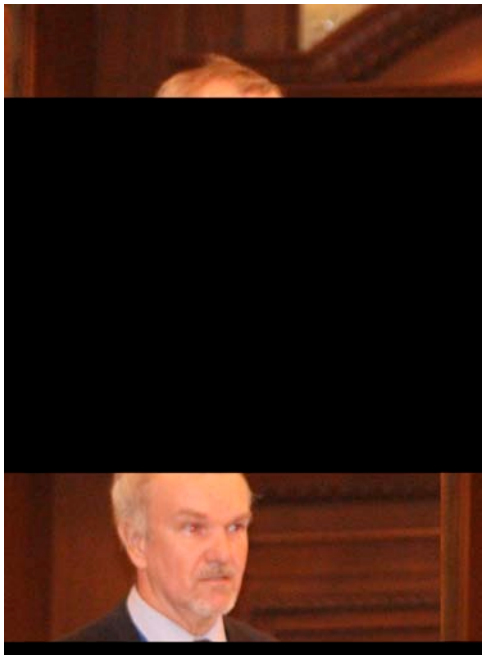
Testing Client Policy: The Emperor's Clothes

Paul Salembier[1]



Abstract:

This article considers the role of legislative counsel in terms of the practical application of the legislation. This role is cast in terms of "road-testing" the proposed legislation: doing a reality check to make sure it is comprehensive and workable. The article provides numerous examples of the logical problem-solving that characterizes this role of challenging, not the policy goals, but rather the way to attain them.

Drafting and Policy

There is a mantra, repeated in the drafting community, that legislative counsel should restrict their attention to drafting, and not meddle in the policy issues underlying the legislation being drafted. Where the line between drafting and policy falls, however, is not always clear, and I'm going to suggest that the line should properly be drawn to encompass some areas where legislative counsel may traditionally have feared to tread.

Legislative counsel are not just scribes, of course, or even literate scribes who happen to be knowledgeable in the arcane rules, forms and ornamentations of legislative drafting. The legislative counsel's role is to translate policy decisions into effective law,[2] and it is

[1] General Counsel with the Canadian Department of Justice (Canada) and the author of *Legal & Legislative Drafting* (Toronto: LexisNexis, 2009). The views expressed in this paper are personal and do not necessarily reflect those of the Department of Justice (Canada).

[2] G. Tanner, "Imperatives in drafting legislation: a brief New Zealand perspective", (2004), 52 *Clarity* 7 at 7.

therefore not enough for them to simply copy down what the instructing official wants to say. Legislative counsel *draft;* they do not take dictation. Their job is instead to take the client's policies and transform them into text that will promote those policies as effectively as possible.

Now, there are ways – all within the legislative counsel's traditional role – in which legislative counsel can and do affect their client's policies. They do this by applying accepted legal constraints:

1. reviewing the content of proposed legislative rules for constitutionality;
2. reviewing proposed rules for consistency with the jurisdiction's statutes of general application; and
3. when drafting regulations, ensuring that the regulations are within the regulation-making powers in the enabling statute.

In each case, any content that is inconsistent with these legal requirements will have to be altered or discarded.

Another straightforward way in which legislative counsel challenge a client's policy – and one that is generally accepted as being within the four corners of their role – occurs when they point out that one rule in a proposed legislative scheme contradicts another. If section 5 says a citizen must do X, and section 10 says the citizen must not do X, then the legislative counsel draws the conflict to the attention of the instructing officials, asks which rule must give way, and adjusts the text accordingly.

In doing so, the legislative counsel is not usurping the instructing official's policy role, because it is not the legislative counsel who makes the choice about which policy will apply. Rather, they are simply pointing out an incoherent aspect of the proposed legislative scheme, leaving it to the instructing official to decide how the policy will be adjusted.

I would suggest that a good legislative counsel should go well beyond this, however. I'd like to propose that legislative counsel also have a role to play in "road-testing" the client's proposed legislation: doing a reality check to make sure it will work in practice. And I suggest to you that this should be considered, not as trenching on the client's policy domain, but rather as an extension of the "what-if" scenarios that all good legislative counsel run through to ensure that the legislation they are working on is comprehensive and workable.

What distinguishes a top legislative counsel from one less skilled is not so much knowledge of the rules of grammar – because this is the minimum expected of all legislative counsel – but rather the ability to determine whether a provision gets across the message clearly and effectively. This involves not only a determination of whether a draft contains potential ambiguities or contradictions, but also whether the proposed legislative provision is the best way to achieve the client's goals, or in fact achieves them at all.

