Statutory Interpretation: Tupper and the Queen

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Almost every aspect of human life in the Twentieth Century is characterized by dramatic change. Firmly believing in the idea of progress, society generally welcomes each new development as a step on the road to a better life. Legal theory on the other hand, is characterized by its constancy. The legal profession clings with tenacity to outmoded concepts and hoary patterns of thought. With the proliferation of statutes resulting from the ever increasing activity of modern government, the problems of judicial interpretation of statutory language become more acute every year. The traditional approach to this task is clearly inadequate. The solutions it provides have been weighed in the balance of utility and found lacking. Judicial process must be reformed and new methods adopted by the judiciary if law is to fill the needs of modern society.

**THE CANADIAN HERITAGE**

The dominant legal philosophy of the Canadian judiciary is English positivism, which involves the assertion that law is the command of a sovereign authority, found in the acts of a legislature, or past court decisions. It is an entity which exists and can be known. From this it follows that the words of a statute contain a "meaning" which, when found, expresses the sovereign will of the legislature. The positivist approach to the problem of interpretation, therefore, proceeds from the premise that it is the function of a judge to find the "intent" of the legislature, and to give effect to it. In theory this can be achieved in most cases by examining the language of the statute, and attributing to it a "literal" or "plain" meaning. As an aid to discovery the courts use the ordinary grammatical rules of construction. The "ejusdem generis" rule, for example, states that a general phrase is restricted to instances of the same type as preceding specific words. The rule "expressio unius exclusio alterius" indicates that the expression of one thing in a statute excludes by implication other things unexpressed. If it applies these rules and construes words in their ordinary or customary sense, the court will usually find that a statute has a clear meaning, and "...if the precise words used are plain and unambiguous... [it is]... bound to construe them in their ordinary sense even though it leads to an absurdity or a manifest injustice". Occasionally the language of the statute

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in question may be too ambiguous to admit of a "plain" meaning. Then the search for intention may include an examination of the preamble or title of the Act, or other Acts in pari materia with the one being considered. If intent still proves elusive, the various canons and presumptions pronounced by judges over the years will be used to arrive at the true meaning of the Act.

This is the basis of the technique which follows from acceptance of the positivist position. It purports to reduce to a minimum the law making function of the judge, and to give a maximum of responsibility to the legislature. Those who adhere to this position claim that the emphasis on the plain meaning rule gives certainty and predictability to the law. It forces the courts to remain subordinate to the will of the legislature, the only position compatible with democratic theory. Like Lord Evershed, they fondly hope that

"... out of the vast body of judicial decisions on the interpretation of statutes, there will in the end emerge rules, few in number but well understood, generally applicable or applicable to particular and defined classes of legislation, which may supersede and render obsolete other dicta derived from a different age and a different philosophy."

THE ANTITHESIS

It is against this principle of interpretation that the American legal realists directed their devastating attack. Men like Max Radin denied that a statute could ever have an inherent meaning which would clearly apply to any situation, until the courts have interpreted it. Every statute (excepting possibly the bill of attainder) is a statement in more or less general terms, which concerns a range of situations. As such it is almost by definition ambiguous. The events to which it will be applied are unique, in time if nothing else. When a court states that the meaning of a statute is plain it has already interpreted the words in question, and has decided that the event before it must be included within, or excluded from, the class to which those words refer. Does a statute which provides that theft of a cow shall be grand larceny apply where a heifer is stolen? The meaning is plain, but only after a heifer has been classified as a cow. Plain meaning at law exists only as a matter of legal fiat.

Not only do the realists assert that the notion of meaning is fictional, but they deny that there is anything in reality which can be identified as legislative intention. A legislature is comprised of many members each of whom may have had his own idea of what

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3 The various interpretation acts (e.g., Interpretation Act, S.C. 1967, c. 7) affect the various techniques only minimally, and will not be considered in this paper.
5 Radin, Statutory Interpretation (1930), 43 Harv. L. Rev. 863.
7 Witherspoon, Administrative Discretion to Determine Statutory Meaning: "The Middle Road" (1962), 40 Texas L. Rev. 751 at 762.
was involved in an act when he voted. Even if every individual voter were of the same mind, there would be no way to know that intention. If the intention discerned is that of the draftsman of the bill, then it is not legislative but ministerial. Ambiguities in a statute are often the consequence of the necessity for group action to achieve legislation. "There is little meaning to a statute, consequently, because if there had been more, there might have been insufficient agreement to enact it." Finally, the concept of intention becomes patently spurious when conditions which prompted the passing of a statute change, so that the remedy it provides is inappropriate. In this case, as with other unforeseen situations, the legislature did not, and could not have intended to provide a standard, because it had no faculty for prescience.

