe, interpretation was restricted. Emperor Justinian was said to have prohibited the creation of interpretive commentaries on the laws found in his *Corpus juris civilis*.⁵⁰ The principle according to Helmholz was summed up by the following maxim: “the power to interpret the law belongs to the one who establishes the law.”⁵¹

Legislative intent became the “paramount rule” of interpretation during an era where common law courts increasingly saw themselves as one among other branches of the state responsible for governance.⁵² As far back as the *Sussex Peerage Case*, English courts declared that “the only rule of construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act.”⁵³

These views were imported to Canada and continued to define the separation of powers background on which legislative intent rests. As Dickson CJ wrote in *Fraser*, “[t]here is in Canada a separation of powers among the three branches of government – the legislature, the executive, and the judiciary.”⁵⁴ Though the lines that separate these powers are sometimes blurred and roles may from time-to-time overlap, the basic structure of the state is always present. Canada’s written and unwritten constitution informs these boundaries.

At its most basic, a constitution (written or unwritten) is a formal plan on how a society chooses to govern itself.⁵⁵ Canada’s constitution, written and unwritten, is no exception. Like any good manual, a constitution spells out the roles of institutional actors, the powers

⁵⁰ Helmholz, *above* n. 4 at 5.

⁵¹ *Ibid.*

⁵² Ekins, “Indispensability of Legislative Intentions”, *above* n. 11 at 39.

⁵³ *Sussex Peerage Case* (1844), 11 CL & Finn 85 at para 143, 8ER 1034 (UK). [*Sussex Peerage Case*].

⁵⁴ *Fraser v Public Service Relations Board*, [1985] 2 SCR 455 at para 39 [*Fraser*].

⁵⁵ Scott J Shapiro, *Legality* (Cambridge: Harvard University Press, 2011).

of those institutional actors, who gets to make the rules (laws), how those laws are made, who implements the laws, and who interprets the law, applies the law, and resolves disputes.

Under the *Constitution Act, 1867*, the power to enact statutes is vested in the legislatures.⁵⁶ Sections 91 and 92 further divides this authority into subject-matters apportioned to Parliament under s 91 and the provincial legislatures under s 92. While legislatures do not enjoy exclusive authority over governance, they do possess exclusive authority to make statutes. One can view legislation as the legislature's means to express its authority under ss 91 and 92 of the *Constitution Act, 1867*. Absent successful constitutional challenge, a legislatures legislative authority is supreme.

Legislative intent as an objective of statutory interpretation relies on the backdrop of the separation of powers for its justification. The judiciary has no legislative authority. While courts can make law through the common law, they cannot pass statutes. Courts give effect to the intention expressed in the statute. At the core of the judicial function is interpreting the law. As Lorne Neudorf put it, the interpretive function "lies at the very heart of the judicial exercise."⁵⁷

To interpret a statute without reference to the intent of the legislature that passed it not only offends the separation of powers but fails to appreciate the nature of statutory interpretation. The statute itself can be thought of as the formal expression of the legislature's authority to govern within its jurisdiction. The statute is the vessel that holds the legislature's intent when it passed the law.⁵⁸ Even when the legislature uses broad language or delegates authority, it nonetheless does this through statute. Both are variations in the extent to which the legislature exercises its authority, yet both are done by statute. If the legislature wants to delegate authority to the courts, it does so by using broad language in the text of legislation. Likewise, if the legislature wants as a matter of policy to pass authority to a delegate, it does so by enacting legislation.

What makes statutes become law is the process the legislature's intention takes. Through the legislative process a bill is transformed into a law. Removing the formality leaves nothing but an expression of a policy choice – a decision by a group of individuals (albeit a special group vested with the power to govern) to, as MacCallum would put it, change the law.

Many academics recognize the close relationship between legislative intent and the separation of powers. For example, Ruth Sullivan writes that

⁵⁶ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, ss 91 & 92.

⁵⁷ Lorne Neudorf, "Declaratory Legislation: Legislatures in the Judicial Domain?" (2014) 47 UBC L Rev at 323.

⁵⁸ Daniella Muryнка, "Some Problems with Killing the Legislator" (2015) 73 UT Fac L Rev at 33.

[e]veryone agrees the interpreters must give effect to the intention of the legislature, for this remains the official goal of statutory interpretation grounded in the norm of legislative sovereignty.⁵⁹

Similarly, Randal Graham has also commented on interpretation and the judicial function. For Graham, the backdrop of the separation of powers and the distinction between elected legislators and unelected judges is central to understanding the interpretive exercise:

The interpreter, by contrast, lacked the power to *create* a statute's meaning, but was instead bound to apply the text in a way that coincided with the lawmaker's intention. The unelected judge merely follows the will of the legislative author, interpreting statutes in a way that gives effect to the intention of the elected public officials.⁶⁰

Even the way doctrines of statutory interpretation are described rely on a separation of powers narrative. In Chapter 6 of Sullivan's *Construction of Statutes*, Sullivan's discussion of plausible meaning, drafting mistakes, and gaps are framed against ideas of the judicial role.⁶¹ Sullivan invokes the concept of "jurisdiction" to explain courts' authority to employ interpretive techniques.⁶² For example, Sullivan explains that jurisdiction to correct drafting errors "arises when the court has reason to believe that the text of legislation does not express what the legislature meant to say".⁶³ A court can change the text of a statute only when it is shown that the text does not reflect what the legislature intended to say.⁶⁴ If the text itself were law and not a vessel for the legislature's will, Sullivan's rationale would fall apart.

The same rationale applies when courts read down provisions. Courts read down provisions of a statute when the words used are "over-inclusive" and apply to circumstances beyond the intended mischief.⁶⁵ When the words of a statute are over-inclusive, courts narrow the scope of the law. From the point of view of the separation of powers, nothing improper happens when courts read down text because all that is happening is the adoption of a narrower intended meaning instead of the broader meaning. Examined through the lens of intentionalism, reading down makes perfect sense because the court is simply asking whether the means (the words of the law) accurately express the intent.

In contrast, a court's ability to deal with situations where statutes are under-inclusive is much more limited. Sullivan begins her section on gaps in legislation by acknowledging that

⁵⁹ Sullivan "Problems with Shared Meaning Rule", *above n. 14* at 74.

⁶⁰ Randal N Graham, "A Unified Theory of Statutory Interpretation" (2002) *Stat L Rev* 23 at 155.

⁶¹ Sullivan, *Construction of Statutes*, *above n. 29* at 173.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid* at 172.

⁶⁵ *Ibid* at 178.

“[i]t has long been established that courts may correct drafting errors but have no jurisdiction to cure gaps in a legislative scheme”.⁶⁶ Unlike over-inclusion, gaps occur when legislation fails to go far enough. Courts could easily cure gaps in legislation by “adding words that expand the scope of the legislation”, but they are reluctant to do so.⁶⁷ Again, the concept of jurisdiction arises. As Sullivan writes, “[t]he real reason courts cannot cure gaps is that they lack jurisdiction”.⁶⁸ The reason courts lack jurisdiction is because

reading down to cure over-inclusion is considered interpretation, provided it can be justified, whereas reading in to cure under-inclusion (or gaps) is considered amendment and must be left to the legislature.⁶⁹

The reason reading down is considered interpretation and reading in is considered amendment is because to interpret is to work with what is given, while to amend is to create something new. When a statute is over-inclusive, the legislature has given too much. A court may read-down the provision for legitimate purposes and not offend the separation of powers because in doing so it is merely choosing one of many plausible meanings. The choosing of one over other plausible meaning happens every time a court interprets a statutory power that, on its face seems as though it has no limits. Every statutory power has implied limits. The law does not require the legislature to bring implicit limits to the forefront. One of those limits is the *Charter*.⁷⁰ Statutory powers often do not express this limit but are read down so as not to empower the delegate to violate the *Charter*.

On the other hand, when a court reads in to cure under-inclusion it is no longer working with what the legislature provided. Instead, the court must create to fill the gap. Of course, this interpretive process assumes the gap cannot be interpreted away by applying the modern principle. Where the court applies the modern principle and determines the statute does not extend as far as a party sought or the statute has a gap, the court has no option but to respect the wishes of the legislature. The legislature means what it says, and if the legislature created a gap in its statutory scheme, it meant it. To fill this gap would be to encroach upon the legislative function.

Understanding the Modern Principle

In *Rizzo*, the Supreme Court adopted Driedger’s modern principle as the proper approach to statutory interpretation in Canada. With the adoption of the modern principle, the Court entered a new era of statutory interpretation. Understanding the modern principle is crucial to understanding statutory interpretation.

⁶⁶ *Ibid* at 177.

⁶⁷ *Ibid* at 178.

⁶⁸ *Ibid* at 177

⁶⁹ *Ibid* at 178.

⁷⁰ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11,

The modern principle states that

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.⁷¹

Despite varying interpretations of the modern principle among academics, Driedger's formulation is not distinct from the object of interpretation. Rather, the modern principle affirms the centrality of legislative intent in Canadian statutory interpretation. In adopting the modern principle in *Rizzo*, the Supreme Court did not change the prevailing objective of statutory interpretation.

Prior to *Rizzo*, the object of interpretation was to discover the intent of the legislature. The problem with interpretation leading up to *Rizzo* was the presence of competing approaches, as courts disagreed on the application of the mischief rule, the literal rule, and the golden rule.⁷² Driedger's formulation consolidated centuries of interpretive approaches into a unified approach under the banner "the modern principle". While courts prior to the modern principle applied different interpretive approaches inconsistently, Driedger sought to harmonize the competing approaches.

As John Mark Keyes argues, Driedger's modern principle "suggests that meaning of a legislative text is construed from indicators of the legislator's intention."⁷³ Comments from the Supreme Court in *Vavilov* suggest this is how the Court understands it:

[t]he Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context.⁷⁴

Potential Unanswered Question

Driedger's modern principle is not perfect. Until now, I have framed the modern principle as one approach that affirmed legislative intent as the objective of statutory interpretation. Having intent as one among other indicia places a wrinkle in this view, asking what legislative intent is: one factor among many or the object of interpretation?

Some scholars have commented on this aspect of the modern principle. Beaulac and Côté, for example, argue that placing intent among the other indicia of legislative intent is repetitive. As Beaulac and Côté write,

⁷¹ *Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983)

⁷² *Rizzo*, above n. 7 at 21.

⁷³ John Keyes, "Judicial Review and the Interpretation of Legislation: Who Gets the Last Word?" (2006), 19:12 Can J Admin L & Prac 134.

⁷⁴ *Vavilov*, above n. 8 at 118.

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 intent is determined.⁷⁵

One explanation for the addition of intent is that it is shorthand for the presumptions of legislative intent. By adding intent among the other indicia, Driedger reminds the reader to consider relevant and applicable presumptions of intent during the interpretive exercise. The "intent" cited in the formulation is different from the intent the court is trying to discover. The intent of the legislature remains the goal, but a specific presumption of intent is one of the many signals.

Another explanation is to treat intent as a separate indicia of legislative intent unassociated with the presumption. This is what the Supreme Court did in *Summers*.⁷⁶ The case concerned sentencing enhancement for offenders who were not released on bail and remained in jail awaiting trial.⁷⁷ At issue was whether recent amendments to the sentencing scheme at the time precluded sentencing judges from awarding pre-sentence custody enhancement on the basis of loss of eligibility for early release and parole alone.⁷⁸ In determining whether s 719(3.1) of the *Criminal Code* precluded judges from awarding an enhancement above a 1.5:1 ratio, the Court framed the intention of Parliament as one factor among others like the text of the provision, the structure of the section, and the scheme of the sentencing regime. Rather than frame intent as the object, the Court noted that

[t]he intention of Parliament can be determined with reference to the legislative history, including Hansard evidence committee debates...⁷⁹

The approach from *Summers* seems to be an outlier. Despite the characterization of legislative intent as one among many factors in *Summers*, the Court has been consistent in describing legislative intent as the interpretive objective. In *Paterson*, the Court referenced intent as the object. In *Bell ExpressVu*, the Court wrote that,

[w]hen 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.⁸⁰

One explanation for this treatment of intent in *Summers* is that the Court misspoke when it used the term "intent." Instead, what the Court really meant to say was "purpose." When the

⁷⁵ Beaulac, *above* n. 6 at 163.

⁷⁶ *R v Summers*, 2014 SCC 26 [*Summers*].

⁷⁷ *Ibid* at para 1.

⁷⁸ *Ibid* at para 71.

⁷⁹ *Ibid* at para 51

⁸⁰ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62 [*Bell ExpressVu*].

Court referenced legislative history as one tool for determining intention, what it really meant was using extrinsic aids to determine the purpose of the law. This explanation aligns better with a view of intent as the ultimate objective as opposed to one among many factors.

Determining the line between purpose and intent is difficult. Often these terms are used synonymously. Some scholars, however, argue that there is a distinction. According to Dickerson, for example, legislative intent is merely the “immediate legislative purpose” while “purpose” refers to any broader or remote (“ulterior”) legislative purpose.”⁸¹ Cameron Hutchison describes purpose as referring to the “object of the Act”.⁸² Like intent, legislation is “presumed to have a discoverable purpose.”⁸³ The purpose of a statute can be determined from stated purposes in the preamble or divined from the kind extrinsic factors referenced in *Summers*.⁸⁴

The common thread of Dickerson and Hutchinson’s definition is that purpose is broader than intent. Determining the purpose of a statute requires focusing on the mischief the legislature sought to address when it passed the law. If intent asks *what* meaning the legislature wanted, then purpose asks *why* the legislature wanted the law in the first place. The focus of purpose is the underlying “evil” the statute is meant to cure.⁸⁵ This is the foundation of the mischief rule laid down in *Heydon’s Case* where the court instructed judges to “make such construction as shall suppress the mischief (and) advance the remedy”.⁸⁶ As Willis noted, under the rule, statutes are interpreted in a manner that “best accomplishes the social purpose of the Act.”⁸⁷

One can distinguish purpose from intent by thinking of purpose as a guide for discovering legislative intent.⁸⁸ The object of statutory interpretation is not to discover the purpose of the statute. The object is to uncover intent. The purpose of statute is one tool to uncover that intent, as “you cannot interpret a statute properly until you know the social policy it was passed to effect”.⁸⁹ This is one way to explain the Supreme Court’s treatment of intent in *Summers*.

It is unlikely we will ever discover the *true* explanation about why Driedger doubled down on intent, just as how we may never discover the *true* intent of the legislature. As Sullivan

⁸¹ Dickerson, “Statutory Interpretation”, *above* n. 34 at 224.

⁸² Cameron Hutchison, “Which Kraft of Statutory Interpretation? A Supreme Court of Canada Trilogy on Intellectual Property Law” (2008-2009) 46 *Alta L Rev* at 7.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ H W Jones, “Statutory Doubts and Legislative Intention” (1940) 40 *Colum L Rev* 957

⁸⁶ *Heydon’s Case* (1584), 3 Co. 7b.

⁸⁷ Willis, *above* n. 17 at 14.

⁸⁸ Dickerson, “Statutory Interpretation”, *above* n. 34 at 323

⁸⁹ Willis, *above* n. 17 at 14.

notes in her foreword to the 4th edition of *Construction of Statutes*, Driedger's formulation is "obscure", and it is "difficult to resist the suspicion that the success of the formulation is due in part to that very obscurity."⁹⁰

Presumptions of Legislative Intent

Sometimes called "canons of construction", legislative presumptions are deeply linked to legislative intent because they are concrete expressions of what that intent might be. Any discussion of legislative intent should include the presumptions. Presumptions of legislative intent have played an important role in our legal system. In addition to their utility, presumptions of intent helped ground the legal system.

Roles of the Presumptions

Presumptions of legislative intent serve different functions in our legal system.

At their most basic, presumptions of legislative intent settle ties. In an adversarial system, this could be their most important role. By setting a default, like the presumption of subjective *mens rea* in criminal statutes, the law ensures (all arguments being equal) that there will be a winner.

Another function of the presumptions is that they advance uniformity in the law, at least in part, by guiding the exercise of judicial discretion. Presumptions narrow – even if slightly – the broad scope of judicial discretion when it comes to interpretation.

Related to narrowing judicial discretion, presumptions have the ability to properly frame the interpretive issue. Sullivan touches on this in her article on the interpretive approach to bilingual legislation.⁹¹ Similar to uniformity, presumptions of legislative intent frame the interpretive inquiry by stating exactly what the interpreter needs to do. Sullivan discusses this in the context of the presumption of shared meaning. As she notes in her matter-of-fact style,

[p]resumptions matter; otherwise there would be no point in creating them. When the existence of a shared meaning gives rise to a presumption in favour of the shared meaning, it transforms the interpretive question from "what is the best or most plausible meaning having regard to the purpose or context?" into "is there other evidence of legislative intent that is sufficient to rebut the presumption."⁹²

⁹⁰ Sullivan, *Construction of Statutes*, above n. 29 at x.

⁹¹ Sullivan "Problems with Shared Meaning Rule", above n. 14.

⁹² *Ibid* at 79.

Andrew Gage argues presumptions promote democratic accountability.⁹³ For Gage, presumptions of intent, which required legislatures to express policy preferences in clear language, promoted democratic accountability because they pushed the legislature to be clear about its decisions. Presumptions made it harder for Parliament to hide behind vague or cryptic language lest its policy goals risk being undermined by the courts. As Gage notes,

[b]y requiring the legislator to be clear about its intentions, the principle forces public debate on issues of public importance, and requires the legislature to be up front when it intends to negatively impact long-standing public rights.⁹⁴

Another function of the presumptions is their ability to promote dialogue between the judicial and legislative branches. Kent Roach makes this argument in his article “Common Law Bill of Rights as Dialogue between Courts and Legislatures.”⁹⁵ As Roach outlines in his tribute to John Willis, presumptions of legislative intent did in the pre-*Charter* era, what constitutional review under the *Charter* does today.⁹⁶ As Roach explained, the application of the presumptions often resulted in “ping-pong matches” between “courts concerned with fundamental principles of criminal liability and the rights of the accused and Parliament, which is concerned with public and media pressure to do something about crime.”⁹⁷ The result of this back and forth was what Roach called a “democratic common law constitutionalism.”⁹⁸ While Parliament ultimately had the last word, interpretive maxims like clear statement rules crafted by the courts meant that, on issues of fundamental rights, legislative silence or general language was not enough.⁹⁹ Parliament had to speak and speak clearly.

Constructing the Legislature

An important auxiliary function of presumptions is that they construct an image of the legislature. In crafting the “ideal legislature” from values and rights the courts deem worthy of protection, the presumptions of intent contribute to a kind of common law constitution. Willis referred to this as an “ideal constitution” for England and Canada.¹⁰⁰ If constitutionalism asks what kind of state the society has, presumptions of legislative intent answer: one where Parliament is rational, restrained, respectful of vested rights, does not

⁹³ Andrew Gage, “Public Rights and the Lost Principle of Statutory Interpretation” (2005) 15 J Env L & Prac at 140. *Ibid* at 79.

⁹⁴ *Ibid*.

⁹⁵ Kent Roach, “Common Law Bill of Rights as Dialogue between Courts and Legislatures” (2005) 55 U Toronto LJ at 742.

⁹⁶ *Ibid* at 755.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* at 736

⁹⁹ *Ibid* at 742.

¹⁰⁰ Willis, *above* n. 17 at 17.

intend to frustrate Canada's international obligations, and so on. Each time a court creates and applies a presumption, it creates an image of a legislature. This common law constitution is the consequence of the judiciary's respect for legislative sovereignty and desire to see that justice is done.

Viewed from this perspective, each presumption of intent tells something about Parliament. Both procedural and substantive presumptions construct a normative legislature in the courts' own image. Procedural presumptions tell us that we have a rational legislature, one that operates according to rules of logic.¹⁰¹ Here, presumptions like the presumption against tautology tells us that Parliament means what it says. The presumption of static meaning tells us Parliament does not intend the meaning of its words to change over time.

