CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

LEGAL DRAFTING: LANGUAGE AND THE LAW

New technology and drafting:
The latest devices, techniques and ideas

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Contents

First words

New technology and drafting: the latest devices, techniques and ideas for drafting sounds heavy going just after breakfast. To make it more digestible the session will be divided into 2 parts

- the first, some ideas about drafting and the technology available to help drafters

- the second, a session by Susan Krongold who interviewed legislative counsel across Canada this summer. You will hear something of her study about making statutes more readable.

We will finish with a short wrap up with a few minutes for questions.

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PART 1

INFORMATION ANXIETY

(1) What can we do about it?

Technology of the mind and machine

The technology I am going to talk about covers both the technology of the mind and the machine. What sorts of things can we use or think about to help us write better? - and what kinds of technology is available to make writing easier?

Information anxiety

People read legislation and legal documents looking for answers to questions. More often than not what they find is what Richard Saul Wurman calls information anxiety;[1] the black hole between data and knowledge. It happens when "information" doesn't tell us what we want or need to know.

Starting point

The starting point to fill that black hole is to accept that what we write is not for ourselves but for others. For this session I ask you to accept that what you write is for others and to think about what that means. Think about what you hear in this session not in terms of whether you think it is a good idea, but whether those for whom you write would be helped by it.

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1 Richard Saul Wurman: Information Anxiety, Doubleday

The moment we accept, even temporarily, that what we write is not for ourselves but for others, our minds start to reorient themselves. We start to think not only of getting what we write correct - but of getting the message across to those for whom we write. It means we become interested in clarity as well as precision. That leads us

> to ask what helps people understand texts (and then to use those things in our writing); and
>
> to ask what impedes understanding (and so avoid those things in our writing).

Writing for others means we are constantly on the look out for ideas. Ideas that help communication. Ideas we can then use for particular drafting jobs. What we are about is to reverse the extraordinarily strange situation that free societies have arrived at where their members enter binding obligations they do not understand and are governed from cradle to grave by texts they often cannot comprehend.[2]

Doing something about the language of the law

There is no doubt that people outside the legal profession are becoming increasingly restless about the language of the law. Fortunately there are a growing number of lawyers who are doing something about it. They recognise that the language of the law can gain enormously from the help other professions and

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2 A modification of Mr Bennion's comment:

> It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend. The democratic origins are impeccable the result far from satisfactory...

F Bennion: Bennion on Statute Law, Longman (3d) p10.

disciplines can give it.[3]

The very fact that this seminar has been organized, and of the participation in it, indicates a realization that our writing can be helped by other professions and disciplines. It is a great step forward.

Each advance of knowledge about how readers read and understand texts should be complemented by a shift in style, organisation, word order, thinking, or document design by us as writers. This conference shows us many ways in which we can start that process.

Social and economic reasons for improving the language of the law

If laws are written or contracts are drawn up that cannot be readily understood by those most affected by them the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it. Ignorance of and disrespect for the law damage the fabric of society.[4]

Unnecessarily complex language, redundant words, and language which fails to communicate, impose an enormous financial burden on all levels of society. Even minor improvements to the language of the law can bring substantial savings of time; time which can then be put to more productive use.[5]

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3 The admirable comment of a witness in the Wandsworth County Court comes to mind

> I know that ignorance is no excuse for the law.

Recorded in a footnote to A Russell: Legislative Drafting and Forms, Butterworths 4th ed p17.

4 See Sir John Donaldson's comment in Merkur Island Shipping Co. v Laughton [1983] 1 All ER p334.

5 Legislative counsel have long recognised this fact in Canada. Interpretation Acts were, in part, designed to economise on the language of statutes.

A plea and a smorgasbord

I have a plea and a smorgasbord of ideas

- the plea is to think not only of getting legislation and legal documents right, but to think of making them as intelligible as their subject matter allows;

- the smorgasbord of ideas is drawn from new and old drafting ideas which can help make documents easier to read and more understandable - understandable enough to help reduce information anxiety.

* * *

(2) Lawyers as writers

There are, I think, 4 types of lawyer writers:

1 there are the non writers

The lawyers who will do almost anything to avoid writing. They will use an ill fitting precedent, give no thought to communication - don't see anything wrong with this sort of letter[6]

6 Written by one lawyer to another in August 1990.

> We have acknowledgement and thanks, your letter of August 15th together with your enclosed resume. Might we thank you for forwarding the same to us?
>
> Unfortunately, our office is composed of an Association of five lawyers, each of whom have their own areas of practice and such, the office is not meanable to the hiring of an associate. Again, might I thank you for your interest in our firm?

Or a law society that passes a rule reading:[7]

> Money shall be withdrawn from a trust account only by cheque which:
>
> (a) shall not be made payable to cash or bearer;
>
> (b) money shall be withdrawn from a trust deposit that has no chequing privileges by being transferred to the member's operating trust account
>
> (c) a transfer of funds from a trust deposit to an operating trust account shall be recorded in the member's books and records, including the transfer journal or chronological file referred to in Rule 118 (2) (d), even though such a transfer may not be a transfer between trust ledger accounts.

2 there are technical writers

They do care about what they write, but only enough to get it right. As long as the lawyer writer is satisfied that the words do "get it right" no more needs to be done. The technical writer has no concern about using archaic legal language, overlong sentences, does not recognise redundancies, and sees complexity as an inevitable necessity of legal writing. And the technical writer makes no attempt to simplify what he or she writes - so creating a self fulfilling prophesy - that legal writing has to be complex.

