

Commonwealth Association of Legislative Counsel

THE LOOPHOLE



February 2017 (Issue No. 1 of 2017)

THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 1 of 2017

Editor in Chief – John Mark Keyes

Editorial Board – Bethea Christian, Therese Perera, Bilika Simamba

CALC Council

President – Peter Quiggin, First Parliamentary Counsel, Commonwealth of Australia

Vice President – Katy LeRoy, Parliamentary Counsel, New Zealand

Secretary – Ross Carter, Parliamentary Counsel, New Zealand

Treasurer – John Mark Keyes, Sessional Professor, University of Ottawa, Canada

Council Members –

Estelle Appiah, Legislative Drafting Consultant, Ghana

Bethea Christian, Legislative Counsel, Cayman Islands

Don Colagiuri, Parliamentary Counsel, New South Wales, Australia

Philippe Hallée, Director, Legal Operations, Privy Council Office, Canada

Adrian Hogarth, Senior Parliamentary Counsel, Law Commission of England and Wales

Theresa Johnson, Law Draftsman, Hong Kong

Brenda King, First Legislative Counsel for Northern Ireland

Therese R. Perera, P.C., Specialist in Legislation and Legislative Drafting/ Retired Legal Draftsman, Colombo, Sri Lanka

Editorial Policies

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.

Submissions and other correspondence about *The Loophole* should be addressed to —

John Mark Keyes, Editor in Chief, *The Loophole*,

E-mail: calc.loophole@gmail.com

Copyright

All rights are reserved. No part of this publication may be reproduced or transmitted without the permission of the holders of the copyrights. Unless otherwise stated, copyright is held by the authors of the published material. This restriction does not apply to transmission to CALC members or to reproduction for that purpose.

Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

Contents

| | |
|--------------------------------------------------------------------------------------------------------|----|
| Editor’s Notes | 1 |
| Upcoming Conferences..... | 3 |
| Catalogue of Loopholes and CALC Newsletters —New Edition | |
| Magdalene Starke and Nick Horn..... | 4 |
| Legislative Counsel Facilitating Consultation within Government | |
| Rebecca Considine..... | 6 |
| Definitions – A Powerful Tool for Keeping and Effective Statute Book | |
| Louise Finucane | 15 |
| Good Law: How Does It Contribute to the Effectiveness of Legislation? | |
| Hayley Rogers..... | 33 |
| The Frailties of Hansard Evidence Are Many: The Use of House of Assembly Debates in Nova Scotia Courts | |
| Graham Steele..... | 40 |

Editor's Notes

As we move closer to the next CALC Conference, this issue completes the publication of papers from the Edinburgh conference in 2015, which was organized around the theme of legislative counsel as catalysts of democracy and keepers of the statute book. The three conference papers published in this issue squarely address this theme.

Consultation is a hallmark of modern democratic law-making. Much has been written on public consultation, but it has another less well-known aspect. Rebecca Considine's *Legislative Counsel Facilitating Consultation within Government*, considers the need for consistency and coordination in law-making by connecting government agencies. Laws are seldom, if ever, stand-alone pieces of work. They invariably interconnect, and in doing so it is vital that the agencies responsible for them be connected as well. Her article provides valuable guidance for legislative counsel on how this can be done.

A good statute book must not only reflect sound policy, it must also work effectively in communicating that policy. With Louise Finucane's *Definitions – A Powerful Tool for Keeping an Effective Statute Book* we turn from the policy role of legislative counsel to their role in formulating legislative text. Legislation almost invariably contains definitions, and her article focuses on three techniques to improve their quality:

- the “one-term-one-meaning” principle;
- the Dictionary;
- “Just-in-time” definitions.

She provides sound practical advice on how these techniques can and should be deployed in legislative drafting.

The third article is Hayley Rogers' *Good Law: How does It Contribute to the Effectiveness of Legislation?* She provides an account of what the UK Office of Parliamentary Counsel is doing to promote “Good Law”, which is characterized as legislation that is *effective, necessary, clear, coherent* and *accessible*. Its contributions to Good Law include a new manual of [Drafting Guidance](#), improvements to explanatory notes, and much more.

This issue concludes with an article by Graham Steele on reports of parliamentary proceedings as aids to the interpretation of legislation: *The Frailties of Hansard Evidence are Many*. Graham has a unique perspective on this question as both a lawyer and a former member of the Legislative Assembly of the Canadian Province of Nova Scotia. His insights from the inside of legislative debates are intended to spark greater judicial circumspection in the use of Hansard reports.

This issue also includes a short article by Magdelene Starke and Nick Horne who have laboured diligently to update the [CALC Catalogue – Loophole and CALC Newsletter Articles](#). This indispensable tool helps members find past articles in CALC's two periodical publications, for which we owe Magdelene and Nick a debt of thanks.

I trust the articles in this issue will provide useful and stimulating reading, and whet your appetite for more to come from the next conference in Melbourne at the end of March this year. I hope to see you there, and if not, to help you attend virtually through the publication of conference papers in future issues of the Loophole.

John Mark Keyes
Ottawa,
February, 2017

Upcoming Conferences

Commonwealth Law Conference 2017

The 20th Commonwealth Law Conference will be held *in Melbourne, Australia in March 2017*. It will be hosted by the Law Institute of Victoria. The conference will include an extensive program of 48 sessions as well as a gala welcome dinner and social events. Final dates in March 2017 are to be confirmed.

Further information will be available at <https://commonwealthlawyers.com/>.

CALC Conference

The next CALC Conference will also be held *in Melbourne 29-31 March 2017*, in tandem with the CLC Conference. There will also be an optional workshop in Sydney on April 4.

The Conference's theme is *Beginning with the End in Mind – Legislative Drafting in the Context of 21st Century Challenges*. This theme recognises the role of legislative counsel in seeking to ensure that what they draft will be legally effective and will properly reflect the underlying policy. It also reflects the rapidly changing context in which legislative counsel are drafting, including advances in information technology, and the increasing global prominence of human rights.

Further information on the Conference will be available at <http://www.calc.ngo/conferences>.

Catalogue of Loopholes and CALC Newsletters —New Edition

Magdalene Starke and Nick Horn¹

The [CALC Catalogue – Loophole and CALC Newsletter Articles](#) has been updated in May 2016. Here, all significant articles ever published in the *The Loophole* and the *Newsletter* are listed conveniently by subject, accompanied by a thumbnail summary. A new feature is a consolidated list of the catalogued articles, sorted alphabetically by author/title.

Your faithful cataloguers had the rare opportunity to spend some time during a quiet (for parliamentary counsel, at least!) federal election period perusing recent additions to the CALC archive. Which of these particularly piqued our interest? So many! Here are some highlights.

How interesting to explore the drafter's role and how to navigate the divide between policy-making and drafting in Ian Brown's "Sleeping better: ethics for drafters"² ! What informs the discretion a drafter exercises in filling the gaps in policy? This topic is also traversed by Teri Cherkewich in "By sword and shield: legislative counsel's role in advancing and protecting democracy one word (and client) at a time"³. Is there a duty on legislative counsel to uphold an abstract constitutional principle of democracy? Cherkewich traces a chain of delegations beginning with the people as a whole, to the executive branch of government (accountable to the legislative body), to instructing officers developing policy, and then to legislative counsel working with the drafting instructions.

To jolt us out of complacency and steer us away from the temptation of hard and fast doctrinal rules about clearer drafting, we recommend Alison Bertlin's "What works best for the reader? A study on drafting and presenting legislation"⁴. Sometimes a legislative sentence unbroken by the structure of subsections or paragraphs, sometimes even a "sandwich" provision, may be easier to understand than the alternative. Empirical testing such as that analysed in Bertlin's article challenges assumptions and brings to us an objectively different perspective on reading legislation.

We also found of great practical use the wonderfully sharp and concise toolkit for drafters described by Jack Stark in "Tools for statutory drafters"⁵. Duncan Berry's reminder to think about the consequences in "Is it sufficient for legislative counsel merely to state the rules"⁶,

¹ Magdalene Starke is Assistant Legislative Counsel and Nick Horn is Senior Assistant Parliamentary Counsel in the Australian Office of Legislative Counsel, Canberra.

² *The Loophole*, May 2016 (2016.2), p 17.

³ *The Loophole*, Jan. 2016 (2016.1), p 4.

⁴ *The Loophole*, May 2014 (2014.2), p 25.

⁵ *The Loophole*, Apr. 2012 (2012.2), p 51.

⁶ *The Loophole*, Apr. 2012 (2012.2), p 59

and Ruth Sullivan’s “The challenges of transitional law - the Canadian experience”⁷ also stood out for us. But there is so much more! We hope you may be able to use the updated catalogue to explore more efficiently the most recent additions and - of course - the whole corpus of contributions to CALC publications over the years.

The catalogue was first published in *The Loophole*, February 2011, and was previously updated in January 2012. The revised 3rd edition is now available on the shiny new CALC website launched this year in July. Go to <http://www.calc.ngo/publications/papers-articles>.

⁷ *The Loophole*, May 2013 (2013.1), p 14.

Legislative Counsel Facilitating Consultation within Government

Rebecca Considine¹



Abstract:

Sometimes a government wishes to take a whole-of-government approach to particular matters, or there are matters that a particular government department has a special focus on and expertise in. Instructions do not always take account of this, and sometimes the issues only arise as drafting advances. A legislative drafting office can play a valuable role in connecting instructors with other government departments to improve the consistency and quality of the law. The Australian Office of Parliamentary Counsel has a formal process for making these connections. This paper outlines the process and discusses how it is used and the influence it has.

Outline

This paper is about the role of the Office of Parliamentary Counsel (OPC) in Canberra in facilitating consultation within government on certain matters that in broad terms relate to “good government”.

It deals with the following aspects of our role:

- what these matters are;

¹ Senior Assistant Parliamentary Counsel at the Office of Parliamentary Counsel in Canberra, Australia drafting and supervising the drafting of government Bills, parliamentary amendments and other legislative instruments. Ms. Considine has also worked in the Parliament itself during a period of minority government to assist private members, and in Honiara, Solomon Islands, on various legislative drafting projects. She previously spent 5 years practising as a private commercial lawyer in Melbourne and has a Master of Laws specialising in Government and Commercial Law from the Australian National University and an Arts/Law degree from the University of Melbourne.

- how we facilitate consultation on them;
- the time and value this adds to the drafting process;
- how it influences our work.

Scope

About OPC

OPC is the legislative drafting office for the federal government of Australia. OPC is responsible for drafting all federal government Bills and regulations. On request, we also draft other federal government legislative instruments.

This paper mainly relates to our role in facilitating consultation on Bills, though we also have this role in drafting regulations and, on request, other legislative instruments.

Matters we do (and don't) facilitate consultation on

This paper is not about consultation on the main policy ideas to be implemented by a Bill. That is a matter for the instructing agency.

But beneath the main policy ideas in a Bill lie a multitude of smaller policy choices. Some of these smaller policy choices can have a big impact on the fairness of the legislation to those regulated by it and on the balance between the legislature and the executive. For example:

- will there be merits review of any new administrative decisions?
- will there be criminal offences? If so, what level of fault is required to make out an offence?
- will there be other coercive powers (such as powers to enter, search and seize property)? If so, what safeguards are needed?
- are there other possible impacts on human rights and if so, are they defensible and consistent with Australia's international obligations?
- is legislative power to be delegated? If so, will delegated instruments be disallowable by the legislature? How much legislative power is to be delegated, and to whom?

Legislative counsel will know that these issues come up *all the time*.

Often, a legislative counsel is the first person to ask these questions. And even if the questions have been asked during the policy development process that led to the drafting instructions, it is common for them to be first properly considered while the drafting is being done.

So, often, the instructing agency will not have given them any particular thought. Generally, they just want their main policy ideas to work and they want whatever machinery is needed

to make that happen. They are happy to be advised as to what that machinery should be. They are experts in their policy area, not in administrative, criminal or international law.

However, these *are* matters of policy. And so they should be decided by someone other than the legislative counsel.

In jurisdictions where financial and technical resources are very limited, legislative counsel may be the best-placed person to make the decisions and will have dual responsibilities as drafter and policy-maker. However, in the Australian federal jurisdiction, comparatively rich in both kinds of resources, legislative counsel are cautious to ensure that all policy decisions, including legal policy decisions, are made by the instructing agency. If the instructing agency does not have a view about a matter and feels unqualified to form one, or just wants to conform to whatever the policy norms might be, we need a channel to give the instructing agency the benefit of the expertise of those who set those policy norms.

This channel is supplied by our referral process.

OPC has a checklist of matters which require a draft to be referred by OPC to the parts of the federal government bureaucracy that have expertise and whole-of-government responsibilities (our *responding agencies*). When the process works well, it is a good example of legislative counsel fulfilling a role that contributes to democratic government and an effective statute book. It is particularly an example of how a centralised drafting agency can contribute to those ends.

How OPC facilitates consultation

OPC legislative counsel are required to follow [Drafting Directions](#) issued by the First Parliamentary Counsel. Our Drafting Directions are publicly available.² Legislative counsel are consulted before a Drafting Direction is issued or updated. Drafting Directions are updated from time to time as needed.

One of the most frequently updated is Drafting Direction 4.2—*Referral of drafts to agencies*. The main part of this Drafting Direction outlines OPC's role in the referral process. The key things are:

- we refer drafts only within the federal government. Obviously, there are confidentiality issues about referring drafts more widely. While we do this from time to time, that is a different procedure and not covered by this paper;
- we refer drafts to federal government agencies that have responsibilities in relation to a particular policy area, generally because they have a coordinating role or a role in relation to whole-of-government policy that is affected by something in the draft, but sometimes just because of their expertise on a peculiarly technical matter;

² Available at http://www.opc.gov.au/about/draft_directions.htm.

