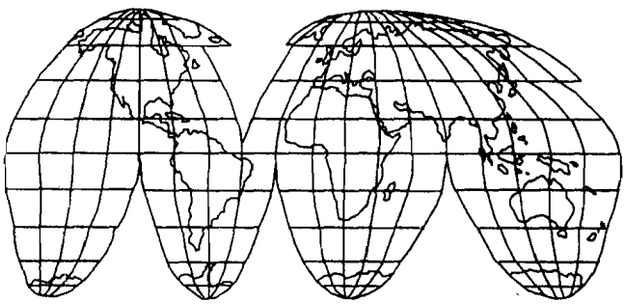
THE LOOPHOLE

The Newsletter of the Commonwealth Association of Legislative Counsel (C A L C)

Please ensure that a copy of this issue is circulated to each CALC member in your jurisdiction



FEBRUARY 1996

"*The Loophole*" is the newsletter of the Commonwealth Association of Legislative Counsel established on 21 September 1983 in the course of the 7th Commonwealth Law Conference held in Hong Kong.

The constitution of the Association provides for an elected Council. The present Council consists of:

Mrs V S Rama Devi *President*	India
Mr Dennis R Murphy, QC *Vice-President*	Australia
Mr D L Mendis *Caribbean Member*	St Kitts-Nevis
Mr Walter Iles, QC *Pacific Member*	New Zealand
Mr N J Abeyesekere *Asian Member*	Sri Lanka
Mr Peter J Pagano, QC *Member of the Council*	Canada
Mr Edward Caldwell *Secretary*	United Kingdom
(To be appointed) *African Member*	.....

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SECRETARY'S NOTES

The Commonwealth Law Conference

Our members will no doubt already know about the 11th Commonwealth Law Conference in Vancouver from August 25th to 29th this year. But just in case anyone has not seen the proposed Conference programme, details are included at the end of this issue of *The Loophole*.

The organisers of the Commonwealth Law Conference (the Canadian Bar Association) may be contacted:

by phone:	(613) 237-2925
by fax:	(613) 237-3726
by Email:	info@cba.org

There is up-to-date information available on the Internet at http://cba.org/abc.

We shall, as usual, be holding our triennial general meeting as part of the Commonwealth Law Conference "Fringe". That should occupy only one of the Conference days, leaving members free to attend sessions of the Conference. I hope that many of our members will be able to get to Vancouver and would be grateful if those who are planning to attend the CALC general meeting would let me know. It will help if I have a rough idea of the number of members who will be in Vancouver when it comes to making arrangements with our Canadian colleagues.

Volunteers please!

I would also be grateful to hear from members with proposals for papers to be delivered at our Vancouver meeting. We must soon turn to the task of planning an agenda.

The hidden price of membership

Membership of the Association is free to all who are entitled to membership but sometimes there is a hidden price. When Professor St. John Bates, the Clerk of Tynwald but perhaps better known to us as the editor of the *Statute Law Review*, applied for membership I was delighted on at least two counts. The first was that we were acquiring such a distinguished member. The second was that it seemed to me that it might be possible to persuade St John to write an article for *The Loophole* about Tynwald – probably the world's oldest legislature. I am grateful to St John for the speed with which he responded to my request. His description of the legislative world of Tynwald is our opening contribution to this issue.

Troublesome words

We have two articles in this issue about those troublesome things – words. Dennis Murphy's exploration of the differences between "that" and "which" reminded me of how

dangerous a little learning can be when it comes to trying to be grammatically correct. Several years ago I drafted an amendment for a government Bill and was surprised, when it was printed on the Order Paper, to find that someone had changed my (deliberately chosen) "that" to "which". The someone turned out to be the Minister's private secretary acting, without reference to me, on the instructions of the Minister. The Minister was also acting on instructions. As a boy, he had been told by one of his teachers that it was a cardinal rule of grammar that the word "that" was to be avoided if at all possible. Ever since, he had been removing "that" whenever he came across it and putting "which" in its place. Perhaps Anthony Watson-Brown's article about "shall" will provoke a similar crusade to stamp out a much over-used but still sometimes rather useful little word. If only we could find a way of legislating without words.

An advertisement

As *The Loophole* holds itself out as a newsletter, I thought that readers might wish to know about news of the following kind:

> *Experienced Parliamentary Counsel required for short or long term work in the Office of the Parliamentary Draftsman, Dublin.*
>
> *Applicants should have at least 20 years experience of a common law jurisdiction.*
>
> *Any person interested in undertaking such work should contact–*
>
> > *Edward Donelan,*
> > *Office of the Parliamentary Draftsman,*
> > *Government Buildings,*
> > *DUBLIN 2,*
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36 Whitehall London SW1A 2AY

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THE LEGISLATIVE PROCESS IN THE ISLE OF MAN

St.John Bates[1]

Introduction

The Isle of Man is an island of 221 square miles with a population of 70,000 situated almost equidistant from England, Scotland and Ireland in the North Irish Sea. It is a UK Crown dependency and, by convention, the Crown is responsible for its defence, external relations and "ultimately the good government of the Island". Subject to these conventional responsibilities, the Island has a high degree of autonomy with its own legal system, judiciary, government and parliament, Tynwald, which celebrated its millennium in 1979 and lays claim to be the oldest parliament in the world in continuous existence.[2]

Tynwald has two Branches: the House of Keys, with 24 directly elected Members, and the Legislative Council, with two *ex officio* Members (HM Attorney General for the Isle of Man, who does not have a vote, and the Bishop of Sodor and Man) eight Members elected by the House of Keys and a presiding officer (the President of Tynwald, who is elected by the Members of Tynwald, and also sits *ex officio* as the presiding officer of the Legislative Council). The two Branches sit separately, principally to consider primary legislation, and together as Tynwald Court, although they normally vote separately, for most other parliamentary purposes. The sittings and recesses of Tynwald Court and its Branches are determined by their Standing Orders. The parliamentary year runs from October to July during which, save in recesses, the Branches each sit one day a week, except the third week in the month when they sit together as Tynwald Court for up to three days.

Tynwald operates with many of the constraints which are inherent in small jurisdictions[3] and within its own particular constitutional and political context. A significant constitutional consideration is that the origins of Tynwald are coeval with those of Westminster and it does not derive its legislative competence from Westminster. However, Westminster does on occasion extend its legislation to the Island,[4] presumably on the basis of the constitutional conventions regulating the relationship between the United Kingdom and the Isle of Man. More commonly, UK legislation may provide for its extension to the Isle of Man by Order in Council and the UK Government consult the Isle of Man Government on whether it wishes the legislation to be so extended. The contemporary position of the Isle of Man Government is that it prefers to introduce parallel legislation in Tynwald rather than have UK legislation extended to the Island by Order or, in some cases, to apply with

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[1] Clerk of Tynwald, Secretary of the House of Keys and Counsel to the Speaker; he writes in a private capacity and not as an officer of Tynwald.

[2] It was pre-dated by the Althing, but the Icelandic parliament had a more chequered history.

[3] T W Cain, *"The Legislative Draftsman in a Small Jurisdiction"* (1990) 11 Stat L R 77.

[4] (UK) Extradition Act 1989, s.29.

modifications UK and EU legislation by subordinate legislation made under an Act of Tynwald.[5]

There are two particularly salient features of the domestic political context. First, virtually all Members of Tynwald sit as independents. Thus, although four Members of Tynwald sit as Members of the Manx Labour Party and five other Members have formed themselves into a group to offer alternative policies, party politics is not a significant feature of the Manx Legislature. Secondly, most Members of Tynwald have an executive as well as a parliamentary role. Until the late 1980s the executive government was undertaken through functional Boards of Tynwald. This was then replaced by a ministerial system, but the preponderance of Members of Tynwald still hold government appointments. In consequence, Tynwald and its Branches at their best offer a rather pure form of Athenian democracy, but the governmental structure does not particularly lend itself to systematic and coherent parliamentary scrutiny of government policy, legislative or otherwise, or its administration.

Primary Legislation

Tynwald procedures provide for both Government Bills and Private Members Bills.[6] Both of these categories of Bill are drafted by two legislative draftsmen, who are civil servants in the Attorney General's Chambers. Government Bills are drafted on the instructions of relevant Government Departments, an arrangement which was formalised in 1993.[7] Private Members Bills are drafted on the instructions of the Member concerned, once the Member has obtained leave to introduce the Bill. The draftsmen also draft amendments to Bills, both on behalf of the Government and also of private Members. Even in the context of a small legislature, this is quite a substantial burden in the context of primary legislation and it is not totally free from tension. The Attorney General's Chambers in its drafting role maintains a close liaison with the Home Office, the lead Department for the Isle of Man in the UK Government. This is seen as generally helpful by the Chambers, particularly as a substantial proportion of Manx primary legislation is modelled on UK legislation. Some parliamentarians view this relationship with the Home Office less benignly. Their suspicion derives from the UK Government effectively advising the Crown on whether Royal Assent should be given to Manx primary legislation. Obviously, this advisory power gives some point to Home Office comment. This is acceptable where, for example, there is some dubiety about the compliance of a Manx Bill with Manx international obligations for which the UK Government is responsible; it would be less acceptable were advice on Royal Assent to be influenced by purely UK considerations.

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[5] Examples of such Manx statutory application powers are the Social Security Act 1982, s.1, and the European Communities (Isle of Man) Act 1973, s.2A.

[6] There is also a private Bill procedure: *Standing Orders of the House of Keys*, SO 212-222; *Standing Orders of the Legislative Council*, SO 31-35.

[7] The Government policy document, "Isle of Man Government Policy Report 1993", published in October 1993, para 11.5, stated "A new feature of the [legislative] programme this year is that for each Bill a responsible Department has been identified. This is a reflection of a Council of Ministers decision which is aimed at emphasising Departmental responsibility for legislation and which will ensure that, should any enquiry or clarification be required in respect of any aspect of any Government Bill, there is a clearly identified agency to which enquiries may be addressed".

Once a Bill has been drafted and authorised for introduction into the House by the Council of Ministers or, in the case of a Private Member's Bill, by the House itself,[8] the Bill is published. As far as Government Bills are concerned, neither the Government nor the Member promoting the Bill are normally over-zealous in providing Members with background material. The Counsel to the Speaker does, however, usually provide Members with a written opinion on the technical, rather than policy, aspects of Bills. In practice, virtually every Bill is introduced first in the House rather than in the Legislative Council. It is though, the Speaker who determines which Member takes a Bill and when it will be placed on the Order Paper. Since the introduction of the ministerial system, the Speaker will receive a suggestion from the Government as to the Member who might take a Government Bill, and normally accedes to the suggestion but this is not invariable.

There are four stages for the consideration of Bills in the House and Standing Orders require that these stages be taken at separate sittings. So, even without a suspension of Standing Orders, a Bill can theoretically complete its passage in a course of four of the weekly sittings of the House. The first reading is purely formal, with the Secretary of the House reading out the short title and the name of the Member promoting the Bill. The second reading is a debate on the principles of the Bill. At this stage any person may present a memorial, up to 48 hours before the sitting at which the second reading is on the Order Paper, for leave to appear and be heard at the Bar either in person or by counsel. The memorialist must be a person whose interest, as distinct from the interest of the general public or a section of the general public to which the Bill relates, is adversely affected.[9] If the memorial is in order, the House may decide to hear such a memorialist at the second reading, or subsequently at the consideration of the clauses, or certain clauses, or at both stages. This procedure is now rarely used, but when it is the memorialist is heard and may be questioned by the Members immediately after the motion is moved and before it is debated.

The third stage is the clauses stage, at which the Bill receives detailed consideration clause by clause, normally by the whole House. However, after the second reading motion has been carried and at the clauses stage, the whole Bill or a portion of it may be referred to a committee. These Bill committees have a limited utility for they are empowered to take written and oral evidence but not to amend the Bill, although they may recommend amendments. So, such a committee reports to the House which then proceeds with the clauses stage, including any tabled amendments. The procedural rules for tabling amendments are not rigorous: 24 hours notice of new clauses must be given to the Secretary of the House (rather than to its Members!), and other amendments, as long as they are in writing, can be tabled without notice. The final stage in the Keys is the third reading, which is again a debate on principle, but here

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[8] *Standing Orders of the House of Keys*, SO 150. Authority for the introduction of a Bill in the House also flows from the Bill having been passed in the Legislative Council, being re-introduced into the House following rejection in the Council, or by resolution of Tynwald or the House itself: *ibid*, SO 148.