The critics of positivism have highlighted the futility of the use of rules, presumptions and canons of construction to find this fictitious legislative intent, by pointing out that almost every rule has an opposite, and both can apply to any interpretive situation. Karl Llewellyn has paired statements by American judges which illustrate this characteristic of rules. The same could easily be done with English or Canadian dicta. It is a presumption, for example,

"... that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication,..."  

But it had also been stated that

"... even where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words if they are fairly susceptible to it."  

It is reasonably obvious that when contradictory "rules" can be applied to a given event the "rule" itself cannot be the basis of decision.

Despite the verisimilitude provided by Latin phraseology, the various maxims have no real content, say the rule sceptics, and add neither predictability, nor certainty, to the law. When a court states the *ejusdem generis* rule the real decision is not whether general words are limited by those preceding, but whether the rule itself is to be denied or affirmed in the particular case. To the realist, the rules, maxims, presumptions and canons of construction are no more than devices "... whereby to achieve some desired result." The judge remains free to choose which of innumerable rules he will use. His choice must be based on factors independent of rules.

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8 Witherspoon, Administrative Discretion to Determine Statutory Meaning: "The High Road" (1956), 35 Texas L. Rev. 63 at 75.
9 Llewellyn, Remarks on the Theory of Appellate Decisions and the rules or canons about How Statutes are to be Construed (1950), 3 Vand. L. Rev. 365.
10 Wilson & Galpin, supra, note 4 at 78.
11 Id. at 66.
12 Radin, supra, note 5 at 874.
13 Willis, supra, note 2 at 11.
Even those staunch in defence of the literal rule cannot wholly ignore the general purpose of the statute, what C. K. Allen calls the *ratio legis*.\(^{14}\) Most judges will rebel against the rigid application of unreasonable language. The difficulty lies in striking a balance between “...two antagonistic principles—the authority of the printed word and the dictates of legal reasonableness ...”\(^{15}\) It is in this conflict between the literal rule and good sense, that the reasoning of the traditional approach is reduced to absurdity.

Here the court may rely on the “Golden Rule”:

> “The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency but no farther.”\(^{16}\)

There is, of course, no way of knowing what constitutes an absurdity or an inconsistency, without which “[h]owever unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect.”\(^{17}\) The inadequacy of this method of reasoning is evident in what appears to be a serious statement in the leading text: “The difficulty lies in deciding between words that are plain but absurd and words which are so absurd as not to be deemed plain.”\(^{18}\)

**PLAIN MEANING REVIVED**

In spite of the apparent shortcomings of the traditional approach to statutory interpretation, its theoretical justification has recently been reformulated by H. L. A. Hart.\(^{19}\) Hart’s philosophy of law is a variety of legal positivism in which he substitutes the conception of an ultimate rule of recognition, providing a basis for rules and criteria of validity, for the Austinian habit of obedience to a legally unlimited sovereign.\(^{20}\) This rule of recognition is the source of law from which primary and secondary rules making up the legal system have developed. Primary rules impose duties, and compel men to do or abstain from doing certain actions. Secondary rules confer powers, public or private, and provide a method by which men can introduce new primary rules, or vary, control or extinguish old ones.\(^{21}\) Because Hart sees law as a body of rules proceeding from a formal source, he must attribute some content to those rules. He states that the language in which they are expressed can have meaning within limits. All general words have a core of settled meaning, a range of standard instances within which they can be applied with certainty.\(^{22}\) In ad-

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14 C. ALLEN, LAW IN THE MAKING (1964), at 491.  
15 Id. at 492.  
17 WILSON & GALPIN, *supra*, note 4 at 5.  
18 Id. at 7.  
20 Id. pp. 102-7.  
21 Id. pp. 78-9.  
tion to the “paradigm, clear cases”, however, there is a penumbra of doubt surrounding legislative meaning, a class of “debatable cases in which words are neither obviously applicable nor obviously ruled out”. Here the open texture of language leaves discretion to the judge to choose whether or not a penumbral situation is to be included within the rule as being legally similar to a core situation. It is only in this vague area of “uncertainty at the borderline” that the judge has a legislative function, a choice which should be made in the light of social aims. With the great mass of ordinary cases meaning is determinate and can be applied without difficulty. Where the unenvisaged case does arise an aim or purpose must be attributed to the rule and the question decided by confronting the issues at stake, “... choosing between the competing interests in the way which best satisfies us.”

The primary difficulty with this theory of the nature of statutory language is that it offers no criteria for determining whether any given case falls within the core of standard instances, requiring mere application of the rule, or whether it is a penumbral situation, requiring judicial creativity and a consideration of social aims. This is what one writer has called the Achilles heel of the core-penumbra thesis.

