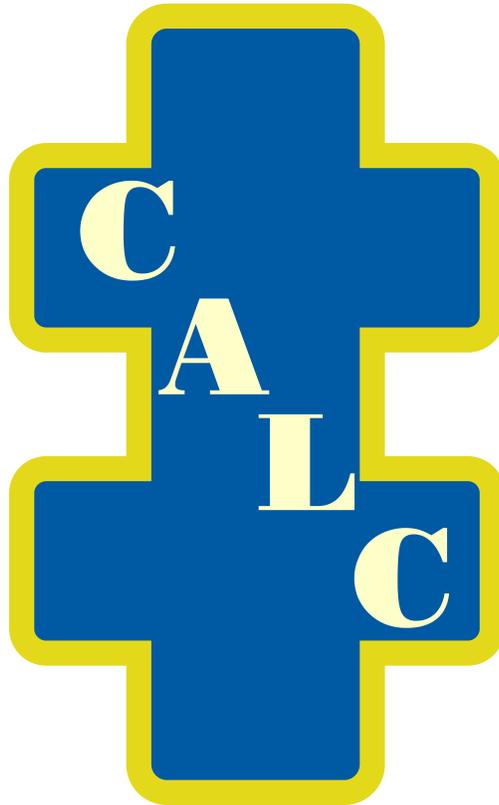


Commonwealth Association of Legislative Counsel

THE LOOPHOLE



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THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 1 of 2016

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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Contents

Editor’s Notes	1
Upcoming Conferences.....	2
By Sword and Shield: Legislative Counsel’s Role in Advancing and Protecting Democracy One Word (and Client) at a Time	
Teri Cherkewich.....	4
Shifting Boundaries between Policy and Technical Matters in Legislative Drafting	
John Mark Keyes and Dale Dewhurst	23
Language of Calculation and Determination: Drafting Taxation Laws	
Penny Alexander	40
Book Reviews	
<i>Burrows and Carter Statute Law in New Zealand</i> , 5 th ed.....	51
<i>Public Law in the Age of Statutes</i> , Essays in Honour of Dennis Pearce.....	54

Editor's Notes

The Loophole closes out 2015 with two more papers from CALC's immensely successful conference in Edinburgh in April, which brought together over 200 participants from throughout the Commonwealth and beyond.

One of the most striking features of this and other CALC Conferences is how they highlight how much legislative counsel have in common with each other despite their many regional and national differences. Thus, Teri Cherkewich's paper written from the perspective of a small Canadian jurisdiction, Yukon, resonated broadly in terms of outlining the challenges of ensuring that those who have a democratic mandate to give drafting instructions fulfil their instruction-giving role and understand how their instructions are being translated into legislative texts. Although her perspective is informed by her experience in a small jurisdiction with limited policy-making and legal resources, it is by no means unique to these jurisdictions and is equally relevant in larger jurisdictions faced with cost-cutting measures and constant turn-over in policy officials.

By the same token, the next paper by Dale Dewhurst and the undersigned looks at common types of provisions found in legislative texts throughout the Commonwealth. It too considers the roles of instructing officials and legislative counsel and their intersection in decisions about how these provisions should be drafted. In many respects, there is no longer (if there ever was) a sharp divide between these roles in the drafting of titles, purpose clauses and commencement provisions. Rather, there are legitimate concerns and objectives from each perspective to be reconciled. The paper aims to prompt debate on these matters in a quest for drafting standards that will be widely recognized.

The third article in this issue takes us into territory beyond the 2015 Conference. Penny Alexander from Victoria looks at the sometimes daunting world of drafting tax legislation. Her article is prompted by a recent decision of the Victorian Court of Appeal considering the drafting and interpretation of provisions authorizing tax officials to do things and the degree of discretion (if any) these authorizing provisions entail.

This issue concludes with two reviews of recently published books on topics relating to legislation: Ross Carter's 5th edition of *Burrows and Carter Statute Law in New Zealand* and *Public Law in the Age of Statutes*, a collection of essays in honour of Dennis Pearce.

Happy reading, and all the best for 2016.

John Mark Keyes

Ottawa, January, 2016

Upcoming Conferences

Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ)

This biannual conference will be held again on *12-13 September, 2016 in Ottawa, Canada*. The theme will be the *New Legislative Counsel at the Intersection of Law, Policy and Politics*. It will feature speakers on the challenges legislative counsel face in more dynamic legal, policy and political environments. It will also include practical workshops on important aspects of legislative drafting.

Further details will be available on the CIAJ website: <http://www.ciaj-icaj.ca/>.

Clarity 2016

Clarity's next international conference will be held in *Wellington, New Zealand on 3–5 November 2016*. The conference will have a strong focus on practical, interactive learning. We promise compelling keynote speakers along with interactive workshops, case study presentations, panel discussions, mentoring appointments, and 'speed learning' events. There'll be a strong legal theme along with topics relevant to all sectors and industries. See more detail at the [Clarity2016](#) conference website.

International Conference of Legislative Drafting and Law Reform

The fourth annual International Conference of Legislative Drafting and Law Reform will be held at the World Bank headquarters *in Washington, DC on 10-11 November 2016*. Last year's conference in July drew attendees and speakers from a range of legislative drafting and legal backgrounds, including CALC members. (For more information about last year's conference, see ilegis.org.) Toby Dorsey, the Special Counsel of the United States Sentencing Commission and an associate member of CALC, is on the organizing board of the conference and is the chair of the speakers and agenda committee; they are very interested in having CALC members attend and serve as speakers.

If you are interested in attending, please save the date and plan to come; if you are interested in giving a presentation, please contact Toby Dorsey at tobiasadorsey@gmail.com. He intends to submit more information about the conference when it becomes available

Commonwealth Law Conference 2017

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

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

CALC Conference

The next CALC Conference will also be held *in Melbourne in March 2017*, in tandem with the CLC Conference. Further information will be available at <http://www.opc.gov.au/calc/conferences.htm>.

By Sword and Shield: Legislative Counsel’s Role in Advancing and Protecting Democracy One Word (and Client) at a Time

Teri Cherkewich¹



Abstract

This article generally explores the role of legislative counsel who draft government bills within the law-making process. It considers different ways that legislative counsel work to strengthen the democratic principle within that process. It also considers how the context of a small maturing government may impact this role. The case of underdeveloped instructions is explored throughout this article as a means to investigate how legislative counsel can ensure that, in working with clients, their actions strengthen the democratic principle as opposed to weaken it.

Introduction

If competent drafting requires that legislation² accurately express the intention of the democratically-elected law maker but drafting instructions do not clearly articulate that intention, what is a drafter to do in the name of “democracy”? This article explores this

¹ Legislative Counsel, Legislative Counsel Office, Government of Yukon (teri.cherkewich@gov.yk.ca). This article was prepared for presentation at the Commonwealth Association of Legislative Counsel Conference 2015 (Edinburgh, Scotland). A previous edition of this article was published in (2015), 36 *Statute Law Review* 253. The views expressed in this article are those of the author alone and are not made on behalf of the Government of Yukon. The author is grateful to both Shawn Courtney for his dedicated copy-editing assistance and John Mark Keyes for his valuable feedback on previous drafts of this article.

² Any reference in this article to legislation or the law-making process is limited to the context of government bills; it does not include opposition or private member bills or subordinate legislation.

question by reflecting on the duties of legislative counsel and their relationship to the instructing officers who are their clients. It approaches this question from a theoretical perspective and supplements it with an anecdote from a Canadian territory (Yukon). The author's own experience as a maturing drafter in a small maturing government has influenced this article's investigations. Ultimately, the intention behind this article is to invigorate the conversation on the role of legislative counsel in supporting the democratic law-making process; a conversation that has already begun thanks to the work of those whose research supports this article.

Part I of this article proposes that legislative counsel have a duty to uphold the democratic principle in the work they do. The means by which they discharge this duty are explored generally, and more specifically in the case of underdeveloped instructions. Part II suggests that legislative counsel's duty to uphold the democratic principle may be heightened in the context of a small maturing government given resource shortages and limited legislative scrutiny. The author provides her own working context (Yukon, Canada) to illustrate this point. The article concludes by proposing that where a heightened duty exists and underdeveloped instructions are presented, legislative counsel may have some 'hard choices' in the work they do.

Part I: Democracy and Legislative Counsel's Role in it

1. Catalysts with a duty to uphold the democratic principle

It is hard to argue with Gregory Tardi's proposition that in modern times "democracy" is one of the most nebulous and meaning-laden expressions in the language of public discourse."³ As Canadian courts have said, the concept of "democracy" is multifaceted and complex as it has both individual and institutional aspects,⁴ which in turn have both theoretical and practical dimensions.

At an institutional level, it is a constitutional principle that guides self-governance by a sovereign people through "the [will] of the people".⁵ In this regard and in combination with other constitutional principles (for example, the rule of law), it informs the functioning of the law-making process.⁶

³ Gregory Tardi, *The Theory and Practice of Political Law* (Toronto: Carswell, 2011) at 71. For a discussion on how democracy as a concept has evolved and been conflated with other important societal values, like freedom or equality, see Mark. E. Warren, *Democracy and Trust* (Cambridge: Cambridge University Press, 1999) ("Warren") at 159; and James Bryce, *Modern Democracies*, Volume 1 (Toronto: The MacMillan Co. of Canada, 1921) ("Bryce") at 20.

⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (SCC) at para 61.

⁵ *Ibid* at para 64 and 66.

⁶ *Ibid* at para 62.

Practically, however, democracy consists of the various processes, institutions and laws that may vary in substance according to a jurisdiction's culture and legal tradition.⁷ Accordingly, "democracy" as a concept or expression is difficult to neatly summarize or confine; however, for the purposes of this article, "democracy" is, except where the context otherwise suggests, limited to its role as a constitutional principle that informs the law-making process of a democratic state by requiring that this process effectively enable the expression of the will of the people.

The basic premise of any process informed by the democratic principle is that "power [resides] in the people as a whole".⁸ Alternatively put, the foundational basis of any democratic government is that "the people rule".⁹ The practical realities of government structure, however, mean that only a few individuals within a sovereign state can be chosen and entrusted to exercise the people's power.¹⁰ The democratic method of entrusting this power is through free and fair elections of representatives who are chosen based upon the majority vote of the electorate.¹¹ It is through this exercise that a trust relationship is implicitly established between the elected representatives and the people they represent.¹² Such a trust relationship is important for maintaining the stability and peace that is common to democratic societies because it underscores to those in power that they exercise that power strictly as trustees of the people, in the public's interest.¹³ Moreover, through the process of recurrent elections, this relationship renews itself and reminds the parties to it of their duties to each other.¹⁴

In between elections, the body of elected representatives works to fulfill a primary duty flowing from this trust relationship: the making of laws in the public's interest.¹⁵ Given

⁷ For an interesting review of the evolution of democracy in different jurisdictional contexts, see generally *Dixon v. British Columbia (A.G.)*, 1989 CanLii 248 (BCSC).

⁸ *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 (SCC) at para 28.

⁹ *Dixon*, above n. 7 at para 66.

¹⁰ "[D]emocracy entails the popular election of officials who are thereby entrusted with the right to exercise public power": John Mark Keyes, "Professional Responsibilities of Legislative Counsel" *The Loophole*, Oct. 2009 (2009.3) at 52.

¹¹ The formula for elections is as varied as the democracies that establish it.

¹² Admittedly, this is an over simplification of a very complex area of political theory and science. For a thorough analysis, see generally Warren, above n. 3.

¹³ See Warren, *ibid.* at 4, 18, 22, 158 and 335.

¹⁴ Although the duties of elected representatives are obvious (see Warren, *ibid.*), the duties of the electorate are less clear. Canadian courts have provided some guidance but mostly in obiter: in *Thompson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 569 at para 127, the Supreme Court of Canada stated that the most important "democratic duty" of a citizen is to choose who will govern them (i.e. by voting). Also see Tardi's comments on the citizen's duty to know about the democratic society in which they live, above n. 3 at xviii.

¹⁵ "The most fundamental function of elected representatives is to represent their constituency. They function in two roles – legislative and what has sometimes been termed the 'ombudsman role'...[i]n the legislative role, it is the majority of elected representatives who determine who forms government and what laws are passed": *Dixon*, above n. 7 at para 98.

obvious structural limitations, practical aspects of the law-making process are delegated to allow the members of the legislative body to focus on what they were elected to do: deliberate on laws tabled before them.¹⁶ From a drafting perspective within a parliamentary context, two important delegations are made: one to the responsible minister (and impliedly to that minister's department) and one to legislative counsel.

In a parliamentary context, the doctrine of responsible government provides that the executive branch of government, acting through its responsible ministers, has the authority to make decisions or set policy for draft laws that will be tabled before the legislative body.¹⁷ In this capacity however, the executive remains accountable to the legislative body because the latter has the authority to ultimately decide whether those draft laws will be enacted. Thus, through the doctrine of responsible government the first important delegation that facilitates the democratic law-making process is achieved. Moreover, in respect of a specific legislative proposal, a responsible minister's department will develop the policy required to support the drafting of laws for that legislative proposal.¹⁸ Ordinarily, once the policy has been developed an instructing officer from within that department will be chosen to play the important intermediary role between the policy maker (the department) and the writer of the proposed law (legislative counsel). The instructing officer's role is an important one because they are charged with the responsibility to sufficiently¹⁹ articulate the intentions of the policy maker in a manner that allows the drafting of laws to accurately reflect those intentions. The instructing officer fulfills this duty by presenting the drafter with sufficient instructions.²⁰

The next important delegation occurs when drafting instructions are provided: legislative counsel is delegated the responsibility to translate the law maker's intentions into legally-

¹⁶ "In practice few polities achieve an ideal-type of democratic law-making process marked by deliberation": Ann Wilcox Seidman, Robert. B. Seidman & Nalin Aberyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer Law International, 2001) at 21.

¹⁷ The concept of "responsible government" is fundamental to any democratic governmental structure in Canada: *Quebec Secession Reference*, above n. 4 at para 65. A government is "responsible" in the sense that the executive is responsible to the legislative assembly, meaning that the executive must have the confidence of the legislative assembly in order to continue in office: see Peter.W. Hogg, *Constitutional Law of Canada*, 2012 Student ed. (Toronto: Thomson Reuters Canada Ltd. 2012) at 9-2.

¹⁸ The delegation of responsibilities from a minister to their department is supported by the *Carltona* doctrine. This doctrine provides for an implied delegation of authority from a minister to a responsible public servant so that the minister is not required to act personally: *Carltona Ltd. v. Commissioner of Works*, [1943] 2 All E.R. 560 (C.A) at 563. This rule has been codified in many jurisdictions.

¹⁹ "Sufficient" does not necessarily mean detailed as the latter can be an obstacle to the drafting process: see John Mark Keyes, "Legislative Services Offices and the Role of Legislative Counsel" (2009) Department of Justice (Canada) at 8. An alternative term that has been used in this context is "adequacy": see Elmer Driedger, *The Composition of Legislation*, 2nd ed. (Ottawa: Department of Justice, 1976) at xvi and David Hull, "Drafters' Devils" *The Loophole*, June 2000 at 15.

