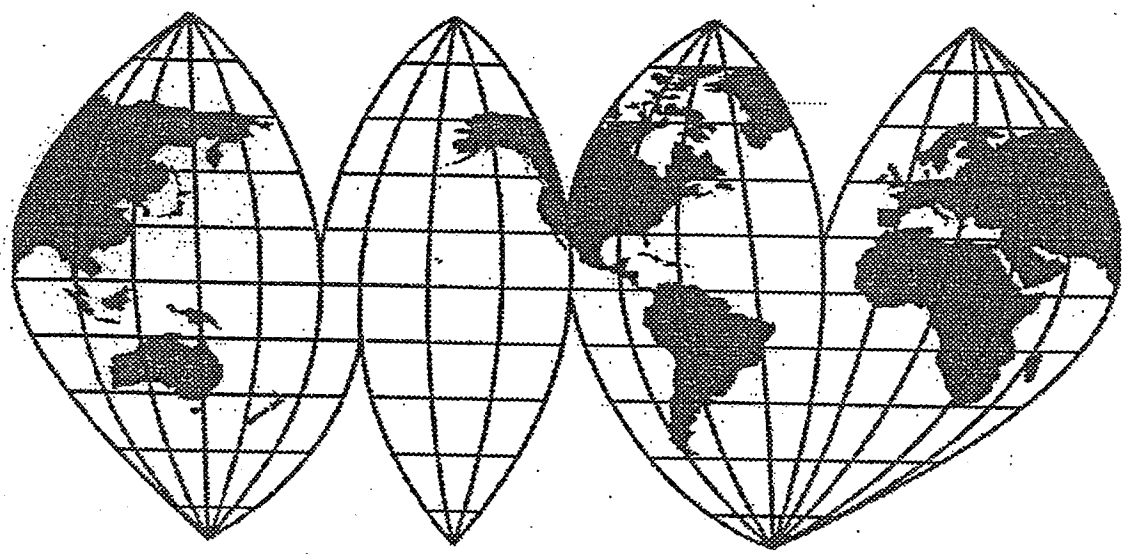
The Loophole

The newsletter of the Commonwealth Association of Legislative Counsel (CALC)



CALC General Meeting
There will be a general meeting of CALC held during the Commonwealth Law Conference (September 13 to 16) in Kuala Lumpur, Malaysia.

N.B. Information on the place, time and agenda of the CALC meeting will be sent shortly.

June 1999

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

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THE LOOPHOLE is the newsletter of the Commonwealth Association of Legislative Counsel established on September 21, 1983 in the course of the 7th Commonwealth Law Conference held in Hong Kong.

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Introduction

The articles in this issue will be of interest to all drafters. Of particular interest to Canadian drafters is the paper on the Eurig decision. The case has required most Canadian Provinces to re-enact by statute their probate fees and to undertake reviews of all of their other fees.

I would like to thank each of the persons who contributed articles for this issue of the LOOPHOLE.

Please note further information on the CALC General Meeting will be forthcoming.

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Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law

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April 26, 1999

*An earlier draft of this paper was presented at the 16th Constitutional and Administrative Law Conference of the Department of Justice (Canada), Ottawa: April 6, 1999.

Introduction

The decision of the Supreme Court of Canada in *Re Eurig Estate*[1] has attracted a great deal of attention because of the impact it may have on the operation of a wide range of revenue-generating provisions in delegated legislation. However, it also raises serious questions about the relationship between the courts and primary legislative bodies, such as Parliament and the provincial legislatures. These questions turn on two sections of the *Constitution Act, 1867*[2] governing the origination of taxation and spending bills (section 53) and the recommendation of spending bills by the Crown (section 54). The *Eurig* decision has now moved these arcane provisions out of the precincts of Parliament and into the courts and chambers of judges.

At the same time as the Supreme Court was wrestling with *Re Eurig Estate*, the Speakers of the Senate and the House of Commons were contending with similar issues in relation to a private member's bill (S-13) that originated in the Senate. It provided for the collection and spending of a levy on the sale or other disposition of tobacco products. The Speakers reached opposite conclusions on whether the levy was a tax.

The purpose of this paper is to review these developments and speculate on where they will lead.

Re Eurig Estate

Judicial and parliamentary bodies have traditionally steered clear of each other when it comes to the way they operate, as opposed to the end-products of their operation. Although legislatures have reversed court judgments and courts have invalidated legislation, they have respected each other's right to function as each sees fit. In Parliament, the *sub judice* rule prevents debate on matters that are before the courts, which, by the same token, have recognized the right of legislative bodies to control their own proceedings.[3] Most recently, in the *New Brunswick Broadcasting Co. v. Nova Scotia* McLachlin, J said:

> Our democratic government consists of several branches: the Crown, as represented by the Governor-General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[4]

It thus comes as a surprise to find that the Speakers are not the only ones who may rule on procedural matters relating to financial legislation.

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[1] [1998] 2 SCJ No. 72.

[2] 30 & 31 Victoria, c. 3. (UK).

[3] *Pickin v. British Railways Board* [1974] AC 765 (HL); *Drewery v. Century City Developments Ltd. (No. 1)* (1974), 52 DLR (3d) 512 (Ont. HC); *Re Canada Assistance Plan* [1991] 1 SCR 525. However, note K. Swinton, "Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege" (1976), 14 *Osgoode Hall LJ* 345.

[4] [1993] 1 SCR 319 at 389.

In *Re Eurig Estate*, the Supreme Court of Canada considered the imposition of probate fees by regulations under the Ontario *Administration of Justice Act*. A majority of the Court held that the fees were taxes and that they contravened section 53 of the *Constitution Act, 1867* because they were imposed by a regulation of the Lieutenant-Governor in Council, rather than in a bill passed by the Legislative Assembly. Mr. Justice Major wrote:

> [para 30] In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

He also stated that section 53 "is a constitutional imperative that is enforceable by the courts." He found it unnecessary to address the judicial enforceability of the requirement of a royal recommendation under section 54 *Constitution Act, 1867*.

It is difficult to know what prompted the majority in *Re Eurig Estate* to overcome the traditional judicial reserve about treading into parliamentary affairs. Perhaps the best explanation lies in its characterization of section 53 as embodying the principle of "no taxation without representation". This elevates it from a mere rule of internal procedure to a constitutional protection for the purses of citizens. In this the majority was clearly following the lead staked out in the legislative language cases that extend from *Blaikie*[5] to *Mercure*.[6] In these cases, the Supreme Court found that provisions such as section 133 of the *Constitution Act, 1867* are much more than rules of internal procedure. They recognize the fundamental importance of language as the medium for participating in law-making activity and for communicating the law. Their importance in advancing democratic values and the rule of law provides the rationale for their judicial enforcement.

