



CIAJ Legislative Drafting Conference 2020: Gender-neutral Drafting

September 18, 2020

Peter Birt

**Senior Counsel, Bijuralism and Advisory Services Section,
Public Law and Legislative Services Sector**

Department of Justice Canada





Uniform Law Conference of Canada – Uniform Drafting Conventions

I. GENERAL

Logical organization

1. The organization of an Act should be logical.

[Commentary...]

Style

2. An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language.

[Commentary...]

Sex-specific references

3. Sex-specific references should be avoided.



Uniform Law Conference of Canada – Uniform Drafting Conventions (continued)

In the English version of an Act, pronouns such as "he", "his" and "him" should not be used if the message is intended to refer to **persons of either sex**. Instead, the drafter can use "he or she", repeat the noun referred to or use a combination of these methods. Typographical devices such as brackets, virgules and hyphens are unseemly and distracting and should not be used. It is usually possible to restructure sentences so as to avoid the problem altogether.

Nouns that have the appearance of referring to **men only** should be replaced by terms that can refer to **both sexes** (for example, use "firefighter" instead of "fireman").



Uniform Law Conference of Canada – Uniform Drafting Conventions (continued)

Because French nouns have grammatical rather than natural gender, and because in that language adjectives and past participles must agree with the nouns to which they relate, French solutions to the problems of sex-specific references are necessarily different from those used in the English version. See the French commentary on this point.

<https://www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act?showall=&limitstart=>





Are all federal laws gender-neutral now? No

60 (1) No benefit is payable to any person under this Act unless an application therefor has been made by **him** or on **his** behalf and payment of the benefit has been approved under this Act.

(1.1) An application ... is deemed to be made on January 1 ... if

- (a) the person is a beneficiary of a retirement pension on that day;
and
- (b) the Minister has the information necessary to determine whether a post-retirement benefit is payable to **them**.

Canada Pension Plan (R.S.C. 1985, c. C-8)

5





Is every gender-specific reference bad? No

World War I means the war waged by the German Emperor and **His** Allies against **His** Majesty and **His** Majesty's Allies, and the period denoted by the term *World War I* is the period between August 4, 1914 and August 31, 1921, both dates inclusive;

World War II means the war waged by **His** Majesty and **His** Majesty's Allies against Germany and Germany's Allies, and the period denoted by the term *World War II* is the period between September 1, 1939 and April 1, 1947, both dates inclusive.

Pension Act (R.S.C. 1985, c. P-6)



What does the *Interpretation Act* say?

33 (1) Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.

33 (1) Le masculin ou le féminin s'applique, le cas échéant, aux personnes physiques de l'un ou l'autre sexe et aux personnes morales.

***Interpretation Act* (R.S.C. 1985, c. I-21)**

7





Drafting Solutions

An officer may issue a licence if **he** determines that the applicant has met the prescribed requirements.

- repeat the noun (but multiple repetition can be annoying):

An officer may issue a licence if *the officer* determines that the applicant has met the prescribed requirements.

- use the plural (but not if it creates confusion)

Officers may issue licences if *they determine* that the applicants have met the prescribed requirements.





Solution 1: Repeat the noun to avoid pronouns

3 (1) ... the Minister of Justice shall ... examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the [Statutory Instruments Act](#) and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and **he** shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Canadian Bill of Rights (S.C. 1960, c. 44)

9





Solution 1: Repeat the noun to avoid pronouns

4.1 (1) ... the Minister shall ... examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the [*Statutory Instruments Act*](#) and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and **the Minister** shall report any such inconsistency to the House of Commons at the first convenient opportunity.

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

10





Solution 2: Draft in the plural

28 (2) This section does not apply to authorize the Governor in Council to delegate any power vested in the Governor in Council under this Act to make regulations, prescribe shipping safety control zones or designate pollution prevention officers and **their** powers.

Arctic Waters Pollution Prevention Act (R.S.C. 1985, c. A-12)



Drafting Solutions

An officer may issue a licence if **he** determines that the applicant has met the prescribed requirements.

- eliminate the need for a pronoun by redrafting:

An officer may issue a licence *after determining* that the applicant has met the prescribed requirements.

(This redraft is problematic – it creates too strong a presupposition that the condition will be met and the licence issued.)