²⁰ The process of providing instructions is, however, not linear. An instructing officer may be required to provide on-going instructions during the drafting process as iterations of a bill are produced.

binding rules. Legislative counsel's duty is to coherently and accurately²¹ translate instructions in the form of policy statements into effective new laws that harmonize with existing laws. It is through the successful completion of this translation exercise that legislative counsel act as catalysts in a cascading chain of responsibility upon which the democratic law-making process relies. This chain of responsibility originates with the legislative body (elected representatives charged with the duty to make the people's laws), flows through to the executive via the doctrine of responsible government (the responsible minister and their department define the policy for which laws are required) and ends with legislative counsel who are responsible for transforming the policy intention into draft laws to be deliberated upon by the legislative body. As a corollary to this, and by virtue of delivering a bill that is acceptable to the executive, legislative counsel discharge their duty within this chain and in turn trigger a reversal of the flow of responsibility for the draft laws. Ultimately, upon the tabling of a bill this responsibility re-vests in those who were originally charged with it: the elected representatives. By being a catalyst in this 'democratically-driven chain of responsibility', legislative counsel's work is fundamental to supporting the fulfillment of one of the legislative body's primary democratic duties: deliberating on laws proposed for the benefit of the people.

As a catalyst in a potentially long chain of actors,²² legislative counsel occupy an important position of trust not only in relation to their clients,²³ but also in relation to the people who will be governed by the laws they draft. This proposition is based on two reasons: first, because legislative counsel act as agents of the public's trustees in the law-making process; and second, because legislative counsel exercise a specialized craft that others in the chain, and those who will be governed by the laws they draft, rely on for the law-making process to be successful and laws to be sound. Thus, just as legislative counsel owe a duty to the elected representatives to accurately reflect their intentions in draft laws, they also owe a duty to the beneficiaries of the laws to ensure that draft laws are sound (coherent and effective). In this sense, I share Melanie Bromley's view that "the laws that [legislative counsel] draft ultimately belong to the people who are governed by those laws".²⁴

²¹ "Accuracy' (the expression of the client's will) should always be an objective of the principled legislative drafter": David A. Marcello, "The Ethics and Politics of Legislative Drafting" (1996) 70:2437 *Tulane Law Rev* at 2453. Also see Reed Dickerson, *The Fundamentals of Legal Drafting* (Toronto: Little, Brown and Company, 1986) at 61.

²² The many other responsibilities required to be fulfilled between the making of a policy decision by the law maker and the tabling of a bill are not noted because this article's focus is drafting. It is recognized, however, that there are many other important roles that are required other than the drafter and the instructing officer for the democratic law-making process to be successful.

²³ For a general statement on legislative counsel's position of trust, see Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24 *Statute Law Review* at 131.

²⁴ Melanie Bromley, "Whose Law is it? – Accessibility through LENZ: Opportunities for the New Zealand public to shape the law as it is made" *The Loophole*, Oct. 2009 (2009.3) at 16.

Based on the above, not only do legislative counsel owe a duty to their client as lawyers,²⁵ to the government as public servants²⁶ and to the Attorney General as his or her delegate,²⁷ but also to the people governed by the laws that they draft as agents of the public's trustees in the law-making process. Such a duty is distinct from legislative counsel's other duties because it does not strictly rely on a relationship with a specific person or body. Rather, in a parliamentary context, it is rooted in the constitutional entrenchment of the democratic principle in tandem with the relationships and doctrines that support that entrenchment (for example, the trust relationship between elected representatives and the people and the doctrine of responsible government). Because this duty does not vest in any specific person it is best framed as a duty on legislative counsel to uphold the democratic principle in the work that they do. As alluded to above, legislative counsel discharge this duty by attending to its two facets: first, by ensuring draft laws accurately reflect the law maker's intentions in order to enable the expression of the will of the people; and second, by ensuring that draft laws are sound so that no unintended harm is caused to those who are governed by them.

I note that the existence of a duty on legislative counsel to uphold an abstract constitutional principle has already been suggested. As John Mark Keyes has stated:

[a drafting office] has responsibilities that go beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law...[t]hese responsibilities may also include *the protection of values associated with the entire legal system, such as fairness and equality* [emphasis added].²⁸

Thus, if legislative counsel have a duty to protect the values buttressing the legal system, then it is reasonable to suggest the same in respect of a principle upon which free, peaceful and stable societies are built.²⁹ I acknowledge, however, that some legislative counsel may initially balk at the thought of an additional duty upon an already mounting pile of professional obligations.³⁰ Fortunately though, as mentioned above, legislative counsel

²⁵ See Keyes above n. 10 at 40.

²⁶ *Ibid* at 43.

²⁷ *Ibid* at 44 for an overview of the statutory framework of this duty and other statutory duties that apply in a Canadian federal context.

²⁸ *Ibid*. The same author extends this view beyond domestic legal systems to international ones by suggesting that legislative counsel owe a duty to uphold the principle of sustainability: see John Mark Keyes, "Sustainable Drafting" *The Loophole*, Feb. 2011 (2011.1) at 59. Also see supporting comments in Stephen Argument, "Legislative counsel and pre-legislative scrutiny" *The Loophole*, Jan. 2010 (2010.1) at 69.

²⁹ In referring to democratic governments as a form of government, Viscount Bryce stated "no other method has been found for determining peaceably and legally what is to be deemed the will of a community which is not unanimous": Bryce above n. 3 at 20. In this regard, I am reminded of the quote often attributed to Winston Churchill: "democracy is the worst form of government except for all those other forms that have been tried from time to time".

³⁰ "Drafters have an onerous responsibility within the overall system of justice": Deborah MacNair, "The Role of the Federal Public Sector Lawyer: from Polyester to Silk" (2001) 50 U.N.B.L.J. 125 at para 150.

discharge this duty in their everyday work by competently attending to their responsibilities, specifically by ensuring that the laws they draft are accurate and sound.

A final comment on legislative counsel's role within democratic government is warranted. As with any trusting relationship, reciprocity is essential. Therefore, just as others must trust legislative counsel in what they do and that they do it well, so too must legislative counsel rely on and trust in the knowledge and judgment of their clients. In this sense, cultivating trust within the law-making process of a democracy may be as critical to its success as it is to any other type of human relationship.

2. Other means of advancing and protecting the democratic principle

a. Wielding the servant's sword: removing obstacles to the deliberation of laws by addressing underdeveloped instructions

As I suggest above, legislative counsel work daily to uphold their duty to the democratic principle and consequently strengthen it within the law-making process by ensuring that a bill is accurate and sound. However, when drafting instructions do not clearly articulate the law maker's intentions or have not properly addressed legal or legislative considerations,³¹ legislative counsel's ability to discharge this duty becomes more challenging.

Underdeveloped instructions³² can arrive on legislative counsel's desk for many different reasons. Some of those reasons may be outside of the client's control and some may be within it. As such it is not fair to immediately assume that the cause lies solely with the client. In fact, underdeveloped instructions may typify bigger challenges that modern democracies face. Some general challenges include: the recent trend of shrinking government resources; the inflexibility of legislative timelines; and the increasing sophistication of law and policy.

A challenge more specific to the drafting process is the increasing trend of governments to commit to public consultations. Public consultations offer the law-maker an important opportunity to seek differing views on a legislative proposal before making a decision whether to proceed with it. In this manner, public consultations can strengthen democracy's trust relationship by keeping the public informed and by inviting its participation in the law-making process. However, public consultations often require the collection and analysis of much information as a precursor to the law maker's decision. This can mean that more must be done in same amount of time by the responsible department and its instructing officer. However, sometimes the reason for underdeveloped instructions is the client's own lack of capacity: they may be relatively new to the world of policy development; they may be new to the subject-matter of the legislative proposal; or they may lack a solid understanding

³¹ For example, in the context of an amending bill, instructions have been developed without thorough consideration of the existing law that is to be amended.

³² This term is meant to encompass instructions that do not clearly or sufficiently articulate their objective and instructions that have not fully considered relevant legal and legislative considerations.

about how the law works and is written. Regardless of the reason, any one or a combination of these may mean that an instructing officer struggles to find adequate resources and time to conduct the research required to fully develop and test alternative approaches. Consequently, legislative counsel and their client may share a common challenge in the drafting process as both struggle to balance the need for time to do their work against the need to ensure that an accurate and sound bill is produced.

When presented with underdeveloped instructions, a legislative counsel has an important opportunity to support the democratic law-making process. They do this by addressing the root cause of underdeveloped instructions, which may include inconsistencies, incoherence or gaps in a legislative proposal. At times, the root cause may be the client's inability to properly "determine the ingredients" of their proposed law.³³ According to Elmer Driedger:

determining the conception of a law to be expressed... is the most important step [of the drafting process] because if there is no idea there is nothing to express; and if the law as conceived is faulty or defective the law as expressed will also be so.³⁴

Therefore, legislative counsel are invested in this step of the drafting process because its outcome can directly affect their ability to draft accurate and sound laws.

If legislative counsel are called upon to support their client's efforts in this first step (something that even Driedger admits is inevitable at times),³⁵ they can draw upon not only their drafting skills but also their legal skills (for example, knowledge of the law and how to research it) and the skills they have developed through working with their clients and within the law-making process (for example, knowledge of how policy is developed). The combination of these skills provides legislative counsel with a valuable tool – a metaphorical sword of sorts – that they can wield to cut away obstacles that block the client from determining the ingredients of their proposed law. When working through these obstacles with their client, legislative counsel can assist by presenting coherent and workable alternatives. Working with the same goal in mind, legislative counsel's efforts with this sword focus the client on answering the fundamental democratic question that often remains unanswered in these situations: what really *is* the people's will? Proficiently and promptly determining the answer to this question through determining the required ingredients for a law can expediently advance the law-making process to its next step: creating the elements required to express in law the people's will.³⁶

³³ Driedger, above n. 19 at xxv.

³⁴ *Ibid.*

³⁵ *Ibid* at xv . It was estimated some time ago that there is a 19:1 ratio between preparation time and drafting time: Marcello, above n. 21 at 2447 referring to Harry W. Jones, "Some reflections on a draftsman's time sheet" (1949) 35 A.B.A.J. If this ratio holds true today then it would seem that legislative counsel spend much effort in this step of the drafting process.

³⁶ Driedger above n. 19 at xxv.

Some of the specific ways in which legislative counsel wield their sword to help the client with the unanswered question is by posing piercing questions to the client about the important ingredients of the legislative text to be drafted (the ‘who’, ‘what’, ‘when’, ‘where’ and ‘how’). This method can often illuminate for the client the limitations, incoherence or gaps in their proposal. At other times wielding their sword may result in working with their client on interpretations of existing law. Such work can help clarify whether challenges with a proposal are rooted in its contents, an incoherence in existing law, or a potential misinterpretation of the law. At other times, particularly when timing is sensitive, legislative counsel may wield their sword by putting concepts down on paper in an effort to stimulate the client’s thinking. This last method can be quite effective by jump-starting the process of determining the ingredients.

Specifically with respect to this last method, legislative counsel’s involvement presents an interesting dilemma for a few reasons. One reason is that the traditional notion of their role in the law-making process is limited to a translator of intentions and not an active participant in their determination. In the translator role, legislative counsel exercise an important but limited discretion within the drafting process: to make choices on the text of the law, which includes choices regarding words, sentences, syntax, structure, etc. This discretion, however, does not extend to substantive aspects of a legislative proposal. Another reason is that by assisting in clarifying the law maker’s intentions, legislative counsel is involved in clarifying their own instructions, a matter for which they are greatly invested but have no authority to determine. A final reason is that a drafter’s involvement in determining the ingredients of a law through the process of offering substantive alternatives may force them to confront Driedger’s proverbial “dividing line between policy and law, form and substance”, a line that Driedger admits is not a sharp one.³⁷

In the case of underdeveloped instructions, Driedger’s dividing line is important because it relates to what Reed Dickerson called the drafter’s “practical problem”: how to discharge their duty to the client without encroaching on the client’s prerogatives.³⁸ It is also important from a democratic perspective because it demarcates legislative counsel’s limitations within a democratically-driven law-making process: they are not democratically elected and therefore have no authority to venture over the line into the domain of the decision maker. To do so would be undemocratic. However, it is extremely unlikely that a legislative counsel will consciously venture in this manner; rather, they are more likely to unconsciously veer towards the line without realizing it. Thus, without proper awareness a legislative counsel may, without any malice in mind, awaken to the realization that they have ventured into prohibited territory.

³⁷ *Ibid* at xv.

³⁸ Dickerson, above n. 21 at 10.

Although the method of composing a text to stimulate thinking is an effective one, I note Dickerson’s view that “thinking and composing cannot be functionally divorced”.³⁹ This view recognizes that when legislative counsel compose a text, they are naturally called upon to make decisions about the ingredients of that text (the ‘who’, ‘what’, ‘when’, ‘where’ and ‘how’). Thus, if a legislative counsel resorts to this method the client may increasingly rely on the legislative counsel’s independent thinking as opposed to their own. This may in turn lead to a reciprocal increase in both legislative counsel’s *potential* to influence the success of a proposal (the timely tabling of a bill) and their *potential* to influence its substance (determine its ingredients). I have already alluded to the former potential in the context of legislative counsel’s exercise of their sword. The latter potential, however, is what David Marcello refers to as a drafter’s “policymaking potential”: the potential to influence the shape and substance of legislation through the performance of drafting tasks.⁴⁰

I propose that the former potential is a democratic one and the latter is an undemocratic one. Relating this to legislative counsel’s sword, it follows that such a sword may be viewed as double-edged: on one edge lies the potential for legislative counsel to act as an important catalyst in the democratic law-making process; on the other edge lies their policy-making potential, which, if realized, could weaken the vitality of the democratic principle within that process.

So how does a legislative counsel, in a world where form and substance and thinking and composing cannot be functionally divorced, determine whether their efforts have cut the right or wrong way? One way is to ensure that all policy-making decisions remain with the client whether they are perceived as significant (such as a choice between two different schemes for the law) or insignificant (such as choosing a term of art that will be a central concept for that scheme).⁴¹ Success in this scenario likely depends on two factors. The first is the client’s ability to make those decisions and, likely more fundamental to democracy, to fully comprehend the decisions that they make. In this sense, legislative counsel must foster their client’s ability to understand the decisions that they make because without such understanding there can be no confidence that a decision on the text of the law fully rests with the proper decision maker. The second factor is legislative counsel’s ability to remain aware of their position relative to the dividing line at any particular moment. Although Dickerson’s answer to his “practical problem” is “a wholesome point of view and some sophistication [along with] tact and diplomacy”⁴² (no doubt wise advice), I would suggest that more is required. This is because even well-intentioned efforts to advance a client’s cause could cut the wrong way if undertaken without regard for the dividing line or without the client fully appreciating the effect of their decisions on the ingredients of a proposed law.

³⁹ *Ibid* at 6.

⁴⁰ Marcello, above n. 21 at 2440.

⁴¹ *Ibid*.

⁴² Dickerson, above n. 21 at 10.

b. Shielding the people's laws from harm: harmoniously integrating new laws and rewriting problematic ones to protect the integrity of the statute book

Just as legislative counsel can contribute to the democratic law-making process by helping clients determine the ingredients required for a law, they can also contribute from a more defensive position in their role as “guardians of the statute book”.⁴³ Through ensuring the seamless integration of new laws and identifying inconsistencies or incoherence within existing laws, legislative counsel routinely work to shield from harm one of democracy's vital institutions: its laws.