Even the legislature's presumed compliance with ancient grammatical canons helps construct the ideal of a rational lawmaker. For example, the legislature is presumed to be aware of and act in accordance with the canon of *noscitur a sociis* which states that a general word takes its colour from the preceding specific words.¹⁰² Similarly, it is also presumed to act in accordance with the canon of *expressio unius est exclusio alterius*, the rule that states that the express mention of one person or thing implies the exclusion of other persons or things of the same class not mentioned.¹⁰³

Substantive presumptions go even further. Whereas procedural presumptions draw the general outline of a rational entity, substantive presumptions colour between and beyond those lines. Parliament does not just do its work rationally; it also has certain value judgments. For example, the presumption of subjective *mens rea* tells us that Parliament respects the presumption of innocence.¹⁰⁴ The presumption of restraint tells us that Parliament does not intend to criminalize otherwise common practices.¹⁰⁵ The presumption of compliance with international law tells us that Parliament respects international roles and is presumed not to intend to frustrate Canada's international obligations.¹⁰⁶ When viewed as a whole, sitting side by side and on top of one another, these presumptions of intent construct a fictional legislature from normative bricks.

It is arguable whether the presumptions *actually* reflect the practices of the legislature. As Roach notes, presumptions "functioned less as true presumptions of legislative intent and more as values that would be protected by the judiciary."¹⁰⁷ Presumptions are "expressions

¹⁰¹ Thomas A Cromwell, Siena Anstis and Thomas Touchie, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretations" (2017) at 299.

¹⁰² Willis, *above* n. 17 at 7.

¹⁰³ *Ibid.*

¹⁰⁴ *R v Zora*, 2020 SCC 14 [*Zora*].

¹⁰⁵ Michael Plaxton, "The Presumption of Restraint and Implicit Law" (2020) McGill Law Journal, Forthcoming at 1

¹⁰⁶ *Argentina v Mellino*, [1987] 1 SCR 536 [*Mellino*].

¹⁰⁷ Roach, "Common Law Bill of Rights", *above* n. 95 at 748.

of the Court’s constitutional values”, sending a message about the kind of legal system in which we live.¹⁰⁸ The decision to recognize and apply a presumption is value laden, from the decision of which interest to prefer to the choice on how far the legislature must go to rebut the presumption. As Hamish Stewart argues in his article “A Defence of Constitutionalized Interpretation,”

[b]y interpreting statutes on the assumption that the legislature intends to respect basic legal values, the court not only protects these values but effectively requires the government and the legislature to explain why those values should be construed differently, or even disregarded altogether.¹⁰⁹

It does not take long before one begins to question the efficacy of this type of legal romanticism. Presumptions of intent may construct the image of a fictional legislature – rational, respectful of legal norms, and out to do no harm – but how accurate are these images? Are the legislatures, constructed in the annals of the court reporters, really the same as the one on Parliament Hill, at Queen’s Park, or in Quebec City?

Presumptions of intent construct an “ideal legislature”, but nothing stops legislatures from acting contrary to the presumed intent, whether it is drafting an illogical regulatory scheme or intending to act beyond the jurisdiction it is presumed to respect. Two cases illustrate this point.

Consider *Morgentaler II*, where the Supreme Court invalidated portions of Nova Scotia’s *Medical Services Act* and regulations made under the Act purporting to regulate hospitals.¹¹⁰ Despite the fact that the impugned laws were purported to have been enacted within the province’s jurisdiction and that the legislature and delegates were presumed to have respected the limits of that jurisdiction, the Supreme Court held that in fact they constituted “an indivisible attempt by the province to legislate in the area of criminal law.”¹¹¹

Another example is the *Reference re Environmental Management Act (British Columbia)*, 2020 SCC 1.¹¹² At issue in that case was the constitutionality of the British Columbia’s *Environmental Management Act (EMA)* and more specifically whether the British Columbia legislature overstepped its jurisdiction in attempting to interfere with the controversial Trans Mountain Pipeline.¹¹³ The pipeline project – an interprovincial undertaking – fell exclusively within Parliament’s jurisdiction and could not be stopped by the province. Under the guise

¹⁰⁸ *Ibid* at 740.

¹⁰⁹ Hamish Stewart, “A Defence of Constitutionalized Interpretation” (2016) 36 *Nat’l J Const L* 195.

¹¹⁰ *R v Morgentaler*, [1993] 3 SCR 463 [*Morgentaler II*].

¹¹¹ *Ibid*.

¹¹² *Reference re Environmental Management Act (British Columbia)*, 2020 SCC 1 [*Environmental Management Reference SCC*].

¹¹³ *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 [*Environmental Management Reference BCCA*].

of its jurisdiction under s 92, the legislature passed the *EMA* to regulate and even prohibit the presence of heavy oil in the province.¹¹⁴ The legislation was ultimately struck down, as it was in pith and substance an attempt to regulate federal undertakings under s.92(10) of the *Constitution Act, 1867*.¹¹⁵

Suffice to say neither the Nova Scotia legislature nor the British Columbia legislature lived up to the image the presumptions painted of them. Courts rarely – if ever – impute the good faith of legislatures and in both cases neither the Supreme Court nor the British Columbia Court of Appeal opined on the motivations of either assembly. Despite the absence of a “gotcha moment”, the sub-text of these decisions is hard to miss. In both cases, the legislatures tried to do what the law prohibited them from doing. Under public pressure to curtail access to abortion, Nova Scotia sought to regulate the practice indirectly by regulating hospitals. Similarly, under growing public pressure against the federal TMX pipeline project, the legislature of British Columbia sought to impair the pipeline by regulating hazardous substances entering the provinces. Both failed.

Presumptions of Legislative Intent are Evolving

Presumptions of legislative intent are not set in stone. If we understand the presumptions as expressions of core legal values, then it is only natural that they evolve with the changing legal attitudes. How courts understand themselves, their role, the legislature, and the overall constitution of the legal system is far from static.

The changing nature of legal norms means the changing nature of presumptions. As time passes once dominant presumptions can fall by the wayside while others can rise and fall in prominence over time.

This evolving nature of the presumptions is best illustrated by comparing the treatment of the criminal law’s most important canons of interpretation: strict construction and the presumption of subjective *mens rea*. Both are historically rooted in the common law and have formed the foundation of our understanding of penal legislation. Yet, while strict construction has largely fallen by the wayside, the presumption of subjective *mens rea* has experienced periodic ups and downs.

Strict Construction’s Decline

The doctrine of strict construction is an ancient presumption of legislative intent. According to the doctrine, criminal statutes should be interpreted to benefit the accused. When assessing the scope of criminal liability, courts are to adopt an interpretation most favourable to an accused person. Often this means narrowing the scope of substantive criminal law. Strict construction flows from a general presumption of restraint. The criminal

¹¹⁴ *Ibid* at para 1.

¹¹⁵ *Ibid* at para 105.

law is serious, and its consequences are often dire. Thus, Parliament is presumed to act with a measure of restraint when it criminalizes conduct.

At one time, the doctrine of strict construction was a staple of the criminal law. At the height of its importance, the doctrine was often employed when many offences carried the death penalty.¹¹⁶ Common law courts often relied on strict construction as one of the many tools to protect accused persons from the full force of Draconian legal provisions passed by Parliament.¹¹⁷

As society changed, however, and the touch of criminal law became gentler, courts saw little justification in a *strict* application of the doctrine. This is illustrated in the Supreme Court's decision *Pare*, where the Court opined on the state of the doctrine in modern society. At issue was s 214(5)(b) of the *Criminal Code* which classified murder as first-degree murder where death is caused by a person *while committing* an enumerated offence. Pare was charged with first-degree murder under the provision in an incident where he murdered a young boy two minutes after indecently assaulting him out of fear the victim would tell his mother of the assault.¹¹⁸ Pare argued that *while committing* required one continuous transaction and the two-minute break between the assault and murder meant his conduct did not fall under s 214(5)(b). Even if "*while committing*" could be interpreted broadly, strict construction required the Court to adopt a reading most favourable to Paré.

In a decision authored by Wilson J, the Court rejected Pare's argument. Though strict construction still had a place in Canadian law, its precise role had been attenuated by changing circumstances. Although Wilson J confirmed the existence of strict construction on account that "the seriousness of imposing criminal penalties of any sorts demands reasonable doubts be resolved in favour of the accused", she recognized that the "justification for the doctrine has been substantially eroded."¹¹⁹

Rather than apply from the start of the interpretive inquiry, strict construction was only at play when a court was faced with more than one reasonable interpretation.¹²⁰ In Pare's case, strict construction was never triggered because *while committing only* had one reasonable interpretation, namely, a connection between the two offences without a need that they occurred simultaneously.¹²¹

The result was that strict construction became a "canon of last resort"¹²². As Michael Plaxton notes, the "canon of strict construction applies only once the interpreting court has already

¹¹⁶ *R v Pare*, [1987] 2 SCR 618; 1987 CanLII 1 (SCC), para 26 [*Pare*].

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* at para 28.

¹²¹ *Ibid* at para 36.

¹²² Plaxton, "Presumption of Restrain", *above* n. 105 at 9.

concluded that the provision is irreducibly ambiguous”¹²³. Like in *Pare*, only after a court runs the provision through the modern principle, and determines the text is ambiguous, is the dilemma resolved to the accused’s benefit. The effect is a threshold requirement before strict construction is applicable. This is also how courts apply *Charter* considerations in interpretation and attracts much the same criticism. As John Mark Keyes and Carol Diamond note, a threshold ambiguity requirement is difficult to define, as determining whether text lends itself to more than one reasonable interpretation depends largely on who is doing the interpreting.¹²⁴

Around the same time the Supreme Court had decided *Pare*, Sullivan mounted her own attack against strict construction. In her article “Interpreting the *Criminal Code*: How Neutral Can it Be? A Comment on *R v McCraw*”, Sullivan outlined what she regarded as a mischief of the strict construction.¹²⁵ Sullivan was critical of strict construction as it allowed judges to hide behind a veil of untenable neutrality. In the case of *McCraw*, the trial judge was able to frame his interpretive choices as “judicial choiceslessness in the face of the law” to acquit the accused because the strict construction compelled him to apply a narrow interpretation of uttering threats to cause serious bodily harm under (what was at that time) s 243.4(1)(a) of the *Criminal Code*.¹²⁶

Much like Wilson J in *Pare*, Sullivan argued that the doctrine of strict construction had been watered down since its early application by common law courts centuries prior.¹²⁷ It no longer commanded the force it once had and had to yield to other, more modern, interpretive tools. Unlike Wilson J, Sullivan went further and advocated that the doctrine should no longer have a place in Canadian law.¹²⁸ Citing the *Interpretation Act*, Sullivan argued that Parliament’s decision in enacting s 12, which stated that “Every enactment is deemed remedial, and shall be given such fair, large, and liberal construction”, left no room for the doctrine, as strict construction relied on a general presumption that penal statutes should be interpreted narrowly.

The Presumption of Subjective Mens Rea

In contrast to strict construction, the presumption of subjective *mens rea* has gone through periodic ups and downs. Like strict construction, the presumption of subjective *mens rea* flows from the same imputed restraint of Parliament’s criminal law power. The presumption

¹²³ *Ibid* at 8.

¹²⁴ John Mark Keyes & Carol Diamond, “Constitutional Inconsistency in Legislation - Interpretation and the Ambiguous Role of Ambiguity” (2016) 48 Ottawa L Rev 313.

¹²⁵ Ruth Sullivan, “Interpreting the *Criminal Code*: How Neutral Can it Be? A Comment on *R v McCraw*” (1989) 21:1 Ottawa L Rev at 221

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

of subjective *mens rea* means that with respect to true crimes, Parliament intends to criminalize intentional conduct. At different low points, scholars have questioned the role of this presumption in Canadian criminal law, suggesting it no longer plays an important role in the interpretation of criminal statutes. The presumption has nonetheless endured, rising again in significance.

Like all presumptions, the presumption of subjective *mens rea* reflects a core value of our legal system. In *ADH*, speaking for the Court, Cromwell J described this core value as the principle that “the morally innocent should not be punished.”¹²⁹ This foundational precept, as Dickson J described it in *Pappajohn*, asserts that “man cannot be adjudged guilty and subjected to punishment, unless the commission of the crime was voluntarily directed by a willing mind.”¹³⁰ The presumption’s roots date back centuries in the common law. As Dickson J noted in *Sault Ste Marie*,

Blackstone made the point over two hundred years ago in words still apt: “. . . to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will. . .,” 4 Comm 21.¹³¹

Although it lay at the core of our understanding of criminal law, the presumption of *mens rea* was not immune to criticism. In “Statutory Interpretation in a Nutshell”, Willis cast doubt on the longevity of the presumption. While the presumption may have been strong in times prior, its winds have waned. In his own words Willis noted that “[t]hen the presumption of *mens rea* being required in a statute was firmly settled; today the presumption is probably on the decline: at any rate its application is very uncertain.”¹³²

More recently, Kent Roach has also questioned the strength of the presumption. In his article paying tribute to Willis’s theory of statutory interpretation, Roach argues how much of the thrust of the presumptions has been eclipsed by the *Charter*.¹³³ Prior to 1982, courts breathed life into a common law bill of rights through their recognition and application of presumptions of intent.¹³⁴ Then, with the advent of the *Charter* and the entrenchment of substantive values into the constitution, Courts received directly what was before then only implied.¹³⁵ The result is that much of the attention shifted away from the presumption and to substantive sections of the *Charter*, like s 7.¹³⁶ As Roach notes,

¹²⁹ *R v ADH*, 2013 SCC 28 at para 27

¹³⁰ *Pappajohn v The Queen*, [1980] 2 SCR 120, 1980 CanLII 13 (SCC) at 130 [*Pappajohn*].

¹³¹ *R v Sault Ste Marie*, [1978] 2 SCR 1299; 1978 CanLII 11 (SCC) at 1303 [*Sault Ste Marie*].

¹³² Willis, *above* n. 17 at 24.

¹³³ Roach, “Common Law Bill of Rights”, *above* n. 95 at 733.

¹³⁴ *Ibid* at 737.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.

the court's refusal to recognize the common law presumptions as principles of fundamental justice seems to have drained these presumptions of much of their validity.¹³⁷

The result, according to Roach, is that

[c]ourts today rarely stand up for 'ancient principles' such as the presumption of subjective fault for criminal liability, the presumption of fault for regulatory liability, the principle against judicial creation of crimes or police powers, or the doctrine of strict construction of the criminal law.¹³⁸

Despite comments by Willis and Roach, the presumption lives on, arguably stronger than ever. Like Willis, Roach suggested that the presumption of subjective fault had – along with the other presumptions – lost much of its fuel following the *Charter*, implying like Willis that it was on the decline.

The Supreme Court's recent jurisprudence suggests otherwise. Cases from the Supreme Court in the past decade, interpreting the scope of criminal offences, have arguably revived the presumption of subjective *mens rea*. In *ADH* for example, a case where the Court held that the offence of child abandonment under s 218 of the *Criminal Code* required the Crown to prove subjective fault, Cromwell J wrote that

the presumption of subjective fault is not an outdated rule of construction which is at odds with the modern approach to statutory interpretation repeatedly endorsed by the Court.¹³⁹

In its analysis of the provision, the Court followed its precedent and began its interpretive inquiry with the principle that Parliament intends a subjective fault standard. The entire decision is couched in the language of legislative intent. Having reviewed extrinsic and intrinsic indicia of intent, Cromwell J concluded that “the text, scheme and purpose of the provision support this view that subjective fault is required. To the extent that Parliament's intent is unclear, the presumption of subjective fault ought to have its full operation in this case.”¹⁴⁰

The same thing occurred recently in the Court's judgment in *Zora*. The case presented the Court with an opportunity to double-down or depart from its stance on the presumption in *ADH*. *Zora* asked whether the offence of breach of bail conditions under s 145(3) of the *Criminal Code* required the Crown to prove that an accused knowingly and intentionally breached his bail conditions or that his breach was simply a departure from what is expected

¹³⁷ *Ibid* at 765.

¹³⁸ *Ibid*.

¹³⁹ *R v ADH*, 2013 SCC 28 at para 28 [*ADH*].

¹⁴⁰ *Ibid* at para 29.

of a reasonable person.¹⁴¹ In a unanimous decision authored by Martin J, the Court held that s 145(3) contained a subjective fault standard.¹⁴²

Doubling-down on the court's precedent, Martin J started her analysis with the recognition that "a key part of the context in interpreting s 145(3) is the long-standing presumption that Parliament intends crimes to have a subjective fault element."¹⁴³ Citing *ADH*, Martin J referenced the underlying value of the presumption, noted that far from absolute, the presumption merely "captures what was assumed to be present in the mind of Parliament when enacting the provision."¹⁴⁴

If one accepts Willi's and Roach's observations on the presumption of subjective *mens rea*, then the Supreme Court's decisions in *ADH* and *Zora* are the latest uptick in a history of a presumption that experienced its own boom and busts. Compare this with the experience of strict construction. While strict construction has been reduced to a canon of last resort, the presumption of subjective fault colours the interpretive analysis from the outset. Whereas the former has shrunk in importance under the weight of changing norms, the latter garnered increased significance.

Recognition of New Presumptions

Just as old presumptions of legislative intent can evolve, so too are new ones recognized. An area in statutory interpretation that has drawn little attention is the recognition of new presumptions. Despite presumptions playing an important role in statutory interpretation, there is no test for their recognition. Kent Roach has likened the presumptions as precursors to principles of fundamental justice embedded in s 7 of the *Charter*. Yet, while the Supreme Court has articulated a test for the recognition of novel principles of fundamental justice, no analogous test exists for the recognition of new presumptions.

Some scholars continue to advocate for the recognition of new presumptions. For example, Andrew Gage in his article on public rights argues for the expansion of the presumption that the legislature does not intend to interfere with public rights in the field of environmental law.¹⁴⁵

The most recent and important recognition of a new presumption of legislative intent is found in the Supreme Court's decision in *Vavilov*. In *Vavilov*, the Court created two new presumptions in the context of administrative law. First, the Court created "a presumption

¹⁴¹ *Zora*, above n. 104 at paras 1-5.

¹⁴² *Ibid*.

¹⁴³ *Ibid* at para 32.

¹⁴⁴ *Ibid* at para 33.

¹⁴⁵ Gage, above n. 93.

that reasonableness is the applicable standard in all cases.”¹⁴⁶ Second, the Court stated that a statutory right appeal mechanism from an administrative decision to a court is a clear indicator that the legislature intended an appellate standard of review when a court reviews the decision.¹⁴⁷ Both are significant because they illustrate how the Court goes about recognizing new presumptions.

In contrast to the Court’s approach to the recognition of novel principles of fundamental justice, the Court in *Vavilov* did not articulate a test for the recognition of this global presumption of reasonableness. The Court relied on broad policy reasons grounded in the value of respect of legislative choice and what it called the “democratic principle.”¹⁴⁸ For both justifications, the Court imputed an intention to the legislature. In explaining why it was appropriate to set reasonableness as the blanket, default standard of review, the Court reasoned that

[w]here the legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decision of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference.¹⁴⁹

The Court followed the same logic when it characterized statutory appeal mechanisms as a clear sign of an appellate standard of review. If reasonableness was justified under the theory that the legislature’s choice to take a matter away from the courts signalled a deferential standard, then a route back to the courts signalled the legislature’s desire for less deference.¹⁵⁰ Coherence and conceptual balance required

courts to give effect to the legislature’s intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision.¹⁵¹

This rationale for the recognition of presumptions is broad. There is no multi-part test. Instead, courts look at the context and rely on policy-based rationales. The Court references and relies on what it considers important values. The Supreme Court’s approach to

¹⁴⁶ *Vavilov*, above n. 8 at para 10.

¹⁴⁷ *Ibid* at para 17.

¹⁴⁸ *Ibid* at para 30.

¹⁴⁹ *Ibid* at para 24.

¹⁵⁰ *Ibid* at para 36.

¹⁵¹ *Ibid*.

recognition of the new presumptions in *Vavilov* is, therefore, historically consistent with how other presumptions have been recognized in other contexts.

If any principle can be deduced to explain how courts recognize new presumptions, it is simply that sometimes different types of legislation attract different kinds of interpretations and presumptions for different reasons. In *Vavilov*, the Court referenced “institutional design choice” as a key reason for creating a presumption of reasonableness.¹⁵² This means that where the statute delegates power to a non-judicial decision-maker, the legislature is presumed to intend a deferential standard.¹⁵³

Similarly, other kinds of legislation call for their own presumptions. The *Criminal Code* attracts the presumption of subjective *mens rea* and a presumption of restraint in recognition of harsh penal consequences. Human rights legislation is interpreted in a broad and generous manner and attracts a presumption that such legislation trumps conflicting ordinary legislation in recognition of their quasi-constitutional status.¹⁵⁴ The *Extradition Act* like other domestic statutes that implement Canada’s treaty obligations, is interpreted liberally because courts presume that Parliament does not intend to frustrate Canada’s ability to honour its international obligations.¹⁵⁵

The reasons for each of these presumptions were context-specific. In each case, courts looked at the statute or statutory scheme and imputed an intention on the legislature based on values that either arose from the statute or that the statute touched on. Where legislation delegated power to executive officers, those values are institutional design choice and respect for the democratic principle.¹⁵⁶ In the context of true crimes, that value is the principle that we do not punish the morally innocent.