The legislative counsels' independence from the policy development process gives them the ability to look at a legislative proposal with "fresh eyes", which can make it easier to identify logical inconsistencies that have escaped the attention of those who developed the underlying policy. Logical gaps in legislative proposals can arise out of unwarranted assumptions made by the client, or perhaps simply from an unfamiliarity with the way in which binding legal rules are developed. As Justice Keith Mason observed about client ministries:

> Their rosy vision of desired outcomes may blind them to the need to cover all bases so as to pre-empt the avoidance techniques of those not favourably disposed to the new dispensation.[3]

What appears clear and simple to an inexperienced person may – to the practiced professional – be anything but.

A failure to cover all of the logical bases creates a loophole: the "gotcha" moment when those who are not favourably disposed to a new rule surge through a gap in the legislative scheme. There will always be some uncertainty in how well a proposed law will meet its objectives when confronted with the vicissitudes of life in a complex society. The military equivalent of this is "No plan survives first contact with the enemy"[4] or, in the context of sport, "Everything is complicated by the presence of the other team".[5]

Legislative counsel can identify logical gaps by questioning muddled instructions, challenging any unstated assumptions and verifying the cohesiveness and coherence of the proposed legislative scheme. This isn't as difficult as it sounds. The way in which a legislative counsel tests any proposed scheme is to mentally apply it to a hypothetical situation or, optimally, to a range of hypothetical situations.

On one type of logical challenge there is general agreement in theory but very haphazard observance in practice. I am speaking of instances in which clients give instructions that they think are clear, but which on closer examination are revealed to be ambiguous. Too often legislative counsel don't think about what they are being asked to write and simply reproduce the ambiguous instruction as ambiguous text.

Consider the following provision:

> 1. The executive director shall be a member of the Board.

[3] K. Mason, "The View from the Other Side - Judicial Experiences of Legislation", paper delivered to the Fourth Australasian Drafting Conference, August 3, 2005.

[4] Attributed to the Prussian General Helmuth von Motke.

[5] Jean-Paul Sartre, *Critique of Dialectical Reason* Vol 1 (London: Verso, 2004) at p. 473.

Provisions virtually identical to this can be found in the legislation of Canada, Ontario, New Zealand and Hong Kong.[6] Such a provision can give rise, however, to two different but equally plausible rules:

> 1A. A person is not eligible to be appointed as executive director unless the person is a member of the Board.

or:

> 1B. On appointment, the executive director becomes an *ex officio* member of the Board.

It is the legislative counsel's job to identify this sort of ambiguity, press the instructing official for clarification and draft the provision accordingly. If the intended meaning is 1A, then if there is any possibility that the position of executive director might be occupied by a person who is not a member of the Board at the time the provision comes into force, a transitional rule should be added to determine whether:

1) the incumbent would have to resign;
2) the provision would apply only to subsequent appointments; or
3) the incumbent would be required to seek appointment to the Board, coupled with a further provision to address a situation in which the incumbent did not succeed in becoming a Board member.

One can look at a case like this as an instance of a legislative counsel simply clarifying muddled drafting instructions, and in some situations that will be true. In most situations, however, I've found that clarifying the muddle takes the client into a new realm of policy development in which the legislative counsel is the trusty guide who points out the various paths the client can take and advises on where those paths lead. In these cases, the legislative counsel plays an integral role in formulating the ultimate policy.

Doing the Math

Provisions incorporating mathematical formulas present one of the easiest situations in which the legislative counsel can test the logic underlying a proposed provision. To do so, they simply plug in some sample figures for the variables (or requests representative samples from the client) and see whether the formula produces the expected results.

The following example involved a scheme for repayment by a pool of local government borrowers of a shortfall caused by a default on the part of one of the borrowers. The idea

[6] See, for example, *Marine Transportation Security Regulations* (Canada), SOR/2004-144, s. 210(1); *Real Estate Agents Act 1976 No 9* (New Zealand), s. 67(1); *Judicature Act 1908 No 89* (New Zealand), s. 388(2); *Chinese Medicine Ordinance* (Hong Kong), Cap. 549, s. 31(b)(i); *Professional Engineers Act* (Ontario), R.S.O. 1990, c. P.28, s. 3(8). Tobias Dorsey discusses a similar example in his *Legislative Drafter's Deskbook* (Washington, D.C.: TheCapitol.Net, 2006) at 193. See also Elmer Driedger, *The Composition of Legislation*, 2nd ed. (Ottawa: Department of Justice, 1976) at 15.