In any particular drafting project, legislative counsel must ensure that the new law as drafted is consistent and coherent with existing law. This is a standard practice against which competence is judged. However, when analyzing an existing law as part of a drafting assignment, what if the drafter discovers serious statutory inconsistencies, incoherence or gaps that may not directly relate to the original instructions? And what if the client confirms that this aspect of the legislation frustrates efforts to administer it resulting in a burden on the state? Being entrusted with upholding the integrity of the statute book as its guardians, legislative counsel are called upon to determine what they can do to help address this potential harm to democracy.⁴⁴

As with sword, when legislative counsel are called upon to raise their shield to protect the statute book, they have another opportunity to be mindful of the proverbial dividing line. Such a line in this case is a fine one to walk. On the one hand, legislative counsel's role as guardian may compel them to advocate for changes to the law. On the other hand, they cannot appear to encroach on the client's prerogative in so doing. Such advocacy without encroachment can be challenging for two reasons.

First, legislative counsel may often more fully appreciate than their clients the significance of a problem within the statute book simply because, due to the nature of their work, they are the most familiar with it. This may mean that they must invest time in explaining the problem to the client in the hope that they too will take responsibility for its solution. In this regard, the client may have to heavily rely on legislative counsel's assessment of a legislative problem. Thus, legislative counsel's ability to shield the statute book from harm may depend upon the trust that their clients have in them to accurately assess the underlying problem along with any feasible and expedient solution.

A second reason is that the dividing line may shift with further exploration of a problem. When there is no judicial interpretation of an expression, legislative counsel may have to work with the client to seek their understanding of that expression. At times this may reveal that the client is unclear themselves. Thus, a problem originally identified as a non-

⁴³ Keyes, above n. 10 at 67.

⁴⁴ Note that Marcello, above n. 21 at 2446 suggests that any type of advocacy by legislative counsel is improper; however this comment was in the context of a congressional legislative process as opposed to a parliamentary one.

substantive one (for example, inconsistency in the language of a statute) can morph into a substantive one (what is actually intended by the expression). In such a situation the client may be asked to wade into a substantive policy area that they sought to avoid (perhaps noting that they originally avoided it due to lack of resources). Advocacy in these cases can also be challenging because of the potential for these types of problems to shift from being strictly rooted in the meaning of a text to being rooted in a gap in the client's policy.

In summary, legislative counsel's ability to contribute to strengthening the democratic principle within the law-making process is largely due to the position they hold, the skills they develop and the relationships they form; basically, it is part of their job. The role of legislative counsel is a serious one that carries both great responsibility and potential for positive change. However, in recognition of the two edges of their sword, legislative counsel must be mindful when exercising it so as to avoid unintentionally harming the democratic principle. There can be no greater need for such awareness than in a small government in the early stages of democratization where limitations within the law-making process may require legislative counsel to be intensely committed to upholding their duty to the democratic principle.

Part II: Small Maturing Governments and Hard Choices

1. A heightened duty to the democratic principle in small maturing governments

In exploring legislative counsel's duty to the democratic principle, I would be remiss not to investigate how contextual factors may impact this role, particularly considering structural and systemic differences between large mature governments and small maturing ones.⁴⁵ To begin, a few notable differences are outlined below.

Generally speaking, smaller governments reflect smaller population bases, which may in turn translate into two factors that can impact the drafter in their work: fewer available human resources to fill the various roles required to develop policy and support the drafting of laws; and fewer financial resources allocated for the development of policy, drafting expertise and maintenance of the statute book.⁴⁶ These issues can be further aggravated if a

⁴⁵ For consistency sake, the precedent adopted to distinguish "small governments" from "large governments" is the one set out in Bilika H. Simamba, "Managing increasing government expectations with respect to legislation while maintaining quality: an assessment of developing jurisdictions" *The Loophole*, Jan. 2009 (2009.1) at 7. In that article, a "small jurisdiction" is defined as a jurisdiction with a population that does not exceed 200,000. For the purposes of this article, I am conflating Simamba's "small jurisdiction" with my use of the expression "small government". Based upon this numerical distinction, I estimate that approximately 11 of 53 member states of the Commonwealth (21% of all member states) would fall within the small (jurisdiction) government category. This number, however, does not take into account the provincial, territorial or state governments within each member state. Distinguishing between a mature government and a maturing one is difficult because no specific point of division will be totally satisfactory; therefore for ease, a government is considered maturing if it democratized within the last 50 years and is considered mature if it democratized more than 50 years ago.

⁴⁶ See comments in Hull, above n. 19 at 17 and David Hull, "The Role of Legislative Counsel: Wordsmith or Counsel?" *The Loophole*, Aug. 2008 (2008.1) at 35.

small government's jurisdiction is remote.⁴⁷ If a small government has also recently democratized, a few more factors may also arise: a lack of legislative or jurisprudential precedent for that jurisdiction; and a less robust law-making process with limited legislative scrutiny. These factors, alone or in combination, may translate into a variety of scenarios. For instance, they may result in a drafting office consisting only of one drafter;⁴⁸ there may be no or limited support personnel (for example, editorial staff); or there may be no or a limited drafting conventions manual.

The above factors can also directly impact the work of instructing officers, which in turn may further affect legislative counsel. For example, in the case of fewer human and financial resources, an instructing officer may have limited opportunity for training, or limited or no access to legal counsel during the development of a legislative proposal. In the case of the first limitation, the effect on the drafter is likely obvious. However, in the case of the latter, the effect is less obvious but no less significant. When a client is without legal support it may be that they are less alive to the relevant legal or legislative considerations when developing their proposal. As discussed above, this can cause significant difficulties for legislative counsel because it may result in an inadequate or unworkable proposal being presented for drafting at a very late stage in the law-making process. Thus, legislative counsel may be required, as a part of drawing their sword, to undertake the work of building a 'legal baseline' (an analysis of the state of the existing law as it relates to what is being proposed). Although creating a legal baseline is important, if it is not completed early in the law-making process two further challenges can arise: the legislative counsel has less time for actual drafting and the client may discover at a late stage that their proposal is unworkable. Therefore, if the client is unable to obtain timely legal advice legislative counsel may find themselves working hard to ensure that the all the ingredients required for a proposed law have been properly and fully considered by the client as a prerequisite to the actual drafting exercise.

A final difference for consideration between large mature governments and small maturing ones is related to the legislative scrutiny process. Smaller governments often have less means available to establish and conduct an intensive legislative scrutiny process. One consequence of this is that the scrutiny process can result in a weak or non-existent "legislative audit trail".⁴⁹ Given that parliamentary democracies are based upon the doctrine of responsible government where accountability to the legislative body is critical to its proper functioning, the lack of a legislative audit trail may become a democratic issue because it may evidence a lack of accountability of the legislative counsel within that

⁴⁷ See John F. Wilson, "Challenges of drafting in a developing country" *The Loophole*, July 2007 (2007.2) at 38.

⁴⁸ *Ibid* at 37.

⁴⁹ See Hull, above n. 19 at 37 where "legislative audit trail" refers to a process where the relationship between the policy intentions behind a proposed law are neatly tracked to where and how those intentions are expressed within the provisions of a draft law.

system. Consequently, if gaps in accountability exist within the law-making process then that process may be viewed from a democratic perspective as vulnerable.

At times, courts will, through the application of statutory principles aimed at ensuring (no matter the quality of a legislative scheme or text) that a legislative provision is interpreted as “remedial” in order to attain its legislative “objects”,⁵⁰ hold legislative counsel indirectly accountable by having to undertake extraneous statutory interpretation exercises in order to make a poorly drafted law workable.⁵¹ This method of scrutiny of a drafting work, however, is obviously not desirable for democracy for two reasons: first, when this method is applied, the law has already been enacted; and second, the legislative counsel is not held directly accountable. In this regard, even though the work of courts may provide another opportunity to scrutinize a drafter’s work, by the time this scrutiny is applied democracy may have already borne the burden of the faulty law.

Without external scrutiny, a heavy responsibility falls upon legislative counsel and the drafting office to be the “first bulwark in legislative scrutiny”⁵² and potentially the last.⁵³ In this regard, Ruth Sullivan’s following comment is notable:

[g]iven the current conceptions of democracy and the rule of law, and given the way those conceptions are put into practice in parliamentary democracies like Canada, the work that drafters do warrants careful scrutiny.⁵⁴

Sullivan’s comments appear to apply regardless of how sophisticated a government’s law-making process is. Yet in the case of less sophisticated processes where internal scrutiny is already minimal, one is left wondering how sufficient scrutiny of a drafter’s work can be effectively achieved in these contexts. Absent an ideal scenario where sufficient internal and external scrutiny mechanisms are in place, the pragmatic answer relies upon two fundamental aspects of the law-making process.

The first is rigorous application of the existing scrutiny process that includes, at the very least, scrutiny by the client, their department and Cabinet. The second is legislative counsel’s commitment to steadfastly uphold all of their duties but in particular their duty to the democratic principle by ensuring not only that the draft laws are accurate and sound, but

⁵⁰ This is a reference to common provision found in interpretation statutes that courts may rely upon in order to give effect to the purpose of the statute when such a purpose is not explicitly clear by virtue of the legislative scheme or text. See, for example, section 10 of Yukon’s *Interpretation Act*, where it states “[e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large and liberal interpretation that best insures the attainment of its objects”.

⁵¹ It is also noted that a drafter is somewhat immunized from direct criticism given the application by the courts of presumption of linguistic and drafting competence: see Ruth Sullivan, *Sullivan and Driedger on Construction of Statutes*, 6th Ed. (Markham: Lexis Nexis Canada, 2014) at 205.

⁵² Stephen Argument, “Straddling the barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeper poacher” *The Loophole*, Oct. 2007 (2007.3) at 67.

⁵³ Wilson, above n. 47 at 38.

⁵⁴ Ruth Sullivan, “The Promise of Plain Language Drafting” (2001) 47 McGill L.J. 97 at 99.

also that their work is transparent. A part of this transparency includes ensuring that clients understand the laws that legislative counsel draft for them. Legislative counsel's commitment in this manner, therefore, may require educating their clients with a better understanding of the law and how it is drafted. Such a pedagogical role for legislative counsel (where feasible) can strengthen the scrutiny process and their own accountability by building in an important check and balance on their work: a client who has the critical tools and knowledge to understand and scrutinize legislation.

Based on the above, legislative counsel's duty to uphold the democratic principle is heightened in the context of a small maturing government if that government's law-making process is a vulnerable one having limited legislative scrutiny and accountability. Such a heightened duty may also apply in a larger mature government where some of these factors exist and consequently produce a similar vulnerability. Regardless, the heightening of this duty requires that legislative counsel make their work transparent to their clients by ensuring their clients fully understand the content and legal implications of the proposed laws that they have worked on together. It also requires that legislative counsel exercise extra caution when wielding their sword due to their appreciation of existing vulnerabilities within that law-making process. To illustrate where such a heightened duty may be seen to exist, the context of the Canadian territory of Yukon is discussed next.

2. A case of a heightened duty? Yukon's evolution (through devolution) into a democratic government

This is the law of the Yukon, and ever she makes it plain:

*Send not your foolish and feeble; send me your strong and your sane.*⁵⁵

Since its inception over 100 years ago, Yukon continues to evolve as a jurisdiction. It is, and has always been, a small jurisdiction in terms of population⁵⁶ but a large one in terms of geography.⁵⁷ Although Yukon was inhabited by First Nation peoples long before the arrival of Europeans, it found its spot on the international stage just over a century ago. With the influx of thousands of desperate gold-rushers into Yukon, the Government of Canada realized that this vast landscape could no longer remain, for the most part, administratively barren. Hence, a new territory was born to avert chaos and crime and, more importantly, so that Canada could lay its claim to sovereignty over these rich lands.⁵⁸

⁵⁵ Opening lines of Robert Service's poem *The Law of the Yukon*.

⁵⁶ As of June 2014, Yukon Bureau of Statistics cited Yukon's total population at 36,667. This number is comparable to the population of the City of Stirling or the Town of Falkirk, Scotland.

⁵⁷ The Yukon land mass consists of approximately 483,450 km². It is larger than California and covers more area than Belgium, Denmark, Germany and the Netherlands combined.

⁵⁸ David W. Allen, "Information Sharing During the Klondike Goldrush" (2007) 67:4 *Journal of Economic History* 1 at 7.

In 1898 *The Yukon Territory Act*⁵⁹ was enacted by the Canadian parliament. Under that statute, a territorial government for Yukon was established with its law-making branch consisting of a federally appointed Commissioner and an unelected advisory Council.⁶⁰ It was not until 50 years later that the democratic principle was introduced into Yukon's governance model, albeit on a very limited scale. In 1952, the unelected Council was replaced with an elected Council; however, the Commissioner remained accountable to the federal government as opposed to the elected Council.⁶¹ This shift in Yukon's governance model laid down the road map for its future evolution into a fully democratic government.

From 1953 until 1979, the Commissioner continued to be accountable to the federal government. In 1979, this relationship changed significantly when the federal government instructed the Commissioner that she was no longer accountable to it, but rather to the elected representatives of the Council (today known as the Legislative Assembly of Yukon).⁶² By virtue of this instruction, the territorial government began its new era as a fully democratic government. This step, however, did not change the constitutional status of Yukon: it remained, and to this day remains, a creature of a federal statute.

Since 1979, Yukon has continued to mature as a government through a staged devolution process. The most recent devolution of power was in 2003 when Parliament devolved the administration and control over all Crown lands and water within Yukon to the territorial government. At that time, Parliament also expanded the territorial government's legislative powers to those substantially equivalent to a province.⁶³ To date, however, the jurisdictional status of Yukon is a curious one: a territory that is a creature of federal statute but whose government is a responsible one and exercises province-like legislative powers.

Another important feature of Yukon's evolution was initiated a few years before democratization began in earnest. In 1973, a contingent of Yukon First Nation (Aboriginal) leaders requested that the federal government enter into formal nation-to-nation treaty negotiations with them. Approximately 20 years later, the first comprehensive land claims agreements were signed between the federal government, the territorial government, and four Yukon First Nations. These agreements are constitutionally entrenched⁶⁴, and pursuant to their related self-government agreements First Nations governments are vested with specific legislative powers that, if exercised, displace existing territorial laws in that area.

⁵⁹ 61 Victoria, c. 6 (Canada).

⁶⁰ *Ibid.*, ss. 5 and 6. The federal Governor in Council retained the power to limit any law that was made by the Commissioner.

⁶¹ The *Yukon Act* 1898 was replaced by the *Yukon Act*, R.S.C., 1952, c.298 ("*Yukon Act* 1952"). The latter consisted of 112 more provisions than the former evidencing an expansion of scope of the statute.

⁶² These instructions were set out in a letter dated October 9, 1979 from federal Minister Jake Epp (Department of Indian and Northern Development) to the Yukon's Commissioner Lone Christensen.

⁶³ The *Yukon Act*, S.C. 2002, c. 7 replaced the *Yukon Act*, R.S.C 1985, c. Y-2.