While flexible, this broad, policy-heavy reasoning is unpredictable. The absence of a uniform theory by the Supreme Court leaves lower courts with little guidance should they face a situation where parties seek the recognition of a new presumption. This is one area that would undoubtedly benefit from further scholarship, especially when one considers the impact a presumption can have on an area of the law.

Criticism of Legislative Intent

Legislative intent and the presumptions of intent have been the subject of harsh criticism. Historically, many arguments have been marshalled against legislative intent and the presumptions that flow from it. Summarizing some of these criticisms illuminates underlying concerns. Major criticisms against legislative intent can be divided into five

¹⁵² *Ibid* at para 25.

¹⁵³ *Ibid* at para 26.

¹⁵⁴ *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536.

¹⁵⁵ *Mellino*, above n. 106.

¹⁵⁶ *Vavilov*, above n. 8 at para 30.

categories. Each of these categories mounts argument against a view of statutory interpretation grounded in legislative intent.

Integrity Criticism

The first group of criticism against legislative intent can be classified under a general category, roughly described as the integrity problem. The integrity criticism is historic and has seen many iterations. At its basis, the integrity criticism of legislative intent argues that grounding the objective of interpretation in the idea of an “objective legislature” allows judges to mask their personal preferences. Over-reliance on legislative intent allows judges to engage in a consequentialist analysis. At their basic, the consequentialists argue that judges are being dishonest in how they interpret text. Rather than using the indicia of intent to honestly arrive at the intent of the legislature, judges are using legislative intent to mask personal preferences for preferred interpretations.

Stephane Beaulac and Pierre-Andre Côté launch this criticism against the modern principle in their article “Driedger’s Modern Principle at the Supreme Court of Canada: Interpretation, Justification, Legitimization.”¹⁵⁷ According to Beaulac and Côté, the “modern principle of statutory interpretation has been utilised by the courts in Canada to fulfill a rhetorical function – that is to explain and justify in objective terms interpretive decisions.”¹⁵⁸ By allowing judges to look beyond the four corners of the statute for indicia of intent, the modern principle acts as a licence for judges to interpret first and justify later. This broad licence poses an integrity problem because rather than being honest in their *pursuit* of legal meaning, courts are picking the interpretation they prefer then simply using the modern principle to explain and justify that interpretation. Discovery of legislative intent is turned on its head.

Sullivan makes a similar point with respect to the presumptions of legislative intent. Like Beaulac and Côté, Sullivan is skeptical about integrity in the interpretive process. She is concerned with whether courts really mean what they say when they use the presumptions of intent to guide their interpretation. As she notes

[b]y expressing this preference in the form of a presumption concerning the intention of the legislature, the courts were able to pay lip service to the doctrine of Parliamentary sovereignty and at the same time assert their own will¹⁵⁹

¹⁵⁷ Beaulac, *above* n. 6.

¹⁵⁸ *Ibid* at 140.

¹⁵⁹ Sullivan, “Interpreting the *Criminal Code*”, *above* n. 125 at 223.

Utility Criticism

The utility problem raises a different kind of criticism for legislative intent. Critics under this category argue that legislative intent, in particular presumptions of legislative intent, adds little to the interpretive exercise. For critics, presumptions of intent do little to constrain the interpretive process because there is no agreement as to which presumptions apply, at what time, and what contrary evidence is sufficient to rebut them. At most, the presumptions and the language of legislative intent add little to the exercise.

The most well-known criticism of the utility of presumptions comes from Karl Llewellyn in his article “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed.”¹⁶⁰ In his article, Llewellyn cuts to the truth of interpretation: providing lawyers with a blueprint for effective advocacy at the appellate level. For Llewellyn, like many other legal realists of his day, the idea that there was *one* correct interpretation and all a lawyer needed to do was utilize the canons of construction as tools to uncover the meaning was not borne out in experience. As he wrote,

[t]he major defect in that system is a mistaken idea which many lawyers have about it – to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law.¹⁶¹

Coupled with the fact that there exists no single meaning, at the core of Llewellyn’s criticism of the presumptions is an attack on their utility. Presumptions of legislative intent are no more helpful in finding the correct resolution than any other interpretive technique because there is no *one* true answer to find. Thus, Llewellyn highlights the disconnect between the purpose of the presumptions and their operation by showing that for every presumption pointing the court to one interpretation, there was another presumption pointing in the opposite direction.

According to Llewellyn, an interpretation of a statute was not found, but rather “must be sold.”¹⁶² An advocate appearing before an appellate court, the professor counseled, should adopt the “conventional vocabulary” which “unhappily requires discussion as if only one single correct answer could exist” while at the same time knowing that “there are two opposing canons on almost every point.”¹⁶³

If proof of the utility criticism is in the eating, then skeptics of Llewellyn’s cynical realism need look no further than the practice of our current Supreme Court. In *Vavilov*, both the majority and dissent marshaled different presumptions to advance competing arguments on

¹⁶⁰ Karl Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed” (1950) 3 Vand L Rev.

¹⁶¹ *Ibid* at 86

¹⁶² *Ibid* at para 91.

¹⁶³ *Ibid*.

the issue of statutory appeal mechanisms. According to the majority, treating statutory appeal mechanisms as a signal for the legislature's intent that appellate standards apply on review flowed from the presumption of consistent expression and the presumption that the legislature does not speak in vain.¹⁶⁴ For the majority,

[a]ccepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes.¹⁶⁵

Then, a paragraph later, the majority stated the following:

However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant, contrary to the well-established principle that the legislature does not speak in vain.¹⁶⁶

The dissent disagreed, arguing the majority's approach hinged "almost entirely on a textualist argument" that the word "appeal" was a clear indicator of the legislature's intent.¹⁶⁷ In its refutation of the majority's interpretation of statutory appeal mechanisms, the dissent relied on the presumption that the legislature is presumed to enact legislation in compliance with existing common law rules.¹⁶⁸ For the dissent, the reason appeal provisions were not indicators of the legislature's desire for an appellate standard was because for 25 years courts had not treated these provisions as determinative of a standard of review.¹⁶⁹ As Abella J wrote for the dissent,

[i]n any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review. Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules.¹⁷⁰

¹⁶⁴ *Vavilov*, above n. 8 at paras 17, 44, and 45.

¹⁶⁵ *Ibid* at para 44.

¹⁶⁶ *Ibid* at para 45.

¹⁶⁷ *Ibid* at para 246.

¹⁶⁸ *Ibid* at para 249.

¹⁶⁹ *Ibid* at para 246.

¹⁷⁰ *Ibid* at para 249.

The sharp disagreement between the majority and dissent in *Vavilov* reads like something out of Llewellyn's article. Both sides used different presumptions to arrive at opposing interpretations on what the legislature intended by a statutory appeal mechanism. The fact that both sides could use these presumptions to arrive at opposing answers speaks to the presumptions' utility deficit.

A more recent iteration of the utility problem comes from former Supreme Court Justice Thomas Cromwell in his co-authored article, "Revisiting the Role of Presumption of Legislative Intent in Statutory Interpretations". Like Llewellyn, Cromwell J argues that the use of presumptions of intent as defaults is unhelpful and misleading. As currently formulated, "judges selectively rely on presumptions to support a particular outcome rather than use them consistently as interpretive tools."¹⁷¹ Like Llewellyn, Cromwell J and Anstis question the utility of presumptions when they allow judges to cherry-pick the canon that will lead to the preferred result.

Yet, while Llewellyn seems to accept the role of canons and outlines how advocates can refine their skills to better play the interpretive game, Cromwell and Anstis go a step further. For Cromwell J, the language of presumptions and how we understand them should be abandoned. Rather than having the presumptions define the interpretive questions like in *ADH* and *Zora*, canons of construction should be "treated as principles of interpretation that form part of the broader context in which the legislation is enacted."¹⁷² It is hard not to miss the irony of Cromwell J's argument: the Justice who with one pen authored the Court's presumption-centred decision in *ADH*, now calls on courts to effectively abandon presumptions altogether.

Elitism Critique and the Rule of Law

A third group of criticisms against legislative intent points to the risk that law will become increasingly inaccessible to the public. An objective of interpretation grounded in legislative intent coupled with a pragmatic approach to interpretation pushes legal accessibility beyond the reach of the public. The result according to this criticism is that the respect for Parliamentary sovereignty is elevated at the expense of the rule of law.

Danielle Murynka grounds the elite criticism in the text of the statute. According to Murynka, the more removed an interpretation is from the text, the more elitist the law becomes, as only a select group of experts in society have the knowledge to discover the hidden legal meaning of a statute.¹⁷³ Driedger's modern principle may have addressed the problem of latent ambiguity by allowing interpreters to consider the entire context of the statute, but it did so at the cost of increasing interpretive complexity. As Murynka argues,

¹⁷¹ Cromwell, *above* n. 101 at 314.

¹⁷² *Ibid* at 316.

¹⁷³ Murynka, *above* n. 58 at 31.

“access to extrinsic interpretive aids such as legislative history creates a potential for clever lawyers to complicate otherwise simple interpretive matters.”¹⁷⁴

The elitism concern is further aggravated when courts start interpreting a statute. As soon as a court interprets a statute, some meaning is transferred from the text to the case law. As Hall put it, “meaning becomes defined by precedent not by text and statutes become integrated with the corpus of law through judicial interpretation.”¹⁷⁵ As this process of interpretation occurs, the law becomes more inaccessible to the average person with no formal legal training.

Emanating from the elitist argument is the tension between two principles of our legal system. On the one hand, when courts ground the interpretive task as discerning the intent of the legislature, they pay respect to the principle of legislative sovereignty. Access to interpretive aids, like legislative history, legislative evolution, and ancient presumptions of intent, is permissible – if not encouraged – because it brings the interpreter closer to what the enacting legislature intended. On the other hand, if an interpretation veers too far from the text, values like accessibility and intelligibility flowing from the rule of law suffer. Thus, while democratic sovereignty is an important principle, it is not the only principle at stake.¹⁷⁶

At its most persuasive, the elitist argument appeals to basic fairness. There is something unfair in a legal system where an ordinary citizen reads the law and makes a good faith effort to comply with that law but is nonetheless punished because they forgot to consider the presumption against tautology, or the presumption of consistent expression.

This kind of concern for fairness can be found in Sullivan’s criticism of the Supreme Court’s approach to interpreting bilingual legislation. Statutory interpretation is not devoid of considerations of fairness. Interpretive rules, Sullivan argues, should take account of fairness concerns for the governed. According to Sullivan, the problem with the Supreme Court’s shared meaning rule from *Daust* is its risk that a person can be “taken by surprise”.¹⁷⁷ In proposing her own approach to interpreting bilingual legislation, Sullivan grounds her argument in an idea of fairness, rooted in the private law doctrine of *contra proferentem*.¹⁷⁸ For Sullivan, “if a legislature creates and publishes a text with a mistake that gives rise to an interpretation dispute, it is fair to make the legislature bear the cost of its bad drafting.”¹⁷⁹

¹⁷⁴ *Ibid.*

¹⁷⁵ Geoff R Hall, “Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology” (1998) 21:1 *Advocates Q* 38 at 61.

¹⁷⁶ One of many helpful contributions by Professor Keyes.

¹⁷⁷ Sullivan “Problems with Shared Meaning Rule”, *above* n. 14 at 77.

¹⁷⁸ *Ibid* at 16.

¹⁷⁹ *Ibid.*

Separation of Powers Criticism

A fourth group of criticisms of legislative intent and the presumptions of legislative intent is that they undermine the role of the legislature and impair the separation of powers.

Legislative intent can impair the separation of powers by undermining legislative efforts or getting in the way of the legislature's function in society. Like other criticisms, this one can flow from the integrity problem, as courts use legislative intent to undermine the legislative function.

A classic criticism of legislative intent is that courts weaponized the concept to undermine legislative efforts. Rather than using legislative intent as a shield, legal realists were critical of the way in which largely conservative courts used presumptions as swords to undermine popular social reform.¹⁸⁰ Willis was one of these critics. Even though Willis's concept of the Common Law Bill of Rights is celebrated as a positive example of common law courts protecting important social values, Willis was critical of these presumptions.¹⁸¹ Willis saw the concept of legislative intent as a judicial construction, largely forged by judges to cloak in legitimacy the personal preferences of those expected to be impartial.¹⁸² For Willis and many legal realists of his time, the presumptions allowed judges to slow progress under the guise of respecting a fabricated intent of the legislature.

This argument has been around for a long time and will likely never disappear, as it is a symptom of underlying social tensions. Because law exists within a social reality, interpretation can never be value neutral, nor is interpretation done in a vacuum. Broader social issues bleed into the interpretation of statutes. Thus, Sullivan's criticism of the trial judge's application of strict construction to narrowly interpret the offence of uttering threats at the expense of a victimized woman reflects the tensions of maturing society grappling with issues of gender equality and violence against women.

Similarly, future US Supreme Court Justice Harlan Stone's criticism of judicial efforts to undermine Congressional action during the Lochner era reflects the frustration and uncertainty of social reformers at a time where progressive remedial legislation was reined back with narrow interpretivism. As Stone noted in his speech on the US common law,

[a] narrow literalism too often defeated the purpose of remedial legislation, while a seeming contest went on with the apparent purpose of ascertaining whether the legislature would ultimately secure a desired reform or the courts would succeed in resisting it.¹⁸³

¹⁸⁰ Willis, *above* n. 17 at 3.

¹⁸¹ *Ibid* at 18.

¹⁸² *Ibid*.

¹⁸³ H F Stone, "The Common Law in the United States" (1936) 50 Harv L R at 14.

The view of presumptions of intent as the courts' weapons against legislatures is historically grounded. H W Jones in his article "Statutory Doubts and Legislative Intention" notes how some major presumptions of intent were created at a time where views of the legislatures by judges were not so positive.¹⁸⁴ Again, rules of statutory interpretation are not devoid of their social context. Created at a time where courts viewed legislative action as unwanted interventions, presumptions of legislative intent reflected a skepticism towards legislative efforts. During this era, legislative reform was seen by many jurists as encroachments on the reasoned realm of the common law. As Jones notes,

[t]he general judicial attitude at the time of the original pronouncement of the traditional rules of statutory interpretation is indicated by the charge of the great common lawyer, the late Sir Frederick Pollock, that many of the rules-of-thumb known as canons of construction

"...cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of the interference within the narrowest possible bounds"
(from *Essays in Jurisprudence and Ethics* (1882)).¹⁸⁵

Thus, while one reading of the judicial exercise of its interpretative function may celebrate figures like Lord Coke for his dictum in *Dr. Bonham's Case* where he wrote that "the common law will control acts of Parliament, and sometimes adjudge them to be utterly void", another would be more skeptical.¹⁸⁶ Those skeptics may see these examples as thwarting the legislature's legitimate role by a judiciary that disagrees on matters of policy.

Even though some criticisms of legislative intent and the presumptions assume a measure of bad faith against judges, others do not. Michael Plaxton for example argues that presumptions of legislative intent intrude upon the legislature even when applied in good faith. His criticism does not presuppose bad faith interpretations. In fact, it applies just the same where judges interpret law in good faith or bad. Comparing the impact of a disapproved interpretation against a constitutional declaratory relief, Plaxton argues that

[r]equiring Parliament either to live with a statutory regime that fails to achieve its intended objectives, or else re-enact the statute, represents a significant intrusion on the legislative role. Indeed, a declaration of invalidity is modest in comparison, since it relieves Parliament of the burden of living with a statutory provision or scheme it may not have intended to make.¹⁸⁷

¹⁸⁴ Jones, *above* n. 85 at 955-58.

¹⁸⁵ *Ibid.*

¹⁸⁶ M D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 UTLJ 91 at 109.

¹⁸⁷ Plaxton, "Presumption of Restraint", *above* n. 105 at 15.

Presumptions of Intent Undermine Dialogue Theory

A final criticism of legislative intent and the presumptions argues that they impede the dialogue between courts and legislatures. This argument focuses on the impact of the presumptions on the kind of constitutional dialogue between legislatures and the courts. Roach argues that the presumptions have impeded dialogue, as too much reliance on them makes courts reluctant to strike down legislation on constitutional grounds.

Roach, in essence, expresses a kind of *Bell ExpressVu* argument.¹⁸⁸ He sees the risk in relying on the presumptions to save legislation that would otherwise be struck down on *Charter* grounds. One never gets to the *Charter* question or reasonable limits under s 1, as presumptions allow courts to side-step the constitutional question by narrowing the scope of the law through interpretation. The Supreme Court's decision in *Corbett* is one example.¹⁸⁹ There, the Court interpreted s 12 of the *Canada Evidence Act* (allowing for the admission of the accused's criminal record) to preserve a trial judge's residual discretion to exclude prejudicial evidence to avoid the question whether the provision violated s 11(d) of the *Charter*.¹⁹⁰ In essence, the Court in *Corbett* relied on the presumption that in enacting s 12, Parliament did not intend to usurp a trial judge's common law authority to nonetheless exclude the criminal record if its prejudicial effect outweighed its probative value. In using the presumptions to resolve the dispute, the Court found the constitutional question unnecessary to answer. Whether the Court purposefully engineered its narrow interpretation to avoid the *Charter* issue is debateable. According to the criticism outlined by Roach, however, the Supreme Court's approach arguably silences any constitutional dialogue that may have occurred had the presumption not been applied.

Responses to Criticism

In light of the criticisms of legislative intent and the conceptual difficulties of defining legislative intent, is a view of statutory interpretation grounded in legislative intent still the best option? One alternative approach suggests so. While legislative intent may not be the ideal interpretive objective, it is at least the most acceptable. Grounded in the separation of powers, legislative intent is historically rooted and fits within a broader narrative.

Legislative intent is not the only view of interpretation available. Randal Graham in his article "A Unified Theory of Statutory Interpretation" proposes an alternative to intentionalism.¹⁹¹ Under a "unified theory of statutory interpretation" Graham argues for an approach that combines an originalist theory with dynamic theory, resulting in two interpretive paths. Under the first path, where there is vagueness, the court applies a

¹⁸⁸ *Bell ExpressVu*, above n. 80 at paras 62-67.

¹⁸⁹ *R v Corbett*, [1988] 1 SCR 670; 1988 CanLII 80 (SCC) [*Corbett*].

¹⁹⁰ *Ibid.*

¹⁹¹ Graham, above n. 60 at 103bid at 134.

dynamic meaning because the presence of vague terms is an indication that the legislature is delegating the power to determine meaning to the courts. Under the second path, where there is ambiguity, courts apply originalism because the task here is to uncover which of the two ambiguous interpretations the legislature intended.¹⁹²

Another theory of statutory interpretation is dynamic interpretation. Under a dynamic theory of interpretation, the judge is not constrained by the intent of the legislature. Under a dynamic theory of interpretation, the law is interpreted with reference to contemporary ideals.¹⁹³ Legislative intent may be one factor, but it does not define the inquiry.¹⁹⁴

Sometimes called a progressive interpretation, dynamism is considered the opposite of intentionalism. While a view of statutory interpretation based on legislative intent conceptualizes its interpreter as an archaeologist, a dynamic theory views its interpreter as a craftsperson or dynamo. As Graham describes it,

[u]nlike Cote's archaeologists, the 'dynamo' refuses to see a statute's meaning as an artifact to be discovered through the use of historical evidence. Instead, the dynamo sees the statute's text as clay that can be shaped in ways that were not necessarily intended by the statute's drafters.¹⁹⁵

Dynamic interpretation, therefore, is wedded neither to the text of the statute nor to the intent of the legislature because neither can provide answers in difficult cases.¹⁹⁶ The interpreter must look beyond the statute, and even beyond extrinsic sources, to construct satisfactory interpretation. Because statutory meaning is ever evolving, it is only necessary that the "the law must bend and stretch in ways that the drafter could not expect."¹⁹⁷

While the fluidity of dynamism may sound appealing, this theory comes with its own criticism. The major critique of a dynamic interpretive theory is that it is inherently unpredictable.¹⁹⁸ By placing every consideration on the table, dynamic interpretations make it difficult to predict how a court will interpret the law. The interpretive exercise under a dynamic interpretation is unhinged, as the absence of objective signposts means interpreters are free to construct an interpretation according to whatever considerations they see fit.¹⁹⁹

Even precedent loses its usefulness. As Graham argues, the possibility that a "future 'dynamic interpreter' may claim that social ideals have changed in a way that supports a

¹⁹² *Ibid* at 134.