[9] *Ibid*, SO 176-8.

the Bill must be carried by a absolute majority of the House,[10] whereas at second reading and the clauses stage motions are carried by a simple majority.

Once a Bill has completed its passage in the Keys, it is considered by the Legislative Council through the same stages. There are, however, some differences of procedure and practice in the Council which are worth noting in passing: debate is much less formal; the first reading in the Council involves a debate on the Bill and at least as late as the 1970s Bills were lost at this stage in the Council;[11] and finally it is rare for the Council to refer a Bill to a committee, although there has been a recent instance.[12] Consideration in the Council is normally much less lengthy, and successive stages may well be taken at the same sitting. Where Council amendments are not agreed by the Keys, there may be a conference between the two Branches.[13] The conference is chaired by the Lieutenant Governor and the Council are normally represented by the entire Council whereas the Keys are represented by three or five Members. The conference takes place in the Council Chamber in private. As a consequence of at least some of these features, many Members of the Keys consider the procedure to be antiquated and in need of reform, although it does seem to work. Were it to fail there is a statutory procedure, very similar to the UK Parliament Acts 1911-1949, by which a Bill may become law without having been passed by the Council.[14]

There are two further stages to the enactment of primary legislation. A Bill which has passed in both the Keys and the Council[15] then comes before Tynwald Court where it is required to be signed by an absolute majority of both the Council and the Keys before it may proceed to Royal Assent.[16] This procedure may have political pitfalls, in that a Bill can for example carry in the Keys at third reading but when it comes to be signed may not attract an absolute majority of the House.[17] It does not have any contemporary functional purpose although it may be that in the nineteenth century it was a device which allowed the UK Government to be sure that Tynwald Bills had indeed the support of the Keys and the Council. The Royal Assent to Tynwald Bills is a matter for the Crown on the advice of the Privy Council, in effect the Home

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[10] *Ibid*, SO 158(2). Standing Orders require Members, unless they have leave of absence, to attend each sitting in its entirety.

[11] The Licensing (Sunday Opening) Bill was discharged on 6th December 1977 and the Licensing (Amendment) Bill was discharged on 27th June 1978, by the Council at first reading.

[12] A Special Committee on the Food Bill was appointed by the Council on 24th January 1995, and reported on 5th December 1995.

[13] *Standing Orders of the House of Keys*, SO 130-139; *Standing Orders of the Legislative Council*, SO 23.

[14] Isle of Man Constitution Act 1961, s.10.

[15] Or is deemed to have passed in the Council: note 13

[16] *Standing Orders of Tynwald*, SO 160; it must also be signed by the President of Tynwald, as presiding officer. Where the Bill is deemed to have been passed by the Council the requirement that it be signed by a quorum of the Council does not apply: Isle of Man Constitution Act 1961, s.10(2).

[17] This last occurred with a Licensing Bill in 1973.

Secretary. By Order in Council, there is a delegated power for the Lieutenant Governor to give Royal Assent to Tynwald Bills[18] and Royal Assent is now almost invariably given by this means. The date on which an Act of Tynwald is passed is the day on which the Royal Assent has been announced in Tynwald by the President of Tynwald rather than the date on which Royal Assent is given,[19] and this can create difficulty.

Finally, the Viking origins of Tynwald play their part. Tynwald meets annually on 5th July at one of its historic outdoor meeting places, Tynwald Hill at St John's in the centre of the Island. Acts of Tynwald which have been passed are promulgated from Tynwald Hill during this ceremony by reading a memorandum (both in English and in Manx), containing the short title and a summary of the long title of each Act. Any Act of Tynwald which is not so promulgated within a period of 18 months from the date on which it is passed ceases to have effect.[20]

Subordinate Legislation

Subordinate legislation made under Acts of Tynwald normally requires to be laid before, and may be the subject of an affirmative or negative procedure in, Tynwald Court. For a variety of reasons beyond those which normally apply, subordinate legislation is much used in the Isle of Man. It has, for example, the advantage of being able to legislate without formal reference to the United Kingdom, which amongst other things avoids non-insular delay. However, despite the increase in subordinate legislation in the Isle of Man, Tynwald Court has not yet established any systematic or comprehensive mechanism for scrutinising such delegated legislation, either technically or on its merits. Counsel to the Speaker does though circulate Members with an opinion on subordinate legislation laid before Tynwald which appears to raise legal or technical, as opposed to policy, concerns.

Conclusion

Tynwald has a Westminster legislative procedure, modified by its ancient origins and contemporary needs. This brings with it the familiar concerns of pressure on legislative time and the lack of opportunity (or, in the case of Tynwald, perhaps the failure to grasp sufficiently the opportunity) of parliamentary scrutiny. As in many other jurisdictions, the pressure on legislative time is commonly attributed to governmental legislative enthusiasm. The Isle of Man Government announced twenty-eight Bills which it wished to introduce in the twenty-one Keys sitting days in the 1995-96 session. This pressure is increased by a number of factors. The absence of party politics and consequential reduced Government control of the legislative programme, not always lamented by Members, is one. Another is the relative informality and generosity of Tynwald. As well as the informality of tabling amendments, there are no time constraints on the consideration of legislation, and the

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[18] Royal Assent to Legislation (Isle of Man) Order 1981.

[19] Interpretation Act 1976, s.10.

[20] Promulgation Act 1988, s.3(2); the promulgation must be certified by the Lieutenant Governor (who presides over Tynwald on Tynwald Day), the President of Tynwald and the Speaker of the House of Keys: *ibid*, s.4.

House is generous in giving leave to Members to introduce Private Members Bills. Leave has been refused by the House on only one occasion in the past eight years and, once introduced, such Bills are accorded the same parliamentary time as Government Bills. These pressures are somewhat reduced by the capacity to carry Bills over from session to session in the Keys during the life of the House, and from one House to the next if the Bill is in the Legislative Council when the House is dissolved.

The legislative competence of Tynwald is an important aspect of the constitutional status of the Isle of Man. Indeed, it must be one of the few legislatures which is accorded a favourable mention in its country's national anthem.[21] However, having lost executive competence in the past decade, Tynwald may feel the need to reformulate its parliamentary role for its second millennium.

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[21]The first verse of the Manx National Anthem is:

"O land of our birth,
O gem of God's earth,
O Island so strong and so fair;
Built firm as Barrule,
Thy throne of Home Rule,
Makes us free as Thy sweet mountain air".

BILL REVIEW – A QUESTION OF QUALITY

Dennis Murphy[1]

Two related issues affecting the quality of legislation have been addressed in the Parliamentary Counsel's Office of New South Wales, Australia. These issues are:

- quality control, and
- the more important issue of bringing the collective experience and expertise of the Office to bear in as many Bills as possible.

Every Bill is subject to some degree of internal review in the Parliamentary Counsel's Office. A very important part of the drafting process is played by the Bill Review Group, consisting of the five most senior officers (the Parliamentary Counsel and Deputy and Assistant Parliamentary Counsel).

As far as time and pressure permit, all priority Bills are reviewed by this Group in detail. The Group was established in the late 1980s.

Copies of a Bill to be reviewed are circulated to members of the Group. Originally, the next step was for the Group to meet formally to discuss the Bill.

From 1995, comments are to be provided to the drafters by each member of the Group in advance of a formal meeting. During especially busy periods, comments may be provided by some only of the members of the Group. After receiving comments, the drafters will, if necessary, prepare a fresh draft of the Bill, indicating where the principal alterations have been made. Alternatively, the drafters may request that some or all of the issues be discussed at a meeting of the Group before alterations are made. The making of written comments is intended to reduce the time needed at formal meetings of the Group.

The Group meets formally to discuss the draft. It is here that differences of opinion and possible idiosyncrasies are ironed out. Sometimes the benefit of joint discussion at a meeting of the Group produces a new insight into the project, so that a further draft is necessary. On some occasions, a further meeting of the Group is held to consider a revised draft, though this is fairly unusual.

This process of Bill review enables the collective experience and expertise of the Office to be brought to bear on draft legislation.

The Group is usually chaired by the Parliamentary Counsel and operates by consensus. In the rare instance where consensus cannot be achieved, the matter is settled by the Parliamentary Counsel.

The Parliamentary Counsel sets a timetable for comments to be made and meetings to be held.

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[1] Parliamentary Counsel, New South Wales.

The work of the Group complements the team approach to drafting that is adopted as far as possible. The system is universally regarded as working very well and as enhancing the quality of legislation of New South Wales.

THE LEGISLATIVE TRANSFORMATION OF TREATIES

D L Mendis[1]

> "Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfilment of both these august functions is to entrust them only to those who are equal to their demands."
>
> Justice Felix Frankfurter
> "Some Reflections on the Reading of Statutes"
> 48 Col.LR 546.

It is proposed, in this article, to discuss the legislative process,[2] legislative practices[3] and legislative problems[4] relating to transformation of treaties into national law in the UK and Commonwealth countries. It is the most important stage in the implementation of treaties at national level in the UK and other Commonwealth countries.

I. Legislative Process

The legislative process relating to transformation of treaties can be divided into two phases, namely, (a) pre-parliamentary process and (b) parliamentary process. It is useful to ascertain the impact of the legislative process on legislative transformation of treaties at national level in the UK and other Commonwealth countries in a comparative manner.

a. Pre-parliamentary process

In the United Kingdom, the pre-parliamentary process relating to legislative transformation of treaties begins when the appropriate Cabinet Committee approval is obtained by the instructing department, and drafting instructions are transmitted to the Office of the Parliamentary Counsel.[5] The Office of the Parliamentary Counsel in the UK

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[1] D L Mendis, LL.B (Cey), M.Phil. (Cantab); Visiting Scholar - Centre of International Studies, University of Cambridge. Council Member of the Commonwealth Association of Legislative Counsel (CALC). Formerly, Senior Assistant Legal Draftsman (Sri Lanka); First Parliamentary Counsel (Sierra Leone); UN Legal Expert (OPAS) (St Kitts-Nevis); ICAO Aviation Legislation Consultant (Pakistan).

[2] J A G Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen and Unwin: 1974); D Miers, and A Page, *Legislation* (2nd edn) (Sweet and Maxwell: 1990), chs 2, 3, 4 and 5; M. Zander, *The Law-Making Process* (3rd edn) (Weidenfeld and Nicolson: 1989).

[3] G C Thornton, *Legislative Drafting* (Butterworths: 1987), pp.236-40; F A R Bennion, *Statutory Interpretation* (2nd edn) (Butterworths: 1992), F A Mann, *Foreign Affairs in English Courts* (Oxford University Press: 1986), pp.84-101; Jane D N Bates, *The Conversion of EEC Legislation into UK Legislation* (1989) 10 Stat. LR 110; A J G M Sanders, *Transformation of Treaties*, (1974) THRH 364.

[4] Bennion, n.3 above; Thornton, n.3 above; E Driedger, *The Composition of Legislation* (Ottawa; 1973) at 213.

[5] Griffith, n.2 above, at 14. "What happens in Parliament is often not the most formative part of the legislative process. Indeed the presentation of the proposals in the form of a bill, representing it may be many hours of hard labour by parliamentary counsel means that the ossification is well advanced. The most formative part of the whole process -- the point at which the proposal may have most significantly changed -- is the time when the Departments are consulting with the affected interest. *The legislative transformation of treaties at national level may*

was established in 1869.[6] Since then, the Office has grown in number and has been responsible for the drafting of a large volume of legislation relating to treaties on a variety of subject-matter.

The United Kingdom is also responsible for the external affairs of her colonies and dependencies. The drafting of legislation relating to treaties for the colonies and dependencies is the responsibility of the British Government. Generally, such legislation relating to treaties is extended to the colonies and dependencies by way of a statutory instrument.[7] This procedure is vividly described by Michael Bradley, the former Attorney General of the Cayman Islands, in the following manner:

> "Many of the treaties are of a very complex nature and are in relation to matters which might perhaps affect a small territory once in a hundred years. We usually go along with the wish of the United Kingdom to have the treaty applied to dependent territory. The next stage is that where legislative action is required, the United Kingdom comes back to us and asks whether we wish to adopt our own domestic legislation with respect to the matter or whether we wish it to be extended to our territory by a statutory instrument."