- whatever response we receive, we do not make changes to a draft except on instructions from the instructing agency.

The checklist of matters that require a draft to be referred is in 2 parts at the end of the Drafting Direction. Attachment A is limited to the Attorney-General's Department, and Attachment B covers all other federal government agencies.

Very broadly, the sorts of things that are covered by the lists can be summarised as follows.

Matters of legal policy

These involve:

- matters relating to administrative decisions (for example, whether new administrative decisions are subject to merits review);
- provisions relating to criminal justice matters that depart from the norms set out in the [Attorney-General's Agency's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#);³
- matters affecting courts and tribunals, such as privative clauses or provisions expanding jurisdiction or affecting powers;
- provisions that authorise the making of legislative instruments that depart from defaults set by the [Legislation Act 2003](#), such as instruments that are authorised to modify the provisions of an Act, or that are not disallowable by the Parliament;
- matters of information privacy, access to information and secrecy;
- matters of international law, in particular human rights;
- specific constitutional law issues, such as provisions conferring powers on an officer of a State;
- provisions that alter the standard provisions of certain Acts of general application, such as the [Electronic Transactions Act 1999](#) or the [Freedom of Information Act 1982](#).

Other matters requiring expert input

The following matters also require expert input:

- matters affecting the Australian Public Service or statutory officeholders;
- matters affecting Australian external territories;
- funding and governance of federal government entities;
- technical details such as the use of statistics or geographic coordinates;
- amendments of, or changes affecting, legislation or functions of an agency other than the instructing agency.

³ Available at <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

Legislative counsel flag the matters that arise as they work, or after a draft is prepared. Depending on the size of the Bill, this can take minutes or hours. Once we have a good idea of which issues are raised where in the draft, we use a Microsoft Word macro designed in-house to generate the referral sheet (with pre-filled entries signalling what the issue is and tailored statements of where in the draft it arises) and the email to which the draft and referral sheet are attached (with pre-filled recipients' addresses). Some responding agencies use a specific referral inbox; others have OPC send the email to named individuals; some agencies have OPC do both. In any case, part of the arrangement is that the onus is on the responding agencies to maintain current contact information for OPC.

Time and value added to the drafting process

Timeframes

The standard timeframe for responses is 5 working days. When working out a drafting timetable, I aim to have the draft referred at least 2 weeks before the draft needs to be settled, so that we have at least a week to deal with anything that comes up as a result of the referral.

Of course, this isn't possible some of the time. Maybe we only have 2 weeks for the whole project. Maybe the first draft isn't ready until a couple of days before (or after) the drafting deadline. Maybe a whole lot of new provisions, raising checklist issues, get added in days before (or after) the drafting deadline. Drafts are sometimes referred with a request for responses within 1 to 2 days, or even, occasionally, within hours.

The onus is on the responding agencies to respond. Usually, we get responses within the timeframe we set. If they don't respond, the legislative counsel will not usually chase them up and nor will the instructors. If they ask for more time, the legislative counsel will generally just remind them that it may not be possible to take responses into account if they come too close to the drafting deadline.

Nature of responses and how they are dealt with

Our email referring the draft invites responding agencies to contact us or the instructors with any questions ahead of providing a response. This invitation is often taken up when the timeframe for responding is very short.

If contacted, the legislative counsel would outline how the draft is supposed to work. Sometimes the legislative counsel might outline the instructors' reasons for taking a particular approach, but it is up to the instructors, not the legislative counsel, to make the policy case for the draft.

Responses are emailed to OPC and copied to instructors.

Change requested

Occasionally, a response will object to something in a draft and recommend a change. In this case, the legislative counsel does no more than make sure the instructors are aware of the response and leave it to them to deal with. In most cases, the instructing and responding agencies will reach agreement that there is either a good reason for the way the draft is drafted or that it should be changed in an agreed way.

If they can't agree, and the responding agency decides to persist with their objection, the matter would be handled by more senior people in the agencies and, if it were to remain unresolved, would ultimately have to be sorted out at Ministerial level. Things would rarely get to that level, at least as part of this process. Usually, if someone asks that a change be made as part of this process, and persists with the request following discussion with the instructors, the instructors will agree to make the change.

Explanation needed

Responding agencies commonly ask for an explanation for particular policy choices and recommend that the explanation be included in the explanatory material that accompanies the Bill or instrument. For example, they might seek an explanation of why a particular penalty is considered appropriate, why an offence is strict liability, why a particular administrative decision is not subject to merits review or why the draft displaces a rule provided for by an Act of general application. This sort of questioning anticipates the work done in the Parliament by the committees scrutinising Bills and instruments. There is considerable overlap between the matters covered by the referral process and the matters of concern to these committees, and a committee will ask the Minister to explain in writing if the explanatory materials do not explain a matter to its satisfaction. Making instructors aware of issues during the drafting process gives them the best opportunity to properly consider their reasoning and set it out in the explanatory material.

Human rights issues are perhaps a special case. Australian law requires that Bills are accompanied by a statement of compatibility with human rights under 7 central international human rights treaties to which Australia is party. Often the Human Rights contact will note that justifications for particular aspects of the policy should be noted in the explanatory memorandum and recommend that particular matters be dealt with in the statement of compatibility with human rights. I don't think we know what percentage of drafts are referred to the International Law and Human Rights Branch of the Attorney-General's Department, but I would guess that I identify human rights issues in around two-thirds to three-quarters of the drafts I work on. I don't mean that that percentage of drafts raise concerns or might be inconsistent with human rights obligations; rather, that that percentage of drafts will contain measures that in some way engage the human rights obligations found in the main treaties to which Australia is a party.

Nil response

Often, the response will simply be that there is no comment. This is because many of the matters referred are fairly low-level routinely-arising matters that instructors are happy to have handled according to policy norms. For example, new legislative instruments are nearly always disallowable, merits review is commonly available for new administrative discretions, and privacy protections are maintained for collection of new personal information.

Overall, the quality of the responses we get is good. Routine things that we would not expect to be controversial are mostly treated as routine and uncontroversial; sometimes a responding agency identifies particular sensitivities or alternative views that have been missed by the instructors and drafter.

How the responses influence our work

OPC and responding agencies have learned from each other over the years this process has been in place.

Most obviously, legislative counsel learn from experience what a responding agency is likely to say about particular provisions and can have this discussion with instructors ahead of referring the draft. Over time, this means that the proportion of responses that require no action, or only the inclusion of explanatory material, increases. It does not prevent instructors from adopting policies that are outside the norms, but it helps to ensure that this is generally only done after careful consideration and for good reason, and that instructors are aware of the need for their reasoning to be included in the explanatory material.

I noted above that, in the Australian federal jurisdiction, the legislative counsel is responsible for making drafting decisions (no small matter), while the instructing agency is responsible for the policy decisions (though often content to conform to policy parameters set by a responding agency in relation to the sorts of matters identified above as legal policy decisions). But the existence of these lines of responsibility does not exclude legislative counsel from a role in legal policy development. The referral process is a good communication channel between OPC and responding agencies. This is so even though, much of the time, we leave the instructing and responding agencies to communicate between themselves once we have initiated the process. Most particularly at times when the law is changing (for example, a new judicial decision, or the commencement of a new Act of general application), the referral process allows legislative counsel and the responding agency (in these cases, the Attorney-General's Department) to identify commonly-occurring issues and together to work out solutions that can be widely applied and are effective from the perspective of both the legislative counsel and the responding agency.

Some examples of the law changes during which policy problems and solutions (with drafting implications) were worked out at least partly via the referral process include:

- commencement of the [Criminal Code](#), dealing among other things with the drafting of criminal offences so as to ensure that the appropriate fault element set out in the Code is attracted to the appropriate physical element of the offence and that the imposition of an evidential burden of proof on a defendant is done deliberately and only after careful consideration; and
- commencement of the [Legislation Act 2003](#), dealing among other things with the basic issues of distinguishing instruments of a legislative character from other kinds of instruments and considering the circumstances in which it might be appropriate to provide that a legislative instrument is not disallowable by the Parliament.

Another benefit of the communication channel opened by the referral process is that legislative counsel get to know the names of individuals in responding agencies who might have a view on a matter or some relevant experience, meaning that there is a contact available to discuss an issue with even if the issue is not on the checklist. These sorts of informal contacts can be invaluable in getting issues considered by the appropriate people at an early stage.

Another, minor, benefit of the referral process for law-making generally is that, as in many jurisdictions, OPC legislative counsel tend to outstay their policy-making colleagues over the medium to long-term. This means that our long and regular exposure to the referral process can serve as corporate memory for the responding agency too. A legislative counsel can spot a response that appears anomalous very quickly and, in discussions with the responding agency, can ensure that, if there is a change in approach, the implications are understood and that, if a change in approach is not intended, the response is corrected accordingly.

Are there risks, or downsides? A possible risk could be the relationship between OPC and the responding agencies becoming a little too cosy, with legislative counsel encouraging instructors to fall into line with the policy norms without asking them to properly consider whether the norms are appropriate in their case. Downsides could include legislative counsel and instructors having to spend a lot of time explaining and justifying material to a person who has misconceived something or is pursuing some agenda. These are potential risks and downsides for any sort of regular consultation. I don't think that they are serious issues in our referral process at present.

Conclusion

OPC legislative counsel go through a very structured procedure as part of the drafting process to ensure that matters of interest to particular parts of the Government are seen by the appropriate agencies, as far as possible in a timeframe that allows them to consider what they are looking at and, if they want to respond, to respond in a way that is a useful part of the process. The procedure is not perfect. I have sometimes missed an issue that I should

have referred, and sometimes we get responses that are a bit misconceived or unhelpful. Legislative counsel need to be careful to make sure instructors understand they have a choice, and need not fall into line if they have good reasons to do something differently. The Parliamentary scrutiny committees are still kept busy seeking explanations from Ministers (though not as much as would be the case without this process). But overall, the process contributes to consistency and careful policy-making, which makes it an example of the way that a centralised drafting agency can contribute to the workings of good government and an effective statute book.

Definitions – A Powerful Tool for Keeping and Effective Statute Book

Louise Finucane¹



Abstract

The effective use of definitions can be a powerful tool in drafting reader-friendly and legally effective legislation. This article discusses the important role that definitions play and explores 3 drafting techniques aimed at enhancing the use of definitions in legislation. This article also canvasses the story telling approach to drafting, which is to present legislative provisions to readers in a way that tells them a story. It discusses how the drafting of definitions fits in with the storytelling approach to improve the readability and effectiveness of legislation.

Introduction

Keeping an effective statute book means ensuring that our statutes are user-friendly and legally effective. And this is all about meaning—it's about users of our statutes arriving at the same meaning as was intended when the statute was enacted (which is more or less as we drafted it). Users can have a long and agonising journey arriving at that meaning or a short and pleasant one (well, as pleasant as it can be with legislation).

¹ First Assistant Parliamentary Counsel, Office of Parliamentary Counsel, Australian Capital Territory.

The effective use of definitions can help users arrive at the intended meaning, and can be a powerful tool for user-friendly and legally effective legislation, making it clearer, shorter and easier to navigate. However, the ill-use of definitions can obfuscate meaning and make legislation more complex and difficult to understand, which not only creates difficulties for users but may also lead to the legislation being challenged in court.

Drafting definitions is a large topic, too large to canvass all of it here,² but I would like to talk about 3 drafting techniques we have been exploring in the Australian Office of Parliamentary Counsel.

- The first is the “one term, one meaning” principle in drafting definitions, which is that a term is to have only one meaning in an Act.
- The second is use of the Dictionary, which is to list every defined term in the general definition section (also called the Dictionary) for the Act.
- The third is use of just-in-time definitions, which is to integrate definitions into the narrative of the legislative provisions.

The first 2 techniques, I think, are pretty fundamental for drafters to use in order to produce user-friendly legislation. The third technique is a feature of the storytelling approach to drafting. This paper ends with a case study comparing the traditional approach to drafting with the storytelling approach.

One term, one meaning

In the past, particularly for large Acts of the Australian Commonwealth Parliament, a term or expression was defined to have different meanings for the purposes of different provisions of the Act. For example, in different parts or divisions of an Act, the same term was defined to mean different things. Often these definitions were included in the definition section at the beginning of a part, division, subdivision or section so that the meaning of the term applied for the whole of the part, division, subdivision or section only. These definition sections were in addition to the general definition section that was usually towards the front of the Act (which also may have defined the term in a different way).

However, this approach is unfriendly to users of legislation because they need to identify, and track down, the correct meaning for the particular provision they are concerned with. They may not even be aware that the term has a different meaning in the provision and, if they are aware, they may not know where to find it. This is likely to impede their understanding of the provisions and their confidence and trust in the text. It can also lead to

² There are many other issues that could be discussed about definitions – for example, the use of descriptive, accurate, short and natural labels for definitions (as opposed to nondescript, misleading, long or artificial labels); the location of the Dictionary (should it be located at the beginning or the end of the Act?); drafting relational definitions; identifying that a term is defined (for example, the use of bold italics); and added features showing that a term is defined (for example, the use of asterisks).

uncertainty about the meaning of the term in the particular provision. Uncertainty about meaning can result in ineffective legislation.

If you think about it, it would be a very rare occasion in non-legislative text for different people, things, or places, to be given the same name. For example, in *Oliver Twist*, there weren't 2 different people both called Oliver Twist, or 2 different places both called London. We don't do that in non-legislative text because it's confusing.

For the same reason, we now implement the “one term, one meaning principle” in our office. This requires that each term in an Act should only have one meaning throughout the Act. This means:

- we avoid defining a term to have different meanings in different provisions of the same Act; and
- we avoid defining in one provision of an Act a term that is used in its ordinary meaning in another provision of the Act.