¹⁹³ *Ibid* at 104

¹⁹⁴ *Ibid* at 105.

¹⁹⁵ *Ibid*.

¹⁹⁶ Kent Roach, "What's Old and New about the Legal Process" (1997) 47 UT LJ at 384.

¹⁹⁷ Graham, *above* n. 60 at 110.

¹⁹⁸ *Ibid* at 113.

¹⁹⁹ *Ibid*.

new and creative construction of a statute” leaves one questioning the reliability of precedent.²⁰⁰ As a result, uniformity and the rule of law suffer. Each interpreter becomes a law unto themselves. To quote John Mark Keyes, “[a] rule that means what each person wants it to mean is not law.”²⁰¹

Therefore, if the main criticism of a legislative intent is that it allows judges to engage in consequentialist analysis, dynamism as an alternative is arguably worse. For all its limitations, intentionalism is at least faithful to the norm of legislative sovereignty.²⁰² In contrast, under a dynamic objective, the interpreter need not remain faithful to the wishes of the legislature at all if it chooses not to. The reasons for doing so are entirely up to the interpreter.

Much of the problem with legislative intent may not be so much in the theory, but instead in how it is used. Many of the criticisms of legislative intent presuppose a dishonesty on the part of judges. If this is the case and the true problem is dishonesty, then no interpretive objective can offer a solution. Not even dynamic interpretation is immune from abuse. Interpretation is a human endeavour. The limitations of language and our means of communications inevitably leave some room to be exploited by a disingenuous interpreter.

Even a narrower approach to statutory interpretation does not solve the integrity problem. The modern principle is often criticized for increasing judicial discretion by making all indicators of legislative intent available to the interpreter, but there is no guarantee that a narrower interpretive approach will curb rogue judges. Plain meaning is said to represent an attempt to narrow the scope of the interpretive process.²⁰³ Even though the plain meaning rule binds the interpreter to the text of the statute, this approach still leaves room for dishonesty. As Geoff Hall points out, the plain meaning rule is often criticized because it permits, even requires, judges to “disguise the real reasoning process leading to the adoption of one interpretation over another.”²⁰⁴

What separates legislative intent from other interpretive theories is its grounding in the separation of powers. The importance of legislative intent’s grounding in the separation of powers should not be understated. Untying the interpretation of statutes from the legislative intent undermines the legitimacy of legislation as law.

The concern for legitimacy is present whether legislative intent is real or a fiction. Some thinkers who view legislative intent as a fiction, nonetheless, support the idea. For these

²⁰⁰ *Ibid.*

²⁰¹ Keyes, “Judicial Review and the Interpretation of Legislation”, *above* n. 73 at 135.

²⁰² Sullivan “Problems with Shared Meaning Rule”, *above* n. 14 at 74.

²⁰³ Keyes, “Judicial Review and the Interpretation of Legislation”, *above* n. 73 at 131.

²⁰⁴ Hall, *above* n. 175 at 41.

individuals, legislative intent is a necessary fiction.²⁰⁵ The interpreter seeks that which can never actually be found, or as Hooper notes, “[t]he legal interpretive process seeks to *discover* the “fictitious intent of the legislature.”²⁰⁶

The value of legislative intent is not in whether it accurately describes the state of the world. Grounding statutory interpretation in legislative intent places judges in the right “frame of mind” vis-à-vis their role.²⁰⁷ As Dickerson argues,

[i]f legislative intent in the subjective sense does not exist in at least some degree, the legislative process is blatant nonsense unworthy of serious investigation. But if there were no actual legislative intent, judicial deference to the constitutional separation of powers would require the courts to act as if there were, because the concept is necessary to put courts in an appropriately deferential frame of mind. This alone would be enough to moot the general issue of its existence.²⁰⁸

Conclusion

As the interpretive objective, legislative intent plays an important role in statutory interpretation. It defines the interpretive process, ties together concepts and doctrines, and situates interpretation within the broader legal context. Sharply criticized, there are many tensions within legislative intent. Whether fact or fiction, legislative intent relies on a core separation of powers rationale for its justification. All this to say, though often ignored or misunderstood, legislative intent has an important role to play in how we understand our legal system. By framing the interpretive objective as a search for the intention of the legislature, legislative intent places the interpreter in a frame of mind that respects legal norms such as the separation of powers and legislative sovereignty. Framing the objective of statutory interpretation as a search for legislative intent may not solve all the conundrums of statutory interpretation, but at least it tells us how to read statutes and what to think about as we interpret them.

²⁰⁵ Nicholas Hooper, "Notes Toward a Postmodern Principle" (2018) *Can LJ & Juris* at 44.

²⁰⁶ *Ibid.*

²⁰⁷ Dickerson, "Statutory Interpretation", *above* n. 34 at 217.

²⁰⁸ *Ibid.*

The basics of symbolic formal logic as a useful tool for legislative counsel

Matthew Waddington¹



Abstract

This article offers an introduction to symbolic formal logic and its application to legislative drafting. A familiarity with the basics of symbolic formal logic can reinforce our common sense logic checking of drafts, and could in future help us to use computerised checking. The article introduces the logical connectors “not”, “and”, “or” and “if”, which offer safeguards against ambiguities and mistakes in the use of those terms in drafting. The article then shows how the notation and concepts of symbolic formal logic cast further light on our use of “must” and “is” (after the banishment of “shall”), along with “must not”, the weak and strong versions of “may”, and the treacherous “may not”.

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Introduction – what is symbolic formal logic and how is it useful in drafting?

Legislative counsel use many skills, not just our specialist legal knowledge.

- We need a grasp of grammar and how to parse a sentence. Some of us back that up with knowledge of other languages or of linguistics.
- We also need common sense logic. Equally some of us back that up with knowledge of philosophical logic, mathematical logic, computer logic or several varieties of logic.

It is not essential for legislative counsel to know other languages or to understand formal logic, but both of them can help in our work. Some legislative counsel (including me) did not hate algebra at school, but have not embarked on learning computer programming.² For us, the basic³ notation of formal symbolic logic can be a useful tool in its own right to help sustain and reinforce our rigorous approach by supporting our common sense logic. That is not to suggest that all of us should take up formal logic, or that the full power of formal logic can be applied to legislative drafting, only that it may be a useful tool for some people for some aspects of drafting.

Traditional logic relies on statements being true or false, with nothing in between, and on reducing arguments to their core propositions (organised as premises leading to conclusions). Common law practitioners often contrast this with our human, non-binary approach and the flexibility of the common law (or casuistry, as civil lawyers may see it).⁴ Legislative counsel in the Commonwealth typically work with the common law, but our aim is to produce internally coherent statutory rules which can be applied broadly. That involves a binary element in ensuring there is someone who has to make a decision on whether or not a person is guilty, an applicant is fit or an action is reasonable, however human and vague those questions are.

What is logic and what is it for?

We all know that logic is something that, as legislative counsel, we already use to check the structure and consistency of our drafts. It is no good a draft saying somebody has to do something, if somewhere else it says they have to refrain from doing it (unless the drafter

² Legislative counsel with coding skills are already diving into producing programs that computerise legislation. Some might see formal logic as a distraction and argue we should learn to code instead. But even the simplest formal logic can help us understand how programmers are working with legislation, particularly for “Rules as Code” (see Loophole June 2019 and <https://oecd-opsi.org/projects/rulesascode/>).

³ Formal logic is a very rich topic. This article sticks firmly to the shallow end. For more see Hage (2016) “Elementary Logic for Lawyers” <http://www.jaaphage.nl/pdf/ElementaryLogicForLawyers.pdf> and Sartor (2006) “Fundamental legal concepts: A formal and teleological characterisation” (2008), 14(1-2) *Artificial Intelligence and Law* and at [DEON 2008](#).

⁴ O W Holmes Jr famously said “The life of the law has not been logic; it has been experience” in *The Common Law* (Little, Brown & Co: Boston, 1881). But see also Lovevinger, Lee) “An Introduction to Legal Logic” (1952, 27(4) *Indiana Law Journal* and S. Haack, “On Logic in the Law: ‘Something, But Not All’” (2007), 20(1) *Ratio Juris*.

has reconciled the two by making one an exception to the other, setting out different circumstances in which each applies, or in some other way).

But what is there beyond this common sense logic? The starting point is classical propositional logic, which deals in propositions that can only be true or false and looks at the formal structure of the relationships between propositions that produce valid arguments by leading from premises to conclusions. The classic example is –

If Socrates is a man, then Socrates is mortal;
Socrates is a man;
therefore Socrates is mortal.

A legal equivalent is –

If the force used by the defendant was reasonable, then the defendant is not guilty;
the force used by the defendant was reasonable;
therefore the defendant is not guilty.

Symbolic formal logic uses notation to bring out the abstract form of these relationships by stripping out the content of each particular proposition and substituting a place-holder that can stand for any proposition (as long as the substituted proposition is still one that has to be true or false). So the structure of the Socrates argument works for any pair of propositions, including reasonable force and guilt. If that pair is represented by P and Q (in each case couched as “it is true that ...”), then the argument can be represented as –

If P, then Q;
P;
therefore Q.

That form of an argument is evidently valid. By contrast, one invalid argument would be –

If P then Q;
Q;
therefore P.

That is because Q could be true without P, in that Socrates could be mortal without being a man, and some other defence could render the defendant not guilty.

These propositions can be formalised further using symbols for the relationships, so that “If P then Q” is rendered symbolically as “ $P \rightarrow Q$ ”. But there is a different relationship where P always stands or falls together with Q, for which we need “if and only if” (abbreviated as “iff”), which is rendered symbolically as “ $P \leftrightarrow Q$ ”.

But formal logic's symbolic notation, and its concepts of the relationships between propositions, can be used for purposes other than examining arguments for validity.⁵ Legislative counsel could use it to check that we are being logically consistent in our drafts – not giving a circular definition, not simultaneously imposing an obligation and a prohibition on the same person in relation to the same activity, and so on. That can be done by drafters using the symbolic logic notation ourselves⁶ or by developing a software program to run the logic checks and produce questions.⁷

Languages and logics

Languages can be divided into natural and non-natural and both can be parsed.

- **Natural languages** – Legislation is drafted in a “natural” language. In much of the Commonwealth, and in the USA, that language is English. In some jurisdictions legislation is drafted in two natural languages with equal status – English and French in Canada; English and Welsh in Wales. In the EU legislation can be drafted in multiple natural languages (and is made in 24 languages, in theory all with equal status).
- **Non-natural languages** – As well as natural languages, there are also non-natural languages. Computer languages are one example, which breaks down into sub-groups including machine languages, mark-up languages (such as HTML for websites and XML for structured documents) and programming languages (such as Python, C, Java). Like natural languages, computer languages each have their own grammar, with semantics (what the elements represent) and syntax (how the elements relate to each other). Logic is like a language or set of (families of) languages. Each “logical language” has its own syntax and semantics, with types and families of logics sharing elements of their syntax or semantics or both.⁸
- **Parsing** – Statements can be parsed, both in natural languages and in logics. Legislative counsel parse English sentences to work out what is going on and check that they are properly constructed. Parsing in a natural language involves (at some level) identifying not only which words are verbs, nouns, adjectives, adverbs, pronouns and so on, but also (more importantly for us) how the words

⁵ Variants of symbolic logic notation are used in computer logic, to give instructions to a computer in an unambiguous way to ensure the right output for a given input.

⁶ An early version of this suggestion was the quirky “systematic pulverization” system in EA Layman, “Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents” ([University of Michigan Law School Scholarship Repository](#), 1957).

⁷ Work on Rules as Code may produce such a tool. Ideally it would not be a “computer says no” nuisance, but a polite helper that says “Just checking – that looks like a logical inconsistency, I am probably missing something, but did you mean it. If so, is it worth seeing if you can recast it to remove the false impression of inconsistency, or is it all fine?”.

⁸ This article looks at basic notation, and sacrifices consistency to explanation. For a good example of how a more complex notation system can be built up, see Sartor, above n. 3.

(and phrases and clauses) relate to each other. Parsing is a useful tool in logic too (and in computer coding).

Connectors – “not”, “and”, “or”, “if”

Connector symbols

After the variables (in this case the true/false propositions) have been abstracted into symbols, the next element to formalise is the connectors (often called “operators” in computer logic).

The argument from the previous example can be made slightly more complex by adding “and” –

*If Socrates is a Greek, **and** Socrates is a philosopher, then Socrates is wise;*
*Socrates is a Greek **and** Socrates is a philosopher;*
therefore Socrates is wise.

Again, that argument works for any trio of propositions, including legal propositions. Representing that trio by P, Q and R, the argument can be abstracted and formalised as

If P and Q, then R; P and Q; therefore R.

The other special connectors that can be used in these structures are “not” and “or” –

*If Socrates is a philosopher, **or** Socrates is **not** a Persian, then Socrates is wise;*
*Socrates is **not** a Persian;*
therefore Socrates is wise.

Using P, Q & R again, the structure of that argument is

If P or not Q, then R; not Q; therefore R.

Unfortunately, the natural language “or” and “if” turn out to be ambiguous in ways that haunt our drafting. The logical connectors have fixed meanings to help avoid that ambiguity.

~	not	Negation of a proposition that has to be either true or false. So there will be a negation, the negation of the negation will be the original, with no in between.
^	and	Both have to be true. (“but” can be “and” with an overlay of “surprisingly”.)
∨	or	One or other <i>or both</i> . (Separate from “exclusive or” as “one or other, <i>but not both</i> ”.)

\rightarrow	if, then	"If X, then Y" – if X is true, Y has to be true. But all other combinations are allowed, including X false with Y true or false.
\leftrightarrow	if & only if	"If & only if X, then Y", "Iff X, Y" – if X is true then Y has to be true, but also if Y is true then X has to be true. So if either is false, they both have to be false.

Truth tables

Each of the logical connectors produces a new combined proposition that is itself true or false. That means the connectors can be mapped into tables showing how they preserve or alter the truth or falsity of the propositions fed into them. So, the combined proposition "P and Q" is true only when both P and Q are true, and not if either or both are false. But if instead what links P to Q is the "exclusive or", the combined proposition is true if either one of P or Q is true, but not if both or neither are true. These results can be set out in tables as a way of fully specifying the meanings of each of the connectives without ambiguity using "T" for true and "F" for false (though "true" and "false" are not defined).

Not (takes just one proposition)

P	$\sim P$
T	F
F	T

And

P	Q	$P \wedge Q$
T	T	T
T	F	F
F	T	F
F	F	F

Inclusive or

One or the other or both

P	Q	$P \vee Q$
T	T	T
T	F	T
F	T	T
F	F	F

Exclusive or

One or the other, but not both/neither

P	Q	$P \oplus Q$
T	T	F
T	F	T
F	T	T
F	F	F

If (but not only if)

No P without Q

P	Q	$P \rightarrow Q$
T	T	T
T	F	F
F	T	T
F	F	T

If & only if – “iff”

Both or neither, but not either one without other

P	Q	$P \leftrightarrow Q$
T	T	T
T	F	F
F	T	F
F	F	T

Truth tables can be made for connectors producing every other permutation of the results in the third column (for connectors that link only two propositions). But it is not useful to do so, as most of these connectors can be reduced to each other, and the other versions are not commonly needed.⁹ Using connectors

Using the connectors, we can formalise whole arguments. Going back to

If P or Q, then R;

Q;

therefore R,

that can be represented as –

$(P \vee Q) \rightarrow R$;

Q;

therefore R.

If we look further back to

If P then Q;

P;

therefore Q,

we can symbolise that as

⁹ Some of the other permutations can appear in computing, where electrical engineers use "logic gates" for connectors, including "NOR", which is only true when both P and Q are false, and "NAND", which is only false when both P and Q are true.

$P \rightarrow Q$;

P;

therefore Q.

We can apply this to one model of the law as, for example –

If (the defendant worked without a licence) then (the defendant committed an offence);
(the defendant worked without a licence);

therefore (the defendant committed an offence).

In this model the first part is the rule drafted as legislation (and explained by the judge to the jury). The second is a finding of fact by the jury. The third is the conclusion about the legal position and is drawn from the application of the rule to the fact. In the rule, “P” is a statement of fact (which is true or false in a given case), “Q” is a statement of the legal status arising from that fact (again true or false in a given case) and “ $P \rightarrow Q$ ” is a legal rule.

This is an over-simplification in that the rule needs to be expressed generally and the finding of fact needs to be particular (and is usually in the past) – “If *any* person works without a licence, then *that* person commits an offence; *this* person worked without a licence; therefore, *this* person committed an offence”. There are logical ways of representing that too, but they are beyond the scope of this introduction.¹⁰

“And”, inclusive “or”, exclusive “or” – semantic or syntactic ambiguity

As Commonwealth legislative counsel we are also careful with how we combine or separate items in lists. We use “and” and “or”, and we use numbered paragraphs with different numbering styles and indenting at different levels, with only one connector (after the penultimate item) per level. That is because we recognise that “if a person walks and talks or claps” is ambiguous. But it is ambiguous in two different ways, syntactically and semantically.

Syntactic ambiguity – First there is a problem over the grouping and range.

- Does it mean the person needs to be clapping, or else both walking and talking, or does it mean the person needs to be walking, but also either talking or clapping?
- To distinguish in a complex draft, particularly where there are subordinate clauses in the elements, we use paragraphing, numbering and indenting conventions rather than parentheses (which many jurisdictions save for explanatory material).
- But in a simple case like this the legislative counsel is likely to use the natural language rewritten with commas and “both” or “either” (“if a person walks, and

¹⁰ This aspect of legislative drafting conventions has been noted in a new English-based computer language “Logical English”, being developed by Robert Kowalski – see the items gathered on his Research Gate page at <https://www.researchgate.net/project/Logical-English>.

either talks or claps”), rather than go for the paragraphed version (unless there is going to be some need elsewhere in the draft to refer back to an element which is easier to identify by its number in the paragraphed version).

- Either way, the logic can be a neat way to sum up the relations and to check them.
- In mathematics there is a sequence in which operations should be taken to be intended when no further guidance is given.¹¹ But in algebra it is generally easier just to use parentheses to isolate elements, to determine the order in which you apply the addition, subtraction, multiplication and division. So $(2 \times 3) + 4 = 10$, whereas $2 \times (3 + 4) = 14$. Brackets can be artificially added to natural language to mark the ranges of the “and” and “or”.
- Logic uses brackets similarly, with “ \vee ” for “or” and “ \wedge ” for “and” –

“if a person (**w**alks and **t**alks) or **c**laps, then ...” = $((W \wedge T) \vee C) \rightarrow \dots$

“if a person **w**alks and (**t**alks or **c**laps), then ...” = $(W \wedge (T \vee C)) \rightarrow \dots$

Semantic ambiguity – There is also a problem with two meanings of “or”.

- Is this example meant also to cover the case in which the person does all three activities, or not? How do we indicate which?
- The natural language “or” can be **inclusive** or **exclusive** – the inclusive is “X or Y, or both”, while the exclusive is “X or Y, but not both”. Legislative counsel tend to use “or” in the inclusive sense, but sometimes exclusive. But do we always check whether it is clear which one we are using, and whether we need to add “or both” or “but not both”?¹²
- Logicians use “ \vee ” for inclusive “or”. For exclusive “or” logicians sometimes use “ \oplus ” (borrowed from computing), but they tend to prefer instead to spell out the exclusive form as “X or Y, but not both”, so that it becomes “ $(X \vee Y) \wedge \sim(X \wedge Y)$ ”.
- There is a third possible type of “or”, though not a normal English meaning, which can be rendered “neither or either, but not both”. It is known as “**NAND**” (again borrowed from computing) and is “ $\sim(X \wedge Y)$ ” – they cannot both be true, but they can both be false, or either of them can be true on its own.

Here are renderings of “person walks and talks or claps” – firstly where clapping is an alternative to walking while talking, but with only the logic versions fully specifying that the “or” is inclusive.

¹¹ It is known in Britain as “BODMAS” for Brackets, Orders, Divide, Multiply, Add, then Subtract (with other names in other countries).