Another important parallel between *Eurig* and one of the language rights cases, *Mercure*, involves the form of constitutional amendments. In both cases, the Supreme Court rejected the notion of implied repeal, which it had previously accepted in *Re Agricultural Products*.[7] This dovetails with the majority's suggestion, albeit *obiter*, that section 53 prevents parliamentary bodies from delegating unfettered power to impose taxes. This opinion reflects a twofold insistence on a minimum level of detail in statutes. First, amendments to constitutional provisions must be express, presumably identifying how their text is changed. Second, the delegation of taxation powers must be accompanied by a legislative framework to structure or constrain them.

It remains to be seen how the Supreme Court will deal with these issues if they are squarely put to it, particularly given the strong dissenting judgements of four members of the Court. Binnie, J held that section 53 deals with "bills", not regulations, while Bastarache, J argued that section 53 (if it applies at all to a unicameral legislature) at most requires enabling provisions to be in bills originating in the lower

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[5] *Blaikie (No. 1)* [1979] 2 SCR 1016.
[6] *R. v. Mercure* [1988]1 SCR 234.
[7] *Re Agricultural Products* [1978] 2 SCR 1198.

House. This interpretation is confirmed by the generality of its reference to bills "for" appropriating public revenue or imposing taxes.[8]

It also remains to be seen whether the Court will take the same approach to the requirement of a royal recommendation under section 54 of the *Constitution Act, 1867* or, indeed, to the other rules of parliamentary procedure expressed in sections 34 to 36 and 44 to 49, which deal with such matters as quorum and majority votes. It can be argued that section 54 should not be judicially enforced because it protects the right of the Crown to initiate spending legislation and acts as a flag to make members of Parliament aware of the spending implications of bills.[9] It is difficult to see in it any more noble principle that benefits the public generally, apart from providing greater control over the spending of public money. It is little more than a vestige of Canada's colonial past and surely the Government and parliamentarians need no help from the courts in controlling public spending.

Jurisdiction and Rulings of Speakers on Financial Legislation

The *Eurig* decision confirms an overlap of jurisdiction between the Speakers and the courts on the procedural issues. Speakers have often noted this overlap, as indeed the Commons Speaker did in ruling on Bill S-13:

> though this tax question might be characterized as a question of law and in another context outside this Chamber might be raised and considered as a question of law, in this context it is considered only as an integral part of a question on procedure and parliamentary privilege.[10]

It is not clear whether the Speakers are in any sense bound by the rulings of the courts on section 53. Although the courts clearly cannot dictate how Parliament conducts its proceedings, they hold over it the possibility of invalidating legislation that is enacted in contravention of what they consider section 53 to require. This is a remarkable development, not only because the majority in *Eurig* rejected the rulings and dicta of previous Canadian cases,[11] but also because it is out of step with the High Court of Australia, which, like Binnie, J in dissent, has ruled that the courts have no power to enforce comparable provisions in its Constitution, their jurisdiction being confined to laws, not "proposed laws".[12]

The entry of the courts into parliamentary procedure relating to financial legislation raises the possibility of conflict with Speaker's rulings and, if there is a conflict, the question of which should prevail. The potential for conflict arises not only because they have traditionally operated quite independently of each other, but also because of their institutional differences. Courts operate within a relatively rigid system of rules, argument and precedent. They follow the rulings of higher courts, unless the rulings can be distinguished.

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[8] See J.M. Keyes, *Executive Legislation* (Butterworths: 1992) at 44.
[9] J.M. Keyes, "When Bills and Amendments Require the Royal Recommendation" (1997-98), 20 *Can. Parl. Rev.* 15.
[10] See also A Fraser, et. al., *Beauchesne's Parliamentary Rules & Forms*, 6th ed. (Toronto: 1991), at 49.
[11] *Re Agricultural Products* [1978] 2 SCR 1198 at 1291 and *The King v. Irwin* [1926] ExCR 127.
[12] *Victoria v. Commonwealth* (1975) ALR 277 (HC) at 347.

In contrast, the procedural system that the Speakers superintend does not have same rigidity. Procedure is as much a product of practice, custom and convention as it is of rules and rulings.[13] The mere fact that a particular procedure has been previously followed makes it a precedent.[14] Arguments about parliamentary procedure are not the preserve of a single profession of lawyers and procedural decisions often reflect their fluid political context. In fact, in the Senate, Speaker's rulings can be overturned by a majority vote.[15]

In the parliamentary context, the determination of whether a charge is a tax is motivated by procedural rather than legal concerns. The Speaker does not rule on questions of law but, as noted above, questions of procedure and practice in relation to financial legislation may require the Speaker to address the question of whether a particular bill imposes a tax. These questions involve not only the originatation of bills, but also the adoption of a ways and means motion. A ways and means motion is a necessary preliminary to taxation measures, including the "the continuation of an expiring tax, an increase in the rate of an existing tax, or an extension of the incidence of a tax so as to include persons not already payers."[16] If a bill that imposes a tax does not originate in the House of Commons and is not preceded by a ways and means motion, the Speaker may rule it out of order.

The question decided by the Supreme Court in *Re Eurig Estate* (the propriety of delegating taxation powers) has been specifically addressed in two rulings in the British House of Commons. In 1917, the Chairman of the Committee of Ways and Means did not allow an amendment to a Finance Bill that would have authorized the Food Controller to make orders amending the relief from duty granted by the bill. The reason given was because "It would allow an authority other than the Committee of Ways and Means to impose taxation"[17]

Two years later, the Speaker of the House of Commons ruled on this question, but reached a different conclusion. Lord R. Cecil submitted that "it is a fundamental rule that this House does not delegate its power of taxation".[18] However, the Speaker replied:

> The third question is whether the House of Commons can divest itself of the responsibility of fixing the rate and amounts of these fines and fees and hand that duty over to an outside body such as a Trade Regulation Committee. It has been part of the unwritten law of Parliament that the goods upon which and the rates at which taxes are to be levied shall be fixed and determined by the House of Commons itself. I am not prepared to say that the House cannot delegate that power to some other body, such as a Trade Regulation Committee. I will only say that at present I am unaware of any similar case. It may be argued that if Parliament is desirous of altering its practice it should be done in some definite, specific and formal manner, and not a mere adjunct to other

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[13] P. Laundy, *Parliaments of the Modern World* (Dartmouth: 1989) at 62.
[14] See, for example, the ruling of the Senate Speaker on Bill S-13, discussed below at pages 7-8.
[15] *Rules of the Senate*, s. 18(4).
[16] Sir D. Limon, et. al., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed. (Butterworths: 1997), at 776-777.
[17] *House of Commons Debates (UK)*, vol 95, c. 828 (July 2, 1917).
[18] *House of Commons Debates (UK)*, vol 122, c. 213-214 (December 2, 1919). This ruling was cited with approval in *House of Commons Debates (UK)*, vol 259, c. 720 (November 17, 1931).

