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Legislative Drafting in Statutory Interpretation: A Plea for Recognition

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Abstract

This article examines how knowledge of drafting conventions and realities can enhance statutory interpretation. Information about how legislative counsel draft legislation and realities they face is more readily available now than ever. Despite this, Canadian courts have seldom drawn on drafting conventions when interpreting legislation while simultaneously relying on principles of interpretation that do not necessarily reflect drafting realities. This article argues that understanding drafting conventions and realities can enhance statutory interpretation by better enabling interpreters to derive meaning from the text and style of legislation, as well as encouraging them to think critically about the applicability of long-standing interpretive principles. It also highlights the need for more education on drafting conventions and realities in law schools to develop new generations of interpreters who are better equipped to uncover the intended meaning of legislation.

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Introduction

When you read text, you think about what the writer meant. You think about why the writer chose certain words or used a certain structure. You think about why the writer mentioned something in one part of the work instead of another. These questions are part of the natural process of interpretation. When it comes to legislation, more resources are available than ever to help readers seeking to understand its meaning (referred to as "interpreters" throughout this article) answer these questions. Drafting guides are readily available online, legislative counsel are openly sharing their practices and struggles, and academics are shedding light on the creation of legislation. However, despite the increased availability of information, Canadian courts are largely ignoring these resources in statutory interpretation.

This article examines how knowledge of drafting conventions and drafting realities can enhance statutory interpretation. Part 1 examines the current use of drafting conventions in Canadian law, with an emphasis on the use of publicly available drafting guides. Part 2 establishes the rationale for why drafting conventions should be considered in statutory interpretation and examines how these conventions can help interpreters draw meaning from the words and structure of legislation to improve interpretation. Part 3 analyses the usefulness of commonly relied on interpretive rules in the face of the operational realities of legislative drafting and suggests that these rules should be less heavily relied on. Finally, Part 4 proposes the need for more education regarding drafting conventions and realities in law schools to develop new generations of interpreters who are better equipped to interpret legislation.

Part 1: Drafting conventions are seldom referenced in Canadian case law

In recent years there have been increased efforts to shed light on the way legislation is developed in Canada. These efforts include the publication of drafting guides that illuminate the processes and conventions used in developing legislation. The most comprehensive of these drafting guides is the *Uniform Drafting Conventions*, published by the Uniform Law

Conference of Canada.[2] The *Uniform Drafting Conventions* were first adopted in 1919 and provide a number of rules, primarily related to form, for the development of legislation across Canada.[3] The *Uniform Drafting Conventions* have been endorsed by Ruth Sullivan in her texts on statutory interpretation as aids to interpreting legislation.

Additional drafting guides have been published and made readily available by various Canadian jurisdictions. The federal government published *Legistics* in 2000, which provides guidance on various drafting issues and makes recommendations about how to construct legislation.[4] *Legistics* includes information about how certain ideas should be expressed in legislation, how sentences and paragraphs should be built, and how certain punctuation should be used. The Office of the Legislative Counsel in British Columbia published its guide to legislation and drafting, *A Guide to Legislation and Legislative Process in British Columbia* (*BC Legislation Guide*), in 2013.[5] The *Guide* is comprised of five Parts, one of which details the province's drafting practices. This Part includes conventions for word use, as well as commentary on how to structure and organize legislation.[6] However, the *Guide* is not as detailed as *Legistics*. Other provinces have also published reports detailing their legislative processes; however, these guides do not provide details about drafting conventions.[7] This article will focus on the *Uniform Drafting Conventions*, *Legistics*, and the *BC Legislation Guide* because of their depth and general availability.

Although the drafting guides mentioned above exist and are available for use by lawyers and judges in arguing statutory interpretation cases and resolving questions of statutory interpretation respectively, they have rarely been cited in case law. The *Uniform Drafting Conventions* have received the most attention of the three sets of conventions, having been referred to by the Supreme Court of Canada (SCC), the Federal Court (FC), and Ontario courts.[8] This is likely because the *Uniform Drafting Conventions* have been featured in Ruth Sullivan's texts on statutory interpretation, which are widely relied on by Canadian courts. The *Uniform Drafting Conventions* have also been referenced at the tribunal level in Nova

[2] Uniform Law Conference of Canada, "Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada" (last visited 21 April 2020), online: www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act [*Uniform Drafting Conventions*].

[3] *Ibid*.

[4] Department of Justice Canada, "Legistics" (last modified 12 May 2020), online: Department of Justice https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.html [*Legistics*].

[5] British Columbia, Ministry of Justice, *A Guide to Legislation and Legislative Process in British Columbia* (Guide) (British Columbia: Ministry of Justice, 01 August 2013), online:https://www.crownpub.bc.ca/Product/Details/7665005851_S [*BC Legislation Guide*].

[6] *BC Legislation Guide*, *ibid* at Part 2: *Drafting Principles*.

[7] See, for example, Alberta Justice, *A Guide to the Legislative Process - Acts and Regulations* (Guide) (Alberta: Alberta Justice, July 2005); and Ontario, Ministry of the Attorney General, *Policy Development Process in Ontario* (Ontario: Ministry of the Attorney General).

[8] The *Uniform Drafting Conventions* have been referenced once by each of the Supreme Court of Canada, the Federal Court, the Ontario Court of Appeal, and the Ontario Superior Court (citing the Ontario Court of Appeal decision). These cases are discussed in Part II.