Here is an example of something simple made overly complex by the way it is written.

> 119. Every member who is engaged in the practice of law within Alberta shall annually, within forty-five days of the end of each of his fiscal years, complete a Member's Certificate in Form S in the Schedule to these Rules in three copies of which one copy shall be forwarded to the Secretary, one copy shall be supplied to his Chartered Accountant or Certified General Accountant and one copy shall be retained by

7 This rule became effective in June 1990.

the member and shall annually within ninety days of the end of each of his fiscal years:

(a) have his books of account reviewed by a Chartered Accountant or Certified General Accountant or other person approved by the Sub-Committee on Lawyers' Trust Accounts; and

(b) cause an Accountant's Report in the form and content of Form T in the Schedule to these Rules to be duly completed by a Chartered Accountant or Certified General Accountant or other person approved in accordance with clause (a) of this Rule and filed with the Secretary by the person making the review.

Or worse, this recital from an agreement about lost bank cheques[8]

AND WHEREAS the said _____ alleges that the said Cheque has been lost or mislaid, and has requested the said Bank to reverse in said account the charge of said Cheque so lost or mislaid as aforesaid, and the said Bank has consented to do so upon the said obligors executing these presents.

3 there are legislative counsel

In this century legislative counsel have been the most innovative of legal writers. Their contribution is either unknown to or overlooked by the legal profession. The Canadian Bar Association/Canadian Banker's Association Joint Committee[9] is just the latest example to incorrectly lump bad legal drafting with legislation. For the most part there is no comparison between the modern Act and the standard legal precedent. The legal profession can learn much from legislative counsel.[10]

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8 Canadian Bar Association and Canadian Banker's Association Joint Committee Report: The Decline and Fall of Gobbledygook: Report on Plain Language Documentation, Canadian Bar Association (1990), Appendix B-1.

9 Joint Committee Report on Plain Language Documentation.

10 This is not to suggest legislative drafting cannot be improved - it can. But any comparison between Canadian legislation and legislation elsewhere in the Commonwealth shows the superiority of the Canadian style. This has been greatly helped by periodic revisions of the statutes. It is only in the past 5 years that Australia has, in places, improved its legislative drafting style. This is based largely on a rejection of the views of a Scottish Parliamentary Counsel who says that (in the UK) only the remote lunatic fringe reads legislation so the readability of legislation is an irrelevant consideration in drafting. (Proceedings of the Franco-British Conference on British and French Statutory Drafting 7-8 April 1986, Edited by Sir William Dale).

4 there are communicating lawyers

Lawyers who are not satisfied with "getting it right" but move on to making the writing communicate. They make their writing as intelligible as they possibly can. They balance precision and clarity. Some legislative counsel fall in this category, some do not.

* * *

It is not my purpose to poke about legal precedents and hold them up for criticism. My purpose is to show you a few of the devices, techniques and ideas used by communicating lawyers. Here are some of them.

PART 2

COMMUNICATING TO AN AUDIENCE

(A) New thoughts on thinking about writing

New drafting techniques and ideas stem from accepting that every legal document is intended to be read.

Understanding by whom particular legal language will be read and how readers will use a document gives writers ideas for writing documents so that they can be more easily understood.

(1) Stating a purpose

Research shows that readers are better able to understand and interpret texts when they have a context for reading them. Purpose sections can create the context.

What are purpose sections?

By a 'purpose section' I mean a statement in an Act or legal document which states the basis on which the legislation or legal document rests and which is itself law making or intended to have legal effect.

Sir William Dale has described the reason for including purpose sections in legislation this way[11]

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11 Statute Law Review, Spring 1988, p15.

An enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, and assists the courts when in doubt about the application of some specific provision.

Why purpose sections are becoming more popular

Every Act is passed for a reason. Those reasons may be, in the mind of the reader, of lesser or greater importance, valid or not. But there is, in the collective "mind" of Parliament, a reason for every Act it passes.

On that basis, if there is a reason, a purpose, for passing an Act, it is only common sense to say what that purpose is. In the absence of a statement of purpose, the reader is left to search for his or her understanding of the purpose.

If the reader has to come to a conclusion about the purpose of an Act, even if that conclusion is a mental exercise, why not help the reader by stating the purpose explicitly?

So the reason for a 'purpose section' is to aid in understanding the text of the Act and an aid to interpreting it when questions arise. A purpose section is an aid to every reader - from the recipient of some benefit or obligation under the Act to the interpreter, whether that interpreter acts to administer the Act or to judge legal issues arising from it.

The problem with purpose sections

The major objection (raised by writers <u>not</u> readers) about including purpose sections in legislation or legal documents is that they will be used! But used to obscure what the writer thinks would otherwise be clear.

Another typical objection to purpose sections is that they restate in different words what is said more specifically in later provisions of the Act or agreement.

A third objection is that purpose sections tend to lose their purpose and become merely statements descriptive of what follows (eg "this Act regulates the sale of liquor"), or much worse, a political manifesto.[12] This is much more likely to be a problem for legislative counsel than for lawyers in private practice.

Appendix 1 suggests some ways of thinking about and testing purpose sections and some comments of readers who find them helpful.

Aiding interpretation

The bottom line is surely that the proprietary interest a writer has in the document he or she writes is fleeting. After the writing is complete the document gains a life of its own. New issues, different situations, new technology, human ingenuity all create situations the original writer may not have contemplated or have dealt with imperfectly. These issues most often arise years after the document left the writer's hands. It is then that purpose sections can be particularly helpful in aiding interpretation.