⁶⁴ Pursuant to section 35 of the *Constitution Act*, 1982 (Schedule B, *Canada Act*, 1982, (U.K.) 1982, .c11).

Today, 11 of the 14 Yukon First Nations have signed treaties and are in the process of implementing them.⁶⁵

The territorial government's law-making process is based upon a Westminster parliamentary model. Before a bill is tabled in the Legislative Assembly, it is scrutinized by the Legislative Counsel Office, the responsible department and the Cabinet Committee on Legislation. At times, upon Cabinet approval, a bill may be informally scrutinized through public consultations. Also, within this law-making process, instructing officers rarely have dedicated legal counsel available to support development of legislative proposals.

Once a bill has been tabled and before enactment, generally its only formal scrutiny is after second reading during debate in the Committee of the Whole of the Legislative Assembly.⁶⁶ Although there is authority under the Legislative Assembly's Standing Orders to establish standing committees on legislation, this authority has never been exercised and no such standing committees have ever been established. On a related point, the Legislative Assembly has also never appointed a law clerk as an advisor to it during this process. As such, the most intensive scrutiny of a bill is generally done before it is tabled.⁶⁷

It is within this landscape that the territorial government's Legislative Counsel Office works. It is a relatively small office⁶⁸ responsible for drafting in English and translating into French all government bills, regulations and orders,⁶⁹ along with the maintenance of the government's online unofficial consolidation of the statute book.

There is a heightened duty on drafters within this context to uphold the democratic principle in the work that they do because of contextual factors in Yukon, notably

- a small and remote population; a small tax base;
- a maturing government through a staged devolution process;
- a dearth of legal or legislative precedent in certain areas;⁷⁰

⁶⁵ A challenging task if one considers that some of these First Nations have a total population of about 200 persons. In the 2006 Census, Statistics Canada reported a Yukon First Nations population of 7,580 persons, representing approximately 25% of the population of Yukon.

⁶⁶ There are 19 members in Yukon's current Legislative Assembly.

⁶⁷ According to Peter Bernhardt, the lack of scrutiny of legislation is not solely a Yukon problem but perhaps a Canadian one (at least at a provincial level): see Peter Bernhardt, "Parliamentary scrutiny of delegated legislation in Canada" *The Loophole*, Dec. 2014 (2014.2) at 75.

⁶⁸ The Legislative Counsel Office consists of a team of nine: Chief Legislative Counsel, three English Legislative Counsel, two Bilingual Legislative Counsel, a Regulations Officer and two legislative assistants.

⁶⁹ The Yukon's *Languages Act*, R.S.Y. 2002, c. 133 requires that all legislation be made in both English and French. At this time, Legislative Counsel Office does not do bilingual drafting and legislative services are not provided for opposition or private member bills. In 2013, the Legislative Counsel Office drafted 300 instruments (21 bills, 81 regulations and 198 orders-in-council).

⁷⁰ The Yukon's original statute book relied heavily on precedents from other jurisdictions. It is unusual for laws to be made strictly for modernization purposes. For example, in the last 5 years, out of a total of 63 bills enacted by the Legislature (excluding appropriation bills) 3 bills were made with the primary intention of

- limited dedicated legal support for instructing officers; and a limited scrutiny process⁷¹.

Such a heightened duty is most certainly not unique to Yukon, but may also apply to other small maturing governments or, as mentioned above, a larger mature government where similar factors exist. Regardless, what all drafters with a heightened duty may share is the common experience of facing ‘hard choices’ in their work when presented with underdeveloped instructions.

3. Facing and navigating ‘hard choices’

When legislative counsel is presented with underdeveloped instructions within a vulnerable law-making process, hard choices can arise. A hard choice arises because in these moments legislative counsel’s sword can cut both ways: for the democratic cause or against it. The difference in result can be subtle given the factors in play and the nature of the legislative counsel’s work with clients. Moreover, it will be a rare case when unwholesome intentions are the reason for a cut against. Rather, the difference between a cut that advances democracy versus one that inhibits it will likely be rooted in an unconscious action by a legislative counsel. These unconscious actions can be driven by the pressures resulting from limitations within a law-making process (for example, lack of resources, scrutiny and time). Taking the lead on a drafting project out of concern for its success, or not confirming the client’s understanding of a decision for the sake of expediency, are examples of unconscious cuts against democracy. Although the rare exception in this case may be forgivable, as on its own it will not fully undermine the democratic principle, too many cuts over time and the democratic law-making process may begin to bleed.

When a hard choice arises a legislative counsel may feel a pull between two opposing forces. One force encourages them to exercise their skills to seemingly advance the law-making process by producing draft legislation. This force suggests to them that they have a real opportunity to make a positive difference to democracy. The other force may tug at them in recognition that their duties require that they not step over the dividing line, no matter how motivated they are to assist their client or seemingly advance democracy. Legislative counsel may struggle to determine what to do when there is heavy client reliance and a choice not to assist may mean a delay in the legislative body’s ability to deliberate on

replacing outdated laws: *An Act to Amend the Government Organisation Act*, S.Y. 2014, c. 5, *Animal Health Act*, S.Y. 2013, c. 10 and *Pioneer Utility Grant Act*, S.Y. 2014, c. 13.

⁷¹ Yukon has a *Continuing Consolidation of Statutes Act*, R.S.Y. 2002, c. 41 that provides the Chief Legislative Counsel with certain powers to ‘tidy up’ the statute book (to use an expression suggested in Duncan Berry, “Keeping the Statute Book up-to-date – a personal view” *The Loophole*, Oct. 2007 (2007.3) at 43). But these powers are limited because they only apply in respect of an official revision. Yukon’s last official revision was in 2002. Given that the Legislative Counsel Office now maintains an unofficial online consolidation, it is may be some time before the next official revision.

an intended law. Doing too much may mean that their wholesome efforts translate into undemocratic results. Doing too little may mean that democracy is stifled.

The best that legislative counsel can do is to find a balance between these two tensions through being mindful of all of their duties. An example of finding this balance is when legislative counsel reminds their client of the importance of including the critical ingredients of a law in a bill as opposed to deferring them to regulation. When time is severely limited and the client has presented the drafter with underdeveloped instructions, this may be tempting to do. However, being mindful of their duty to uphold the democratic principle, legislative counsel will instead educate their client on why taking this approach is undemocratic: because it denies the legislative body an opportunity to deliberate on matters important to the general public. Such advice may be hard to provide at times; however, sometimes serving democracy means that legislative counsel must fearlessly advise their client that in order to properly advance democracy (and in turn discharge their duty) more time is needed. To not advise in this manner may ultimately mean that legislative counsel has not discharged their duty to uphold the democratic principle and unconsciously wielded their sword against its cause.

Ultimately, skilfully navigating hard choices requires the exercise of personal judgment in moments of great pressure, when a drafter is in a position to make a real difference to the law-making process. Thus, effectively making a hard choice requires a conscious decision about whether advancing forward (for example, actively working with the client to determine the ingredients of a proposed law) or retreating (for example, removing oneself from the client's decision making process) serves not only their client but also democracy.

Conclusion

Legislative counsel's role within democratic government has both enviable and unenviable aspects. On one hand, they have daily opportunities to strengthen the democratic principle within the law-making process. On the other hand with such opportunities come important responsibilities and potentially hard choices. This may be particularly true of legislative counsel working in small maturing governments where vulnerabilities in the law-making process may call upon them to work harder to ensure that the democratic principle is upheld in the work that they do. Ultimately, though, it is legislative counsel's responsibility to navigate hard choices in a manner that ensures they remain protectors of the democratic law-making process as opposed to its assailants. Fortunate is legislative counsel to have ample opportunities to serve democracy directly, one word and one client at a time.

Shifting Boundaries between Policy and Technical Matters in Legislative Drafting

John Mark Keyes¹ and Dale Dewhurst²



Abstract

This article considers the division of labour between policy matters and drafting matters in the preparation of legislative texts under the Westminster parliamentary model. It notes that although many matters clearly fall on one side or the other of the boundary between these two types of matters, the boundary is not always clear and may be shifting in some respects. The article argues for more international debate of these questions with a view to establishing global consensus if not standardization.

Introduction

We begin with two premises about legislative drafting that are generally accepted in jurisdictions based on the British parliamentary model:

1. substantive policy matters involving the objectives and content of legislation are determined by those who provide drafting instructions and promote draft legislation through the enactment process;
2. technical drafting matters relating to the translation of drafting instructions into effective legislation are determined by legislative counsel responsible for drafting the legislation.

These premises recognize that legislative processes, and the legislation that results from them, will be more effective in achieving their goals if legislation is drafted by professionals

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who are skilled in writing legislative texts and have a sound understanding of how legislation operates within a legal system. Legislation also benefits from the sense of perspective that drafting professionals bring to the formulation and implementation of policy.

Recent times have seen many aspects of legislative drafting debated by its practitioners, but none more so than the dividing line between the two categories described above. This question goes to the heart of the role of legislative counsel. When matters shift from one category to the other, it sometimes provokes debate and concern.

This has been most recently demonstrated in relation to the titles of bills. What was once thought to be a matter within the exclusive purview of legislative counsel, now appears to be taken over by those responsible for policy matters, particularly those in the political world.³

The shift can also happen in the other direction when very general instructions are given to prepare a legislative text, or no instructions are available for significant policy issues arising in drafting the text.⁴ In these cases, legislative counsel are left to assume a significant policy-making role and work these issues out for themselves.

In this paper, we look at how matters have been characterized as either policy or technical. There is surprisingly little discussion of this question in the literature on legislative drafting. Most commentators tend to assume that the distinction is clear and proceed to discuss the interplay between these two facets of legislative drafting.⁵ We also suggest that there is merit in preserving this distinction and paying attention to how matters are characterized as one or the other.

What counts as policy?

There are many ways to describe policy in the context of legislation. In its most basic terms, it involves decisions about what legislation is supposed to deal with and the way in which those things are to be dealt with. These things are, in turn, framed by the need to address human behaviour, or at any rate the behaviour of legal persons, whether physical or institutional.

Policy is often conceived in terms of objectives. This reflects the reactive nature of legislation in parliamentary systems. It is fundamentally oriented towards addressing issues of general concern by bringing about some social change. This notion of policy is firmly rooted in the basic postulates of democratic government and the rule of law that law be made by persons and bodies having the authority to make it, notably by elected

³ P. O'Brien, "Legislative Titles: What's in a Name?" [The Loophole](#), November 2012, No. 3.

⁴ See, for example, T. Walsh, "Addressing the Decline of Capacity to Give Drafting Instructions" [The Loophole](#), October 2013, No. 3.

⁵ See, for example, H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed. (Bloomsbury Professional Ltd.: Hayward's Heath, 2013) at 142-144.

representatives. If they are to exercise their authority meaningfully, they must consider and make decisions about the objectives of legislation. They cannot simply rely on others and rubber-stamp what is proposed by others. At the very least, this requires consideration of purposes and intended results, which constitute perhaps the most basic form of legislative policy.

Policy also concerns the way results are to be achieved, including the threshold question of whether legislation is the best means of accomplishing these results. Social behaviour is the product of a wide variety of factors, which the current debate about “nudging” demonstrates.⁶ And laws are not necessarily the best way to accomplish policy objectives, as illustrated by failed legislative initiatives such as the prohibition of alcohol consumption in the United States and Canada in the 1930s. Although laws may accomplish their policy objectives to some extent, they can also have unintended consequences that create far more problems than they solve.⁷

It might be thought that decisions about the use of legislation to accomplish policy objectives are technical (instrumental) matters, distinct from the substantive policy. However, the assessment of whether legislation is the right tool to accomplish policy objectives is hardly an exact science, despite the efforts of jurists, economists and other social scientists to apply intellectual rigour and empirical data to these questions.⁸ Instrument choice is generally considered to be a matter of policy. It can be informed by an understanding of how laws operate, but it cannot be determined by technical, including legal, analysis alone.

Another way to explain why instrument choice is a policy matter is by considering the political reality in which legislation is enacted. Legislation is not just a legal tool, it is also a political tool, as reflected in Lord Thring’s famous aphorism: “Bills are made to pass as razors are made to sell.” Legislative processes under the Westminster model of parliamentary democracy are in the hands of elected politicians, who are as concerned about being seen to deal with social issues as they are about effectively dealing with them. In fact, given that the effectiveness of dealing with an issue is generally not known until some years after legislation is enacted, public perception about dealing with the issue tends to be the paramount consideration in the minds of elected representatives.

From a political perspective, policy includes decisions about matters that attract, or have the potential to attract, public attention. The effectiveness of a law in bringing about some desired social change may be an important consideration, but if the political priority is to be

⁶ See, for example, R. Baldwin, “From Regulation to Behaviour Change: Giving Nudge the Third Degree” (2014), 77 *Modern LR* 831.

⁷ See W. Bogart, *Consequences: The Impact of Law and its Consequences*, (University of Toronto Press: Toronto, 2002) at 102.

⁸ Note proposals for more rigour in this regard by M. Mousmouti, “Effectiveness as an Aid to Legislative Drafting” [The Loophole](#), May 2014, No. 2.

seen to be doing something about a social issue, nothing can beat legislation given the public attention it generally attracts.

Another factor making legislation attractive as a policy vehicle is the difficulty, if not impossibility, of determining what its effect will be. This means that elected representatives cannot in the short-term be held to account for this dimension of legislation. In fact, accountability over the long-term is questionable as well given the range of factors operating on a given policy matter in as much as inefficacy can often be attributed to changing and unforeseeable conditions.

To conclude then: matters of policy clearly involve decisions about what result or social change is to be achieved through legislation. They also involve at least some decisions about how the result or change is to be achieved, notably about whether legislation is to be used. The characterization of these questions as matters of policy appears to depend on two factors. One is the degree to which the matter is seen to be resolvable by recourse to technical considerations, as opposed to being a matter of political judgment. The other factor is public interest. A high level of public interest with implications for political fortunes will move a matter into the realm of political decision-making even though it may have technical aspects.

From the standpoint of legislative drafting, there is little difficulty in accepting that decisions about the objectives of legislation or the results to be achieved are policy matters, are to be decided by those who provide drafting instructions. Legislative counsel under the Westminster model have a role here in terms of prompting the clarification of these objectives or advising on their consistency with constitutional or other legal limits, but they do not determine what these objectives should be.

In contrast, there is debate and uncertainty about whether the means of achieving legislative objectives are policy matters. The public interest factor is amorphous, informed by wide-ranging and often shifting political considerations. Although it can perhaps be safely assumed that many aspects of legislation will not engender political interest, these assumptions sometimes become untenable. We propose to explore this further by turning to the flip-side of the question posed at the outset.

What counts as technical?

We have suggested above that technical matters are principally concerned with the *implementation* of policy. However, some aspects of implementation, like decisions about whether to use laws, are often treated as policy issues. What then is left for technical matters?

The most obviously technical matters are those of legislative form. This includes features such as the numbering of provisions and the page-layout of legislative text. Legislative form is typically set by detailed rules, the application of which is regarded as a purely technical

function. Although such rules are often addressed as matters of the administration of government publishing offices, notably in the United Kingdom,⁹ they are sometimes established through instruments that involve political decisions, as for example in Canada where the format of federal statutes is prescribed under the *Publication of Statutes Act*.¹⁰ At the provincial level, the Ontario *Legislation Act* contains a similar provision for regulations prescribing the manner of publishing Acts,¹¹ although few details have in fact been prescribed.¹² Legislation dealing with these matters is also found in many other countries.¹³ Thus, these matters are considered to be political to some extent, although they do not typically engender much public interest. It seems fair to say that they are regarded as mainly technical and within the remit of legislative counsel offices.

