How to Change Laws Without Changing the Law: Problems with the Presumption of Substantive Change for Plain Language Reforms

Alexander G Geddes

STATUTORY INTERPRETATION IS standing in the way of improving the clarity of Canadian legislation. Although legislators use plain language principles when they write new statutes, revising or amending existing statutes has been more difficult because one principle of statutory interpretation, the presumption of substantive change, creates problems for plain language law reform. This paper examines the presumption of substantive change and concludes that Canadian judges should reduce their reliance on it and legislators should supply more evidence to rebut it. The paper begins by addressing why we should make laws clear and why non-substantive clarity changes to the law should be done separately from substantive law reform. It then reviews judicial decisions that deal with the presumption of substantive change to highlight the confusion it causes for judges, and it reveals that interpretation Acts have failed to oust the presumption. Finally, it compares different ways that legislators have tried to avoid the problems caused by the presumption and assesses their effectiveness. This discussion includes examples from Canadian provinces, the United Kingdom and Australia. The conclusions of the paper are that judges should reconsider the value of this principle of statutory interpretation because it causes judicial confusion and that legislators must embrace major non-substantive clarity law reform projects to

L'INTERPRÉTATION DES LOIS est un obstacle qui freine le processus de clarification de la législation canadienne. Bien que les législateurs et les législatrices [ci-après «législateurs»] rédigent les lois en langage clair, quand il est temps de réviser ou de modifier des lois existantes, les choses se compliquent en raison d'un principe d'interprétation des lois : la présomption de changement de fond, qui cause des problèmes en matière de réforme linguistique. Cet article fait l'analyse de la présomption de changement de fond et conclut que les juges canadiens et canadiennes doivent tenter de moins dépendre d'elle, et que les législateurs devraient fournir davantage de preuves pour la rejeter. Ce texte commence en donnant les raisons pour lesquelles les lois devraient être rédigées de façon claire et pourquoi les changements de forme visant à clarifier les lois devraient être apportés séparément des changements de fond visant la réforme de la loi. Ensuite, le texte passe en revue les décisions judiciaires qui traitent de la présomption de changement de fond pour souligner la confusion qu'elle provoque auprès des juges, et révèle que les lois d'interprétation n'ont pas réussi à se débarrasser de cette présomption. Enfin, l'article compare les différentes méthodes employées par les législateurs pour tenter d'éviter les problèmes causés par la présomption et évaluer leur efficacité. Cette discussion comprend des exemples en provenance des

ensure judges take notice of their intent to clarify the law without changing the law.

provinces canadiennes, du Royaume-Uni et de l'Australie. L'article conclut que les juges devraient reconsidérer l'ampleur de la valeur de ce principe de l'interprétation des lois parce qu'il est source de confusion judiciaire, et que les législateurs devront s'adapter aux projets de réforme de la loi en ce qui concerne les changements de forme visant à clarifier la loi s'ils veulent que les juges prennent conscience de leur intention de clarifier les lois sans changer la loi.

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I. INTRODUCTION

> *If one, settling a pillow by her head,*
> *Should say: "That is not what I meant at all;*
> *That is not it, at all."*
>
> —T.S. Eliot[1]

In the modernist poetry of T.S. Eliot, his subjects regularly experience the existential despair that accompanies humans' inability to understand one another. One such character is the protagonist in Eliot's "The Love Song of J. Alfred Prufrock." Prufrock is paralyzed by his fear that he might misread the signals sent by a dinner companion (as well as by the purposelessness of his life). As he ponders his failure to understand, Prufrock is confined to a long, dark night of the soul. Canadian judges confront an equally unpleasant task when they interpret laws, and their searches for meaning pose a similar existential threat to the rule of law. Most laws in the contemporary Canadian legal context come from statutes enacted by the legislative branch of government, which is separate from the judiciary. As legislators write or amend laws and judges interpret those laws, problems

* Alex works as Legislative Counsel with the Department of Justice's Legislation Section, and he is a graduate of the University of Ottawa's LLM with Concentration in Legislative Studies program. Alex would like to thank John Mark Keyes for his encouragement and for reviewing multiple drafts of this article. The views expressed in this article are those of the author and do not necessarily represent the views of the Department of Justice or the Government of Canada.

1 T S Eliot, "The Love Song of J Alfred Prufrock", *Poetry: A Magazine of Verse* 6:3 (June 1915) 130 at 134.

arise due to the lawmakers' inability to effectively use language or due to the inherent flaws in written languages' ability to communicate meaning. Judges are forced into a Prufrockian task of trying to parse meaning from cryptic provisions in legislation and regulations.

Two responses to the issue of finding meaning in statute law have surfaced. First, commentators have called for an increased emphasis on improving the law's accessibility. They argue that statutes should be infused with plain language drafting techniques because the rule of law depends on citizens' ability to understand the law.[2] This requires redrafting and reforming the statute book. Second, judges have developed principles of statutory interpretation to guide them in the herculean task of finding meaning in the web of statute law. While judges designed these principles to help determine the legislature's intent, they occasionally cast more shade than light.

This paper examines one principle of statutory interpretation that inhibits efforts to improve the accessibility of laws and causes confusion in Canadian case law: the presumption of substantive change. This presumption is one of the many interpretive tools at the disposal of judges when they must determine the meaning of a legislative provision. It encourages judges to look to previous versions of that provision for clues about its meaning and assumes that legislators intend to change the substance of the law when they change the wording of a provision. If the wording of the provision has changed, a judge can presume that the legislators intended to make substantive changes to the law unless there is evidence that shows the intent was to make non-substantive improvements to the quality of the law.[3] As the Supreme Court of Canada explained in *Bathurst Paper*

2 See the discussion of plain language drafting in sections II(A) and II(B). Prominent promoters of plain language drafting include Joseph Kimble and Helen Xanthaki. The plain language approach to legislative drafting is different from the plain meaning approach to statutory interpretation. Plain language is an emphasis on using accessible language and style. Plain meaning is the view that when the meaning of legislative text is clear, judges should apply the plain meaning and avoid conduct a contextual analysis of the legislation. See especially Joseph Kimble, *Seeing Through Legalese: More Essays on Plain Language* (Durham, NC: Carolina Academic Press, 2017); Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (London: Hart Publishing, 2014) at 108–131. For more on the plain meaning rule in statutory interpretation, see section III(B).

3 The concept of "legislative intent" is problematic. Ruth Sullivan highlights the problems that arise from conflating legislative intent with the subjective goals or wishes of the people who create legislation. See Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 32 [Sullivan, *Statutory Interpretation*]. See also Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed,

Limited v Minister of Municipal Affairs of New Brunswick[4], "[l]egislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended."[5] The presumption relies on the belief that legislatures do not usually use legislative resources to merely repair language. It also reflects the principle of legislative supremacy as judges must give effect to the will of the legislators to change the law.

Despite the assistance it offers judges, the presumption of substantive change has had a negative impact on efforts to improve the clarity and quality of Canadian legislation. Legislators, legislative drafters, academics, lawyers, and judges have acknowledged the need to clarify Canadian legislation.[6] Such improvements require making amendments to existing statutes that enhance their readability without making substantive changes to the law. However, the presumption of substantive change inhibits non-substantive law reform because legislators fear a judge will misunderstand their intent and mistakenly identify a substantive change to the law.

The fear that the presumption of substantive change may lead judges astray exists because judges often disagree about its use. One example of this problem is the Supreme Court of Canada's split decision in *Marche v Halifax Insurance Co*.[7] In *Marche*, the judges disagreed about whether a change to provisions in Nova Scotia's insurance legislation in 1956 was a substantive change of the law or a mere clarification of the law without

translated by Steven Sacks (Toronto: Thomson Reuters, 2011) at 5. However, Sullivan also acknowledges that understanding "legislative intent" as a reflection of the will of the people who create the legislation is necessary for courts because "statutes are obviously drafted for a reason, and the language in which they are drafted reflects deliberate and careful choices by the legislature" (Sullivan, *Statutory Interpretation*, *supra* note 3). Thus, legislative intent can be a desire to substantively change the law or to clarify the language without changing the law.

4 [1972] SCR 471, 1971 CanLII 176 [*Bathurst* cited to SCR].

5 *Ibid* at 477–78. See also Ruth Sullivan, *Statutory Interpretation*, *supra* note 3 at 272–74.

6 See generally Ruth Sullivan, "The Promise of Plain Language Drafting" (2001) 47:1 McGill LJ 97 [Sullivan, "Promise"]; Susan Krongold, "Writing Laws: Making Them Easier to Understand" (1992) 24:2 Ottawa L Rev 495; Ian Waddell, "The Case for Plain Language Legislation" (1992) 15:4 Can Parliamentary Rev 14 [Waddell, "Plain Language Legislation"]; Roderick A Macdonald, "The Fridge-Door Statute" (2001) 47:1 McGill LJ 11; CBC News, "Is the Law Too Complicated? A Call to Write Laws in Plain English", *CBC Radio* (8 January 2016), online: <www.cbc.ca/radio/the180/unheard-muslim-voices-banning-dangerous-dogs-and-a-plea-for-plain-language-1.3393360/is-the-law-too-complicated-a-call-to-write-laws-in-plain-english-1.3393377>.

7 2005 SCC 6 [*Marche*]. For more on *Marche*, see section III(B), for a discussion on the old and new versions of the provisions; the new version appeared to have a broader meaning (as the majority concluded), but it also had elements suggestive of a purely stylistic reform.

changing its meaning. The old version of the provisions allowed judges to set aside non-statutory clauses in insurance contracts but judges could not set aside statutory clauses. The amended version was more ambiguous. The majority concluded that the change altered the law to allow judges to set aside both statutory and non-statutory clauses in insurance contracts, and it relied on the presumption of substantive change to strengthen its view. However, the dissent argued that the changes did not alter the law and judges could still only set aside non-statutory conditions; it saw the change as an attempt to merely simplify the style. The disagreement in *Marche* is not an isolated incident as judges often disagree about the presumption, and those disagreements bring into question its value.

Thomas Cromwell, a former justice of the Supreme Court of Canada, has called for scrutiny of the continued use of all presumptions in statutory interpretation.[8] This paper addresses one of those presumptions and concludes that the presumption of substantive change is ripe for review in the context of contemporary efforts to improve the law's clarity. In the face of the confusion it has caused, judges need to reduce their reliance on it and legislators need to increase the availability of evidence that demonstrates their intent to make non-substantive changes. A decrease in the use of the presumption of change by judges and an increase of evidence within and around legislation showing no substantive change will augment Canadian legislators' ability to carry out the non-substantive reform that improves the clarity of the law and its accessibility.

This paper examines the problems of the presumption of substantive change and the ways in which legislative drafters can avoid its heavy-handed application. Section two reviews the theoretical context that underpins this discussion. It examines the need to improve access to the law and explains why clarity reforms should be separate from policy reforms. Section three canvasses the current state of the presumption of substantive change. The focus in this section is on the roots of the presumption, the confusion it causes, and the limited relief provided by interpretation legislation. Section four analyzes the different ways in which legislative drafters can overcome the presumption and the effectiveness of those methods. Finally, section five compares the Canadian context to projects in the United Kingdom (UK) and Australia to identify how legislative reform efforts in those countries can assist drafters in Canada in developing strategies to rebut the presumption.

8 See Thomas A Cromwell, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95:2 Can Bar Rev 297 at 301.

In brief, the presumption of substantive change is a source of confusion and it weighs down efforts to improve the quality of Canadian legislation. A review of Canadian jurisprudence on the presumption and related efforts at legislative reform reveals the need to alter the role it plays in statutory interpretation. Making Canadian law more accessible requires judges to give less weight to the presumption and legislators to provide more evidence that judges can rely upon to rebut the presumption. The reward for these efforts will be more accessible laws and increased understanding between the legislature and the judiciary.