Writing purpose sections is not easy, nor are they always helpful or desirable, but most readers do find them helpful. We should think about including them in the

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12 Francis Bennion probably sums up the drafter's objections best:

> Draftsmen dislike the purpose clause. They take the view that often the aims of legislation cannot usefully or safely be summarised or condensed by such means. A political purpose clause is no more than a political manifesto, which may obscure what otherwise may be precise and exact... The draftsman's view is that his Act should be allowed to speak for itself.

F Bennion: Statutory Interpretation, Butterworths, London 1984 p580.

legislation and documents we write more often than we do.[13]

(2) Document organization

Documents should be organised to help the most likely readers. Legislation and legal documents are not read for pleasure but to get information. So, from a readers' point of view, good writing is writing that structures information in a way that enables readers to get the information they seek as easily as possible.

How will the document be used?

Organizing a document well means that we must know who the most likely readers of it will be. The writer is often not the best person to make decisions about the organisation of a document. Clients can help here whether they are

> Government Departments; they should know who the likely readers are and the questions they commonly ask and mistakes most often made by the readers they serve;
>
> businesses; who should similarly know what their customers are like and the questions they ask;
>
> individual clients; who feel isolated, threatened and excluded by legal language but who if given a chance, would probably like to help design the documents they are asked to sign.

Even accepting that our government, business or human clients should help design the most appropriate organisation for documents leaves difficult and important questions. Research into how people read and react to documents should guide us

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13 Using purpose sections is not an argument for a civil law drafting style instead of a common law style. It is intended as a plea to keep an open mind and to use whatever tools are appropriate to do the job.

as we internally organize them. If we can foresee how readers are likely to use a particular document we can organise it so that it is as efficient as possible for their use.

Organizing for readers

Our usual writing practice is to impose our own writer based thinking process and organisation on readers. A process and organisation that is entirely logical to the writer but not necessarily helpful for the reader.

We can look at organisation on several levels:

(a) overall organisation[14]

(b) organisation within Parts and divisions

(c) sentence word order.

For example

> A typical legal document will start a clause "Subject to ..."
>
> For the writer this is entirely logical. He or she knows that what is about to be written is qualified by something coming later. The writer wants the reader to be warned, so the automatic "subject to" pops

14 It is entirely correct for a writer to start a drafting project making sure the foundations are properly established. Creating an administrative agency and providing for its operation for example - and then building on that structure. But when the writer is satisfied that all the pieces are correct he or she should think of organization from the reader's point of view. Is it helpful for the administrative agency to come first? Would it be more helpful if the important substance of the legislation or agreement came first - with the administrative agency much later?

into mind.

Now think of this from the reader's point of view. Before they read anything they are told to refer to somewhere else in the document. They look there, not knowing how the qualification relates to what they are about to read. They go back to the clause and read the rest of it. Inevitably they must then go back to the qualifying clause.

The reader is bounced about the document trying to understand the writer's logic.

A different approach will often help readers. If readers first understood the basic content of the section they would then be much better able to fit qualifications into it. This could be done in a number of ways

- putting the "subject to" at the end
- briefly describing what the "subject to" is about, followed by the section reference
- structuring the whole document so that the basic thrust of sections comes in subsection (1) and exemptions or limitations in later subsections
- using a footnote to indicate there is a qualification to the statement
- using typographical aids to highlight exceptions and qualifications to a statement.

What works best? Whatever works best for the readers for whom you are writing. Don't know? Do some testing ...,[15] ask some questions, take advice from others.

The principle to be drawn from the research to date is this:

> **writers should structure information around people performing actions or asking questions in particular situations**

This principle has been called the scenario principle.[16]

(3) The scenario principle

Here are some examples of the scenario principle:

(i) using questions

Most readers come to legislation and legal documents with questions: can I do this? what happens if I do that? how can I get this or that?

How helpful it would be if readers coming to a document with a question not only found the same question in the document - but the answer. It is a

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15 The Law Reform Commission of Victoria, Australia, commented on the practice of stating conditions before a rule in these words:

> Linguists have discovered that that style of writing is only suitable for those who read or write in Japanese or Turkish. It runs directly contrary to the way in which ideas are presented in other languages, including English.

Access to the Law: the structure and format of legislation (1990)

16 PV Anderson, RJ Brockmann, CR Miller: New Essays in Technical and Scientific Communication: Research Theory and Practice (1983), essay by Linda Flower, John Hayes and Heidi Swarts called Revising Functional Documents: The Scenario Principle p41.

simple matter for documents to be given appropriate headings stated as questions; and suddenly the document becomes alive, meaningful, useful - it becomes functional.

For example, instead of a heading "Eligibility" why not try "Who is eligible?"; instead of "Coverage" try "What happens if there is a fire?"

Some commercial documents have started to use this technique but rarely is it found in legislation. It could and should be.

(ii) using diagrams

Some provisions are tough to write.[17] Despite our best efforts they may not be easy to understand. How can the reader be helped in these circumstances?

If there are a series of complex provisions in which it is easy to get lost an explanatory line diagram can help paint the big picture so that readers can find a road map out of the forest. A line diagram was included in Alberta's 1973 Labour Relations Bill (although not enacted as part of the legislation) to explain how parties in collective bargaining could move to a strike or lock out position through a complex process. Australian drafters have gone further and included line diagrams as part of the Act.