Drafting style and the arrangement of legislative provisions are also usually regarded as technical matters, at least in general terms. There tends to be general acceptance of this in policy and political circles, although there can sometimes be debate about what is an acceptable legislative style. These debates have played out in many places, particularly over the past half century in terms of reforms to make legislation more readable and accessible.

In the UK, the Renton Report on the Preparation of Legislation was commissioned by James Prior, the Lord President of the Council and Leader of the House of Commons.¹⁴ In Australia, reforms relating to drafting style were driven by political proponents of plain language, such as Jim Kennan, the Attorney General of Victoria who launched the study of this subject by the Law Reform Commission of that state in 1985.¹⁵ In Canada, the Commissioner of Official Languages reported on the poor drafting quality of the French version of Canadian legislation in 1970s, which prompted a review of drafting practices within the Department of Justice and the institution of co-drafting for the preparation of legislation simultaneously in both official languages (English and French).¹⁶ But these examples of political interest in matters of drafting style and presentation are few and far between. And the responses generated to concerns about drafting style have if anything affirmed the technical nature of this aspect of legislation.

⁹ See F. Bennion, *Bennion on Statute Law*, 3rd ed. (Longman Group: London, 1990) at 78ff.

¹⁰ RSC 1985, c. S-21, s. 11.

¹¹ [SO 2006, c. 21, Sched F](#), s. 16(b).

¹² Only two regulations have been made under the *Legislation Act*: [O.Reg. 169/14](#) (E-Laws Website Address) and [O.Reg. 413/08](#) (Official Copy of Law from E-Laws Website).

¹³ See, for example, the Australian [Acts Publication Act 1905](#) and the New Zealand [Legislation Act 2012](#).

¹⁴ Cmnd. 6053.

¹⁵ Law Reform Commission of Victoria, [Report on Plain English and the Law](#), Report No. 9, (Melbourne, 1990).

¹⁶ See [Guide to Making Federal Acts and Regulations](#) (Privy Council Office: Ottawa, 2001) at Ch. 2.3, "Co-drafting".

Although guidance on drafting style is often framed in terms of general principles relating to the structure and organization of a legislative text and its readability, they nevertheless demonstrate features that mark this aspect of legislation as technical. The literature on drafting style and readability, including the reports mentioned above, demonstrates that it is not simply another policy issue arising in the legislative process.¹⁷ Drafting style may on occasion have to bend to linguistic practices in particular fields of endeavour that it governs, such as securities trading or aviation, but this simply affirms the technical character of the matter as an example of one form of technical language prevailing over another. There may also be occasions when political considerations prevail, notably in terms of language that will elicit political compromise despite its vagueness or ambiguity. But, as exceptions, they too tend demonstrate the general acceptance of legislative style as a technical rather than policy matter.

Yet another way of characterizing technical matters is in terms of types of provisions. The literature on legislative drafting has developed a variety of categories typically found in legislation. The broadest category is simply “substantive” provisions, generally comprising rules, powers and the creation of offices and legal entities. These provisions largely depend on policy matters in terms of their substance. But, as just noted, they have a technical dimension in terms of drafting style. They are also affected by constitutional limitations, notably those relating to fundamental human rights.

The other categories of provisions largely support the operation of substantive provisions and might be thought of as technical. One prominent category is generally described as preliminary and final provisions.¹⁸ But as we have seen above in relation to instrument choice, the instrumental quality of provisions as mechanisms for implementing policy objectives does not guarantee that they will be considered purely technical. They may have features that attract attention in terms of the public or political interest they generate. In the next section of this paper, we examine these provisions with a view to highlighting these features and how they can transform a technical matter into one of policy.

Preliminary and Final provisions – Technical or Policy Matters?

A number of types of provisions are generally included at the beginning and end of a legislative text to perform mainly technical functions. Most of these do not contain substantive rules of law. But they play important functions in establishing the authenticity of the legislation, in supporting its operation and use and in ensuring that new legislation is compatible with existing legislation. They are generally described as follows:

¹⁷ See (2014), 71 *Clarity – Journal of the international Association promoting plain legal language*, which is devoted to the work of Robert Eagleson and contains a selection of previously articles describing plain language analysis of legal texts and its roots in empirical studies.

¹⁸ For a detailed examination of technical matters of legislative form and drafting preliminary and final provisions, see Athabasca University Open Course Ware, [LGST 555, Drafting Preliminary, Amending, and Final Provisions](#).

- words of enactment
- titles,
- preambles¹⁹ and purpose clauses²⁰
- interpretation provisions²¹
- application provisions²²
- commencement and duration provisions²³
- amending and transitional provisions,²⁴
- schedules²⁵

Words of Enactment

Words of enactment attest to the making of a legislative text. They say who is making it and, particularly with subordinate legislation, they indicate the source of authority to make it. It is difficult to think of a more technical type of provision. Although they are essential and are often established in Constitutions or Interpretation Acts,²⁶ they generate next to no political or public interest and courts have resisted attempts to use them to attack the validity of legislation.²⁷

Titles

Titles serve a variety of functions in legislation. Their principle purpose is as mechanism for identifying and referring to a text. But this purpose unfolds differently in the pre- and post-enactment phases of legislative texts.

In the pre-enactment phase, these texts have a public profile provided by the legislative process, whether parliamentary or regulatory. The purpose of the title is simply to label a bill or draft regulation that is being presented for debate or comment. And bills also have bill numbers attached to them, which generally become the dominant method of referring to them. In fact, bill numbers sometimes survive the enactment process and continue to be

¹⁹ See LGST 555, "[How do we draft titles, preambles and words of enactment?](#)"

²⁰ See LGST 555, "[When and how do we draft purpose clauses?](#)"

²¹ See LGST 555, "[How do we draft interpretation provisions?](#)"

²² See LGST 555, "[When and how do we draft application provisions?](#)"

²³ See LGST 555, "[How do we draft commencement and duration provisions?](#)"

²⁴ See LGST 555, "[Drafting Amending Provisions](#)".

²⁵ See LGST 555, "[Drafting Schedules](#)."

²⁶ See, for example, *Interpretation Act*, RSC 1985, c. I-21, s. 4.

²⁷ See *British Columbia Milk Board v. Grisnich* [1995] SCJ No. 35 at para. [24], and more generally J.M. Keyes, *Executive Legislation*, 2nd ed. (Lexis Nexis Canada: Markham, 2010) at 331-333.

widely used to refer to Acts.²⁸ Thus, titles are far from critical as pre-enactment referential tools.

Titles to bills serve another purpose in parliamentary procedure. They are used to provide notice of tabling and to define the scope of a bill for the purpose of determining the admissibility of amendments. Amendments that go beyond the scope of a bill as tabled (and as indicated by its title) risk being ruled out of order.²⁹ This procedural purpose explains why some jurisdictions attach both long and short titles to bills. The long title serves the parliamentary procedural purpose while the short title serves the referential purpose.

Recent commentary on bill titles also demonstrates that titles have come to be used for communications purposes by the political proponents of bills.³⁰ They are used to highlight or frame a bill in a way that suggests effective political action.

Once a bill is enacted, the purpose of its title shifts somewhat. Although it is still used for referential purposes, these purposes manifest themselves in terms of legal practitioners and members of the public using titles to locate the law that concerns them. Titles appear not only in legislative enactments, they also show up in tables of legislation and are generally a searchable field in on-line databases of legislation. They become devices for finding legislation, as opposed to simply referring to it. Short titles are particularly useful in this regard.

A secondary purpose in the post-enactment phase is as an aid to the interpretation of the legislative text. Most courts will now consider titles, although there is debate about the weight to be given to them.³¹

Given the potential significance of titles for debating and interpretive purposes, it is not surprising that they would be treated as policy matters. The technical post-enactment function of facilitating access to legislation is sometimes swamped by these other purposes, and in a world controlled by political actors, it is not hard to see which purposes prevail. As long as titles are seen to be important political tools in the enactment process, the purposes of post-enactment access will take a back seat. The way titles may be distorted for these purposes deserves criticism, but as a policy matter.

Happily, in Canada, the politicization of bill titles manifests itself principally in amending legislation. Once an amending Act is enacted, the amendments become integrated into the principal Acts it amends. The amending Act ceases to have a great deal of significance, except in terms of legislative history.

²⁸ In Canada, one of the best examples of this is Bill 101 of the Quebec National Assembly in 1977: see *The Canadian Encyclopedia* at <http://www.thecanadianencyclopedia.ca/en/article/bill-101/>.

²⁹ *House of Commons Procedure and Practice*, 2nd ed. (Ottawa, 2009) at

³⁰ See O'Brien, above n. 3.

³¹ See R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Lexis Nexis Canada: Markham, 2014) at 440-447.

Preambles

Preambles have a long pedigree in legal drafting. Their purpose is largely evidentiary: to provide a record of matters that are conditions precedent to making a legal instrument. They precede the words of enactment in the text and, in the context of legislation, they have evolved into statements needed to support its constitutionality, which may depend on matters such as the national or local nature of the subject-matter of the bill or whether there is a compelling social issue that requires coercive measures to address it. Thus, the basic function of a preamble is highly technical in terms of supporting the validity of the legislation and fending off a legal challenge. This limited technical function is also reflected in the caution that courts have shown about using preambles for interpretive purposes,³² despite Interpretation Act provisions saying that a preamble “is part of [the] Act and may be used to help explain its purpose”.³³

This technical legal purpose has now been subsumed by broader public and political expectations of preambular statements explaining why legislation is being enacted. Although reasons are generally not required to be given for the exercise of legislative authority,³⁴ more modern democratic expectations of transparency have led to a demand for preambles in legislation, particularly when issues of significant public interest are at stake.³⁵ This demand in turn moves preambles from being technical legal devices for ensuring legality into the domain policy as tools for gaining support for it and demonstrating effective legislative action for political purposes. In fact, this additional self-serving political purpose may help explain why courts have demonstrated caution in using preambles for interpretive purposes.

Purpose Clauses

Purpose clauses are found within legislation, usually near the beginning of the text. They tend to be forward-looking, describing what the legislation is intended to achieve as opposed to the circumstances that prompted its enactment. These two perspectives sometimes overlap: if the purpose is to overcome an existing problem, then the problem may have to be explained to make the purpose intelligible.

³²For example, in the classic English case of *A.G. v. Prince Ernest Augustus of Hanover* [1957] 1 All ER 49, [1957] AC 436 a 467 (HL), Lord Norman said:

The preamble is not, however of the same weight as an aid to construction of a section of the Act as are the other relevant enacting words to be found elsewhere in the Act or even in related Acts.

See also Sullivan, above n. 31 at 452-454.

³³ See, for example, *Legislation Act*, SC 2006, c. 21, Sched. F, s. 69 and *Interpretation Act*, RSC 1985, c. I-21, s. 13.

³⁴ See *Catalyst Paper Corporation v. North Cowichan* [2012 SCC 2](#) at para. [29].

³⁵ K. Roach, (2001) [47 McGill L.J. 129](#).

Purpose clauses have policy functions similar to those of preambles and, from a political perspective, they are largely indistinguishable. They also have technical functions in assisting readers of legislation to understand its provisions and helping resolve interpretive questions. Modern guidance on legislative drafting has promoted the use of purpose clauses and courts appear to be prepared to give them more weight than preambles in legislative interpretation.³⁶ This is based on their inclusion in the body of the legislative text, along with the other dispositive provisions. However, it is debatable whether this formal distinction provides reason enough to accord purpose clauses more weight when they are arguably subject to the same political frailties as preambles.

Interpretation Provisions

Interpretation provisions supplement substantive provisions. They qualify or bring precision to words used in these provisions. Drafting them is generally an aspect of drafting substantive provisions. However, questions about the need to define terms involve the more general question of how much precision is needed in drafting provisions. This is both a technical and a policy question. It is technical in so far as it is linguistic, having to do with the meaning of words. It is a policy question in so far as precision may be a factor in obtaining political support. The price of obtaining support may be the addition of language to ensure that a particular interest is met; it may equally be resort to language that is somewhat vague, allowing various interest groups to read into it what suits them.

Definitions of particular terms also tend to be a focus of political attention, involving matters of language on which policy officials may have views as strong as those of legislative counsel, particularly when informed by particular constituencies affected by legislation. Thus, despite the general drafting advice to eschew definitions,³⁷ they are sometimes drafted on a policy basis to meet objectives related to the enactment of legislation.

Application Provisions

Legislation generally applies according to its terms. Its application is thus simply an aspect of drafting substantive provisions. However, the application of legislation is also qualified by a number of overarching presumptions having to do with constitutional authority and the rule of law. These presumptions relate to:

³⁶ See Sullivan, above n. 31 at 458-460.

³⁷ See for example the [Drafting Conventions of the Uniform Law Conference of Canada](#), s. 21:

21. (1) Definitions should be used sparingly and only for the following purposes:

- (a) to establish that a term is not being used in a usual meaning, or is being used in only one of several usual meanings;
- (b) to avoid excessive repetition;
- (c) to allow the use of an abbreviation;
- (d) to signal the use of an unusual or novel term.

- territoriality – laws apply within the territory of the jurisdiction making them;
- temporality – laws apply prospectively to events taking place after they come into force;
- legal capacity and immunity – apply only to legal persons who have legal capacity and are not protected by some legal immunity (for example, diplomatic immunity).

If these presumptions would produce unintended results, legislation must expressly provide otherwise (assuming there is legal authority to do so). Drafting provisions to accomplish this involves both matters of law (constitutionality) and policy.

Commencement and Duration Provisions

Commencement and duration provisions are a particular type of application provision. They stipulate the time period within which legislation operates. And, like other application provisions, they operate within a presumptive legal framework associated with the rule of law.

Legislation is generally presumed to come into force when the last procedural step required for its enactment has taken place. In parliamentary processes, this step is the assent of the sovereign or head of state. In regulatory processes, it is generally the date of registration since the final step in these processes is seldom a public event like sovereign assent.

Legislation is also presumed to continue in force until it is repealed. Thus, quite ancient legislation is still capable of being enforced in modern times if it has never been repealed.³⁸

However, this presumptive framework is capable of being put aside by legislative provisions to the contrary. This has led to a variety of provisions that allow legislation to be brought into force in piece-meal fashion at different times.³⁹ Thus, commencement is largely a policy matter, albeit subject to general constraints of parliamentary intention and requirements of intelligibility.

Provisions that limit the duration of legislation are equally policy matters. This is notably demonstrated by so-called “Sunset” legislation enacted as part of regulatory reform programs, notably in several Australian states.⁴⁰ This legislation provides that subordinate legislation expires after a prescribed period of time, thus requiring it to be reviewed regularly and re-made if it is found to have continuing utility.

³⁸ See, for example, [Conseil scolaire francophone de la Colombie-Britannique 2013 SCC 42](#) involving the application of an 18th century English statute in British Columbia in 2013.