In other Commonwealth countries, the drafting of legislation relating to transformation of treaties is generally handled by the Office of the Parliamentary Counsel, Legal Draftsman's Department or the Attorney General's Chambers in consultation with the department or office responsible for initiating such legislation.[8] For example, in large Commonwealth countries, there is a separate department or an office established for drafting government legislation, while in smaller Commonwealth countries, such work is generally handled by a Division or a person in the Attorney General's Office.[9] Most of these departments and offices are responsible to a Minister of Justice or the Attorney General, as the case may be, and not to the Prime Minister as in the UK.[10]

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constitute an exception as such legislation to a large extent is determined by the treaty itself." (emphasis added).

[6] It was founded in 1869 by Mr Robert Lowe, then Chancellor of the Exchequer, (later Lord Sherbrooke) who had an exceptional perception of the difficulty of parliamentary drafting and the need for training in this "very peculiar branch of business".

[7] *Proceedings of the Second Commonwealth Conference on Delegated Legislation* (1983), III, at p.83. See Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, (Stevens: 1966), at p.375; Craies, *Statute Law*, (7th edn) (Sweet and Maxwell: 1971), at p.123. See also Article 19(9) of the ILO Constitution which requires a member state to implement ILO conventions so far as practicable in respect of all territories for whose international relations they are responsible. This requirement applies subject to modifications specified in Article 19 of the ILO Constitution.

[8] R C S Sarkar, *Role of Government Departments in the Legislative Process*, II Const. Parl. Studies, 1-11; Dorothy Johnston, *Role of the Administrator in the Preparation of United Kingdom Legislation* (1980) 1 Stat.LR 67.

[9] Canada, Zimbabwe, New Zealand, Trinidad and Tobago and Kenya have an Office of Parliamentary Counsel responsible to the Minister of Justice or Attorney General; Sri Lanka, Malaysia and Malawi have a Legal Draftsman's Department similarly responsible to the Minister of Justice. In small states in the Caribbean, Pacific and the Indian Ocean, a Legal Draftsman or First Parliamentary Counsel is part of the Attorney General's Chambers and directly responsible to the Attorney General.

[10] In Australia, the Office of the Parliamentary Counsel is regulated by the Office of Parliamentary Counsel Act 1970 (no.8 of 1970). The Department is regulated by an Act of Parliament so that First Parliamentary Counsel can maintain his independence and serve all ministries and Departments of government with a sense of

In all Commonwealth countries, legislation relating to treaties is drafted by persons who are described as legal draftsmen, legislative counsel or parliamentary counsel.[11] In 1951, Sir Granville Ram vividly described parliamentary counsel in the following manner.[12]

> "Most of them know that drafting of bills is done by a person called Parliamentary Counsel, who are seldom seen and never heard and whom they imagine to be rather queer persons engaged in mole-like activities beneath the surface of the legal world."

The role played by parliamentary counsel in the legislative process is unique in the UK and other Commonwealth countries as legislative drafting in non-Commonwealth countries is generally handled by persons who are "specialists" in the field of a particular subject with which the legislation is concerned and not by persons who are specially trained and employed for that purpose by the state.[13] The parliamentary counsel have, however, special responsibilities in regard to legislative transformation of treaties. These responsibilities become complicated when parliamentary counsel receive inadequate written instructions for the drafting of legislation relating to treaties at national level.

Thornton provides eight valuable practical points in order to achieve the object and purpose of treaties in the legislative transformation at national level.[14] They are:

(1) declaring the object and purpose of such legislation;

(2) identification of the parties to the treaty;

(3) inclusion of an explanatory preamble;

(4) enabling provisions to amend the treaty incorporated in a Schedule by way of subsidiary legislation;

(5) elaboration of the legislation by subsidiary legislation;

(6) provisions to deal with other inconsistent national legislation;

(7) provisions to deal with inconsistency with the official text;

(8) inclusion of a provision to the effect that the terms and expressions of the implementing legislation to have the same meaning as in the treaty.

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impartiality.

[11] In 1986, at the Conference of Commonwealth Association of Legislative Counsel (CALC), in Ocho Rios, Jamaica, it was decided by a motion forwarded by "draftswomen" of the Association that the use of the term "draftsmen" should be discarded in preference to "legislative counsel" or "parliamentary counsel".

[12] Sir Granville Ram, *The Improvement of the Statute Book*, 1 JSPT (1947-51), at 442.

[13] This expertise of parliamentary counsel is sometimes not taken into account in the recruitment of personnel by international organisations to provide technical assistance for the preparation and drafting of legislation relating to treaties at national level.

[14] Thornton, n.3 above, at p.239.

In the preparation of implementing legislation, there is also the responsibility for parliamentary counsel to comply with the domestic constitution, reservations and interpretive declarations made to such treaties by states parties. In federal states, the division of legislative powers between the centre and the provinces also impacts on the preparation of such legislation relating to treaties.[15] The question as to whether resort should be made to primary or secondary legislation is another important practical consideration that has to be taken into account to reduce the cost of implementation. As parliamentary counsel are generally responsible only for the structure and form of a Parliamentary Bill, the policy is usually determined by the instructing department. However, in the case of legislative transformation of treaties, as the form and policy are so inextricably interwoven, the parliamentary counsel tend to play a more critical role in determining the policy itself as contained in the treaty when drafting legislation relating to such treaties.[16]

b. Parliamentary Process

The parliamentary process relating to legislative transformation of treaties is much the same as for any other ordinary legislation in the UK and other Commonwealth countries.[17] The draft Bills relating to treaties go through the same three readings in Parliament. In larger Commonwealth countries, such Bills are generally referred to a Standing Committee of the House while in the smaller countries, they are taken up by the Committee of the whole House.[18] In the second reading of the Bill, amendments relating to conformity with the treaty may be raised by members of Parliament. In Committee, amendments may be moved which are within the objects of the Bill. Parliamentary counsel assist the passage of such Bills through the Parliament until they are finally passed into legislation.[19] The above legislative procedure is avoided in some Commonwealth countries by adopting treaties by way of a Resolution of Parliament or by granting ministers the power to transform treaties by way of subsidiary legislation or collective agreements.[20]

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[15] See *Commonwealth v. Tasmania*, [1983] 46 ALR 625; *AG Canada v. AG Ontario* [1937] AC 326 PC.

[16] This is an empirical observation made by some of the parliamentary counsel at informal meetings of the CALC. In small countries of the Commonwealth, the policy is undoubtedly determined by reference to the treaty by parliamentary counsel himself.

[17] In the UK treaties which require ratification are generally laid before Parliament in terms of the Ponsonby Rule for 21 days before implementing legislation is introduced in Parliament.

[18] There is, however, nothing comparable in the Commonwealth countries to the Foreign Affairs Committee of the US Senate where treaties are scrupulously debated in the Senate before submission to the President for ratification.

[19] Ram, n.10 above, at 442-3. Sir Granville Ram said "Even when a Bill is transferred from the anvil to be tempered or perhaps destroyed, in the fires of Parliament, the draftsman must still continue to hold the tongs and use his shaping hammer as and when he can".

[20] See s.21(2) of the Constitution of Sierra Leone; C W Jenks, *The application of International Labour Conventions by Means of Collective Agreements*, 19 Zeitschrift für Ausländisches Öffentliches Recht und Volkerrecht, (1958), 197-224.

It must, however, be borne in mind that the role of Parliament in regard to legislative transformation of treaties is that of a "law-transformer" and not that of a "law-giver". For national Parliaments cannot competently change the content of treaties in the process of enacting such implementing legislation. However, the legislative transformation of treaties into national law provides the Parliament with a unique opportunity to participate effectively in matters relating to foreign affairs.[21]

II. Legislative Practices

Within the Commonwealth, various legislative practices are "employed" or rather "invented" for the transformation of treaties into national legislation. It is proposed to illustrate some of these legislative practices and assess their suitability in regard to transformation of treaties at national level.

In the United Kingdom, Francis Bennion has classified the existing legislative practices into direct and indirect methods.[22] The direct method involves the embodiment in an Act of Parliament of the same words or different words to convey the object and purpose of the treaty. The indirect method involves the transformation of the treaty in a Schedule to an Act of Parliament and grants the treaty the force of law with or without modifications. This broad classification does not however illustrate the ingenious variations and permutations evolved by parliamentary counsel in the UK and other Commonwealth countries. In evaluating these methods, Bennion expresses the view that the most satisfactory way of giving effect to a treaty is by the direct method as "internationally agreed words" are sometimes not easily assimilable to the legislative style, syntax, and structure of UK legislation.[23] He says that this method is superior as it may avoid difficulties relating to the interpretation by domestic courts of such legislation at national level. However, he concludes that the direct method does not serve the need of uniformity in the interpretation of implementing legislation at national level. He therefore concedes, despite his personal preference, that the indirect method is adopted more frequently in the UK and in other Commonwealth countries.

Thornton outlines five legislative practices found within the Commonwealth.[24] Four of these practices are identical to an earlier classification made by F A Mann.[25] According to Thornton, these five legislative practices are:

(a) the legislation may contain no reference to the treaty

(b) the legislation may refer to the treaty but not set it out in the Act, or may give effect to it by separate substantive provisions without granting the treaty the force of law;

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[21] C Carstairs, and R Ware, *Parliament and International Relations*, (Open University Press: 1991) pp.37-49.

[22] Bennion, n.3 above, at p.460.

[23] Ibid., Bennion says: "The internationally agreed words cannot be suited to the legal systems of every participating state, and difficulties of interpretation must follow from indirect enactment. From this point of view it is best to produce a version tailored to the municipal system of the country concerned".

[24] Thornton, n.3 above at p.236.

[25] F A Mann, *Interpretation of Uniform Statutes*, (1946) 62 LQR 278.

3. *The legislation may set out the treaty in a Schedule only for purposes of information or reference*

An example of this practice is found in the Antarctic Treaty Act 1967 (UK). As with practice (2), effect is given to the treaty by substantive provisions of the Act and not by endowing the treaty with the force of law. The advantage is that the treaty is easily accessible to the statute law user. On the grounds of its fuller communication, practice (3) is to be preferred to practices (1) and (2).

4. *The legislation may set out the treaty in a Schedule and endow it, or part of it, with the force of law*

Examples of this practice are: Uniform Laws on International Sales Act 1967 (UK), Carriage of Goods by Road Act 1965 (UK), Consular Relations Act 1968 (UK), the Non-Citizens (Registration, Immigration and Expulsion) (Amendment) Act 1980 (Sierra Leone) and Malaysian Geneva Convention Act 1962.

5. *The legislation may endow the treaty with the force of law without reproducing it in a Schedule*

An example of this practice is found in section 3(1) of the International Transport Convention Act 1983 (UK). There are numerous instances where a section or part of a treaty is given effect by reference but not the whole treaty.

Uniformity is most likely to be achieved when practices (4) and (5) are adopted. This can be done only if the contents of the treaty are capable of implementation in this manner into the domestic law. The consequential amendments to the domestic legislation are absolutely necessary whenever this practice is adopted.

6. *The legislation may empower the executive to give effect to a treaty by way of subsidiary legislation or by way of executive action*

Examples of this practice are – The Shipping Act (Canada), Canada Post Corporation Act (Canada), Marine Pollution Prevention Act 1982 (Sri Lanka), the Shipping Act 1981 (Barbados) and section 69 of National Parks and Wildlife Conservation Act 1975 (Australia).

7. *A resolution of Parliament or collective agreement may give effect to a treaty*

Examples of this practice of implementation are found in Article 157 of Chapter XX of the Constitution of Sri Lanka (1978), section 22 of the Republican Constitution of Sierra Leone (1978), and the Statutory Rules and Orders No.31 of 1988 (Antigua and Barbuda).

8. *The legislation may require implementation of legislation according to treaty law*

Section 2(2) of the Fisheries Limits Act 1977, (UK): "A foreign fishing boat shall not enter ... except for a purpose recognised by any convention for the time being in force".

9. *The existing legislation may be used to give effect to a treaty or a treaty may become automatically implemented into municipal law by existing legislation*

Section 38(1) of the Aliens Control Act 1966 (Kingdom of Lesotho). See also *Molefi Legal Adviser* [1970] 3 All ER 725.

b. Which Legislative Practice is more Suitable?