Scotia.[9] *Legistics*, on the other hand, has only been mentioned twice in Canadian case law—once by the British Columbia Court of Appeal (BCCA) and once by the Ontario Landlord Tenant Board (ON LTB).[10] The *BC Legislation Guide* has not been referred to at all.

The handful of references mentioned above pale in comparison to the thousands of published cases dealing with statutory interpretation. A general search of statutory interpretation cases in CanLII yields over 15,000 results. An argument can be made that, although the drafting guides above have not received explicit attention in case law, generally known drafting conventions are frequently used in statutory interpretation cases. However, a search of case law discussing "drafting conventions" in legal databases yields only 100-150 cases. Again, this pales in comparison to the thousands of statutory interpretation cases that exist.

Overall, examining both explicit and abstract references to drafting conventions in Canadian case law demonstrates that drafting conventions are not being used in statutory interpretation with any great frequency. Despite the logical connection between drafting and interpreting legislation, the scan of case law above suggests that interpreters are overlooking useful resources that could help them understand the meaning of legislation by shedding light on how and why the legislation was created as it was.

Part 2: The case for using drafting conventions in statutory interpretation

Although the dominant approach for statutory interpretation in Canada is contextual, the text of the legislation carries significant weight. The modern principle of statutory interpretation is that, "the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".[11] This rule has been widely adopted by the SCC following *Rizzo & Rizzo Shoes Ltd (Re)*, and it has defined statutory interpretation across Canada. The modern principle suggests that the purpose of statutory interpretation is to uncover and give effect to the legislature's intention in enacting a law in order to uncover the meaning of the legislation.[12] However, the meaning of legislation cannot be uncovered without analysing the text of the legislation itself.

Statutory interpretation begins with the text. Professor Sullivan recommends an approach to interpretation that first considers the words of a provision in their immediate context.[13] The immediate context refers to as much of the surrounding text as required to make sense of the

[9] The *Uniform Drafting Conventions* have been referred to in 11 decisions of the Nova Scotia Utility and Review Board.

[10] These cases are discussed in Part II.

[11] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

[12] Susan Baker & Erica Anderson, *Researching Legislative Intent* (Toronto: Irwin Law, 2019) at 9.

[13] Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 49.

words in question, including the section and subsection where the words appear.[14] Reading the words in their immediate context allows an interpreter to arrive at a first impression meaning, which is then tested against the larger context to either resolve or uncover ambiguity.[15]

The larger context is vast and includes the legislative context, the legal context, and the external context.[16] The legal and external contexts go beyond the legislation itself and include external sources of law, as well as the factual and ideological setting of the legislation.[17] The legislative context focuses on the legislation itself. The legislative context includes the whole statute, the legislature's statute book, and relevant legislation from other jurisdictions.[18] Throughout this interpretive analysis, the text and style of legislation remain important considerations.

Moreover, the SCC has expressed that certain presumptions associated with the legal and external contexts cannot be used in the absence of genuine ambiguity, which places even greater importance on the legislation itself. For example, in *Bell ExpressVu Limited Partnership v Rex*, the SCC stated that presumptions about the strict construction of penal statutes and conformity with the *Canadian Charter of Rights and Freedoms* can only be applied where a real ambiguity exists.[19] The SCC explained that a "real ambiguity" exists when the words of a provision are "reasonably capable of more than one meaning".[20] This ambiguity threshold exists for the use of a number of other interpretive principles, such as the principle that statutes relating to Indigenous peoples should be construed liberally and the presumption of conformity with international law.[21]

Analyzing the text, the immediate context of a provision, and the greater legislative context to derive meaningful information about the legislature's intent requires an understanding of how legislation is drafted. It requires an understanding of why certain words are used, how provisions are put together, and how legislation is generally organized. These are all functions of drafting and these important decisions are made by legislative counsel and drafting offices.

Legislative counsel and drafting offices play critical roles in the development of legislation. At an individual level, legislative counsel are responsible for ensuring that government

[14] *Ibid.*

[15] *Ibid*; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 10.

[16] *Ibid* at 51.

[17] *Ibid* at 52.

[18] *Ibid* at 51.

[19] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 28.

[20] *Ibid* at para 29.

[21] Sullivan, *above* note 13 at 255, 314.

policy is effectively expressed in legislation.[22] They find ways to understandably convey the intentions of policy makers and ensure that legislation is readable.[23] They uncover and dispel ambiguity.[24] At a collective level, drafting offices develop standards, policies, and procedures to bring coherence and consistency to the legislative system.[25] In addition, drafting offices consolidate and revise legislation to improve readability.[26] In short, as the drafters of legislation, legislative counsel and drafting offices are intimately involved in communicating the legislature's intent. Therefore, it is difficult to draw meaningful statutory interpretations without understanding how legislative counsel do their jobs and what rules they apply in designing legislation. This is especially true given the current state of statutory interpretation, which emphasizes the text and the meaning it derives from surrounding provisions, the legislative enactment as a whole, and a legislature's statute book.