> proposals, just as when we desire to alter the common law we do so by passing a Statute for that express purpose. ...
>
> But, upon the assumption – an assumption which I am bound to make – that the House of Commons desires to impose these fines and fees, which owing to the nature of the circumstances in which we now find ourselves, may vary from week to week, or, at all events, from month to month, how can it be done? It is evidently impossible to bring in a Bill every month to deal with a fresh situation. It seems to me to be reasonable to fix either certain limits, or a ratio which the fine is to bear to the cost of the article, and to give some authority the duty of fixing the price and applying the ratio which the fine is to bear to the cost of the article and to give some authority the duty of fixing the price and applying the ratio or determining the exact figure of the fine, or in some similar fashion.[19]

This ruling lends credence to the majority position in *Eurig* in so far as it emphasizes the exceptional circumstances justifying the delegation of power and the need to clearly indicate that it is being proposed. However, it also stops short of saying that Parliament has no power to delegate taxation powers and it does not question the justification given for the delegation, but rather assumes it is justified.

Erskine May notes that, in the wake of this ruling, similar provisions have been incorporated into bills founded upon ways and means resolutions, most recently exemplified by sections 2(2), 5 and 97 of the *Value Added Tax Act 1994*.[20] It also recognizes that not all bills delegating taxing powers require a ways and means resolution. The matters given by *Erskine May* as requiring a ways and means resolution include "Delegation of taxing powers *within the United Kingdom*" (emphasis added),[21] suggesting, for example, that bills for self-government outside the United Kingdom are excluded. Bills empowering municipal authorities to levy taxes or borrow money are also excluded.[22]

Speaker's rulings on the permissibility of delegating taxation powers are rare, but there is no shortage of rulings on whether a charge is a tax. The most basic indicator of a tax is the payment of its proceeds into the Consolidated Revenue Fund. However, the fact that they are to be paid elsewhere does not conclusively indicate that the charge is not a tax. If the proceeds are to be used for a public purpose that might otherwise have been required to be financed from the Consolidated Revenue Fund, the charge will be considered a tax, as with the charge imposed on shipowners by the Merchant Shipping Bill, 1973-74 to pay for pollution damage.[23]

Charges imposed on an industry for its own purposes (industry levies) have been held not to be taxes.[24] In determining whether the levy is imposed for the purposes of the industry, the Speakers try to

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[19] *Ibid* at c. 212-213.
[20] Above, note 16 at 779.
[21] *Ibid.*, at 779.
[22] *Ibid.* at 781.
[23] *Ibid.* at 777.
[24] *Ibid.* at 779-780.

ascertain whether it is for the benefit of the industry. *Erskine May*[25] provides the following examples of charges that were considered not to be for the benefit of the industry:

- Air Travel Reserve Fund Bill, 1974-75 establishing a levy to compensate passengers who sustained loss as a result of the financial failure of a travel company (considered a tax rather than a levy because the government had complete discretion to dispose of the assets if the company were wound up),
- Merchant Shipping Bill, 1973-74 establishing a charge to pay for pollution damage.

In contrast, the following are examples were characterized as industry charges:

- Wheat Bill, 1932, charging levies on importers of flour which were payable into a fund from which payments were made to wheat growers,
- Mineral Workings Bill, 1951, setting up a fund from contributions from ironstone operators, owners and the Exchequer to restore agricultural land from which iron ore had been extracted.

Erskine May also provides examples of a number of other measures that required a ways and means resolution:

- Finance Act, 1925, re-imposing certain duties after previous duties imposed in Finance (No.2) Act, 1915,were allowed to lapse in 1924 (the revival of the expired tax was considered as the imposition of a new tax),
- Import Duties, 1932, extending an existing tax to include commodities previously free of duty (considered a new tax),
- Agriculture and Horticulture Bill, 1963-64, imposing a levy on imports in order to maintain a minimum price level (considered a tax),
- charges for services provided by the Government if the charges are so disproportionate to the cost of the services or so broadly based as to amount to taxation (charges that escape this characterization have also been described as "a small fee of an administrative character").[26]

The approach of the Speakers in the determination of whether a charge is a tax is quite different from the approach taken by courts. The judicial concept of tax is grounded in constitutional law principles arising out of the division of powers context. The accepted test to determine if a charge is a tax is set out in *Lawson v. Interior Tree Fruit & Vegetable Committee*,[27] which says that a levy is a tax if it is

- imposed under the authority of the Parliament,
- by a public body,
- for a public purpose, and
- is enforceable by law.[28]

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[25] *Ibid.*, at 778-783.
[26] *Ibid.*
[27] [1931] S.C.R. 357.
[28] *Ibid.* at 363.

Even if charges meet all four criteria, they may, nevertheless, not be considered to be "taxes in the constitutional sense".[29] Courts have made a distinction between taxes and regulatory charges. This distinction depends on the purpose of the charge. A levy can be characterized as a tax if its primary purpose is raising revenue for general governmental purposes. If the levy is imposed for a specific regulatory purpose, then it is not a tax. Regulatory charges are imposed to defray the cost of certain programs or services. The amount of the charge must reasonably relate to the cost of providing the service.[30] A levy may be a regulatory charge even if it has some revenue-raising aspect to it. However, any revenue-raising aspect of the levy must be ancillary, or necessarily incidental, to the regulatory characteristic.[31] In deciding the constitutional validity of a legislation that imposes a levy, courts have used the pith and substance analysis to determine the purpose of the levy. They have asked

- Is the legislation imposing the levy is, in pith and substance, in relation to taxation?
- Is the levy imposed to raise revenue for government purposes?
- Is it imposed to defray the cost of a regulatory program?
- If there is a revenue-raising aspect to the levy, is this aspect ancillary to the regulatory scheme?