It is difficult to identify which legislative practice is more suitable for legislative transformation of treaties in the UK and elsewhere. The suitability of a particular legislative practice depends to a large extent on the nature and subject-matter of the treaty.[32] As a result, no hard and fast rule can be laid down regarding the desirability of any of the above legislative practices. Since Parliament takes the role of a "law transformer" in regard to the legislative transformation of treaties, there is very little that can be done to avoid any ambiguities or uncertainties appearing in the treaty itself. It must be noted that when a treaty is appended as a Schedule to an Act of Parliament and given the force of law, it is paradoxically the treaty that is interpreted by the domestic courts at national level and therefore interpretation of the treaty is dependent on the way it is transformed. For these reasons, it is necessary to choose the most suitable legislative practice that will help to attain the object and purpose of a treaty at a national level having regard to its nature, content and complexity, as there is no "golden rule" as to which legislative practice is the most suitable.[33]

III. Legislative Problems

There are many legislative problems relating to the transformation of treaties which have not yet been critically reviewed in the Commonwealth. Some of these legislative problems are controversial and require careful examination in order to avoid difficulties in the transformation of treaties at national level.

The transformation of treaties by way of subsidiary legislation creates enormous legislative problems in the UK and other Commonwealth countries. In some Commonwealth countries, the principal Act makes provision for the entirety of the treaty to be transformed by subsidiary legislation. For example, Canada Post Corporation Act 1970 RSC and the Shipping Act 1970 RSC empowers the Minister to implement the entirety of treaties relating to Postal Union Conventions of the UPU and Load Line Conventions and Safety of Sea Conventions of the IMO by subsidiary legislation.[34] Similarly, the Merchant Shipping Act 1885 of Antigua and Barbuda grants the minister such power under section 289 in the following manner:

> "289. (1) In order to prevent, combat or contain damage done by pollution of the sea by oil from ships and also to compensate the victims of oil pollution, the Minister may by notice ratify the following international conventions--

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[32] Sir Henry de Waal, QC, First Parliamentary Counsel (UK) in a personal communication indicated that "which method is adopted depends on the nature of the treaty but the practice is increasingly to adopt the former (indirect method), adding ancillary provisions as may be necessary".

[33] "The golden rule is that there are no golden rules." George Bernard Shaw, (1903) *Man and Superman: Maxims for Revolutionists.*

[34] In Australia, similar powers are given to the Governor-General under s.69 of the National Parks and Wildlife Conservation Act 1975 to implement a number of treaties (including RAMSAR and CITES) by way of Regulations. Similar provisions are also found in s.17 of the Marine Pollution Prevention Act 1982 of Sri Lanka.

(i) International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended from time to time.

(ii) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage, 1962.

(iii) International Convention on Civil Liability for Oil Pollution Damage, 1969,

(iv) International Convention for the Prevention of Pollution from Ships, 1973, as amended by the 1978 Protocol.

(2) The Minister shall make regulations for implementing the provisions of this Part relating to the prohibitions of discharge of oil."

It is unlikely that the grant of such wide powers to the Executive to implement a treaty at national level could be challenged on the basis of *vires*.[35] However, regulations made under such enabling powers may be reviewed by domestic courts as to whether the Executive has acted within the provisions of the treaty. It is also difficult to find any decision in Commonwealth countries where such regulations have been reviewed for validity under the doctrine of *vires* for violation of the object and purpose of the treaty. This indeed is an unsatisfactory situation as the Executive could interpret the treaty and implement it in the way it thinks best. Professor Crawford states:

> "In such cases the Courts would be extremely reluctant to substitute their own view of an issue for the view of the primary decision maker. In the absence of *mala fides* or the complete lack of any evidence to support judgment, such a decision becomes in practice unreviewable."

The legislative transformation of a treaty by way of reference without reproducing the treaty as a Schedule to an Act of Parliament may also create a different kind of a legislative problem. In the International Transport Conventions Act 1983 (UK), the provisions of the Convention Concerning International Carriage by Rail are not reproduced in the Schedule, but the Convention is given the force of law by section 1(3). It provides:

> "The provisions having the force of law by virtue of this section are–
>
> (a) the provisions of the Convention as presented to Parliament in April 1982 and set out in Command Paper 8535; and
>
> (b) as respects Annexes I, II and III to Appendix B to the Convention, the provisions referred to in that Command Paper;
>
> and judicial notice shall be taken of those provisions as if they were contained in this Act."

Professor Driedger has commented on the incorporation by reference of non-statutory material.[36]

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[35] T StJ N Bates, *Parliament, Policy and Delegated Power*, 1986 Stat. LR 114. He says at 115 that "competence once granted will not be reviewed by the courts".

[36] E Driedger, n.4 above, at 213.

"Material other than statutes may be incorporated by reference ... Referential legislation of this character presents problems ... The reader – layman, judge or lawyer – must go elsewhere to find the law, and how can he be sure that he has a correct or authentic text? The second problem is whether the Statue incorporates the material as it exists the day the statute is passed or as it is amended from time to time?"

Thus it appears that the UK parliamentary counsel, in drafting section 1(3) of the International Transport Conventions Act 1983 have cleverly avoided some of the concerns raised by Professor Driedger.

In "small" and "micro" states[37] of the Commonwealth however, printing and other difficulties make it virtually impossible to reproduce prolix treaties in Schedules. As a result, the legislative practice of transforming a treaty without reproducing the treaty in a Schedule serves a useful purpose and may be justified in exceptional circumstances.[38]

This practice of legislative transformation by reference is controversial and may be subjected to criticism. However, in no circumstances should the provisions of a treaty be incorporated by reference and be made to override the provisions of ordinary legislation prospectively as it would result in elevating the treaty to the status of "a higher law". Such a legislative practice is found in section 313 of the Shipping Act 1981 of Barbados and reads as follows:

"313. Where a provision of an international convention or international regulation and a provision of this Act or any regulation in force by virtue of this Act conflict in any manner, the provision of the international convention or international regulation prevails unless the Minister otherwise provides by such regulations as he may make in that behalf."

IV. Conclusion

The legislative transformation of treaties into national law is a difficult exercise due to inherent differences between a treaty and legislation.[39] Treaties are a product of intense negotiations among states with political, economic, and cultural differences. The negotiators are generally not lawyers but diplomats who seek to reach agreement by

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[37] Micro states are small states in the Commonwealth with less than 200,000 population. Small states have a population between 200,000 and 2 million.

[38] Reproduction of the protocols of the Chicago Convention 1944 under principal legislation may pose both technical and printing difficulties in a majority of small and micro states of the Commonwealth. The author encountered such difficulties in the reproduction of Protocols of the Chicago Convention under the Civil Aviation Act 1986 (No. 4 of 1986) in the state of St Christopher and Nevis.

[39] *The Blonde [1992]* 1AC 313 (PC). Lord Sumner while interpreting the Hague Convention 1907 said "It is expressed by what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety or scholarship or exactness of literary idiom". See also Bennion, n.3 above, at p.461 - "It is rather like saying that, by Act of Parliament, a woman shall be a man. Inconveniences ensue".

accommodation and compromise through vague and ambiguous language.[40] The legislative transformation of treaties therefore inevitably becomes a challenging task as the style, tradition, and language of treaties differ substantially from that of legislation. This is compounded in Commonwealth countries where the language of legislation has changed from English to national languages: Malaysia, Sri Lanka, Maldives, Malta, Hong Kong, Cyprus, India and Pakistan are all examples of this.

Legislative transformation of treaties requires on the one hand certainty and on the other hand uniformity. When the provisions of a treaty are "re-phrased" or "re-drafted" in order to attain certainty, it is always possible that uniformity may be lost on the "anvil of the draftsman's table".[41] The combination of uniformity and certainty cannot be easily attained in the legislative transformation of treaties.[42] "Fit legislation" as Justice Frankfurter said, can only be achieved by entrusting this kind of work "only to those who are equal to its demands".[43]

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[40] Mr P E Johnson, QC, First Parliamentary Counsel (Canada) in a personal communication said "Due to the fact that the treaties are drafted by the parties thereto after prolonged negotiation and compromise, the terms of the resulting treaty are often intentionally vague and ambiguous; the difficulties of the drafter of the domestic legislation often became apparent – how to incorporate the "compromise" flexible approach as reflected in the provisions of the treaty while maintaining the degree of precision required for domestic legislation."

[41] Mr I M L Turnbull, QC, First Parliamentary Counsel (Australia) in a personal communication indicated "To put a treaty into precise language, one has to interpret it. One can never be certain of interpreting it correctly". For example, the undefined term "pollution damage" in the Civil Liability Convention of IMO 1969 may have different meanings in the interpretation of it in different legal systems.

[42] Sir William Dale, *Legislative Drafting: A New Approach* (Butterworths: 1975). Sir William advocates that the legislative style of the UK should be reformed. It is submitted that this is an area where such an experiment in legislative drafting could be easily undertaken in order to avoid the excessive "formality" and also to achieve uniformity at national level in the implementation of such legislation in the UK and other Commonwealth countries.

[43] This article first appeared in the *Statute Law Review*. It is published here by the kind permission of the editor of that journal (Professor St John Bates, whose article about Tynwald appears earlier in this edition of *The Loophole*) and its publisher, The Oxford University Press.

THE TEMPLATE

A GUIDE FOR THE ANALYSIS OF COMPLEX LEGISLATION

Spring Yeun Ching Fung
&
Anthony Watson-Brown

This short paper describes our approach to writing a research paper undertaken by us in February, March and April 1994 under the auspices of the Institute of Advanced Legal Studies (IALS) at London University with the assistance of Nuffield Foundation Fellowships. It also introduces the resulting research paper.

The concept of the Template arose from our informal discussions in Hong Kong during the latter part of 1993. Both of us work on the Style and Practices Committee of the Law Drafting Division of the Attorney General's Chambers in Hong Kong. We had noticed that the complexity of the approach of some of the styles adopted in drafting English legislation in Hong Kong was not assisting with the translation and rendering of an authentic Chinese text of the laws of Hong Kong. The English language version of the legislation written in certain styles is often difficult to understand even for legally trained persons. That in turn hinders the production of an authentic Chinese version.

Looking at the project purely in the English language context, we thought that it should be possible to devise a short guide that might assist translators in coming to grips with the meaning of complex legislation before commencing the onerous task of translating the text.

We were granted the fellowships on Christmas Eve 1993, to start the project on 1 February 1994. After a fairly frantic rush to put our individual programmes into the best possible order prior to taking a 3 month sabbatical, we flew out of Hong Kong in late January. We were greeted by the Administrative staff of the IALS and soon met the Director, Professor Terence Daintith. Hilary Lewis-Rutley ran the programme and Sir William Dale was assigned as our supervisor.

Our first task was to assess the size of the task. Sir William gave us free access to his collection of papers and texts. The IALS library and SOAS and London University Libraries were also made available to us for our research. For the next 5 weeks we read our way though 14 law texts, 7 writing texts, 45 published articles and another dozen unpublished papers plus cases and statutes. We also attended a number of seminars relating to law drafting, legal education, seminar presentation and other legal topics. During our attachment we also presented a paper for the Government Legal Advisers Course conducted by the IALS.

Fairly early on, Sir William asked the question "Why 'The Template'?". A quick rush to the dictionary gave the answer, if figuratively applied by us:

> **template**, a pattern, usually thin board or metal plate, used as a guide for cutting or drilling metal, stone, wood, etc.

We were aiming to produce a short analytical guide. This was to allow a non-lawyer to take apart a legislative sentence to find its constituent parts, trim away wordiness and re-assemble the sentence in a legislative syntax. We wanted the Template to have some justification in law and in grammar. We also wanted the resulting sentence as communicative as possible of the underlying meaning.

Our 5 weeks of reading revealed that George Coode had done most of the work for us in 1843! Professor Elmer Driedger critically analysed Coode's work in the late 1960s and early 1970s. Robert Dick, a Canadian Queen's Counsel and law drafter, critiqued Driedger. Our job became relatively simple. Take Coode, answer Driedger's problems with Coode, having regard to Dick and throw in the work done by the Canadians and Australians on modernising legislative language. As a comparative measure we looked at the work carried out in the private and commercial sectors particularly in the United Kingdom. All these confirmed our view that communication as a basic theme was correct. In about 10 days we designed the Template document. It is short, 2 pages. We prepared 2 sheets as analysis guides. So in 4 pages we had a Template with 2 pages of working instructions.