An officer *who determines* that an applicant has met the prescribed requirements may issue a licence.





Drafting Solutions

- use *he or she, him or her or his or her* (but this can get tiresome and is problematic for corporate bodies)

An officer may issue a licence if *he or she* determines that the applicant has met the prescribed requirements.

- use the singular *they, their or them*

An officer may issue a licence if *they* determine that the applicant has met the prescribed requirements.

- See Legistics, *Gender-neutral Language*; and *Singular “They”*

<http://canada.justice.gc.ca/eng/dept-min/pub/legis/n15.html>

<http://canada.justice.gc.ca/eng/dept-min/pub/legis/n41.html>





Singular *they*: not just for gender-neutrality

“Clearly every father is worried about the safety of **their** children...”

National Post, March 20, 2003, p. 1

“Every dad should have three or four dishes **they** can make and they should be legendary.”

Globe and Mail, Jan. 6, 2010, p. L3





Singular *they*: not just for gender-neutrality

If either McIlroy or Westwood goes on to win the Match Play Championship, **they** would go to No. 1 in the world.

Ottawa Citizen, February 26, 2012, p. C2 (Both Rory McIlroy and Lee Westwood are men.)

But he now knows how to choke another man unconscious or twist off **their** arm, if need be.

Ottawa Citizen, April 18, 2015, p. B5

(The article is about an English professor who took up mixed martial arts.)





Singular *they*: not just for gender-neutrality

The two pictures ... are proof that no woman should ever let a plastic surgeon touch **them**.

Globe and Mail, April 7, 2003, p. A12

I'm sure I'm not the only woman who has had cars drive around **them**, inches away, when crossing the street with a child.

Globe and Mail, September 15, 2006, p. A16





Singular *they*: not just for gender-neutrality

Anyone wanting to displace Rhian Wilkinson as Canada's first choice right back had better have **their** sprinting shoes on and **their** technical wits about **them**. She will not be overtaken easily.

Ottawa Citizen, April 20, 2013, p. C6

“I cared so much about every single girl on that team,” she says. “It didn't matter if **they** were on the first line or **they** were the third backup goalie.”

MacLean's, May 2, 2016, p. 48





Drafting Solution: singular *they*

18 (2) The Chief Electoral Officer shall ensure that any information on the following that is provided under subsections (1) to (1.2) in an advertising message is accessible to electors with a disability:

...

(b) how an elector may have **their** name added to a list of electors and may have corrections made to information respecting **them** on the list;

...

(d) how an elector may prove **their** identity and residence in order to vote, including the pieces of identification that **they** may use to that end;

Canada Elections Act (S.C. 2000, c. 9)

18





Drafting Solution: *he or she, etc.*

14 (3) If, in the opinion of the Auditor General, a Crown corporation ... fails to provide any or sufficient information or explanations, **he** may so advise the Governor in Council, who may thereupon direct the officers of the corporation to furnish the Auditor General with such information and explanations and to give **him** access to those records, documents, books, accounts and vouchers of the corporation ... access to which is, in the opinion of **the Auditor General**, necessary for **him** to fulfil **his** responsibilities as the auditor of the accounts of Canada.

15 (1) The officers and employees that are necessary to enable the Auditor General to perform **his or her** duties are to be appointed in accordance with the [*Public Service Employment Act*](#)...

Auditor General Act (R.S.C. 1985, c. A-17)

19





Drafting Solution: singular *they*, *he* or *she*, etc.

8 (1) The place of ordinary residence of a person is the place that has always been, or that has been adopted as, **his or her** dwelling place, and to which the person intends to return when away from it.

...

(2.1) The place of ordinary residence of a person who resides outside Canada is **their** last place of ordinary residence in Canada.

...

(4) If a person usually sleeps in one place and has **their** meals or is employed in another place, **their** place of ordinary residence is where **they** sleep.

Canada Elections Act (S.C. 2000, c. 9)

20





New Vocabulary: difficulties

324 Subsection 323(1) does not apply in respect of
(a) the transmission of a message that was transmitted to the public on **what is commonly known as the Internet** before the blackout period described in that subsection and that was not changed during that period;

Canada Elections Act (S.C. 2000, c. 9)