was that the non-defaulting borrowers would be required to remit payments to cover the shortfall in an amount proportional to the amount of tax revenues available to each borrower. The formula initially proposed for the amount of the payment by each non-defaulting member was:

> 2 – Every member shall contribute to repayment of the shortfall in accordance with the formula:
>
> $$\frac{A}{B} \times \text{C}$$
>
> where
>
> A is the gross annual tax revenue of the borrower,
>
> B is the aggregate gross annual tax revenues of all borrowers, *and*
>
> C is the amount of the shortfall to be recovered.

If you plug figures into the example,[7] it all appears to work out very well until you think back to the original reason why the clause is being invoked: a default by one of the borrowers. If the defaulting borrower couldn't make the payment that led to the shortfall in the first place, then there is reason to doubt whether it can make the payment needed to cover the shortfall.

A more logical formula, then, would allocate the responsibility for repayment of the shortfall among the remaining *solvent* borrowers. The scheme eventually put into place provided for negotiations with any defaulting borrowers to determine what amounts they could pay, followed by a call for repayment of the remainder by the remaining non-defaulting borrowers. The corrected formula was:

> 2A – Every member who has not defaulted shall contribute to repayment of the shortfall in accordance with the formula:
>
> $$\frac{A}{B - C} \times \left(D - E \right)$$

[7] To test the logic of this formula, the drafter would work out a sample problem, assuming borrowers (B_1, B_2, B_3, B_4, and B_5) with varying percentages of the total available tax revenues (5%, 10%, 20%, 30% and 35%, respectively) and a shortfall of $100,000 caused by a default by borrower B_5. Once the formula is worked through it produces payments owed of $5000, $10,000, $20,000, $30,000, and $35,000, which together add up to $100,000 – the amount of the shortfall.

where

A is the gross annual tax revenue of the borrower,

B is the aggregate gross annual tax revenue of all borrowers, and

C is the aggregate gross annual property tax revenue of defaulting members

D is the amount of the shortfall to be recovered, and

E is the aggregate of any payments negotiated from the defaulting members.

Another case that was more straightforward involved a ministry that was attempting to recover large sums of money from the banking community. The formula that was proposed, though, was based on making payments that constituted a fixed percentage of a declining balance. It was relatively easy to point out to them that they would *never* succeed in recovering the total amount owed as long as the percentage to be recovered was fixed at less than 100%.

Putting the Cart before the Horse

One type of logical error to which clients are prone is to address the subject of a legislative provision as if the provision had already been applied to it.

Consider the following example:

> 3 – A statement of claim may be served by mailing a copy of the document to the last known address of the individual, accompanied by an acknowledgement of receipt card in the form set out in Schedule 1, if the individual returns the acknowledgement of receipt card.

The provision contemplates the service of a statement of claim on someone by mailing it to the person, along with a card that the person can mail back to confirm receipt of the document. The idea would be that if the plaintiff can get the defendant to send back the acknowledgment of receipt card, the plaintiff can avoid the effort and expense of serving the document personally.

The problem with the drafting of the provision lies in the trailing condition *if the individual returns the acknowledgement of receipt card*. The trailing condition imposes a requirement that must be satisfied before the permission conferred by the provision is given. Given that a receipt card can never be returned until the document has been sent, the condition can never be satisfied until after the act for which permission is required has been undertaken.

What the provision is attempting to convey is that the plaintiff can *try* to serve the document by mail, but that the attempt will be successful only if the defendant returns the acknowledgement of receipt card. This is more appropriately expressed by focusing on the attempt/success aspect of the process:

> 3A – (1) A plaintiff **may attempt to serve** a statement of claim on an individual by mailing a copy of the document to the last known address of the individual, accompanied by an acknowledgement of receipt card in the form set out in Schedule 1.
>
> (2) Service of a statement of claim under subsection (1) **is made if** the individual returns the acknowledgement of receipt card.

While the impact of the logical error in this example is fairly benign, such an error could make the provision difficult to enforce where compliance with the rule in question is more onerous.

Hanging Qualifiers

The next example is similar in that it contains a trailing condition that determines whether the rule will operate or not:

> 4 – At least 60 days before amending a property taxation law, the municipal council shall
>
> (a) publish a notice of the amendment law in a local newspaper,
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer, and
>
> (c) obtain the approval of the Municipal Board,
>
> unless the amendment is not significant in nature.