A consequence of applying the “one term, one meaning” principle is that, for more recent Acts, we only have one general definition section (or Dictionary) in our Acts and do not have definition sections at the beginning or end of chapters, parts, divisions, subdivisions or sections.

The Dictionary

When definitions are spread across an Act, it can make it difficult for users to identify that a term is defined and then if it is, find where the definition is. For this reason we have a rule in our office that requires that every term that is defined in an Act must be included in the general definition section for the Act, which we often label “the Dictionary”. This means that the Dictionary will contain both:

- a full definition of the term for the Act (or the “real definition” of the term); and
- a “signpost definition” of the term, indicating the provision where the term is fully defined: signpost definitions refer users to the provision where the real definition of the term is located (which will be outside of the Dictionary).

The benefit of the Dictionary is that it helps users to identify that a term is defined and where to find the definition.

Just-in-time definitions

The storytelling approach

Just-in-time definitions are terms that are defined in the narrative structure of the legislation at the point that is most useful to the reader. That is, the definitions come “just in time”. They are real definitions which are integrated into the narrative of the main or operative provisions, rather than being separated from them by being placed in the Dictionary (though

there will be a signpost definition of them in the Dictionary). Just-in-time definitions relate to something more fundamental about our drafting approach and I think they make more sense if I explain that drafting approach before going on to explain how we set up just-in-time definitions.

That drafting approach is the storytelling approach, which essentially tries to present legislative provisions to readers in a way that tells them a story. Just as a storyteller introduces characters in the story, describes their relationships with each other, the activities they engage in and the events that affect them in a progressive and unfolding way (rather than all at once), so too does the drafter when drafting legislation.

The characters in the legislative story may be individuals or corporate bodies, statutory bodies or non-statutory bodies, governmental bodies or private bodies, any of which may be playing the leading role or a minor role. The events that happen to the characters and the activities they engage in may be many and varied, from being paid money or being granted a licence to committing a criminal offence. And instead of our story starting with “once upon a time”, we start with “the Parliament enacts”.

The storytelling approach involves a number of drafting techniques, but for me the significant ones are drafting in the narrative style and structuring provisions so that the legislative story unfolds progressively, leading readers downwards in the structure from the general operative provisions to the more detailed operative provisions. On this approach, as far as possible, definitions are integrated into the narrative of the legislative story and appear in the story just in time.

This approach differs from our traditional drafting approach to structuring provisions, which followed this basic structure:

- the definitions and interpretive provisions;
- the main or operative provisions.

Using the traditional approach, all terms are fully defined in the Dictionary (or, where the term requires more provisions to define it, in a separate section in the interpretation part or division for the Act within which the Dictionary is located). That is, the real definitions of terms are located in the Dictionary (or interpretation part or division), outside the narrative of the main or operative provisions.

Using the storytelling approach, as far as possible, terms are fully defined inside the narrative of the provisions in the place where the term is most commonly used or with which it has the closest connection in the narrative. That is, the real definitions are located within the narrative of the main or operative provisions, outside of the Dictionary (though there will be a signpost definition for each term in the Dictionary).

Creating just-in-time definitions

We use 2 methods to create just-in-time definitions. The first is the standard narrative method, which is to define the term in bold italics as soon as possible after the first reference to the defined term in the substantive provision. For example, section 550 of the *Fair Work Act 2009*:

550 Involvement in contravention treated in same way as actual contravention

- (1) A person who is **involved in**³ a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

The second method is the bracketed-text method, which is to define the term inside the narrative of the substantive provision. For example, subsection 302(1) of the *Fair Work Act 2009*:

- (1) The FWC may make any order (an ***equal remuneration order***) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

Case study

In 2013 we were instructed to draft a Bill about the governance, performance and accountability of Commonwealth bodies (such as Commonwealth Departments and statutory bodies, both corporate and non-corporate).⁴ It was to deal with things such as the use and management of Commonwealth property, and placed certain obligations on those bodies, such as the preparation of annual reports and financial and performance statements. In terms of a storyline, it was pretty dry and unexciting, even for a drafter.

At the end of the drafting plan stage we had concepts for a number of characters in the legislative story.

The main character was called a “Commonwealth entity”, which covered the Commonwealth bodies the legislation was concerned with. This character was the central

³ For explanatory purposes, yellow highlighting has been used at various places in this paper. However, we do not use highlighting in Commonwealth legislation.

⁴ This Bill became the *Public Governance, Performance and Accountability Act 2013*.

character in the story – the protagonist – and we had a definition that defined what was covered by that term. There were 2 types of Commonwealth entities - “corporate Commonwealth entities” and “non-corporate Commonwealth entities”. This distinction was important for the storyline because different consequences flowed depending on the type of entity. We also had definitions for those 2 terms.

The second character was the “accountable authority”, which was the person or body in charge of the Commonwealth entity.

And finally the third character was the “official” – the employees and members of the Commonwealth entity who did the day-to-day work of the entity (for example public servants working in the entity).

If we had taken the traditional drafting approach (and defined all of the terms in one part of the Act, separate from the main provisions in which they appeared), the provisions may have looked something like those in Attachment A:

- the main provisions start with the duties that apply to accountable authorities; and
- the full definitions of the terms “Commonwealth entity”, “corporate Commonwealth entity”, “non-corporate Commonwealth entity”, “accountable authority” and “official” are either in the Dictionary, or if they are too long to include there, in their own sections in the interpretation part or division in which the Dictionary is located (separate from the main provisions).

The approach in Attachment A gives no indication of the relationship between the characters in the story or where they fit in the hierarchy. This is because the definitions have to go in alphabetical order (rather than in the order of their importance) and they are separated from each other by other definitions (rather than being grouped together).

The story starts with the duties of accountable authorities and officials, assuming that the reader knows who these characters are. This would mean that readers would have to do the initial work of making the connections between the main characters for themselves.

However, we took the storytelling approach illustrated in Attachment B. We introduced the characters first, in order of importance, and went a little way towards describing their relationship before going on to provide for what they were to do or not do.

We started with the main character in the story – Commonwealth entities – and then went on to describe the 2 types of Commonwealth entities and what Commonwealth entities were made up of – the accountable authorities and officials. Having identified the characters in descending order of importance, the rest of the legislative story dealt with the activities that they were or were not to engage in.

We took this approach to allow the legislative story to unfold progressively and to expressly make connections for users so that they didn’t need to do that for themselves. This was

aimed at enhancing legal effectiveness and user-friendliness – helping users to arrive at the meaning that we intended and making their journey to that meaning as pleasant as possible.

Conclusion

The drafting of definitions is a large topic and this paper canvasses 3 drafting techniques about the good use of definitions:

- the “*one term, one meaning*” principle – ensuring that terms do not have different meanings throughout the legislation to make legislation easier to understand and aid clarity of meaning;
- the *Dictionary* – listing every term that is defined (whether as a real or signpost definition) to help users first identify that a term is defined and then let them know where to find it, which aids users in navigating and comprehending the legislation;
- *just-in-time definitions* – integrating definitions into the narrative of the legislative story to allow that story to unfold progressively so as to enhance the user-friendliness of the provisions.

An essential element of the role of drafters in keeping an effective statute book is to draft legislation so that its users are able to arrive at the intended meaning as easily as possible. The storytelling approach, in conjunction with the good use of definitions, can help greatly with that.

Attachment A - Traditional Drafting Approach

Part 2-2 - Accountable authorities and officials

Division 1 - Guide to this Part

14 Guide to this Part

This Part is about the accountable authorities and officials of Commonwealth entities.

Accountable authorities

There are general duties that apply to all accountable authorities. Those duties are set out in sections 15 to 19.

.....

Division 2 - Accountable authorities

Subdivision A - General duties of accountable authorities

15 Duty to govern the Commonwealth entity

(1) The **accountable authority** of a **Commonwealth entity** must govern the entity in a way that:

- (a) promotes the proper use and management of public resources for which the authority is responsible; and
- (b) promotes the achievement of the purposes of the entity; and
- (c) promotes the financial sustainability of the entity.

Note: Section 21 (which is about the application of government policy) affects how this duty applies to accountable authorities of non-corporate Commonwealth entities.

(2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.

.....

Part 1-2 - Definitions⁵

Division 1 - Guide to this Part

7 Guide to this Part

This Part is about the terms that are defined in this Act.

Division 2 has the Dictionary (see section 8). The Dictionary is a list of every term that is defined in this Act. A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

⁵ In Attachment A and Attachment B, for explanatory purposes the general definition section is placed after the main provisions. However, in Commonwealth legislation the general definition section for an Act is usually placed at the beginning of the Act (as opposed to the end). For this reason, the section numbering is out of order in the attachments.

Division 2 - Interpretation

8 The Dictionary

In this Act:

accountable authority: see section 9.

accounting standards means the accounting standards issued by the Australian Accounting Standards Board, as in force or applicable from time to time.

Agency Head has the meaning given by section 7 of the *Public Service Act 1999*.

arrangement includes a contract, agreement, deed or understanding.

bankable money means relevant money that can be deposited in a bank.

Commonwealth company means a Corporations Act company that the Commonwealth controls. However, it does not include a company that is a subsidiary of:

- (d) a Commonwealth company; or
- (e) a corporate Commonwealth entity; or
- (f) the Future Fund Board of Guardians.

Commonwealth entity means:

- (g) a Department of State; or
- (h) a Parliamentary Department; or
- (i) a listed entity; or
- (j) a body corporate that is established by a law of the Commonwealth; or
- (k) a body corporate that:
 - (i) is established under a law of the Commonwealth (other than a Commonwealth company); and
 - (ii) is prescribed by an Act or the rules to be a Commonwealth entity;

but does not include the High Court of Australia or the Future Fund Board of Guardians.

corporate Commonwealth entity means a Commonwealth entity that is a body corporate.

Corporations Act company means a body corporate that is incorporated, or taken to be incorporated, under the *Corporations Act 2001*.

CRF (short for Consolidated Revenue Fund) means the Consolidated Revenue Fund referred to in section 81 of the Constitution.

Department of State:

(l) includes any body (except a body corporate), person, group of persons or organisation that is prescribed by an Act or the rules in relation to a specified Department of State; and

(m) excludes any part of a Department of State that is a listed entity.

director of a Commonwealth company has the meaning given by the *Corporations Act 2001*.

eligible delegate: see subsection 108(2).

enabling legislation for a Commonwealth entity that is established by or under an Act or legislative instrument means that Act or legislative instrument.

finance law means:

(n) this Act; or

(o) the rules; or

(p) any instrument made under this Act; or

(q) an Appropriation Act.

Finance Minister means the Minister who administers this Act.

Finance Secretary means the Secretary of the Department.

Future Fund Board of Guardians means the Future Fund Board of Guardians established by section 34 of the *Future Fund Act 2006*.

governing body of a corporate Commonwealth entity means:

(r) for a corporate Commonwealth entity that has a board, council or other governing body - that board, council or governing body; and

(s) otherwise - all of the members of the entity.

government business enterprise means a Commonwealth entity or Commonwealth company that is prescribed by the rules.

government policy order means an order that specifies a policy of the Australian Government that is to apply in relation to one or more corporate Commonwealth entities or Commonwealth companies.

intelligence or security agency has the same meaning as in section 85ZL of the *Crimes Act 1914*.

listed entity means:

(t) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State); or

(u) any combination of bodies (except bodies corporate), persons, groups of persons or organisations (whether or not part of a Department of State);
that is prescribed by an Act or the rules to be a listed entity.

listed law enforcement agency means a law enforcement agency (within the meaning of section 85ZL of the *Crimes Act 1914*) that is prescribed by the rules.

Minister includes a Presiding Officer.

money includes cheques and similar instruments.

non-corporate Commonwealth entity means a Commonwealth entity that is not a body corporate.

official: see section 10.

.....

9 Accountable authorities

The following table sets out the person or body that is the **accountable authority** of a Commonwealth entity:

| Accountable authorities | | |
|--------------------------------|---------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| Item | If the Commonwealth entity is: | then the accountable authority of the entity is: |
| 1 | a Department of State | the Secretary of the Department. |
| 2 | a Parliamentary Department | the Secretary of the Department. |
| 3 | a listed entity | the person or group of persons prescribed by an Act or the rules to be the accountable authority of the entity. |
| 4 | a body corporate | the governing body of the entity, unless otherwise prescribed by an Act or the rules. |

10 Officials

Officials of Commonwealth entities (other than listed entities)

- (1) An **official** of a Commonwealth entity (other than a listed entity) is a person who is in, or forms part of, the entity.
- (2) Without limiting subsection (1), an **official** of a Commonwealth entity (other than a listed entity) includes:
 - (v) a person who is, or is a member of, the accountable authority of the entity; or
 - (w) a person who is an officer, employee or member of the entity; or

- (x) a person, or a person in a class, prescribed by an Act or the rules to be an official of the entity.
- (3) Despite subsections (1) and (2), each of the following is not an **official** of a Commonwealth entity (other than a listed entity):
 - (y) a Minister;
 - (z) a judge;
 - (aa) a consultant or independent contractor of the entity (other than a consultant or independent contractor of a kind prescribed by an Act or the rules for the purposes of paragraph (2)(c));
 - (bb) a person, or a person in a class, prescribed by an Act or the rules not to be an official of the entity.

Officials of listed entities

- (4) An **official** of a Commonwealth entity that is a listed entity is a person who is prescribed by an Act or the rules to be an official of the entity.

Attachment B - Storytelling Drafting Approach

Part 2-1 - Core provisions for this Chapter

Division 1 - Guide to this Part

9 Guide to this Part

This Part has the core provisions for this Chapter, which is mainly about Commonwealth entities. (For Commonwealth companies, see Chapter 3.)