“A ‘penumbral’ question is presented to the courts applying the ‘hard core and penumbra’ thesis every time the court has to decide whether a given case of uncertainty as to what to do in assigning meaning to a statutory term is to be classified as one for its ‘interpretation’ function or one for its ‘legislative’ function.”

How does one decide whether social aims are important or irrelevant? If the difference between core and penumbra is a difference in degree, why are not social aims always to some degree relevant? Finally, Hart did not attempt to answer perhaps the most important question: how is the judge to choose between competing interests?

THE PESSIMISM OF REALISM

The destructive criticism of the American Legal Realists has done much to force a reappraisal of the function of the judge. It has exposed in minute detail many “freaks of judicial lawmaking”, the errors of formalism and mechanical jurisprudence. It has emphasized the areas of freedom of action open to the judge where he must make a deliberate choice. Realism has proved invaluable as an analytical tool but “[a]nalysis is useless if it destroys what it is intended to explain.”

23 Hart, Concept of Law, 125.
24 Supra, note 22 at 200.
25 Supra, note 23 at 125.
26 Supra, note 22 at 202.
27 Supra, note 23 at 126.
29 Id. at 589.
31 Cardozo, The Nature of the Judicial Process (1921), 127.
In its extreme form Realism is a sterile doctrine. It denies that there are any objective standards which can guide the courts in assigning meaning to a statute. "There are no such things as rules or principles: there are only isolated dooms". Radin, for example, not only dismisses the concept of legislative intent, but he rejects the idea that the purpose or object of a statute can provide any guidance for the judge in his interpretive function. Because every end is a means to some other end the immediate purpose of a statute will depend largely on its remoter purpose. Thus Radin argues that the judge can only "... select one of a concatenated sequence of purposes" and "... he is impelled to make his selection . . . by those psychical elements which make him the kind of person he is."

"What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains."

He neither can nor should look for normative standards other than his own biases or his opinion of current community mores.

**RENAISSANCE OF AN OLD IDEA**

Somewhere between the extremes of literalism and realism there is a theoretical approach to the problem of statutory interpretation which could lead to a better understanding of the judicial process, and a more satisfactory judicial technique. The primary requirement of this approach is a return to the search for the legislative purpose of a statute. It is no credit to English jurisprudence that a draft formulation of this approach has existed for almost four centuries. It was in 1584, that Sir Roger Manwood, C.B. and the other Barons of the Exchequer met to decide *Heydon's Case*. Their opinion is worth repeating:

"For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy . . . ."

This statement of principle might have provided a foundation on which to build a theory, but about two hundred years ago the courts reached what Plucknett described as "... the curious conclusion that a statute can only be construed in the light of strictly professional learning." They would consider what the law was before the statute,  

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32 *Id.* at 126.  
33 Radin, *supra*, note 5 at 878.  
34 *Id.* at 881.  
35 *Id.* at 884.  
36 (1584), 30 co.7a, 76 E.R. 637.  
the "mischief" the statute was meant to remedy in view of what it actually said, but they refused to look to Parliamentary debates for guidance as to what was meant to be achieved by the language used, nor to the Parliamentary history of a bill.\textsuperscript{38} It is true that every word stated in the legislature should not become part of the law, and that an excessive reliance on aids to the discovery of purpose which are not readily available to the layman might be a hardship to those who have to regulate their conduct by reference to statutory words. The existence of these dangers, however, does not justify the conclusion that the real aims and objectives of those who created a rule are irrelevant when that rule is being applied. One respected legal scholar laments:\textsuperscript{39}

"Much of our case-law certainly suggests that the letter killeth more often than the spirit giveth life. We have a most elaborate code, slowly and painfully built up for literal interpretation, and there is not a comma or a hyphen which has not its solemn precedent. . . . There is much reason for thinking that if the same amount of attention had been paid to the more difficult and elusive principles of Heydon's Case—if, in short, our statutory interpretation had not so weakly followed the line of least resistance—many existing anomalies in our law might have been avoided."

If the court will not consider the evidence which was before Parliament, or the general trend of debate, it can only speculate as to the object or purpose of an Act. The dogma that all law must come from the four corners of a statute cloaks a failure to look for what is difficult to find.

\textit{PURPOSIVE REALISM}

In recent years many legal thinkers have pleaded for the recognition of the fundamental importance of legislative purpose in interpretation. Professor Lon Fuller is one of the most persuasive. His view of the function of the judge is coloured by his idea of law as the "... enterprise of subjecting human conduct to the governance of rules."\textsuperscript{40} Unlike Hart and the positivists, who focus upon the rules and the legal system as a body of rules, Fuller "... treats laws as an activity and regards a legal system as the product of a sustained purposive effect."\textsuperscript{41} From this it follows that courts and legislature have co-operative roles to play in the task of striving for excellence in legality, in ensuring the success of the purposive activity which is law.