II. NON-SUBSTANTIVE CLARITY CHANGES MAKE LAWS MORE ACCESSIBLE

Before examining the confusion caused by the presumption of substantive change and the ways in which a legislature can communicate its intent to make non-substantive changes to laws, a theoretical issue requires attention: should legislatures make non-substantive amendments to improve the clarity of laws at all? On the one hand, non-substantive clarity amendments use scarce legislative resources.[9] On the other hand, they strengthen the law's accessibility. This section reviews the debate on the merit of making non-substantive changes by examining why a legislature should change laws without changing the law and why it should separate non-substantive clarity reforms from policy reforms. The academic discussion of these issues shows that amendments to improve the clarity of laws without changing the law are necessary because they augment the law's accessibility and enhance the likelihood of success for non-substantive reform projects.

A. Why Should a Legislature Change Laws Without Changing the Law?

Although contemporary proponents of improved clarity in legislation often present their mission as a new and innovative approach to communicating the law to citizens, such calls for increased accessibility are centuries old. The historical antecedents to the contemporary plain language movement illustrate how law reformers have long recognized a

9 See Ian Brodie, *At the Centre of Government: The Prime Minister and the Limits on Political Power* (Montreal & Kingston, ON: McGill-Queen's University Press, 2018) at 46, 89. Time in the legislature (to enact laws) is a government's "most precious commodity" and its "scarcest resource" (*ibid* at 89).

close relationship between the accessibility of laws and the rule of law.[10] The Renton Report suggests that calls for improved legislative drafting date back to at least the 17th century.[11] One early complaint came from Thomas Jefferson who stated that the British drafting style rendered laws "more perplexed and incomprehensible" for lawyers and non-legal readers.[12] The fact that Jefferson included the problem of non-legal readers not understanding the law shows that early reformers were aware of how inaccessible laws put the rule of law at risk. They appreciated that a legal system's legitimacy erodes when citizens must follow laws they cannot understand and that confusing laws cause distrust in and disrespect for the law. The historical call for clearer laws showcases the fundamental advantages of enhanced legal accessibility.

The spirit of historical complaints from Jefferson and other law reformers about the inaccessibility of law continues today. Contemporary advocates of plain language echo historical fears about the impact of legal inaccessibility on the rule of law, and they articulate additional practical benefits to improving the clarity of laws.[13] Susan Krongold lists the following advantages to plain language drafting: it enhances the rule of law, improves fairness in law, and decreases the administrative costs of confusing laws.[14] Similarly, Ted Hughes, who led British Columbia's Justice Reform Committee, reaches a similar conclusion that plain language makes the legal system "more relevant, efficient, accessible and less

10 See Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 UTLJ 715 (for a detailed discussion of a principle that this paper does not attempt to define).

11 See London, Her Majesty's Stationery Office, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (May 1975) (Chair: Sir David Renton) at para 2.8.

12 *Ibid* at para 2.10.

13 Although the plain language movement is the loudest voice in advocating for improved clarity in legislation, plain language is not necessarily the only way to achieve clarity. However, the plain language movement has incorporated many principles that advance clarity and it shares the same goals. For recent promotions of plain language drafting, see Kimble, *supra* note 2; Xanthaki, *supra* note 2; Michael Kirby, "Plain Concord: Clarity's Ten Commandments" (address delivered at the Plain Language Conference, Sydney, 19 October 2009), online (pdf): <www.michaelkirby.com.au/images/stories/speeches/2000s/2009%2B/2407.Speech_-_Plain_Language_Conf.Sydney_October_2009.pdf>.

14 Krongold, *supra* note 6 at 501–02. There has been significant academic discussion on plain language drafting. For examples of strong and nuanced portrayals of plain language, see Sullivan, "Promise", *supra* note 6; Kimble, *supra* note 2; Paul Salembier, *Legal and Legislative Drafting*, 2nd ed (Toronto: LexisNexis, 2018) at 579.

costly."[15] Krongold and Hughes both acknowledge the philosophical benefits of plain language for strengthening the rule of law, and they stress the practical advantages like equal access and reduced costs. Plain language improves the rule of law as citizens can understand the rules, and it reduces the cost of law as citizens will not need to pay for legal interpreters and there will be fewer costs associated with accidental non-compliance. Overall, plain language reform strengthens the rule of law and offers practical efficiencies.

Despite the advantages espoused by plain language advocates, critics have ridiculed them for having utopian dreams about the law's accessibility. They suggest plain language reform is an ineffective use of resources because the law is so complex that drafters cannot and should not waste time trying to make the law intelligible to all.[16] Others criticize plain language for assuming that anyone outside the legal profession reads legislation.[17] They argue that laws only need to be comprehensible to lawyers and judges because they are the only people who read laws. Finally, some suggest that rewriting the law accessibly will distort the law. For instance, Jack Stark argues that plain language "is a disaster because it generates many errors, because it is illogical and ignores the statutory drafting language-game."[18] These criticisms arise whenever legislatures propose new plain language projects, and any attempt to make amendments that improve the clarity of the law must grapple with them.

Plain language advocates and moderate voices in the legislative drafting world have offered explanations that acknowledge the partial truth of such criticisms while simultaneously illustrating why there is still value in

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15 Law Reform Commission of British Columbia, *Access to Justice: The Report of the Justice Reform Committee, 1988* (Victoria: Law Reform Commission of British Columbia, 1988) at 12. See also Krongold, *supra* note 6 at 502.

16 See Rabeea Assy, "Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language" (2011) 38:3 J L & Soc'y 376. For more criticism of plain language drafting, see especially Jack Stark, "Plain Language" (June 2012), online: *National Conference of State Legislatures* <www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/june-2012-plain-language.aspx>; Jeffrey Barnes, "When 'Plain Language' Legislation Is Ambiguous—Sources of Doubt and Lessons for the Plain Language Movement" (2010) 34 Melbourne UL Rev 671.

17 This is a common criticism of plain language drafting. See e.g. Stark, *supra* note 16 or the criticisms of the UK and Australian tax law rewrite projects discussed at sections V(A) and (B).

18 Stark, *supra* note 16. But see the response to Stark from Joseph Kimble, "Wrong—Again—About Plain Language" (December 2012), online: *National Conference of State Legislatures* <www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/lsss-wrong-again-about-plain-language.aspx>.

clarity improvements to legislation. Ruth Sullivan is one of these moderate voices. She has the following perspective:

> I personally doubt that the techniques of plain language drafting can make the law accessible to the public at large. I doubt that the official text of legislation is the best way to communicate legal messages… [However,] [u]sing plain language techniques is almost sure to make legislation easier for legal insiders to read and use. It will likely improve the accuracy of interpretation by unofficial interpreters…who must translate relevant legislation for their constituent groups.[19]

Sullivan's support for improving the language in legislation weathers the criticisms levelled against plain language drafting. According to her, even if citizens do not read the law, they can still benefit from plain language rewrites. They will access the law more efficiently and accurately through official and unofficial interpreters, and those interpreters' understanding of the law will improve with clearer laws. Therefore, if legislators value greater accessibility, efficiency, and support for the rule of law, then efforts like those promoted by plain language advocates to improve the quality of the law are necessary.

B. Why Should a Legislature Separate Non-Substantive Clarity Changes From Substantive Changes?

If a legislature accepts that improving the clarity of laws is worthwhile, it must decide if it will make those improvements as part of a holistic reform project that includes clarity and policy changes or if it will separate policy and language clarity improvements. Tackling these issues at the same time seems to offer advantages. Sullivan argues that legislators should not attempt plain language rewrites of laws without making any substantive change because a plain language rewrite will likely make inadvertent changes to the substance of the law and any claims that the law is the same

19 Ruth Sullivan, "Some Implications of Plain Language Drafting" (2001) 22:3 Stat L Rev 145 at 180 [Sullivan, "Implications"]. Another moderate voice in the plain language debate is John Mark Keyes. He acknowledges that plain language drafting will not make every reader able to read a document. However, he argues that plain language still has value because it will make texts easier to read for those who do read legal texts. See John Mark Keyes, "Plain Language and the Tower of Babel: Myth or Reality?" (2001) 4:1 Leg Ethics 15 at 16.

will cause confusion.[20] As well, dealing with substance and language at the same time could address the root causes of confusing statutory language, which is often confusing policy.[21] Another argument in favour of holistic law reform is that it would avoid creating confusion in the principles of statutory interpretation.[22] For example, the presumption of substantive change would, as this paper argues, need adjustment if a legislature splits policy and clarity reforms. Overall, it seems instinctive that a legislature should change every problematic aspect of its laws at once. However, that instinct does not address the complex political and legal context in which such reforms happen.

Despite the advantages of holistic reform, amendment efforts to improve the clarity of laws without altering the substance of the law are more effective for practical and theoretical reasons. One practical reason for separating reform projects is political expediency. Changing the law exposes a government to debate about the merits of the change. Thus, if a plain language rewrite of a statute accompanies a policy change, its success would depend on the government's ability to generate support for the policy change. In contrast, amendments that exclusively address clarity insulate the government from political risk as few politicians would position themselves as being opposed to improving the clarity of laws. As Ian Waddell explained when he put forward a plain language bill in the Canadian Parliament, "[i]f we want to foster respect for and knowledge of the law and our democratic institutions, we have to make the workings of our government directly accessible to as many people as possible."[23] It would be difficult for any politician to oppose that sentiment. Therefore, separating policy and clarity revisions of laws would offer political

20 Sullivan, "Implications", *supra* note 19 at 177. Sullivan also suggests that it may be impossible to change the language of legislation without changing its meaning (Sullivan, "Promise", *supra* note 6 at 119).

21 In his reflection on the UK's Tax Law Rewrite Project, Jonathan Teasdale argues that the project's inability to alter the law was a major limitation on its effectiveness. See Jonathan Teasdale, "Linguistics and Law Reform" (2014) 2:2 Theory & Practice Legislation 115 at 121. For a discussion of the criticisms of that project, see especially section V(A).

22 See Brian Hunt, "Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?" (2003) 24:2 Stat L Rev 112 at 114–15.

23 "Plain Language Legislation", *supra* note 6 at 15. While serving as Members of Parliament, Waddell and Ted White tried to introduce private member bills to make plain language review mandatory for laws. See Bill C-311, *An Act to promote the use of plain language in federal statutes*, 2nd Sess, 36th Parl, 1999, (first reading 5 November 1999).

insulation for plain language reforms efforts.[24] Disentangling policy and clarity changes from one another may be difficult, but it would improve the likelihood of success for clarity changes.

As well, amendments to laws that only address language polishing have theoretical advantages. The argument in favour of holistic law reform rests in part on the positivist assumption that it is impossible to change the wording of a law without changing the law. However, Sullivan explains that one feature of a plain language revision is that it undermines this positivist assumption about the law; plain language projects show a law can remain the same when the words used to communicate it change.[25] If the law can stay the same when legislative drafters change the wording of a law, then such changes can expose a law's policy weaknesses. For example, Canada's *Income Tax Act* has sections describing the tax benefits available to citizens that are densely worded, use cross-referencing extensively, and feature convoluted sentences.[26] Thus, a taxpayer who is angry about not receiving a certain benefit would likely need to rely on policy statements or legal assistance to understand why she is not receiving the benefit. Then, she would communicate that frustration to her representative in the legislature, and that representative would need to work through the same process, likely with the help of research staff, to determine the source of the problem in this legislation. In contrast, a clearer provision

24 An attempt in the late-1990s and early-2000s to revise Canada's employment insurance legislation is a cautionary tale in the practical challenges of separating policy and clarity changes. Legislative drafters and plain language experts spent years revising the employment insurance legislation to enhance its clarity, but the project was undone by the pressure to include policy changes with the accessibility improvements. Keyes and Sullivan wrote about this project while it was ongoing and spoke positively about its potential to improve the accessibility of the employment insurance regime (Keyes, *supra* note 19 at 17; Sullivan, "Promise", *supra* note 6 at 104). However, the reforms never became law, and Keyes explains that the project failed because it was impossible to separate the accessibility goal from pressures for policy change (Keyes in discussion with the author, April 2018). Salembier laments the resources consumed by this project as it used "up to four drafters full-time for more than two years" and there were further "contracting costs for plain language experts" (Salembier, *supra* note 14 at 602, n100).