An argument can be made that understanding drafting conventions when interpreting legislation is unnecessary because legislative counsel normally rely on ordinary meaning and legislation is written in ordinary language. However, this argument disregards the fact that legislation is a specific type of writing with its own style. Academics and courts alike have acknowledged that legislation is its own literary genre, drafted to convey meaning in a particular way.[27] The British Columbia Court of Appeal has recently stated:

> Legislation is not written like other texts; it conveys meaning in a particular way. Those who search for symbolism or narrative search in vain. The legislator instead follows conventions specific to legislation in order to explicitly and implicitly tell the reader what the law is.[28]

Therefore, as its own literary genre, legislation has unique characteristics. It contains various elements, such as sections and subsections, that do not appear in other forms of writing. It follows certain rules, like avoiding metaphors, irony, wit, embellishment, colloquialism, and rhetorical devices, that other types of writing do not.[29] Accordingly, just as a reader needs to understand the stylistic conventions of poetry to properly understand the meaning of a poem, so too does an interpreter need to understand legislative drafting conventions to property understand the meaning of legislation.

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[22] John Mark Keyes & Katharine MacCormick, "Roles of Legislative Drafting Offices and Drafters" (Paper delivered at the Canadian Institute for the Administration of Justice, September 2002) at 11.

[23] *Ibid* at 17.

[24] *Ibid* at 16.

[25] *Ibid* at 8.

[26] *Ibid* at 9.

[27] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at §8.1-§8.3.

[28] *Evans v New Westminster (Police Department)*, 2019 BCCA 317 at para 28 [*Evans*].

[29] Sullivan, *above* note 13 at 22.

Drafting conventions help clarify the meaning of common language used in legislation

A review of the way that courts and tribunals have used drafting guides like the *Uniform Drafting Conventions* and *Legistics* demonstrates how useful drafting conventions can be in identifying and resolving ambiguity in statutory interpretation.

Drafting conventions have been helpful in determining the scope of what is included by certain terms. For example, in the only SCC decision that discusses the *Uniform Drafting Conventions*, the SCC used the *Conventions* to dispel ambiguity about the meaning of "owner" in the *Civil Air Navigation Services Commercialization Act* (*CANSCA*). In *Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of)*, the SCC relied on section 21(4) of the *Uniform Drafting Conventions* to support the conclusion that the meaning of "owner" in section 55 of the *CANSCA* was limited to the four examples provided in the legislation even though the examples were introduced by "includes" rather than "means".[30] The Court relied on the fact that, although the English version of the *CANSCA* used the word "includes", the French version used "s'entend".[31] As section 21(4) of the *Uniform Drafting Conventions* states, "s'entend" is equivalent to "means", which signifies an exhaustive definition.[32] The SCC relied on this, the shared meaning rule, and evidence of the legislature's intent, to support its determination.[33]

The *Uniform Drafting Conventions* were similarly used by the Ontario Court of Appeal (ONCA) in *Macartney v Warner*.[34] In this case, Justice Morden, in his concurring opinion, relied on the *Uniform Drafting Conventions* to determine that the examples of recoverable damages under section 61(2) of the *Family Law Act* (*FLA*) were not exhaustive.[35] Section 61(2) of the *FLA* used "includes" rather than "means" when detailing the damages that could be claimed. As such, Justice Morden found that the list of damages in the provision was not exhaustive because "includes" is generally used to provide examples of a term's meaning without being all-inclusive.[36]

At the tribunal level, the Nova Scotia Utility and Review Board (NSUARB) has also used the *Uniform Drafting Conventions* to determine the scope of words. Eleven decisions of the NSUARB reference the *Uniform Drafting Conventions*, and all of them use the *Conventions* in the same way.[37] All of the decisions discussed the use of "includes" and "means" when

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[30] *Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of)*, 2006 SCC 24 at paras 46-49 [*Canada 3000*].

[31] *Ibid*.

[32] *Uniform Drafting Conventions*, *above* note 2, s 21(4).

[33] *Canada 3000*, *above* note 30 at paras 49-53.

[34] *Macartney v Warner* (2000), 46 OR (3d) 641, 183 DLR (4th) 345 [*Macartney*].

[35] *Ibid* at paras 81-82.

[36] *Ibid* at para 81; *Uniform Drafting Conventions*, *above* note 2, s 21(4).

[37] See: *Richardson v Wolfville (Town)*, 2000 NSUARB 76; *Maxwell v Kentville (Town)*, 2002 NSUARB 63; *Nova Scotia (Director of assessment) v Ocean Produce International Ltd*, 2002 NSUARB 10; *Fox (Re)*, 2007

defining terms, as section 21(4) of the *Conventions* states. For example, in *Richardson v Wolfville (Town)*, the NSUARB found that meaning of "aggrieved person" in section 191(a) of the *Municipal Government Act* was not limited to the examples provided in the legislation because, according to section 21(4) of the *Uniform Drafting Conventions*, the use of "includes" in a definition signifies that the definition is not exhaustive.[38] The same logic was used in *Nova Scotia (Director of assessment) v Ocean Produce International Ltd* to determine that the definition of "farm property" in section 2 of the *Assessment Act* was exhaustive, given that it contained the word "means".[39]

Overall, the examples above demonstrate the useful role that drafting conventions can play in understanding terminology and syntactical constructions frequently used in legislation. Although a question can be raised as to how important the drafting conventions were in the cases above given that the dictionary definitions of "means" and "includes" are exhaustive and non-exhaustive respectively, the decision makers in most of the cases above relied almost exclusively on the drafting conventions to reach their conclusions. This suggests that, while there may be other tools available to assist in interpreting legislative terminology, drafting conventions still hold value. Further, although existing decisions have only relied on drafting conventions to interpret "includes" and "means", drafting guides provide information about the use of many other terms commonly found in legislation. For example, *Legistics* provides commentary on the use of "and", "or", "must", "may", "shall", "such", and more.[40] Drafting conventions could prove more valuable in helping interpreters resolve questions arising from the use of these frequently contested terms.