How could we justify its operation? For 5 weeks we analysed 10 sections. Some were drawn from Hong Kong legislation, some from examples given in Driedger's work. A little over half of the published paper is taken up by the notes we made on these initial analysis forays. While some may not agree with the results in every case, those where differences lie are those where courts would have found similar discrepancies. It was interesting to see how the rules designed by Coode about 150 years ago applied with the very minor adaptations to take account of the changes in circumstances of the section in that time.

What is the Template and how does it work? In modern legislation, the subsection is the basic legislative sentence. Using the Coode analysis of "legal subject", "legal action", "case" and "condition", we added the "main theme" and "precondition". Most legislative sentences involve one or more of the identified attributes. If they do not, then they fall squarely into Coode's category of "impertinences".

Having read through the section the reader seeks out the "main theme". Usually (but not always) it coincides with the margin note or section heading. With the main theme in mind, the reader then seeks the "legal subject". This is usually found in the subject of the active voice version of the first sentence of a section. It may not be there but it usually is. The legal subject is the actor of the legal action. This actor may be qualified in a number of ways.

If the qualification of the legal subject is more than a mere complementary phrase, the qualification will probably be a "precondition". Coode recognised this but left the term as "condition". The reason for identifying a precondition is that these are better understood if placed earlier rather than later in a sentence.

The "legal action" is next sought. It is usually the verb and its modifiers in the active voice version of the legislative sentence. Regardless of the grammar, the legal action is, as its name implies, the action that the law envisages in the particular legislative sentence. The action is often not just the verb but a verb with modifications. When the modifications are significant qualifications, these will be identified as the "case" and "condition" in which the legal action applies. If the modification of the legal action is a

"precondition", it will be treated in the same way as a precondition that qualifies the legal subject. The case and condition are also used as building blocks for the legislative sentence.

Once the building blocks are identified, they are re-assembled as an active voice sentence structured as "legal subject"/"precondition" (these are often interchangeable), "legal action", "case"/"condition" (these are also often interchangeable).

The paper consists of 6 Parts. Part 1 introduces the concept of the Template. Parts 2 and 3 deal with the theory behind the system of analysis and the theory of law drafting on which the analysis and re-assembly are based. Part 4 sets out some elementary style rules for the re-assembly process. Part 5 describes the Template and sets out the analysis sheets. The final Part 6 is the notes we took when we first tested the Template.

By late April we had prepared a working paper that ran to about 140 pages in draft. A synopsis of this was circulated to a select group of academics, parliamentary counsel and legal practitioners. We presented the paper to a lively reception by about 20 people in the basement of Charles Clore House in Russell Square. While we did not convince all of the audience of all of the points made on the issue raised, there was a consensus that the Template appeared to have a valid function in analysing legislation particularly in preparing it for translation. Many present, however, supported the totality of the paper, particularly the criticism of the archaic styles that still permeate our precedents. The brief elements of style approach were also well received by many of the attendees.

The paper is available through the Institute of Advanced Legal Studies, Charles Clore House, 17 Russell Square, London WC1B 8DR. The cost is £5.50 sterling. Whether you are involved in law translation or not, the Template is a relevant contemporary discussion of issues that affect every law draftsman and is commended to you for that reason.

A WHICH HUNT

That and which

The following is an extract from a drafting circular recently issued in the Parliamentary Counsel's Office, New South Wales, Australia. While it does not claim any particular originality, it might be of interest to readers.

We have on a number of occasions discussed whether there is a difference between "that" and "which" in at least some contexts, and we have noted that normal usage does not always observe the distinction and that there are numerous instances in the statute book where it has been disregarded.

Nevertheless, we have resolved to use "that" where it appears to be appropriate. Perhaps the following discussion will assist with understanding the distinction.

Garner says that "[T]he distinction eludes otherwise brilliant minds".[1]

He explains the distinction in terms of restrictive clauses and nonrestrictive clauses:

> Restrictive clauses, which usually begin with *that*, are not set off by commas. These clauses are essential to the grammatical and logical completeness of a sentence.
>
> > The fact that most swayed Judge X was the defendants' destruction of evidence.
>
> Nonrestrictive clauses, which usually begin with *which*, are set off by commas. These clauses are so loosely connected with the essential meaning of the sentence that they might have been omitted without a change in that essential meaning.
>
> > The Supreme Court, [which is] the forum of last resort in the [US] federal system, hears more and more cases every year.
>
> The simplest test for determining the type of relative clause is this: if putting the clause in parentheses leaves the basic meaning of the sentence intact, the clause is nonrestrictive (properly introduced by *which*). If the sentence is rendered nonsensical in context when the clause is put in parentheses, or gives the sentence an entirely different sense, then it is restrictive (properly introduced by *that*).

Bryson[2] explains the distinction in terms of defining and non-defining clauses:

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[1] Bryan A. Garner, *The Elements of Legal Style* (1991) p141.

[2] Bill Bryson, *The Penguin Dictionary of Troublesome Words* (2nd ed) p159.

To understand the distinctions between *that* and *which* it is necessary to understand defining and non-defining clauses. Learning these distinctions is not, it must be said, anyone's idea of a good time, but it is one technical aspect of good grammar that every professional user of English should understand because it is at the root of an assortment of grammatical errors.

A non-defining clause is one that can be regarded as parenthetical: "The tree, *which had no leaves*, was a birch." The italicized words are effectively an aside and could be deleted. The real point of the sentence is that the tree was a birch; its leaflessness is incidental. A defining clause is one that is essential to the sense of the sentence: "The tree *that had no leaves* was a birch". Here the leaflessness is a defining characteristic; it helps us to distinguish that tree from other trees.

In correct usage *that* is always used to indicate defining clauses and *which* to indicate non-defining ones. Defining clauses should never be set off with commas and non-defining clauses always should. On that much the authorities are agreed. Where divergence creeps in is on the question of how strictly the distinctions should be observed.

Strunk and White[3] explain the distinction in similar terms:

> *That* is the defining, or restrictive pronoun, *which* the non-defining, or nonrestrictive. ...
>
> > The lawn mower that is broken is in the garage. (Tells which one)
> >
> > The lawn mower, which is broken, is in the garage. (Adds a fact about the only mower in question).

In many cases, the distinction will not make much difference. In the following example the distinction could however be important:

> Evidence for the prosecution must be given by written statements that are admissible as evidence.
>
> Evidence for the prosecution must be given by written statements, which are admissible as evidence.

Perhaps we might conclude with Strunk and White that "The careful writer, watchful for small conveniences, goes *which-hunting*, removes the defining *whiches*, and by doing so improves his [or her] work".[4]

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[3] William Strunk & E.B. White, *The Elements of Style* (3rd ed) p59.

[4] Idem.

Dennis Murphy
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SHALL REVISITED

BY

Anthony Watson-Brown[1]

While researching material for the preparation of a guide to assist in the analysis of complex legislation,[2] I came across the recent (1989) arguments in Australia against the use of "shall" in legal documents. The arguments for the preservation of its use raised in answer at the time were also available to me as were the traditional texts on legal drafting that had always warned about the misuses of "shall".

The issues in favour of dropping "shall" were addressed in a piecemeal manner that does not allow for a balanced assessment of the benefits and pitfalls of using "shall". I have a view on its use which I express later, but I would like to address the subject looking at all sides first, as the issues are not simply "yes" or "no".

Time frames, etc., in legislation and legal documents

It is worthwhile looking at where "shall" has problems in legal drafting. These include the grammatical description of "shall" in terms of tense, aspect and mood and its historical and linguistic development.

A typical comment on the use of "shall" in English legislation is made by Mrs L Dodova, a Bulgarian academic lawyer and law translator. Writing in the *Statute Law Review*[3] she says:

> "The issue in the case of 'shall' is not so much, however, that of 'shall' versus 'will' or of 'shall' versus 'may', but that of 'shall' versus the present tense."

As the law is always speaking, the usual convention in common law countries is to draft in the present tense:[4] That is not to say future time has no place in a legislative sentence or legal document.

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[1] The author is a barrister admitted in a number of jurisdictions in Australia and in Hong Kong where he is a Senior Assistant Law Draftsman in the Attorney-General's Chambers. He was a 1994 Nuffield Fellow at the Institute of Advanced Legal Studies of London University.

[2] Spring Y C Fung & Anthony Watson-Brown, *The Template*, 1994 IALS Research Working Paper.

[3] (1989) Vol. 10, Issue 1, Summer, Statute Law Review 71.

[4] Driedger E A, 1976, *The Composition of Legislation; Legislative Forms and Precedents* (Department of Justice, Ottawa) page 8 and following; Drafting Conventions, Uniform Law Conference, Canada, section 24 (NB: "shall" is a major "exception"); Russell, Sir Alison K C, 1938, *Legislative Drafting and Forms*, page 107.

Driedger refers to the "enacting verb" when speaking of the requirement for present tense. Using George Coode's analysis[5] of "legal subject", "legal action", "case" and "condition", this verb is the essence of the legal action which should be expressed in the present tense. Cases and conditions that apply to the legal action may be expressed in time frames other than the present tense.

In dealing with tense, Reed Dickerson[6] says:

> "Because provisions of continuing effect speak as of the time they are read, they should be written in the present tense."

Other time frames

Professor Jack Davies[7] describes the use of future tense in legislation as:

> "Future tense is seldom needed in statutes, for a legislative act applies to the ever-present present."

This is consistent with the statement by Professor Geoffrey Leech[8] where he notes present tense as appropriate for "eternal" truths of a scientific or proverbial nature, ie, "laws". The description of a fact situation qualifying the legal action can give rise to three forms of present and past tense, namely, simple, perfect and progressive. The future time is normally only found in some subordinate clauses, ie, cases and conditions.

The imperative and some confusion

Driedger[9] says that the imperative is never used as the imperative is not used in the third person which is the person in which law is written. Sir Alison Russell[10] notes that "shall" may be used as an imperative, but never in the future tense. Similar conflicting remarks are heard privately when discussing the question of legal writing. This confusion relates to using the phrase "the imperative mood" to identify "modality". The imperative mood is not found in legislation as legislation is written in the form of statements. The imperative mood is generally found in speech, usually in the form of commands or suggestions. Commands in law are more often accompanied by a modal auxiliary which does not create an imperative mood but does effect a command.

In legislation "shall" is used in the third person (as that is the person in which legislation is written). The same principle applies to most legal documents although some modern

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[5] *Coode on Legislative Expression*, 2nd ed, 1852, reproduced in Driedger (cited above) as Appendix 1, page 317 at page 322.

[6] Reed Dickerson 1981, *Materials on Legal Drafting* (West Publishing).

[7] Davies, Professor Jack, *Legislative Law and Process in a Nutshell* (West Publishing).

[8] Leech, Professor Geoffrey, 1987, *Meaning and the English Verb*, 2nd ed, Longman, page 9.

[9] Driedger, page 8.

[10] Russell, page 107.

consumer documents are written in the first and second persons and wills are generally expressed in the first and third persons.

"Shall", in legislation, should be used to indicate a command. When used in this manner, there seems to be no conflict between the primary drafting rule referred to, ie, to use the present tense when writing a law. When compared with the common use of the verb outside the law, a conflict appears to arise as its popular use appears to be to use it to signify futurity.

The origins of "shall"

George Coode[11] noted the origin of "shall" as being from the Old English "*scealan*", to owe, to be obliged. He claimed the origin of "shall" lay in an obligation and the word originally had this sense of mandatory compulsion. *The Shorter Oxford Dictionary* traces other origins that indicate a relationship to teutonic forms indicating guilt and debt.

The other old English word that expressed the speaker's intention (rather than obligation) to do something is "*willan*". This word and "shall" are discussed in a detailed way by Leslie K Arnovik[12] in her discussion of the development of future constructions in English as both "shall" and "will" developed secondary meanings relating to future intention as well as the original meanings of obligation and current intention.

The fist relatively modern discussion of "shall" and "will" was recorded by Bishop John Wallis[13] in 1653 when he noted:

> " 'Shall' and 'will' indicate the future: 'it shall burn, it will burn'. It is difficult for foreigners to know when to use the first form and when the second (we do not use them interchangeably) and no other description that I have seen has given any rules for guidance, so I thought I ought to give some; if these rules are observed they will prevent any mistakes being made."

Arnovik commented on Wallis' statement by adding:

> "He therefore explained that in order for a speaker to make a promise, he should use 'will' in the first person and 'shall' in the second and third persons. The forms for making a prediction are reversed: 'shall' for the first person, 'will' in the second and third persons occur in predictive statements."