25 "Promise", *supra* note 6 at 119. As discussed above, Sullivan also suggests that it would be difficult to change the language of a law without inadvertently changing its meaning (*ibid*). However, Canadian judges are already aware that different words can communicate the same meaning because federal legislation (and some provision legislation) in Canada is bilingual. Provisions are written in both languages, and both versions are equally authoritative. See *Interpretation Act*, RSC 1985, c I-21, s 8.1. For more analysis on the principles of statutory interpretation arising in the context of bilingual legislation, see especially Sullivan, *Statutory Interpretation*, *supra* note 3 at 95–113.

26 See e.g. *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 122.7.

in the legislation would enable the aggrieved taxpayer and her legislative representative to have a direct and succinct conversation about the taxpayer's problem. Thus, the democratic system benefits from non-substantive amendments to improve laws' clarity.

III. THE PRESUMPTION OF SUBSTANTIVE CHANGE CAUSES CONFUSION AND LEGISLATION HAS FAILED TO ELIMINATE IT

If a legislature accepts that language improvements to the law outside policy changes are a worthwhile investment of resources, the presumption of substantive change demands its attention. The presumption inhibits non-substantive improvements to legislation because judges assume a change has a substantive purpose unless there is evidence to show that the legislature intended mere language polishing. The presumption is one of many principles of statutory interpretation. The relevance of these principles varies from case to case, and it is up to judges to decide which principles they use and the ways in which they use them. Unlike other principles, the presumption of substantive change has lost much of its usefulness, so it is time for judges to reduce their reliance on it. This section explores the presumption's decreasing utility due to the differences between the context from which it emerged and contemporary legislative drafting. It reviews the judicial confusion caused by the presumption. Finally, this section examines the failure of legislative attempts to oust the presumption. This discussion reveals that judges must reduce their use of the presumption because of the confusion it causes, and that reduced role will open the door for non-substantive clarity reforms.

A. The Presumption of Substantive Change Is Outdated

Like most principles of statutory interpretation, the presumption of substantive change developed in a particular historical context. However, there are significant differences between the context in which it arose and contemporary Canadian legislative drafting, and those differences have reduced its relevance. The presumption was imported into Canadian law from the UK, and it is a respected principle in UK law.[27] The presumption's

27 See Oliver Jones & F A R Bennion, *Bennion on Statutory Interpretation: A Code*, 6th ed (UK: LexisNexis, 2013). As Bennion explains, "[e]xcept in the case of declaratory, codifying, or consolidating Acts, the sole purpose of an Act is to change the law" (*ibid* at 549).

strength there reflects the fact that the UK was the birthplace of judge-made common law, and statute law was historically of secondary importance. The drafting of legislation in the UK was originally contracted out to conveyancers who wrote with an opaque and verbose style, and the UK employed few or no government drafters.[28] When the UK did turn its attention to improving the quality of laws, its focus was on statute revisions that dealt with imperfections in the law and the removal of obsolete material at the same time.[29] Given this context, it is unsurprising that the UK did not historically invest resources on mere language polishing.[30] With its preference for judge-made law and the emphasis on formal revision processes that emphasized the removal of obsolete material, UK judges could be confident in concluding that the intent of changes outside those formal revisions processes was to make substantive alterations to the law.

From that historical UK context, the presumption of substantive change made its way into Canadian approaches to statutory interpretation. However, when the presumption first appeared in Canadian law, Canadian judges suggested that courts should take a measured approach in its application. The seminal case on the presumption in Canada is *Ottawa (City) v Hunter*[31] which dealt with a statute addressing appeals to the Supreme Court of Canada. One provision permitted litigants to appeal a decision to the Court if the amount in controversy on appeal exceeded $1,000. In its decision, the Court emphasized the significance of the legislature's decision to add the words "in the appeal" after the phrase "the amount in controversy."[32] The Court made the following statement that became the root of the presumption in Canada:

> [W]e would be setting at naught the very clear intention of the legislature if we gave to the last enactment the same construction that had

28 Renton, *supra* note 11 at 2.4.

29 *Ibid*. It focused its attention on removing obsolete material because its statute book was full of outdated and historical Acts of Parliament.

30 See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at para 23.23 [Sullivan, *Construction of Statutes*].

31 [1901] 31 SCR 7, 1900 CanLII 10 [*Hunter* cited to SCR].

32 *Ibid* at 10. In this case, the older version was the provision that dealt with appeals from Quebec; that provision simply stated that the dollar amount threshold for an appeal to the Supreme Court of Canada centered on "the amount in controversy" (*ibid*). The newer version was the provision that dealt with appeals from Ontario, and it stated that "[n]o appeal shall lie to the Supreme Court of Canada from any judgement of the Court of Appeal for Ontario except…where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars" (*ibid*).

> been judicially given to the prior one…We cannot so read out of a statute expressions that must be held to have deliberately been inserted so as to make the new statute different from the prior one.[33]

Although this case launched the presumption in Canada, the Court's endorsement of it is limited. The Court emphasized that the amendments at issue in this case clearly signaled an intent to make a substantive change by departing from a previous version of the law. The decision does not instruct judges to presume that language changes mean substantive change; instead, it suggests judges should examine a language change to determine what the legislature intended. Despite this measured tone from the Court, its reasoning became the foundation for the presumption in Canada.

Since *Hunter*, the gap between the historical context in which the presumption of substantive change arose and the realities of contemporary legislative drafting in Canada has grown. The Supreme Court of Canada has endorsed the presumption in subsequent decisions, but even those statements are becoming outdated. The clearest statement from the Court came in 1971 with its decision in *Bathurst*.[34] The Court concluded that "[l]egislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended."[35] This conclusion offers support to the presumption and highlights the Court's commitment to judicial respect for legislative intent. However, *Bathurst* was decided 47 years ago. It predates the contemporary plain language movement, the shifts in technology for drafting and publishing laws, and the decline of formal revision and consolidation processes.[36] Legislative drafting has changed as Canadian legis-

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33 *Ibid* at 10. Although *Hunter* is the seminal case for the presumption in Canada, it was not a pure example of the application of the principle as it did not deal with a change to a particular provision. Instead, it examined two separate provisions (one for appeals from Quebec and the other for appeals from Ontario) and the distinction between the two was that the provision for Ontario came after the provision for Quebec.

34 *Supra* note 4. In *Bathurst*, a private Act from 1927 exempted the Bathurst company from taxation, but a public Act in 1968 changed the definition of who was eligible for tax concessions (*ibid* at 472–76). Bathurst's claim that its tax exemption survived the 1968 change to the definition of tax concessions failed and the Court concluded that it had lost its tax-exempt status.

35 *Ibid* at 477–78.

36 Although Salembier explains that the principles of plain language drafting have been present for many years, academic discussion of plain language tends to be from the 1990s or later (Salembier, *supra* note 14 at 579). See also Krongold, *supra* note 6 in 1992; Keyes, *supra* note 19 in 2001; Sullivan, "Promise", *supra* note 6 in 2001. The *Canada Gazette* has been published online since 1998. See Government of Canada, *160 Years of the Canada*

lators now acknowledge the value of improving accessibility through plain language drafting. Sullivan explains that in contemporary Canada "purely formal amendment is not unusual" for the purposes of correcting errors, clarifying confusing provisions, and improving drafting.[37] As well, federal and provincial governments employ hundreds of specialized legislative drafters. Finally, fixing unclear laws and providing citizens with refined versions of legislative texts is easier with the online publication of laws. The purpose of the presumption of substantive change is to ensure the judiciary defers to legislative intent, but non-substantive change is more likely to be intended in the contemporary context. The likelihood of a government making clarity upgrades to its laws has grown to the point that the presumption is no longer useful.

B. Canadian Judges Struggle with the Presumption of Substantive Change

Perhaps due to its poor fit in the context of contemporary legislative drafting, confusion abounds when Canadian judges try to apply, rebut, or reject the presumption of substantive change.

1. *Judges Disagree About Whether to Apply the Presumption of Substantive Change*

Judges in appellate courts rarely agree when confronted with the presumption of substantive change. They have freedom to choose the principles of statutory interpretation relevant to a case, but even when they agree to invoke the presumption they regularly disagree about whether it should prevail.[38] One example is the Supreme Court of Canada's decision in *Marche*. In that case, the Court examined a change regarding judges' powers to set aside clauses in insurance contracts. Here is the old provision:

Gazette (Canada Gazette Directorate, 2001) at 50. For further discussion of the decline in formal consolidation and revision processes, see section IV(A).

37 Sullivan, *Statutory Interpretation*, *supra* note 3 at 273–74.

38 See e.g. *Marche*, *supra* note 7; *McGuigan v R*, [1982] 1 SCR 284, 1982 CanLII 41 [*McGuigan*]; *Skoke-Graham v R*, [1985] 1 SCR 106, 1985 CanLII 60; *R v DLW*, 2016 SCC 22 [*DLW*]; *Crupi v Canada (Employment and Immigration Commission)*, [1986] 3 FC 3, 10 CCEL 286 (CA) [*Crupi*]; *Envision Edmonton Opportunities Society v Edmonton (City)*, 2012 ABCA 188 [*Envision Edmonton*]. This list is far from exhaustive.

> 11. [A policy] may contain a clause not inconsistent with any statutory condition…Such clause shall be binding…only in so far as it is held by the court…to be just and reasonable.[39]

The updated provision reads as follows:

> 171. Where a contract…
> (b) contains any stipulation, condition or warranty…[the] stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court….[40]

The presumption received significantly different treatment by the majority and dissent in this case. The majority claimed "the guiding rule of interpretation that legislative change is made for a purpose" in support of its conclusion that the legislature intended a substantive change.[41] It did not examine whether the language changes could have been for language polishing reasons; instead, it cited the presumption while omitting the possibility of rebuttal. In contrast, the dissent acknowledged the presumption, but highlighted its rebuttability.[42] Unlike the majority, the dissent considered whether the legislature intended a substantive change or not. This approach reflects the overarching goal in statutory interpretation of determining the legislature's intent. If courts stopped using the presumption, judges would be forced to follow the lead of the dissent in *Marche*. However, the majority's use of the presumption as a shortcut for avoiding that analysis became the precedent for courts to follow.

The Supreme Court suffered a similar split in a criminal case involving bestiality provisions in criminal legislation. In *R v DLW*, the Court confronted a charge of "bestiality" under the *Criminal Code*. The judges delved into the presumption of substantive change because the wording in the *Criminal Code* changed in 1955 from "buggery…with any other living creature" (which required penetration) to "bestiality."[43] The majority reasoned that this change was merely an update to old language; therefore,

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39 *Fire Insurance Policy Act*, RSNS 1954, c 100, s 11.

40 *Insurance Act*, RSNS 1989, c 231, s 171.

41 *Marche*, *supra* note 7 at paras 21, 25–26.

42 *Ibid* at paras 101–03.

43 The buggery provision in the old Act read: "Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature". See *Criminal Code*, RSC 1927, c 36, s 202. The bestiality provision in the new Act reads: "Every person who commits bestiality is guilty…". See *Criminal Code*, RSC 1985, c C-46, s 160(1).

"bestiality" retained the element of penetration. In contrast, the dissent argued the change was substantive and "bestiality" encompassed more behaviours than the previous language.[44] The judicial reasoning in *DLW* reflects an improvement on the analysis from *Marche* as both the majority and dissent recognized the possibility that the presumption of substantive change can be ousted, and a major statutory overhaul like the one that happened to the *Criminal Code* in 1955 can be evidence of an intent to do language polishing.[45] However, the impact of the presumption was ultimately inconclusive as the majority and dissent reached opposing conclusions on whether the legislature intended to make a substantive change. Thus, even when Canadian judges agree that the presumption requires analysis, they still disagree over whether the presumption should prevail. Disagreements like this are common when judges employ principles of statutory interpretation; but the presumption of substantive change rarely resolves disagreements about legislative intent.