Drafting conventions help clarify what the form of legislation implies

The *Uniform Drafting Conventions* and *Legistics* have also been used to draw conclusions from the structure and form of legislation. They have been used to understand the significance of a provision being in one part of a statute instead of another, the importance of a word's tense, and the implications of structural elements like paragraphs. In *Hrushka v Canada (Foreign Affairs)*, the Federal Court used the *Uniform Drafting Conventions'* commentary on definitions to interpret Passport Canada's scope of authority pursuant to the *Canadian Passport Order*.[41] The Court held that Passport Canada did not have the authority to withhold passport services pursuant section 2 of the *Order*, which was the definitions

NSUARB 12; *Whitcombe, Re*, 2005 NSUARB 63; *Dolliver v Shelburne (Town Council of)*, 2001 NSUARB 68; *D & M Lightfoot Farms Ltd, Re*, 2005 NSUARB 117; *Eco Awareness Society (Re)*, 2010 NSUARB 102; *Dartmouth Crossing Limited (Re)*, 2015 NSUARB 48; *Lunenburg Heritage Society (Re)*, 2010 NSUARB 224; and *Peninsula South Community Association v Chebucto Community Council (Halifax Regional Municipality)*, 2002 NSUARB 7.

[38] *Richardson v Wolfville (Town)*, 2000 NSUARB 76 at paras 26-27.

[39] *Nova Scotia (Director of assessment) v Ocean Produce International Ltd*, 2002 NSUARB 10 at para 29.

[40] *Legistics*, *above* note 4.

[41] *Hrushka v Canada (Foreign Affairs)*, 2009 FC 69 [*Hrushka*].

section.[42] That section stated that “"Passport Canada" means a section of the Department of Foreign Affairs and International Trade, wherever located, that has been charged by the Minister with the issuing, refusing, revoking, withholding, recovery, and use of passports.”[43] Foreign Affairs Canada argued that the authority to withhold passport services flowed naturally from Passport Canada’s ability to revoke passports.[44] However, the Court found that section 2 could not confer powers on Passport Canada because definitions do not contain substantive content according to drafting conventions like section 21(2) of the *Uniform Drafting Conventions*.[45]

Moreover, the ON LTB has used *Legistics* to draw inferences from the tense used in legislation. In *TET-77648-17 (Re)*, the ON LTB used the present indicative portion of *Legistics* to support a finding that a tenant could only request an order under section 29(1) of the *Residential Tenancies Act* (*RTA*) for the past actions of a landlord.[46] *Legistics* provides that legislation should be written in the present tense, and that other tenses should only be used in subordinate clauses to express actions that take place before or after the action in the principal clause.[47] Section 29(1) of the *RTA* allows tenants to apply for an order from the ON LTB that a landlord “has substantially interfered with their reasonable enjoyment of their rental unit”.[48] Given the use of past tense in section 29(1), the ON LTB found that the legislation did not allow tenants to make applications for orders based on anticipated interferences.[49]

Further, the BCCA has used *Legistics* to examine the use of paragraphing in the *Motor Vehicle Act*. In *Evans v New Westminster* [*Evans*], the BCCA interpreted section 215(3)(b) of the *Motor Vehicle Act*, which states that[50]:

> 215 (3) A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol,
>
> …
>
> (b) serve the driver with a notice of driving prohibition, and …

The question in *Evans* was whether a peace officer could serve a driving prohibition at a police station as opposed to a highway or industrial road. The BCCA ultimately relied on

[42] *Ibid* at para 18.

[43] *Ibid* at para 14.

[44] *Ibid* at paras 16-18.

[45] *Ibid.*

[46] *TET-77648-17 (Re)*, 2017 CanLII 48811 at paras 4-5 (ON LTB) [*TET-77648-17*].

[47] *Legistics*, *above* note 4 at *Present Indicative*.

[48] *TET-77648-17*, *above* note 46 at para 4.

[49] *Ibid* at para 5.

[50] *Evans*, *above* note 28 at para 15.

the purpose of the legislation—to prevent driving under the influence of drugs—to interpret the provision broadly. The Court held that peace officers were not restricted to serving driving prohibitions on a highway or industrial road, which is inconsistent with the way that paragraphing is generally used in drafting.[51] As stated in *Legistics*, when using paragraphing, parallel units of text must be capable of being read grammatically with the opening words preceding them.[52] This would suggest that section 215(3)(b) of the *Motor Vehicle Act* is constrained by the limiting words "any time or place on a highway or industrial road" in section 215(3). This was the argument advanced by Mr. Evans.[53] Although the BCCA did not accept Mr. Evans's interpretation after examining the public safety purpose of the legislation, his use of *Legistics* and paragraphing is instructive. His argument provides an example of how lawyers can use drafting conventions to craft arguments about what the structure of legislation, which can play an important role in informing the meaning of the words, implies.[54]

Overall, the cases above provide examples of the important role that drafting conventions can play in uncovering the meaning of words based on how and where the words are used in legislation. The structure and form of legislation is an important part of the context that helps clarify the meaning of the text and, as such, understanding these elements allows interpreters to elevate their interpretations.