³⁹ See generally R. Tremblay, *Entrée en vigueur des lois* (Les Éditions Yvon Blais: Cowansville, 1997) and J.M. Keyes, “May the Force be with You: The Netherworld of Unproclaimed Statutes” (2007), 20 *Canadian Journal of Administrative Law and Practice* 261.

⁴⁰ See *Subordinate Legislation Act* (NSW), s. 10, *Subordinate Legislation Act* (Vict), s. 5 and *Statutory Instruments Act* (QLD), Part VII. See generally D. Pearce & S. Argument, *Delegated Legislation in Australia*, 4th ed. (Lexis Nexis Butterworths Australia: Chatswood, 2012) at 41-42, 57.

Amending and Transitional Provisions

There are two main approaches to amending legislation. One is the traditional English approach of simply enacting new legislation that supersedes previously enacted legislation to the extent that it is inconsistent with the new legislation. The policy or technical characterization of the legislation depends on the content of the new legislation.

The second method, which has been widely used in other jurisdictions throughout the Commonwealth, is textual amendment. It involves two levels of legislation: the existing legislation (often referred to as the “principal Act”) and the amending legislation, which indicates how the existing legislation is amended. Amending legislation has no other function than to change the existing legislation. Once it has accomplished this change (by coming into force), it is spent. Thus, it might be thought that amending legislation is purely technical since it is simply a vehicle for making changes. Although the changes themselves may be matters of policy, integrating them into the existing legislation is a purely technical matter. However, this is not always the case.

Political considerations may be involved in deciding how to make changes. Rules of parliamentary debate often depend on how much of the existing legislation is opened up for amendment. When highly controversial legislation is involved, it may be in the interests of the proponent of the changes to limit the debate to matters that are focused on the amendment itself, as opposed to contextual provisions. Rather than replacing an entire section, it may be preferable to replace only a subsection and avoid opening up adjacent provisions for debate and further amendment.

Issues of transparency and readability can also arise with amending legislation. A bill containing a lengthy series of detailed amendments to particular words will be difficult to understand without considerable effort to situate the amendments in the existing legislation. In contrast, replacing an Act in its entirety gives the reader a complete picture of what the resulting legislation will look like.

Transitional provisions determine how circumstances that have already arisen under existing the legislation are to be treated after it is amended (including by being repealed or replaced). Although these questions often have significant policy components, they tend to be neglected by policy officials who are focused on how the amendments will operate for the future rather than tidying details about the past.

Schedules

Schedules form part of the legislative text to which they are attached. They are a convenient organizational device for separating provisions that could have been included in the body of the Act, but are lengthy and detailed and may obscure the more important provisions that have to be there. They may, alternatively, be used to provide access to some pre-existing text, such as a treaty, that is relevant to the legislation.

The legal effect of a schedule varies, depending on how it is treated in provisions (often called “inducing words”) in the main body of the legislative text. These provisions may give the material in the schedule the same binding legal effect as the legislative text. Or they may simply refer to the material as something related to the legislative text, without giving it legal force. For example, an Act may give the force of law to a treaty set out in the schedule, in which case the material in the schedule has the force of law. Or it may contain provisions that implement the treaty by creating law that accomplishes what the treaty binds the State to do. In this case, the treaty is provided as background for the provisions that implement it. Although it may have relevance in interpreting these provisions, it does not itself have legal effect.⁴¹

Decisions about using schedules have both technical and policy components. The policy component relates to the legal effect of the material to be contained in the schedule. But this aspect also has a technical component. If the legislation is not to give it legal effect, then it cannot be included within the body of the legislative text. To do so would defeat the intention of not giving it legal effect and create confusion.

When material is intended to have legal effect, decisions about including it in a schedule are largely technical, generally reflecting considerations about the readability of the text. However, the inclusion of material in a schedule also tends to reduce its visibility, particularly during the enactment process. Thus, policy pressures can come into play, either to reduce or heighten visibility. Provisions that might be considered matters of detail that risk encumbering the main provisions may nevertheless attract some public attention and, for that reason, be kept with the main provisions. Alternatively, there may be some political advantage to reducing the visibility of some provisions to as to avoid controversy, in which case a schedule may be the preferred place for them.

Another example of policy concerns influencing the use of schedules has to do with the use of omnibus bills. Their use in Canada is now quite widespread⁴² and it is common in some jurisdictions, notably in Ontario, to combine one or more new Acts into an omnibus bill containing amendments to existing legislation. New Acts are enacted by placing them in schedules to the omnibus bill.⁴³ Budget bills are the most common examples of this, but they have attracted criticism on the basis that they diminish parliamentary review of legislation and, in that sense, are undemocratic.⁴⁴

⁴¹ See Sullivan, above n. 31 at 472-480.

⁴² Their use is largely unique to Canada: see A. O'Brien & M. Bosc, ed., [House of Commons Procedure and Practice, 2nd ed.](#) (House of Commons: Ottawa, 2009), The Legislative Process, [Forms of Bills](#). See also L. Gunter, “Omnibus Bills in Hill History,” [Toronto Sun, June 18, 2012](#) and L. Massicotte, “Omnibus Bills in Theory and Practice”, (2013), [36 Canadian Parliamentary Review No. 1](#).

⁴³ See, for example, *Building Opportunity and Securing Our Future Act (Budget Measures)*, 2014, [SO 2014, c. 7](#).

⁴⁴ Above, n. 42.

Widening the Discourse on Technical Drafting Matters

The discussion above has looked mainly at how matters that have traditionally been considered technical can attract attention in policy circles and come to be regarded as policy matters. But what of the matters that continue to fly beneath the political radar? And what of technical matters beyond the realm of preliminary and final provisions, notably

- the general arrangement and formatting of legislation,
- the way in which particular types of legislation or legislative provisions are to be organized and subdivided,
- the use of subsidiary legislation,
- methods of amendment and transitional provisions,
- the commencement and operation of legislation.⁴⁵

And finally, what of the interpretive practices of courts: are these not also technical matters, despite their connection to policy issues? For example, the discussion above noted how purpose clauses have policy functions similar to preambles and technical functions that help resolve interpretative questions. Some courts have shown a tendency to give them more weight, partly because of their inclusion within the body of the legislative text. Is this formal distinction sufficient reason to accord purpose clauses more weight? Many jurisdictions use purpose clauses rarely, if at all. Other jurisdictions commonly include them. In Australia they are a standard feature in many Acts.⁴⁶

Is it enough simply to say that they are matters of drafting expertise? Perhaps consideration should also be given to how they are settled.

Legislative drafting as a professional discipline has a long history entwined with the development of democratic institutions and the legal profession in England. *Craie's on Statute Law* traces drafting history back to the judges of the king's courts in the 13th century.⁴⁷ Towards the end of the 15th century, legislative drafting shifted into the hands of conveyancers who brought a penchant for detail and verbosity to the drafting of legislation.⁴⁸ This approach engendered much criticism, particularly from the judiciary, but also from social thinkers like Bentham who recognized the great potential of legislation for achieving social and economic progress. And thus began more conscious efforts at trying to understand how legislative drafting could assist these enterprises, particularly in terms of improving the dissemination of its contents through more readable texts. Thus, from Lord Thring in the middle of the 19th century⁴⁹ to Thornton and Xanthaki at the beginning of the

⁴⁵ LGST 553: Legislative Structure, Style and Limits, Module 1, Section 2, "[Factors Influencing an Outline for a Bill](#)".

⁴⁶ LGST 555: Drafting Preliminary, Amending, and Final Provisions, Module 1, Section 5, "[What is a purpose clause?](#)"

⁴⁷ S. Edgar, *Craie's on Statute Law*, 7th ed. (Sweet & Maxwell: London, 1971) at 21ff.

⁴⁸ *Ibid.*, at 22.

⁴⁹ See A. Samuels, "Henry Thring: The First Modern Drafter" (2003) 24 *Statute Law Review* 91.

21st, we have a modest body of scholarly literature on how legislative drafting should be done to accomplish these goals. We also have innumerable examples of drafting manuals and guidelines prepared by legislative drafting offices throughout this period.⁵⁰ Conferences such as those that CALC offers also provide opportunities to consider the technical aspects of drafting practice, as well as larger questions relating to policy. And finally, journals such as the *Statute Law Review* and the *Loophole* publish articles of topical interest.

These approaches to defining and refining good legislative practice have produced a fairly well-defined discipline. However, it is not generally well-known or understood, which may explain why technical issues are sometimes perhaps ill-advisedly overtaken by policy considerations. Thus, legislative drafting as a discipline might benefit from wider discussion of its more technical aspects, not only with a view to explaining their basis, but also to take advantage of the modern communications technologies that are transforming so many areas of human endeavor.

Athabasca University has for some years offered a diploma program in legislative drafting using these technologies to deliver courses on-line. It has also more recently updated the original program materials developed by Professor Patchett for the Commonwealth Secretariat and made these materials available as Open Course Ware (OCW).⁵¹ These materials describe technical legislative drafting practices in some detail, but they also ask readers to find out what is done in their own jurisdiction and encourage them to follow those practices. But why do the practices differ? Take, for example, the placement of short titles and commencement provisions. They can either be at the beginning or the end of a statute, depending on the jurisdictional practice. Why this variation?

Each of the OCW courses offers potential for answering these questions in an open forum that can be widely accessed. The courses have two avenues for input:

1. an “[Online Forum](#)” where new discussion items can be created, responded to and debated; and
2. a “[Sharing Jurisdictional Information](#)” blog where examples from various jurisdictions can be shared for reference and to advance future discussions in the Online Forum.

These features are available to anyone who logs into the [OCW site](#)⁵² with the user name (legal_studies) and password (password123) contained on the first page of each OCW course⁵³. Once a user logs into these sites they see sample discussion topics in the online

⁵⁰ Some of the richest and most accessible examples are found on the website of the Australian Commonwealth Office of Parliamentary Counsel: <http://www.opc.gov.au/about/documents.htm>.

⁵¹ [LGST 551: Introduction to Legislative Drafting](#); [LGST 553: Legislative Structure, Style, and Limits](#); [LGST 555: Drafting Preliminary, Amending and Final Provisions](#); and [LGST 557: Implementing Provisions and Drafting Processes](#).

⁵² Athabasca University Open Course Ware site: <http://ocw.lms.athabascau.ca/>

⁵³ Rather than providing automatic login, the login information must be drawn from the OCW pages. This has been done to thwart automatic web bot entries from being made.

forum to mirror some of the issues discussed above. It is hoped that people will comment, explain, justify or even critique their local practice. At the very least, it would provide a better understanding of the basis for local practices. And perhaps an inter-jurisdictional consensus might develop that some practices are better than others. Over time, these discussions will be distilled and used to further update and enhance the OCW materials themselves. If the drafting community as a whole is able to demonstrate why some things are and should be done in a particular way, and if widespread practices rooted in solid reasoning do emerge, then perhaps political classes in particular jurisdictions would better recognize and respect these professional roles.

Leaving aside constitutional and statutory requirements (such as those contained in Interpretation Acts or General Clauses Acts), there are numerous instances of these “more technical provisions” identified in the OCWs where a deeper understanding of the reasons for variation may be illuminated by discussions amongst the broader drafting community. While user expectations develop based upon past drafting practices, and innovations must be approached cautiously, sound analyses of the reasons for these practices may well influence the future direction of jurisdictional approaches.⁵⁴

Further, these conventions may or may not be captured in drafting style manuals, guidelines or other written sources that are treated as authoritative.⁵⁵ Where style manuals, written guidelines and other authoritative textual resources do exist, a direct comparison of these resources (providing it is permissible for them to be made public) may do much to illuminate best practices and avoid the kinds of shortcomings that were contemplated when the guideline materials were created.

Conclusions

The divide between policy and drafting technique is a critical feature in drafting legislation in jurisdictions that operate under the Westminster model of parliamentary democracy. It brings both expertise and an outside perspective to the implementation of policy. But this divide is not etched in stone.

Traditional considerations distinguishing substantive elements from procedural elements, between *what* is to be said versus *how* it is to be said, can provide assistance but they are not conclusive. This is because the divide between policy and drafting technique shifts with the dynamic of democratic and legislative processes as well as the currents of public interest and opinion. Aspects of legislation that may serve a largely technical purpose can also serve policy or political ends. But underlying the shifting currents of public and political interest

⁵⁴ LGST 551: Introduction to Legislative Drafting, Module 1, Section 3; [Why do we draft as we do in parliamentary systems.](#)

⁵⁵ LGST 553: Legislative Structure, Style and Limits, Module 2, Section 1, “[How can we develop good legislative style?](#)”

there remain foundational elements where the professional expertise of legislative counsel is essential for the creation of effective legislation.

We have identified above several considerations that may provide assistance when assessing the nature of this divide and how it can be addressed from a drafting perspective. These include policy-focused considerations such as: public interest, political implications and expectations of what will accomplish desired social changes, all of which are rooted in the basic postulates of democratic government. Considerations more directly related to how language and the legal system work traditionally fall on the side of drafting technique and the professional expertise of legislative counsel, including a sound understanding of how legislation operates within a legal system, matters of legislative form, drafting style, the structure and organization of legislative texts and the interpretive practices of courts and how those practices determine the legal effect of those texts.

It is futile simply to complain about political decisions and hope for a change of government. Policy decisions on technical matters are likely to endure; if they have been found advantageous by one government, the next one is likely to find the same. It is thus critical for legislative counsel to understand the rationale that underlies the various aspects of a legislative text and the way it is drafted in order to articulate this rationale in the face of competing policy or politically based demands and to find ways of reconciling the two.

The defence of drafting technique might be aided by appealing to a broader, interjurisdictional consensus on what constitutes good drafting. Texts and manuals on drafting can help articulate this consensus, but there is also a need for ongoing discussion to deal with issues as they arise. Athabasca University's OCW website on legislative drafting provides an opportunity to do just that. In the online forum in LGST 555 we have captured many of the considerations involved in analyzing the divide between policy and drafting technique. The invitation is there. The next step is yours.

Language of Calculation and Determination: Drafting Taxation Laws

Penny Alexander¹



Abstract

On 1 July 2014 the Victorian Court of Appeal handed down a unanimous judgment identifying the elements necessary to construct taxation laws. The Court of Appeal also considered whether a particular taxation provision conferred a discretion. After finding that it did not, the Court took the unusual step of suggesting how the provision might have been drafted if a discretion had been intended. The judgment provides valuable insight into the judiciary's understanding of taxation provisions.

This article sets out the elements identified by the Court of Appeal, analyses the suggested provision, and summarises the parts of the judgment that are relevant for legislative counsel. It also provides some background on the approaches to statutory interpretation in Australia.

Introduction

On 1 July 2014 the Victorian Court of Appeal handed down a unanimous judgment about the interpretation of a taxation provision in Victorian gambling regulation legislation. The

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case, *Treasurer of Victoria v Tabcorp Holdings Limited*,² provides a clear statement about the Victorian judiciary's approach to interpreting taxation laws.

Tabcorp Holdings identified the elements of conventional taxation laws and considered how taxation provisions that confer a discretion are to be drafted. After finding that there was no discretion in the provision in question, the Court suggested how the provision might have been drafted if a discretion had been intended. It also canvassed the meaning of some phrases commonly used in taxation provisions.