2. *Judges Have Questioned the Value of Searching for Legislative Intent in the Legislative Evolution and the Presumption of Substantive Change*

The judicial disagreements caused by the presumption of substantive change are unsurprising because judges often quarrel when confronted with questions of statutory interpretation. However, the quarrels that arise with this presumption tend to lead judges to question the entire project of searching through a provision's legislative evolution to locate the legislative intent. The presumption of substantive change is one part of a larger judicial inquiry into a provision's legislative evolution for clues about the legislative intent. Although legislative evolution is an accepted interpretive tool in Canadian courts, judges have questioned the value of this search and, consequently, the utility of the presumption.

One example of this questioning appears in *R v McIntosh*.[46] That case dealt with criminal provisions relating to self-defence as a justification in

44 *DLW*, *supra* note 38 at paras 95–96, 140–41.

45 The provisions at issue in *DLW* had undergone such an overhaul. For further discussion on the advantages of major overhaul projects, see section IV(B). Also, *DLW* demonstrates the important role that the bilingual nature of Canadian legislation can play in assessing whether a change was substantive. The majority relied on the fact that the wording of the French version of the provision did not change when the wording of the English version changed as evidence that the legislative intent was mere language polishing (*ibid* at paras 41–43, 77).

46 [1995] 1 SCR 686, 95 CC (3d) 481 [*McIntosh* cited to SCR].

a second-degree murder trial. The key question was whether the words "without having provoked the assault," which appeared in section 34(1) of the *Criminal Code* but were absent from section 34(2), should be read into section 34(2).[47] The Supreme Court of Canada split. The majority decided to apply what appeared to them to be the clear meaning of the law. Their view is that provisions must be unclear before judges can embark on a detailed analysis of legislative intent, and judges decide themselves when provisions are clear or ambiguous.[48] They cast aside the value of the entire search and consequently left no room for the presumption to enter their analysis. In contrast, four dissenting judges reviewed the legislative evolution and invoked the presumption. For them, the presumption was a key factor in helping to locate that legislative intent.

Since *McIntosh*, the dissenting judges' analysis has become the dominant approach used in Canadian courts. Judges view the search through a provision's evolution as an integral part of statutory interpretation. However, there are exceptions. In some cases, judges have revisited the debate from *McIntosh* and questioned the relevance of legislative evolution. For instance, the Supreme Court in *R v Daoust* has emphasized that it "cannot use the history of a clearly drafted statute as a basis for changing it or completely disregarding its meaning."[49] The logic in *Daoust* cautions against the automatic assumption that legislative evolution and presumption of substantive change are relevant in every case. This acknowledgement

47 *Ibid* at paras 19–20.

48 This approach requires legislation to reach an "ambiguity threshold" before judges investigate legislative intent. Some have supported the view that an ambiguity threshold exists, and it is an error for judges to search for legislative intent when a provision is clear. Others have criticized this approach because it draws an unsound distinction between reading and interpretation, does not account for different views on how clear a text is (e.g. in *McIntosh*, nine judges could not agree on whether the meaning of a provision was clear or on what the meaning was) and restrains judges' obligations to search for legislative intent (Sullivan, *Statutory Interpretation*, *supra* note 3 at 71–72). Sullivan calls this approach the "plain meaning rule" (*ibid* at 70). For a detailed analysis of the "plain meaning rule", see the Court's split decision in *Will-Kare Paving & Contracting Ltd v Canada*, 2000 SCC 36. See also John Mark Keyes & Carol Diamond, "Constitutional Inconsistency in Legislation—Interpretation and the Ambiguous Role of Ambiguity" (2017) 48:2 Ottawa L Rev 313.

49 2004 SCC 6 at para 2 [*Daoust*]. *Daoust* shows that the "plain meaning rule" continues to appear despite the criticism of it. For another criticism of the process of searching for legislative intent in its evolution, see the decision from Justice La Forest (who was later one of the dissenting judges in *McIntosh*) in *New Brunswick v Estabrooks Pontiac Buick Ltd* (1982), 44 NBR (2d) 201, 144 DLR (3d) 21. In that case, Justice La Forest expressed frustration with that provision's history: "the least that can be said in the light of its legislative history is that one is left in considerable doubt about the intention of the Legislature" (*ibid* at para 56).

opens the door for judges to dismiss the value of the presumption, but it continues to factor into judgements.[50]

In addition to the concerns raised by the majority in *McIntosh* and the Court in *Daoust* about the overall value of examining legislative intent and evolution, the presumption of substantive change has also come under fire for its inconclusiveness. One example of a judge complaining about the lack of clarity provided by the presumption is a concurring judgement in *Envision Edmonton*.[51] At issue in that case was a change of the wording in a section of Alberta's *Municipal Government Act* regarding the timing for petitions for by-law changes.[52] The old provision read as follows:

> 125(1) The electors of a municipality may submit a petition to the council for
> (a) a by-law, or
> (b) the repeal, amendment or suspension of any existing by-law or resolution dealing with any matter within the legislative jurisdiction of the council under this Act.
>
> (2) A petition under this section for a by-law that will have the effect of repealing, amending or suspending an existing by-law or resolution has no effect unless it is filed with the municipal secretary within 60 days of the day on which the existing by-law or resolution was passed.

There was a change in the wording in the new provisions:

> 232(1) Electors may petition for
> (a) a new bylaw, or
> (b) a bylaw to amend or repeal a bylaw or resolution on any matter within the jurisdiction of the council under this or another enactment
>
> ...
>
> 233(2) A petition under section 232 requesting an amendment or repeal of a bylaw or resolution is not sufficient unless it is filed with the chief administrative officer within 60 days after the day on which that bylaw or resolution was passed.

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50 Evidence that Courts have not fully embraced the approach in *Daoust* lies in the fact that many decisions since 2004 have failed to follow its logic. See e.g. the cases listed at note 38, *above*.

51 *Supra* note 38.

52 See *Municipal Government Amendment Act*, SA 1985, c 43, s 125(1); *Municipal Government Act*, RSA 2000, c M-26, s 232(1).

At issue in this case was the question about whether a petition brought before the council was a petition for a new bylaw (with possibly no time limitations) or one that requested an amendment or repeal of an existing bylaw (which has a 60-day time limitation).

The majority and the concurring judgment in this case split on the issue of whether the change was substantive or mere language polishing. The majority concluded that the legislature intended a substantive change by removing the phrase "that will have the effect of repealing, amending or suspending an existing by-law or resolution." The substantive change was that petitions for new bylaws had no time limitation even if they would necessarily cause the repeal or amendment of an existing bylaw.[53] However, the majority based its decision on an erroneous use of the "different words, different meaning" principle of statutory interpretation.[54] It was an error for the majority to invoke the "different words, different meaning" principle because that principle only applies to differences in terminology within a single version of a statute (different provisions in the current version of the statute); it does not apply to differences in terminology between different versions of the same statute (legislative evolution).[55] In contrast, the concurring judge concludes that both arguments have merit; it is possible that the legislature intended to make a substantive change, and it is also possible that the legislature was merely cleaning up the provision. In the face of that ambiguity, the concurring judge dismissed the value of the legislative evolution in this case because both the arguments for and against a substantive change had merit and the wording change provided no insight into the legislative intent.[56] This disagreement highlights the limited value provided by the presumption for judges engaged in statutory interpretation in some cases.

If a judge were to follow the lead of the majority in *Envision Edmonton* and vigorously apply the presumption of substantive change, then she would conclude that a substantive change was intended in situations like those in this case where both arguments are compelling. However, that analysis is unsatisfying as it uses a lack of clarity about legislative intent as a signal of legislative intent. An approach that better reflects the

53 *Envision Edmonton*, *supra* note 38 at para 28.

54 *Ibid*.

55 Sullivan, *Statutory Interpretation*, *supra* note 3 at 147–48.

56 *Envision Edmonton*, *supra* note 38. O'Ferrall J, in a concurring opinion, laments that "attempting to ascertain the Legislature's intent for the change of wording…[is] not particularly fruitful" (*ibid* at para 76).

overarching goal of statutory interpretation would be to follow the lead of the concurring judgement in *Envision Edmonton* and ascribe no weight to legislative evolution when it is unclear whether a change was substantive or mere language polishing. The dismissal of the presumption in the concurring judgement in *Envision Edmonton* is an improved judicial approach that acknowledges the contemporary context of legislative drafting that regularly conducts non-substantive law reform.

3. *Judges Find No Change when the Language Suggests Change Was Intended and Vice Versa*

Further evidence that judges struggle with the presumption of substantive change is the lack of internal consistency and faulty analysis when judges use it. The Supreme Court of Canada fails to use or rebut the presumption consistently. The Court's treatment of changes in two cases involving criminal legislation showcases this problem. In *DLW*, a majority of the Court rebutted the presumption and found that the legislative change (from "buggery…with an animal" to "bestiality") updated the language without making substantive changes to the law.[57] However, this conclusion appears inconsistent with the Court's reasoning in *R v Chase*.[58] In *Chase*, the Court analyzed amendments that replaced old offences of rape, attempted rape, and indecent assault with a new offence of sexual assault. The Court found the legislative intent regarding the provisions in *Chase* was to substantively change the law of sexual offences.[59]

The Court's conclusion in *DLW* seems irreconcilable with the *Chase* logic as both dealt with rephrasing old offences. However, there is a key difference in the legislative contexts in which these changes took place. The changes at issue in *DLW* occurred during an exhaustive overhaul and consolidation of Canada's criminal legislation in 1955, whereas the changes in *Chase* were a result of a specific amendment of the sexual offences in the criminal legislation.[60] This distinction highlights the value of major revision processes for facilitating language polishing, but it also demonstrates the continuing power of these presumptions. Two cases with

57 *Supra* note 38.

58 [1987] 2 SCR 293, 1987 CanLII 23 [*Chase* cited to SCR].

59 *Ibid* at 300–03.

60 See A J MacLeod & J C Martin, "The Revision of the Criminal Code" (1955) 33 Can Bar Rev 3 at 3. The primary purpose of the 1955 revision was "not to effect changes in the law but to remove those features that had aroused the most criticism" (*ibid* at 3). They admit that there were changes to the law, but such changes were introduced and debated by Parliament (*ibid* at 4).

similar changes to the law led to very different results, in part because the Court placed its confidence in the value of competing presumptions.

Decisions from other courts betray similar flaws in judicial reasoning when the presumption factors into decisions. For instance, the Federal Court of Appeal ineffectively used the presumption in *Crupi* when it had to determine whether Mr. Crupi, who was confined to the Penetanguishene Mental Health Centre after being charged with an offence, was entitled to employment insurance. The old provision read as follows:

> 45. A claimant is not entitled to receive benefit while he is an inmate of any prison or penitentiary or an institution supported wholly or partly out of public funds…[61]

The new provision had slightly different wording:

> 45. Except under section 31, a claimant is not entitled to receive benefit for any period during which (a) he is an inmate of any prison or similar institution…[62]

Three judges of the Federal Court of Appeal gave three different opinions. Two judges relied in part on the presumption and found the change was evidence of intent to remove institutions like Penetanguishene from the provision while the third judge found no such intent.[63] This case showcases the way in which the presumption can mislead judges when they attempt to uncover legislative intent because the change has all the characteristics of a plain language rewrite and there is little evidence of a substantive change. It broke up a long provision into smaller chunks and substituted general language in place of the old provision's attempt to provide a list of all kinds of institutions. However, the majority gave no consideration to the possibility that this was non-substantive language polishing.[64] *Crupi* is

61 *Unemployment Insurance Act, 1971*, SC 1970–71–72 (3rd Sess), c 48, s 45.

62 *Unemployment Insurance Act, 1971*, SC 1970–71–72 (3rd Sess), c 48, s 45, as re-enacted by SC 1974–75–76 (1st Sess), c 80, s 17.

63 *Crupi*, *supra* note 38 at paras 2 (one judge using the presumption), 15 (the second judge agreeing with the first judge but ignoring the presumption), and 52 (the third judge also does not address the presumption but reaches the opposite conclusion about the meaning of the key language).

64 *Crupi* is not an isolated instance of confusion. Other judges have similarly failed to consider the possibility of "mere language polishing". See *McGuigan*, *supra* note 38 (majority reasons); *McDougall and Cox v Mahone Bay School Board* (1979), 33 NSR (2d) 435, 1979 CanLII 2534 (CA).

one example of judges overlooking a clarity explanation because they wish to find a substantive change.