It:

- defines what a Commonwealth entity is (see section 10); and
- defines what the 2 types of Commonwealth entities - corporate Commonwealth entities and non-corporate Commonwealth entities - are (see section 11); and
- defines who the accountable authority of the entity is (see section 12); and
- defines who the officials of the entity are (see section 13).

Division 2 - Core provisions for this Chapter

10 Commonwealth entities

(1) A *Commonwealth entity* is:

(cc) a Department of State; or

(dd) a Parliamentary Department; or

(ee) a listed entity; or

(ff) a body corporate that is established by a law of the Commonwealth; or

(gg) a body corporate that:

(i) is established under a law of the Commonwealth (other than a Commonwealth company); and

(ii) is prescribed by an Act or the rules to be a Commonwealth entity.

Note: Commonwealth companies are not Commonwealth entities because they are not covered by this subsection. Chapter 3 deals with Commonwealth companies.

(2) However, the High Court and the Future Fund Board of Guardians are not *Commonwealth entities*.

11 Types of Commonwealth entities

There are 2 types of Commonwealth entities:

- (hh) a **corporate Commonwealth entity**, which is a Commonwealth entity that is a body corporate; and
- (ii) a **non-corporate Commonwealth entity**, which is a Commonwealth entity that is not a body corporate.

Note: Corporate Commonwealth entities are legally separate from the Commonwealth, whereas non-corporate Commonwealth entities are part of the Commonwealth.

12 Accountable authorities

- (1) Each Commonwealth entity has an **accountable authority**.
- (2) The following table sets out the person or body that is the **accountable authority** of a Commonwealth entity:

| Accountable authorities | | |
|--------------------------------|---------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| Item | If the Commonwealth entity is: | then the accountable authority of the entity is: |
| 1 | a Department of State | the Secretary of the Department. |
| 2 | a Parliamentary Department | the Secretary of the Department. |
| 3 | a listed entity | the person or group of persons prescribed by an Act or the rules to be the accountable authority of the entity. |
| 4 | a body corporate | the governing body of the entity, unless otherwise prescribed by an Act or the rules. |

13 Officials

- (1) Each Commonwealth entity has **officials**.

Officials of Commonwealth entities (other than listed entities)

- (2) An **official** of a Commonwealth entity (other than a listed entity) is a person who is in, or forms part of, the entity.
- (3) Without limiting subsection (2), an **official** of a Commonwealth entity (other than a listed entity) includes:
 - (jj) a person who is, or is a member of, the accountable authority of the entity; or
 - (kk) a person who is an officer, employee or member of the entity; or
 - (ll) a person, or a person in a class, prescribed by an Act or the rules to be an official of the entity.

- (4) Despite subsections (2) and (3), each of the following is not an **official** of a Commonwealth entity (other than a listed entity):
- (mm) a Minister;
 - (nn) a judge;
 - (oo) a consultant or independent contractor of the entity (other than a consultant or independent contractor of a kind prescribed by an Act or the rules for the purposes of paragraph (3)(c));
 - (pp) a person, or a person in a class, prescribed by an Act or the rules not to be an official of the entity.

Officials of listed entities

- (5) An **official** of a Commonwealth entity that is a listed entity is a person who is prescribed by an Act or the rules to be an official of the entity.

Part 2-2 - Accountable authorities and officials

Division 1 - Guide to this Part

14 Guide to this Part

This Part is about the accountable authorities and officials of Commonwealth entities.

Accountable authorities

There are general duties that apply to all accountable authorities. Those duties are set out in sections 15 to 19.

.....

Division 2 - Accountable authorities

Subdivision A - General duties of accountable authorities

15 Duty to govern the Commonwealth entity

- (1) The **accountable authority** of a **Commonwealth entity** must govern the entity in a way that:
- (qq) promotes the proper use and management of public resources for which the authority is responsible; and
 - (rr) promotes the achievement of the purposes of the entity; and
 - (ss) promotes the financial sustainability of the entity.

Note: Section 21 (which is about the application of government policy) affects how this duty applies to accountable authorities of non-corporate Commonwealth entities.

- (2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.

....

Part 1-2 - Definitions

Division 1 - Guide to this Part

7 Guide to this Part

This Part is about the terms that are defined in this Act.

Division 2 has the Dictionary (see section 8). The Dictionary is a list of every term that is defined in this Act. A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

Division 2 - The Dictionary

8 The Dictionary

In this Act:

accountable authority: see subsection 12(2).

accounting standards means the accounting standards issued by the Australian Accounting Standards Board, as in force or applicable from time to time.

Agency Head has the meaning given by section 7 of the *Public Service Act 1999*.

arrangement: see subsection 23(2).

authorised investment: see subsection 58(8).

bank means:

(tt) an authorised deposit-taking institution (within the meaning of the *Banking Act 1959*); or

(uu) the Reserve Bank of Australia; or

(vv) a person who carries on the business of banking outside Australia.

bankable money: see subsection 55(2).

Commonwealth company: see subsection 89(1).

Commonwealth entity: see subsections 10(1) and (2).

corporate Commonwealth entity: see paragraph 11(a).

Corporations Act company means a body corporate that is incorporated, or taken to be incorporated, under the *Corporations Act 2001*.

CRF (short for Consolidated Revenue Fund) means the Consolidated Revenue Fund referred to in section 81 of the Constitution.

Department of State:

(ww) includes any body (except a body corporate), person, group of persons or organisation that is prescribed by an Act or the rules in relation to a specified Department of State; and

(xx) excludes any part of a Department of State that is a listed entity.

director of a Commonwealth company has the meaning given by the *Corporations Act 2001*.

eligible delegate: see subsection 108(2).

enabling legislation for a Commonwealth entity that is established by or under an Act or legislative instrument means that Act or legislative instrument.

finance law means:

(yy) this Act; or

(zz) the rules; or

(aaa) any instrument made under this Act; or

(bbb) an Appropriation Act.

Finance Minister means the Minister who administers this Act.

Finance Secretary means the Secretary of the Department.

Future Fund Board of Guardians means the Future Fund Board of Guardians established by section 34 of the *Future Fund Act 2006*.

governing body of a corporate Commonwealth entity means:

(ccc) for a corporate Commonwealth entity that has a board, council or other governing body - that board, council or governing body; and

(ddd) otherwise - all of the members of the entity.

government business enterprise means a Commonwealth entity or Commonwealth company that is prescribed by the rules.

government policy order: see subsections 22(1) and 93(1).

intelligence or security agency has the same meaning as in section 85ZL of the *Crimes Act 1914*.

listed entity means:

- (eee) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State); or
- (fff) any combination of bodies (except bodies corporate), persons, groups of persons or organisations (whether or not part of a Department of State);

that is prescribed by an Act or the rules to be a listed entity.

listed law enforcement agency means a law enforcement agency (within the meaning of section 85ZL of the *Crimes Act 1914*) that is prescribed by the rules.

Minister includes a Presiding Officer.

money includes cheques and similar instruments.

non-corporate Commonwealth entity: see paragraph 11(b).

official: see subsections 13(2), (3), (4) and (5).

Good Law: How Does It Contribute to the Effectiveness of Legislation?

Hayley Rogers¹



Abstract

*The Good Law initiative is led by the UK Office of the Parliamentary Counsel (OPC) in London, in partnership with key stakeholders, in particular The National Archives (TNA) as hosts of legislation.gov.uk. The initiative aims to promote law that is **effective, necessary, clear, coherent** and **accessible**. This article aims to explain the background to the launch of the initiative, and what it has achieved so far in terms of contributing to the effectiveness of legislation.*

Background

The [Good Law](#) initiative was launched by the UK Office of the Parliamentary Counsel (OPC) in April 2013 in response to concerns over the complexity and volume of legislation and evidence of the changing audience for it, based on research carried out by the UK's National Archives (TNA) on users of legislation.gov.uk, the government website for UK legislation.

Its vision is Good Law: law that is **effective, necessary, clear, coherent** and **accessible**.

OPC lead the overall initiative but do so in partnership with key stakeholders, including TNA, the UK Parliament, the policy profession within government, lawyers, legal publishers and academics.

¹ Parliamentary Counsel, Office of the Parliamentary Counsel (UK), London.

Concerns over complexity and volume of legislation

Prompted by concerns expressed by judges and parliamentarians, OPC commissioned a review of the causes of perceived complexity of legislation. The results of the review were published in a report entitled “When Laws Become Too Complex”.²

This report highlighted a number of factors behind actual and perceived complexity of legislation, including its sheer volume, the language and structure of Acts and statutory instruments, the mixture of freestanding and amending provision, and the difficulty of accessing the up-to-date text. It also drew attention to shortcomings in the policy-making process.

A changing audience

The publication of the report coincided with a greater understanding of the changing audience for legislation. This understanding was prompted by research undertaken by TNA on users of legislation.gov.uk.

Lawyers who qualified in pre-digital days were used to a world where those affected by legislation accessed it primarily through legally qualified intermediaries. The lawyers looked to books (the Public General Acts, or commercially published updated sets of statutes or handbooks) in order to find legislative text.

With the growth in the internet and its availability and use, the way in which those affected by legislation gain access to it has changed rapidly. TNA record around 2 to 3 million unique visitors to legislation.gov.uk each month, and their research indicates that around 70 to 80% of these are not legally qualified. So users of legislation are accessing the raw legislative text directly, more often than not without the benefit of legal advice.

In an effort to find out more about how these new users responded to legislation, and whether particular drafting techniques aided or hindered comprehensibility, OPC conducted some research in partnership with TNA. The outcome of this research has been reported in this journal previously and has provoked much interest³.

Vision for Good Law

The vision for what “good law” might look like evolved from a consideration within OPC of these developments and how as a drafting office we might respond to them. Given OPC’s role in drafting legislation, our focus throughout has been on UK primary and secondary legislation only: we viewed case law as beyond our remit. So we are using “good law” to mean “good legislation”.

² <https://www.gov.uk/government/publications/when-laws-become-too-complex>.

³ Alison Bertlin, “What works best for the reader? A study on drafting and presenting legislation” *The Loophole*, May 2014 (2014.2) 25: <http://www.calc.ngo/sites/default/files/loophole/may-2014.pdf>.

OPC posited that “good” law has five main characteristics: it is *effective, necessary, clear, coherent* and *accessible*. I shall examine each in turn.

Effective

OPC began from the premise that legislation must be effective: it must achieve what it sets out to achieve, in policy terms. However beautifully drafted and easy to access, legislation that fails to achieve its stated aim is worthless.

Necessary

The traditional starting point for legislative counsel is that the purpose of legislation is to change the law. If legislation is not needed to achieve a particular legal outcome (because, for example, particular behaviour is already a criminal offence) then legislation that purports to do so is unnecessary. The same could be said of legislation that is declaratory or presentational in nature.

The risk of enacting unnecessary legislation is that courts may be tempted to give it a legal effect on the basis that “it must have been intended to change the law” – which may of course mean it does not in fact pass the “effectiveness” test, because it does not achieve the intended policy outcome.

Clear

Given the wide readership of legislation, OPC encourages its legislative counsel to take seriously the need to express legislation in as clear and intelligible a way as possible. There are of course limits to what is possible, but clear and clearly expressed legislation is nevertheless a worthwhile goal.

Coherent

UK Bills are often a mixture of freestanding and amending provision. It is not always easy for legislative counsel to work out where to locate new provisions, and this results in a fragmented statute book that can be very difficult to navigate, particularly in areas where there is a lot of existing legislation. A coherent and logical approach would make legislation easier to find and understand.

Accessible

In some ways this characteristic encompasses many of the others: if law is “good” it should be possible to locate it and understand what you are looking at. The up-to-date text of legislation should be readily available in a range of formats.

How do we get there?

Having identified characteristics of “good law”, the next step is of course to consider how it might be achieved. OPC has focused on two areas: the quality of the statute book and the user experience.

The quality of the statute book may be seen as influenced by the content of legislation (is it necessary?) and its language and style (is it clear?).

Factors affecting the user experience of legislation can be identified as the architecture of the statute book (how coherent is freestanding or amending legislation?) and the way in which it is published (how accessible is the text?).

Examining the user experience has led OPC back to a consideration of the readers of legislation, in particular who they are, what needs they have, and what knowledge and assumptions they bring when reading legislation.

OPC’s earlier research and that carried out by TNA have been helpful in all these respects. TNA have identified three “personas” representing the primary “types” of users of legislation. The first is the persona TNA call “Mark Green”, who represents users who are not legally qualified but need to use legislation in the course of their work (such as environmental health officers; the police; head teachers). TNA think these make up around 70 to 80% of their users. The second is the “Jane Booker” persona, who stands for all legally qualified users of legislation.gov.uk (around 10 to 15% of legislation.gov.uk users). The third is the “Heather Cole” persona, a concerned citizen looking to establish her rights (for example to special educational provision for a child), and makes up 10 to 15% of users of legislation.gov.uk.

Of course, many legally qualified users of legislation will access it via subscription services rather than relying on legislation.gov.uk, but bearing these personas in mind has helped us consider and evaluate our readers’ needs. It has also helped us to consider what knowledge and assumptions they bring when reading legislation. TNA have found that non-legally qualified users of legislation.gov.uk will tend to assume a piece of legislation they are looking at is up-to-date, in force, and applies in the part of the UK in which they live. Lawyers may bring different assumptions, and OPC’s research on users of legislation uncovered a surprising lack of understanding of matters that legislative counsel tend to take for granted, such as the basic structural building blocks of legislative text (sections; subsections; paragraphs etc.).

What is happening so far?