Having adopted purpose as the key to intelligent interpretation Fuller must define, and suggest a method for finding it. Here he resorts to metaphor.\textsuperscript{42} He compares the task of a judge to that of the man whose father dies leaving him a sketch of an invention, the development of which is incomplete. The son, instructed to finish the work his father had begun, must first decide what need the projected

\textsuperscript{38} Id. at 335.
\textsuperscript{39} \textsc{Allen}, supra, note 14 at 507.
\textsuperscript{40} \textsc{L. Fuller, The Morality of Law} (1964), 106.
\textsuperscript{41} Id. at 105.
\textsuperscript{42} Id. at 85.
device was designed to fill. He must discover its purpose. He would then attempt to find the principles on which its construction was based, and to complete it in the light of this knowledge. It is this process of thought which should be adopted by the judge in fashioning rules out of statutory language. "The time for praise or blame would come when we could survey what he had accomplished in this inescapably creative role." Merit would depend on whether the remedy provided by the statute, as applied in the particular case, was an apt solution to the problem.

As Fuller himself concedes, this analogy is deceptively simple. There may be a number of possible "mischiefs" which could have prompted the passing of a statute. There may be a chain or sequence of purposes only one of which can be chosen by the judge. At which link should he stop?

One example of the difficulty of divining purpose has often been quoted. In 1910 the Mann Act went into effect in the United States. Cited as the White Slave Traffic Act, it provided that the transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . ." across state boundaries would be a felony. It was passed in response to a general belief that there were organized groups in the States which preyed on virtuous young girls, luring or coercing them into lives of prostitution, and then subjecting them to such brutal treatment that they remained held in a state of near slavery. Although the reports of a number of investigations had been published, the debate in Congress showed no common understanding of the facts. In the light of history the evils of white slavery seem to have been grossly exaggerated. There was, however, a vague consensus that the bill was aimed at trade or commerce in captive women who were the victims of a criminal organization. It was not expected to interfere with state powers to control local prostitution or immorality.

Within a very few years the Supreme Court had put its own interpretation on the broad and ambiguous words of the Mann Act. In 1915, it held that a woman could be convicted of conspiracy to violate it, by agreeing to be transported for purposes of prostitution. The White Slave Traffic Act was successfully employed as a basis for the prosecution of a member of the class it was passed to protect. Two years later, in the Caminetti cases, the Court denied the necessity of any organized traffic and applied the words "for any other immoral purpose" to the transportation of professional prostitutes, not only by procurers, but by their customers. This sanctioned the prosecution, under the Act, of anyone who took a woman, even with her consent, across state lines for purposes of sexual immorality. In 1946, the Court upheld the conviction of a Mormon who, believing in and practicing polygamy, crossed a state border with his wives.

43 Id. at 87.
44 Id. at 87.
45 Case names and citations have been omitted; they can be found in E. LEVY, AN INTRODUCTION TO LEGAL REASONING (1943), pp. 33-57; and HART & SACKS, supra, note 6, pp. 1269-1274.
Professor Levi used this account of the history of the *Mann Act* in *An Introduction to Legal Reasoning* to show how statutory words receive a fixed area of meaning once they have been interpreted. He argues that after a decisive interpretation has determined the general direction of an act, the court must not return to the original language, and by reinterpretating legislative intent, attempt to escape the consequences of caselaw. If the courts adopted a policy of revising their interpretation of statutes at frequent intervals there would be little incentive for the legislature ever to act.\(^4\) The primary law making responsibility rests with the legislative branch of government, he states, and the courts should operate so that it will be encouraged to carry out its task effectively.\(^4\)

Henry M. Hart and Albert Sacks suggest, using the *Mann Act* to illustrate their point, that the legislative history and background of a bill can be an aid to the discovery of its purpose, even though preconceptions as to the use to be made of this material might affect the conclusions drawn from it. Clearly, neither the draftsman nor Congress as a whole intended to deal with all interstate forms of sexual immorality between men and women. On the other hand, it is doubtful whether the legislative history shows convincingly that the purpose of the bill was to deal only with commercialized vice and not with non-pecuniary immoralities.\(^4\)

They argue that the doubt engendered by the title, *White Slave Traffic*, in the light of the history of the bill, should have precluded the Court from giving a broad interpretation to a penal statute, as it did in the *Caminetti* cases.\(^4\)

Furthermore, the "... prevailing policy against incautious or casual extensions of federal power into spheres occupied by the states"\(^5\) should have raised a presumption against such a construction which the legislative history definitely fails to overcome.\(^5\)

These two lessons drawn from the same set of facts illustrate the complexity of the relationship between the purpose of the statute and intent of the legislature. This may be what Llewellyn had in mind when he described statutory purpose, in the sense of policy, as being of two kinds each limited to some extent by the measures chosen and the language used.