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17 In a great response to a question about why the Canadian Income Tax Act could not be drafted using a ten commandments style, Don Thorson, former deputy Minister of Justice and principal drafter of the Act said

> the fact is that Moses is not available for employment by the Department of Justice, and even if he were available it would be interesting to see what Moses could hope to do with concepts such as "tax paid undistributed surplus on hand" "control period earnings" and "foreign accrual property income..."

(ML Friedland: Access to the Law, Carswell-Methuen, (1975) p65.

(iii) using examples

Examples have been used occasionally in legislation[18] and legal documents. They have been welcomed by a wide variety of readers and more use should be made of them.[19]

Examples illustrate ideas. The texts we write have ideas behind them - our ideas. If those ideas are not, or are inadequately, conveyed to the readers of the text there is a lack of communication. One way of making sure the ideas we have get across to readers is to help readers with examples. Examples then can be seen as some of the thoughts that the writer has for interpreting the text.

The use of examples, or ideas, embedded in a text can take many forms but the fundamental reason is to help readers better understand the information presented in the text.

Examples can be designed in various ways:

- **a simple illustration like this**

> (x) "writing" includes printing, typewriting, or any other intentional reduction of language into legible form, or to a form which can be converted into legible form by a machine or a device, such as language
>
> (i) on microfilm,
>
> (ii) in electronic, mechanical or magnetic storage, or
>
> (iii) in electronic data transmission signals;
>
> (Extract from a Model Land Recording and Registration

18 Section 14AD of the Australian Interpretation Act says how examples are to be treated if they are used in legislation.

19 Appendix 2 gives some background to the use of examples in legislation.

Act prepared by a Joint Land Titles Committee representing all Provinces and Territories, except Quebec, July, 1990.)

This simple kind of illustration is similar to the typical formulation of regulation making sections in Acts which start with a general statement followed by a list (of examples) of specific regulation making powers.

- **an illustration of how a complicated section works**

This technique has been used to good effect. An outstanding example is the *Consumer Credit Act 1974* (UK). Appendix 2 shows how it was done.

- **a way of helping to change long held attitudes and approaches**

The traditional way of drafting municipal bylaw making powers is to list in considerable detail what a municipality can make bylaws about. If as a matter of policy you are instructed to draft municipal bylaw powers as general statements, how can this be done while ensuring administrators know what they can advise their councils to do; councils have some reasonable assurance that they are not losing bylaw making powers; and the courts take a different approach to interpreting bylaw making powers?

One answer is to include in the Act a list of examples illustrating and indicating what bylaws a council can pass - all

the questions listed above are then conveniently answered.[20]

(iv) using formulas

Often now used in legislation but less frequently in legal documents, the use of formula instead of words is a very helpful drafting technique.

(v) other techniques

Pictures, maps, graphs and logic trees are other techniques that can be used to great effect in our writing.

(4) Using the present tense

Advice from experts

Everyone who writes about legal writing advocates the use of the present tense. Yet lawyers persist in complicating their writing by the use (and often misuse) of the word "shall" in various forms.

The advice to use the present tense in drafting legal documents is consistently given but persistently ignored by most lawyers. J.K. Aitken says:[21]

> "The way is therefore open for draftsmen to restrict their use of shall to the expression of the will of the parties as to actions in the future in pursuance of the document. If this is a draftsman's practice, he will find that his

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20 Municipal Statutes Review Committee: Proposed new Municipal Government Act (Alberta) (October 1990)

21 JK Aitken: Piesse The Elements of Drafting, The Law Book Company (6 Ed) p81.

> language seems to be less cumbersome and is easier to follow. He may also avoid positive errors ..."

J.K. Aitken then goes on to recount errors that can arise by using the future tense in drafting.[22]

Robert Dick concurs with the advice to use the present tense. In Legal Drafting (2nd Edition) p 84 he says:

> "In a document the drafter can use the phrase 'if at any time' with the present tense of the verb if he feels that the present tense alone inadequately expresses time relationship under the set of circumstances that are set out in the document."

He also goes on to point to the dangers of not using the present tense. He concludes with a quotation from Pigeon J. formerly of the Supreme Court of Canada who said (in translation):[23]

> "An error to be avoided is the unnecessary use of a tense other than the present tense ... the use of future tense is therefore to be avoided."

Legislative drafting practice

In Australia, the United Kingdom and New Zealand some legislation is in the present tense but there seems to be no uniform drafting practice. In Canada, legislation has long been written in the simple present tense.

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22 See also *Attorney-General v. Craig* [1958] VR 34 in which the Victorian Full Court commented on practice of present tense drafting.

23 Redaction et Interpretation des Lois (Quebec: University of Laval, 1965) p9

The reason why Acts were originally written in the future tense was best summed up by former United Kingdom Parliamentary Counsel Sir Harold Kent in his book, "In on the Act".

In describing his first few days in the Office of Parliamentary Counsel he said he read Lord Thring's book, Practical Legislation:

> "The heart of the little book is Thring's analysis of legislative language, the form of an enactment. He says that in its simplest form it is a declaration of the legislature directing or empowering the doing or abstention from doing of a particular act or thing". He goes on to say that 'if the law is imperative, the proper auxiliary verb is 'shall' or 'shall not', if permissive, 'may'.' Later on in the Office I heard people speak of the 'imperative shall' as a key feature of the legislative form. Indeed, even when an enactment is permissive, such phrases as 'shall have power' or 'it shall be lawful' are often used instead of 'may'. the truth is that a statute creates a new legal situation, and it is appropriate for a sovereign Parliament to command that it shall be so." (p 25)

Later in his book Sir Harold notes:

> "from time to time I note that even the old imperative 'shall' is yielding to the present indicative" (p 106)