¹² A recent decision of the British Columbia Court of Appeal deals with an example where this was not checked: *R. v. Ghadban*, 2021 BCCA 69 (CanLII), <https://canlii.ca/t/jd6nq>

Natural language rewritten with commas and “both”	... person claps, or both walks and talks
Modern Commonwealth legislative drafting style – using disciplined paragraphing, numbering and indenting, with one connector per level	(1) ... person – (a) both – (i) walks, and (ii) talks; or (b) claps.
Natural language with brackets added	... person ((walks and talks) or claps)
Same with logical connector symbols	... person ((walks \wedge talks) \vee claps)
Fully formalised with W for “walks”, T for “talks”, C for “claps”	... $(W \wedge T) \vee C$

Here are renderings of “person walks and talks or claps” – where walking is required, but can be accompanied by either talking or clapping. Again only the logic versions fully specify that the “or” is inclusive.

Natural language rewritten with commas and “either”	... person walks, and either talks or claps
Modern Commonwealth legislative drafting style	(1) ... person – (a) walks; and (b) either – (i) talks, or (ii) claps.
Natural language with brackets added	... person (walks and (talks or claps))
Same with logical connector symbols	... person (walks \wedge (talks \vee claps))
Fully formalised	... $W \wedge (T \vee C)$

Lastly, here are renderings that expressly tackle both the scope of “and”/“or” and the inclusive/exclusive “or”, with different instructions resulting in four different drafts.

<i>Instructions</i>	<i>Legislative draft</i>	<i>Logic</i>
Clapping is an alternative to walking while talking, or all three can be done at once	(1) ... person does either or both of – (a) walking and talking; (b) clapping.	$(W \wedge T) \vee C$
Clapping is an alternative to walking while talking, but all three cannot be done at once	(1) ... person does either, but not both, of – (a) walking and talking; (b) clapping.	$(W \wedge T) \oplus C$
Walking is required, and needs to be accompanied by either talking or clapping or both	(1) ... person – (a) walks; and (b) talks or claps, or does both.	$W \wedge (T \vee C)$
Walking is required, and needs to be accompanied by either talking or clapping (but there cannot be both of those two)	(1) ... person – (a) walks; and (b) talks or claps, but does not do both.	$W \wedge (T \oplus C)$

At this point I hope many legislative counsel will appreciate the way the logical formulations avoid ambiguity while remaining concise and even elegant. I hope they will also extrapolate from these simplified examples to the more complex structures that we are often asked to draft.

“Not” – binary decisions and a drafting puzzle

As legislative counsel, we know we have to be careful with negations. “Not” is rendered in symbolic logic notation as “~” and placed before the negated element.¹³ Formal logic works in a binary way (like a computer), so that for every scenario we can think of, either X is true of that scenario, or X is not true of it. The logical idea of negation is linked to the logical idea of a proposition, which is just a statement that has to be either true or false (unlike a question or command).¹⁴ So “X” stands for “it is the case that X [is true]”, whereas “~X”

¹³ Other “logics” may symbolise negation as “-”, “!” or “¬”. There are alternatives to the other symbols used here as well. Consistency inside one logical language matters, rather than the actual symbol.

¹⁴ At first sight legislation might seem like commands, but it is better to see “A person who does X must do Y” as a statement of the law. Those statements are true within the correct jurisdiction, during the period the

stands for “it is not the case that X [is true]”. Imposing legal obligations works like that too in a sense. In the end somebody has to decide either that you complied or did not comply, with no half-way house. We try to draft to enable users to be clear about what does and does not count as compliance, but ultimately somebody has to make their mind up.

This article does not attempt to do more than scratch the surface of how logic works beyond simply formalising propositions. But an aspect worth mentioning in connection with negation is one of De Morgan’s Laws¹⁵ which can be formalised as –

$$\text{not } (X \text{ or } Y) = \text{not-}X \text{ and not-}Y \quad (\text{rather than “not-}X \text{ or not-}Y\text{”})$$
$$\sim(X \vee Y) = \sim X \wedge \sim Y$$

A drafter can be caught out by the need to flip from “or” to “and” when the range of the negation is changed. To see that in practice, consider section 8(10) of the [Human Transplantation \(Wales\) Act 2013](#) which says, with some paraphrasing –

- (10) A person is **not** eligible to act under an appointment if the person –
- (a) is **not** an adult, **or**
- (b) **is** of a prescribed description.¹⁶

The idea was to prescribe descriptions of persons who do not have capacity. Another jurisdiction wanted to adapt the Welsh model. The initial double negative was considered unhelpful, particularly with the hidden negative in the lack of capacity. It was feasible to switch to a positive expression because this was the only eligibility rule. But an attempt to manipulate the concepts without help from De Morgan’s laws led to overlooking the need to change “or” to “and”, which resulted in:

- (10) A person **is** eligible to act under an appointment if the person –
- (a) **is** an adult, **or**
- (b) is **not** of a prescribed description.

When it came to drafting the subsidiary legislation to prescribe descriptions of persons who lacked capacity, the problem became apparent. If the prescribed description involves lack of capacity, then the result is that incapacitated adults are eligible, as are children with capacity, not just adults with capacity. Switching “or” to “and” gives the same result as the Welsh legislation, in that only adults with capacity are eligible. This could have been flagged by

legislation is in force, and to the extent that some other law does not override them. At another level it is also true that a given person in a given situation either is or is not legally obliged by this rule to do Y.

¹⁵ Named after Augustus De Morgan, a 19th-century counterpart of George Boole. Boole’s work on logic is credited as significant to the development of computing (including for his use of 0 and 1 to stand for false and true, as forerunners of digital bits). Many non-coders know of “Boolean searches” (using logical connectors).

¹⁶ 2013 (anaw 5)

using symbolic logic (a computer can apply De Morgan's laws even if a drafter struggles with them).

I will come back to negation again below in relation to "must" to show how the notation can also help clarify what negation is doing in relation to different parts of a sentence dealing with obligations, prohibitions or permissions.

"If", "iff" – implicit use, and drafting clearly about "if not"

"If" is special because of its prominence across formal logic, computer logic and legislative drafting.

- In symbolic logic notation "If X then Y" can be rendered as " $X \rightarrow Y$ ". But logical "if" is odd, in that it does not imply either causation or passage of time and when X is false, " $X \rightarrow Y$ " is true regardless of whether Y is true or false.¹⁷ But it can be useful for drafters to be reminded to check whether they are assuming either of those factors. Also logic distinguishes between " \rightarrow " for "if, but not necessarily only if" and " \leftrightarrow " for "if and only if" (abbreviated as "iff"). Sometimes in a draft the difference will not carry any weight, but legislative counsel could benefit from routinely checking which version they mean and whether that is beyond doubt in the draft.
- The classic use of "if" in **computer logic** is for "if, else" instructions – "if this is true, do that; otherwise do this other action". In one sense legislation tells people what to do, but it is not set out as a sequence of instructions for performing a task legally, or as a description of a procedure.¹⁸ Instead it sets out what the law is, leaving the users to apply it to their circumstances. Nevertheless, it may be useful for drafters to consider what is meant to happen if X is false, and whether that is clear enough in the draft. Often we do not spell out the "else" because the draft is not attempting to dictate the legal position in that case, and is leaving it to whatever was already the law.

In common law legislative drafting we want rules that can be applied to cases, so we tend to avoid statements of general principles as obligations and rely on "if" instead. Perhaps the fundamental model¹⁹ is "If facts X and Y are the case, then Z is the legal consequence", where Z is a statement of the law rather than of facts – "If you killed someone, and you

¹⁷ See truth tables above p.63.

¹⁸ "Rules as Code" has highlighted computing's distinction between "declarative" programs (such as Prolog) and "imperative" programs (such as Python). Imperative programs are much more common, and are embedded in the thinking of most programmers, because they tell a computer how to execute a program to perform a task. Declarative programs are not instructions to perform a task, and instead they tell the computer what are the conditions for something to be true, much like formal logic but also like legislation.

¹⁹ Dating back to 1877 in Lord Thring, [*Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents*](#) (George E. Eyre and William: Spottiswoode, 1877).

meant to, then that amounts to the offence of murder for which you are liable to be punished”.

In symbolic logic “(X does P) \leftrightarrow (X must do Q)” means there are no situations other than X doing P in which X must do Q. But “(X does P) \rightarrow (X must do Q)” implies there might be situations other than X doing P in which X must nevertheless do Q.

In computer logic “if A, then B, else C” means “if A then B, and if not A then C”. This renders “iff X does P then X must do Q” as “if X does P, then X must do Q, else not(X must do Q)”. But “if X does P then X must do Q” might come out as “if X does P, then X must do Q, else X must do R” where having to do R might be compatible with (but not fully interchangeable with) not having to do Q.

In the common sense logic of drafting, legislative counsel are used to the idea that we need to ensure there is a clear express or implied sanction for non-compliance with a “must”, without which it would not really be a “must”.

When we draft a provision with the form “if X does P, then X must do Q”, we know it must be clear what the result is if X does not do Q. Often that involves an express provision that X commits an offence. But if X is a public body we will commonly leave it to the principles of administrative law. In other cases there will be other sanctions or consequences expressed or implied.

Are we always as clear when it comes to the result if X does not do P in the first place? For example, if we provide that “if an inspector serves a pig hygiene notice, the farmer must clean the pig pen” are we always clear about whether the farmer need not clean the pig pen in the absence of a notice? If we have an additional more general provision that “a farmer must keep animal pens clean”, we will need to clarify the relationship between the two. Perhaps failing to clean the pig pen without a notice is a less serious offence than failing to clean it after a notice, or perhaps we really mean that pens for all other animals must always be kept clean, but pig pens only need to be cleaned when there is a notice. In other cases the consequence of the “if” condition not being met might be limited to just meaning that this provision does not impose the obligation, but there may be other law that does impose it.

For example, “if the employee works over 7 hours, the employer must give a meal break” would not normally be intended to imply that there is no legal obligation at all to provide a meal break to a 6-hour employee, although a particular employee could be contractually entitled to the break. Using formal logic notation would help legislative counsel to ensure we have thought through all these permutations and to check whether we ought to make express provision for “if not P” (instead of just for “if P”) or whether an implied provision about “if not P” is clear enough to readers.

These “if” structures are also often present implicitly in our drafts, such as in “a person who does X must Y” and “a person doing X must Y”. Those are both equivalent to “if a person

does X, that person must Y”. Our definitions, with their strict use of “means” and “includes”, can also be rendered as “if” and “iff” structures.

“Ship” means a large boat = If (and **only** if) a boat is large, it counts as a ship = $S \leftrightarrow LB$

“Ship” includes kayak = If (but **not only** if) this is a kayak, it counts as a ship = $K \rightarrow S$

“An X must do Y” + “X **means** a Z that is a T” = “**If** a Z is a T, the Z must do Y”

This last one is not “iff”, despite the “means”, because “an X must do Y” translates as “if, but not only if, something is an X, then that thing must do Y”. As mentioned above, when we say “if an inspector serves a pig hygiene notice, the farmer must clean the pig pen” we are not necessarily implying that there are no other circumstances in which the farmer must clean the pig pen (and it may or may not be clear enough in a particular case for the draft to rely on the reader using canons of construction such as *expressio unius*).

It is worth mentioning the dangers in using negation with “if”, which relate to the caution drafters exercise over “unless”. I will not go into that further here, but the reader is invited to try using “unless” to solve the human transplantation rewrite problem set out above (in relation to “not”).

“Must”, “may” and “is” – the logic of our core elements

Deontic logic – “must”, “must not” and “may”

A key part of what legislative counsel do is to impose legal obligations and prohibitions (that would not have been there otherwise) on a person in given factual circumstances and to carve out permissions from those obligations and prohibitions. We also take care to ensure there is a legal consequence if the person contravenes the obligation or prohibition. These features are what make our provisions a legal rule, as opposed to a mere statement of fact. In modern Commonwealth drafting we have three basic building blocks we use to do this –

“must”,

“must not”,

“may”.²⁰

The branch of logic that attempts to systematise these concepts is deontic logic, which deals in obligations, prohibitions and permissions. Deontic logic can produce sophisticated

²⁰ Dating back to 1845 in Coode’s “legal action” as one of his “essential elements” of a “legislative sentence” – see “On Legislative Expression”, reprinted in EA Driedger, *The Composition of Legislation*, 2nd ed. (Department of Justice: Ottawa, 1976) at 317. In those days “shall” was used rather than “must” (and it still is used in some Commonwealth offices). It causes problems not only because some readers think it is future, but also because it blurs the difference between obligations and other elements, such as in “shall mean” or where the provision means something happens by operation of law (as in establishing a legal person).

renderings of rules.²¹ In modern drafting, as in deontic logic, these building blocks can be treated as binary because legislation will rely on an adjudication system to decide whether a given person is or is not subject to the obligation or prohibition and has or has not complied. But there are several problems with deontic logic. For instance, one of the most troublesome is the “gentle murder” or “contrary to duty” paradox²² where simple forms of deontic logic struggle with taking “you must not murder” and adding “if you murder, you must murder gently” because these forms of logic produce the contradiction “you must murder”. But legislative counsel are familiar with the idea of aggravating factors and overlapping offences of increasing seriousness. We might draft an offence, carrying a low penalty, of contravening a provision that “a person must not assault another person” and another offence, carrying a higher penalty, of contravening another provision that “a person must not assault another person with a knife”, without expecting a reader to think there is a contradiction between the two prohibitions. We would not express the second prohibition as “if a person assaults another person, s/he must do so without using a knife” . Much academic work is devoted to how best to capture legal rules in deontic logic without falling foul of any of its paradoxes, but it is beyond what is needed for the purposes of this article. In particular when I suggest formal logic is useful to legislative counsel, that does not depend on whether deontic logic will eventually succeed in capturing legal rules fully, nor on whether computer logic is better suited to doing so.

“Is (to be [treated as])”, “means” / “includes” – the role of “if / iff”

Before looking further at “must”, “must not” and “may”, we should touch on the other elements in our drafts where we are not using those concepts. One of the results of the shift in the modern style from “shall” to “must” has been a sharper focus on the distinction between imposing obligations and these other elements. Obligations can be contravened, and we need to say what happens if they are. But in other cases where we used to use “shall” we now find “must” does not fit.²³

In some provisions we are actually creating a legal effect just by operation of law. “There is established an Office of the Digitisation of Statutes” and “The XYZ Act is repealed” each mean some legal change has actually happened; it is not a question of somebody being able

²¹ More sophisticated when combined with “predicate logic”. This article sticks to “propositional” logics that only operate on a whole proposition (a complete statement that can be true or false). Predicate logic breaks down propositions, rendering “a person walks” as “pW”, instead of just “P” (“a person” alone is not true or false, nor is “walks”), to allow quantification (all, some, none) and preserve references to the same person between two propositions.

²² See H Prakken and M Sergot, “Dyadic Deontic Logic and Contrary-to-Duty Obligations” in E Nute (ed) *Defeasible Deontic Logic* (Springer: 1997), available at <https://www.doc.ic.ac.uk/~mjs/publications/DyadicDeontic.pdf> .

²³ See “constitutive rules” and “counting as” in Sartor, above n.3.

to contravene the provision. “The contract is void if X” similarly works by operation of law, but only when an “if” condition is met. For these we now use –

“is”,

“is to be [treated as]”,

“[other appropriate present tense verbs]”.

Many of these cases might be unpacked as really being about their consequences for a “must/may” provision elsewhere in the draft, where the “is” provision serves to feed into the “must/may” provision. For instance, a provision saying “the contract *is* voidable if X” could be unpacked as

“if X, then a party to the contract *may* Y, and if Y then all parties *may* act as if the contract had not been made”.

Those cases seem to be different from definition provisions, which are merely flagging the use of particular words in the draft (often merely as a convenient shorthand), rather than changing the law or making anything happen. For definitions we now use –

“means”,

“includes” (and “does not include”).

As explained above on “if” and “iff”, there is also a sense in which definitions can be seen as another set of “if” provisions (for “includes”) and “iff” provisions (for “means”).

Then there are cases like “the application/notice is invalid if it does not contain X” (which is sometimes rendered as “the application/notice *must* contain X”, even though it is not couched in terms of imposing an obligation on a person). In one sense that amounts to no more than saying that the application or notice will lead to certain legal consequences (the regulator must grant or consider the application, or the person on whom the notice is served must cease trading) as long as it is made/served in compliance with a set of “if” conditions. That is using “invalid” as shorthand to cover the class of applications/notices that do not meet the “if” conditions and therefore do not lead to the legal consequences.

“Must”, “must not”, “need not” – how can deontic logic symbols and negation help?

Now we come back to “must” and “must not”, before moving on to “may”.

“Must” – In symbolic notation for deontic logic “must” can be rendered as “O”, which can also be translated as “it is obligatory that”. So “OP” means “it is obligatory that P”, where “P” is a proposition that can be true or false (but is not made true just by being obligatory). But as legislative counsel we are not dealing with how the world should be in general – we need someone obliged to make it that way (and a consequence if they do not). That can be rendered as “O_xP”. That equates to “it is obligatory on x that P happens”, where “x” stands

for a type of a person and “ P ” stands for a state of affairs or action. That equates to “ x **must** do P ”, or “ x must bring it about that P is the case” (where P is not necessarily x ’s action), or “ x must see to it that that P is the case” (abbreviated to STIT). So if “ x ” stands for “a person who sets up a business” and “ P ” stands for “the person on whom the obligation is imposed applies for a licence”, then “ OxP ” can be used to stand for “a person who sets up a business must apply for a licence”.

“Must not” and “need not” – The magic of this “ O ” is that you can apply a negation to it in two different ways. The negation symbol (here “ \sim ”) always comes immediately before whatever it negates. That gives you –

- “ $Ox\sim P$ ” as “it is obligatory on x that not- P ” – “ x does have to not-apply-for-a-licence”, which means “ x is prohibited from applying for a licence”, which we express as “ x **must not** apply for a licence”.
- “ $\sim OxP$ ” as “it is not obligatory on x that P ” – “ x need not apply for a licence” – which sounds like “may” (discussed next).

The prohibition works on the footing that either P is the case or it is not, so anything other than P is not P . Not P (“ $\sim P$ ”) captures everything x could be doing, being or whatever, apart from P .

Weak “must” – There are uses of “must” that do not fit the classic Coodean idea of a person being obliged to do something or face a sanction.²⁴ For example, sometimes we say “an application/notice *must* contain” or “an appeal *must* be lodged within 28 days”. These do not fit the model of imposing an obligation on a person who faces a sanction for breach. Instead they are better seen as concerning validity, in the sense of whether my action will have its intended legal effect in imposing some duty on someone else. There is not space here to go further into that or into other examples of “weak must”,²⁵ but I touch on similar issues with “awkward may” below.

“May” – what can logic reveal about what it is doing in drafts?

“May” is slightly fiddly compared to “must”.

- Returning to P as an action being taken by the person on whom the obligation is imposed, so far we have seen “ OP ” (you must do the action), “ $\sim OP$ ” (it is not the case that you must do the action), and “ $O\sim P$ ” (you must not-do the action). That leaves “ $\sim O\sim P$ ” (it is not the case that you must not-do the action).

²⁴ See n. 20 above

²⁵ Kowalski, above n. 10 favours avoiding deontic logic because of the problems in its sophisticated operation. One approach might be to treat all “must” provisions, whether “weak” or Coodean, merely as if-then provisions leading to whatever consequences are set out (or implied) as the result of the “must” requirement or condition not being met.

- There is a sense in which, if you *must* do something, then you may do it. It would be a drafting error to require someone to do something if elsewhere you had said they were not permitted to do it. In the same sense if you *must* not-do something, then you *may* not-do it. But that is a very weak sense of permission and is not normally how we use “may” in drafting.
- Legislative counsel normally use “may” in a stronger sense, to mean you are permitted to do the action or not at your discretion. That can be rephrased as “it is not obligatory that you do the action, and it is not obligatory that you don’t do the action”.
- Going back to licences – in our legislation “you may apply for a licence” normally implies “also you may not-apply-for-a-licence”. That is different from “you may-not apply-for-a-licence”, which really means “you must-not apply-for-a-licence” – that ambiguity is why we need to avoid “may not” or use it with care.
- Switching the “may” out for “not-obligatory” gives “it is not-obligatory that you apply for a licence, and it is not-obligatory that you don’t apply for a licence”.
- In the symbolic rendering that is “ $\sim OP \wedge \sim O\sim P$ ”.