Drafting conventions can help offset overreliance on legislative purpose

In addition to clarifying meaning, interpretive arguments based on drafting conventions can help to counterbalance overreliance on legislative purpose in statutory interpretation. While the purpose of legislation is an important consideration that must be identified and considered in every case, Canadian courts have generally rejected a purposive approach to statutory interpretation.[55] Under a purposive approach to interpretation, the purpose of legislation is the primary concern for an interpreter—other indicators of meaning, including the text, are subordinate.[56]

The SCC has indicated that the purpose of legislation does not give an interpreter *carte blanche* to disregard the words of a statute. In *University of British Columbia v Berg* [*Berg*], in the context of human rights legislation that is meant to be interpreted broadly and purposively, the SCC stated that purposive interpretation does not give a decision maker "license to ignore the words" of a statute.[57] More recently in *Bastien Estate v Canada*, the

[51] *Ibid* at paras 32-28.

[52] *Legistics*, *above* note 4 at *Paragraphing*.

[53] *Evans*, *above* note 28 at para 30.

[54] Sullivan, *above* note 13 at 130.

[55] Sullivan, *above* note 27 at §9.3; §9.9.

[56] *Ibid* at §9.8.

[57] *Berg v University of British Columbia*, [1993] 2 SCR 353 at para 40, 102 DLR (4th) 665.

SCC affirmed the principle in *Berg* and indicated that a purposive interpretation must be rooted in the statutory text and cannot ignore that which the text expresses.[58] However, despite the SCC's clear guidance, Professor Sullivan notes that there are a number of Canadian cases in which courts, rather than interpreting the legislature's words in light of the legislation's purpose, have ensured that the purpose of legislation is achieved regardless of any limiting language in the text.[59] The BCCA in *Evans* arguably did the same in its interpretation of section 215(3)(b) of the *Motor Vehicle Act* given that the purpose of *Act* drove interpretation. In *Evans*, the Court did not appear to interpret the limiting words from section 215(3) in light of the purpose of the *Motor Vehicle Act* at all. In fact, the BCCA explicitly acknowledged that the interpretation it accepted favoured the "purpose, greater context and consequences of the provision over a strict reading of its text".[60] Based on the SCC's guidance above, this approach appears incorrect in that it unduly emphasized the legislation's purpose to the exclusion of the statutory text.

Overall, Mr. Evans's drafting argument in *Evans* likely should not have been so readily overridden by the purpose-based arguments in the case. The decision demonstrates the resistance of some judges to generally accepted drafting conventions, particularly when they determine that the purpose of a piece of legislation supports a meaning that the text does not. In the ordinary course of statutory interpretation, however, it is clear that the text and purpose of legislation must be considered together to derive meaning. As such, drafting conventions can help elucidate what the text expresses so that purposive interpretations do not dominate statutory interpretation. This can help to enhance the integrity of statutory interpretation and ensure that cases are consistently decided in accordance with correct interpretive principles.

Part 3: Commonly relied on interpretive rules do not adequately reflect drafting realities

The previous portions of this article discussed the value of drafting conventions and their potential to improve statutory interpretation. However, a discussion of some of the most commonly used presumptions in statutory interpretation, which are based on conventions attributed to legislative counsel by the courts, is also warranted. This Part will examine the realities of drafting and argue that, in light of the operational constraints on drafters, some of the most commonly used presumptions about drafting should be less heavily relied on. This discussion is important when examining drafting conventions because conventions that are not strictly adhered to cannot be relied on with any certainty.

One of the main ways through which drafting conventions have historically informed statutory interpretation is through the rules of textual analysis. Textual analysis refers to the

[58] *Bastien Estate v Canada*, 2011 SCC 38 at para 25.

[59] Sullivan, *above* note 27 at §9.8.

[60] *Evans*, *above* note 28 at para 38.

process of exploring, refining, and testing first impression interpretations by consciously examining the text and identifying the conventions and assumptions underlying logical interpretations.[61] Two of the most commonly relied on rules of textual analysis are the presumption of consistent expression and the presumption against tautology.

Consistent Expression

The presumption of consistent expression assumes that the legislature chooses its words carefully and consistently both within a statute and across a legislature's statute book.[62]This means that, throughout legislation: (1) the same words have the same meaning; (2) different words have different meanings; and (3) patterns of expression are used consistently.[63] The presumption of consistent expression is a common interpretive rule that has been used and endorsed consistently by the SCC. For example, in *R v Zeolkowski*, the SCC stated that, "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation".[64] Further, in *Agraira v Canada (Public Safety and Emergency Preparedness)*, the SCC stated that, "If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings".[65]

Consistent expression is discussed in drafting guides. In the *Uniform Drafting Conventions*, section 34(1) states that, "Different words should not be used to express the same meaning within a single Act".[66] Section 34(2) goes on to state that the same term can only be used to express different meanings where the intended meaning is perfectly clear in the context.[67] The *BC Legislation Guide* also refers to the presumption of consistent expression, stating that the principle constrains legislative drafting and implies that different words have different legal effects.[68] These conventions demonstrate that legislative counsel acknowledge the presumption of consistent expression in their work.

However, the realities of legislative drafting call into question the validity and reliability of the presumption of consistent expression. Research on legislative drafting practices in the US found that, although 93% of legislative counsel aspired to use consistent terms throughout legislation, organizational barriers made realizing this aspiration difficult.[69] Further, the study found that only 9% of legislative counsel often or always intended for

[61] Sullivan, *above* note 13 at 129.