OPC’s aim has been to lead, or encourage others to initiate, projects contributing to all four strands identified above: content, language and style, architecture of the statute book, and publication.

Content: Is legislation needed?

OPC has been working closely with the team supporting the Cabinet’s Parliamentary Business and Legislation Committee (PBL Committee) and policy professionals within government to promote good law principles and awareness of legislation as just one of a range of regulatory solutions.

For example, the standard form that departments are required to submit as part of the bidding process for a place in the legislative programme requires them to give details of what legislation they need, and why their aims cannot be achieved without primary legislation. This is then examined by PBL Committee when planning the legislative programme.

OPC also helps run training sessions for departmental policy officials to enable them to gain an understanding of what can and cannot be achieved by legislation. As mentioned above, the policy-making process can itself result in unnecessary complexity in legislative outcomes.

Language and style: is legislation clear and comprehensible?

OPC has updated its in-house drafting guidance and keeps it under review in the light of research and user feedback. The guidance now highlights the importance of clarity and consistency, and discusses techniques for achieving them. The guidance is publicly available⁴.

OPC operates internal review mechanisms as bills are drafted and encourages user feedback. The aim is to create a feedback loop so that unhelpful and confusing drafting techniques are quickly identified, and good practice is adopted across the office.

A “hub” of secondary legislation drafters has been in place since March 2016. An experienced OPC legislative counsel is seconded to the hub and provides drafting advice and support to the government lawyers who work there. The hub’s aim is to provide a centre of excellence for the drafting and handling of secondary legislation.

OPC legislative counsel run training for government lawyers who draft secondary legislation. They also contribute to courses aimed at Commonwealth drafters.

Architecture of the statute book: is legislation coherent?

With the Law Commission for England and Wales and the Attorney General’s Office, OPC encourages departments to consider consolidation of their primary and secondary legislation.

4

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454628/guidancebook_August_2015.pdf.

Consolidation is, however, often a lengthy and laborious process, and so an alternative is to gather together legislation on a topic-by-topic basis in virtual form. Some “virtual” consolidation of legislation by subject matter has been developed by individual departments – see for example www.legislation.gov.uk/defralex . This pulls together up-to-date primary and secondary legislation belonging to one government department (the Department for the Environment, Food and Rural Affairs - DEFRA) and allows it to be searched by subject matter. DEFRA, TNA and OPC have publicised this work and promoted it to other departments.

Publication: is legislation accessible?

Under the heading of “publication”, OPC and TNA have supported projects relating to access to legislative text and also explanatory material intended to help users understand legislation more easily.

Up-to-date legislation.gov.uk

As part of the Open Government Partnership, the UK government committed to bringing the primary legislation on legislation.gov.uk up-to-date and to keeping it up-to-date. It has made great progress in doing so. Once this is done, the same processes, methods and tools can be applied to the task of bringing the secondary legislation up-to-date.

The next version of legislation.gov.uk will make it easier to see what legislation is wholly, partially or not yet in force and navigate text using a range of digital formats. The territorial application of legislation will be easier to find, and the plan is to include links to related legislative material.

New format Explanatory Notes

Explanatory Notes for Bills have been overhauled, and a new format has been in use since 2015. The project to re-design the format and content of the Notes gathered feedback from users and involved Parliament, OPC and departments working together.

The improved content of Explanatory Notes now includes a greater use of alternative ways of presenting material (such as flow charts and diagrams), contents pages, clearer explanations of the effect of provisions and reduced duplication of material in the Bill itself.

Effect of amendments made by Bills

Many Bills amend existing legislation, often by making detailed textual amendments. It can be very hard for parliamentarians to see what the effect of an amending Bill is on the existing statute book. A solution is to produce the text of an Act as amended by a Bill, showing the effect the Bill’s amendments would have on the existing legislation.

The draft Protection of Charities Bill, published in October 2014, made a number of amendments to the *Charities Act 2011*. A “proposed version” of the *Charities Act 2011*,

showing the effect of the Bill amendments, was published alongside the draft Bill, and was widely welcomed.

Drafting, amending and publishing tools

A joint project between OPC, TNA and Parliament aims to produce a new tool to enable an “end-to-end” process for drafting, amending and publishing Bills and Acts. Once implemented, this will make production of “as proposed to be amended” text of Acts much easier and therefore much more likely to happen as a matter of routine. It will also make it easier to keep legislation.gov.uk up-to-date.

What gets in the way?

Clearly there is always more that could be done to produce and promote good law. But as all legislative counsel know there are obstacles to achieving the best possible outcome. These include the time pressures under which legislation is often produced, the innate complexity of some areas of policy, and the existing legislative landscape, which forms the context in which any new legislation is required to operate.

Finally

Concerns over complexity of legislation are not new. Edward VI (king of England from 1537 to 1553) is reported to have expressed the wish that the “superfluous and tedious statutes” might be “brought into one sum together and made more plain and short”.⁵ But given the far more extensive audience for legislation in the digital age, it no longer seems acceptable as legislative counsel to shrug our shoulders and view this as inevitable. The Good Law initiative is an attempt to take the quality of legislation seriously, and as such to enhance its effectiveness.

⁵ King Edward’s discourse on the Reformation of Abuses, cited in Courtney Ilbert, *The Mechanics of Law-making*, (Columbia University Press: New York, 1914) at 25.

The Frailties of Hansard Evidence Are Many: The Use of House of Assembly Debates in Nova Scotia Courts

Graham Steele¹



Abstract

The Supreme Court of Canada has permitted the use of Hansard for the purposes of statutory interpretation, though within strict limits. A review of a decade's worth of Nova Scotia court decisions reveals, however, that the courts rarely instruct themselves on the proper use of Hansard. As a result, they receive it too often in evidence, and use it in inappropriate ways. The author argues that the courts will lead themselves into difficulty if they are not more cognizant of Hansard's many frailties.

Introduction

How do Nova Scotia courts use the debates of the House of Assembly?

My analysis of the caselaw on this question is supplemented by my experience as a member of the Nova Scotia House of Assembly. This mixture of doctrine and experience may offer a unique pathway to an understanding of how the courts are using—and I will argue misusing—evidence of debates in the Nova Scotia House of Assembly.

¹ Assistant Professor of Business Law, Rowe School of Business, Dalhousie University. Member of the House of Assembly for Nova Scotia (Canada) from March 2001 until September 2013 and Finance Minister from 2009 to 2012..

It is, in fact, my experience as an elected member that led me to this topic. When I was in law school in the mid-1980s, I learned that Hansard was generally not admitted in evidence. By the late 1990s, when I left the practice of law and entered politics, I was vaguely aware that the court's view of Hansard had evolved, but I wasn't sure how. On some days when I spoke in the House of Assembly—particularly as a minister speaking to the principle of the bill on second reading—I wondered whether and how my words might later be used in court.

After leaving politics and returning to the study of law, I delved into the recent evolution of the judicial use of Hansard, which starts with two key Supreme Court of Canada decisions: *R. v. Morgentaler*² in 1993, and *Re Rizzo & Rizzo Shoes*³ in 1998. *Morgentaler* and *Rizzo* are the leading cases on the admissibility and use of Hansard, and as we will see, the rule laid down in them is reasonably clear: Hansard is admissible, but it should not be given much weight.

Still, I had a nagging doubt—born of some experience from my practicing days—as to whether the courts were consistently applying the *Morgentaler/Rizzo* rule. So the heart of this paper is a systematic analysis of how Nova Scotia's courts have been using Hansard. I identified every reported Nova Scotia decision in the period 2004–2014 in which there is a reference to Hansard, and then asked the question: is the *Morgentaler/Rizzo* rule being followed?

I was surprised by the results. Nova Scotia's courts are using Hansard more, and giving it more weight, than one would expect in light of the *Morgentaler/Rizzo* rule. This is partly the fault of the courts, who rarely instruct themselves on the use of Hansard; and it is partly the fault of counsel, who seem ready to present the court with great tracts of Hansard in the hope that something will stick. But the fundamental problem with the use of Hansard evidence can be traced back to a flaw in the *Morgentaler/Rizzo* rule itself.

The Leading Canadian Cases: *Morgentaler* and *Rizzo*

Morgentaler

There are two leading Canadian cases on the judicial use of Hansard, and the first of these is *Morgentaler*. It is, by coincidence, a case from Nova Scotia.

In early 1989, Dr. Henry Morgentaler announced his intention to open an abortion clinic in Halifax. The provincial government was opposed. First it adopted a regulation prohibiting abortions performed outside a hospital and denying medical services insurance for any abortion performed outside a hospital. The government later repealed this regulation, and introduced into the House of Assembly the *Medical Services Act*, which had the same effect.

² [1993] 3 SCR 463, 1993 CanLII 74 (SCC), (*Morgentaler*).

³ [1998] 1 SCR 27, 1998 CanLII 837 (SCC), (*Rizzo*).

The bill was debated and approved by the House of Assembly, and received Royal Assent shortly afterwards.

Despite the prohibition in the *Medical Services Act*, Morgentaler opened the clinic and, in October 1989, performed 14 abortions. He was charged with 14 counts of violating the *Medical Services Act*. Morgentaler acknowledged having performed the abortions, but challenged the constitutionality of the law. The case eventually made its way to the Supreme Court of Canada.

The question before the court was whether the *Medical Services Act* was, in pith and substance, criminal law, and therefore *ultra vires* the provincial legislature. Justice Sopinka, writing for a unanimous bench, concluded it was. In reaching that conclusion, Sopinka J. made extensive references to Hansard and other extrinsic materials.

Sopinka J. addressed the question of whether Hansard is admissible, though perhaps not in the detail that would truly impress the point on lower courts. He traced the early rejection of Hansard evidence, and the more recent relaxation of that rule:

The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (*Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in *Reference re Residential Tenancies Act, 1979*, *supra*, at p. 721 as "inadmissible as having little evidential weight", and was excluded in *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, at p. 319, and *Attorney General of Canada v. Reader's Digest Association (Canada) Ltd.*, [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. (Emphasis added.)⁴

The last, underlined sentence is the one most commonly cited with respect to Hansard evidence. The frequent citation of that one sentence, though, has tended to erase a very important aspect of the *Morgentaler* rule: that Sopinka J.'s analysis was expressly limited to constitutional cases.

All the precedents cited by Sopinka J. for the use of Hansard are constitutional cases. A passage from Peter Hogg's *Constitutional Law of Canada*, quoted with approval by Sopinka J., also makes a clear distinction between constitutional cases and others:

Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The

⁴ Above n. 2 at 484.

relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. (Emphasis added.)⁵

There is therefore a very good argument to be made that *Morgentaler* is authority for the admissibility of Hansard *only* in constitutional cases, and perhaps only in pith-and-substance cases. Sopinka J. recognized that the Nova Scotia government was sophisticated enough to be aware that it was approaching constitutional boundaries. The court needed to get behind the actual words of a statute and ask: what is this law *really* about? In such a case, it is unremarkable that the court should look at the entire factual context, including what was said in the elected assembly.

A great deal of extrinsic evidence was adduced in the *Morgentaler* case, and Hansard from the House of Assembly was only one small part of it. Sopinka J. referred (both directly and by incorporating reasons from Freeman J.A. in the Nova Scotia Court of Appeal) to

- a ministerial statement by the Minister of Health;
- remarks by the Minister of Health in the budget debate; and
- second-reading speeches by the Minister of Health, the opposition health critic, and an opposition backbencher.

In light of all the extrinsic evidence, Sopinka J. concluded that the *Medical Services Act* was, in pith and substance, criminal law. It was therefore *ultra vires* the province.

The important question of whether Hansard is limited to constitutional cases, or whether it could be used in run-of-the-mill cases of statutory interpretation, would have to wait for another day, and that day turned out to be *Rizzo*.

Rizzo Shoes

At the heart of *Rizzo* was a question of statutory interpretation. When a company went bankrupt (as *Rizzo & Rizzo Shoes Ltd.* had), did the Ontario *Employment Standards Act*⁶ apply so as to entitle employees to termination pay, vacation pay and severance? The key section read as follows:

⁵ *Ibid.*, at 485.

⁶ R.S.O. 1980, c. 137.

40. (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives [followed by a list of notice periods].

The Ontario Court of Appeal ruled that this provision did not apply to loss of employment due to bankruptcy. The words, on their face, applied when an employer terminated employment, but not when employment was terminated by operation of law.

The Supreme Court of Canada unanimously disagreed. Justice Iacobucci, for the court, laid out the already well-known principle of statutory interpretation:

Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.⁷

Iacobucci J. also relied on s. 10 of the Ontario *Interpretation Act*:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.⁸

Although he acknowledged that the plain meaning of the *Employment Standards Act* supported the Court of Appeal's decision, Iacobucci J. believed the Court of Appeal had unduly restricted its inquiry:

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was

⁷ Above n. 3 at para. 21.

⁸ R.S.O. 1980, c. 219.

the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.⁹

Iacobucci J.'s discussion led him to previous judicial decisions, textbooks, the legislative history of the statute—and Hansard.

Although it was far from central to his interpretation of the *ESA*, Iacobucci J. found support for his interpretation in statements made by the Ontario Minister of Labour on two different occasions. On June 4, 1981, the Minister of Labour, Dr. Robert Elgie, had risen to make a ministerial statement, in which he outlined the details of *ESA* amendments he would be making later that day; and on June 16, 1981, the minister gave his second-reading speech.

Finally, *after* having considered the Hansard evidence, Iacobucci J. makes a brief comment on its admissibility:

Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the “intent” of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.¹⁰

And that is all Iacobucci J. wrote. He did not spell out the many frailties of Hansard evidence, nor did he elaborate on the limits to its role. Most importantly, Iacobucci J. left out all the parts of the *Morgentaler* decision that might support a distinction, for purposes of using Hansard, between constitutional and non-constitutional cases.