"On the one hand there are the ideas consciously before the draftsmen, the committee, the legislature: a known evil to be cured, a known goal to be attained, a deliberate choice of one line of approach rather than another. Here talk of intent is reasonably realistic; committee reports, legislative debate, historical knowledge of contemporary thinking or campaigning which points up the evil or the goal can have significance."\(^5\)

\(^4\) Levi, *supra*, note 45 at 32.
\(^4\) Id. at 57.
\(^4\) Hart & Sacks, *supra*, note 6 at 1272.
\(^4\) Id. at 1272.
\(^5\) Id. at 1271.
\(^5\) Id. at 1272.
\(^5\) Llewellyn, *supra*, note 9 at 400.
In this sense there is a connection between legislative purpose and the intent of the legislator.

"But on the other hand—and increasingly as a statute gains in age—its language is called upon to deal with circumstances utterly unanticipated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation."53

In the first few years after the Mann Act was passed there would have been considerable merit in looking to the mechanics of the legislative process to find the evil to be cured, the choice of measures adopted and the anticipated effect of the statute. But after the Supreme Court had construed the Act its purpose could not have been found in the legislative history. Twenty or thirty years after Congress argued the bill there would have been no point in asking what Mr. Mann or the House intended to achieve by it, especially when their view of the "mischief" to be remedied was based on such uncertain and inaccurate information. The question then would be: what is the purpose which the Supreme Court, exercising its legislative function, has attributed to the Act.

If one accepts the concept of law as the purposive enterprise of subjecting human conduct to the governance of rules, then the quality of a technique of statutory interpretation will be measured by the success which courts using it achieve in this task. Hart and Sacks have formulated an approach which might increase the likelihood of achieving excellence in judicial process. They propose a two step procedure.

The court's first job is to "decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved . . ."54 Occasionally, this may be stated in the act or a preamble, but otherwise it must be inferred, and this requires that the court make an effort to imagine the position of the legislature which created the act. In this the judge must make two assumptions. He must assume that the legislature "... was made up of reasonable men pursuing reasonable purposes reasonably."55 In addition, whether or not he agrees personally with the reasonableness of the policies promoted in the statute, he must recognize that the legislators "... were trying responsibly and in good faith to discharge their constitutional powers and duties."56 The judge should then use the principles of Heydon's Case, comparison of old and new law, to find the "mischief" and the "true reason of the remedy." In this task prior development of the law, public knowledge, commission reports and legislative history may all be relevant.57 The purpose which should be attributed to the statute may also depend on the

53 Id. at 400.
54 Hart & Sacks, supra, note 6 at 1411.
55 Id. at 1415.
56 Id. at 1415.
57 Id. at 1415.
way it has been interpreted in previous cases, where the courts in
the exercise of their power to create law may have defined the
purpose of an act.

Once it has decided the matter of purpose, the court must
"interpret the words of the statute immediately in question so as
to carry out the purpose as best it can, making sure, however, that
it does not give the words either—(a) a meaning they will not bear,
or (b) a meaning which would violate any established policy of clear
statement."

The language of a statute limits the action a court can take.
Dictionaries, and the traditional grammatical rules and maxims of
construction may be used to show the possible range of meanings
open to the court. But the legislative process cannot operate if the
integrity of language is subverted by deliberate misuse of words.

The policies of clear statement which should restrict the court
in its choice of meaning for a particular statute have their origin
in the principle that it is of vital importance that men can know
in general terms the conduct which the law demands of them. The
language of the law must have sufficient clarity to make this pos-
sible, especially when the boundaries of criminal conduct are defined,
or where the implementation of legislative purpose would demand a
departure from traditional legal policy.

HOPE FOR THE BETTER WAY

The method of judicial reasoning outlined here would demand
far more of the judge than is conventional. He must have a thorough
understanding of the role which he is to play in the lawmaking
process if he is to act creatively and yet abide by democratic prin-
ciples. For this reason he should approach the task of interpretation
with a clear idea of the limits of his own power and the power of
the legislature. He must concede the supremacy of the legislative
branch of government in the policy making area. The court is not
equipped to carry out large scale investigations, to determine the
worth of many competing interests and assign priorities to various
policies. Responsibility here must be taken by the legislature and
issues decided in the political arena. But the fact that some questions
must be left to the legislature does not mean that only that body
can create or change law.

"While on the one hand maintaining the historic common law position
that a legislative command is to be construed literally so as to interfere
as little as possible with the status quo, the courts have with the other
hand elevated a concept that only the legislature has lawmaking power
into a formidable barrier to improvement and adaptation of law through
the judicial process."