[62] Sullivan, *above* note 27 at §8.32

[63] Sullivan, *ibid* at §8.32-§8.39.

[64] *R v Zeolkowski*, [1989] 1 SCR 1378 at para 19, 61 DLR (4th) 725.

[65] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81.

[66] *Uniform Drafting Conventions*, *above* note 2, s 34(1).

[67] *Ibid*, s 34(2).

[68] *BC Legislation Guide*, *above* note 5 at 2 in Part 2: *Drafting Principles*.

[69] Abbe R Cluck & Lisa Schultz Bressman, "Statutory Interpretation from the Inside -- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I" (2013) 65:5 Stan L Rev 901 at 936.

terms to apply consistently across statutes covering unrelated subject matter.[70] This percentage makes sense given that statute books are extensive, dealing with a vast number of subjects, and developed over time. The principle of consistent expression applies most strongly across a legislature's statute book to statutes and provisions dealing with related subject matter, suggesting that courts account for the differences in how language is used in different contexts, and over time, in statutory interpretation.[71] Nevertheless, the US study still suggests that the principle of consistent expression, despite being commonly relied on by the courts, is not a drafting convention that legislative counsel strictly adhere to—particularly across statutes.

While the US data may not accurately reflect the practices of Canadian legislative counsel, the organizational barriers that US legislative counsel identified as preventing them from achieving consistent expression also exist in Canada. One of the major barriers to consistent expression identified in the US study was the increasing tendency to legislate through unorthodox vehicles like omnibus bills.[72] Omnibus bills are, simply speaking, bills designed to amend, repeal, or enact several pieces of legislation at once.[73] Omnibus bills have been used in Canada since 1888 and, although they are generally characterized by the compilation of separate but related initiatives, they sometimes consolidate unrelated subject matter.[74] The challenge with omnibus legislation is that it is long and complex, and there is often scant opportunity for review and parliamentary scrutiny.[75] This, understandably, increases the likelihood of inconsistencies. In the US study, 74% of legislative counsel stated that omnibus legislation was more likely to be internally inconsistent than legislation covering just one topic.[76]

Moreover, in Canada, legislative counsel are increasingly working with limited time and resources. Legislation in Canada is often drafted with tight deadlines and pressure on legislative counsel to get the job done as quickly as possible.[77] A ballpark estimate of the time required to prepare a piece of legislation at the Department of Justice has historically been between three to nine months, which is daunting given the complexity of most legislation.[78] Further, while the Department of Justice's Legislative Services Branch—the branch responsible for drafting federal legislation—is relatively large, employing 200 staff

[70] *Ibid*.

[71] Sullivan, *above* note 27 at §8.32.

[72] Cluck & Bressman, *above* note 69 at 936.

[73] Baker & Anderson, *above* note 12 at 46.

[74] *Ibid* at 46; Adam M Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2017) 48:1 Ottawa L Rev 1 at 9.

[75] Dodek*, ibid* at 13-14; Baker & Anderson, *ibid* at 46.

[76] Cluck & Bressman, *above* note 69 at 936.

[77] Keyes & MacCormick, *above* note 22 at 20.

[78] Jean-Charles Bélanger, "The Origins of the Legislation Section and the Federal Legislative Process in Canada" (Presentation delivered at the Faculty of Law, University of Ottawa, January 9, 2020) [unpublished].

in 2013 (of whom approximately 55% were legislative counsel), other drafting bodies are substantially smaller.[79] For example, as of January 2020, the House of Commons and Senate only had three and five legislative counsel on staff respectively to draft private members' legislation.[80] Given increases in the number of private members' legislation passing into law, any mistakes would be likely to go unnoticed in light of the lack of resources.[81]

Finally, the process by which legislation is developed and enacted in Canada likely contributes to inconsistencies. Large bills can be drafted by several teams of legislative counsel and pieced together, which risks their internal consistency.[82] Further, at the federal level in Canada, the text of bills can be substantially amended throughout the parliamentary process at the committee stage.[83] While government amendments are prepared, or at least reviewed by, legislative counsel, they have limited control over changes made at the committee stage given that they are seldom involved in the discussions.[84] Parliamentarians can change amendments in committee and adopt modifications, thus potentially introducing inconsistencies.[85] Overall, the realities of drafting detailed above demonstrate that there are organizational barriers likely preventing legislative counsel from attaining the ideal of consistent expression.

Although Canadian courts do not regard the presumption of consistent expression as infallible, there are relatively few examples of the presumption being rebutted. In *Bapoo v Cooperators*, the ONCA stated that the presumption in favour of consistent expression is not an inflexible rule or infallible guide to interpretation.[86] The Court ultimately found that the same words used in different parts of the legislation being interpreted had different meanings because of differences in context.[87] However, despite the fact that *Bapoo* was decided 23 years ago, the decision has not been cited frequently.[88] This suggests that, although the presumption in favour of consistent expression is not infallible, it is generally

[79] Canada, Department of Justice, *Legislative Services Branch Evaluation Final Report* (Ottawa: Department of Justice, June 2013) at 7.

[80] Charlie Feldman and Alexandra Schorah, "Legislative Drafting at the House of Commons and the Senate" (Presentation delivered at the Faculty of Law, University of Ottawa, January 9, 2020) [unpublished].