Wallis' rules have generally been followed to varying degrees since his time until recently. In the latter part of the 20th century, the formal distinction between "shall" and "will" in English usage has deteriorated. Today, English users regularly interchange the two.

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[11] Driedger, page 322.

[12] Arnovik, Leslie K, 1990, *The Development of Future Constructions in English*, (Peter Lang, New York).

[13] Arnovik, page 2.

I was able to confirm this at least anecdotally in a meeting with Professor Sidney Greenbaum of the English Department of University College of London University. During the meeting Professor Greenbaum looked at the corpus of Southern English language held on the Department's computer. The usage of "shall" to "will" was in the order of 1:10. while the spoken use of "shall" was generally in conformance with Bishop Wallis' rules, the written usage showed false imperatives in legal and quasi legal documents. It is interesting that the legal sector is the only part of society that has clung to the 340-year old Wallis' Rules for "shall" and "will".

In February 1989 the Current Topics section of the *Australian Law Journal* ran an article entitled *Must we continue with "shall"*.[14] The authors, Professor Robert Eagleson and Ms Michele Asprey, noted that the new practice of replacing "shall" with "must" in legal documents accorded with the general usage in which "must" is the normal modal auxiliary to express obligation. They cited Quirk, Greenbaum, Leech and Svartik, *A Comprehensive Grammar of the English Language,* Gower, *A Complete Plain Words* and a number of current dictionaries in support. The practice reflected the direction taken by the Victorian Parliamentary Counsel.

The authorities cited certainly indicated that the use of "shall" in the third person no longer guaranteed a sense of mandatory obligation. On the contrary, "shall" was more likely to be used to refer to future time when used in any grammatical person. A quantum leap was taken by the writers to presume that "must" was the proper modal auxiliary to indicate obligation even though it followed the Victorian precedent.[15] In all other regards their arguments display sound logic.

The reply *In defence of "shall"*[16] came from Mr J M Bennett. His argument was that there was a fundamental flaw in trying to find a word, for legal purposes, that is inelastic and having some absolute meaning. Skilled legal draftsmen rely on judicial interpretation to devise a form of words capable of retaining a stable meaning over prolonged periods, despite changes in general, fashionable or idiomatic usage. His second argument is that little is gained and much lost by the proposed change. It would still be for the courts to decide where meanings are disputed to construe whatever words may be used in the context in which they have been used. He cited the judgment of Fullager J in the *Encyclopaedia Britannica* case[17] where the learned judge criticised a provision in the 1984 *Interpretation of Legislation Act* (Victoria) that required a mandatory interpretation be given to "shall" and a discretionary meaning be given to "may". He also cited a number of "less compelling" reasons for retaining "shall".

Bennet's final words are:

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[14] (1989) 63 AU 75.

[15] Plain English in Legislation, Ministerial Statement by Mr J H Kennan, Attorney-General to the Victorian Legislative Council, 7 May 1985.

[16] (1989) 63 AU 522.

[17] *Encylopaedia Britannica (Australia) v Director of Consumer Affairs* (1988) ASC 57, 840.

"In sum, it is submitted that it may not always be appropriate for drafting purposes to replace the word 'shall' by 'must'."[18]

The reply by Professor Eagleson[19] concedes that replacing "shall" by "must" will not cure all bad drafting ills. It directly addresses the arguments put and is worth reading in conjunction with the two earlier articles. I leave you to consider who won that particular debate.

The discussion has not been entirely restricted to Australian contributors. Mark Adler,[20] an English solicitor, deals with "shall" as follows:

"Using the present tense and 'shall':

Traditionally, 'I shall' and 'you will' both mean one thing, whereas 'I will' and 'you shall' mean something else. So few people know or care about the distinction that even if a speaker uses it correctly, the listener cannot be sure he is doing so, so the doubt about the meaning remains. Normal use now is for 'shall' to be replaced by 'will' to express the future and 'must' to express the imperative."

The meaning of "shall"

If we take the first step a person writing a legal document should take when confronted with an ambiguous word, we find "shall" has 10 meanings given to it in the *Concise Oxford Dictionary*.[21] *The Shorter Oxford Dictionary* gives not less than 29 meanings, many of which are now archaic. With that background, a lawyer should be wary of using the word, as it is not easy to see what is meant.

Fowler[22] says:

"... shall is used, chiefly in formal contexts and legal documents, or much more often futurity is allowed to be inferred from the context and the present tense is used."

The work does not identify the use of "shall" in legal writing other than in an indefinite future sense. Fowler[23] also envisages "shall" being used in the third person to indicate a promise or permission.

Legislative Drafting approaches to "shall"

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[18] (1989) 63 AU 522, 525.

[19] (1989) 63 AU 726.

[20] Adler, Mark, *Clarity for Lawyers*, (1990, The Law Society, London) at page 43.

[21] *Concise Oxford Dictionary of Current English*, 7th ed., 1982.

[22] Fowler, *Fowler's Modern English Usage*, 2nd ed, reprint 1986, page 550.

[23] Fowler, page 713.

Driedger[24] describes "shall" as a "legislative auxiliary". The reason for this appears to be that "shall" is difficult to place into a common English grammatical sense in the way it is used in legislation as it is no longer commonly used (except in legislation and legal documents). The proper description is that "shall" is a modal auxiliary. The further classification as a "legislative auxiliary" may be justified in linguistics. On plain English arguments, the classification of "shall" as a special legal classification would seemingly condemn its use in legislation.

Driedger's primary uses for "shall" as a legislative auxiliary are to create a universal duty and to create a universal prohibition. He also describes "shall" as a non-obligatory auxiliary in certain circumstances. He does this in an historical analysis of the law rather than as a justification of the uses described. This use as a "non-obligatory auxiliary" is found in:

(a) conditional clauses, which use he does not support for modern drafting,

(b) "divine ordination", which he also does not support for modern drafting,

(c) the creative "shall", which he notes has been superseded in modern drafting,

(d) the unintended command, which seems, on its face, to be poor drafting,

(e) granting a permission or power, where "may" would be better,

(f) commands to the inanimate, for which he suggests "must",

(g) a directory sense.

The seven uses of "shall" as a "non-obligatory" auxiliary are an abuse of "shall" in legislation and its abuse in these ways is extensive.

The problem with "shall" in modern times

It is not easy to see "shall" achieve the present indicative function of a verb in the third person. Lawyers trained in the English common law tradition may accept it, but others do not. In its primary meaning with the first person it is an auxiliary which is used to indicate future time. It is recognised by most people as such.[25] But we as drafters have been known to use, or attempt to use, "shall" to achieve a duty, an obligation, a power, a command, a conditional command, the creation of a body, a permission, a prohibition, and even an offence.

So which meaning do we give "shall" when it may mean any two or more of the above? If it is "future" in its operation, when does it ever "crystallise"?

A simple test for the use of "shall" in the modal form

How do we identify the use of "shall" in the modal form in a legal context? If we are able to substitute "must" or the expression "is required to" for "shall" in the text of a section,

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[24] Driedger, page 9.

[25] See L Dodova, (1989) Vol. 10, Issue 1, Summer, *Statute Law Review* 71.

then we have identified the proper modal use of "shall". If "must" or "is required to" does not fit, the use is not for a command or other mandatory requirement.

Alternatives to "shall"

Indeed, why do we use "shall"? Is it possible to achieve the meaning we require without "shall"? Driedger[26] suggests that in some circumstances "must" may be used:

> " 'Must' could be substituted for shall: it merely states an existence of an obligation and does not directly impose it."

I have some difficulty with this assertion. Professor Leech[27] explains the use of "must" as "that the speaker (in law, the legislation) is the person who exerts authority over the person(s) mentioned in the clause". (parenthesis added) He then analyses "have (got) to" as a similar modal auxiliary phrase. He further says:

> "The meaning of 'have (got) to' differs from the meaning of ... 'must' in that the authority of the speaker is not involved. 'Have (got) to' expresses obligation or requirement generally, without specifying the person exercising the power or influence."

Reed Dickerson[28] in his chapter on Fundamentals of Legal Drafting, dealing with mood says:

> *Semantic ambiguity: Mood*
>
> "The words 'shall' and 'shall not' normally imply that to accomplish the purpose of the provision someone must act or refrain from acting. Draftsmen often use these words merely to declare a legal result, rather than to prescribe a rule of conduct. In this usage the word 'shall' is not only unnecessary but involves a circumlocution in thought ('false imperative') because the purpose of the provision is achieved in the very act of declaring the legal result. Worse, use of the false imperative (eg, 'Each person shall be required to ...') may create doubt in particular instances whether the result is self-executing, as it is in a declaratory provision, or is effective only when required action is taken.
>
> In declaratory (ie self-executing) provisions, therefore, the draftsman should use the indicative, not the imperative, mood."

I would describe this "imperative mood" as the "modal form of shall" but agree with the principle of the use of the indicative mood for declaratory provisions. The false imperative is also discussed by Driedger[29] under his analysis of the uses of "shall".

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[26] Driedger, page 14.

[27] Leech, page 77, para 115.

[28] Reed Dickerson, page 93.

[29] Driedger, pages 12-14.

Reed Dickerson[30] sets out a number of conventions to overcome the problems of "shall", "may" and "must". I adopt them in the conclusion to this paper with minor adaptations. His explanations should be read and adopted.

Barbara Child[31] comments on similar drafting conventions by saying:

> "Lawyers and legislators alike make mistakes in attempting to follow these conventions. Professor Davies reports that the editorial check of bills that produces the most substantive corrections is the check for correct use of 'shall', 'may', 'must' and 'should'. (Jack Davies, *Legislative Law and Process in a Nutshell,* West Publishing). Even he is willing to use 'must' to exhort, rather than saving it strictly for conditions precedent, while he makes the major point about 'shall':
>
> > 'Shall' is the most powerful word in the legislative arsenal. It must not be squandered by misuse. 'Shall' must not be wasted to put verbs into the future tense."

Subjectivity of "must"

A principal difficult with "must" versus "have to" is noted by Leech[32] as:

> "... 'must' is subjective, in that it refers to what the speaker thinks is important or essential to do. 'Have to', on the other hand, is more objective, ie, the obligation tends to come from a source outside the speaker."

Plain English approaches

Mark Adler[33] deals with "shall" as follows:

> "*Using the present tense and 'shall'*
>
> A lot of breath has been spent on this now unpopular word, a favourite of legislators and of lawyers but otherwise almost obsolete.
>
> .....
>
> Even 'shall' can be ambiguous. Take this extract from a constitution:
>
> > The Chairman shall be a member of the committee.
>
> Does this limit the candidates for the chair or appoint the chairman to the committee? Admittedly, the same difficulty arises with 'must', so the sentence

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[30] Reed Dickerson, page 182.

[31] Child, Barbara, 1992, *Drafting Legal Documents: Principles and Practices* (2nd ed. West Publications), page 204.

[32] Leech, paragraph 121, page 82.

[33] Adler, page 43.

needs recasting, but it is a caution against the misleading claims of precision made in favour of 'shall'. It should read either

> The chair(man) must be appointed from the committee.

or

> The chair(man) has a place on the committee."

Adler does not have a preference for replacing "shall" with "must" but says that the drafter should analyse the sentence and decide which formula to use to make the sense clear. The more aggressive approach seems to be that espoused by Professor Eagleson and Ms Asprey.[34] As mentioned, they advocate the substitution of "shall" with "must". I support the Adler approach of choosing "horses for courses", ie, using what best suits the context.

"Shall" versus "may"

The problems with "shall" are not wholly tied up with futurity as the Bulgarian legal translator Dodova[35] allude to, but extend to a conflict with "may". Australian authors MacAdam and Smith[36] state:

> "The determination of whether a provision is mandatory or directory is one of the most unsatisfactory areas of law relating to statutory interpretation. The problem arises from the use of the words 'shall' and 'may' and similar terms as 'it shall be lawful' in statutes. Where the term 'shall' is used, the starting point is that the relevant provision is mandatory or in other words 'shall' in effect means 'must'. Where terms such as 'may' or 'it shall be lawful' are used, the starting point is that the provision is directory or in other words 'may' or 'it shall be lawful' in effect imply a discretion.
>
> Unfortunately these starting points are subject to many exceptions and it has been held in many cases that 'shall' is directory and, in effect, means 'may', or that 'may' or 'it shall be lawful' is mandatory and, in effect, means 'must'. Even more unfortunately these cases do not seem to contain any clear general principles which assist in the resolution of the mandatory versus directory dilemma."