58 Id. at 1411.
59 Id. at 1412.
60 Id. at 1413.
61 Read, The Judicial Process in Common Law Canada (1959), 37 CAN. B.
REV. 265 at 276.
Those who create statutes must frame general propositions in language. Their power is limited by its nature. They cannot anticipate in detail every effect of their work; nor can they resolve in advance all the possible conflicts which may arise out of the choice of a particular remedy for an immediate problem. It is the responsibility of the courts to create law and resolve conflicts in the light of the general approach taken by the legislature—to co-operate in the effort to achieve excellence in legality. In this co-operation is the only hope for a process which will encourage decisions in the "Grand Style":

"'Precedent' guided, but 'principle' controlled; and nothing [is] good 'Principle' which [does] not look like wisdom-in-result for the welfare of All-of-us."62

**TUPPER v. THE QUEEN**

Almost any decision of the Supreme Court of Canada could be analysed with profit in the light of the theoretical conclusions advanced here. Writing of the situation in the United States, Professor Witherspoon states:

"It is becoming increasingly rare today for an American court to 'whistle up its courage' with a forthright statement that the meaning it assigns a statute is 'what the statute says' or is the 'manifestly plain meaning of the statute' while at the same time omitting any reference to the complex thought process by which the conclusion was reached."63

There is no lack of whistling in Canadian courts. The two opinions in *Tupper*64 comprise a total of four pages of type in the Dominion Law Reports. This is the Canadian style. It is worth comparing the approach taken by the Court with that which might have been taken by a different court with a different heritage.

The appellant was charged under s. 295 (1) of the *Criminal Code* which reads:

"Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years."

He had been a passenger in the front seat of a car which was stopped by the police in downtown Hamilton at ten minutes to two in the morning of October 5, 1965. In the car the police had found: a screwdriver in the rear seat; a Phillips screwdriver on the passenger side of the front seat; a flashlight, a pair of socks and a pair of nylons in the glove box; a seventeen inch gooseneck crowbar, a pair of gloves and a small screwdriver under the front seat on the driver's side. About two weeks earlier the accused had been in the car when it had been stopped and searched. The same articles, with the exception of the crowbar, were in it then, but no charges were laid. The car did not belong to either Tupper or the driver. It had been rented by

62 Llewellyn, *supra*, note 9 at 396.
63 Witherspoon, "The Low Road", *supra*, note 28 at 426.
64 (1967), 63 D.L.R. 2d 289.
a third person for one day on September 23, and had been retained beyond the term of the lease.

Tupper was convicted at trial. The conviction was affirmed and sentence increased by the Ontario Court of Appeal. He then appealed to the Supreme Court of Canada on two questions of law: (1) whether there was any evidence of possession before the magistrate, and (2) whether it is necessary for the crown to adduce evidence of suspicious circumstances when the instruments are "capable of and normally used for ordinary purposes, but may also be used for house-breaking"; before the accused must prove his possession of them was lawful.

The first question was succinctly answered in the affirmative. Judson, J., pointed out that one of the screwdrivers was on the seat on which Tupper was sitting, took judicial notice of the fact that "[s]crewdrivers are not left haphazardly on the seats of cars", and disposed of the first ground of appeal.

Nor did the second question present any great difficulty to the court. After stating that leave had been granted because of the disparity between decisions in various provinces, Judson, J., proceeded, in about two hundred words, to settle the law.

The defence relied on a number of cases to the effect that where the instruments in question would normally serve a lawful purpose, the crown must adduce some evidence from which an inference might be drawn that they were intended to be used for an unlawful purpose, before the burden of proving a lawful excuse fell upon the accused. Judson, J. disagreed:

"... this statement of the law is erroneous and ignores the plain wording of the section. The English version reads: 'any instrument for house-breaking'; the French version reads: 'un instrument pouvant servir aux effractions de maisons'. The French version makes the meaning clear. Both versions mean the same thing. An instrument for house-breaking is one capable of being used for house-breaking."

"Once possession of an instrument capable of being used for house-breaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question."

Hall, J. reluctantly found himself compelled by the wording of the section, to agree with the law as pronounced by Judson, J.: "Whether Parliament intended it or not s. 295(1), as it reads, permits of no other interpretation." He goes on, however, to draw to

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65 Id. at 290.
66 Id. at 291.
67 Fauteux, Martland and Ritchie JJ. concurred with Judson J.; Hall J. concurred in a separate opinion.
69 Supra, note 64 at 292.
70 Id. at 292.
71 Id. at 292.
Parliament's attention the fact that this would require that anyone
in the possession of a variety of common tools in the most innocent
circumstances could be

"... brought into Court and put to the proof that he has a lawful excuse
for having a screwdriver, a flashlight or some other such household tool
or instrument in his car, boat, tool kit or on his person at any given time
or place which includes his home." 72

Surely that one great sun of a principle, the plain meaning rule, 73
has dictated a conclusion which is anything but "wisdom-in-result for
the welfare of All-of-us." 74 The words of s. 295(1) now have a plain
meaning; did they before the Supreme Court so held?