The substantive pith and substance approach used by courts in the determination of a tax in the division of powers context is different from the more flexible approach taken by the Speakers in the procedural context. Unlike the courts, the Speakers do not look at the correlation between the cost of the program and the levy imposed in order to determine whether or not the amount of the levy is reasonable – they only look at whether the levy is imposed on an industry and whether it is imposed for the benefit of that industry. For example, levies used to fund a regulatory scheme created for the protection of the public generally would likely be considered taxes by the Speakers, but not by the courts. Contrariwise, if a levy were imposed to raise revenue for an industry, without any relationship to the costs incurred in regulating the industry, parliamentary practice suggests that it would be an industry levy, but the courts would most likely find it to be a tax.[32]

Speakers' Rulings on Bill S-13: *Tobacco Industry Responsibility Act*

The possibility of conflict between Speaker's rulings and the courts is also illustrated by the differing rulings of the Speakers of the Senate and the House of Commons in relation to Bill S-13. This bill proposed the incorporation of a non-profit foundation (the Canadian Tobacco Industry Community Responsibility Foundation). It also proposed to authorize the Foundation to collect a levy on the sale or other disposition of tobacco products and to use the proceeds for a variety of purposes, principally related to reducing the use of tobacco products by young persons in Canada.

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[29] *Labourers' International Union of North America v. Ontario Construction Secretariat*, (1997), 31 OR (3d) 261 (OntCt (GenDiv)) at 267.

[30] See *Re Agricultural Products Marketing Act* [1978] 2 SCR 1198, *Re Exported Natural Gas* [1982] 1 SCR 1004, *Allard Construction v. Coquitlam* [1993] 4 SCR 371 and *Ontario Home Builders' Association v. York Region Board of Education* [1996] 2 SCR 929.

[31] See Re *Exported Natural Gas* and *Ontario Home Builders' Association v. York Region Board of Education.*

[32] See *Eurig*, above note 1.

As the bill number indicates, it was first introduced in the Senate where, on April 2, 1998, the Speaker decided that the provisions authorizing the use of this money did not amount to an appropriation requiring the royal recommendation. The Speaker began his ruling by stating that

> The fundamental purpose of the requirement for a Royal Recommendation is to limit the authority for appropriating money from the Consolidated Revenue Fund to the Government.

He also noted the definitions of "appropriation", "Consolidated Revenue Fund" and "public money" in section 2 of the *Financial Administration Act*,[33] observing that the definition of "public money" is cast in terms of "all money belonging to Canada". The decision turns on this point since clause 33(1) of the bill stated that "the Foundation is not an agent of Her Majesty and its funds are not public funds of Canada."

The Speaker then addressed the question of whether the levy was a tax. This is important not only for section 53, but also for section 54, which expressly applies to the appropriation of not only public revenue, but also "any tax or impost". He found that the levy did not constitute a tax because it was "imposed on the tobacco industry alone ... to meet an industry purpose beneficial to it." This conclusion was based on the language of the bill, which said that its purpose was

> to enable and assist the Canadian tobacco industry to carry out its publicly-stated objective of reducing the use of tobacco products by young persons throughout Canada.

The Speaker also took note of Bill C-32 (*An Act to amend the Copyright Act*, enacted as SC 1997, c. 24) which had been introduced in the House of Commons without a ways and means motion. This bill provided for the imposition of a levy on blank recording tape and the payment of the proceeds into a fund to benefit composers and recording artists.

This ruling is significant in at least two ways. First, it recognizes that not all money payable under statutory authority is public money or, as section 54 of the *Constitution Act, 1867* puts it, "public revenue or ... any tax or impost". Second, it recognizes that the definitions of the *Financial Administration Act* can be important indicators of the scope of the requirement for a royal recommendation. This provides guidance on determining these questions and it suggests that careful drafting may provide persuasive arguments for avoiding the requirement. However, the strength of this guidance is thrown into question by a subsequent ruling on the bill by the Speaker of the House of Commons.

When the bill reached the House of Commons, the Government House Leader objected that it imposed a tax and, accordingly, should have originated in that House and should have been preceded by the adoption of a ways and means motion. The debate focused on whether the levy was imposed for the benefit of the tobacco industry. On December 2, 1998, the Speaker decided it was not and ruled the bill out of order because it had originated in the Senate. Although he noted both the stated purpose of the bill as well as the provision that the levy was not payable into the Consolidated Revenue Fund, he concluded

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[33] RSC 1985, c. F-11.

> Surely the lack of credibility referred to [in the bill] is a function of our common sense understanding of the self-interest of the tobacco industry, namely that, as a commercial enterprise, its primary goal is to expand its markets and thereby to increase profits. Young people would constitute the future growth potential for the industry's market. How could it be of benefit to the industry to reduce smoking among the very people who constitute its growth market? It is this implausible proposition that underlies the credibility problem to which the bill refers.

The Commons Speaker also noted the blank tape levy imposed by Bill C-32 and cited an English Speaker's ruling on a bill amending the *Merchant Shipping Act* to provide for a levy on the shipping industry to be paid in to a fund to defray the costs of cleaning up oil spills. He considered that the Bill C-32 levy was imposed on an industry for its own purposes, even though many manufacturers of blank tape would not benefit from it in so far as they held no copyright in musical works. The Speaker also agreed with the English ruling that the *Merchant Shipping Act* levy was not for the benefit of the industry on which it was imposed, but was for a general public purpose (environmental restoration). However, this conflicts with the precedent set in Canada with the introduction of Bill C-121 (*An Act to amend the Canada Shipping Act*, enacted as SC 1993, c. 36) without a ways and means motion, even though it too imposed a levy on the shipping industry and established the Ship-source Oil Pollution Fund under section 702 of the *Canada Shipping Act*.[34]

The differing results in the two Speakers' rulings demonstrate the fluidity of parliamentary practice. They also turn on how each Speaker determined the purpose of the bill. The Senate Speaker was prepared to rely on what the bill said, whereas the Commons Speaker took a substantive approach, relying on "our common sense understanding" and posing the question "Why is legislation like this required?". The differing approaches raise important questions that go to the heart of the Speaker's role.

The textual approach of the Senate Speaker operates at a distance from the bill, avoiding comment on its merits. This allows the Speaker to maintain the impartiality that is so crucial to his office by leaving the merits to be judged by the members. However, it also leaves open the possibility of form triumphing over substance, a possibility that clearly worried the Commons Speaker. This concern for substance is laudable and it is also demonstrated by the courts when they must determine the purposes of legislation or the character of amounts required to be paid under it. But it requires a thorough understanding of the context of the legislation and how it is likely to operate. Deciding these issues at a preliminary stage in parliamentary proceedings on the basis of "common sense" may not necessarily do them justice. For example, Bill S-13 was intended to operate in the context of the prohibitions of the *Tobacco Act*[35] on furnishing tobacco products to young persons. Steps to dissuade them from tobacco use would arguably not be contrary to the interests of the tobacco industry because sales to young persons are already illegal.