Conclusions on "shall" and possible solutions

There is nothing in English that requires the use of "shall". The issues outlined may be a little revolutionary in the context of traditional drafting styles, but "shall" is a dangerous word to use. "Shall" is easily misunderstood (9 pages of "*Stroud's Judicial Dictionary*" is testament to this). It may well be dead in common parlance for the purposes that lawyers use it and that certainly leads to uncertainty.

The ability of "shall" to have several meanings should cause concern to legal writers. Public users of law need to have "shall" explained.

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[34] (1989) 63 AU 75.

[35] (1989) Vol.10, Issue 1, Summer, *Statute Law Review 71.*

[36] MacAdam and Smith, *Statutes*, 1985 (Butterworths, Australia), page 230.

A primary rule of drafting is that the law is always speaking so the appropriate tense of the legal action in a legislative sentence is the present tense. "Shall" has a primary sense of future time, and, even in its modal form, has an aspect of futurity.

"Shall" has been abused in the past and the statute book is littered with poor precedents.

In reviewing trends in jurisdictions that have moved towards a plain English approach, "shall" is progressively being replaced by "must". However, it is difficult to find a complete rationale for this change. "Must" has little or no connotation of future time but has other applications, eg, to indicate a requirement other than a command. It also causes traditionalists, privately at least, some feeling of rancour, possibly for the reasons given by Driedger, ie, it merely indicates the obligation without expressly imposing it, or possibly for the reasons given by Leech, ie, it is more subjective than "shall".

It is appropriate to remember that it is the LAW that is speaking. The natural implication of "is required to", "shall" or "must" is that it is a requirement of the law imposing an obligation to the extent necessary to enforce the statement of law.

Legal writers should have the option of using a suitable alternative if that alternative suits the circumstances of the task at hand.

Options

It is possible to place a duty on a person by using:

"A person is required to ..."

OR

"A person must ..."

OR (as described in Fowler as being more common)

"A person is to ..."

A prohibition can take the form:

"A person is required not to ..."

OR

"A person must not ..."

OR (more simply?)

"A person is not to ..."

The problems of "shall", "may" and "must" should be seen against the creation and negation of rights, legal authority, duties or conditions precedent. Reed Dickerson's conventions are basically sound. They are (with minor adaptations):

1. To create a right, say "is entitled to".

2. To create discretionary authority, say "may".

3. To create a duty, say "must" or "is required to".

4. To create a mere condition precedent, say "must" (eg "To be eligible to occupy the office of mayor, a person must ...").

5. To negate a right, say "is not entitled to".

6. To negate discretionary authority, say "may not".

7. To negate a duty or a mere condition precedent, say "is not required to".

8. To create a duty not to act (ie, a prohibition), say "must not" or "is required not to" (note the difference from negating a duty or mere condition precedent).

(TRANSLATION FROM FRENCH)

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LEGISLATIVE BIJURALISM IN A BILINGUAL CONTEXT:

MEETING THE CHALLENGE

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LEGISLATIVE BIJURALISM IN A BILINGUAL CONTEXT:

MEETING THE CHALLENGE

I. THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

1. Bijuralism

Ever since the enactment of the *Quebec Act, 1774* Canada, or what is now known as Canada, has been a land that – for better or worse – has two legal systems: the French civil law system in Quebec and the English common law system elsewhere. Even though the common law system had been imposed on the province of Quebec as a result of the conquest of the French by the British in 1760, just a few years later the *Quebec Act, 1774* allowed that province to return to French civil law for private law matters, although its public law would continue to be based on English common law.

This state of affairs was indirectly sanctioned by section 92 of the *Constitution Act, 1867*, giving the provinces exclusive legislative jurisdiction over property and civil rights.

Quebec is therefore governed both by the civil law (in relation to its private law) and by the common law (in relation to its public law). Since the federal government legislates first and foremost in the area of public law, it is essentially governed by common law principles. For example, Canadian criminal law, which is under the exclusive jurisdiction of the Parliament of Canada, is governed exclusively by the common law.

It happens fairly often, however, that laws enacted by the Parliament of Canada touch on concepts or notions involving private law, and more particularly provincial private law. A preliminary examination of federal legislation has turned up forty-seven statutes with points of contact with Quebec law. Parliament is even on occasion required to legislate on matters that definitely fall within the private law domain, such as bankruptcy legislation, which governs the legal relationships between the bankrupt and his or her creditors. Bankruptcy is a matter under exclusive federal jurisdiction, according to section 91 of the *Constitution Act, 1867*.

While Parliament does enact private law rules, its role in this regard is rather limited, since the contacts of federal legislation with private law generally take the form of references to existing provincial legislation. However, whether Parliament establishes new rules in the area of private law or refers to existing provincial private law rules, it must, unless, as is sometimes the case, the legislative measures contemplated are to apply only to common law provinces or to the province of Quebec, express the measures that it enacts in the area of private law "bijurally".

Bijural expression is not an obligation, strictly speaking, and still less is it a constitutional requirement. When Parliament has to legislate in a private law domain, it may very well decide to speak only in common law or only in civil law terms and leave it to the courts to deal with the questions that are bound to arise when the legislation is applied in the regions of the country whose legal system was not explicitly taken into consideration by Parliament.

2. Bilingualism

Under section 133 of the *Constitution Act, 1867*, the Parliament of Canada is required to enact its laws in English and in French. Section 18 of the Canadian Charter of Rights and Freedoms (Constitution Act, 1982), which reflects the substance of subsection 9(1) of the original *Official Languages Act* (R.S.C. 1985, c. 0-3), clearly states that both language versions of the statutes are "equally authoritative". There is thus an explicit constitutional and legislative requirement for bilingualism in federal statutes, which does not exist in the area of legislative bijuralism. The framework for bijuralism is far less defined.

I have presented the constitutional and legislative framework in which bills to be tabled in Parliament are prepared in this way in order to highlight the challenges involved in the bilingual and bijural drafting of federal legislation. The remainder of my discussion is a brief reflection on the magnitude of the challenge taken on by the federal Department of Justice in committing itself to the bijural drafting of bilingual federal statutes.

II. LEGISLATIVE BIJURALISM

In bilingual countries where there is only one legal system, it is difficult to draft enactments in two official versions. Preparing bilingual versions in a bijural context is an even more challenging proposition! It is true that the Department of Justice has been doing this for a long time but, for the reasons stated below, it intends to proceed with an even greater determination in the years ahead. The fact is that the context in which federal legislation is prepared has changed a great deal since the end of the 1960s.

1. New context

(i) *Official Languages Act*

In 1969 came the enactment by Parliament of the *Official Languages Act* (R.S.C. 1985, c. 0-3, s. 2), which established the equal status of English and French "for all purposes of the Parliament and the Government of Canada".

(ii) Codrafting

Towards the end of the 1970s, the Department instituted a unique system, codrafting, which has since been adopted by other countries (i.e., Switzerland – the Federal Chancery and the Chancery of the Canton of Berne – and Hong Kong).

Since 1978, all bills prepared by the Legislation Section in the Department are drafted by a team of two lawyers: an anglophone, usually, though not necessarily, trained in common law, and a francophone, usually, though not necessarily, trained in civil law.

The Section's objective is to produce, with the same care and attention, two original and authentic versions from Cabinet documents drafted in both languages and from drafting instructions that are also provided, wherever feasible, in both

languages by the department responsible for the legislation in question. In sum, one version is no longer just a translation of the other, as was the case until 1978.

Moreover, since a team of drafters usually consists of a "civilian" lawyer and a common law lawyer, the final legislative product tends to be a better reflection of Canada's two legal systems. Obviously, a francophone drafter cannot necessarily be held responsible for the way in which civil law concepts are expressed by the anglophone drafter in the English version, nor can the latter guarantee the accuracy of the common law concepts expressed by the francophone drafter in the French version. The ideal, of course, would be to have legislative drafters who are trained both in civil law and in common law, but that is a utopian solution.

The Section can, nonetheless, rely on a number of "bijural" drafters. Two of its anglophone drafters are civilians and, sooner or later, it will no doubt have francophone drafters who are trained in common law.

(iii) Bilingualization of a growing number of provinces and territories

With the bilingualization of a growing number of provinces and territories came the need for common law lawyers who had been trained in French. So it was that, during the late 1970s, the University of Moncton and the University of Ottawa began to offer common law courses in French, with the result that Canada now has hundreds of francophone lawyers who practice common law in French.

At the same time, work was undertaken by eminent Canadian lawyers – from the Moncton Centre for Legal Translation and Terminology, the Research Centre of Private and Comparative Law (McGill University) and the National Program for the Integration of Both Official Languages in the Administration of Justice (Department of Justice and Department of the Secretary of State of Canada) – in common law terminology in French and civil law terminology in English. Their work has been made available to legislative drafters and Canadian lawyers generally and provides tools, such as glossaries, lexicons and dictionaries, that are indispensable for bijural drafting in a bilingual context.

(iv) Consultations on the French version of federal statutes

The comments from the consultations conducted by the Department of Justice between 1988 and 1991 regarding the French version of federal statutes revealed the extent to which the two versions of the federal laws should better reflect the two Canadian legal systems.

(v) The new Civil Code of Quebec

The coming into force of the new *Civil Code of Quebec*, set for next January, is giving the Department of Justice an opportunity to review its approach to the two legal systems in federal enactments. With the need to adapt federal statutes and regulations to the new Code has come an awareness that such enactments should better and more systematically reflect Canada's bijuralism.

2. Implementing legislative bijuralism

There are many ways – each with its advantages and disadvantages – to draft bijural legislation in a bilingual context. I will discuss some of these briefly and provide a few examples of the techniques used by federal drafters.

(i) Full application

If bijuralism were to be fully implemented in federal legislation, it would require four official versions: English and French civil law versions, and English and French common law versions. Such an approach has already been suggested. The cost of producing four official versions would simply be prohibitive, however, and such a number is unwarranted, to say the least, in view of the small number of federal legislative provisions involving private law principles derived from common law or civil law concepts.

(ii) Application "in the Scottish manner"

Another type of legislative bijuralism, somewhat similar to the model used by the Parliament of Great Britain when enacting special provisions for Scotland, consists in adapting an entire legal situation to a special regime – generally, in Canada, to Quebec civil law. Thus, in section 86 **et seq** of the *Bankruptcy and Insolvency Act* (R.S.C. 1985, c. B-3), in both versions of course, there were special rules for the sale of certain types of real property belonging to a bankrupt in Quebec. These rules were drafted strictly in terms of the Quebec *Civil Code* and *Code of Civil Procedure*. Another example of this type of bijuralism is found in section 13 of the *National Housing Act* (R.S.C. 1985, c. N-11). Part of the provision is as follows:

> **13.** (1) The first case referred to in section 12 is where
>
> (a)...
>
> (b) one of the following events occurs:
>
> > (i) in the Province of Quebec, the owner of the hypothecated property ceases to be such by virtue of a clause of giving in payment,
> >
> > (ii) in any other part of Canada, the equity of redemption in the mortgaged property is foreclosed,
> >
> > (iii) ...

(**N.B.** The clause of giving in payment mentioned above will undergo substantial change when the new *Civil Code of Quebec* comes into force.)

(iii) Use of specific terms

It often happens that Parliament, when dealing with a specific legal concept, feels that the concept should be expressed in terms that are proper to each legal regime. Thus the English version of an Act may refer to "fee simple or ownership" as the equivalent of "fief simple ou propriété" in the French version. With this solution, most of the problems that the implementation of bijuralism might pose in federal legislation can be resolved. This method can, however, be awkward in provisions where a whole litany of legal concepts has to be enumerated.

(iv) Use of neutral terms

Another solution involves the use of neutral or general terms that do not have particular legal connotations that would link them more to one legal system than the other, in order to render a concept in the two systems. If a general concept is involved, the use of the neutral term, without a definition, may work quite well and generally will not create any problems. If a specific concept is involved, the term used will probably have to be defined. The use of neutral terms – whether or not they are defined – has the advantage of treating both legal systems on an equal footing.

(v) "Selective" bijuralism

Parliament may choose to be selective and to render only some civil law and common law concepts in both languages. It may rely on rules of construction to make the meaning clear for the other concepts that it chooses to render in terms of only one of the systems – most frequently in terms of common law in the English version and civil law in the French version.