In the first place one might wonder how language which was
clear and unambiguous could have been interpreted by so many
different courts in different ways. But this question apart, there is
at least one "rule" of interpretation which suggests that there might
have been a shadow of ambiguity here.

"In dealing with matters related to the general public, statutes are pre-
sumed to use words in their popular sense; uti loquitur vulgus." 75

Would an instrument for housebreaking in the popular sense, be any
ting capable of being used for breaking into a house?

If the man next door were to meet a nurse in a hospital corridor
carrying a tray on which there are scalpels, sutures, clamps, scissors,
forceps, thread and rubber gloves, he would have little trouble in
identifying these objects as surgical instruments. Some of them were
designed specifically for the purpose of operating on the human body.
Others acquire their character from their situation. If the tray con-
tained only the gloves and a pair of scissors, the man next door
might have some difficulty in classifying these items, but he would
no longer be perplexed when he saw the nurse enter the operating
theatre. Now he could state with some certainty that these were
instruments for surgery. But if he then went home, pointed to the
rubber gloves and the kitchen scissors on the counter beside the sink,
and asked his wife for the surgical instruments, would she under-
stand him?

Again, if the man next door were asked for a tool for naildriving,
would he understand this as a request for a hammer, or a shoe? Yet
when he finds a large nail protruding from the bench on which
he sits in the ball park, he may well use the heel of his shoe to drive
it in. It is submitted that as language is commonly used, a hammer
is a tool for driving nails and a screwdriver for placing screws. They
are plainly housebreaking instruments only because the Court did
not use language in the ordinary way. Thus words become terms
of art.

72 Id. at 293.
73 Willis, supra, note 2 at 2.
74 Llewellyn, supra, note 9 at 396.
75 Wilson & Galpin, supra, note 4 at 53.
In the majority judgment, much was made of the fact that the French version of the section can be translated, "an instrument able to serve for the breaking of houses." For Judson, J., this settled the matter, making the English meaning clear. The process of reasoning is deceptively simple. The rule that both English and French versions of a Canadian statute are official, and therefore either can be used to interpret the other, does not have much to recommend it. Because Parliament speaks with this forked tongue, everyone must be presumed to know the law in two languages, an empty presumption in the light of the fact that the vast majority of Canadians are fluent in only one. The criminal law, in particular, should not be an arcane science. Be that as it may, this rule, like all the others, requires a choice.

The simple statement, "both versions mean the same thing", can only be made when both versions have been interpreted, and a decision made to apply the rule. If the French had been "... ne pas pouvant servir aux effractions ..." the Court would not have hesitated to point out that there had been an obvious oversight, and the versions could not possibly mean the same thing. The method can be illustrated by another recent Supreme Court decision.

In Klippert76 the defence suggested that the French version of s. 659(b) of the Criminal Code should be considered as governing. The question before the Court involved the definition of a "dangerous sexual offender": in English, "a person who by his conduct in any sexual matter, has shown a failure to control his sexual impulses ..."; in French, one "... qui d'après sa conduite a matière sexuelle, a manifesté une impuissance à maitriser ses impulsions sexuelles ..." Defence counsel argued that the French version indicated that the meaning of the section was similar to that of the English version before it was amended in 1961, and that a dangerous sexual offender was someone who had shown a lack of power to control his sexual impulses rather than one who had merely failed to control them.77

Fauteux, J. compared the words of the present French version with those before the amendment, and found them substantially identical. He therefore decided that this was not a situation where the English or French text was capable of assisting the other in a matter of interpretation, but one where it was necessary to elect between versions. With good reason, he chose to follow the version which reflected the change in the law made by the amendment.78

The purpose of this account has nothing to do with the merit of the choice made by Fauteux, J. It is merely to show that both versions are not always construed as the "intent of Parliament". In Klippert the Court found a reason for entirely disregarding the French words. In Tupper, on the other hand, the question was deter-

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76 (1968), 65 D.L.R. 2d 698.
77 Id. at 708.
78 Id. at 709.
mined by the simple expedient of applying the rule, and the plain meaning in French became the plain meaning in English. In both cases the Court had a choice. First as to whether it would consider the two official versions as authoritative, so they could assist each other, and secondly, as to which of the two would do the assisting.

If the Court had viewed the law as a purposive activity and had adopted an approach approximating that suggested earlier in this paper, it might not have interpreted s. 295(1) in a manner which Hall, J. found alarming.