The significance of *Rizzo* is that it takes the idea laid down in *Morgentaler* – the idea that Hansard is admissible, though with caution—and expands it beyond the characterization of a law for constitutional purposes, to every question of statutory interpretation.

The “many frailties” of Hansard

In *Rizzo*, Justice Iacobucci noted that “the frailties of Hansard evidence are many,” but he did not enumerate them. Before we turn to an examination of the Nova Scotia cases, I think it is important to enumerate what exactly those frailties are.¹¹ It is only with that context that we can understand just how problematic some of the judicial uses of Hansard are.

⁹ *Ibid.* at para. 23.

¹⁰ *Ibid.* at para. 35.

¹¹ The original and strongest objection to the use of Hansard was that it interfered with parliamentary privilege. That is why the proceedings of Parliament are not reviewed by the courts. This is, of course, a

How faithful a record is it?

Is Hansard an accurate record of what is said in the Nova Scotia House of Assembly? Yes, but not 100% of the time. If the Hansard is important enough to use for statutory interpretation, we need to understand how it is produced.

There is a recording microphone at every desk in the legislative chamber. Typically only one microphone is on at a time, because only one member can have the floor. The Speaker of the House has the ultimate authority as to who has the floor, but the routine switching of microphones is done by a technician in a hidden control room.

The system records the member's words. The recording is sent to the Hansard Office, where the recording is transcribed, edited, and published on-line. Typically the process between speech and publication takes about 24 hours, but it can, depending on circumstances, take a longer or shorter time. When I was first elected, a hard copy of Hansard would be circulated to the members, and stored at their desks. But this intensive use of paper fell out of favour, especially because the members rarely looked at it. Today, the on-line version is the only version anyone uses. The enormous advantage offered by on-line Hansard is that it is searchable. Before the on-line version was available, searching Hansard was tedious and time-consuming.

Unlike some other Canadian assemblies—for example, the House of Commons—the Nova Scotia legislature does not circulate Hansard drafts (“the blues”) to members, and there is no formal procedure for correcting errors.

In my experience, very few MLAs review Hansard for accuracy. Politics moves quickly. By the next day, members have mentally moved on to other business.

Having read a significant amount of Hansard over the years, I believe that the vast majority of Hansard does faithfully capture what was said. But very occasionally, I would glance back at what I was recorded as having said, and I was sometimes dismayed at how the transcript could vary from what I knew I had actually said.

Beyond the question of pure transcription errors, there is the question of whether Hansard captures the *sense* of what is being said. Like any transcript, including a discovery transcript or a trial transcript, the words on the page may be literally accurate yet miss what the speaker was conveying. A transcript captures poorly, if it captures at all, the speaker's humour, sarcasm, emphasis, tone, body language, and gestures, as well as reactions from the audience and the speaker's reaction to those reactions. These things might be perfectly clear to a live audience, and they are essential to the speaker's meaning; but they may be lost in a transcript.

different issue entirely, and so, except for one brief mention arising from a particular ruling, I will leave it aside for purposes of this article.

Even something as simple as punctuation and paragraphing can change the meaning of a sentence. The Hansard staff have no way of knowing where the speaker would put a colon, a dash, or a paragraph break. Unless the speaker is explicit, it may not be evident that the speaker is quoting from something or someone else, or where the quotation begins and ends.

The Hansard recordings are preserved, although I am not certain for how long. House of Assembly proceedings are also televised, and the broadcast recording is, as far as I know, preserved forever. I can find no evidence, however, that the courts have resorted to listening to or watching the tapes in order to assure itself that Hansard is accurate.

In short, when Hansard is used in judicial proceedings, it is taken at face value. That is likely a matter of judicial economy, as much as anything else. But counsel and the courts need to be aware of the most basic frailty of Hansard evidence: the transcript may not accurately capture what was said, nor the context that lent meaning to the speaker's words.

Who speaks for the legislature?

The most fundamental frailty of Hansard evidence is the one alluded to by Sopinka J. in *Morgentaler*, quoted above: "The main criticism of such evidence has been that it cannot represent the 'intent' of the legislature, an incorporeal body."

The House of Assembly is a multi-member body. It is a concept, not a person. It has no thoughts or feelings. It cannot have an intention, any more than a rock can have an intention; and neither can a statute. Nevertheless, the search for "legislative intent" or "the legislator's intent" is at the heart of statutory interpretation. Recall Driedger's modern rule of statutory interpretation, cited approvingly in *Rizzo* and in hundreds, if not thousands, of other judicial decisions:

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. (Emphasis added.)

Recall also the Ontario *Interpretation Act*, cited by Iacobucci J. in *Rizzo*:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. (Emphasis added.)

Every province, and the federal jurisdiction in Canada, has an *Interpretation Act* with variations on these words. Section 9(5) of Nova Scotia's *Interpretation Act*¹² reads thus (emphasis added):

Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

We can see in all of these guidelines a direction to the courts to hunt for the legislature's "intent" or "objects."

The concept of "the intention of Parliament" makes the most sense when it is taken as a metaphor. The courts imagine the elected assembly as a single person, who is presumed to be knowledgeable about the law, knowledgeable about the subject-matter of the bill, logical, concise, and reasonable. That metaphorical legislator is good at their job and knows what they're doing: "the legislature is presumed to have created a coherent, consistent and harmonious statutory scheme."¹³ This is the person on the Clapham omnibus, re-imagined as a Member of Parliament.

The metaphor of "the legislator", imagined as a single, thoughtful individual with a coherent intention, is a useful mental tool to aid in the task of statutory interpretation. All of the problems associated with the use of Hansard evidence arise when the courts take the metaphor too far; that is to say, when they take it literally, and start searching for "legislative intent" in the words of real flesh-and-blood individuals.

After all, who speaks for Parliament? Certainly not the premier/prime minister, nor any minister of the Crown. They may be the authorized spokesperson for the government of the day, but they do not speak on behalf of the assembly. The Speaker is the authorized spokesperson of Parliament, but only in very limited circumstances, and certainly not for the

¹² RSNS 1989, c. 235,

¹³ *R. v Summers* (2014) 371 DLR (4th) 581, 2014 SCC 26.

purpose of statutory interpretation. Even when Parliament is unanimous, it “speaks” through the bills or motions it adopts.

Besides, it is entirely possible that different members will have different understandings of what a bill does. Reasonable people can see different meanings in the same words. They may all vote yes, and yet disagree profoundly on how the bill should apply to a set of facts.

So who speaks for Parliament? Nobody. That is why the courts will always struggle with their use of Hansard evidence. In most cases, they slide over this conceptual conundrum with two giant leaps of logic: they take the intention of *the minister* and call it the intention of *the government*; and then they take the intention of *the government* and call it the intention of *Parliament*. But they are not the same thing. They are not the same thing at all.

What is the Quality of the Speeches?

Even if the court were satisfied that Hansard is reliable, and that a particular speaker could speak on behalf of Parliament, there is a further frailty of Hansard evidence: is the speaker a reliable witness?

Speeches in an elected assembly are political speeches, made by politicians, in a political forum. One does not have to sit in the assembly to know that politicians do not have much of a reputation for speaking “the truth, the whole truth, and nothing but the truth.” Surely the courts are aware of politicians’ reputation, and take it into account, but I could find no instance of a judge saying it out loud. Perhaps it is deemed impolite.

I have sat in an assembly, and I can confirm that the quality of most speeches there is low. Party discipline means that the votes are pre-determined, and nobody is open to persuasion. There is no meaningful debate, in the sense of an informed exchange of views. There is therefore little incentive for members to do much research or thinking about the substance of a bill. Sometimes a member will speak to a bill without having read it. The purpose of the speeches is usually to characterize the bill politically, as being worthy either of credit or blame.

If all of this sounds unduly harsh, all I can say is: that was my experience from the 12 years in the House. Of course there are exceptions. Occasionally a speech in the House is brilliant and insightful. But I am speaking of the general rule, and as a general rule, the quality of speeches is low.

Should an exception be made for speeches by the sponsoring minister?¹⁴ Of all the members in the assembly, the minister is in the best position to speak knowledgeably to the substance of a bill. The minister’s speech on second reading is typically the fullest statement in the

¹⁴ A bill can be sponsored by any member of the assembly. In Nova Scotia it is very rare, however, for a “private member’s bill” to be approved. The vast majority of approved bills are government bills, introduced by the Cabinet minister whose department is responsible for the subject-matter of the bill. That’s why, in this paper, I refer mostly to “the sponsoring minister” rather than “the sponsoring member.”

House about why the minister introduced the bill, and any noteworthy decisions on policy or drafting. The minister is the spokesperson for the government on that bill. By implication, the minister's intention is shared by all members on the government benches who will vote for the bill.

Although the minister's speeches are most likely to be substantive, we still need to be cautious.

First, the minister is only one member of the assembly, and the minister's intention may not be shared by others, even on their own side of the House. Perhaps others see something different in the bill. More likely, other members have no particular intent at all. Their true intention, in the narrowest sense, is to vote with their party.

Second, the minister's grasp of the bill may itself be shaky. We do not have government by experts, and ministers are typically not experts in the subject-matter of their department. We can have a teacher as health minister, a lawyer as finance minister, and a fisherman as environment minister. Even if a minister understands the broad outline of a bill, and is able to give broad political direction, the details are typically left to civil servants and legislative counsel. The minister's second-reading speech is almost always written by staff, and the minister merely reads it.

The fact is that political speech is a different beast altogether than sworn testimony in a courtroom. MPs can have all kinds of motivations for saying what they say. Maybe a deal has been done: you support my legislation and I'll support yours. Maybe the government is deliberately using ambiguity to win support for legislation that might not otherwise pass. Maybe the sponsoring minister doesn't really believe that the bill does what he says, but for political reasons he has to claim that it does. Maybe the minister just doesn't understand the file. Maybe the minister's speech has been written by someone else. Maybe the minister's instructions from his boss are "read the speech and don't think too much." These and a thousand other scenarios make Hansard a slippery foundation for any judicial decision.

The "Model" Use of Hansard

Justice Iacobucci in *Rizzo* writes "the frailties of Hansard evidence are many." He does not enumerate those frailties, but undoubtedly he had a fine appreciation for them. He was, after all, a former Deputy Minister of Justice of Canada, and must have had substantial dealings with Parliament and parliamentarians.

As we will see, it is difficult to know just how much other judges know about the workings of Parliament or the House of Assembly. Only a handful of Nova Scotia's judges have been elected members.

Here's the rub: Hansard is itself a text, and like any text it has to be interpreted. To interpret Hansard properly requires consideration of its whole context. And how much do judges really understand about the context of an elected assembly?

When interpreting Hansard, it is surely relevant to consider at least these questions: How much does the speaker actually know about the subject? Who wrote the speech? What's going on around the speaker? What is the political dynamic in the legislature? Is there a majority or minority? How close is the next election, and how are electoral considerations weighing on the speeches in parliament? How publicly controversial is this bill? What stage of the proceedings is the bill at? Are there procedural considerations at play? These questions are all relevant to an understanding of Hansard, but answering them explicitly opens a Pandora's Box, so the courts almost never touch them.

In *Rizzo* itself, Iacobucci J. made a very restrained use of Hansard. There are three noteworthy elements:

- only the sponsoring minister is cited;
- the quotations are brief;
- the quotations support an interpretation reached by other means.

I will refer to a use of Hansard displaying these three elements as a “model use.”

The use of Hansard, after *Rizzo Shoes*, in Nova Scotia

I turn now to an examination of how Hansard evidence is being used in Nova Scotia's courts. I limited my search to the ten-year period of 2004–2014. I found, in that period, 31 reported decisions in which Hansard is cited.¹⁵

The use of Hansard in the Court of Appeal

Model uses

In the study period, there were nine cases in which the Court of Appeal referred to Hansard.

One would hope that Nova Scotia's highest court would set an example for other courts. Unfortunately, the Court of Appeal's use of Hansard is inconsistent.

In only three of these nine cases did the Court of Appeal explicitly instruct itself on the law regarding the admissibility and weight of Hansard.¹⁶ Perhaps this is the root of some of the difficulties. If one does not remind oneself of the *Morgentaler/Rizzo* rule—regarding the admissibility but limited weight of Hansard evidence—there may be a tendency to admit it too readily and weight it too heavily.

Only two of the nine Court of Appeal decisions demonstrate what I would call a “model use” of Hansard:

¹⁵ My CANLII search strategies were to search the Nova Scotia court databases for (1) “Hansard”, (2) “House of Assembly /p Debates”, and (3) “House of Commons Debates”.

¹⁶ *Antigonish (County) v. Antigonish (Town)*, 2006 NSCA 29; *Keizer v. Slauenwhite*, 2012 NSCA 20; and *R. v. Hutchinson*, 251 CCC (3D) 51, 2010 NSCA 3 (per Beveridge J.A., dissenting).

- *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, per Fichaud J.A. for a unanimous court, concerning the *Marketable Titles Act* and the *Land Registration Act*.
- *R. v. Hutchinson*, 2010 NSCA 3, per Beveridge J.A., dissenting, concerning the consent provisions of the *Criminal Code*. The majority does not refer to Hansard.