This provision sets out three requirements that a municipal council must satisfy –if the amendment is significant in nature. Unlike the last example, the problem with this provision is not one of timing, since it is possible to have an idea whether an amendment is significant or not before the rule is to apply. The problem lies in the fact that the condition contains a subjective element, without identifying who will determine that element. In other words, the provision does not tell us who gets to decide whether the amendment is significant or not.

To determine the extent of the problem this poses, the legislative counsel needs to simply apply it to the range of possible scenarios. The most likely scenario is that the municipal council would make a preliminary determination of significance or insignificance in relation to a proposed property taxation law and would act accordingly – and, if it thought it was *not* significant, it would not bother to fulfill the conditions set out in paragraphs (a) to (c). It would continue doing so until such time as a disgruntled taxpayer challenged an amendment in court.

Because the issue of significance/insignificance relates to a condition precedent to the making of the amendment in question, identifying which entity is empowered to make that determination is key to the validity of the amendment. If the court determines that the municipal council itself was indeed the appropriate determiner of significance, its decision

would be difficult to overturn.[8] Given that the provision contemplates approval by a superior entity (the Municipal Board) and that courts are reluctant to sanction a scheme in which a lower body can insulate its decisions from review (by simply determining them to be insignificant), it is likely the court would consider that the Municipal Board was intended to be the arbiter of significance. This would open the amendment up to a whole new line of attack – failure to satisfy a condition precedent – that would not otherwise be available in a normal application for judicial review.

If the court ultimately determined that the municipal council was not entitled to determine significance, it might rule the amendment to be inoperative until the appropriate entity (the Municipal Board) ruled on the issue of significance. To avoid the uncertainty and delay this would entail, the court might also decide to short-circuit the process and make its own determination of "significance". If the court disagreed with the municipal council and considered that the taxation amendment was indeed significant, it would likely rule the amending law to be *ultra vires*, because the conditions precedent set out in paragraphs (a) to (c) of the provision would not have been satisfied.

To avoid the uncertainty and expense of litigation, an attentive legislative counsel would ask his or her instructing official to identify who the arbiter of significance or insignificance was intended to be. Two possibilities (other than an eventual court) present themselves:

- the municipal council itself, or
- the Municipal Board referred to in paragraph (c).

If the intention was that the municipal council should itself determine whether its proposed amendment is significant or not, the provision can be redrafted in a much more clear-cut manner to reflect that intention:

> 4A – Where the municipal council proposes to amend a property taxation law **and the council considers the amendment to be significant in nature**, at least 60 days before making the amendment the council shall
>
> (a) publish a notice of the amendment law in a local newspaper;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and
>
> (c) obtain the approval of the Municipal Board.[9]

[8] *Reference re Chemical Regulations*, [1943] S.C.R. 1, at 12; *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[9] A shorter, but more indirect, version would be:

> At least 60 days before making a property taxation law amendment that the municipal council considers to be significant in nature, the council shall
>
> (a) publish a notice of the amendment law in a local newspaper;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and

However, since the instruction contemplates that a municipal council must obtain approval for significant amendments from a superior body (the Municipal Board), that superior body is not likely going to concede to the council the authority to determine which amendments require their approval and which do not. The council would otherwise be able to shield all of its amendments from review by the Municipal Board. The most likely scenario, – and what was in fact the decision in the provision on which this example is based – is therefore that the Municipal Board is to be given the discretion to determine whether a property taxation law is significant enough to require its approval, or viewed from another perspective, whether a given amendment is insignificant enough that its approval (and the advance notice requirements) can be dispensed with.

In order to make any such determination, though, the Board will first need to see the amendment. The most convenient manner to achieve this is to provide that all amendments must be forwarded to the Board, and for the Board to grant an exemption from the publication and notice requirements for insignificant amendments. The provision would therefore be split into two rules:[10]

> 4B – (1) At least 60 days before amending a property taxation law, the municipal council shall
>
> (a) apply to Municipal Board for approval of the law;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and
>
> (c) publish a notice of the amendment law in a local newspaper.
>
> (2) At the request of a municipal council, the Municipal Board may exempt the council from the requirements of paragraphs (1)(b) and (c) **if the Board considers that the amendment is not significant in nature.**

Rules Made to be Broken

Instructing officers who are more acquainted with administering policy than enforcing binding legal rules may at times find themselves suggesting redundancies in rules "just in case the first one doesn't work". Such an approach is reminiscent of the Groucho Marx philosophy: "Those are my principles, and if you don't like them... well, I have others."