Interchangeability – So far we have seen how to use the logical ideas of negation and “and” on the trio of “must”, “must not” and may” to reduce them all to “must” –

“must X”

“must not X” = “must $\sim X$ ”

“may X” = “(\sim must X) & (\sim must $\sim X$)”.

These can be rendered in an exaggerated version of a logician’s natural language as –

It is the case that (it is obligatory to see to it that (it is the case that (X is true))).

It is the case that (it is obligatory to see to it that (it is *not* the case that (X is true))).

It is *not* the case that (it is obligatory to see to it that (it is the case that (X is true))) and it is *not* the case that (it is obligatory to see to it that (it is *not* the case that (X is true))).

If we use the symbol O, and drop the X, then we get –

Must = O

Must not = O \sim

May = $\sim O \wedge \sim O\sim$

That is the whole of our main tool-set reduced to one symbol and two connectors.

Alternative symbols – Sometimes “must not” is represented as F (forbidden), and “may” as P (permitted). Sometimes, confusingly, it is the other way round – P for Prohibited and F for Facultative. It does not matter which way, as long as you are consistent (in the particular

logical language). Equally the terms could all instead be reduced to prohibition (P), instead of obligation –

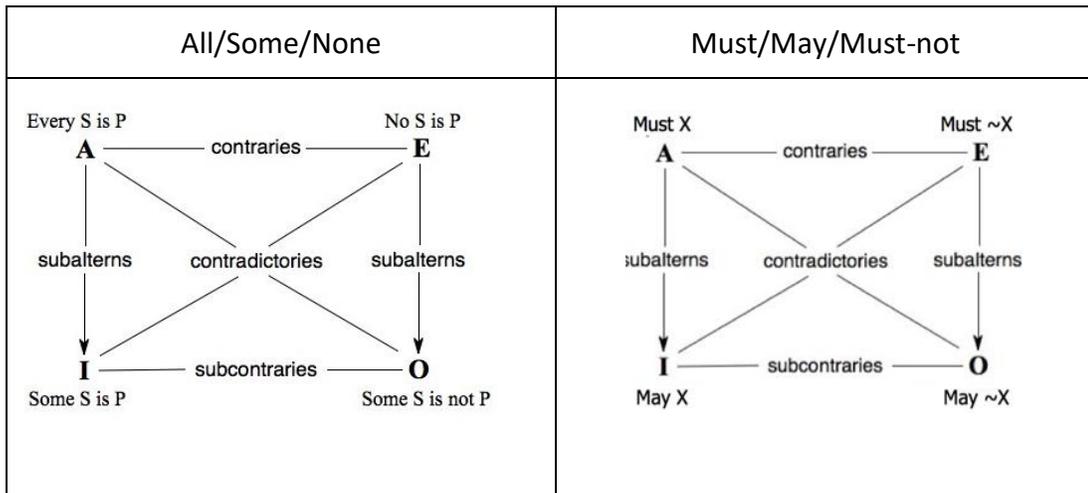
$$\text{must} = P\sim ; \text{must not} = P ; \text{may} = \sim P \wedge \sim P\sim$$

Again, it does not matter which way around it is done, as long as you are consistent. I will stick to “O” here.

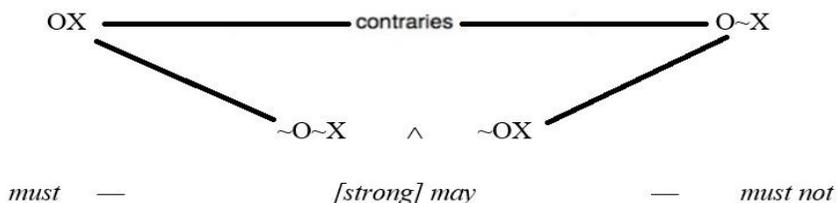
Ambiguous “may” – Turning back to the ambiguity of “may” –

- the strong “may” is “ $\sim O \wedge \sim O\sim$ ”, where you can choose either way;
- the weak “may” is just “ $\sim O$ ”, which can be compatible with a prohibition;
- the weak “may-not” is just “ $\sim O\sim$ ”, which can be compatible with an obligation.

These relationships can be represented by a “square of opposition” in which the contraries are the opposite state of affairs, whereas the contradictories are merely inconsistent. The original square was produced to illustrate Aristotle’s logic of “all”, “none” and “some”, but has since been applied to deontic logic.



The ambiguity of “some” (“at least part of, and maybe all of” or “at least part of, but not all of”) reflects the ambiguities of “or” and “may”. Normal English conventions would be that if you say “Some S is P”, you are implying that not all S is P. Drafting conventions take that further – if we meant “All S is P” we would have said so and our choice of “Some S is P” must be read as implying “not all”. Equally with “must” and “may”, drafters would not say “may” and leave it at that if we meant “must” – a weak “may” does not tell you the actual position, unlike the strong “may” which does. So, if we mean “must” or “must not” then we will say them, and finish the job, without bothering with “may”. That squeezes the bottom of the square into a trapezium or triangle, with the “may”s at the bottom linked by “and” in the drafter’s strong “may” –



But are we always clear about the distinctions, or are we sometimes lulled into assuming “may” is unambiguous (as we can be with “or”)? We are often saved from embarrassment by the common law background to our drafting, which adds three more factors.

- A “**natural person**” (a human “individual”) is entitled to do (or not do) anything that is not prohibited and entitled not to do (or to do) anything that is not obligatory. So the default for a human person is that they “may” do anything (in the strong sense of “may”) unless the law says otherwise.
- By contrast a “**legal person**” is commonly a “creature of statute”. It is created by the statute itself, like a Minister in some jurisdictions, or created by somebody taking some action under the statute, like a company or foundation. It will only have power to do what the statute enables it to do (of course the Crown is different, not being a creature of statute). So we do need to use “may” somewhere for legal persons.
- We normally only legislate to **change** what would be the underlying position anyway.
- So, when a human is the subject (of our “must”, “must not” or “may”), we generally do not need “may” because it is implied anyway, and it is the “must” or “must not” that we need to carve out of the underlying freedom. We then need “may” only where the draft has already imposed a “must” or “must not”, from which we now need to carve out an exception reverting to the underlying freedom. But with a legal person, are we really carving out what it “may” do from an underlying prohibition, or is it sometimes a case of powers, to which I turn next?

Awkward “may”, treacherous “may not”, discretion/power, Hohfeld’s power/liability

Carving out exceptions with “may” is the clearest case, but it also helps in analysing the less clear cases, such as “A car-owner may apply for registration”. Of course none of us is breaking the law if we apply pointlessly to people for things that they cannot give us. So this is not a case of the draft containing (somewhere else) a prohibition (“must not”) on making applications, from which the “may” is now being carved out as an exception. Instead, as mentioned above, there is a sense in which “W may apply to X for Y” implies that, if W does so, then X is going to be obliged to give Y to W, if conditions Z (assumed to appear later in the draft) are met. If we treat this as an awkward case of “may” (not fitting the model of being neither obliged nor prohibited) then it can be unpacked as short-hand for –

“If W applies to X for Y (and of course nobody can stop W doing so, or force W to do so), and conditions Z are met, then X must give Y to W”

In symbolic terms that can be rendered as –

“(A_{wxy} ∧ Z) → OG_{xyw}”.

But this case might reflect an important distinction.

- At one level it is the legislator who, by enacting legislation, imposes legal obligations or prohibitions, or grants permissions, affecting the legal status of citizens or other persons (natural or legal).
- But at another level we all impose legal obligations and prohibitions on, and grant permissions to, each other every day – by entering contracts, granting or refusing permission to enter our land, and so on.

In that light, the effect of “may apply” is that a private citizen can impose a legal obligation on an authority to consider granting (and possibly to grant) something. The citizen does so by applying to that authority for that thing in the way that we have provided for with our “may apply”.

Another common case of “may” is “the inspector *may* serve an enforcement notice on the business-owner”. Inspectors generally don’t breach a prohibition by giving people ineffective paper (without intending to deceive, at least), so this is not carving out from a prohibition. Instead, it can be seen as reflecting a difference between “may” as a “power” and “may” as an ordinary freedom or discretion.

But then there is “may not”, which I have already mentioned as ambiguous and to be avoided unless the particular use is unambiguous and convenient. Usually it can be replaced by “must not”. But sometimes it is used as an exception to a power, as in “the inspector *may not* serve an enforcement notice if...”. If we used “must not” there, it might imply the notice would be valid and there would be some other sanction on the inspector, whereas “may not” seems to imply the notice would be invalid (with no further sanction). Those distinctions seem better dealt with explicitly, rather than hanging too much weight on “must/may not”.

A key early writer on rights and powers was Wesley Hohfeld.²⁶ He analysed these and other concepts, and fitted them into a logical grid of their relationships to each other, represented here as two squares of opposition.

²⁶ In his 1913 and 1917 Yale Law Journal papers, both called “Some fundamental legal conceptions as applied in judicial reasoning” – <https://digitalcommons.law.yale.edu/yj/vol23/iss1/4>.

right	-- opposite of --	no-right
⋮ correlative of ⋮		⋮ correlative of ⋮
duty	-- opposite of --	privilege {not to}

power	-- opposite of --	disability
⋮ correlative of ⋮		⋮ correlative of ⋮
liability	-- opposite of --	immunity

Hohfeld takes the common idea that my right is reflected in your duty (adding that the absence is my “no-right” and your “privilege”) and works up to the idea of my “power” to do something that imposes on you a duty you did not already have. So, you have a corresponding “liability” before you have the duty. Then if I do not have the power then I have a “disability” and you are correspondingly immune.

But do we really need to analyse it in that way? As legislative counsel we happily build on “must”, “must not” and “may” for nearly all our needs, rarely having to trouble ourselves with these additional concepts. This results

- partly because we favour a simpler term over a more complex one;
- and in turn partly because more complex common law terms can set hares running that we do not need;
- and perhaps partly also because we are not often tinkering directly with the richer common law concepts, given the acute awareness among Commonwealth legislative counsel of the folly of trying to pin live butterflies.

We could break down Hohfeld’s concepts into “must”, “must not” and “may”, but that is beyond the scope of the present article. Meanwhile Sartor offers a symbolic logic analysis of Hohfeld.²⁷

Conclusion

I hope this outline shows that the basic notation system of formal symbolic logic can be useful to legislative counsel and help add further rigour to the way we check our drafts using our common sense logic. Some of that help is fairly routine, such as reminding us to check for inclusive or exclusive “or”, and some is less routine, such as checking for “if” or “iff”. But some of it should also make us clarify what we are doing with our “is/must/may” tools. The switch from “shall” to “must” or “is” has already shone some light on those tools, and the application of formal logic should help take that further.

²⁷ Sartor, above n. 3.

An Impossible Dream: Modernization Committee Efforts to Make the U.S. Congress Work Better

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Abstract

At the beginning of the 116th Congress, the U.S. House of Representatives created the Select Committee on the Modernization of Congress (Modernization Committee). This bipartisan committee has worked diligently since 2019, and its Members remain committed to finding solutions to the challenges faced by the legislative branch. The Committee's charge is to research and offer solutions on a variety of issues including improving technology and cybersecurity, increasing transparency and access, reclaiming Congress' Article One powers, improving staff diversity and training, and studying administrative efficiencies, such as an improved congressional calendar.

The Modernization Committee published a final, 292-page report in the 116th Congress that included 97 recommendations, some of which were implemented on March 10, 2020, when the U.S. House passed H.Res.756. The Committee continues its work in the 117th Congress, and in July 2021, it issued its first set of 20 recommendations for this session, which are focused on making the House more accessible, and on strengthening the institution through increased staff capacity.

Political analysts and other interested parties will continue to watch as the Modernization Committee continues its path-breaking work throughout the 117th Congress.

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Introduction

Fixing Congress is a perennial cry by policy pundits and citizens alike.² A September 2021, poll by Gallup found that only 27% of those surveyed approve of the way the U.S. Congress is handling its job.³ And the approval rating hasn’t edged much higher in the past 20 years.⁴

But those low ratings⁵ don’t reflect what the American people want. They truly want their elected representatives to be more effective. A poll by the Bipartisan Policy Center and

² “Congress is the legislative branch of the federal government that represents the American people and makes the nation’s laws. It shares power with the executive branch, led by the president, and the judicial branch, whose highest body is the Supreme Court of the United States. Of the three branches of government, Congress is the only one elected directly by the people.” See “What Congress Does”, *U.S. Capitol Visitor Center*, <<https://www.visitthecapitol.gov/about-congress/what-congress-does>> accessed Sept. 23, 2021. “Congress is divided into two institutions: the House of Representatives and the Senate.” See “Two Bodies, One Branch”, *U.S. Capitol Visitor Center* <<https://www.visitthecapitol.gov/about-congress/two-bodies-one-branch>> accessed Sept. 23, 2021.

³ “Congress and the Public”, *Gallup*, Jul. 6-21, 2021 <<https://news.gallup.com/poll/1600/congress-public.aspx>> accessed 23 Sept. 2021.

⁴ *Ibid.*

⁵ “For the last decade, few things have ranked lower than Congress’ approval rating. Since Gallup began measuring it in the 1970s, the highest congressional approval rating was 84 percent, right after the 9/11 terrorist attacks. The lowest it has been was 9 percent in 2013, right after a prolonged government shutdown... But this constant fluctuation and generally dismal approval rating is often attributed to one thing: partisan bickering that undermines the ability of the institution to operate effectively for the American people. Partisanship is cited as the reason for gridlock, inaction, ugly campaigns, and vitriolic arguments seen everywhere from the House floor to social media.” Select Committee on the Modernization of Congress, “Final Report” (October 2020) p 83 <<https://modernizecongress.house.gov/final-report->

Morning Consult poll discovered that two in three voters (67%) want their Congressional Member to work collaboratively so they can reach solutions and pass legislation.⁶ The Bipartisan Policy Center believes that achieving "...buy-in from both sides of the aisle is the only way to create durable policy solutions. The poll re-affirms that the public wants the two political parties to come together on our country's biggest priorities."⁷ The puzzle is how to reach that goal.

Many obstacles exist, including increased partisanship, the need for more time and resources and continuing technological challenges. And others have tried before, including three joint select committees, four House select committees, and two commissions focused on reforming Congress.⁸ These repeated attempts might even dissuade some from trying.

But a relatively new U.S. House of Representatives Select Committee on Modernization (Modernization Committee) is now leading the charge, with a simple yet profound mantra, "Make Congress Work Better."⁹ And this Modernization Committee is definitely worth watching.

Background

The Modernization Committee was created by Title II of the resolution adopting the rules for the U.S. House of Representatives for the 116th Session of Congress, passed by the House as the session began on January 9, 2019.¹⁰ Its mandate gives the Select Committee no legislative authority. Instead, its "sole authority... shall be to investigate, study, make findings, hold public hearings, and develop recommendations on modernizing Congress..."¹¹ In other words, it was tasked with developing recommendations to make Congress simply work better.

The resolution establishing the Select Committee asked it to make recommendations on:

116th/chapter/chapter-2-encourage-civility-and-bipartisanship-in-congress> accessed Sept. 23, 2021 ("Final Report").

⁶ Manning, Luci, "Majority of American Voters Want Congress to Work Together", *Bipartisan Policy Center* (Aug. 20, 2021) <<https://bipartisanpolicy.org/blog/majority-of-american-voters-want-congress-to-work-together/>> accessed Sept. 23, 2021.

⁷ *Ibid.*

⁸ "Final Report" (n 5) at 45.

⁹ Select Committee on the Modernization of Congress, "Chair Kilmer Urges House to Adopt Committee Recommendations for 117th Congress" (Press release, Oct. 1, 2020) <<https://modernizecongress.house.gov/news/press-releases/chair-kilmer-urges-house-to-adopt-committee-recommendations-for-117th-congress>> accessed Sept. 23, 2021 ("Kilmer Testimony").

¹⁰ H.Res.6, 116th Congress (2019-2020): Adopting the Rules of the House of Representatives for the One Hundred Sixteenth Congress, and for other purposes (Sept. 1, 2019) <<https://www.congress.gov/bill/116th-congress/house-resolution/6/text?q=%7B%22search%22%3A%5B%22HRes6%22%5D%7D&r=2&s=1>> accessed Sept. 23, 2021.

¹¹ *Ibid.*

- (A) rules to promote a more modern and efficient Congress;
- (B) procedures, including the schedule and calendar;
- (C) policies to develop the next generation of leaders;
- (D) staff recruitment, diversity, retention, and compensation and benefits;
- (E) administrative efficiencies, including purchasing, travel, outside services, and shared administrative staff;
- (F) technology and innovation; and
- (G) the work of the House Commission on Congressional Mailing Standards.¹²

The Modernization Committee also was required to periodically report to the House Administration Committee and to produce a final report at the end of the 116th Congress.

Speaker of the House Nancy Pelosi selected Derek Kilmer, a Democrat from Washington State, as the Modernization Committee's first Chair, and Minority Leader Kevin McCarthy selected Vice Chair Tom Graves, a Republican from Georgia, to serve on the committee. These two Members represent U.S. Congressional Districts that literally are on opposite sides of the country, and are in many ways, just as far apart politically.

Yet, the Modernization Committee went about its mission with vigor and bipartisan cooperation. In the first session of its existence, the Modernization Committee demonstrated a level of activity that would be considered intense for any committee. It held 16 hearings in its first 2-year tenure, 14 of those in 2019. The other 2 hearings and the immense task of writing its final report were the main focus of its 2020 activity.¹³

Modernization Committee Hearings of the 116th Congress

Since the effort to "fix Congress" is complex, the topics of the Modernization Committee's hearings in the 116th Congress were wide ranging.¹⁴ The Committee Members listened to current and former members of the House discuss possible improvements (March 12 and May 1, 2019). They looked at past congressional reform efforts (March 27, 2019). They studied opening up the legislative process and making legislative information more transparent (May 10, 2019) and explored improving constituent engagement (June 5, 2019).

The Modernization Committee Members next reviewed ideas to improve diversity and retain congressional staff (June 20, 2019) and efforts to foster the next generation of leaders (July 11, 2019). They inquired about what the States were doing to improve legislative

¹² Ibid.

¹³ Select Committee on the Modernization of Congress, "Committee Activity - Hearing" <<https://modernizecongress.house.gov/committee-activity/hearings>> accessed Sept. 23, 2021.

¹⁴ Select Committee on Modernization of Congress, "Hearings," <<https://modernizecongress.house.gov/committee-activity/hearings>> accessed Sept. 24, 2021

technologies (July 24, 2019). They even heard ideas from a House Budget Committee colleague on ways to improve the Budget and Appropriations Process (September 19, 2019). Focusing on a key committee priority, the Modernization Committee Members heard witnesses discuss how to improve civility and improve collaboration in the Congress (September 26, 2019).

The Modernization Committee continued to explore other modernization improvements throughout the 116th Congress. Committee Members began to evaluate ways to improve the House Schedule and Calendar (October 16, 2019) and reviewed ways to bring Congressional Mailing Standards into the 21st Century (October 31, 2019). They looked at administrative efficiencies and streamlining operations (November 15, 2019) and studied reform efforts and State best practices (December 5, 2019).

The Modernization Committee continued its dynamic pace in 2020, the second session of the 116th Congress. The Modernization Committee held additional hearings, including one to review the U.S. House of Representative's obligations under Article One of the U.S. Constitution,¹⁵ and to study "Restoring Capacity and Equipping Congress to Better Serve Americans" (January 14, 2020). Finally, the Modernization Committee's February 5, 2020 hearing focused on "Fostering a More Deliberative Process in Congress".

The number and breadth of topics for the Modernization Committee's 116th Congress hearings alone are impressive, but those hearings were a prelude to other path-breaking activities.

Other Modernization Committee Efforts including Recommendations

On May 23, 2019, the Modernization Committee issued its first set of unanimously adopted, bipartisan recommendations. This first set focused on increasing transparency in the legislative branch and giving citizens greater access to the inner-workings of the Congress.¹⁶ Those 5 recommendations involved:

- 1) adopting one standardized format for drafting, viewing, and publishing legislation;
- 2) providing resources to finish the legislative comparison project on schedule and train staff on how to use new software;

¹⁵ "Article I assigns the responsibility for making laws to the Legislative Branch (Congress). Congress is divided into two parts, or "Houses," the House of Representatives and the Senate. The bicameral Congress was a compromise between the large states, which wanted representation based on population, and the small ones, which wanted the states to have equal representation." See "The Constitution: What Does it Say?", *National Archives* <<https://www.archives.gov/founding-docs/constitution/what-does-it-say>> accessed Sept. 24, 2021.