C. Legislation Aimed at Ousting the Presumptions of Substantive Change Have Failed

1. *The Federal Interpretation Act Fails to Oust the Presumption of Substantive Change*

Given the inability of Canadian judges to make effective use of the presumption of substantive change, the onus is on Canadian legislatures to provide judges with clarity about this issue. In fact, legislators have tried to do so through federal and provincial interpretation statutes by including provisions that purport to oust the presumption. One example of this is subsection 45(2) of Canada's federal *Interpretation Act*:

> 45(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.[65]

Although this provision itself may lack plain language clarity, it appears to facilitate the use of non-substantive legislative amendments by eliminating the presumption of substantive change. However, its attempt to oust the presumption has failed. As Pierre-André Côté explains, judges pay little attention to this provision and continue to apply the presumption as if this provision does not exist. According to Côté, "the practical effect of [the *Interpretation Act* provision] has been rather limited. Although at times used to rebut arguments based on amendment, the section has also been ignored or simply declared inapplicable."[66] That conclusion seems at odds with the plain meaning of this provision, but the caselaw confirms Côté's pessimism about Canada's *Interpretation Act*.

The *Interpretation Act* has failed to make an impact on judicial reasoning. Judges are more likely to cite this provision as a precursor to stating the presumption and making use of the presumption instead of the *Interpretation Act* provision. The Federal Court of Appeal's reasoning in *Silicon*

65 *Supra* note 25, s 45(2).

66 Côté, Beaulac & Devinat, *supra* note 3 at 462.

Graphics Ltd v Canada[67] is reflective of that approach. In *Silicon*, Justice Sexton goes from citing the *Interpretation Act* provision, to promoting the presumption, to finding a substantive change in the span of three paragraphs. The following is his analysis of the *Interpretation Act* provision:

> [T]he Interpretation Act does not preclude the Court from drawing an inference that amendments to legislation are intended to change the legislation…there is a presumption that changes to the wording of legislation are purposeful and that the provisions of the Interpretation Act referred to above do not preclude the Court from acknowledging that, in principle at least, the foremost purpose of amendments is to bring about a substantive change in the law.[68]

This reasoning neutralizes the *Interpretation Act* provision. Although the provision's plain meaning appears to oust any inferences or presumptions about the purpose of amendments, the *Silicon* approach suggests judges can still draw an inference that amendments usually change the substance of the law.

Canadian judges have followed the *Silicon* approach to the *Interpretation Act*.[69] This approach reflects the theory that there is a separation of powers between judges and legislators (legislators make laws and judges interpret those laws) and judges have the final say in determining the meaning of the *Interpretation Act*. However, it ignores the principle of legislative supremacy. While judges should interpret laws, they must respect the clear intent of Parliament and the *Interpretation Act* provision suggests that judges should no longer apply the presumption. The *Interpretation Act* is not always mandatory as legislation can evince an intention to avoid the principles outlined in the *Interpretation Act* or employ principles that only apply to that legislation.[70] As well, the *Interpretation Act* includes both clear rules and broad principles. However, the *Interpret-*

67 2002 FCA 260 [*Silicon*]. The change at issue in *Silicon* was a not a previous change to the legislation but a subsequent. At issue was whether Silicon was a Canadian owned company. According to the old legislation, a company was Canadian-owned if it was controlled by a majority of Canadians, but the new legislation used ownership in addition to control. Thus, the Federal Court of Appeal reasoned that the ownership by non-Canadians was insufficient to disqualify a company as Canadian owned Company under the old regime; the company needed to be controlled by a majority of non-Canadians to be disqualified.

68 *Ibid* at para 43.

69 See *R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier* cited to SCR]; *Henry v Saskatchewan Workers' Compensation Board* (1999), 1999 CanLII 12241, 177 Sask R 35 (CA) [*Henry*].

70 *Supra* note 25, s 3.

ation Act appears to expressly eliminate the presumption of substantive change, so judges should not use it unless a legislative text exhibits an intention for the presumption to apply. Despite that clarity, the *Silicon* approach remains dominant in Canadian judicial reasoning. Until higher courts expunge the *Silicon* approach, the Canadian *Interpretation Act* will remain an insufficient tool for ousting the presumption.

There have been attempts by courts to give weight to the *Interpretation Act* provision that purports to oust the presumption of substantive change, but those efforts have been ineffective. The high-water mark was the Supreme Court of Canada's decision in *Cuerrier* where it found that the sexual assault provisions in the *Criminal Code* retained the common law rule that fraud vitiated consent.[71] However, the *Interpretation Act* provision was a secondary aspect of the decision; the case's focus was primarily on consolidating common law in statutes. This reflects another presumption against changing the common law. This case highlights a double standard as courts are loathe to find a change to the common law when that law is codified in a statute, but are receptive to change when a statute is replaced. Essentially, courts are reluctant to accept that a legislature would wish to change a law that the courts themselves made, but they are more comfortable with assuming that a legislature would choose to change a law the legislature made.

In other cases that cite the *Interpretation Act* provision and discuss the presumption, the result is often split courts and dissenting judges. For example, the Federal Court of Appeal split in *Canada v Mara Properties Ltd*.[72] In that case, one judge found that there was a substantive change to the *Income Tax Act*, another judge cited the *Interpretation Act* provision to support a finding of no change, and a third judge did not address the issue at all.[73] This disagreement about the provision's relevance is further evidence that it has not adequately sidelined the presumption of substantive change. Thus, the Canadian *Interpretation Act* is a false beacon of hope for those who wish to improve the law through non-substantive language polishing.

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71 *Cuerrier*, *supra* note 69 at para 36. The previous version of the legislation at issue in *Cuerrier* provided that "consent to sexual intercourse was vitiated when it was obtained 'by false and fraudulent representations as to the nature and quality of the act'" (*ibid* at para 30). However, the new provision simply stated that "no consent is obtained where the complainant submits or does not resist by reason of…fraud" (*ibid* at para 8).

72 [1995] 2 FC 433, 1995 CanLII 3578 (CA).

73 *Ibid*.

One aspect of the *Interpretation Act* that has facilitated successful efforts to make non-substantive changes to the law is the section that addresses the bilingual and bijural nature of law-making in Canada. Canada has two official languages, English and French, and two legal traditions, civil law in Quebec and common law in the rest of Canada. Canadian legislation is enacted in English and French. Both texts are equally authoritative, and courts have adapted statutory interpretation techniques to respect the bilingual and bijural nature of Canada's legislation.[74] The *Interpretation Act* was amended to address the potential confusion between this aspect of Canadian legislation and the presumption of substantive change after a major harmonization project of English and French versions of Canada's legislation in the late 1990s and early 2000s. This harmonization process led to the development of techniques for drafting and amending bijural legislation, including the use of bijural terms, doublets, the inclusion of two terms, a common law term and an civil law term, in both languages, and generic terms.[75] The introduction of these new techniques led to multiple non-substantive legislative revisions to harmonize English and French versions of legislation. As these revisions took place, sections 8.1 and 8.2 of the *Interpretation Act* helped insulate these projects from the presumption of substantive change.[76] These changes to the *Interpretation Act* and the major reform project to harmonize English and French versions of the law meant the changes that occurred during this process avoided the application of the presumption. However, this benefit was limited to changes during the harmonization process.

2. *Provincial Interpretation Acts Have Received Inconsistent Treatment in Cases Involving the Presumption of Substantive Change*

Provincial interpretation Acts with provisions that purport to oust the presumption of substantive change have seen more judicial respect than their

74 Sullivan, *Statutory Interpretation*, *supra* note 3 at 91–106.

75 *Ibid* at 93–94.

76 Section 8.2 of the *Interpretation Act* was especially important in emphasizing the purpose of these bijural drafting techniques as it states the following: "Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in other provinces". For an example of how these provisions protected the legislative changes from the presumption of substantive change, see *Schreiber v Canada* (*AG*), 2002 SCC 62 [*Schreiber*]. In that case, the Court concluded that a change in the wording of a statute was part of the harmonization project and did not substantively change the law.

federal counterpart, but those decisions are inconsistent. In British Columbia, a recent judgment hints that the province may be falling into the *Silicon* approach. In *The Owners, Strata Plan KAS 2428 v Baettig*[77], the Court of Appeal cited the *Interpretation Act* provision but then reminded itself of the following: "[A] court may look to prior versions of an enactment to assist with interpretation of the version which is applicable in a particular case…[I]t is presumed that amendments are made for an intelligible purpose: to clarify meaning, to correct a mistake, or to change the law."[78] On its face, this statement appears to offer deference to the *Interpretation Act* because it acknowledges that changes can be to "clarify meaning." However, it raises questions because the judges found that the legislature intended to make substantive changes despite the fact that another judge had ruled the same amendment was a non-substantive plain language rewrite.[79] The amendment at issue was a change in wording to the costs that a condominium corporation could collect from a condo owner: the corporation could collect the "legal costs of a proceeding" under the old statute, but the new statute permitted it to collect "reasonable legal costs."[80] There appears to be little difference between those expressions, but the Court of Appeal saw a change.

The conclusion in *Baettig* was a failure for the legislative attempt to oust the provision. The Court of Appeal concluded that the legislature intended to expand the scope of the legal costs that the condo corporation could collect because it felt that "legal costs of a proceeding" only addressed in-court fees while "reasonable legal costs" included in-court and out-of-court legal costs. As well, the Court of Appeal highlighted "structural changes" as indicative of a substantive change.[81] This conclusion is untenable as that "structural change" was the use of paragraphing to split up a long provision and other judges saw no substantive change in the language around legal costs. Thus, this decision shows that British Columbia's *Interpretation Act* is an insufficient tool for ensuring courts avoid errors caused by the presumption.

77 2017 BCCA 377 [*Baettig*].

78 *Ibid* at para 44, citing *Raguin v Insurance Corporation of British Columbia*, 2011 BCCA 482 at para 36.

79 See *First West Credit Union v Milligan*, 2012 BCSC 610 [*Milligan*]. *Milligan* appears again in the analysis of judicial responses to major reform projects.

80 *Baettig*, *supra* note 77 at para 55.

81 *Ibid* at paras 51–54.

The Canadian jurisdiction that has had the most success in undermining the presumption of substantive change is Ontario. Its *Legislation Act, 2006*[82] is the most recent interpretation legislation, and it features the simplest version of a provision to oust the presumption:

> 56(2) The amendment of an Act or regulation does not imply that the previous state of the law was different.[83]

The simplicity of this provision may be partially responsible for its success as Ontario's Court of Appeal has recognized that the presumption of substantive change is no longer applicable. As the Court explained in *Demers v Monty*:

> [A] mere amendment of a regulation does not imply anything about the previous state of the law, and especially does not imply that the previous state of the law was different… Equally, however, the court should not presume the law is the same despite the amendment… The amendment standing alone is a neutral consideration.[84]

This analysis articulates a new approach in which a judge should start with no presumption. That judge must weigh the possibility of substantive or non-substantive changes equally. This is the kind of approach that could provide legislators with the interpretive space needed to make non-substantive changes to improve the clarity of laws. Still, it remains to be seen to what extent other judges will adopt the *Demers* approach.

Other provinces do not have a case akin to *Demers*. The leading case on interpretation provisions in Saskatchewan provides continued support

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82 SO 2006, c 21, Sched F [*Legislation Act, 2006*].

83 *Ibid*, s 56(2).