[81] *Ibid*. According to Parliament of Canada data, only 9 private members' public bills passed in the 11th session of Parliament, compared to 43 in the 41st session and 21 in the 42nd session (see: Parliament of Canada, "Private Members' Public Bills Passed by Parliament" (last visited 21 April 2020 online: Parlinfo).

[82] Wendy Gordon, former Deputy Law Clerk and Parliamentary Counsel of the House of Commons (Canada).

[83] Privy Council Office, "Guide to Making Federal Acts and Regulations" (2001) at 149, online (pdf): Government of Canada https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf.

[84] *Ibid* at 159, 164; Gordon, *above* note 82.

[85] Gordon, *above* note 82.

[86] *Bapoo v Co-operators General Insurance* (1997), 36 OR (3d) 616 at para 28, 154 DLR (4th) 385 [*Bapoo*].

[87] *Ibid*.

[88] *Bapoo* has been cited only 37 times according to the Canadian Law Information Institute (CanLII) website.

adhered to in Canadian case law even though there may be a disconnect between the presumption and the realities of drafting.

Overall, the current realities of legislative drafting likely undermine the presumption of consistent expression, thus impairing its usefulness. Consistent expression may be the ideal in drafting, as reflected by the *Uniform Drafting Conventions* and the *BC Legislation Guide*; however, in the absence of strict adherence to the ideal, this convention, though commonly relied on, likely warrants less weight.

No Tautology

The presumption against tautology reflects the idea that the legislature does not use superfluous or meaningless words, repeat itself, or speak in vain.[89] This principle, like the principle of consistent expression, has been articulated and relied on frequently by the SCC. For example, in *R v Proulx*, the SCC stated that, "It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage".[90]

Current drafting conventions reflect the presumption against tautology. Section 2 of the *Uniform Drafting Conventions* states that a statute should be written "simply, clearly, and concisely".[91] Further, section 31 states that redundancies and archaic words or phrases should be avoided.[92] This section recommends eliminating words that add nothing to the message.[93] Taken together, these sections provide guidance against surplusage. Additionally, the *BC Legislation Guide* refers to the rule against tautology. The *Guide* draws three implications from the rule that legislative counsel should keep in mind: (1) legislation should not say anything that it has already said; (2) legislation should not say anything that does not need to be said; and (3) the meaning of words that appear in one place, but not another, is different.[94]

As with consistent expression, the realities of drafting tend to call into question the value of the presumption against tautology in statutory interpretation. In the US, a study found that 18% of legislative counsel stated that the rule against superfluities rarely applied to their drafting, with 45% stating that it only sometimes applied.[95] The legislative counsel surveyed indicated that the prevailing reasons for their departure from the rule against superfluities were that: (1) legislative counsel intentionally erred on the side of redundancy

[89] Sullivan, *above* note 27 at §8.23.

[90] *R v Proulx*, [2000] 1 SCR 61 at para 28, 182 DLR (4th) 1.

[91] *Uniform Drafting Conventions*, *above* note 2, s 2.

[92] *Ibid*, s 31.

[93] *Ibid*, s 31.

[94] *BC Legislation Guide*, *above* note 5 at 3 of Part 2: *Drafting Principles*.

[95] Cluck & Bressman, *above* note 69 at 934.

in legislation to ensure that they captured the intended message, and (2) legislative counsel included redundancy in statutes to adhere to their clients' political needs.[96]

Although the statistics from the US may not apply to Canada, the reasons for including redundancy in legislation do. Judges have acknowledged that legislation sometimes features redundancy in order to be clear and comprehensive.[97] For example, in *Tuteckyj v Winnipeg (City)*, the Manitoba Court of Appeal found that the use of overlapping and repetitive words in a by-law were intended to avoid loopholes and provide clarity.[98] Further, in *Chrysler Canada Ltd v Canada (Competition Tribunal)*, former Chief Justice McLachlin, in her dissent, stated that general phrases that may not seem to serve a purpose are commonly included in legislation to combat arguments seeking to restrict the power conferred.[99] However, although these cases identify exceptions to the presumption against tautology, they have rarely been cited in case law.[100] This suggests that, while the presumption against tautology can be rebutted, it is generally relied on.

In sum, as with consistent expression, the operational realities of legislative drafting tend to undermine the convention against redundancy and superfluities. While avoiding redundancy may be the gold standard in legislative drafting, there are legitimate reasons for its use. As such, despite its popularity, the presumption against tautology likely warrants less reliance to enhance statutory interpretation.

Part 4: Education can improve understanding of drafting conventions and drafting realities to enhance statutory interpretation

The three Parts above highlight the need for more education in drafting conventions and realities to enable legal professionals to apply legislative drafting conventions in statutory interpretation. The first two Parts identified a disconnect between the usefulness of publicly available drafting conventions in understanding the text of legislation and their current use. Part 3 identified a disconnect between the realities of drafting and common conventions attributed to drafters. Accordingly, this Part suggests that education regarding how legislation is developed is required to address these disconnects and enhance statutory interpretation.

As demonstrated in Part 2, courts can consider drafting conventions and guidelines in statutory interpretation. As such, the only barrier to using this information is the general lack of familiarity among Canadian legal professionals with legislative drafting. This problem is

[96] *Ibid* at 934-935.

[97] Sullivan, *above* note 27 at §8.31.

[98] *Tuteckyj v Winnipeg (City)*, 2012 MBCA 100 at para 74.