There are also fleeting references to Hansard in three other appeal decisions:

- *Hayward v. Hayward*, 2011 NSCA 118, in which Justice Oland summarizes the trial decision. The trial judge had looked through Hansard and found no evidence to support an intention of retrospectivity in a particular provision of the *Wills Act*. Justice Oland does not herself use Hansard, nor does she comment on the trial judge's use of it.
- *Allstate Insurance Company of Canada v. Nova Scotia (Insurance Review Board)*, 2006 NSCA 70, in which Justice Oland (for the majority) makes a fleeting reference to Hansard—but only to a date, not to a specific speech—to establish the purpose of amendments to the *Insurance Act*.¹⁷
- *R. v. Allen*, 2005 NSCA 118, in which Justice Saunders (for a unanimous court) makes a similarly fleeting reference to Hansard to establish the purpose of the *Fisheries Organizations Support Act*.¹⁸

I turn now from these model uses (two cases) and minor uses (three cases), to the other four Court of Appeal decisions—decisions where the use of Hansard goes off on tangents that are interesting, though at times problematic.

Carvery

In *R. v. Carvery*,¹⁹ Justice Beveridge, writing for a unanimous court, considered whether 2009 amendments to the *Criminal Code*, known as the *Truth in Sentencing Act*, justify a quasi-automatic 1.5:1 credit for pre-sentence custody. He summed up the guidance on statutory interpretation this way:

[45] I do not think it controversial to say that the various directions involved in the so-called 'modern approach' are closely related and interdependent (*Chieu v. Canada*

¹⁷ Here's the complete passage, from 2006 NSCA 70 at para 20: "The *Act* regulates matters relating to insurance in this province. It is undisputed that Bill 1 was intended to protect consumers from unfair rate increases in the future. See *Hansard Debates*, September 30, 2003. The amendments it made to the *Act* secured lower rates for a certain period, and were designed to prevent any rate increases thereafter unless approved by the Board."

¹⁸ 2012 NSCA 107. Here's the complete passage, from 2005 NSCA 118 at para 26; "The record in this case, which includes the Nova Scotia House of Assembly (Hansard) debates at the time the legislation was introduced, confirm that its purpose was to provide a procedure to enable fisheries organizations to collect annual dues, and to lend strength to the voice and viability of fisheries organizations in the Province."

¹⁹ 2012 NSCA 107, affirmed by the Supreme Court of Canada 2014 SCC 27, with the substantive reasons given in a companion case delivered the same day, *R. v. Summers*, 2014 SCC 26.

(*Minister of Citizenship and Immigration*), 2002 SCC 3, [2002] 1 S.C.R.84, at para. 28). The ultimate goal is to determine the intent of Parliament.²⁰

To find “the intent of Parliament”, Justice Beveridge turned to the grammatical and ordinary use of the words; the scheme of the Act; and the object of the legislation. It is in this last category that we come to legislative history, and Hansard.

“Legislative history of an enactment consists of everything that relates to the conception, preparation and passage of the legislation,” wrote Justice Beveridge.²¹ This is, on its face, remarkably broad. We have gone well beyond a minister’s second-reading speech on the bill. Everything done or said, at any stage of the proceedings, is potentially relevant. For some legislative processes, the passage of a bill can involve days of debate, weeks of study, and dozens or hundreds of witnesses. Is this now all potentially relevant, and admissible in court on the question of interpretation?

Ironically, such a broadly-stated principle was unnecessary for Justice Beveridge’s decision. The Hansard material he actually used was quite limited. His main use of Hansard was by way of quotation from another case. The leading case up to that point, *R. v. Johnson*,²² quoted from committee testimony from the Justice Minister and one of the minister’s senior aides. Here is the full passage:

180 Statements made by a Minister and his or her senior aides may afford ancillary assistance in construing the meaning and purpose of ambiguous statutory language. Here, no clear direction as to government's intendment respecting the relationship between sub-s.(3) and (3.1) can be gleaned from a close reading of the House debates and Committee proceedings. What is clear is that the Minister, despite ample opportunity to do so, conspicuously refrained from characterizing sub-s. (3.1) as an "exception" to the "general rule" in sub-s. (3). Further, and as noted earlier, he stressed that apart from the excluded categories, the language chosen by the government, and ultimately endorsed by Parliament, "permits the court to have discretion to consider on a case-by-case basis where the credit to be awarded for time spent in pre-sentence custody should be more than the general rule of one-to-one". His senior policy advisor, David Daubney, was more direct. The word "exceptional", he said, had been deliberately omitted from the provision by the legislative drafters. Further, in his view "courts trying to do justice will find that in many cases the circumstances do justify something between one to one and 1.5 to one". This testimony, of course, belies any government intention to have sub-s. (3.1) read as applying only to exceptional situations. His advice to the Senate committee studying Bill C-25 reinforces this

²⁰ *Ibid.* at para. 45.

²¹ *Ibid.* at para. 81.

²² (2011) 268 CCC (3d) 423, 2011 ONCJ 77 (Ont. Court of Justice), per Green J.

interpretation: "the circumstances won't be that exceptional: they'll be fairly common and, in the case of the parole loss and the remission loss will be universal."

The most remarkable thing about this passage (which is quoted approvingly by Justice Beveridge)²³ is that the judge gave weight to "statements made by a minister *and his or her senior aides*" (emphasis added). We have seen how Parliament's intent is typically reduced to the government's intent, and the government's intent is reduced to the minister's intent. Now we see the minister's intent being expressed by his unelected aide.

Next, Justice Beveridge noted the Crown's reference to evidence of the Justice Minister before a committee of the House of Commons, in which the minister further explained why the bill was introduced. He concluded, however, that the minister's remarks "reveal what is already easily discernible," namely the government's desire to abolish 2:1 credit, and to address the public perception that sentences were too lenient because of credit for pre-trial detention.

The Supreme Court of Canada affirmed the Court of Appeal's decision in *Carvery* and largely adopted Justice Beveridge's reasoning.²⁴ It did not, however, refer to the passage from Justice Green in *Johnson*, but it used the Minister of Justice's remarks to the House of Commons committee as evidence of legislative intent. Like the Court of Appeal, the Supreme Court of Canada did not find the extrinsic evidence (including Hansard) helpful in determining legislative intent of when the "circumstances" justified a credit of 1.5:1.

The Supreme Court of Canada's decision in *R. v. Summers* (in which the substantive reasons were also applied in *R. v. Carvery*) is, in the end, a classic case of the proper use of Hansard. The court instructed itself on how Hansard is to be used:

[51] The intention of Parliament can be determined with reference to the legislative history, including Hansard evidence and committee debates, although the court should be mindful of the limited reliability and weight of such evidence (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 593-94 and 609).²⁵

The court then went on to use a single quotation from the sponsoring minister, to support an interpretation that had been reached in other ways. The only departure from the classic model is that the minister's remarks are from a Commons committee, rather than from a speech given in the House of Commons itself.

²³ Above n. 21

²⁴ Above n. 19.

²⁵ *Ibid.* at para. 51.

Keizer v. Slauenwhite

The issue in *Keizer v. Slauenwhite*²⁶ was whether the Province was subrogated to a claim for nursing-home care resulting from a motor-vehicle accident.

The court in *Keizer* was not unanimous. Hamilton J.A. wrote for the majority, and Oland J.A. wrote a dissent. Both referred to Hansard, though more for what it did not say rather than for what it did. The narrow question of interpretation concerned how 1992 amendments to the Act should be interpreted in light of 2002 amendments. Both Hamilton and Oland J.A. note that there is nothing useful in the 2002 debates to assist in locating legislative intent.

The most interesting point about the use of Hansard in *Keizer* is that the Hansard evidence was introduced *at the appeal stage*. It was not in evidence at trial. Hamilton J.A. wrote:

While no *Hansard* excerpts relating to the legislation were in evidence before the judge, excerpts relating to the 1992 amendments to s. 18 were before this Court. I agree with the parties that we are entitled to take these into account in deciding this appeal.²⁷

Hamilton J.A. did not consider the rules around admissibility and weight, probably because neither party had put them in dispute. But Hansard evidence is still evidence, and needless to say it is highly unusual for an appeal court to receive evidence that was not before the trial judge. The appeal court's willingness to entertain new Hansard evidence illustrates the court's decidedly lax approach to Hansard. It was treated almost like a legal argument, or a copy of a statute attached to an appeal book, rather than what it really is—evidence with many frailties.

In the end, the *Keizer* majority affirmed the trial judge's interpretation of the *Insurance Act*. Hansard, which is paraphrased rather than quoted, supported the trial judge's interpretation. Hamilton J.A. stressed that legislative intent can be gleaned without extrinsic evidence, by looking at the statute itself and without Hansard.²⁸

Antigonish (County) v. Antigonish (Town)

The issue in *Antigonish*²⁹ was whether the Utility and Review Board had the jurisdiction to hear an amalgamation application filed by the county. Oland J.A., for a unanimous court,

²⁶ (2012) 347 DLR (4th) 629, 2012 NSCA 20.

²⁷ *Ibid.* at para. 11.

²⁸ At para 22:

The intention of the Legislature can be inferred without extrinsic evidence; *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, 2003 NSCA 10, at ¶ 51, 59-66 (per Glube C.J.N.S., Chipman J.A. concurring) and at ¶ 99-105 (per Bateman J.A. concurring); *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008) at 275-281.

²⁹ 2006 NSCA 29.

was presented by the town with an appeal book of Hansard excerpts; but in the end, she found them unhelpful.

Of particular note is the fact that Oland J.A. drew an explicit distinction between the remarks of a minister, and the remarks of the opposition:

[34] Much of the material sought to be introduced did not consist of statements or accompanying text supplied by the minister introducing or defending the *Act* in the Legislature, which can be helpful in establishing legislative intent. Rather, they were statements or comments made by members of the opposition who criticized the lack of consultation prior to the formation of the Cape Breton and Halifax Regional Municipalities. The minister did not say anything which would even suggest that the *Act* was intended as a response to those criticisms. Furthermore, it is significant that none of the remarks directly address the question of whether or not s. 372 which deals with the creation of regional municipalities, was intended to displace or to be paramount over s. 358 which concerns amalgamations and annexations.

[35] In my view, the material the Town sought to be introduced does not satisfy the threshold tests of relevance and reliability. Accordingly the volume of Hansard extracts will not be considered in the search for legislative intent.³⁰

Oland J.A. reached the right results, though perhaps without quite correctly instructing herself. As we know from *Morgentaler*, Hansard evidence is admissible. It is always to be given limited weight because of its *inherent* unreliability. The question of *relevance* is a different issue entirely. Whether it comes from Hansard or not, any evidence that is irrelevant is to be disregarded.

In the end, the decision in *Antigonish* is notable mainly for its explicit distinction between a second-reading statement by the sponsoring minister, and “statements or comments made by members of the opposition.”

Hartling v. Nova Scotia (Attorney General)

The most problematic use of Hansard by Nova Scotia’s Court of Appeal is in *Hartling v. Nova Scotia (Attorney General)*.³¹ It is problematic because—in contrast to the rejection of opposition remarks by Oland J.A. in *Antigonish*—MacDonald C.J.N.S. quoted from two members *of the opposition* as a means of establishing legislative intent.

At issue in *Hartling* was the legality of limits imposed on general damages for a “minor injury” suffered in motor vehicle collisions. Three plaintiffs challenged the constitutionality of the law, and they also challenged whether the “minor injury” regulations were authorized

³⁰ *Ibid.* at paras. 34-35.

³¹ 2009 NSCA 130.

by the legislation. It was on that the latter question that MacDonald C.J.N.S., writing for a unanimous court, turned to Hansard.

In an unusual move, MacDonald C.J.N.S. noted the legislative context:

- rapid increases in auto insurance premiums were an issue in the 2003 provincial election;
- the election produced a minority Conservative government; and
- the first piece of legislation introduced after the election was Bill 1, the *Automobile Insurance Reform Act*.

Part of the core of Bill 1 was a limitation on compensation for a “minor injury.” Between first reading and Royal Assent, a definition of “minor injury” was moved from draft regulations into the bill itself, and modified. In order to decide whether the remaining regulations were *ultra vires* the statute, MacDonald C.J.N.S. had to determine the scope of the statutory definition of “minor injury.”

The Chief Justice used a variety of interpretive tools, including three quotations from Hansard.³² The first quotation was from the sponsoring minister’s second-reading speech. This comfortably fits within the “model use” of Hansard. But the next two quotations were from the opposition benches: Liberal leader Danny Graham on second reading, and Liberal MLA Michel Samson on third reading. This last quotation is the most critical, because it is the only one made *after* Bill 1 was amended.

How can an opposition member speak to the intention of a bill that is drafted and introduced by someone else? At the time, the Liberals held only 12 seats in a 52 member assembly. Even if the statements made by Liberal MLAs can be taken as expressing the intent of all 12 Liberals, how can they be taken as expressing the intent *of the legislature*?

There are plausible answers to those questions, but MacDonald C.J.N.S. did not address them explicitly. One must read between the lines. The Chief Justice mentioned twice that there was a minority government, but he did not spell out why that was significant, and the casual reader may miss the point.

Because I was there, I know why it is significant. In order for Bill 1 to pass, the Progressive Conservative government had to attract the support of one of the two opposition parties. The

³² MacDonald C.J.N.S. also refers to the Speech from the Throne as evidence of legislative intent. This is potentially problematic. A Speech from the Throne is a political document. Through the Lieutenant Governor, it sets out the legislative program of the government, and is in fact written by the government. It may express what’s on the mind of the premier, but it is not an expression of what’s on the mind of the *legislature*. Especially in the context of a minority government, reference to documents like a Speech from the Throne must be handled very carefully indeed.

There is a reference to the Speech from the Throne in *Morgentaler*, but in a very different way. The Province was trying to establish its objectives in passing the *Medical Services Act*, and claimed that its primary objective was to prevent privatization in the health-care system. Sopinka J. referred to the Speech from the Throne that had been delivered, and noted the *absence* of any mention of a concern about privatization.