84 2012 ONCA 384 at para 43 [*Demers*]. In *Demers,* the legislative provisions at issue dealt with whether insurance payments were deductible from tort awards in motor vehicle accidents. The key difference between the legislative provisions was that one version of the provision provided for damage awards to be reduced by payments for "loss or income" while the other version reduced benefits for "income loss and loss of earning capacity" (*ibid* at paras 20–21). The Court of Appeal concluded that neither of these provisions altered the older common law approach to deductions for tort awards and that there was no substantive change between them. Again, it appears *Demers* benefited from judges' preference to protect common law. There have been some favourable decisions that reflect the *Demers* approach for the federal interpretation legislation. See *R v AA*, 2015 ONCA 558 at para 69; *Beothuk Data Systems Ltd, Seawatch Division v Dean*, [1998] 1 FC 433 at paras 111–13, CanLII 6360 (CA). However, those decisions have not reset the way courts treat the federal legislation. See especially the Supreme Court of Canada's split in *R v DAI*, 2012 SCC 5; *R v Shukparski*, 2003 SKCA 22.

to the presumption. Saskatchewan's Court of Appeal took the approach of referencing its province's *Interpretation Act*[85] before applying the presumption in *Henry*.[86] The Court in that case cited the relevant provision but then also relied on statements from Sullivan and Coté that express the continued dominance of the provision.[87] It then used the presumption to assist in finding that there was a substantive change to the legislation. This case is reflective of trends in other Canadian jurisdictions.[88] Despite limited success in some provinces, judges in most provinces continue to view such provisions as secondary to the presumption. In the face of weak provisions in interpretation legislation, the way is unclear for legislatures wishing to make non-substantive language improvements.

In sum, the presumption of substantive change causes confusion in Canadian courts. Judges disagree about when and how to use the presumption. At the same time, interpretation Acts have been unsuccessful in eliminating it. The confusion in the caselaw and ineffective interpretation Acts have a chilling effect on legislative efforts to make non-substantive changes to laws that would improve the clarity of those laws without changing the substance of the law. This is because legislators are, with good reason, wary of having a judge misunderstand their purpose and find an unintended substantive change. In the face of this confusion and the need to facilitate non-substantive language improvements, judges need to accept that the presumption of substantive change often casts more shade than light and ascribe less weight to it.

85 See *Interpretation Act, 1995*, SS 1995, c I-11.2.

86 *Henry*, *supra* note 69 at paras 25–32. This case examined the workers' compensation legislation. The old version of the legislation stated the following: "[w]here a worker is found dead at a place where the worker had a right in the course of his employment to be, it shall be presumed that his death was the result of personal injury by accident arising out of and in the course of his employment *unless there is evidence sufficient to rebut the presumption*". See *The Workers' Compensation Act*, RSS 1978, c W-17, s 31(2) [emphasis added]. The new legislation reads "[w]here a worker is found dead at a place where he had a right to be in the course of his employment, it is presumed that his death was the result of injury arising out of and in the course of his employment". See *The Workers' Compensation Act, 2013*, RSS 2013, c W-17.11, s 29. The judge decided that the removal of the words "unless there is evidence sufficient to rebut the presumption" was a substantive change of the law (*Henry*, *supra* note 69 at para 28).

87 *Ibid* at paras 26–27.

88 *Bathurst*, *supra* note 4, remains the leading case on this issue in New Brunswick. See also Manitoba's decision in *Santarsieri* (*Michele*) *Inc v Manitoba* (*Minister of Finance*), 2015 MBCA 71.

IV. EVIDENCE OF LANGUAGE POLISHING CAN REBUT THE PRESUMPTION OF SUBSTANTIVE CHANGE

The previous section exposes the flaws in judges' treatment of the presumption of substantive change and the consequential need for judges to reduce their reliance on it, but judges cannot act alone in facilitating efforts to improve the clarity of legislation. Because the presumption is rebuttable, legislatures need to provide the kinds of evidence that judges use to conclude that the intent was non-substantive language polishing. This section reviews three approaches to rebut the presumption and evaluates the effectiveness of those approaches. When a legislature wishes to signal to judges its intent to make changes to the clarity of legislation, the bigger the signal the more likely judges will heed it.

A. Formal Consolidation and Revision Processes Are Effective But Rare

1. *Formal Consolidation and Revision Processes Are Ideal for Signaling an Intent to Make Non-Substantive Changes to Legislation*

If a legislature wishes to improve the clarity of laws using non-substantive amendments, the best way to do so is through a formal consolidation and revision processes. Consolidation and revision processes are exhaustive overhauls of the statute book in which repealed words and sections are removed, new words are added, and other administrative cleaning occurs.[89] These processes permit revisers to improve the language. For instance, Ontario's most recent revision allowed revisers to "[m]ake any changes that are necessary to bring out more clearly what is considered to be the Legislature's intention, to reconcile apparently inconsistent provisions or to correct clerical, grammatical, or typographical errors."[90] Revisers have the freedom to make non-substantive language improvements to statutes. Despite their power, these processes have received little academic or judicial attention.[91] According to Norman Larsen, "there is a good deal

89 Sullivan, *Construction of Statutes*, *supra* note 30 at paras 24.47–24.51.

90 *Statutes Revision Act, 1989*, SO 1989, c 81, s 3(d) [*Statutes Revision Act, 1989*]. See similar phrasing in Canada's *Legislation Revision and Consolidation Act*, RSC 1985, c S-20, s 6(f) and in equivalent provincial Acts.

91 As Norman Larsen explains, "judicial decisions on the nature and effect of revised statutes are relatively rare, as are articles about either revisions or the decisions" (Norman Larsen, "Statute Revision and Consolidation: History, Process and Problems" (1987) 19:2 Ottawa L Rev 321 at 322).

of conversational wisdom about revisions, much of which is questionable but seldom questioned."[92] Since Larsen, some academics have analyzed consolidations and revisions. For instance, Sullivan applauds the role of the 1985 federal revision in improving French language versions of federal statutes, but also raises concerns about the potential for statute revisers to distort the law.[93] These concerns revolve around the democratic illegitimacy of unelected revisers changing the law. They also echo Sullivan's argument that non-substantive changes undermine positivist assumptions about the law. Despite those concerns, formal consolidation and revision processes are acknowledgements that statutes need regular updating to maintain or improve their clarity.

Although they are rare, judicial decisions that discuss formal consolidation and revisions reveal judges are willing to conclude that changes made in the context of these processes are non-substantive quality improvements that do not change the law. When confronted by federal consolidation and revision processes, courts will follow the rule that "[c]hanges made to legislation in the course of a general statute revision are presumed to be purely formal."[94] One example of this approach in action is in *Sarvanis v Canada*.[95] In that case, the Supreme Court of Canada reasoned that "revisions [done in a formal revision process] will not change the substance of the enactment."[96] Provincial revisions have received similar deference from judges.[97] Courts will bend the language to its limits to

92 *Ibid*.

93 See Ruth Sullivan, "The Challenges of Interpreting Multilingual, Multijural Legislation" (2004) 29:3 Brook J Intl L 985 at 1000, 1021. Sullivan's analysis occurred in the context of the major reform projects that aimed to harmonize the English and French versions of federal legislation discussed in section III(C). Sullivan also raises concerns about the potential for substantive changes, and she suspects the "potential for significant discrepancies is much greater when legislation is restructured or entirely rewritten in the context of a plain language rewrite" (Sullivan, "Implications", *supra* note 19 at 177).

94 Sullivan, *Statutory Interpretation*, *supra* note 3 at 273.

95 2002 SCC 28.

96 *Ibid* at para 13. Courts have shown a similar degree of deference in the federal context. See e.g. *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297; *Reference Re Supreme Court Act, ss 5 and 6*, 2014 SCC 21; *Canada (Minister of Citizenship and Immigration) v Kandola*, 2014 FCA 85; *Kourtessis v MNR* (1989), 39 BCLR (2d) 1, 1989 CanLII 237 (CA).

97 See e.g. *Fernandes v Melo* (1974), 6 OR (2d) 185, 1974 CanLII 727 (Sup Ct); *Foster v Johnsen* (1983), 41 OR (2d) 498, 1983 CanLII 1972 (Sup Ct); *Midas Realty Corp of Canada Inc v Galvic Investments Ltd* (2008), 70 RPR (4th) 261, 2008 CanLII 25063 (Ont Sup Ct). In BC, similar treatment has been given. See e.g. *Sun Life Assurance Co v Ritchie*, 2000 BCCA 231; *Knight v Imperial Tobacco Canada Ltd*, 2009 BCCA 541; *British Columbia (Director of Trade Practices) v Ideal Credit Referral Services Ltd* (1997), 31 BCLR (3d) 37, 145 DLR (4th) 20 (CA). Alberta

preserve the principle that formal consolidation and revision processes do not change the substance of the law. For example, in *Loblaws Inc v Ancaster (Town), Chief Building Official*,[98] a judge in Ontario found that the wording in a revised statute, which stated that any person could appeal an order made by an administrative official, had the same meaning as the old statute, which limited the right of appeal to "any person who considers himself aggrieved by an order."[99] The interpretive calisthenics exhibited in *Ancaster* are indicative of the kind of analysis judges will do to protect a formal consolidation and revision. If a change to the wording occurred in such a process, judges consistently rule that the legislature intended only language polishing.

2. *Formal Consolidation and Revision Processes Are Increasingly Rare*

Despite their advantages for making non-substantive language improvements to legislation, formal consolidation and revision processes are becoming rare in Canada. Although Larsen counts 104 statute revisions and consolidations over Canada's history and Sullivan suggests that revision projects are a "minor industry" in Canada,[100] the number is not growing and that "minor industry" has ground to a halt. The last federal consolidation and revision was in 1985. Ontario, which once conducted formal revisions every ten years, has not had such a process since 1990. Even British Columbia, with its investment in plain language, has not had a full consolidation and revision in 22 years.[101] The reasoning behind the drying up of revisions may be a lack of political will to spend scarce resources on a process that garners little attention. Also, moving statutes into online fora has reduced the need for statute consolidations.[102]

Part of the reason for the drying up of revisions may be because jurisdictions like Ontario have granted revision-like powers to legislative

judges have also done the same. See e.g. *Daniels v Mitchell*, 2005 ABCA 271; *Spracklin v Kitchton*, 2003 ABQB 992.

98 (1992), 95 DLR (4th) 695, 1992 CanLII 8625 (Ont Ct (Gen Div)) [*Ancaster*].

99 *Ibid* at 697–98. The old version of the provision stated that "'any person who considers himself aggrieved by an order given or decision made by an inspector or chief official' may appeal" (*ibid* at 697). The new version states "Any person who wishes to appeal an order given or decision made by an inspector or chief official under this Act or the regulations may…apply…for a hearing and appeal" (*ibid* at 696).

100 Larsen, *supra* note 91 at 321; Sullivan, *Construction of Statutes*, *supra* note 30 at para 23.23.

101 See *Statute Revision Act*, RSBC 1996, c 440. But see notes 113–115 for an explanation on how British Columbia has begun completing revisions of individual statutes.

102 Sullivan, "Promise", *supra* note 6 at 124.

counsel on an ongoing basis.[103] Ontario's Chief Legislative Counsel has used this power extensively to make corrections and editorial changes to Ontario's laws.[104] However, the Chief Legislative Counsel has only used that power for uncontroversial purposes like fixing administrative errors, unifying styles, updating the names of agencies, and improving French translations.[105] The power has not been used to carry out major accessibility projects, and there would likely be democratic legitimacy questions if legislative counsel used it to embark on a major plain language rewrite process. However, the accessibility of the law may depend on more ambitious projects.

B. Major Reform Projects Are the Most Effective Ways to Clarify Laws

1. Canadian Judges Would Likely Take Notice of Major Reform Projects

As formal consolidation and revision efforts have fallen out of favour in Canadian jurisdictions, plain language advocates may increase their calls for governments to engage in large-scale reform projects to improve the clarity of laws. These calls led British Columbia to take steps to integrate plain language drafting principles into its last formal revision in 1996.[106] While that project took place in the context of a formal consolidation and revision, it is the closest Canadian equivalent to major plain language projects that have taken place in other jurisdictions.[107] The British Columbia project targeted the removal of archaic, legal, and Latin terms; it improved

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103 *Legislation Act, 2006*, *supra* note 82. Federal legislation provides the Minister of Justice with similar powers to make minor editorial changes to laws, including the power to "make such minor improvements in the language of the statutes as may be required to bring out more clearly the intention of Parliament…without changing the substance of any enactment" (*Legislation Revision and Consolidation Act*, *supra* note 90, s 6(f)). However, the use of this power without public notice has been the subject of criticism. See Catharine Tunney, "The Glitch List: Ottawa to Start Reporting on Typos in Legislation", *CBC News* (14 August 2018), online: <www.cbc.ca/news/politics/justice-department-typo-letter-1.4784591>.