Conclusion

[34] RSC 1985, c. S-9.
[35] SC 1997, c. 13.

The rulings on Bill S-13 demonstrate very different approaches to distinguishing taxes from industry levies. The approach of the Senate Speaker is grounded in a careful analysis of the language of the bill and suggests a critical regard for the procedural requirements of origination and the royal recommendation, which limit the ability of senators to introduce bills. In contrast, the approach of the Speaker of the House of Commons is substantive in nature and is obviously motivated by concern for the right of that House to originate financial measures.

The merits of each approach are debatable, but it is ironic that the Supreme Court may have tipped them in favour of the substantive approach. Its decision in *Re Eurig Estate* poses a host of questions about the relationship between the courts and parliamentary bodies because it holds that the courts may determine those questions of parliamentary procedure that have been constitutionalized in section 53 of the *Constitution Act, 1867* and, perhaps, in other provisions such as section 54. This means that the Speaker now plays a potentially important role in ensuring that bills conform to these provisions, not only as a matter of parliamentary procedure, but also incidentally as a matter of constitutional law. Given that the courts tend to adopt a substantive approach to questions of legislative purpose and the character of taxes, the Speakers may be able to play a more effective role by taking the same approach.

Although this is one conclusion to be drawn from *Re Eurig Estate*, it is nevertheless profoundly disturbing. In countless decisions, Speakers have indicated that they have no jurisdiction to decide legal questions. Until the Supreme Court decision, this has posed little problem because the procedural context of Speakers' decisions has been quite separate from the context in which these questions arise in the courts, for example in relation to the division of powers between Parliament and the provincial legislatures. However, with *Re Eurig Estate*, we now have exactly the same questions being decided both by the Speakers and the courts. This raises many concerns.

On the question of whether taxation powers can be delegated, it is striking that there appear to be no speaker's rulings against this practice. The rulings cited in *Erskine May* stop short of saying that it cannot be done.[36] They also recognize the acceptability of delegating taxation powers to municipal authorities.[37] Yet, without taking any notice of these rulings, the majority in the Supreme Court of Canada in *Re Eurig Estate* has declared that section 53 of the *Constitution Act,1867* "prohibits not only the Senate but also any other body other than the directly elected legislature from imposing a tax on its own accord."

It is also possible that conflict may occur between the Speakers and the courts if they reach different result on the characterization of taxes. Indeed, given the disagreement between the Speakers on Bill S-13, it is surely not difficult to imagine that the courts may reach different conclusions as well. This is particularly likely because the judicial concept of a tax is rooted in constitutional law cases on the division of powers between Parliament and the provincial legislatures.[38] The courts have taken little account of how taxes have been characterized for the purposes of parliamentary procedure and they should, at the very least, fully consider how Speakers have grappled with this matter.

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[36] See above, page 6.
[37] *Ibid.*.
[38] *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357.

When one turns to section 54 and the royal recommendation, the potential for conflict is even more pronounced. Although some aspects of this requirement are clear, others (such as its application to indirect appropriations) are debatable and, given two other recent Speaker's rulings, appear to be in a state of flux.[39] Given that the courts have had little to do with the royal recommendation or concepts of appropriation, one can only hope that here too they will have due regard for Speakers' rulings.

Finally, arguing for judicial deference is probably not enough. The Government would be well advised to avoid introducing bills in the Senate first if the bills provide for the imposition of charges that might be characterized as taxes. It would also do well to continue being cautious about the royal recommendation and seeking it whenever there is any likelihood of a provision being characterized as an appropriation. As for the other rules of parliamentary procedure enacted in the *Constitution Act, 1867*, only time will tell.

[39] See J. Keyes, "The Royal Recommendation: An Update" (1999), 22 *Canadian Parliamentary Review* (forthcoming).

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The B.C. statute revision experience: "tax law rewrite on a shoestring"

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The international move to plain language tax legislation

There is increasing public demand for clearer legal language on matters that directly affect the pocketbook, particularly the corporate/commercial pocketbook. And an increasing response in the form, for example, of the recent United States presidential directive requiring plain language in securities prospectuses.

The key area of demand, not surprisingly, is for improved tax laws. Resentment of taxation has engendered revolution across the ages. How much greater that resentment when the obligations are stated in almost incomprehensible terms? And this form of legislation has an inherent inclination towards increasing complexity:

- It is subject to frequent amendment to add clarification, provide specific exceptions and close loopholes, as well as to establish new tax obligations or provide new tax credits.
- There is a reluctance on the part of governments to re-enact current tax law for the sake of improving organization when undertaking the required amendments.
- Within our parliamentary system, the pressure of budget drafting leaves barely enough time for the effort needed to convert effective language into clear language, and almost never enough for the extra effort required to take it from clear to plain.

Response to this demand is seen in the various tax law improvement projects currently underway in Australia, New Zealand and the United Kingdom. To say that these projects are large does not do them justice. They are huge — legislative drafting in the public eye on a grand scale. Like home renovations (and here I comment from all too personal experience), it seems these tax law improvement projects take longer, cost more and have more outside help tramping through the existing structure than anyone originally anticipated.

Consider the U.K. Tax Law Simplification Project. If you have not visited their extensive website, I commend it to you.[1] There you will find, for example, the minutes of the July 29, 1998 meeting of the TLSP "Consultative Committee" (with over 16 persons in attendance, a number representing specific organizations). The minutes reveal that the project has been slowed by a lack of drafting resources — although 4 new drafters were to join the rewrite team in the following month — and that this large committee is being called on to make very specific drafting decisions. In that meeting, it seems the drafters were asking the Committee to rethink an earlier decision that

preferred repetition over reliance on cross-referencing (an ever-present conundrum for legislative drafters).

Or consider the Australian Tax Law Improvement Project, with its gradual replacement of large chunks of that country's income tax legislation, with a "guidebook" style and dramatically new graphical approaches to the presentation of tax rules. They too have an Internet website.[2]

While there are clearly benefits to undertaking such work in a highly transparent process that involves and develops the advance agreement of key stakeholders, the expense involved and time required are considerable.

With that in mind, this paper describes a more limited approach — using fewer resources, making less extensive changes — that may still provide some significant improvements.

A "plainer language" revision

Canadian jurisdictions regularly revise their public Acts (if one can call every 15 to 20 years regular). Under the authority of a Statute Revision Act, the jurisdiction will consolidate amendments that have been made since the previous revision, renumbering to eliminate gaps and incorporate additions. In many cases, the revision powers will extend to reordering and rearranging enactments and making minor changes for the purpose of modernizing language and achieving a consistent style.