(c) obtain the approval of the Municipal Board.

[10] Since the Board will already have reviewed the amendment and determined that it is not significant, it makes most sense for the Board to go ahead and approve the amendment at the same time as it grants the exemption. There is therefore no point in the Board approving an exemption from its own approval, and the exemption is therefore limited in this provision to an exemption from the publication and notice requirements.

This, however, is not logical and it is anathema to good drafting principles; if one had to draft alternative rules in order to take into account the possibility that an expressed legal rule might not be followed, the recitation of successive alternatives would be never-ending. The norm is therefore to draft the rule in question just once, and to provide for appropriate consequences for non-compliance.

Sometimes a rule appears to contemplate its own contravention simply because it is drafted in absolute terms, even though exceptions were in fact contemplated. Consider the following example:

> 5 – All documents required to be filed under these Rules shall be in either English or French and, if submitted in a third language, be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

What we have here is a rule:

> All documents required to be filed under these Rules shall be in either English or French …

followed by another statement that

> … if submitted in a third language, [a document must] be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

Here, it is apparent that languages other than English and French were contemplated from the outset. The rule is not therefore that *all documents … shall be in either English or French.* In fact, the rule contemplates that documents can be filed in any language, but if they are filed in English or French they do not require a translation. The rule is hence *all documents … shall be in English or French or some other language (with a translation).* The rule could consequently more properly have been drafted as:

> 5A – All documents required to be filed under these Rules shall be in English or French **or** be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

Now, since the rule doesn't actually require that documents must be in English or French, it could in fact be stripped down to its essence by addressing only the translation requirement for documents that are not in English or French:

> 5B – **A document** required to be filed under these Rules **that is not in English or French** shall be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

The Impossible Takes a Little Longer

It has been a tenet of law from at least the Roman era that "No obligation to do the impossible is binding."[11] Nonetheless, from time to time, text will appear in statutes that appears to require just that.

Donald Hirsch gives an amusing example of a sign instructing Washington commuters on Independence Avenue to "Use All Lanes".[12] I would normally have thought that such a direction was impossible to follow, but after a few days of driving in India I'm no longer quite so sure.

Often, the drafting of an impossible requirement arises out of an ill-advised attempt on the part of instructing officers to encourage those bound by the legislation to *do their best* to advance a goal of the legislation by establishing an objective that turns out to be unattainable. While vigorous exhortation might be laudable in a non-legal setting, it has no place in a statute.

Therefore, while it may be human nature to encourage others to do their best – as in "a man's reach should exceed his grasp" – in drafting legislation, a line must be drawn between an exhortation to stretch personal limits and a legal duty to do so.[13] Consider the following example:

> 6 – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, as soon as possible but not later than 24 hours after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

Now, this provision appears to contemplate the creation of one obligation (*employer is to report as soon as possible*) followed by an alternative obligation (*employer is to report within 24 hours*), in case the employer decides not to comply with the first one. Beyond this, the provision in question could give rise to two situations in which the employer might satisfy one of the obligations while breaching the other.

Consider, for example, a situation where it is later determined that it was possible to make a report within 6 hours, but the employer made the report 15 hours later. The employer

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[11] *Ad impossibilia nemo tenetur*, attributed to Marcus Tullius Cicero (106–43 B.C.), Roman orator, philosopher, and statesman: Celsus's *Digesta*, L, 17.

[12] D. Hirsch, *Drafting Federal Law* (Washington: Office of the General Counsel, Legislation Division, 1980) at p. 3.

[13] Note that strict liability statutes do not impose unreachable standards; they instead merely impose an unconditional requirement to pay for damages caused by those who choose to engage in certain hazardous activities.

will have breached the requirement to report *as soon as possible*, but will have complied with the requirement to report *not later than 24 hours* afterwards.

In another situation, in which it is later determined that it was not possible to make a report until 30 hours later but at which time the employer did so, the employer will have breached the requirement to report *not later than 24 hours* afterwards, but will have complied with the requirement to report *as soon as possible*.