104 These changes are published on Ontario's e-Laws website. See Government of Ontario, "Consolidated Statutes Change Notices", online: <www.ontario.ca/laws/consolidated-statutes-change-notices>; Government of Ontario "Consolidated Statutes Correction Notices", online: <www.ontario.ca/laws/consolidated-statutes-correction-notices>.

105 *Ibid*.

106 See Janet E Erasmus, "Cleaning Up Our Acts: BC Statute Revision Makes Room for Plain Language Changes" (1997) 38 Clarity 3.

107 See section V for a detailed discussion of major tax law rewrites in the UK and Australia.

word choices to ensure effective and consistent use of articles, numbers, and verbs; and it increased the use of lists and split long sections into smaller paragraphs.[108] Similar major projects conducted outside a formal revision and consolidation could be a way to reach a compromise position between the expenses of a formal consolidation and revision and the unpredictability of minor adjustments to individual provisions as they arise. Such projects have precedent elsewhere in Canada.[109] However, they remain underused and untested in courts. Thus, the court decisions that have stemmed from the British Columbia project are the best indicators of how Canadian judges may reply to similar reform projects.

The sample size of judicial considerations on British Columbia's plain language project is too small to accurately predict future judicial responses, but one decision suggests judges may be receptive to such efforts. In *Milligan*,[110] a Supreme Court of British Columbia judge examined whether a legislative change from the plain language rewrite altered the substance of a law on awarding costs. The judge cited Erasmus' summary of the plain language rewrite: "This is not the ordinary case of the legislature modifying the wording of a statute to change its legal effect. Rather, the evidence is that the legislature made a conscious effort to convert British Columbia's legislation to conform with plain language principles."[111] By citing Erasmus' summary of the plain language project, the judge endorsed the idea that descriptions of projects are a kind of evidence that judges should consider when they analyze statutory changes. One judgement is not a trend, but it does offer support for a legislature contemplating a major non-substantive language rewrite of its laws. It signals to judges that they

108 Erasmus, *supra* note 106 at 3.

109 For example, Canada did a full plain language overhaul of its explosive regulations that was completed in 2013. This included, among other features, an overview section as part of the legislation, notes explaining the provisions, and asterisks to mark defined terms. See *Explosives Regulations, 2013*, SOR/2013-211.

110 *Supra* note 79. As discussed above, the substantive findings of *Milligan* may have been overturned by the Court of Appeal in *Baettig*, but that decision did not dispute its interpretive approach. Again, the issue was the difference between the wording of "reasonable legal costs" and "legal costs of a proceeding".

111 *Ibid* at para 63. As discussed in section V, there have been positive judicial responses to major revision projects in Australia and the UK. Also, another major reform project on which plain language revisors can draw for precedent is the harmonization of English and French versions of federal legislation discussed in section III(C). That process was not a plain language project, but it involved a major revision of legislation outside a formal consolidation and revision process. It drew support from amendments to the *Interpretation Act*, and judges acknowledged the legislative intent to make non-substantive changes to the law. See e.g. *Schreiber*, *supra* note 76.

can acknowledge the role of a language reform project in their judgements and use that as a factor in their judgements.

British Columbia has continued to innovate with plain language reform since the 1996 revision. The power to carry out the 1996 plain language project came from the Province's *Statute Revision Act*.[112] The *Statute Revision Act* permits the Chief Legislative Counsel of British Columbia to carry out a general revision of all public Acts, but more significantly it also permits the Chief Legislative Counsel to conduct a "limited revision consisting of an Act or a portion of an Act."[113] Revisions carried out under this limited revision power follow many of the same rules as are usually used for formal consolidation and revision processes, but it permits the Chief Legislative Counsel to carry out smaller revisions of single statutes or sections of statutes. British Columbia publishes a list of the statutes and regulations that it has revised under this power, including its *Insurance Act* in 2012, *Local Government Act* in 2015, and *Municipal Replotting Act* in 2016.[114] Judicial interpretations of those revised Acts have generally accepted that the revisions made no substantive changes to the law.[115] Overall, the approach in British Columbia of taking on individual statute revisions under the authority of the *Statute Revision Act* has opened up an avenue for legislative counsel to take on minor revision projects without having to complete a full formal consolidation and revision process.

Ontario's legislature appears to have endorsed the idea of repairing legislation on an ongoing basis instead of doing a major revision. However, Ontario's Chief Legislative Counsel does not have the same explicit power as his or her British Columbian counterpart to carry out a major revision of a statute. Ontario's *Legislation Act, 2006* provides the Chief Legislative Counsel with the power to improve the clarity of legislation outside

112 *Supra* note 101.

113 *Ibid*, s 1(b). Once the revision is complete, it is presented to a standing committee of the Legislative Assembly for review before it can become law (*ibid*, s 3). British Columbia is following the lead of similar laws in Ireland and the Australian states like Queensland and New South Wales. See Law Reform Commission, "Statute Law Restatement" (July 2008), online (pdf): <lawreform.ie/_fileupload/Reports/Report%20SLR.pdf>.

114 See Legislative Assembly of British Columbia, "Revisions Pursuant to the Statute Revision Act", online: <www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/legislation/act_revisions.htm>. Since 1996, British Columbia has revised 10 statutes and 28 regulations (*ibid*).

115 See e.g. *Anonson v North Vancouver (City)*, 2017 BCCA 205 at para 9; *Buhr v Manulife Financial—Canadian Division*, 2014 BCCA 404 at para 39.

a formal revision.[116] In addition, the *Legislation Act, 2006* empowers the Chief Legislative Counsel to provide notice when he or she makes clarity changes to the law and instructs him or her to "state the change or nature of the change."[117] The *Legislation Act, 2006* is silent about the form of the notice and does not specify to whom the Chief Legislative Counsel should give the notice. The Chief Legislative Counsel has taken this to mean notice to all Ontarians, so all changes are published on Ontario's e-laws website.[118] As well, the provision only received a passing reference when the bill that made this change came before Ontario's legislature.[119] Despite the lack of information about the notice, its intent is clear. If Ontario's Chief Legislative Counsel wishes to make non-substantive changes, he or she can inform judges of this change. This notice would provide judges with the kind of information about major reform projects that was instrumental in *Milligan*. However, as discussed above, the Chief Legislative Counsel has only used this power for minor issues of formatting, consistency, and administrative errors; it has not led to major reform projects and it has yet to receive judicial scrutiny.[120] Thus, Ontario may have the power to complete a revision project similar to the rewrites in British Columbia, but it has not embarked on such a project in the years since this legislation was passed in Ontario.

2. *Minor Concerns Appeal in Judicial Responses to Major Reform Projects*

Despite the potential in *Milligan* and Ontario's *Legislation Act, 2006*, there are two reasons why this approach may not be as effective as formal consolidation and revision projects. First, they are untested, and it remains difficult to predict how courts may respond. Second, a judge may overlook a major reform project. The British Columbia case of *Lovick v Brough*[121] is a

116 *Supra* note 82, s 42. As noted above, Canada's federal Minister of Justice may have similar powers (see the discussion of the federal Minister's powers *supra* notes 90, 103).

117 *Ibid*, s 43.

118 Government of Ontario, *supra* note 104.

119 See "Bill 14, An Act to Promote Access to Justice By Amending or Repealing Various Acts and By Enacting the Legislation Act, 2006", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), 38-2, No 36B (13 February 2006) at 1910 (Hon Michael Bryant).

120 For further discussion on Ontario's revision power, see notes 103–104 and accompanying text.

121 (1998), 36 RFL (4th) 458, 1998 CanLII 1573 (BCSC) [*Lovick*]. The original provision in *Lovick* stated that "the Court shall make an order restraining another party to the

cautionary flag. In that case, a judge considered the change in which "shall" was replaced with "must" and found "must" imposed a different standard:

> I conclude that [the use of 'must'] could only have been to strengthen the imposition of the duty on a Judge to take the action mentioned there. I reject [the defendant's] contention that in this context 'must' means precisely the same as 'shall.' In my opinion 'must' entails a more mandatory obligation admitting of less discretion in the Court.[122]

At first glance, plain language advocates might embrace this case's endorsement of "must" in legislation. However, a closer reading reveals the case's problematic proposition that because "shall" and "must" are different there was a substantive change to the law. This is not an interpretation favourable to clarity projects as it supports the concern that such projects create uncertainty. *Lovick* is also a confusing decision because the change from "shall" to "must" occurred during a formal revision project, and any changes made in the formal revision process could not have made any substantive changes to the law, according to the *Statute Revision Act*. Therefore, it appears the judge made an error in law.[123] While the judge may have erred in the analysis because the change happened in a formal consolidation and revision process, the error would be less clear if this change happened outside that formal process. *Lovick* may be an isolated misunderstanding, and other revisions under British Columbia's *Statute Revision Act* have received judicial deference. However, the unfavourable decision in *Lovick* suggests legislatures must proceed with some caution on major rewrite projects outside full formal consolidation and revisions.

C. Evidence Within or Around Legislation is Ineffective

Formal consolidation and revision processes and major legislative clarity improvement projects may be effective against the presumption of

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proceeding for disposing of…any other property at issue", but the new provision used "must" in place of "shall" (*ibid* at paras 4–5).

122 *Ibid* at paras 6–7. Although, as discussed above, this change happened during a formal consolidation and revision, the Judge only makes passing reference to the fact that this statute was enacted under such a process (*ibid* at para 4). For another example of a decision that casts doubt on the likely success of major revision projects, see *Baettig*, *supra* note 77 and accompanying text.

123 In addition to the formal consolidation and revision legislation, there is also a common law presumption that such processes do not change the law. See *Ammerlaan v Drummond* (1982), 1982 CanLII 772 at para 2, 37 BCLR 394 (SC).

substantive change, but they are costly and time consuming. A legislature may prefer to make smaller changes on an as-needed basis to legislative language, and the presumption suggests the legislature could use internal signals within and around the legislation to express its intent to make non-substantive changes clear to judges. However, when judges grapple with internal evidence, the result is rarely certain. The proof of the ineffectiveness of internal evidence is the caselaw discussed above in section three. In those cases, the judges used Hansard, committee reports, statutory preambles, and other sections to try to determine legislative intent.[124] However, the result was judges confused about when to apply the presumption, split decisions about whether the presumption had been rebutted, and inconsistent outcomes. Although Sullivan's perspective on this evidence is that the presumption is weak and easily rebutted,[125] there are no principles from the cases about what information within or around the legislation will make an impression on a judge.

One Supreme Court of Canada case demonstrates the inconclusiveness of evidence within or around amending legislation. The Court examined a post-9/11 change to Canada's immigration laws in *Agraira v Canada* (*Public Safety and Emergency Preparedness*).[126] Mr. Agraira failed to convince the Court that external evidence, a Senate committee report, from when the old immigration legislation was replaced by new legislation was relevant in assessing whether a change to the wording was substantive. The wording change had occurred in 1977, and it had taken out the phrase "would not be detrimental to the security of Canada" and replaced it with "would not be detrimental to the national interest."[127] Mr. Agraira argued that the committee meeting minutes from 2002, when the legislation was updated, showed that the focus in this section was still on national security concerns and the wording change was mere language polishing. The Court rejected that argument and determined the change was substantive.[128] This conclusion suggests that evidence like committee reports would not be an adequate way for drafters to signal to judges an intent to make non-substantive change. Committee reports, debates, or minutes of

124 The Supreme Court of Canada has regularly endorsed the use of evidence from both the text and the context to determine the meaning of words. See e.g. *Canada* (*Canadian Human Rights Commission*) *v Canada* (*Attorney General*), 2011 SCC 53; *Rizzo & Rizzo Shoes Ltd* (*Re*), [1998] 1 SCR 27, 154 DLR (4th) 193.

125 Sullivan, *Construction of Statutes*, *supra* note 30 at para 23.23.

126 2013 SCC 36 [*Agraira*].

127 *Ibid* at paras 67–68.