New Democratic Party (my party) rejected Bill 1 outright. That left only the Liberals as a potential partner, but the Liberals were not happy with the original definition of “minor injury.” They believed it to be too broad. Negotiations ensued, and Bill 1 was subsequently amended. The Liberals voted for the bill as amended. Thus MLA Samson’s third-reading speech was significant because it expressed the Liberals’ view of what the amendments were intended to achieve.

The difficulty is that MLA Samson’s speech—indeed, any speech recorded in Hansard—is a political speech, not sworn evidence, and a political speech is open to multiple interpretations. There are other, equally plausible readings of events. For example, here is another version of events, which I have made up but which is in keeping with all of the known facts:

The issue of auto insurance premiums was a highly-politicized issue leading up to, during, and after the 2003 provincial election. During the 2003 election, the Liberals promised a 15% reduction in auto insurance premiums. The Conservatives promised a 20% reduction. The NDP promised public auto insurance, and claimed it would lead to a reduction of 25%-30%.

The Liberals did not do well in the election. They were reduced to third-party status. They were therefore keen to re-establish their relevance, and were desperate to find something for which they could take credit and which would contrast them with the NDP.

The Liberal-Conservative negotiations over Bill 1 were held behind closed doors, so there is no public record of who said what, or what options or information were on the table. The two parties emerged with a set of amendments. The Conservatives, who had promised a 20% premium reduction, did not want to make any concessions that would result in a lesser reduction. They had an interest in pretending they had made concessions to the Liberals, while believing they had not. The Liberals, who had promised a 15% premium reduction, had an interest in claiming they had won concessions, whether they had or not.

I want to emphasize that I am not claiming this story is true, although it could be true. My point is only that this story is at least as plausible as the story accepted by Chief Justice MacDonald.

Hartling illustrates the slippery territory into which the courts enter when they go beyond the “model use” of Hansard—typified by *Rizzo*—and start re-constructing events based on Hansard speeches. Hansard is being used to give context to a statute, but *Hansard is itself a text that must be interpreted in its whole context.*

The use of Hansard in trial courts

I turn now from the Court of Appeal to Nova Scotia's trial courts. Given the inconsistent use of Hansard in the Court of Appeal, it is not surprising that use of Hansard at trial is similarly inconsistent.

In the 2004–2014 study period, I found 22 Hansard references in trial court decisions.

In only three of these decisions is there express consideration of the admissibility of Hansard.³³ This statistic is even worse than the statistic in the Court of Appeal, where only three of nine decisions expressly considered the admissibility of Hansard.³⁴ Without specific instruction, it is more likely that Hansard will be used inappropriately.

Only three of the trial decisions display the “model use” use of Hansard typified by *Rizzo*: a brief quotation from the sponsoring minister, usually on second reading, to support a conclusion that has already been reached by other means.³⁵

Most of the remaining trial-court references to Hansard are minor. Thus we have a vague reference to Hansard without a specific quotation,³⁶ a reference to the unavailability of Hansard for the year in question,³⁷ and incorporation of Hansard by quotation from another case.³⁸ There are also instances of a judge considering Hansard but finding nothing relevant in it,³⁹ or giving it little weight.⁴⁰

³³ *TD Financing Services v. McInnis*, 2012 NSSC 52, per LeBlanc J., concerning the *Small Claims Court Act*; *Nova Scotia Teachers' Union v. Nova Scotia (Minister of Education)*, 2011 NSSC 426, concerning the *Education Act*; and *MacNutt v. Nova Scotia (Attorney General)*, 2009 NSSC 70, per Coady J., concerning the *Public Service Act*.

³⁴ See above n.16.

³⁵ *MacNutt* above n. 33; *R. v. Gorman*, 2009 NSPC 55, per Stroud JPC, concerning the *Motor Vehicle Act*; *Smith v. Atlantic Shopping Centres Ltd.*, per MacLellan J., concerning the *Occupiers' Liability Act*.

³⁶ For example, *Delorey v. Strait Regional School Board*, 2012, NSSC 450, per Murray J.; *Rowe v. Brown*, 2008 NSSC 13, per Stewart J., concerning the *Fatal Injuries Act*.

³⁷ *Cron v. Halifax (Regional Municipality)*, 2010 NSSC 460, per Rosinski J. The Act in issue is the *Private Ways Act*, and the year in question is 1926.

³⁸ *Hill v. Cobequid Housing Authority*, 2010 NSSC 294, per MacAdam J., concerning the *Occupiers' Liability Act*; *Re Hayward Estate*, 2010 NSSC 6, per Boudreau J., aff'd 2011 NSCA 118; *Cape Breton Regional Municipality v. Canadian Union of Public Employees, Local 933*, 2005 NSSC 99, per LeBlanc J., concerning the *Trade Union Act*; *Hendrickson v. Hendrickson*, 2004 NSSF 73, per Kelly J., concerning the *Child Support Guidelines*.

³⁹ *Savary v. Nova Scotia (Community Services)*, 2009 NSSC 123, per Murphy J., concerning the *Social Assistance Act*; *Joe Dugas Construction v. Surf Homes Ltd.*, 2008 NSSC 24, per Hood J., concerning the *Builders' Lien Act*.

⁴⁰ *Nova Scotia Teachers' Union v. Nova Scotia (Minister of Education)*, 2011 NSSC 426, per Hood J., concerning the discipline provisions of the *Education Act*.

Some oddities from the trial courts

Quotation of MLAs other than ministers

The Hansard evidence most likely to be used by the courts is from the sponsoring minister's speech on second reading. This is the "model use" of Hansard, typified by *Rizzo*.

We have already seen some uncertainty in the Nova Scotia Court of Appeal about the use of opposition speeches, ranging from their rejection by Oland J.A. in *Antigonish* to their acceptance by MacDonald C.J.N.S. in *Hartling*.

In Nova Scotia's trial courts, non-ministers have been quoted several times.

In *Brocke Estate v. Crowell*,⁴¹ the issue was what discount rate to use in the calculation of damages. Justice Muise cites two passages from Hansard, both from members of the third-party Liberals.⁴² In both cases, the opposition members are purporting to give an account of what *the government* intended or what representatives *of the government* said. No government member is quoted.

In any other context, such evidence would be hearsay. We can see, then, the dangerous road on which the court is travelling. We have a double weakness: Hansard evidence, which should be given limited weight, is used to provide hearsay evidence, which itself should be given limited weight.

An opposition member is also quoted in *French v. Nova Scotia (Attorney General)*,⁴³ but this usage is less problematic than *Brocke Estate* because the sponsoring minister is also quoted, and the two quotations are to the same effect.

A real oddity occurs in *TD Financing Services v. McInnis*.⁴⁴ Counsel submitted to Justice LeBlanc a Hansard transcript of remarks made by MLA Arthur Donahoe. On May 21, 1980, MLA Donahoe spoke on second reading of the *Small Claims Court Act*, and raised a concern that was later addressed in an amendment. The oddity is not what MLA Donahoe said, but the fact that he was, at the time, a government backbencher. These days, it is almost inconceivable that a government backbencher would rise in the House to raise questions about the contents of a government bill. It is hard to know what weight to give to a government backbencher's remarks. It seems clear that a backbencher is not speaking for "the government", much less for the House. So why quote a backbencher at all? In the end, LeBlanc J. skirts the question by finding that the Donahoe quotation offers no assistance.

⁴¹ 2013 NSSC 344.

⁴² Coincidentally, they are same two Liberal MLAs quoted by Chief Justice MacDonald in *Hartling*, note 17 above.

⁴³ 2012 NSSC 394. The opposition member quoted is Maureen MacDonald of the NDP.

⁴⁴ 2012 NSSC 52.

Quotation of a Witness

There was a very unorthodox use of Hansard in *Cayer v. South West Shore Development Authority*.⁴⁵ The Hansard evidence of a non-MLA, given at a committee meeting, was used as proof of its contents.

The issue in *Cayer* was how to characterize the South West Shore Development Authority (known by its acronym SWSDA) for purposes of access-to-information rules in the *Municipal Government Act*. Justice Hood cited a Hansard passage from the appearance of SWSDA's CEO, Frank Anderson, before a House committee. Anderson described SWSDA's legal form, and Justice Hood used this passage as proof of its contents.

Although the reference is minor, and the information could have been obtained in other ways, the dangers should be obvious. Testimony by witnesses at House committees is rarely sworn. In my entire experience on House committees, I remember seeing a witness being sworn only twice, both times at the Public Accounts Committee. In both cases it was done for political effect—once at the request of the opposition, and once at the request of the witness—not because of any legal requirement. Moreover, the proceedings do not have a legal character. Their purposes are different. Members may question witnesses, but the questioning is typically a far cry from a proper cross-examination. One never knows if one is getting all the information, or the best information.

More significantly, evidence given at a legislative proceeding is, in principle, not receivable in a court proceeding. To do so is a violation of parliamentary privilege. Justice Hood should not have received the Hansard evidence, and should not have used it in the way that she did.

The Oddest Case of All

The oddest approach of all to “legislative intent” occurred in *Children's and Family Services of Kings County v. MJB*,⁴⁶ a child protection case heard in the Family Court by Judge Robert Levy.

The decision has two parts. In the first, Justice Levy goes over the facts and makes a disposition. But then there is a lengthy, second part headed “*Obiter Dicta*”, and which begins “If a judge, on the brink of retirement, cannot seek a little indulgence for ever so respectfully tilting at the odd windmill, then it is a hard world indeed.” We have been forewarned: we are entering a strange judicial world. And in that strange judicial world—to cut a very long story short—Justice Levy states that there was apparently no legislative debate on the statutory provision that is the subject of his “*Obiter Dicta*”, and so, to help discern legislative intent, he turns to *a government news release*. He quotes the Minister of

⁴⁵ 2008 NSSC 349.

⁴⁶ 2008 NSFC 12.

Community Services, David Morse, in general support of his thesis, which is that adoption should not automatically foreclose a right of visitation on the part of the birth parents.

The *Morgentaler/Rizzo* rule is that Hansard evidence is admissible, but should not be given much weight because of Hansard's many frailties. But if Hansard is frail, what can we say about a government news release? These are the dangerous roads on which judges travel once they start the hunt for "legislative intent."

The final oddity of the *MJB* case is that Judge Levy is, among all the judges on all the courts in Nova Scotia, one of the very few who has previously sat in the Nova Scotia House of Assembly. If anyone should know better than to quote a government news release as evidence of the intent *of the legislature*, it's Judge Levy.

Conclusion

The use of Hansard evidence by the courts is *inherently* problematic, because it is part of the search for "legislative intent", and "legislative intent" is inherently problematic because a multi-member, incorporeal body does not have any intention at all.

"Legislative intent" is a useful metaphor, but the metaphor frequently gets pushed too far by the courts. They take the metaphor too literally, and start searching for the words of actual, flesh-and-blood members of the legislature. That is the only reason for them to look to Hansard at all. But no individual speaks on behalf of the legislature, and so the use of Hansard, which consists entirely of the speeches of individuals, will *always* fall short.

The Supreme Court of Canada seems aware of the conceptual soup into which the courts will fall if Hansard is used too liberally. Thus the leading Canadian cases on the point, *Morgentaler* and *Rizzo*, urge caution: Hansard evidence is admissible, but its weight should be limited.

My review of ten years' worth of judicial decisions in Nova Scotia suggests that the message of limited weight for Hansard evidence is not getting through. There is cause for concern in the low number of cases in which the court instructs itself on the *Morgentaler/Rizzo* rule: 3 out of 9 cases in the Court of Appeal, and 3 out of 22 in the trial courts. When the court does not instruct itself on Hansard's limited weight, there is a danger that Hansard will be misused and over-used.

There are also decidedly mixed signals from the Court of Appeal, running counter to the *Morgentaler/Rizzo* caution. Justice Beveridge, in *Carvery*,⁴⁷ wrote that "legislative history of an enactment consists of everything that relates to the conception, preparation and passage of the legislation." This seems like an open invitation to counsel to troll through (among other things) all of Hansard. Then there was the Court of Appeal's willingness in

⁴⁷ Above n.19.

*Keizer*⁴⁸ to accept Hansard evidence that was not before the trial judge. Hansard evidence is thus treated as if it is not evidence at all, but something like an argument or a judicial precedent, to be included in the factum or appeal book. Again, this seems like an open invitation to counsel to never stop trolling through Hansard, even on appeal.

These subtle encouragements of Hansard evidence raise a very practical concern: As is evident from the *Antigonish* decision⁴⁹ and other cases, counsel can go to considerable effort and expense to track down all relevant Hansard debates. Sometimes that evidence will be rejected by the court as irrelevant or unreliable. But Hansard is accepted often enough that counsel may say to themselves “Why not?” or “What if we miss something?”

One of the essential points that I have been trying to make is that Hansard is itself a text. Like a statute, a Hansard passage can be properly understood only in its entire context. I am concerned that counsel and judges know little about that context, such as how the legislature works, or how Hansard is put together. In all the decisions I reviewed, I could find only one—Chief Justice MacDonald’s reasons in *Hartling*⁵⁰—in which the legislative and political context of a bill is even mentioned. Even then, the context offered is thin, and alternative readings are possible.

In the end, the *Morgentaler/Rizzo* rule is clear enough: Hansard is admissible, though with limited weight. The “model use” of Hansard, which gives practical effect to the *Morgentaler/Rizzo* rule, is also clear enough: the best use of Hansard is a brief quotation from the sponsoring minister’s second-reading speech, supporting an interpretation reached by other means. My review of 10 years’ worth of judicial uses of Hansard suggest that Nova Scotia’s courts too often stray beyond the *Morgentaler/Rizzo* boundaries. They do so at their peril.

⁴⁸ Above n. 26.

⁴⁹ Above n. 29.

⁵⁰ Above n. 31.