On this analysis the use of "shall" is the command of Parliament rather than a direction to exercise a power or duty at some future time. Whatever the historical reasons for its use its time has surely passed.[24]

The practice of drafting in the present tense has long been followed by legislative

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24 Even Lord Thring went on to say in Practical Legislation p 63

> An Act of Parliament should be deemed to be always speaking, and therefore the present or past tense should be adopted and 'shall' should be used as an imperative only ...

counsel in Canada, in part bolstered by Interpretation Acts which require legislation to be regarded as `always speaking'. Advice and warnings of the dangers inherent in the use of false imperatives in legal documents seem to be ignored.[25]

(5) Other thoughts on stimulating ideas about writing legislation and legal documents

The key to improving legal writing is

- to create structures and forums which will turn ideas about communication into suggestions lawyers can use when they write; and

- to teach lawyers and those entering the profession how to write (especially that legal writing does not have to be turgid, complex and dull).

With the aim of improving legal writing in mind, we should:

(1) encourage more drafting courses and support initiatives to create them;[26]

(2) use other professions and disciplines in the design and teaching of drafting courses;

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25 Robert Dick, Q.C.: Legal Drafting (Carswell) p88. The second edition makes the same point.

26 For example, Canadian Bar Association/Canadian Bankers' Association Joint Committee recommendations and the initiative of the Ontario Law Society.

(3) encourage and support research into how readers try to understand legislation and legal documents and adopt practices which help readers;

(4) create a means of distributing information about writing - whether by a newsletter; regular seminars or a network of contacts;

(5) establish exchanges of people and information about writing (for example, between legislative counsel offices, law reform commissions, universities and the practising bar, both here and overseas);

(6) give opportunities to lawyers on sabbaticals to undertake writing or writing research projects;

(7) establish joint projects between University faculties, and with Universities and others relating to teaching writing or writing research, and engaging in comparative studies of drafting techniques and related matters;

(8) encourage the establishment of bursaries and scholarships related to legal writing;

(9) encourage a multidisciplinary approach to improving the expression of the law.

(B) Testing drafts

How can we establish and maintain quality control over what we write individually and within our offices? Here are some suggestions:

(a) a style guide

Particularly in an office of more than 2 or 3 people it is helpful to have a consistent style. It helps if the writers in your office can agree on certain conventions and develop a style guide which writers follow in day to day writing. Most legislative counsel offices have drafting style guides and some larger law firms, both here and overseas, have started to develop drafting guides.

(b) editors

Several legislative counsel offices in Canada use editors to check on grammar and consistency of drafting. I expect an increasing use will be made of them and perhaps others will be hired with different qualifications.

Some larger law firms are using writing experts to rewrite precedents and improve the firm's writing style. Other firms are organizing seminars to improve writing.[27]

(c) readability tests

Computer software will give your writing a 'score' which gives you some indication of how easy, or difficult, your drafts will be to read.

(d) peer review

The comments of a colleague are invaluable. One suggestion made in a

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27 Over 140 lawyers have taken a specially designed legal writing course offered by Wordsmith Associates, Calgary. The Plain Language Centre also provides a variety of writing courses and other help about writing.

Working Group Study to the Law Reform Commission of Canada called Drafting Laws in French (1979) could establish a consistent review process and direct the writer and reviewer to important issues.

The Study suggested a 'review control sheet' dealing with issues of substance and drafting. With some modifications, Appendix 4 reproduces the questions the study group suggested.

PART 3

STRUCTURE AND FORMAT OF LEGISLATION AND LEGAL DOCUMENTS

Why should we be concerned?

What does the structure and format of legislation and legal documents have to do with writing? Again it is a concern of the writer for the reader. If the structure and format of legislation and legal documents can help readers better understand texts we must be concerned about structure and format.

Legislative counsel have long known that breaking up a text into subsections and further dividing it into paragraphs and clauses not only helps people understand the text but removes ambiguity. Writers who do not break up their texts are missing out on a valuable technique to improving their writing.

Simple examples

Compare this fairly typical clause in a will with the same clause, differently structured with minor editing:

The trusty precedent

Executors and Trustees

(a) I appoint my spouse, JANE DOE, (hereinafter referred to as "my Spouse") to be the sole Executrix and Trustee of this my Will, but if my Spouse does not survive me, or is unable or unwilling to act or to continue to act, then I appoint my son, ROBERT DOE, to be the Executor and Trustee of this my Will, but if my said son does not survive me, or is unable or unwilling to act or to continue to act as Executor and Trustee, or ceased to be a resident of Canada within the meaning of the Income Tax Act (Canada), then I appoint my daughter, JENNIFER DOE, as Executrix and Trustee in his place and stead.

The rewrite

Executors and Trustees

(a) I appoint Jane Doe as the Executrix and Trustee of my Will.

(b) If Jane dies before I do, or is unable or unwilling to act when I die or at any later time, I appoint Robert Doe to be the Executor and Trustee of my Will.

(c) If Robert

(i) dies before me,

(ii) is unable or unwilling to act when I die or at any later time, or

(iii) ceases to be a resident of Canada within the meaning of the Income Tax Act (Canada),

then I appoint Jennifer Doe to be my Executrix and Trustee.

The subdivision of a sentence can put an intended meaning beyond doubt. Barbara Child used this simple example:[28]

> A tax credit is available for stocks, notes, and obligations issued by the US government.