128 *Ibid* at para 69.

proceedings may not receive significant weight, so *Agraira* suggests that a judge may not accept, for example, a statement from a witness in a committee meeting testifying to the fact that a change was purely for clarification purposes.

The presumption of substantive change leaves the door open for legislatures to supply judges with evidence that rebuts the presumption in the materials around the legislation or directly in the legislation. Therefore, if a legislature wishes to carve out the space for efforts to improve the clarity of the law through non-substantive law reform efforts, it must provide such evidence to judges. However, statements from committee meetings may not be enough. A clarity reform purpose would likely need to be stated in the legislative text itself, in a preamble to a legislative text, in an explanatory note accompanying a text, and in the Hansard evidence in which the text receives attention. The conclusions from this section are counterintuitive to the conventional wisdom that law reform projects should target small, manageable, and incremental gains. In contrast, a legislature that wishes to improve the clarity of its laws will ensure judges understand its goal, and as a result, have a more successful law reform project if it takes major steps authorized by legislation, like British Columbia's major revisions of particular statutes under its *Statute Revision Act*. When it comes to signaling a legislative intent to make non-substantive change to the law, the bigger the signal, the more likely judges will heed it.

V. MAJOR REFORM PROJECTS IN OTHER JURISDICTIONS HAVE CLARIFIED LAWS

Although the evidence from Canadian courts hints at positive judicial reactions to major reform efforts outside formal consolidation and revisions processes that clarify law through non-substantive change, there is scant Canadian caselaw on the subject. However, judicial decisions from other countries that have conducted major projects show the likelihood of success for similar projects in Canada. Two projects in particular offer lessons from which Canada can learn, and judicial decisions from those countries support the conclusion that judges in Canada will take notice of major language reform projects and understand their goal of non-substantive improvements. This section examines two plain language rewrite projects of tax law in the UK and Australia, and it reviews judicial reactions to them. Despite unique characteristics, both projects received the kind of judicial respect non-substantive reform efforts need.

A. The United Kingdom's Tax Law Rewrite Project: Judges Modify Statutory Interpretation for a Major Reform Project

The UK Tax Law Rewrite Project (TLRP) is the more recent of the two projects, but its roots are in an older review that was highly critical of the UK's laws. The TLRP began in 1997, but its genesis was in a report released in 1975 by the Renton Committee.[129] According to Teasdale, its purpose was to rewrite tax legislation to use shorter sentences, reduce passive expressions, maintain gender neutrality, and simplify the language.[130] The reviews on the TLRP were mixed but generally positive. Most commentators acknowledge its value in improving the clarity and simplicity of tax law, but they also lament that the project did not have the scope to simplify the policy behind tax law.[131] This is a criticism that reflects the argument discussed above regarding whether language reform should accompany policy reform. However, most of the criticism of the TLRP's limited scope comes from scholars in the field of economics. Therefore, they do not address in depth the potential legal issues of combining these reforms. The TLRP also received mixed reviews from lawyers. They voice concerns that the plain language rewrite opens the door for new litigation over the meaning of terms; however, they acknowledge it is easier to understand after the rewrite.[132] This negative reaction from legal professionals reflects the fears that often prevent a legislature from engaging in major reform projects as plain language skeptics worry that small changes to clarify meaning can lead to debate about new meanings. The discussion from academics and the criticism from lawyers on the value of the TLRP highlight the perennial disagreement about the merit of such projects.

While it is unsurprising that academics and lawyers question the merits of the TLRP, judges are supportive of the project. The UK tax court judges have developed statutory interpretation principles to address it. One articulation of the UK's approach to the TLRP is in *Eclipse Film Partners*

129 Renton, *supra* note 11. That Report claimed that UK statutes used obscure and overly complex language, over-elaborated concepts, ordered provisions in illogical ways, and lacked cohesion (*ibid* at para 6.2).

130 Teasdale, *supra* note 21 at 121.

131 *Ibid*. See also Adrian Sawyer, "Rewriting Tax Legislation—Can Polishing Silver Really Turn It Into Gold?" (2013) 15:1 J Australian Taxation 1 at 9–11; Simon James & Ian Wallschutzky, "Tax Law Improvement in Australia and the UK: The Need for a Strategy for Simplification" (1997) 18:4 Fiscal Studies 445 at 450.

132 See Ipsos MORI (UK), "Review of Rewritten Income Tax Legislation" (June 2011) at 36, 41, 43–44, online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344921/report104.pdf>.

(*No 35*) *LLP v Commissioners for Her Majesty's Revenue and Customs* (*HRMC*).[133] In that case, the judge adopted the principles of statutory interpretation from consolidations to the TLRP:

> [T]he court's main task in this case must be to construe the ITTOIA without reference back to section 18 ICTA…However, where, after undertaking such an exercise, a provision which falls to be applied is found to be ambiguous, a subordinate presumption comes into play, namely that it is presumed that there was no intention to change the meaning of the provision…[134]

According to the *Eclipse* approach, if the new statute is clear, then the judge should apply it. If it is not clear, then the judge should look to the old version of the statute and presume that there had been no change to the law. If Canadian judges took this approach to major reform projects, then there would be no concerns about such projects causing uncertainty. This level of certainty would improve the chances of Canadian legislatures attempting clarity reforms.

B. Australia's Tax Law Improvement Project: Courts Accept Clarity Changes From a Major Reform Project

Just as the UK project demonstrates the ability of judges to adjust to plain language rewrites, the Australian Tax Law Improvement Project (TLIP) has seen a similar trend. The TLIP began in the 1990s and resulted in new tax legislation in 1997. It had similar goals of endeavoring to "improve taxpayer compliance, and reduce compliance costs, by making the law easier to understand for taxpayers."[135] Its scope was also limited to mere language polishing, but there was more space for making slight improvements to tax law.[136] Academic reflections on the project voice the same plaudits and problems with the TLIP that arose in the UK project.[137] The same analysis applies here as these concerns about putting policy and language reforms together may not have the benefits that these commentators suggest given the problems of political expediency and uncertainty.

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133 [2013] UKUT 0639 (TCC).

134 *Ibid* at para 97. See also *Shirly v HRMC*, [2014] UKFTT 1023 (TC); *Barnetts (a Firm) v HRMC*, [2010] UKFTT 286 (TC); *Scott v HMRC*, [2017] UKFTT 385 (TC).

135 Sawyer, *supra* note 131 at 12.

136 James & Wallschutzky, *supra* note 131 at 454–55.

137 *Ibid*; Sawyer, *supra* note 131 at 20–22.

The only unique characteristic of the TLIP seems to be that the legislature was more explicit in its willingness to permit the rewriters freedom to improve the law by ironing out inconsistencies. Still, this feature is not especially unique as it happened during the UK project, and it is common in Canadian consolidation and revision exercises.

Just as UK judges adapted to their jurisdiction's tax rewrite, Australian judges have exhibited comfort with the TLIP. Two cases from Australia's Federal Court highlight judicial acceptance of the TLIP's efforts and its effectiveness in maintaining the law. In *Bartlett v Commissioner of Taxation*,[138] the judge provided the following summary: "The 1997 Act was an outcome of the 'Tax Law Improvement Project' ('the Improvement Project') which was designed to rewrite the income tax law, progressively, in a simplified way…The legislation which emanated from the Improvement Project did not, at least when enacted, purport to change the law but merely the style."[139] The court made a similar pronouncement in *Healey v Commissioner of Taxation*: "The amendments were part of the Tax Law Improvement Project. Accordingly, they were designed to make general improvements in structure, presentation and readability…there was no express intention to make specific changes to the operation of the law."[140] The message from the Court in *Bartlett* and *Healey* is clear: the TLIP amendments made only non-substantive language polishing. There was no attempt, unless clear evidence to the contrary, to make substantive change. In this way, judges had certainty about the principles they were to apply after the tax law rewrite project. The principles developed for the TLIP in *Healey* and the TLRP in *Eclipse* highlight the benefits of major review projects in the UK and Australia. They do not simply rebut the presumption of substantive change; they reverse the presumption in the context of well-publicized revision projects and for the provisions that changed during those projects. The tax law rewrite experience in Australia, like that in the UK, underscores the argument that courts will acknowledge and adapt to major language reform projects.[141]

138 [2003] FCA 1125.

139 *Ibid* at para 60.

140 [2012] FCA 269 at para 77.

141 One potential caveat to the benefits of major reform projects may be an effort in the United States to revise the federal courts' rules of civil procedure without changing their substance, called The Style Project. The Style Project had the stated goal of restating the law without changing it, and the revisors likely have succeeded in doing so; however, there are some fears that the changes will be manipulated for "partisan purposes". See e.g. Edward H Cooper, "Restyling the Civil Rules: Clarity Without Change" (2004) 79:5 Notre

VI. CONCLUSION

Ronald Dworkin, a giant of modern legal philosophy, uses the character of Judge Hercules, who possesses super-human abilities to conduct legal interpretation, as the model for his ideal judge.[142] However, even Judge Hercules would likely struggle to grapple with the presumption of substantive change in Canadian law. Instead of Judge Hercules, Judge Prufrock seems a more accurate characterization of Canadian jurists who are confronted with the presumption as the risk is great that they will fail in uncovering the intent of the legislature. Or perhaps Prufrock is the legislator who resists making non-substantive language changes to the law because he fears "[i]t is impossible to say just what I mean!"[143] From either perspective, the conclusion is the same: the presumption of substantive change is an outdated principle of statutory interpretation that requires readjustment so that legislators can advance efforts to make non-substantive changes that improve the clarity of the law. Legal accessibility and the rule of law depend on a de-emphasis of the presumption by judges and increased use of the most effective ways of communicating their intent to make non-substantive changes by legislatures. The louder those communications from the legislature are, the more likely it is that judges will hear them.

De-emphasizing the presumption of substantive change may facilitate plain language revisions of laws, but it could lead to unintended consequences because the presumption does not exist within a vacuum. It exists in an ecosystem of complementary and contrasting principles of statutory interpretation. Most principles have a contrary principle; the counterweight to the presumption of substantive change is the presumption against implied alteration of the law.[144] Eliminating one principle creates the risk of strengthening its contrary principle and upsetting the

Dame L Rev 1761; Lisa Eichhorn, "Clarity and the Federal Rules of Civil Procedure: A Lesson From the Style Project" (2008) 5:1 J Assoc Leg Writing Directors 1; Steven S Gensler, "Must, Should, Shall" (2015) 43:4 Akron L Rev 1139. However, Canada's courts are less partisan than their American counterparts and therefore would likely see a response from judges similar to the experiences in Australia and the UK.

142 See Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986).

143 Eliot, *supra* note 1 at 134.

144 *Agraira*, *supra* note 126 at para 74 (according to the presumption against implied alteration of the law, courts must presume that the legislature did not intend to change a law when the explicit wording does not change). For example, in *Agraira* the law transferred responsibility to a different ministry, but the Court concluded that changing the minister responsible for an aspect of a law did not alter the substantive meaning of the law (*ibid*).

balance that exists among the various principles of statutory interpretation. Would eliminating the presumption of substantive change empower the presumption against implied alteration of the law? Perhaps that presumption can fill the gap left behind by the presumption of substantive change, or perhaps its value requires similar scrutiny. Should all presumptions cease to exist? Perhaps they still have relevance because they provide judges with tools to guide their reasoning or potentially resolve hard cases, but their value ceases when they cast more shade than light in the search for legislative intent. The presumption of substantive change has ceased to be useful.

If there is no change to the way in which Canadian law treats the presumption of substantive change, the consequences are continued judicial confusion and continued reluctance by legislatures to improve the clarity of the law. Judges must acknowledge the presumption's waning utility. Legislators and legislative drafters can push judges in the direction of relying less on the presumption by engaging in bolder and formal clarity revision projects as these projects will receive judicial attention and respect. The judiciary can then maintain the overarching requirement that it respect the principle of legislative supremacy by respecting the legislative will to make non-substantive change. However, these improvements require a de-emphasis on the presumption of substantive change. Restricting the presumption will not necessarily pave the way to unfettered language improvements to legislative quality in Canada, but it is a step in the right direction.