Before considering the taxation provisions in dispute in *Tabcorp Holdings* and the Court's approach to interpreting the phrases contained in those provisions, it is useful to consider:

- how a tax is commonly defined in Australia;
- the basic elements of a taxation provision, which the Court of Appeal identified;
- the difference between a tax and a fee; and
- the general approach Australian courts take to interpreting taxation provisions.

Definition of a tax

There is a large body of Australian case law discussing the nature of taxes in the context of determining whether particular fiscal provisions are constitutionally valid. One of the most commonly cited definitions is "[a tax] is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered".³ However, that is only a general definition. Payments for "services" rendered are not the only required payments which are not taxes. Others include charges for the acquisition or use of property, fees for privileges and fines or penalties.⁴

Elements of a tax

In *Tabcorp Holdings* the Court of Appeal stated that laws imposing taxation conventionally comprise provisions which specify:

- the person on whom the obligation to pay is imposed [*imposition element*];
- the basis on which the tax payable by that person in the particular year is to be calculated [*calculation element*]; and
- the person whose responsibility it is to assess (calculate) and collect the tax [*collection element*].⁵

² [2014] VSCA 143. The respondents sought special leave to appeal the decision in the High Court of Australia. The High Court refused special leave on 13 February 2015.

³ *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 (Latham CJ).

⁴ *Luton v Lessels* (2002) 210 CLR 333, 342 (Gleeson CJ).

⁵ Above n. 2 at para.[46].

That analysis reflects the way in which we draft taxation laws in Victoria. Regardless of whether the tax is imposed by a single section or an entire Act, these three elements must be included to successfully impose the tax.

Drafting provisions for taxes vs fees

Fees are imposed to defray the cost of services rendered, while taxes are imposed to build up consolidated revenue.⁶ Fees must be charged for particular identified services provided to, or at the request or direction of, a particular person required to make the payment. While the question of whether a particular provision imposes a fee or tax can be a vexed one, this fundamental difference is usually borne out in the different approaches to drafting taxation provisions and fee provisions. In general, when we draft taxation provisions, we use the tripartite approach outlined above because the amount of a tax does not relate to an identifiable service or thing provided to a person. In contrast, when we draft fee provisions, there are only two elements, namely, the fee payable for a particular service or thing and the person to whom it must be paid. The amount of the fee will often be set in a separate location. For example, in Victoria, if a planning permit is required to develop land, you must apply for a permit to the relevant responsible authority and pay the prescribed fee for the application.⁷ The first element of the fee is the requirement to pay it with the application, and the second element is that the fee is payable to the responsible authority.

The kinds of disputes about fees are different from those about taxation provisions. There is little scope for argument about the circumstances in which the fee is payable or the amount of the fee. If you want the identified service or thing (the responsible authority to consider your application), you pay the set fee (the application fee). There may be arguments about whether fees should be waived or reduced, or if an application is received without a fee, the date on which the application can be said to be made,⁸ but these are not disputes about how the law imposing the fee itself applies.

Interpretation of taxation provisions

In general, Australian courts have approached the interpretation of taxation provisions from the starting point that it is necessary for the words of a taxation provision to clearly and unambiguously impose a liability to pay tax.⁹ For example, the late Justice Hill said:

⁶ *Harper v Victoria* (1966) 114 CLR 361, 377 (McTiernan J). In Victoria all taxes form part of the Consolidated Revenue: see section 89 of the *Constitution Act 1975* (Victoria). All money forming part of the Consolidated Revenue is credited to the Consolidated Fund: see section 9(2) of the *Financial Management Act 1994* (Victoria). The Consolidated Fund is the Government's primary financial account, from which Parliament makes appropriations.

⁷ Section 47(1) of the *Planning and Environment Act 1987* (Victoria) provides for applications for planning permits.

⁸ See for example *ML Design v Boroondara CC (Red Dot)* [2005] VCAT 2088 (10 October 2005).

⁹ See for example the judgment of Isaacs J in *Scott v Cawsey* (1907) 5 CLR 132 at 154-155 and the judgment of Deane J in *Hepplles v Federal Commissioner of Taxation* (1992) 173 CLR 492, 510-511, citing a

It is, in my view, important in a democracy, that the government be required to legislate with precision if it is to impose a liability upon its subjects, and conversely it would be a sad day if the courts were to abandon the rule, even if it is but a rule of last resort. A rule which says that in tax cases there should be an attempt on the part of the courts to make the legislation work (in favour of the revenue) is an encouragement to sloppy drafting . . . the legislature must hit its mark. If it fails to do so, it is not for the court to rewrite the law.¹⁰

More recently, the High Court of Australia has held that taxation provisions are not subject to special rules of interpretation, but that the imposition of a tax is part of the context in which they should be interpreted:

First, tax statutes do not form a class of their own to which different rules of construction apply; they are to be construed by application of the settled principles referred to above. Secondly, the fact that a statute is a taxing Act, or contains penal provisions, is part of the context and is therefore relevant to the task of construing the Act in accordance with those settled principles.¹¹

As a result, the starting point in interpreting taxation provisions is to apply ordinary principles of statutory interpretation, notably section 35(a) of the *Interpretation of Legislation Act 1984* (Victoria), which provides that a construction that would promote the purpose or object underlying an Act is to be preferred to a construction that would not promote that purpose or object.¹² However, in subsequent cases such as *Tabcorp Holdings* arguments have still been made that taxes must be clearly imposed.¹³ Legislative counsel must still take extra care to ensure that each element of a taxation provision is present and expressed as clearly and precisely as possible.

Background to Tabcorp Holdings

It became legal to operate gaming machines in Victoria in 1991 provided you had a licence to do so. From 1992 until 2012 the gaming machine industry was run as a duopoly. The two

passage from the judgment of Rich and Dixon JJ in *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233, 243. For a list of other rules of statutory interpretation for taxation provisions sometimes applied see *Tabcorp Holdings Limited v Treasurer of Victoria* [2013] VSC 324 ("*Tabcorp Holdings First Instance*") at para. [27].

¹⁰ Justice D Graham Hill, 'A judicial perspective on tax law reform' (1998) 72 *Australian Law Journal* 685,689.

¹¹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 49 (Hayne, Heydon, Crennan and Kiefel JJ). In the same passage the majority specifically refrained from deciding whether the rules considered in *Anderson* and referred to in *Hepples* (above, n 10) may still be relied on.

¹²Note that section 15AA of the *Acts Interpretation Act 1901* (Commonwealth of Australia) provides that the interpretation that would "best achieve" the purpose or object of the Act is to be preferred to each other interpretation. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, which is often cited in support of courts taking a purposive approach to the interpretation of taxation provisions.

¹³ *Tabcorp Holdings First Instance* above n. 10 at para. [27].

gaming operators were Tabcorp Holdings Limited and Tatts Group Limited (although the licences were held by different but related entities during the 1992 to 2012 period).

For each financial year from 2000 until 2012 the gaming operators were required to pay a levy in respect of the gaming machines they operated.¹⁴ The duopoly arrangement came to an end and each of the licensees ceased operating gaming machines on 15 August 2012. The legislation was amended so that for the 2012-2013 financial year the licensees were required to pay a levy calculated in the same way as the levy had been in previous years, even though they would only be operating the machines for less than two months in that financial year (1 July, 2012 to 15 August, 2012).

The gaming operators challenged the imposition of the levy for the 2012-2013 financial year in the Supreme Court of Victoria. The primary judge held in their favour. The primary judge found, based on the specific language used in the sections in question, that the Treasurer had a discretion to determine the amount of the levy that was payable for the 2012-2013 financial year. The primary judge also held that the provisions were at risk of being unreasonable and unfair, and that there was "always objective good sense in providing the Treasurer with a discretion in determining the amount of the levy for a particular financial year".¹⁵ The Treasurer appealed to the Court of Appeal, which unanimously overturned the decision of the primary judge.

The provisions in dispute in *Tabcorp Holdings*

The relevant taxation provisions are sections 3.6.3 and 3.6.3A of the *Gambling Regulation Act 2003* (Victoria). Section 3.6.3A (a new provision inserted in 2012)¹⁶ imposed the levy for the 2012-2013 financial year and provided the following:

3.6.3A Health benefit levy – financial year 2012 to 2013

- (1) In respect of the financial year beginning on 1 July 2012 and ending on 30 June 2013, a gaming operator must pay to the Commission a health benefit levy calculated in accordance with the formula set out in section 3.6.3(1).
- (2) The Treasurer, in consultation with the Commission, is to determine the amount of the levy on each gaming operator in respect of the financial year and must notify each gaming operator of his or her determination as soon as practicable after making the determination.
- (3) The levy is payable in two equal instalments within the financial year, due on dates determined by the Treasurer in consultation with the Commission.
- (4) The Treasurer must notify each gaming operator of his or her determination under subsection (3) as soon as practicable after making the determination, but at least 15 business days before the first instalment is due.

¹⁴ In *Tabcorp Holdings* above n. 2 the Court of Appeal treated this levy as a tax.

¹⁵ *Tabcorp Holdings First Instance* above n. 10 at para. [38], cited in *Tabcorp Holdings* above n. 2 at para. [72].

¹⁶ New section 3.6.3A of the *Gambling Regulation Act 2003* was inserted by section 11 of the *Gambling Legislation Amendment (Transition) Act 2012* (Victoria).

- (5) In this section, **gaming operator** includes a person who held a gaming operator's licence or a gaming licence.

Section 3.6.3(1) provided the calculation formula, as follows:

3.6.3 Health benefit levy

- (1) A gaming operator must pay to the Commission for payment into the Consolidated Fund each financial year a health benefit levy calculated in accordance with the following formula -

$$L = \$4333.33 \times \frac{GM}{12}$$

Where -

L is the levy payable by the gaming operator;

GM is the sum of the number of gaming machines of the gaming operator that are operating at an approved venue on the first Saturday in each month from and including December in the preceding financial year to and including November in the financial year.

The Court of Appeal found that there were four key elements in this provision (the fourth element being the additional requirement for the operator to pay the levy in instalments). Although the provision had been re-enacted and amended over time, it had not essentially changed since it was first enacted in 2000.¹⁷

These elements were:

1. The gaming operator was obliged to pay the levy each financial year.
2. The quantum of the levy payable in a particular financial year was to be calculated as the multiple of a fixed dollar amount and the number of gaming machines operated (or taken to be operated) by the gaming operator on a particular date in that year.
3. The Treasurer was obliged, in consultation with the gaming regulator, to determine the amount of the levy payable by the gaming operator for that financial year, and to notify the operator.
4. The operator was obliged to pay the levy in two equal instalments, in December and June of the financial year.¹⁸

These key elements accord with the three elements identified above.

5. The gaming operator is the person on whom the obligation to pay is imposed: section 3.6.3A(1).

¹⁷ The tax was first enacted as new section 135A of the *Gambling Machine Control Act 1991* (Victoria), inserted by section 5 of the *Gaming Acts (Gaming Machine Levy) Act 2000* (Victoria). The amount of the levy and the way in which it was calculated was changed in 2001 by section 4 of the *State Taxation Acts (Taxation Reform Implementation) Act 2001* (Victoria).

¹⁸ *Tabcorp Holdings* above n. 2 at para. [10]. This analysis relates to the section as it was first enacted. Once amended, the levy was not calculated on the basis of the number of machines operated on a particular date, but rather on the average number of machines operated throughout a year.

6. The quantum of the levy (being a multiple of a fixed dollar amount and the number of gaming machines operated) is the basis on which the tax payable by the gaming operator is to be calculated: sections 3.6.3A(1) and 3.6.3(1).
7. The Treasurer has responsibility for assessing (calculating) and collecting the tax: section 3.6.3A(2).

Drafting discretions in taxation provisions

The judge at first instance held that section 3.6.3A gave the Treasurer a discretion to determine that an amount different from the amount calculated under the formula in section 3.6.3(1) was payable. The Court of Appeal overturned this finding. The provision did not provide the Treasurer with a discretion and it was incorrect to read the provision as requiring the Treasurer to calculate the amount payable by using the formula and to assess the levy as two separate steps. The Court of Appeal held that the Treasurer's obligation under the third element (calculation and assessment) was simply to perform the arithmetical calculation required by the formula in section 3.6.3(1):

The obligation to pay the tax was imposed on the gaming operator. The provision imposing the liability specified precisely how it was to be calculated. The obligation to assess the tax payable was imposed on the Treasurer. The one was a corollary of the other. In this context, accordingly, the provision imposing on the Treasurer the obligation "to determine" the tax payable cannot be read as if it imposed a discretion to decide whether or not the full amount arrived at by application of the formula should be payable. On the contrary, the Treasurer was bound to apply the statutory formula in order to determine the amount of tax payable.¹⁹

The presence of the word "calculated" coupled with a formula was highly persuasive. The Court of Appeal held that the word "calculated" here was intended in its mathematical sense:

There can be no doubt that, when used in this taxing provision in combination with a mathematical formula, the word "calculated" was intended in its orthodox mathematical sense. Straightforwardly, the section first says that the amount owing under the levy is to be worked out by mathematical means, and then provides, by the formula, those mathematical means. There is no invitation to resort to a non-arithmetical mode of inquiry, or to temper the result of the calculation with non-arithmetical considerations.²⁰

While the words "in accordance with" take their meaning from the context and could, in some cases, mean that strict compliance was not required, in this instance what was intended was a "strict application of the formula"²¹. The function of the Treasurer to determine the

¹⁹ *Ibid.* at para. [50].

²⁰ *Ibid.* at para. [55].

²¹ *Ibid.* at para. [54].

amount payable was to be "governed by the terms in which Parliament imposed the tax and, in particular, by the specified method of calculation".²²

In contrast, words that create a discretion would be very different. The use of the word "determine" was not sufficient in this context to indicate a legislative intention that there was to be a discretion. The Court of Appeal, citing the primary judge, noted that the word "determine" may be used to signify either a mechanical exercise of computation or a process involving reasoning and judgment, depending on the context in which it was used. When the word "determine" is used to mean a process involving reasoning or judgment, there would normally be more than one result reasonably open from the determination.²³ That was not the case here. The Court of Appeal considered how section 3.6.3A might have been drafted if it was intended to confer a discretion on the Treasurer. Section 3.6.3A(1) might have included the following additional words (*italics*):

- (1) In respect of the financial year beginning on 1 July 2012 and ending on 30 June 2013, a gaming operator must pay to the Commission a health benefit levy calculated in accordance with the formula set out in section 3.6.3(1), *provided that, if the Treasurer in the exercise of the discretion conferred by subsection (3) determines that some lesser amount of tax is payable, the operator must pay the amount as so determined, instead of the amount arrived at by application of the formula.*²⁴

And section 3.6.3A(3) would have had to specify a method of determination as follows:

- (3) After calculating the base amount of the levy payable by a gaming operator in accordance with subsection (1), the Treasurer may determine that a lesser amount is payable, if the Treasurer is satisfied that, because of circumstances beyond the control of the operator, it would be unfair or unreasonable to require the operator to pay the full amount of the levy. In deciding whether or not to exercise that discretion, the Treasurer shall have regard to the following matters...²⁵

The above wording expressly contemplates that it would be possible to determine an amount payable without the use of the formula. That is, there is more than one result reasonably open to the Treasurer.