[99] *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 at para 71, 92 DLR (4th) 609.

[100] *Tuteckyj v Winnipeg (City)* has only been cited 3 times according to the Canadian Law Information Institute (CanLII) website, and former Chief Justice McLachlin's comments about tautology in *Chrysler Canada Ltd v Canada (Competition Tribunal)* only 4 times.

not unique to Canada. As Professor Sullivan has aptly stated, "In nearly all jurisdictions, the role of legislative drafting in the creation and administration of law receives scant attention from legal educators and the practising bar."[101] In the United States, drafting manuals were only referenced three times in jurisprudence by 2010.[102]

To effectively integrate drafting conventions and realities in statutory interpretation, education is required across the legal profession. This starts with law schools. It goes without saying that courses related to legislation or legislative drafting are most likely to familiarize students with drafting conventions and realities. However, at least in Canada, students are also likely to be exposed to legislative drafting in statutory interpretation courses given that the leading authorities on statutory interpretation, Professor Sullivan's texts, highlight drafting conventions as an aid to interpretation. Research suggests that most law schools in Canada incorporate some statutory interpretation in first-year courses introducing students to the legal system and public law.[103] While these general first-year courses likely teach the basic principles of statutory interpretation, they likely do not cover the subject matter in enough depth to teach students about drafting conventions and realities. This content is more likely to be taught in specialized upper-year courses devoted to legislative drafting and statutory interpretation, which not all Canadian law schools offer.[104] A review of the course offerings for every law school in Ontario highlights the inconsistent availability of specialized legislative drafting and statutory interpretation courses. In Ontario, only Queen's University and the University of Ottawa offer courses in both statutory interpretation and legislative drafting.[105] Western University, Osgoode Hall Law School, and the University of Toronto offer courses in statutory interpretation; however, they do not offer courses related to legislative drafting.[106] The University of Windsor and Bora Laskin Faculty of Law do not offer courses in either statutory interpretation or legislative drafting.[107] The inconsistent availability of courses related to legislative drafting and statutory interpretation across Ontario—and Canadian—law schools highlights the need for more education in these areas.

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[101] Ruth Sullivan, "The Promise of Plain Language Drafting" (2001) 47 McGill LJ 97 at 99.

[102] BJ Ard, "Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation" (2010) 20:1 Yale LJ 185 at 187.

[103] John Mark Keyes, "Challenges of Teaching Legislative Interpretation in Canada: Tackling Scepticism and Triviality" (2020) 13 Journal of Parliamentary and Political Law 479 at 482-483.

[104] *Ibid*.

[105] Queen's University Faculty of Law, "Course Catalogue" (03 August 2020, (last visited 30 January 2021)); University of Ottawa Faculty of Law- Common Law Section, 2020-2021 Course Information, "2020-2021 Course Search engine" (last visited 30 January 2021).

[106] Western Faculty of Law, "Course Offerings" (last visited 30 January 2021); Osgoode Hall Law School, "Courses and Seminars" (last visited 30 January 2021); University of Toronto Faculty of Law, "Course List (2020-2021)" (last visited 30 January 2021).

[107] University of Windsor Faculty of Law, "2020-2021 Course Descriptions & Evaluation Methodology" (24 November 2020, last visited 30 January 2021); Bora Laskin Faculty of Law, "Law (Laws) Courses" (last visited 30 January 2021).

Perhaps a reason for the lack of educational offerings related to legislation and statutory interpretation in law schools is that students are not interested in these topics. However, given that legislation—as one of Canada's most important sources of law—is pervasive, interest should be driven by legal educators. Research in Australia suggests that a blended-learning approach to teaching statutory interpretation can improve student engagement with the subject.[108] After the judiciary in Australia called the construction of statutes "the single most important aspect of legal and judicial work", a Queensland law school transitioned its statutory interpretation course from the traditional lecture/tutorial/fact-pattern format to a narrative-centered learning experience.[109] The re-imagined course had students work through a mock statutory interpretation problem using an online platform that simulated real-life situations.[110] Upon completion, 85% of students reported that the program helped them engage with statutory interpretation more than they thought they would.[111] This research suggests that disinterest in statutory interpretation, and legislation in general, can be overcome with an effective teaching model.

Conclusion

Understanding how legislation is drafted helps inform how legislation should be interpreted. Although the current approach to statutory interpretation in Canada is contextual and purposive, the legislation itself, including its words and structure, plays a critical role in the overall analysis. Understanding the conventions legislative counsel use, and the constraints they face, helps shed light on why a piece of legislation is the way it is. This helps interpreters formulate and evaluate arguments about why certain interpretations of legislation should be preferred over others, thus enhancing the exercise of statutory interpretation. However, despite the benefits of incorporating knowledge of drafting in statutory interpretation, drafting guides and conventions are seldomly referred to in case law. Further, drafting ideals commonly set for legislative counsel fail to sufficiently reflect the operational realities of legislative drafting. Enhanced education, starting from law school, is required to address these issues and create a new generation of informed interpreters.

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[108] James Duffy, Des Butler & Elizabeth Dickson, "Engaging SEX: Promoting the **S**tatutory Interpretation **EX**perience in Legal Education" (2015) 40:1 Alternative LJ 46.

[109] Duffy, Butler & Dickson, *above* note 108 at 46-48.

[110] *Ibid* at 48.

[111] *Ibid*.