¹⁶ Select Committee on the Modernization of Congress, "Select Committee Unanimously Approves Package of Recommendations to "Open Up" Congress" (Press release, May 23, 2019) <<https://modernizecongress.house.gov/news/press-releases/select-committee-unanimously-approves-package-recommendations-open-congress>> accessed Sept. 24, 2021.

- 3) modernizing the lobbying disclosure system to improve the filing process so that it would be easier to find and track individual disclosures;
- 4) developing a centralized, electronic hub that would list all Federal agency and program reauthorization expiration dates, by committee; and
- 5) developing a centralized, electronic hub of committee votes that would be accessible via [House.gov](https://www.house.gov) and in machine readable format.

But the Modernization Committee's work had only just begun. On July 25, 2019, the Committee unanimously approved its second round of Congressional recommendations.¹⁷ These 24 recommendations, numbers 6-29 of this listing,¹⁸ focused on boosting the quality of constituent engagement, increasing staff retention on Capitol Hill, ensuring Americans with disabilities have access to all procedures and functions of the House, and overhauling the current onboarding and education process for new and current Members of Congress.

On December 19, 2019, the Modernization Committee passed its third round of bipartisan recommendations, focused on encouraging civility and bipartisanship in the Congress, streamlining processes, saving taxpayer dollars and increasing the quality of constituent communication. These 16 recommendations¹⁹ also passed unanimously.²⁰

The House Passes H.Res.756, Containing Modernization Committee Recommendations

In a striking show of support for the Modernization Committee's work, on March 10, 2020, the full House of Representatives overwhelmingly passed H.Res.756: "Moving Our Democracy and Congressional Operations Towards Modernization Resolution".²¹ This bipartisan resolution implemented a variety of recommendations made by the Modernization Committee.

¹⁷ Select Committee on the Modernization of Congress, "Select Committee Unanimously Approves Second Round of Congressional Recommendations" (Press release, July 25, 2019) <<https://modernizecongress.house.gov/news/press-releases/select-committee-unanimously-approves-second-round-congressional-recommendations>> accessed Sept. 24, 2021.

¹⁸ Select Committee on the Modernization of Congress, "116th Congress Recommendations" <<https://modernizecongress.house.gov/116th-recommendations>> accessed Sept. 24, 2021 ("116th Congress Recommendations").

¹⁹ *Ibid*, recommendations 30-45.

²⁰ Select Committee on the Modernization of Congress, "Select Committee Unanimously Approves Third Round of Recommendations" (Press release, Dec. 19, 2019) <<https://modernizecongress.house.gov/news/press-releases/select-committee-unanimously-approves-third-round-recommendations>> accessed Sept. 24, 2021.

²¹ H.Res.756, 116th Congress (2019-2020): Moving our Democracy and Congressional Operations Towards Modernization. (Oct. 3, 2020) <<https://www.congress.gov/bills/116th-congress/house-resolution/756/text?q=%7B%22search%22%3A%5B%22HRes756%22%5D%7D&r=1&s=1>> accessed Sept. 23, 2021.

Although the Modernization Committee did not have any legislative authority under the resolution creating it (H.Res.6), Members worked with other committees to introduce and pass legislation throughout its tenure. “This successful approach made the Modernization Committee the first select committee in recent history to effectively turn suggested reforms into legislative action.”²²

As passed by the House, Title I of H.Res.756 included the Modernization Committee’s recommendations to streamline and reorganize the House’s human resources program and attract and retain congressional staff, namely: a new, centralized human resources hub for Members and their Staff; the submission of diversity and inclusion reports, mandated in H.Res.6; initiation of a report from the House Chief Administrative Officer (CAO) on the feasibility of updating the staff payroll system to bimonthly payments; examining the feasibility of adjusting the statutory limitation on the number of employees who may be employed in the office of a Member; and initiation of a new, uniform employee orientation.²³

Recognizing that newly elected Members face a dizzying array of unfamiliar procedures and rules, Title II of H.Res.756 contains proposals to improve Member orientation. Section 201 asks the CAO to establish a plan for Members to employ a transition staff member during the period between a new election and the start of the Congress. Section 202 asks the Committee on House Administration to improve the overall orientation experience for new Members by making it more accessible and improving the program material. Finally, sections 203 and 204 examine the feasibility and interest in developing a Congressional Leadership Academy and updated cybersecurity training.

Given the breakneck speed of technology changes, Title III of H.Res.756 involves modernizing and revitalizing House technology. Section 301 asks for a report on how to establish and improve a new House Information Resources (HIR) as part of the CAO to modernize technology-use by Members. This title also calls for the HIR to allow Members to beta-test new technologies (section 304), and it also calls for improving member feedback regarding outside vendors and HIR services (section 305). In addition, this title would establish a way to provide HIR with feedback for improvement (section 306). It also contains sections to improve constituency engagement technologies, such as video calls (section 302); to streamline the approval process for outside technology vendors (section 303); and to enable the CAO to leverage the bulk purchasing power of the House (section 306). Title III also would direct the Congressional Research Service (CRS) to provide rapid-

²² “Final Report” (n 5) at 36.

²³ H.Res.756 (n 21).

response short fact sheets on pressing and timely topics (section 307), as well as to establish a nonpartisan constituent engagement and services page on HouseNet (section 308).²⁴

Title IV of this resolution aims to improve House accessibility by mandating three new requirements to enhance citizen involvement in the legislative process. Section 401 requires the CAO to submit a report on website accessibility for all House offices and committees, and to provide recommendations for improvements. Section 402 requires the CAO to submit a plan to standardize closed captioning for all videos created by House offices—including committee hearings, floor proceedings, and other events. Section 403 establishes a comprehensive review of accessibility throughout the United States Capitol buildings and grounds.

Since improving public access is a key focus of the Modernization Committee’s work, Title V of H.Res.756 focuses on transparency and access to congressional documents and publications. Sections 501 and 502 involve projects to standardize legislative texts and facilitate the amendment process. Section 501 standardizes legislative text to be submitted in Extensible Markup Language, or XML, which allows for the legislative comparison project outlined in section 502 to proceed. Section 503 initiates the process to establish a searchable, public database of information on the deadlines and expirations for program authorizations, along with the primary committee of subject matter jurisdiction over each expiring program.²⁵ To enhance public understanding of committee action, section 504 establishes a database of votes taken in committee.

To increase transparency regarding those who lobby the Congress, section 505 asks the House Clerk to submit a report to the Committee on House Administration regarding the status of assigning a unique identification number for each person who files a registration statement or other report required to be filed with the Clerk under the *Lobbying Disclosure Act of 1995* (2 U.S.C. 1601 et seq.).

The final section of H.Res.756 culminates in another transparency effort. Section 506 asks the House Administration Committee to take all practicable steps to make any report required under H.Res.756 publicly available on the official public website of the Committee or in some other way.

²⁴ HouseNet is an internal website that can be used by House of Representative staff members for various administrative functions for their respective Congressional offices. Dumain, Emma, “Internal Website HouseNet Gets a Makeover”, *Roll Call* (March 28, 2013)

<<https://www.rollcall.com/2013/03/28/internal-website-housenet-gets-a-makeover/>> accessed Sept. 24, 2021.

²⁵ “An authorization may generally be described as any statutory provision that defines the authority of the government to act. It can establish or continue a federal agency, program, project, or activity. Further, it may establish policies and restrictions and deal with organizational and administrative matters. It may also, explicitly or implicitly, authorize subsequent congressional action to provide appropriations. By itself, however, an authorization does not provide spending authority.” See “Authorizations and the Appropriations Process”, *Congressional Research Service* (Aug. 27, 2020) at 1 <<https://sgp.fas.org/crs/misc/R46497.pdf>> accessed Sept. 24, 2021.

Passage of H.Res.756 by the House of Representatives was a crowning achievement by the young Modernization Committee. On March 10, 2020, Chair Kilmer marked the occasion of the House passage, noting that:

Today marks the first time in recent history that a committee like ours has turned recommendations into legislative text, and it's thanks to the collaboration and partnership of Democratic and Republican members. I am grateful for their time and commitment to improving the People's House and I'm hopeful there will be more to come.²⁶

The Modernization Committee's intense pace continued for the rest of 2020, and on July 31, 2020, it unanimously passed its fourth set of recommendations.²⁷ These 12 new recommendations²⁸ focused on improving continuity of operations in Congress. This package of recommendations highlighted best practices for remote work, and also focused on identifying the many challenges facing Members and staff while teleworking.

Modernization Committee Passes Its Last Set of Recommendations for 116th Congress

On September 24, 2020, the Modernization Committee passed its fifth and final 2020 package of recommendations. Forty new recommendations were passed, with the aim of helping Congress reclaim its Article One responsibilities, improving the congressional schedule and calendar, boosting congressional capacity, and reforming the budget and appropriations process. That final vote brought the total recommendations passed by the Modernization Committee in the 116th Congress to a grand total of 97.²⁹

²⁶ "Final Report" (n 5) at 37 (Chair Derek Kilmer).

²⁷ Select Committee on the Modernization of Congress, "Select Committee Unanimously Approves Fourth Round of Recommendations" (Press release, July 31, 2020) <<https://modernizecongress.house.gov/news/press-releases/select-committee-unanimously-approves-fourth-round-of-recommendations>> accessed Sept. 24, 2021.

²⁸ "116th Congress Recommendations" (n 18), recommendations 46-57.

²⁹ See "Final Report" (n 5) at 60:

In addition, the Committee passed two additional packages of recommendations in 2020. While these recommendations did not receive a vote on the floor, largely due the limited congressional schedule during the remote work period, they successfully passed the Committee in a unanimous, bipartisan vote. Full text of these recommendations is provided in the Appendix, and will be detailed throughout this report.

Modernization Committee's Final Report, 116th Congress

On October 14, 2020, the Modernization Committee released its final 292-page session report,³⁰ outlining its efforts and containing an astounding 97 recommendations and other findings flowing from its work in the 116th Congress to make Congress work better.³¹

These 97 recommendations were the result of 16 hearings, six virtual discussions and a wide variety of staff and Member-level briefings and listening sessions.

In the Modernization Committee's own words, its session accomplishments were pathbreaking:

The result over the last 20 months was a series of reforms targeted at improving transparency in Congress, streamlining constituent engagement, cultivating staff diversity and retention, and revitalizing our Article One responsibilities bestowed in the Constitution. We also passed reforms to boost civility and bipartisanship throughout Congress, to make the Capitol more accessible to Americans with disabilities, and to improve technology capabilities in the House. Several of these reforms have already been implemented throughout the House, making us the first select committee in recent history to see our recommendations turned into action. This report provides an overview of our proposals, as well as areas that warrant additional attention by future select committees. We also provide background on the issues we found plaguing Congress and how our recommendations ultimately address them.³²

As noted above, a highlight of the Modernization Committee's session achievements was the House passage of over 25 of its recommendations as incorporated into H.Res.756, a crowning accomplishment.

From a technology standpoint, in this final session report, the Modernization Committee modeled its efforts to use enhanced technology, making the report available to view on the Modernization Committee's microsite designed to highlight each section of the report.³³ The

³⁰ *Ibid.*

³¹ Select Committee on the Modernization of Congress, "Select Committee Releases Final Report with 97 Recommendations to Make Congress Work Better for the American People" (Press release, Oct. 14, 2020) <<https://modernizecongress.house.gov/news/press-releases/select-committee-releases-final-report-with-97-recommendations-to-make-congress-work-better-for-the-american-people>> accessed Sept. 24, 2021.

³² "Final Report" (n 5) at 1-2.

³³ Select Committee on the Modernization of Congress, "Select Committee Releases Final Report with 97 Recommendations to Make Congress Work Better for the American People" (Press release, Oct. 14, 2020) <<https://modernizecongress.house.gov/news/press-releases/select-committee-releases-final-report-with-97-recommendations-to-make-congress-work-better-for-the-american-people>> accessed Sept. 24, 2021. The Select Committee noted that it was the first congressional committee to use this technology with the Government Publishing Office (GPO) to produce a committee report, and that XPub is to replace GPO's more than 30-year-old MicroComp composition system. GPO has started to transition the production of all routine legislative documents, including the Congressional Record, the Federal Register, Public Laws, Congressional Bills, Statutes at Large, and House and Senate Calendars, to the XPub system. XPub allows customers to provide GPO with content in any format and get output in flexible print and digital formats. See

Modernization Committee also worked with the Government Publishing Office (GPO) to create and print the report using their XPub technology.³⁴

Chair Kilmer and Vice Chair Graves opined that the report also provides a “roadmap” for future activities of the Modernization Committee.³⁵

Modernization Committee Moves Forward in the 117th Congress

To seek support for the Modernization Committee’s goals, Chair Kilmer testified at the House Rules Committee’s October 1, 2020, Member Day Hearing on Proposed Rules Changes for the 117th Congress.³⁶ Chair Kilmer recalled that during the previous year’s Member Day, he asked the Rules Committee to consider creating a committee to improve congressional operations. The Rules Committee subsequently created the Modernization Committee as part of the Rules Package for the 116th Congress.

At the hearing, Chair Kilmer highlighted several Modernization Committee recommendations, including: creating a community focused grant program to reduce dysfunction in the annual budgeting process; establishing a pilot for weekly “Oxford Style” policy debates³⁷ on the House floor; implementing committee experiments with alternative hearing formats; and following the Modernization Committee’s lead in using mixed seating arrangements where Democrats and Republicans sit side-by-side, rather than on opposite sides of the dais, to encourage dialog and civility.³⁸

Modernization Committee Reauthorized for the 117th Congress

Crucially, to continue its work in the 117th Congress, the Modernization Committee needed new authorization. Its mandate vanished when the 116th Congress ended, and the Modernization Committee still had much left on its “to-do list.” U.S. Speaker of the House

U.S. Government Publishing Office, “GPO Produces U.S. Code with New Digital Publishing Technology” (Press release, Sept. 24, 2019) <<https://www.gpo.gov/who-we-are/news-media/news-and-press-releases/gpo-produces-US-code-with-new-digital-publishing-technology>> accessed Sept. 24, 2021.

³⁴ U.S. Government Publishing Office, “GPO Produces Final Report for the Select Committee on the Modernization of Congress with New Digital Publishing Technology” (Press Release Oct. 15, 2021) <<https://www.gpo.gov/docs/default-source/news-content-pdf-files/2020/20news24.pdf>> accessed Sept. 24, 2021.

³⁵ “Final Report” (n 5) at 2.

³⁶ “Kilmer Testimony” (n 9).

³⁷ Arizona Board of Regents, “Oxford Style”, <<https://www.azregents.edu/sites/default/files/public/Oxford.pdf>> accessed Sept. 24, 2021.

³⁸ “Kilmer Testimony” (n 9).

Nancy Pelosi announced on December 21, 2020, that the Modernization Committee would be reauthorized for the next session of Congress.³⁹

At that time, the Modernization Committee noted that in March of 2020, the House had passed H.Res.756, the Modernization Committee's resolution to implement nearly 30 of its 97 recommendations, and that altogether, the House had implemented 38 of the Modernization Committee's recommendations, including one adopted during New Member Orientation to allow for a paid transition staffer.⁴⁰

On January 4, 2021, the Modernization Committee got a new lease on life when the U.S. House of Representatives adopted the Rules of the 117th Congress, and in those Rules reauthorized the Select Committee on the Modernization of Congress:

The Rules for the 117th Congress adopted today implement recommendations from the Select Committee to streamline and modernize processes, increase accessibility for constituents, and make Congress better reflect the diversity of the American people, including:

- Making permanent the Office of Diversity and Inclusion;
- Implementing electronic filing of committee reports and allowing electronic signatures;
- Broadening availability and utility of legislative documents in machine-readable formats;
- Advancing the use of comparative prints; and,
- Updating the House Commission on Congressional Mailing Standards (now known as the House Communications Standards Commission).⁴¹

Early Activities in 2021

The Modernization Committee started its new session with Chair Kilmer remaining at the helm, and William Timmons (R-SC) serving as Vice Chair. To gather ideas from their House colleagues, the Modernization Committee held a virtual "Member Day" on April 15, 2021 and heard from 25 Members of Congress. Senior congressional leaders attending included House Majority Leader Steny Hoyer, House Minority Whip Steve Scalise, Assistant Speaker Katherine Clark, Democratic Caucus Chair Hakeem Jeffries, Democratic

³⁹ Select Committee on the Modernization of Congress, "Modernization Committee Extended through 117th Congress" (Press release, Dec. 21, 2020) <<https://modernizecongress.house.gov/news/press-releases/modernization-committee-extended-through-117th-congress>> accessed Sept. 24, 2021.

⁴⁰ Ibid.

⁴¹ Select Committee on the Modernization of Congress, "House Extends Select Committee on the Modernization of Congress, Adopts Committee Recommendations" (Press release, Jan. 4, 2021) <<https://modernizecongress.house.gov/news/press-releases/house-extends-select-committee-on-the-modernization-of-congress-adopts-committee-recommendations>> accessed Sept. 24, 2021.

Caucus Vice Chair Pete Aguilar, and House Veterans Affairs Committee Chair Mark Takano.⁴²

Topics included:

- Rules to promote a more modern and efficient legislative body.
- Procedures, including adjusting the schedule and calendar to ensure that Members have more time to hear from constituents and to help deliver solutions.
- Continuity of Congress to ensure the legislative branch can continue to function in challenging circumstances.
- Staff recruitment, diversity, retention, compensation and benefits to find out how best to make the body more representative of the country as a whole, and to ensure it has the capacity to meet the needs of the American people.
- Increasing civility.
- Innovation and updated cybersecurity to examine whether offices and staff are using the best, most modern, and most secure technologies.⁴³

Modernization Committee May 27, 2021 Virtual Hearing: Increasing Accessibility for the Disability Community

As Co-Chair of the Bipartisan Disabilities Caucus,⁴⁴ Rep. Jim Langevin (D-RI) has shared that, “[a]pproximately 61 million Americans – one in four adults – live with a disability”.⁴⁵ For this reason, one of the Modernization Committee’s first activities for the 117th Congress was to hold a virtual hearing on May 27, entitled “Making the House More Accessible to the Disability Community”.⁴⁶ The hearing examined barriers within facilities and technology at the U.S. House of Representatives that inhibit accessibility for Americans.

Chair Kilmer noted:

The physical barriers to access are many and vary across the Capitol complex with small elevators, steep steps, heavy doors, and tight spaces being hallmarks of this institution. Digital accessibility is also a challenge that must be worked on so that

⁴² Select Committee on the Modernization of Congress, “Modernization Committee Holds Member Day”, (Press release, April 15, 2021) <<https://modernizecongress.house.gov/news/press-releases/modernization-committee-holds-member-day>> accessed Sept. 24, 2021.

⁴³ Ibid.

⁴⁴ “Welcome”, *Bipartisan Disabilities Caucus* <<https://disabilitiescaucus-langevin.house.gov/>> accessed Sept. 24, 2021.

⁴⁵ “Disabilities”, *Congressman Jim Langevin* <<https://langevin.house.gov/issue/disabilities>> accessed Sept. 24, 2021.

⁴⁶ Select Committee on the Modernization of Congress, “Select Committee Tackles House Accessibility Hurdles in Hearing” (Press release, May 27, 2021) <<https://modernizecongress.house.gov/news/press-releases/select-committee-tackles-house-accessibility-hurdles-in-hearing>> accessed Sept. 24, 2021.

visually or hearing-impaired individuals can access congressional websites in a consistent way.⁴⁷

Vice Chair Timmons stated:

In every step of the lawmaking process constituents should also be able to participate by meeting with members, attending committee hearings, or by engaging their members of Congress online; but there remain too many physical and technological barriers for many Americans.⁴⁸

Modernization Committee Members heard from Rep. Jim Langevin, founding Co-Chair of the Bipartisan Disability Caucus, and the first quadriplegic to serve in Congress; Phoebe Ball, Disability Counsel for the House Education and Labor Committee; Heather Ansley, Associate Executive Director at Paralyzed Veterans of America (PVA); Judy Brewer, Director of Web Accessibility Initiative (WAI) at the World Wide Web Consortium (W3C); and John Uelmen, General Counsel of the Office of Congressional Workplace Rights.