British Columbia started its most recent statute revision in 1992 and completed the project in 1997. Improving the readability of our statutes was a key goal. To do this, we planned to:

- use document design principles to develop a better format,
- redraft to gender neutral language, and
- to the extent that time and our authorizing legislation allowed, apply other plain language principles.

The improved readability goal was expressly mandated in our *Statute Revision Act*,[3] which provides:

> 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
>
> (a) combine Acts or provisions of them;
>
> (b) alter the numbering and the arrangement of Acts or provisions;
>
> (c) rename an Act or portion of an Act;
>
> (d) alter language and punctuation to achieve a clear, consistent and gender neutral style;
>
> (e) make minor amendments to clarify the intent of the Legislature, to reconcile inconsistent provisions or to correct grammatical or typographical errors; ....

A targeted revision of the *Social Service Tax Act:* A number of general language changes were made throughout the revision relying on these section 2 powers (for example, "shall" was changed to "must", the opening "where" was changed to "if", Latin and other unnecessary legalisms were eliminated). For a few selected Acts, we attempted a fuller plain language revision, targeting those that had high public use and were most in need of improvement. Our sales tax legislation, the *Social Service Tax Act*[4] (SSTA) was one of these.

Over the years of accreted amendments, the SSTA had become more and more difficult for readers to approach. Numbering had come to the point where one had to deal with a tax imposed by section 2 (4.016) and an exemption provided by section 4 (1) (z.991). In one case, a single section went on for over 6 pages, with no marginal notes to indicate that there were a significant number of distinct taxing provisions included within that length. Provisions modified provisions modifying other provisions.

I was the drafter who volunteered to take on the SSTA revision, admittedly with some personal benefit in mind — I do much of the drafting in this area and anything that gave me a more readable starting point was going to improve my life on an annual basis when budget time came round.

Initial resistance from Finance: I started with an expectation that some strong persuasion would be needed to have our tax officials agree with the proposed revision approach — what might be called "aggressive delicacy" — aggressive in that we wanted to invest the time needed to make a significant improvement in readability, delicate in that we appreciated the sensitivity needed to avoid substantive change to tax law in the process.

I had not realized just how difficult this persuasion would be until I made the initial contact (with the excellent policy director who normally provides my instructions on amendments to the Act). The Ministry of Finance and Corporate Relations response was that they did not want anything changed. Their primary concern was with losing the security of legal precedents that have developed over many years of litigation. They also quailed at the consequential clerical work (updating policy manuals, databases and such) that would be required. They were going to get their deputy minister to write our deputy minister expressly requesting an exemption from the statute revision. Ooof!

But I did have some responsive ammunition at this point. There had been a session on plain language tax legislation at the 1994 CIAJ Legislative Drafting Conference. One of the panelists spoke with the poignant regret of hindsight about being a strong lobbyist for leaving the federal *Income Tax Act* numbering unchanged at the time of their 1985 Statute Revision. "*Carpe diem!*" I admonished my Finance contacts. "This may be your only chance at getting the mess cleaned up."'

At the least, I convinced them to let me produce a first revision draft, "redlined" to show changes from the current Act. We would discuss the merits after they had had a chance to see what could be done. In the end, there was (I believe) substantial improvement from what might reasonably be considered as relatively minor changes.

The simple changes: Some changes were quite mechanical:

- ◊ The standard wording changes and gender neutral language revisions were made.
- ◊ Definitions that had been added to individual sections, then later made applicable to more than one section, were consolidated with the other general definitions in a single section.
- ◊ Formulas which had been in the "algebraic term" form were converted into a more explanatory "meaningful label" form. So, for example, the pre-revision formula:

$$Tax = \frac{P \times BCH \times R}{TH}$$

became

Tax = purchase price x rate x (BC usage ÷ total usage)

(While the bracketed division statement might be more readable in a fraction form to indicate its proportionality intention, the resulting formula would have converted less easily into our searchable database — style gave way to technology.)

But the greatest benefits were in improving logical flow, splitting lengthy provisions and splitting lengthy sentences.

Improving logic: The revision re-ordered provisions so that, for example, a vendor registration section did not appear in the middle of the taxing provisions. Then Part headings could be added, directing the readers to "Imposition of Tax", "Exemptions", "Refunds", "Collection of Taxes" and such. And Parts could be further subdivided into topic Divisions.

That re-ordering allowed the table of contents for the Act to be used as an effective search tool (a proper index for the new revision being an unaffordable luxury at this time) — access to the law must include being able to find the relevant provisions, as well as being able to understand them when they are found.

Section splitting: This "letting the light in" (as I have been known to call it) was used at a couple of levels: first, in creating multiple sections from single sections whose subsections dealt with distinctly different topics; second, in splitting single but lengthy and complex sentences (subsections) into separate provisions.

An example of section splitting was the former section 2 ("Tax on purchaser") — the single section that went on for over 6 pages. It became a separate Division of some 15 sections with explanatory headings such as:

Provincial sales tax
Rates of tax
Tax if use of property changes
Tax if trade-in allowed on purchase
Tax if property brought into B.C. for use
Calculation of tax if use in B.C. temporary
Tax if property brought into B.C. by non-residents

In the end, 57 sections of the pre-revision Act became 138 sections in the revision.

Splitting lengthy sentences: This was needed because much of the Act dated back to a time when legislation preferred the form of:

> "Notwithstanding" [some other section],
> "where [this, that and another circumstance exists]
> "a person who" [comes within this, that or the other description]
> "the person shall/may" [do this, that and/or the next thing,]
> [within this time period, in this form and subject to these approvals]
> "except where" [some other circumstance exists,
> in which case some other rule applies].

Compact, yes; efficient, yes. But if one accepts the plain language rubric that readers start losing the sense of a sentence at around word 25, it is apparent this form creates a substantial barrier to comprehension. The complexity was compounded by the fact the SSTA is a tax statute, in which the need for specificity and certainty resulted in more elaboration than might be the case for other legislation.

A number of techniques for sentence splitting were used. For example, a provision that had a complex statement of application (who was subject to the stated legal action and in what circumstances) might be split by providing an opening application statement in the form:

> This section applies to a person who (a), (b) or (c).

The application statement approach did leave the main statement of the revised sentence to a later provision, but it let readers know immediately whether the section had any bearing on their situation. Exception statements were usually moved to a separate provision to follow the main statement of legal action. Process provisions (when, how, how much) would be separated if the legal action statement remained overly complex.