(vi) Use of particular definitions or interpretative provisions

Parliament sometimes uses definitions or other types of interpretative provisions to flag the bijural nature of its enactments. A good example of this can be found in section 2 of the *Crown Liability and Proceedings Act* (R.S.C. 1985, c. C-50), which defines "tort" as including "delict and quasi-delict", and defines "délit civil" as "Délit ou quasi-délit".

(**N.B.** In the new *Civil Code of Quebec*, there is no longer any reference to delicts or quasi-delicts; federal statutes must be changed accordingly.)

In the remainder of that statute, Parliament may refer to a "tort" or a "délit civil" and mean both together, in each of the two versions: delict or quasi-delict in the civil law meaning of civil liability and "tort" in the common law meaning of civil liability.

This solution is far from fully satisfactory, since it gives civil law a somewhat secondary status. In sum, Parliament provides, rather artificially, for a common law term (such as "tort") to include, for the application of the statute in question, civil law concepts (such as "delict" or "quasi-delict"). From a strictly legal standpoint, this works quite well, but it is safe to say that one of the two legal systems -- in this case, the civil law – looks like a poor relation.

(vii) "Semi-bijuralism"

Parliament could also address citizens governed by the common law only in English and those governed by the civil law only in French. The English version of federal statutes would be drafted solely in common law terms, while the French version would be based solely on the civil law. If this option were adopted, the laws as a whole would be bijural, but they would be inadequate to the needs of francophones living outside Quebec and anglophones in Quebec, since such groups would not have access to a version of the federal laws drafted both in their language and in the legal system applying to them. It must be confessed that some federal laws are drafted in "semi-bijural" terms, and little more.

Take, for example, a 1991 statute the English title of which is the *Federal Real Property Act* and the French title of which is the *Loi sur les immeubles fédéraux* (S.C. 1991, c. 50). The former title is obviously drafted in common law terms only, whereas the latter is inspired solely by the civil law. On the other hand, that Act has a provision that perfectly reflects the applicable provincial law. Subsection 5(2) reads as follows:

> (2) Federal real property within Canada may, at the discretion of the Minister of Justice, be granted by any instrument by which, under the laws in force in the province in which the property is situated, real property may be transferred by a private person.

The type of bijuralism that is called "semi-bijuralism" in this paper poses no special problems from a strictly legal point of view. There are in fact a certain number of case law rules – set out in subsection 9(2) of the original *Official Languages Act* (R.S.C. 1985, c. 0-3), but omitted in the most recent *Official Languages Act* (R.S.C. 1985, c. 31 (4th Supp.)), assented to on July 28, 1988 – that allow for making the adaptations required to apply the official language version that does not correspond to the legal system in force in the region of the country where the enactment is to be implemented. For several fairly obvious reasons, this is not a very satisfactory bijural technique.

(viii) The ideal solution?

From our point of view, there is no ideal solution to the problems that can arise in drafting bilingual laws in a bijural context. The requirements of each enactment generally dictate the best path to follow. The drafters may opt in part or in totality for one or more than one of the possibilities listed above. There is room for creativity, however. Since the list of solutions presented above is not intended to be exhaustive, the drafters may well have to invent a different method that is more appropriate to their needs.

3. Common law style or civil law style?

In our opinion, federal laws are not, strictly speaking, drafted in common law style or in civil law style. The francophone drafter drafts in French and his or her anglophone colleague in English, and both should, when dealing with private law concepts, use common law and civil law concepts. All in all, however, the cases of this happening are

relatively rare in federal enactments. As the late Professor Elmer A. Driedger noted at a seminar held in Ottawa in September 1971:

> ... in many statutes there is no "legal" concept involved – only money. (*Proceedings of the Ninth International Symposium on Comparative Law*, University of Ottawa, 1972, at page 76.)

This observation is just as valid today. The majority of legislative provisions drafted by federal drafters contain no concepts that are purely legal. Even more seldom does federal legislation contain private law concepts.

While this may generally be the case, it must nonetheless be acknowledged that the influence of common law principles on federal legislation is a significant one, and for good reason. Indeed, as the late Professor Louis-Philippe Pigeon noted, in an article entitled *La rédaction bilingue des lois fédérales*, published in the *Revue générale de droit*, no. 13, in 1982:

> [TRANSLATION] The drafting of federal laws must obviously start from the principle that the basic law is the common law which underlies its Constitution (*The King v. National Trust Co.*, 1933 S.C.R. 670). It is only where civil law is involved that it is appropriate to inquire how the enactment will be applied in Quebec (...) Beyond this special requirement, it is certain that the basic law is the common law and that the federal laws must be drafted with this in mind. Therefore, the French version of federal statutes cannot be drafted as one might draft similar legislation in France. The fundamental principles are not the same. In the Canadian context, one is obliged to draft enactments in French that are based on the common law and its legal concepts, including its canons of construction. (p. 181)

Professor Pierre-André Côté, at page 25 of the second edition of his work entitled *The Interpretation of Legislation in Canada*, notes that, even in Quebec, so-called statutory enactments "are construed according to rules of interpretation derived from English law..." Therefore, as Louis-Philippe Pigeon stated (at page 182 of the article cited above), [TRANSLATION] "in Canada, beyond the area covered by Quebec's civil law, there is always the underlying, unwritten "common law" which a drafter ignores at his peril, whether drafting in English or in French."

Our answer to the question of whether federal laws are – or should be – drafted in the "civil law style" or in the "common law style" is: "neither". The federal government has its own style of drafting. Federal legislation must reflect both civil law and common law concepts, where necessary, but it must never be forgotten that Canada's basic law is the common law and that its laws will be interpreted in the light of rules and principles drawn from English law. Does this mean that federal legislation is – or should be – drafted in the "common law style"? By no means!

CONCLUSION

Parliament has always recognized the need to enact laws that are both bilingual and bijural. It is fairly clear that the bilingual component, which has a more explicit constitutional and legislative basis, has, over the years, received more attention than the bijural component. The sole objective of the codrafting method instituted by the

Legislation Section of the Department of Justice in 1978 has been to achieve bilingual legislation of better quality, particularly with respect to the French version, which, it must be admitted, had been a mere translation of the English version since Confederation. Only indirectly has codrafting brought about more respect for bijuralism in the drafting of the statutes enacted by the Parliament of Canada.

Even recently, legislative bijuralism was still being accomplished somewhat in the spirit of Monsieur Jourdain, who was astounded to find that he had been speaking in prose. Circumstances now being what they are, however, – in particular in view of the fact that, as stated above, the new *Civil Code of Quebec* will soon be coming into force – there has been increased awareness of the importance of approaching the legislative bijural component more systematically than in the past. The federal government therefore proposes to apply more precise rules in dealing with legislative bijuralism. It also intends to take advantage of the work in progress of reviewing and amending federal legislation in the light of the new *Civil Code of Quebec* to make the further changes that are required for the observance of Canadian bijuralism in general.

The particular interest shown with regard to Canada's experience in codrafting and legislative bijuralism by, among others, Great Britain at the Commonwealth Law Conference recently held in Nicosia should not come as any great surprise, if one thinks of the multitude of rules and standards legislated by the European Community for its members as a whole, including Great Britain. Great Britain appears to have reservations about the quality of the English translation of the European regulations and is of the view that insufficient account is being taken of common law concepts and principles. Some British tend to think that the "European lawmaker" should look into the possibility of employing, where applicable, the Canadian drafting methods.

The fact that Great Britain, Switzerland and Hong Kong view the Canadian experience as a source of inspiration can only encourage Canada to continue along the same path, with even more determination.

11th Commonwealth Law Conference

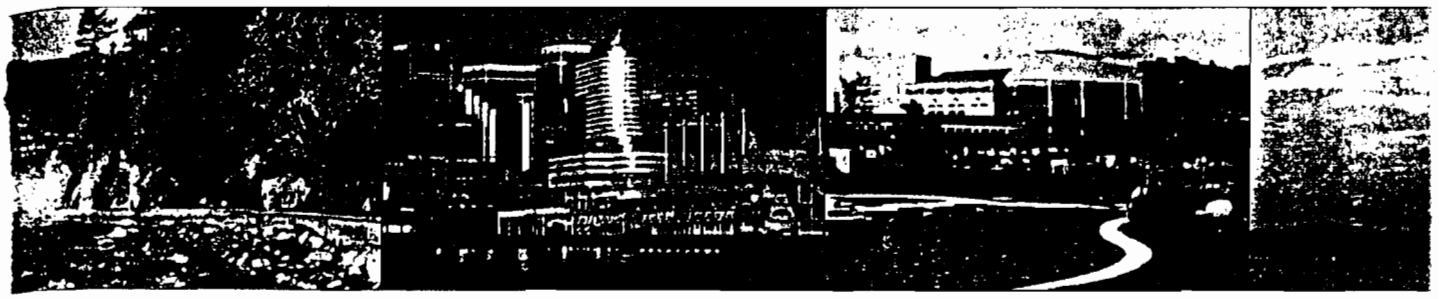
Conference Schedule

Hosted by the
Canadian Bar Association
August 24 – 29, 1996
Vancouver Trade &
Convention Centre

	SATURDAY AUGUST 24	SUNDAY AUGUST 25
MORNING	CBA Council	CBA Council
	CLA Council	CLA Council
		Government & Public Sector Lawyers' Conferen
		Commonwealth Law Reform Agencies' Meeting
NOON	(Working Lunch)	(Working Lunch)
AFTERNOON	CBA Council	CBA Council
	CLA Council	CLA General Meeting
		Government & Public Sector Lawyers' Conferen
		Canadian Judges' Confere Executive Council
		OPTIONAL SIGHTSEEING
EVENING	President's Dinner (by invitation)	Opening Night at General Motors Place

11th Commonwealth Law Conference

Conference Schedule



MONDAY AUGUST 26	TUESDAY AUGUST 27	WEDNESDAY AUGUST 28	THURSDAY AUGUST 29
Opening Plenary	Family Breakfast (Registrants & Children)	Family Breakfast (Registrants & Children)	Family Breakfast (Registrants & Children)
	Plenary: Creative Thinking	CBA Business Meetings	CBA Business Meetings
	CLE PROGRAMME Business Across Borders 1.1 Human Rights 2.1 Public Law 3.1 Legal Profession 4.1 Practice Areas 5.1 Law Practice Management 6.1	CLE PROGRAMME Business Across Borders 1.4 & 1.5 Human Rights 2.4 & 2.5 Public Law 3.4 & 3.5 Legal Profession 4.4 & 4.5 Practice Areas 5.4 & 5.5 Law Practice Management 6.4 & 6.5	CLE PROGRAMME Business Across Borders 1.8 Human Rights 2.8 Public Law 3.8 Legal Profession 4.8 Practice Areas 5.8 Law Practice Management 6.8
	Mooting Competition	Mooting Competition	Closing Plenary
CCCA Conference	CCCA Conference	Commonwealth Association of Armed Forces Lawyers	
TRADE SHOW	TRADE SHOW	TRADE SHOW	TRADE SHOW
Informal Lunch in Exhibit Hall	Informal Lunch in Exhibit Hall	Young Lawyers' Luncheon (Formal Lunch)	
CLA Meeting with Bar Leaders (Informal Lunch) Specialty Group Meetings Canadian Judges' Conference: Annual General Meeting Professional/Private Life: Finding a Balance CCCA Conference Winning Advocacy Workshop Commonwealth Association of Public Sector Lawyers: Inaugural Meeting & Reception TRADE SHOW	CLE PROGRAMME Business Across Borders 1.2 & 1.3 Human Rights 2.2 & 2.3 Public Law 3.2 & 3.3 Legal Profession 4.2 & 4.3 Practice Areas 5.2 & 5.3 Law Practice Management 6.2 & 6.3 CCCA Conference Mooting Competition TRADE SHOW	CLE PROGRAMME Business Across Borders 1.6 & 1.7 Human Rights 2.6 & 2.7 Public Law 3.6 & 3.7 Legal Profession 4.6 & 4.7 Practice Areas 5.6 & 5.7 Law Practice Management 6.6 & 6.7 Commonwealth Association of Armed Forces Lawyers Mooting Competition TRADE SHOW	FREE AFTERNOON
OPTIONAL SIGHTSEEING	OPTIONAL SIGHTSEEING	OPTIONAL SIGHTSEEING	OPTIONAL SIGHTSEEING