Is the credit available for all stocks and all notes no matter who issues them, and only those obligations that are issued by the US government? Or must the stocks and notes as well as the obligations be issued by the US government to be eligible for the credit? The drafter might not notice the ambiguity. But if the provision is set out like this, the ambiguity emerges:

> A tax credit is available for

28 Barbara Child: Drafting Legal Documents, Materials and Problems (1988) West Publishing Co.

(a) stocks,
(b) notes, and
(c) obligations issued by the US government.

The drafter is now forced to consider the alternative possibility:

A tax credit is available for

(a) stocks,
(b) notes, and
(c) obligations

issued by the US government.

It is extraordinary that the legal profession as a whole, which claims to be seeking precision in its writing, does not use the techniques that legislative counsel have used for over 100 years. When text is broken down it not only becomes easier to read it reveals conflicts and ambiguities - most of which can then be easily remedied.

Structure and format of legislation

Henry Thring is usually credited with developing the structure and layout of legislation. He first used a new format in the 1854 Merchant Shipping Bill which he was retained to draft. Thring continued to develop the numbering system used in statutes after the Office of the Parliamentary Counsel to the Treasury was established in the United Kingdom in 1869, and he was appointed the first Parliamentary Counsel.

Although Thring was the first to use a new format and numbering system, the idea of breaking up the text of Acts and legal documents had been promoted by

Bentham some 50 years earlier. Bentham suggested[29]

> Denominate, enumerate and tabulate principles. It facilitates reference, and thereby contributes to conciseness ...
>
> After the verb governing, interpose between it and the list of substantives governed, the words "as follows" with a punctum; - then give to each item a separate line, preceded by a numerical figure.

Appendix 3 traces the way in which the format and layout of our legislation has developed.

Is there something better?

Our numbering system for statutes has served us well. But is there something better? - something that would work more conveniently with a computer? The Victorian Law Reform Commission of Australia thinks so. They suggest a modification of the international standard for numbering (a decimal system) would

- reflect an international trend towards the adoption of decimal numbering systems
- help provide access to legislation in electronic form
- make data retrieval more convenient (brackets and letters would not be used)
- leave less room for ambiguity when retrieving a section

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29 Jeremy Bentham: Of Nomography, p265.

- make reading easier from a screen (numbers replacing letters).[30]

It is time for a thorough review of the way in which the page of the statute book is designed. The results would surely be worthwhile. What efficiencies and economies can be introduced? What changes would improve ease of reading and improve understanding? Is the typeface, line length, page colour, numbering system, margin line and margin note placement the best it can be? We need that research to be conducted not in isolation but in cooperation with other professionals who can help us design our texts to our readers' best advantage.

Our statute book is crisper, clearer and better laid out than most other jurisdictions - lets make a concentrated effort to keep it that way.

If just one or two changes could be made to improve the design of the statute book think of the tremendous savings of time that could be achieved throughout the statute book in all our jurisdictions, not once but on an ongoing basis. And those improvements could be used for statutory instruments, municipal bylaws, company bylaws, collective agreements and club rules as well as other documents.[31]

Although these comments have focused on legislation they apply equally to legal documents.

There is a growing recognition that layout and format is a vital element in drafting

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30 Law Reform Commission of Victoria: Access to the Law, the structure and format of legislation (May 1990). But even so the Commission thinks letters are needed in some cases where Canadian jurisdictions would use ".1 or .2". The jury is out on this suggestion - but it is worth studying.

31 Say for example that comprehensive tests showed that readers were able to locate information a second faster if marginal notes were placed as headings to sections instead of in the margins - or that the placement of section numbers alongside section headings speeded section location - think of the cost savings that could be achieved by everyone reading the statute book each time it is read. Some jurisdictions already use section headings instead of marginal notes.

legal documents. Felsenfeld and Siegal say[32]

> Design should take its place alongside consideration and third party beneficiaries as a principle of contract law. Attention to typeface, letter spacing, clear layout, and colour are important in making a contract intelligible and therefore legally enforceable.

This prophetic statement is coming true. In a recent case in Manitoba[33] the Court found a virtually illegible and incomprehensible exclusion clause (lawyers would call it 'boilerplate') to be ineffective.

Typography[34]

Another aspect to improving the readability of texts is by the use of typographical devices. With the range of typographic tools now available is there any reason why we should not use them in our texts? Why not emphasise critical provisions or those that might be misread by underlining or italicising or otherwise emphasising a word or phrase? Typographical devices are one more tool that we can use.

* * *

The only point I want to make here about numbering systems, page design and typographical devices is that we should at least be aware of them and have an

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32 Carl Felsenfeld and Alan Siegal: Writing Contracts in Plain English (1981) West Publishing Co.

33 *Aurora TV and Radio v. Gelco Express Ltd.* Unreported judgment of Judge Oliphant in the Manitoba Court of Queen's Bench, 10 May 1990, (referred to in the Canadian Bar Association and Canadian Bankers' Association Joint Committee Report: The Decline and Fall of Gobbledygook: Report on Plain Language Documentation (1990).

34 J Hartley: Designing instructional text (2ed) (1985) Nichols Publishing

open mind about their use. If a new technique, device or idea will help communication, assist in aspects of computerisation, help amendments, make revisions easier, or help readers - then we should at least look at it, and probably use it.

PART 4

THE COMPUTER

How it helps writers

We have barely scratched the surface of what the computer can and should be doing for us as writers.

Too many drafters do not know what the computer can do for them. Too many more don't seem to care. In part this is because the law has always tended to isolate itself from other professions and disciplines; in part it is because other writing professions and disciplines have avoided things legal. The legal profession and other professionals are beginning to see the advantages of working together.