At the same time, there was no fixed template for sentence splitting. The end result depended very much on the length of the initial sentence, the complexity of concepts and the relationships between them. Care was taken to keep relatively parallel provisions parallel in their splits.

The initial reception: Finance received my revision draft (along with detailed concordance going both ways), reviewed it carefully themselves, then reviewed it with their solicitor. In the end they decided the risk to their legal precedents was worth the improvement in readability.

On the numbering aspect, they became positively enthusiastic. They acknowledged the work that would be needed on their policy manual and information bulletins, but saw the benefit of easier access to relevant provisions, to the point where they were asking for even more splitting of sections into finer details of topic separation.

They also expressed some wistful hopes that possible ambiguities might be clarified, but accepted the Legislative Counsel position that this was a matter for amendment rather than revision.

Outside review of the draft revision: Once the draft was in a form that Finance was comfortable with, we used our legislation review arrangement with the local Branch of the Canadian Bar Association to provide a confidential review for the SSTA revision.[5]

Senior tax lawyers were provided with copies of the draft in clean and redline formats, along with an explanatory letter about the purposes of the statute revision and our intention to improve readability without changing substantive effect. After they had had a time to consider the revision draft, a lengthy conference call allowed a section-by-section discussion. Again, there were calls for further splitting of sections.

How has the response been?

Our Finance contacts say they find the revised legislation is much easier to work with. They point to it when outlining service improvements the ministry has made for the public. They tell us the legislation is now "logical" and "easy to access". And they also admit it took a whole lot of time and effort to change over their database to the new numbering system.

For this paper I went back and specifically asked, "Would you do it again?" That is, would Finance welcome or accept another revision if the Act got itself into anything approaching a similar state of disorder? (Recognizing that the B.C. *Statute Revision Act* has continuing authority for Chief Legislative Counsel to undertake a limited revision consisting of an Act or a portion of an Act.) Their response was "an unqualified yes."

In terms of public response, Finance officials have received many verbal compliments from tax professionals on how much easier it is to find and understand the relevant provisions. Formal comments have been very limited, although we do have one letter from a tax lawyer praising the "much superior" organizational context of the revision version.

While we have not been overwhelmed with pleasant letters thanking us for the effort, we believe that the changes have not only made the Act more readable, but that they will provide direct benefits, for example, in terms of reducing the need for interpretive bulletins that explain the legislation or that provide guidebooks through the tax law maze. Improved comprehension may mean improved compliance in a self-reporting tax regime. Finance hope that this may also mean reduced litigation, and they will be tracking it over the next few years. Time will tell.

Footnotes

[1] Internet address: http://www.inlandrevenue.gov.uk/rewrite.htm

[2] Internet address: http://www.ato.gov.au/tlip/Tliphome.htm

[3] Enacted to formally authorize our revision as the *Statute Revision Act*, S.B.C. 1992, c. 54. It is now R.S.B.C. 1996, c. 440, and provides a continuing authority for Chief Legislative Counsel to undertake full or partial revisions of the B.C. statutes.

[4] Before the revision, R.S.B.C. 1979, c. 388. Now R.S.B.C. 1996, c. 431.

[5] Described in J. Erasmus and A. McLean, "Confidential review of draft legislation by members of the private bar", a paper presented to the August 1996 CALC meeting (Vancouver, B.C., Canada) held in conjunction with the Commonwealth Law Conference.

How To Prepare Drafting Instructions

For Legislation – Canadian Style

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I Professional drafting offices

A striking feature of Canada's legislative system is the channeling of government Bills and regulations through an office dedicated to legislative drafting. These dedicated drafting offices, inherited from the United Kingdom, have been described as providing a *unique interface* between the executive and the legislature.

This *interface* involves transforming government proposals for new law into Bills or regulations. The commentary following suggests ways in which a government department or agency can best communicate its proposals for new law to the legislative counsel office.

II The challenge

Before legislative counsel can produce a draft, they must know what to say. What the drafter wants to say is what will achieve the aims of the instructing department. When departmental aims are well stated, the drafters' task is easier; when the aims are unclear, or incomplete, those inadequacies are reflected in the drafting.

Most government departments engage in a major regulatory project only once a decade or so. Departmental officers are unlikely to be involved in a significant legislative drafting project more than once or twice in their professional careers. Even if they are, they may be in a different position with new responsibilities. Inevitably, departmental officers need information about preparing new law but find it hard to get.

Political issues add to the practical difficulties of researching and designing a regulatory initiative. Short time frames, limited resources, inadequately planned legislative programs, and policy changes in the middle of a project all tend to be the norm, adding to the complexities and challenges of a legislative drafting project. Yet, these are all facts of drafting life.

III What are drafting instructions?

Drafting instructions tell legislative counsel what is to be achieved by legislation and how the legislation is to achieve it.

The late Dr. Elmer Driedger commented that drafters must

> *be brought to the point where they are qualified to deal with the subject matter from a legislative point of view.*

Legislative counsel need to know:

(a) what the present state of the law is,

(b) what the law is to be, and

(c) why.

The "what will be" and "why" are both important elements of legislative drafting instructions. In writing them down, in thinking them through, and in discussions about them, the "what is to be" and "why" help sharpen the issues from different points of view and often help create new ideas for better legislative solutions.

IV What should drafting instructions include?

Before preparing drafting instructions, instructing officials should meet legislative counsel to establish a relationship and find out anything legislative counsel need to know. Be guided by their advice.

When possible, drafting instructions should include the following material:

- background

  [Instructions should contain sufficient background information to enable the drafter to understand the problem or initiative, how it has arisen, and why it is being proposed. This should include issues the legislation is intended to deal with.

  Proposed legislation often has a history which contributes to the solution proposed by the instructing department. The drafter needs this knowledge for the drafting process, but care should be taken to distinguish between background information and the actual legislative proposal.]

- principal objectives

  [The principal objects of the legislation should be clearly and fully stated. It is helpful for the drafter to know the purpose of the legislation and for the instructing department to think through its precise purpose, so that the drafter properly understands what it is the legislation is intended to achieve.]

- complete, accurate, and comprehensive description, in straightforward language, of how the objectives of the legislation will be achieved.

  [As far as possible, the instructions should provide a picture of how the legislation will actually work, describing the machinery envisaged and the necessary powers and duties.

  Important issues of policy as well as administrative details should be included in the instructions. For example, if a power to make regulations is envisaged, the instructions should identify the kinds of things that are intended to be dealt with by the regulation.