The Modernization Committee noted that in H.Res.756, it had passed three recommendations to increase accessibility for Americans with disabilities:

Title IV [of H.Res.756] makes much-needed improvements to House accessibility by mandating three new requirements to ensure all Americans can be involved in the legislative process. Section 401 requires the CAO to submit a report on website accessibility for all House offices and committees, and to provide recommendations on how Congress will improve any shortcomings. Section 402 requires the CAO to submit a plan to standardize closed captioning for all videos created by House offices—including committee hearings, floor proceedings, and other events. Lastly, Section 403 establishes a comprehensive review of accessibility throughout the Capital [sic] Buildings and Grounds.⁴⁹

In its final report, the Modernization Committee noted that more work needed to be done to “fulfill its obligations so that all Americans are equally able to work for, access, or visit the U.S. Capitol and connect with their representatives at all stages of policy making.”⁵⁰

Improving House Committee Productivity

In the 116th Congress, the Modernization Committee made a variety of recommendations to strengthen House committees and encourage greater collaboration, including:

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ “Final Report” (n 5) at 38. For more information on these recommendations, and further background on Accessibility Services in the House, see “Final Report” (n 5) Chapter 5.

⁵⁰ Ibid, at 150.

- experimenting with alternative hearing formats;
- hiring bipartisan staff;
- holding bipartisan pre-hearing committee meetings;
- encouraging pilot rule changes in subcommittees;
- establishing committee-based domestic policy congressional delegation trips (CODELs);
- increasing capacity for policy staff, especially for Committees, policy support organizations (the General Accountability Office, the Congressional Budget Office, the Congressional Research Service and a restored Office of Technology Assessment); and
- reviewing restored capacity to member-supporting legislative service organizations, and updated technology resources.⁵¹

Continuing its studies in this area, the Modernization Committee held a hearing on July 20, 2021 entitled, “Enhancing Committee Productivity”.

At the first panel, Modernization Committee Members listened to witnesses, including Rep. Diana DeGette (D-CO) and Rep. Fred Upton (R-MI), who shared lessons from working together successfully on the bipartisan 21st Century Cures Act.⁵²

At the second panel, Modernization Committee Members heard from Jenness Simler, a former professional staff member, House Armed Services Committee; Warren Payne, a former staff member, House Committee on Ways and Means, the National Commission on Fiscal Responsibility, and the Joint Select Committee on Deficit Reduction; and E. Scott Adler, a professor of Political Science at the University of Colorado, whose research examines congressional agenda setting and committee power within Congress.⁵³

Problems examined included conflicting committee schedules, decreased committee capacity, and data issues.⁵⁴ Professor Adler suggested the theory that Congressional members will place more effort into legislating when it appears that their ideas have a chance of becoming law.⁵⁵ Therefore, his testimony included three recommendations:

⁵¹ Ibid. Also see “116th Congress Recommendations” (n 18).

⁵² H.R.34, 114th Congress (2015-2016): 21st Century Cures Act (Dec. 13, 2016) <<https://www.congress.gov/bill/114th-congress/house-bill/34/text?q=%7B%22search%22%3A%5B%22HR34%22%2C%22HR34%22%5D%7D&r=4&s=1>> accessed Sept. 24, 2021.

⁵³ Select Committee on the Modernization of Congress, “ICYMI: Select Committee Holds Hearing on Enhancing Committee Productivity” (Press release, July 21, 2021) <<https://modernizecongress.house.gov/news/press-releases/select-committee-holds-hearing-on-enhancing-committee-productivity>> accessed Sept. 24, 2021.

⁵⁴ “Hearing: Enhancing Committee Productivity”, *U.S. House of Representatives Committee Repository* (July 20, 2021) <<https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=113936>> accessed Sept. 24, 2021.

⁵⁵ Adler, E. Scott, Testimony before the Select Committee on the Modernization of Congress, *Hearing on Enhancing Committee Productivity* (July 20, 2021) pp. 7-10

- That standing committees should move to an annual authorization process, to provide lawmakers with opportunities to update public policy and oversee executive branch agencies and programs.
- A recommendation for a procedural change, “guaranteed regular order” (GRO), to help ensure that committees and other members could play important roles in developing major authorization bills.⁵⁶
- That committee jurisdictions should be left as they are, until there may be widespread and bipartisan consensus for a wholesale reconfiguration of committee policy authority.⁵⁷

Moving forward, the Modernization Committee will continue to study these and other recommendations.

The Modernization Committee’s First Set of Recommendations for the 117th Congress

On July 29, 2021, only seven months after the 117th Congress began, the Committee issued its first set of 20 bipartisan recommendations for this session, intended to make the U.S. House of Representatives more accessible and to increase congressional staff capacity.

This package of recommendations follows multiple hearings that investigated how Congress can better serve the American people by professionalizing internships and fellowships, increasing staff capacity, retaining a diverse and representative workforce, and ensuring accessibility for all Americans.⁵⁸

Many of the recommendations focused on enhancing the recruitment, retention, and diversity of congressional staff. Recommendations 1-16 included updating and aligning staff benefits to increase retention; supporting the Office of Employee Assistance; providing talent acquisition software; establishing an Intern & Fellowship Program Officer or Coordinator; and studying remote internships.⁵⁹

Other recommendations emphasized making the House more accessible for people with disabilities (recommendations 17-20), namely, designating a drop-off and pick-up zone near an accessible entrance for those with mobility impairments, and recommending that the

<https://docs.house.gov/meetings/MH/MH00/20210720/113936/HHRG-117-MH00-Wstate-AdlerS-20210720.pdf>> accessed Sept. 23, 2021 (“Adler Testimony”).

⁵⁶ This suggestion would reflect a procedural change to the complicated House rules that effectively exclude most House Members other than House leadership and the Rules Committee from determining how legislation is considered and amended.

⁵⁷ “Hearing: Enhancing Committee Productivity” (n 54).

⁵⁸ Select Committee on the Modernization of Congress, “Select Committee Passes First Set of Bipartisan Recommendations in the 117th Congress” (Press release, July 29, 2021) <[https://modernizecongress.house.gov/news/press-releases/-select-committee-passes-first-set-of-bipartisan-recommendations-in-the-117th-congress->](https://modernizecongress.house.gov/news/press-releases/-select-committee-passes-first-set-of-bipartisan-recommendations-in-the-117th-congress-) accessed Sept. 24, 2021.

⁵⁹ “117th Congress Recommendations”, *Select Committee on the Modernization of Congress* <<https://modernizecongress.house.gov/117th-recommendations>> accessed Sept. 24, 2021.

House should promote awareness of accessibility requirements for Member and committee websites, along with providing staff training.⁶⁰

The Modernization Committee will continue to study these recommendations and other improvements, to make progress on these important Committee goals.

Highlighting a Key Priority: Modernization Committee’s Continuing Focus on Enhancing Civility

While some contend that civility is overrated,⁶¹ that appears to be the minority view. For example, the San Diego Foundation Center for Civic Engagement held a June 18, 2021, event at which community members and local leaders came together to discuss civility in politics at a KPBS Community Heroes event, hosted in partnership with the National Conflict Resolution Center and sponsored by the San Diego Foundation Center for Civic Engagement.⁶² With a similar focus, in September 2021, Claremont McKenna College held its First Annual Dreier Roundtable Civility Award and a Bipartisan Conversation on the Future of American Political Parties.

Enhancing civility and cooperation is a guiding goal of the Modernization Committee. As part of its ongoing efforts, on June 17, 2021, the Modernization Committee held a virtual hearing entitled, “Building a More Civil and Collaborative Culture in Congress”. This was the first virtual hearing in a two-part series, to examine ways to build a more civil and cooperative Congress, to examine the sources of political polarization and methods to improve collaboration throughout Congress. Members sought to better understand a variety of issues, including societal trends that have contributed to the high levels of polarization in Congress.⁶³

Modernization Committee Members heard from Yuval Levin, the Director of Social, Cultural, and Constitutional Studies at the American Enterprise Institute and Molly Reynolds, a Senior Fellow in Governance Studies at the Brookings Institute. The discussion included ways to foster civility and bipartisanship, and the Committee noted that it used newly adopted rules to conduct the hearing in a roundtable format.

⁶⁰ Ibid.

⁶¹ Serwer, Adam, “Civility is Overrated”, *The Atlantic* (December, 2019) <<https://www.theatlantic.com/magazine/archive/2019/12/adam-serwer-civility/600784/>> accessed Sept. 24, 2021.

⁶² “Restoring Civility in Politics” *The San Diego Foundation* (June 26, 2018) <<https://www.sdfoundation.org/news-events/sdf-news/restoring-civility-politics/>> accessed Sept. 24, 2021.

⁶³ Select Committee on the Modernization of Congress, “Select Committee Examines Ways to Build a More Civil and Cooperative Congress” (Press release, June 17, 2021) <<https://modernizecongress.house.gov/news/press-releases/select-committee-examines-ways-to-build-a-more-civil-and-cooperative-congress>> accessed Sept. 24, 2021.

Emphasizing the importance of examining civility, the Modernization Committee held a second virtual hearing on June 24, 2021, entitled, “Rethinking Congressional Culture: Lessons from the Fields of Organizational Psychology and Conflict Resolution”.⁶⁴

Members heard from experts in organizational psychology, cultural change, and conflict resolution who shared examples from their field and “out of the box” ways to help bridge the partisan divide in Congress and build a more collaborative culture.⁶⁵

Chair Kilmer shared that:

Over the past several months I have been grappling with the question: How do I effectively chair a bipartisan committee in an environment that incentivizes partisanship? ...we are not dealing with broken rules and procedures- we are dealing with broken norms.⁶⁶

Vice Chair Timmons noted that:

Right now the loudest voice is the one that is heard, but the loudest voice is never going to be the one that solves the problem. That is why we need to find a way to incentivize collaboration and policy making once again.⁶⁷

Expert witnesses at the hearing included Adam Grant, an organizational psychologist and leading professor at the Wharton School of the University of Pennsylvania; William Doherty, co-founder of Braver Angels, and the creator of the Braver Angels workshop approach to bridging political divides; Amanda Ripley, an investigative journalist and author;⁶⁸ and Kris Miler, an associate professor in the Department of Government and Politics at the University of Maryland who focuses on cooperation and conflict in the U.S. House through the lens of organizational psychology.

Professor Miler shared key insights on viewing the Congress as a workplace, and concluded by saying:

A more cooperative congressional climate, in tandem with an increasingly diverse Congress has the potential to bring new ideas and partnerships to existing policy debates by establishing norms and practices that value and reward engagement in the

⁶⁴ Select Committee on the Modernization of Congress, “Rethinking Congressional Culture: Lessons from the Fields of Organizational Psychology and Conflict Resolution” (Full Committee hearing, June 24, 2021) <<https://modernizecongress.house.gov/rethinking-congressional-culture-lessons-from-the-fields-of-organizational-psychology-and-conflict-resolution>> accessed Sept. 24, 2021.

⁶⁵ Select Committee on the Modernization of Congress, “ICYMI: Select Committee Holds Second Hearing to Improve Civility and Cooperation in Congress” (Press release, June 25, 2021) <<https://modernizecongress.house.gov/news/press-releases/icymi-select-committee-holds-second-hearing-to-improve-civility-and-cooperation-in-congress>> accessed Sept. 24, 2021.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ripley, Amanda, “High Conflict: Why We Get Trapped and How We Get Out” (Simon and Schuster, April 6 2021).

legislative process, rather than partisan warfare. In this way, the hard work being done by this committee and others in Congress to cultivate a more collaborative workplace culture could indirectly generate “outside the box” ideas, and meaningful new proposals to address the policy challenges we face.⁶⁹

On September 23, 2021, the Modernization Committee held a third hearing highlighting the specific ways to foster civility, “Public Pathways to Success: How Practicing Civility, Collaboration, and Leadership Can Empower Members”.⁷⁰

Dr. Alison Craig of the University of Texas shared ideas to increase incentives for Congressional members to collaborate. Ideas include allowing two members to be listed as the sponsors of a bill; encouraging committee chairs to prioritize bipartisan legislation; and creating a bipartisan committee liaison to personal offices to encourage collaboration.⁷¹

Mr. Shola Richards testified and suggested that every committee consider beginning each new session of Congress by creating Civility Norms. He also recommended that each committee determine how to incentivize behavior that promotes civility in committee meetings, for example, “...publicly posting a “Civility Score” on the committee’s website or social media accounts for committee members who consistently adhere to the committee’s norms.”⁷²

Finally, Liz Wiseman shared leadership practices for Congressional leaders, best practices from the corporate world used in complex organizations where managers and professionals must lead and achieve desired outcomes without formal authority. These include delegating leadership and ownership; encouraging members to set and achieve stretch challenges; creating a tough but healthy debate; utilizing each colleague’s unique strength; and building swift trust among unlikely allies.⁷³

⁶⁹ Miler, Kristina C., Testimony before the Select Committee on the Modernization of Congress, *Hearing on Building a More Civil and Collaborative Culture in Congress* (Sept. 23, 2021) at 10 <<https://docs.house.gov/meetings/MH/MH00/20210624/112836/HHRG-117-MH00-Wstate-MilerK-20210624.pdf>> accessed Sept. 24, 2021.

⁷⁰ Select Committee on the Modernization of Congress, “Public: Pathways to Success: How Practicing Civility, Collaboration, and Leadership Can Empower Members” (Full Committee hearing, Sept. 23, 2021) <<https://modernizecongress.house.gov/committee-activity/hearings/pathways-to-success-how-practicing-civility-collaboration-and-leadership-can-empower-members>> accessed Sept. 24, 2021.

⁷¹ Craig, Alison, Testimony before the Select Committee on the Modernization of Congress, *Hearing on Building a More Civil and Collaborative Culture in Congress* (Sept. 23, 2021) <<https://docs.house.gov/meetings/MH/MH00/20210923/114045/HHRG-117-MH00-Wstate-CraigA-20210923.pdf>> accessed Sept. 24, 2021.

⁷² Richards, Shola, Testimony before the Select Committee on the Modernization of Congress, *Hearing on Building a More Civil and Collaborative Culture in Congress* (Sept. 23, 2021) at 2 <<https://docs.house.gov/meetings/MH/MH00/20210923/114045/HHRG-117-MH00-Wstate-RichardsS-20210923.pdf>> accessed Sept. 24, 2021.

⁷³ Wiseman, Liz, Testimony before the Select Committee on the Modernization of Congress, *Hearing on Building a More Civil and Collaborative Culture in Congress* (Sept. 23, 2021)

The Modernization Committee will continue its guiding focus on increasing civility and cooperation in the 117th Congress.

Future Activities of the Modernization Committee

The Modernization Committee's dynamic activities to make the Congress work better for the American people will continue throughout the two-year session of the 117th Congress, which closes at the end of 2022.

The Committee boasts considerable achievements from the 116th Congress and a continuation of its intense activity level in the 117th Congress, including 20 new recommendations added to its 97 recommendations from the previous congressional session. The diverse modernization challenges the U.S. House of Representatives faces will offer many opportunities for the Modernization Committee to hear from additional experts, pursue enhanced studies, and continue its pathbreaking efforts to employ technological and other solutions to make the Congress simply work better.

Looking toward the work ahead, Chair Kilmer shared:

As the 117th Congress begins, it is clear that there is still more work to do. I'm excited to continue the work to fix Congress and help the institution better serve the folks we represent. I'm grateful to my colleagues, House leadership, civic groups, and the American people for seeing the value of this work and ensuring the progress continues.⁷⁴

Focusing on civility, Vice Chair Timmons said:

Making Congress more civil and more collaborative is one of the most important things that this Committee can do to ensure we are better serving American people. Finding opportunities to spend more time with our colleagues and engage in substantial, policy-based conversations will play an essential role in improving this institution.⁷⁵

<<https://docs.house.gov/meetings/MH/MH00/20210923/114045/HHRG-117-MH00-Wstate-WisemanL-20210923.pdf>> accessed Sept. 24, 2021.

⁷⁴ Select Committee on the Modernization of Congress, "House Extends Select Committee on the Modernization of Congress, Adopts Committee Recommendations" (Press release, Jan. 4, 2021) <<https://modernizecongress.house.gov/news/press-releases/house-extends-select-committee-on-the-modernization-of-congress-adopts-committee-recommendations>> accessed Oct. 1, 2021.

⁷⁵ Select Committee on the Modernization of Congress, "Select Committee Examines Ways to Build a More Civil and Cooperative Congress" (Press release, June 17, 2021) <<https://modernizecongress.house.gov/news/press-releases/select-committee-examines-ways-to-build-a-more-civil-and-cooperative-congress>> accessed Oct. 1, 2021.

Given the Modernization Committee's critical mandate and its laser-like focus on studying and overcoming continuing challenges, political analysts and others will be watching intently as the Modernization Committee continues its pathbreaking work.

Book Review

The Lawyer's Style Guide: A Student and Practitioner Guide

By Peter Butt, published by Hart, 2021

Reviewed by Eamonn Moran PSM QC¹

The Lawyer's Style Guide: A Student and Practitioner Guide, by Peter Butt, is a 910-page collection of material relevant to any lawyer who wishes to write well.

The author is a vastly experienced academic and writer in the field of modern legal writing. He has been a long-term advocate for the use of plain language in legal documents, including legislation. Currently he is an Emeritus Professor of Law at the University of Sydney, Australia.

But this is not a typical text on legal writing. It is written in a 'dictionary' format. It is a dictionary not just of words and phrases but also of legal concepts with, in addition, extensive entries on matters pertaining to the mechanics of writing.

Reading the book for the purposes of this review took me back to so many terms and concepts (particularly in the field of property law) I first came across at law school but had scarcely had any need to employ since. But that is typical of any dictionary. You do not commonly use all the words defined there but it is there to help you when you come across a term that you do not understand. Importantly what this book seeks to do is explain a term and then suggest a plain language alternative.

I really enjoyed dipping into this book and learning things I did not know before (or had long ago forgotten) such as the derivation of the phrase 'these presents' in the opening words of old deeds ('know all men by these presents'). It comes from the Latin *presens scriptum* (present writing), later shortened to *presens* and incorporated into English as 'presents', meaning 'writing'. Indeed, a factor this book makes abundantly clear is the important role played by Latin terms in the law. As someone who studied Latin for seven years, I have an affection for the language but readily recognise the communication barrier it erects for the modern user of legal documents.

The scope of the book is wide ranging. For example, there is an entry on fonts and whether a serif font is more readable than a sans serif font. Information is given on how to cite cases and legislation and on how to structure a legal advice.

The book is aimed at a Commonwealth wide readership. Of particular note are the many entries from Scottish law (*avizandum*, *praedial*, *pursuer*, *roup* and *feu* to name but a few). International counterparts of the 'Clapham omnibus' are given such as the 'Shaukiwan tram' (a usage familiar to residents of Hong Kong).

¹ Former Chief Parliamentary Counsel, Victoria, Australia and Law Draftsman, Hong Kong; currently Inspector, Victorian Inspectorate, Victoria, Australia.

Two other really valuable features need to be mentioned. One is the giving of examples of the use of terms and the other is the listing in many of the entries of items for further reading.

The book has a comprehensive index comprising 53 pages and clearly has been carefully edited. I did not come across any misspellings or grammatical infelicities.

There is much of value here for a legislative drafter. It touches on sentence length; sandwich constructions; 'may', 'shall' and 'must'; dashes; document design; gender neutral language; plain language; means/includes; subject verb agreement; flow charts; formulas; how to deal with terms of art; the different roles for 'that' and 'which'; explanations of em dash and en dash (a great dinner party conversation piece); when to use round or square brackets and the techniques for proofreading.

Canons of construction are explained such as *eiusdem generis* and *expressio unius*.

There is a table with an extensive listing of words and phrases with suggested simpler substitutes (for example, 'agree' instead of 'accede to'; 'current' instead of 'extant' and 'from now on' instead of 'henceforth').

The text sensibly urges writers to resist long words and use available short ones (that is, not to indulge in sesquipedalianism, a term defined in the text) but very occasionally the author does just that (for example, at page 629 there is a reference to being 'consciously obscurantist', at page 641 the word 'exegesis' is used instead of 'explanation' and at page 626 'neologisms' appears and not the more readily comprehensible 'newly coined words'). The value of explaining the different meanings of 'Register' and 'Registrar' may be queried but there is undoubted value in distinguishing 'prescribe' from 'proscribe', terms occasionally misused.

Peter Butt has produced a really valuable reference book from which any writer of legal texts could derive benefit. It would be a valuable addition to any law drafter's library. As a sometime writer of legislation, I recommend it unreservedly.