Most lawyers have access to word processing systems. Even if they do not use a word processing system themselves their work is typed on to a system. I will not describe in any detail what a word processing system should have or can do, but I do want to mention a few things that can be particularly helpful to drafters.

Basic word processing functions

You will already know that a word processing system can move around a word, a section or a part of a document from one place in the text to another; words and phrases can be searched and checked for consistent use; spell checking facilities are common; wholesale editing and revising is simplified. But there are other facilities in some systems which are not as well known. A good word processing system will have

- an automatic numbering and renumbering system

  You do not have to worry about renumbering your complete document if you add a new section early in your document - the processing system will renumber the rest of the document automatically (unless you tell it not to);

  Similarly if you completely reorganise a document by moving one part of the text from the back of the document to the front, the document will be automatically renumbered.

  This facility works at several levels - Part numbers, Divisions numbers, section numbers, subsections, paragraphs and clause numbers (and letters) all can be automatically renumbered if you wish[35]

- cross references automatically changed

  If you renumber your document, or your document is automatically renumbered, you can use your word processor to automatically correct the internal cross references in your document. This is a marvellous facility - you can imagine the time that can be saved by using it;

- a search and replace function

  Most of you will know that you can ask your word processor to search for a particular word or phrase, and if you want, have it automatically replaced with another;

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35 Take care with cross references to other Acts. The system will improperly renumber a section reference to another Act unless it is told not to. Also take care if Schedules are used. Both these things can be accommodated easily if you are aware of them.

- table of contents

  A table of contents for a document can be easily created using Part, Division and section headings (marginal notes).

These and many other functions of word processors can help save you drafting time - time that can be put to more productive drafting purposes. You do not need to learn how to type to do these things - although more and more drafters are also doing more drafting by using the keyboard - but you do need to spend some time getting to know what word processing functions can help you as a writer. Many of these functions can remove much of the drudge work in drafting, and do them better than we can.

A lack of information

One difficulty for lawyers is the lack of information on tools we can use. We are largely to blame because we have not shown enough interest. But even with my interest I find it difficult to know where to search for information (or even knowing what I need to know). It requires a constant search.[36]

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36 The Law Reform Commission of Victoria's Report on Plain English and the Law (1987) suggests:

L Miller: Computers for Composition: A Stage Model Approach to Helping, (1986) 20 Visible Language p188.

D Halpern and L Miller: Automated Legal Writing, 1984.

In Canada the Plain Language Centre has an excellent resource centre.

Creative use of the computer

Computers can also be used to create documents in new and innovative ways to help us with what we write and check what we have written.[37] I will briefly describe 2 kinds of programs and how they can be used to help improve legislation and legal documents.

(a) A new type of precedent

Precedents are a boon but also the bane of the legal profession. A boon because there is something to follow; a bane because they tend to be caught in a time warp of obsolete, archaic and unnecessary language.

Some of the latest thinking about developing precedents underlines these thoughts:

(i) understanding the law

Not only must a legal document be correct but all the possible alternative approaches, solutions or options to a given problem or issue need to be considered. The traditional precedent only gives a standard form answer - it does not exercise the mind. If a lawyer does not think of an alternative, the precedent will not help.

(ii) knowledge of the facts

Knowledge of the facts is based on asking the right questions. Again the traditional precedent does not help - it gives answers without necessarily

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37 Timothy Perrin: Better Writing for Lawyers (1990) The Law Society of Upper Canada, contains a number of useful suggestions about how the computer can be used to help the writing process.

knowing the all the relevant facts.

(iii) integrating the law and the facts

The aim of a drafting exercise is to achieve a client's purpose in the best way without unforseen consequences. Computer software programs are now available to help with the task.

Computer programs can be developed to help draft the simplest to the most complicated documents - but the program takes some time to develop.

(iv) the program

The program builds on what lawyers already have in a written questionnaire form (standard questions to ask) or what they have learned to ask clients through years of practice. The questions that are typically asked are redesigned and loaded into the computer program.

You know that any particular answer to a question will initiate a whole new series of questions. All the variations, options and alternatives you would normally ask a client are put into the program. Each lawyer in the office is asked to participate in the questions, variations, options and alternatives. The result is a very comprehensive program containing the collective knowledge and experience of the office. It can, of course, be modified from time to time as necessary.

Because the questionnaire is computerised it can be structured in the form of a logic tree. This means the answers to certain questions automatically cause the system to move into specifically selected lines of other questions - questions that might not have been raised without the help of the computer. Alternatively the

computer will automatically eliminate other questions which are not relevant (a bit like the typical passport form which allows you to skip several questions if, for example, you are not married or have no children.

By this sophisticated branching system the lawyer is lead through all the questions necessary to get a detailed description of the transaction to be created. For many questions the computer provides a suggested answer - if the answer is accepted the return key is tapped - variations to the answer are also given if requested and problems highlighted.

The system can be seen as the collective wisdom of the office in asking the questions to get the facts which can then be turned into clauses, reflecting the office drafting style.[38]

The advantages of this kind of program to lawyers in private practice are obvious. Even the most junior of lawyers has the benefit of the program when asking questions and thinking of the kinds of questions to ask. A similarly structured program to develop legislation seems to be equally advantageous. Legislative counsel tend not to use precedents - certainly not in the same way or to the same extent as lawyers in private practice. The drafter is often left to his or her own devices. The dangers of the drafter not asking all the right questions, or of not thinking of all the options, are very real. With programs designed to ask the right questions the quality of legislation could be improved.