Is the employer in either of these cases liable for having contravened the provision? In both situations the legislator will certainly have breached the rule of law requirement that it must avoid enacting contradictory rules.[14]

In my discussions with the Chief Legislative Counsel of two Commonwealth jurisdictions, one opined that, of course, the *as soon as possible* portion of the provision would be the only binding rule, while the other was equally adamant that the *not later than 24 hours* portion would be the only operative component. While the view of the courts might well be tempered by the facts of the particular case before them, it is clear that the regulating agency will in this case have failed to clearly convey the law to be applied.

The provision can be remedied by simply omitting either the words *as soon as possible but* or *but not later than 24 hours* from the provision. Keeping *as soon as possible* would produce:

> 6A – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, **as soon as possible** after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

A client opting for this rule should be advised that a breach may be difficult to prove, since the regulator would have to demonstrate that an earlier possible opportunity existed and was not seized. It should be kept in mind as well that a provision that requires an employer to act *as soon as possible* imposes a fairly high standard of conduct, which could cause the employer to incur substantial costs to avoid a breach, and perhaps even result in delays in treating injured workers if a priority is given to reporting over treatment. A standard such as this should therefore only be imposed for good reason.[15]

Retaining the *not later than 24 hours* option would produce:

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[14] L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at pp. 65-70.

[15] Such a standard might not be defensible, for example, if the regulating agency would typically take weeks to respond to such a report. Perhaps in recognition of such difficulties, the A.C.T. Parliamentary Counsel's Office recommends that *as soon as possible* and *as soon as practicable* not be used, and that a set period be substituted instead: *Words and Phrases: A Guide to Plain Legal Language*, Oct. 2006, pp. A-77, A-78.

> 6B – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, **not later than 24 hours** after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

In establishing a 24 hour maximum, the regulator will have to keep in mind that some prosecutorial discretion might have to be exercised in circumstances where the rule has been contravened but where it appears that no earlier opportunity presented itself. This option presents another logical gap, in that it would be impossible for an employer to comply with the rule if a single employee were injured in an accident and the employee died two days later. In this situation, because only a single employee was involved, paragraph (b) of the provision would not require a prompt report, but the eventual death of the employee would trigger paragraph (a) *ex post facto*, bringing the employer into breach of the 24-hour requirement of the provision long after the window for compliance had passed by.

This can be remedied in one of two ways. Paragraph (a) could be modified to make it apply only to immediate deaths:

> 9C – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, not later than 24 hours after becoming aware of the occurrence, where the accident results in
>
> (a) the **immediate** death of an employee; or
>
> (b) a disabling injury to two or more employees.

This, however, would relieve the employer of any requirement to report where the employee died later, which might not meet the policy requirements of the regulating agency. To make the provision applicable to eventual deaths as well, the adverbial phrase *not later than 24 hours after* would need to modify the result of the accident[16] rather than the occurrence of the accident. Redrafted in this manner, the provision would read:

> 9D – **Where an accident results in the death of an employee or a disabling injury to two or more employees**, the employer shall report the date, time, location and nature of any accident by telephone to the regional safety officer not later than 24 hours after becoming aware **of the death or injury**.

Why Challenge the Logic?

While the examples I've presented give a taste of the type of logical anomalies that can crop up in legislative and legal documents, the list is by no means exhaustive. There are no

[16] That is, paragraphs (a) and (b) would have to become the object of the adverbial phrase.

limits on the types of logically-challenged legislative schemes the human mind can invent, or of the interpretive quirks that can undermine the operation of an apparently sound legislative provision. To paraphrase Albert Einstein, only two things are limitless: the universe and the ability of a client ministry to mix things up, and I might be wrong about the universe.

I've addressed a number of other types of logical challenges in *Legal & Legislative Drafting*,[17] to which I would naturally refer any who have a further interest in this area.

The most a legislative counsel can therefore do – and what I would suggest of all legislative counsel – is to attempt to develop a habit of confirming that a scheme that on its surface appears logical will still operate properly when tested against real-world possibilities. Most of the time, this can be done by simply posing the question: "So how will this work in practice?"

The salient question, however, is whether doing this goes beyond the legislative counsel's role in providing legal advice and whether it trenches unnecessarily on the realm of policy. The answer to this is clearly "No".

Logical challenges test the mechanism by which the client seeks to attain its policy goals, and not the goals themselves. It is always in the client's best interests to have the legislative counsel, in his or her role as legal adviser, point out any errors or inconsistencies that might prevent the client's objectives from being realized.

In short, no one benefits from seeing the emperor parade about in his birthday clothes.

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[17] (Toronto: LexisNexis, 2009), Ch. 8.