As a first step it would have tried to find the purpose of the section. The crime of possession of housebreaking tools was created by the English judiciary. One of the original definitions was provided in 1852, in *R. v. Oldham*, where it was stated that an “implement of housebreaking” was any one that could be used for that purpose “. . . if the jury find it to have been in the possession of the person charged for that purpose at the time and place alleged . . .” With this definition in mind, the Commissioners incorporated this offence in the English *Draft Code*, with the thought that such possession was *prima facie* evidence of a criminal intent. The Canadian *Criminal Code* of 1892, based on the *Draft Code*, included the crime of possession of housebreaking instruments in what was s. 464, before the revision of 1953-4. This provided that everyone found having possession by night, without lawful excuse the burden of proof of which lay upon him, of any instrument of housebreaking, or, having possession by day with intent to commit an indictable offence, was guilty of an indictable offence. Under this section it was essential that the person be discovered; mere possession without being found had been held not to be sufficient. There was also a heavy burden on the Crown to prove an intent if possession was by day. This was the state of the law at the time the present s. 295(1) was enacted.

The “mischief” against which the law, as developed so far, was directed, was clearly the crime of burglary. The “reason of the remedy” is also relatively clear. Because it is difficult to control this crime if one must wait till a house is broken into, find the culprit and prove his guilt, the law provides other ways to act against those who intend to commit burglary, as evidenced by some action in furtherance of that end. The crimes of conspiracy, attempt and possession of instruments all provide a substitute for the act of housebreaking. In this case the legislature decided that if a person were found at night with certain kinds of tools, that, by itself, would raise a presumption that he intended to use them to commit burglary.

When the *Code* was revised, the word “found” was dropped, and the mere possession, without being able to prove lawful excuse, of

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79 (1852) 5 Cox C.C. 379.
any instrument for housebreaking, at any time, became an offence. By comparing this with the prior law it is evident that one purpose of the revision was to allow the conviction when instruments were found in someone's room or home, and to eliminate the difficult process of proving intent where the possession was not at night. Beyond this it is difficult to infer.

The debates in Parliament on the revision of the *Criminal Code* are not a great deal of help. The Minister of Justice, Mr. Garson, stated that the “... possession of housebreaking tools was considered to bring the accused into the category of a burglar...”,\(^82\) and he clearly intended that the onus should be on anyone possessing such instruments at any time, to show a lawful excuse.\(^83\) This caused Mr. Fulton some concern. He pointed out that it might “... go hard with the genuine artisan who always carries his tools by day...”,\(^84\) but he agreed to the clause because he understood it had been thoroughly discussed in committee. Nobody at that time considered the meaning of the words “instrument for housebreaking”, or suggested that anything capable of being used for housebreaking, without more, would fit the definition. If it was the intention of Parliament to require everyone at any time to be able to prove he had lawful excuse for the possession of a screwdriver, that intention was not articulated.

It thus seems reasonable to conclude that the purpose of s. 295(1), as it operates in the framework of the present Criminal Code, is essentially the same as that of the section it replaced. It provides that the possession of housebreaking instruments, without excuse, is an offence, because that is sufficient reason to infer that the instruments have been, or will be used to commit a burglary.

Having attributed a purpose to the section the Court should then interpret the words to carry out that purpose, bearing in mind that any drastic change in the law should be clearly stated. The construction which the Supreme Court put upon the words in this case, quite obviously results in a departure from the traditional principles of the criminal law. It is somewhat startling to find that everyone who has a hammer may be guilty of an indictable offence if he cannot prove on a balance of probabilities, that he has a lawful excuse for having it; the whole doctrine of "reasonable doubt" has been pushed aside.

It would have been possible to effect the legislative purpose of s. 295(1) without any such extreme interpretation. The example used earlier, of the man next door and his problems with the surgical instruments, helps to indicate the solution. The words "instrument for house-breaking", as used by Parliament, cannot be defined in the abstract. A few items, such as skeleton keys or lock-picks, are

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\(^83\) Id. at 2489.
\(^84\) Id. at 2490.
used solely for breaking into houses, but other tools become house-
breaking instruments only by inference. They are not merely capable
for use for this purpose, but have a character which arises from the
surrounding circumstances. The fact that the section was designed to
remove the necessity of proving a specific intent to commit burglary,
does not mean that the words “instrument for house-breaking” must
be defined in a special way. If the Court had adopted a purposive
approach, it might have realized that it had a duty to create rational
law out of the words of the Criminal Code. It might then have con-
cluded that instruments for housebreaking are those which are cap-
able of use for that purpose, and which by reason of the circum-
stances surrounding their possession, can be inferred to be intended
for use in the commission of housebreaking or to have been used for
housebreaking. Hall, J. might not then have been so unhappy with
the decision.
CASE COMMENT