It is useful to note that there are generally two types of discretion that appear in taxation provisions. In Victoria, both are uncommon. The first is a discretion as to *whether* a person is liable to pay tax at all (for example, whether an exemption applies). The second is a discretion as to the *amount* of the tax that is payable or the way in which it ought to be calculated. The second type usually appears in a limited form (for example, if the exercise of

²² *Ibid.* at para. [57].

²³ *Ibid.* at para. [58], citing the primary judge in *Tabcorp Holdings First Instance* above n. 10 at para. [48].

²⁴ *Ibid.* at para. [68]. Interestingly, the drafting proposed by the Court of Appeal is structured as a proviso, which is not in accordance with the current drafting style used in Victoria.

²⁵ *Ibid.* at para. [68].

the discretion would result in tax being calculated not by one method or at one rate, but by another method or rate, where both methods or rates are set out in the legislation).²⁶

Structure of other taxation provisions in Victoria

While the elements set out by the Court of Appeal in *Tabcorp Holdings* are the building blocks of taxation legislation and reflect the way in which other taxation provisions in Victoria are drafted, this does not mean that there will be three different provisions for every tax that exactly reflect that pattern, in chronological order. The subject matter of taxation laws is often complex, and the elements may be split across a number of provisions.

In considering the elements of a tax and whether a discretion is present, the Court of Appeal also briefly considered the *Duties Act 2000* (Victoria), which imposes a number of different kinds of duty on certain transactions and other matters in Victoria. The Court of Appeal held that a common feature of the *Duties Act* and the provisions in question was that, in the absence of some provision to the contrary, the assessment of the amount of tax payable is strictly governed by the provisions imposing liability on the taxpayer.²⁷

While the elements are present in the *Duties Act*, they are (unlike the provisions in the *Gambling Regulation Act*) spread over a number of provisions. For example, in Chapter 1 of the *Duties Act* (which imposes duty on certain transactions), the *imposition element* is constituted by a number of sections, including:

- Section 12, which provides that duty charged by the Chapter is payable by the transferee unless otherwise provided.
- Section 7, which provides that duty is charged on transfers of dutiable property and a number of other transactions.
- Section 10, which sets out a definition of "dutiable property".

The *calculation element* is constituted by a number of sections, including:

- Section 11, which provides that liability for duty charged by the Chapter arises when a dutiable transaction occurs and section 16, which in effect, provides that duty must be paid within 30 days from when the liability arises.

²⁶ For an example of the first type of discretion, see section 4 of the *Land Tax Act 2005* (Victoria), which provides the Commissioner with a discretion to exempt electricity transmission companies from paying tax on easements if satisfied they should not be liable. For an example of the second type, see section 57L of the *Duties Act 2000* (Victoria), which provides the Commissioner with a discretion to reduce the time required for a person to live in a property where living in a property for a certain period would entitle taxpayers to concessions on amounts payable. Section 69C of the *Duties Act 2000* is an anti-avoidance provision, which provides the Commissioner with a discretion to disregard a tax avoidance scheme, determine what duty would have been payable but for the scheme, and make an assessment giving effect to that determination. Although it is a slightly different type of discretion, broadly speaking it is a discretion as to the way in which tax is calculated.

²⁷ Above n. 2 at para. [49].

- Section 18, which provides that duty is chargeable on the dutiable value of the dutiable property, the subject of the dutiable transaction, at the relevant rate (which is set out elsewhere in the Act).

The *assessment and collection element* is provided for in the *Taxation Administration Act 1997* (Victoria), which is a separate Act containing common processes for the collection of a number of taxes in Victoria.

The unfairness argument

The gaming operators also argued that the absence of a discretion in the relevant taxation provisions could lead to unfair results. No account could be taken if the gaming machines ceased to operate. They argued if there was a fire which destroyed gaming machines it would be irrational and unfair for the Treasurer to apply the formula as if the machines continued to operate for the rest of the year.²⁸

The Court of Appeal rejected this argument and held that an interpretation which provided the Treasurer with a discretion was impermissible. The words of the relevant taxation provisions were clear and therefore Parliament's intention in enacting the provisions was clear - even if that intention was unfair. The question of whether it made good sense to provide the Treasurer with a discretion was a matter of policy and not a question for the Court.²⁹ Accordingly, the words of the statute prevailed over a general sense of unfairness.

The Court of Appeal stated the following in summary of its judgment:

In our view, Parliament's intention was expressed with unambiguous clarity in the language used. The Treasurer was bound to determine the tax payable in accordance with the prescribed formula. The statutory language permits no other interpretation. Specifically, the language does not permit of an interpretation giving the Treasurer a discretionary power of adjustment of the tax liability.

Any unfairness which might be thought to have resulted was the inescapable consequence of the provision as enacted. Our conclusion is reinforced by the fact that, because the Treasurer's determination had to be made well before the end of the financial year, a discretionary power of adjustment would itself have operated in a quite arbitrary and irrational fashion.³⁰

Lessons for legislative counsel from *Tabcorp Holdings*

Tabcorp Holdings provides legislative counsel with a valuable insight into the judiciary's understanding of taxation provisions. The decision reminds us to continually question and

²⁸ *Tabcorp Holdings* above n. 2 at para. [85].

²⁹ *Ibid.* at para. [83].

³⁰ *Ibid.* at para. [6]-[7].

test the words and phrases we use to construct taxation provisions. Is using the word “determine” problematic? Would it be reasonable to read it as requiring a value judgement rather than a simple calculation? Should we avoid the phrase “in accordance with” when referring to a formula? Could it be reasonably understood to permit a calculation only roughly in line with the formula? Would it be clearer to use the word “assess” or the phrase “by using” when referring to a formula?

The decision also reminds us to scrutinise the structure of taxation provisions. Does their structure manifest the intention as clearly as they could? Is there a way to structure the provisions so that the obligation to pay and the obligation to determine are as closely aligned as possible?

While it is not possible to remove all ambiguity or potential for ambiguity in legislation, there will always be scope for refinement and improvement. This is especially important when drafting legislation that is as closely scrutinised as taxation legislation. We must strive to ensure each taxation provision hits its mark.

Book Reviews

Burrows and Carter Statute Law in New Zealand, 5th ed.

Ross Carter, published by Lexis Nexis NZ Ltd., Wellington, 2015

Reviewed by John Mark Keyes¹

Ross Carter's latest (5th) edition of *Burrows and Carter Statute Law in New Zealand* is true to its origins as a book dealing with statute law in all its manifold glory and complexity. There are relatively few books that address statute law so comprehensively – Bennion's being another of this select category. Rather more often, authors deal with one or other of its aspects: drafting, legislative process or interpretation. Yet, the only way to truly do them justice is to situate them in relation to the others.

Statutory interpretation cannot be fully understood without appreciating the drafting conventions that underlie legislation and the processes that create it. For example, one of the most frequently cited rules of interpretation is the presumption against tautology,² which reflects the drafting convention of using no more words than are needed. By the same token, the primacy of the words of a legislative text is based on the complexity of law-making bodies and the absence of any real "intent" as that term is understood in relation to individuals. And yet, judicial interpretation increasingly takes account of what goes on in the enactment process to provide evidence of the purposes and of how legislative language was understood by those who enacted it. And finally drafting practices and the enactment process are influenced by judicial interpretation of previously enacted legislation and by judicial pronouncements about fundamental rights.

So, one might say, the only way to think and write soundly about any aspect of legislation is to immerse yourself in it. And this is exactly what the 5th edition of *Burrows and Carter Statute Law in New Zealand* does.

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² In the last 10 years, the Supreme Court of Canada has cited this presumption in 6 of its decisions: [R. v. Steele](#) - 2014 SCC 61; [Canada \(Canadian Human Rights Commission\) v. Canada \(Attorney General\)](#) - 2011 SCC 53; [McDiarmid Lumber Ltd. v. God's Lake First Nation](#) - 2006 SCC 58; [Placer Dome Canada Ltd. v. Ontario \(Minister of Finance\)](#) - 2006 SCC 20; [Bristol-Myers Squibb Co. v. Canada \(Attorney General\)](#) - 2005 SCC 26; [H.L. v. Canada \(Attorney General\)](#) - 2005 SCC 25.

It begins at the beginning by considering its topic in a conceptual sense. Part I looks at the nature of legislation and its constitutional foundation in a parliamentary democracy such as New Zealand.

From there, Part II moves through a detailed description of the law-making process in New Zealand, providing a remarkable level of granularity in describing the inner-workings of its Government and the other participants in the development of legislation. In reading this chapter, one has the sense of observing a remarkable experiment in democratic governance in a small, but very sophisticated state that is pushing the bounds of transparency and engagement in the development and enactment of its legislation. This sense is confirmed by the author's observation that

The statute books in some ways constitute a social and economic history of New Zealand. In such areas as labour law, taxation, state corporations, local government and social welfare, movement has been, and may again, be rapid, even confusing.³

This book contains a healthy dose of political science that goes some distance towards explaining the legal elements of its subject, for example in its description and analysis of the Attorney General's vetting of bills for conformity with the Bill of Rights in Chapter 3, which goes to the heart of legislative drafting and the role of legislative counsel.⁴

Chapter 4 continues this consideration of law-making processes in terms of legislative drafting. It begins by examining the traditional approach to drafting and then considers its evolution in the modern world of plain language. The book provides encouragement to move towards clearer drafting, but also notes some of the missteps in New Zealand along the way.⁵ This chapter discusses the challenges of finding the right balance between generality and detail and provides numerous examples of both general principles being introduced into legislation and the judicial treatment of them.⁶ This is exactly the rounded perspective on legislation that is needed to understand it fully and is complemented by the concluding discussion of Maori concepts and language in legislation. This discussion presents a facet of legislative drafting that is seldom discussed, but which is increasingly relevant in jurisdictions with linguistically and culturally diverse populations.

Part II concludes by looking at law publishing, but re-casting it in terms of access to law. This re-orientation moves this topic from a mundane administrative chore to an important component of the rule of law, dealing particularly with the modern world of on-line publication with all its benefits and challenges.

³ *Burrows and Carter Statute Law in New Zealand*, 5th ed. at 55.

⁴ *Ibid.* at 64-70.

⁵ *Ibid.* at 143-148.

⁶ *Ibid.* at 138-142.

Parts III and VI address statutory interpretation, first in a general way and then in terms of some specific interpretive questions.

Part III begins by considering why “interpretation” is needed at all and what exactly it is. It then looks at the various approaches that have held sway throughout English and New Zealand history and then looks at the three facets of interpretation that now predominate: purpose, context and legislative text. Curiously, legislative text is addressed after the other two. Although this might be taken to indicate a certain hierarchy in these aspects, it can also be understood to reflect the interplay among these three aspects and the fact that different interpreters may have different starting points in their analysis. It is less important whether one begins by thinking about purposes as opposed to text, than that one fully consider them both.

After considering the three essential aspects of interpretation, the book turns to the non-legislative legal context of the common law and fundamental legal principle, particularly the interaction between legislative texts and the New Zealand *Bill of Rights Act*. Although this Act is not constitutionally entrenched, it nevertheless has considerable influence through the legislative interpretation. The analysis of its interpretive effect is detailed and thoughtful, producing observations such as the following on a court decision departing from an earlier decision made before the *Bill of Rights Act* was enacted:

This comes close to an acknowledgement that where the Bill of Rights is concerned interpretation can be affected by things that have no connection with the intention of the original enacting legislature, rather the court must interpret in light of the all-embracing legislative intent of the *Bill of Rights Act*.⁷

The concluding chapter in Part III and the remaining Parts IV and V examine what might be characterized as the more technical aspects of legislation, focusing on temporal issues of commencement, duration and application in the past, as well as common types of provisions and statutes and the resolution of inconsistencies between legislative provisions.

I beg forgiveness for being perhaps too enthusiastic about *Burrows and Carter Statute Law in New Zealand*. But it is truly a gold-mine of information and analysis about legislation, and as comprehensive as one is likely ever to find. And although its focus is on New Zealand, its relevance travels far beyond. It deals with legislative questions that arise everywhere, and particularly in places that owe their legal origins to the Westminster system of government. In a world that becomes more globalized by the day, it is a rich resource for addressing all manner of legislative questions and should have a role to play in unifying our understanding of what a good legislative system looks like and how it functions.

⁷ *Ibid.* at 374.

Public Law in the Age of Statutes, Essays in Honour of Dennis Pearce

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Reviewed by Eamonn Moran¹

The rapid growth in the volume of legislation (both primary and delegated) over the past 40 years leaves it beyond doubt that we live in an “age of statutes”.² With that growth and the accompanying growth in the conferral by statute of broad discretions on public officials and bodies came the development of administrative law principles and of tribunals to review the exercise of those discretions. That is the backdrop to this short collection of essays published to honour Dennis Pearce, a man who has made an extraordinary contribution to public law in Australia. The essays are based on presentations given at a conference in Canberra in October 2014.

The essays are all penned by persons who themselves have made a distinguished contribution to public law, whether as judges, academics or public officials. Each essay is well written and reveals a depth of knowledge in the author of the area covered by them. Those areas range across statutory interpretation, judicial review, royal commissions and the impact of administrative law on public administration.

I found Professor Cheryl Saunders essay on *Constitutional Dimensions of Statutory Interpretation* particularly interesting. At one point she illustrates well how our assumption that legislative power is used to make law is challenged by legislation that is purely aspirational in nature and how our assumption that there will always be legal limits on the exercise by the executive of delegated legislative or administrative powers is challenged by legislation written in vague terms or that confers broad discretions.

Justice Stephen Gageler of the High Court of Australia contributes an essay with the title *The Master of Words: Who Chooses Statutory Meaning?* The essay explores the issue of who determines the meaning of ambiguous statutory language used in establishing a complex scheme to define a precondition to, or a condition of, the exercise of decision-making powers under the scheme.

John McMillan’s essay on *Administrative Law and Cultural Change* is based on his experience as Ombudsman and Australian Information Commissioner. The essay reflects on the capacity of such bodies to influence how government behaves.

Attempts by the legislature to limit judicial review are touched on in Margaret Allars’ essay *Executive Versus Judiciary Revisited*.

Daniel Stewart’s essay *Private standards as Delegated Legislation* explores the very interesting area of the incorporation of standards developed by private bodies into delegated

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² G Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, Cambridge, 1982) 1.

legislation, raising as it does a host of issues including issues as to the accessibility of the law.

Justice Susan Kenny traces the history of the Administrative Review Council and the contribution made by it and draws a parallel with the Administrative Justice and Tribunals Council in the United Kingdom.

Linda Pearson in her essay *The Vision Splendid: Australian Tribunals in the 21st Century* looks at the development of administrative tribunals in Australia, including how various specialist tribunals have been amalgamated into super tribunals at both the federal and State levels.

Finally AJ Brown takes a provocative look at the role of royal commissions and public inquiries and the selection of the persons to head them in his essay *Australian Tribunals In The 21st Century*.

This collection of essays should be of great interest to anyone interested in what legislation can and cannot do and in how it is administered and that administration reviewed. While the essays are written from an Australian perspective, the underlying themes are of universal relevance. It is attractively published and includes a helpful index. I thoroughly recommend it.