  Instructing officers should not be reticent about pointing to gaps in the instructions or particular areas where advice is being sought or is required. It is far better for legislative counsel to know of the uncertainties than for the department to cover them up.]

- if the draft legislation is to be the subject of a consultative process, the instructions should describe the nature of it and the projected timeframes

- information about the availability of all relevant legal opinions and legal research

- relevant court decisions, or an indication of their availability

- any transitional provisions needed to deal with issues arising as a result of the repeal of one law and the enactment of new law

- the coming into force date of all or part of the legislation, or information about how the law is to come into force

- any Acts or regulations to be amended and the nature of the amendment needed

- any Acts or regulations to be repealed

- information about relevant background material, for example:

  - reports of committees, law reform bodies, or the like, on which the proposals are based

  - legislation in other jurisdictions that would provide useful guidance

  - discussion documents, texts, or articles

- whether other departments and agencies are affected by the proposal. The instructions should indicate if there have been consultations and note any outstanding issues
- areas of concern on which the advice of legislative counsel is requested
- proposed timeframes for introduction as a Bill or enactment as a regulation
- any government, ministerial, or department commitments about the legislative proposal
- the name and contact information for the senior official responsible for giving instructions and answering questions.

If in doubt about what to include in the drafting instructions or how to tackle a problem, call the legislative counsel office. They have a wealth of knowledge and experience and may be able to help with a seemingly intractable problem.

V What form should instructions take?

Most legislative counsel prefer to receive instructions in a straightforward narrative form. Many offices do not object to instructions in the form of a draft, preferably annotated with explanations.

[Departmental drafts are instructions only and legislative counsel will prepare their own draft based on the instructions. Consequently, departmental officers should avoid committing to any particular form of words or expression, because these may not survive the drafting process. Alternatively, involve legislative counsel early to get their input on proposals.]

VI Responsibilities of instructing departments

Few undertakings for a government department are more challenging or complex than to preparing legislative drafting instructions and shepherding a proposed Bill or complex regulation through the legislative process.

Significant legislative proposals should have a strategic plan and resource persons assigned full-time to the project. Without dedicated resources a project will suffer. Resource persons should have authority to make decisions on issues or be able to get decisions quickly.

The departmental person in contact with legislative counsel needs special qualities, not only to prepare instructions and answer questions, but to view drafts with a critical eye to see that they do what is wanted.

Sound legislation is the product of good collaboration between a skilled drafter and knowledgeable officials. The departmental official must have a sense or natural ability for reading drafts and seeing what is right and wrong with them. Although expert in their area, some officials are reluctant to make critical commentary on drafts in the mistaken belief that the legal text is up to legislative counsel, and not of primary concern to them. Other officials have a genuine difficulty seeing the effects of a draft: they see the words but don't see the deficiencies or ramifications. Critical commentary on legislative counsel drafts is a vital element in producing the best legislation possible. It will be expected and encouraged by legislative counsel.

VII Role and responsibilities of legislative counsel

It is helpful for departments and agencies to fully understand the role of legislative counsel. As a general guide, most legislative counsel have these kinds of responsibilities:

- *to maintain an orderly statute book*

  [This includes maintaining a consistently modern style of drafting; avoiding unnecessary renumbering; using the *Interpretation Act* appropriately; making appropriate consequential amendments; avoiding conflicts between one Act and another; making proper use of the *Regulations Act*.]

- *to notify other departments of legislative proposals that may affect Acts under their administration*

  [This can sometimes cause conflict when one department is reluctant to deal with expected objections of another department or just does not want to undertake the burden of considering consequential amendments.]

- *to raise questions of principle*

  [From time to time legislative proposals offend fundamental principles of fairness - for example, proposals to make the law retroactive, certain powers of entry, search, and seizure, interference with individual rights, expropriation without compensation, and so on. Quite apart from Charter of Rights issues, legislative counsel may have a duty to raise fundamental fairness issues at a political or other level if they cannot be satisfactorily resolved with the department concerned.]

- *to insist that transitional problems are considered*

  [Often transitional provisions are left for consideration too late in the drafting process and are seen to be "a legal problem" not of real concern to the instructing department. Transitional sections are a vital component of the draft designed to effect a smooth transition between the old and new law. They can be complex and time-consuming.]

- *to ask questions*

  [Legislative counsel are responsible for preparing sound law. A proposed law can be tested in many ways but one of the most valuable is by asking "What if . . .?" Instructing departments should expect pertinent questions. They help point out flaws and improve the legislative scheme.]

- *to identify and resolve Charter and legal issues*

  [As the Supreme law of Canada, the Charter of Rights and Freedoms must be considered throughout the drafting process. Constitutional opinions are often needed. Any Charter or legal issues that have not already been identified will be raised by legislative counsel.

  If departments are aware of the need to consider constitutional issues, they can often be cleared up early in the drafting process.]

- *to refer unusual offence or penalty provisions to Crown counsel for comment*

- *to consider the "legislative package"*

  [Legislative proposals often involve a mix of new law, amendments to existing law, and the repeal of law. One provision may depend on another. The form of the legislative package must be carefully thought through in collaboration with the instructing department.]

- *to spot financial and other practical implications*

  [When legislative counsel see significant financial implications for a Bill, they must refer it to Treasury officials if the matter has not already been discussed with them. Similarly, if the Bill is likely to have a significant impact on the court system, or the cost of administering a new law by another department, the appropriate departmental officials will be alerted.]

- *to draw attention to significant policy changes made to instructions*

  [It is common for instructions to change during the drafting process. If the change in policy is significant, approval may be required from a minister, cabinet, cabinet committee, or caucus. If the approval is not obtained by the instructing department, legislative counsel may be obliged to raise the issue.]

- *to decide on the last word*

  [The words chosen for a draft are the responsibility of legislative counsel. But departments must be satisfied the words meet the policy objective. Departments are encouraged to comment on issues of precision, comprehension, and clarity, as well as ensuring the draft meets their policy objective.]

Not all legislative counsel have all the listed responsibilities but all have responsibility for some of them. Providing comprehensive instructions and understanding the roles and responsibilities of legislative counsel, in advance of a drafting project, mean that it is more likely the project will proceed smoothly.

VII Conclusion

As Garth Thornton, the author of *Legislative Drafting* (Butterworths) 4th puts it, the drafter needs

> *. . . to develop an obsession to draft so as to be readily understood. [The] task is not only to determine the law, but also to communicate it.*

Creating readily understandable law is challenging at both policy development and drafting levels. But the goal is achievable. Good drafting instructions allows for more time for better legislative drafting.