Over time it should be comparatively easy for the office to pool its collective knowledge about the questions it should commonly ask and the things it should

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38 This description is based on a 11 November 1985 National Law Journal article called Help in drafting complex documents. The article described a program called "Workform" available at that time in the United States.

There are other programs similar to this on the market and some word processing systems allow this form of program to be developed. (See the Lawyer's PC, 1 October 1987 issue describing Wordperfect as a legal systems engine.)

think about when designing particular pieces of legislation. Often the questions that need to be asked are the same, not only within the same office, but within the same country. A useful pooling of the whole country's talent could follow.

Drafting precedents

Obviously computer programs that develop questions can also propose precedent sections. Whether for law firms or legislative counsel offices standard clauses[39] can provide consistent style and quality. If a drafter proposes a variation to the standard, justification for the change could be required, or approval from a senior member of the office.

There seems to me to be a considerable opportunity to improve substance, style and consistency of Canadian legislation with this kind of project.[40]

(b) Computer programs that criticise (constructively)

Several software programs are now available to help writers analyze their writing. Like most tools they have limitations but they can be very helpful guides.

The programs analyze documents and point out possible problems with grammar,

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39 The great fear of precedent clauses is that once a precedent is established it stagnates. Legislative counsel can avoid this by review of the precedents when revisions of the statutes are conducted.

40 A project of this nature could be Commonwealth in scope - perhaps in one sense picking up on the suggestion made by Francis Bennion in 1980 in Statute Law (p24):

> Standardization is an area where cooperation between Commonwealth countries would be fruitful. Model clauses on topics like strict liability or powers of entry could be drawn up in uniform terms applicable to any common law country

style, word use and punctuation. A comment will explain the problem and sometimes will offer alternative words or phrases.

The programs do not automatically change the text, they will always wait for you to make that decision.

The best program I have seen so far is Grammatik IV because it allows me a greater number of choices both in the kind of criticisms I want to see and allows me to add additional writing problems I want pointed out.

Typically writing programs will:

- point out use of the passive voice
- suggest simpler words for what it considers are complex words
- choose the number of words in a sentence before it is pointed out as being 'long'
- point out brackets or punctuation that is not closed
- phrases which could be replaced with one or two words
- archaic, redundant, offensive words.

This is just a small sample of the things a writing program will do. If you wish, you can ask the program to give you a readability score (usually based on the Flesch or Flesch-Kincaid Readability Tests). Grammatik's summary analysis of this document is included as Appendix 5.

For the legal office a software program that is designed for the office style can be a great help in improving writing. For example, if the office wanted to turn its precedents into gender neutral documents the software program will point out "he", "she", "him", "her" and suggest alternatives. Or if the office decided to purge "said" - the program can assist the purge.

For legislation and legal documents if you decide to avoid "where" except when used in a geographical context, and use "if" or "when" instead - the program can help.

Similarly, replacing phrases like "In the event that" with "if" the program can help. Some of the drudge work in revisions of the statutes could be eased by the assistance of these software programs.

Last words

Lawyers don't write for themselves they write for others.

The essence of legal writing is communication; to communicate a law, lay out the terms of a contract, draw up a will. We purport to be doing this for clients. Too often we are doing it only for ourselves.

It is time that we lawyers, the highest paid but worst writers, learn how to communicate with the words we use. Time we break out of the traditional blinkered mold in which we were trained; time we learned from other professions and disciplines; time we learned how to communicate.

There is no special language - grammar, syntax or composition for statutes,[41] or legal documents. The form of statutes and legal documents over the centuries and in different countries attests to the correctness of that view. Each in their own way create public or private law. Each in their own way must be interpreted by those who must administer them, the public affected by them, the parties bound by them, and by judges who must make decisions about them.

We can all improve our communication if we adopt Dr Elmer Driedger's philosophy which is valid for all legal writing[42]

> a writer of laws must have the freedom of an artist, freedom to use to the fullest extent everything that language permits, and (the writer) must not be shackled by artificial rules or forms; and further, laws should be written in modern language and not in ancient, archaic or obsolete terms or forms.

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41 So wrote Dr. Elmer Driedger in "A Manual of Instructions for Legislative and Legal Writing", Canadian Government Publishing Centre, Ottawa.

42 Driedger's manual p4.

APPENDIX 1

Purpose sections

Assume that as a matter of policy a decision has been made to include a "purpose section" in an Act or legal document.

What kind of thought should go into what the section actually says, and when?

(a) early thoughts

A purpose section (at least one that is closer to a statement of principle than purely descriptive) should be thought about early in the policy thinking and drafting process.

A purpose section should be the foundation of what follows and so should be constructed at the outset, not made to fit around the detail. Early consideration also helps to test a purpose section properly. Test it in terms of subsequent policy decisions and, equally important, in terms of subsequent drafting.

If the drafter starts with a purpose section it will always be in mind; it can be constantly used to check subsequent provisions (to see whether they conform to the purpose) - it provides a mental guide for subsequent drafting.

There are benefits from this. It is inevitable that in the course of subsequent policy consideration and drafting the first draft of a purpose section will be found to be inaccurate. it will be too wide or too narrow; it will provide too great a discretion or too narrow a parameter for subsequent decision making and interpretation.

An early draft purpose section can be modified and molded to meet the need.

So the first point is - think about the purpose section - and write it - early in the process.

(b) what kind of purpose section?

(i) fundamental statement

These are usually grand statements of high principle. They are usually cast in sufficiently general terms to avoid conflict with subsequent specific sections.

The danger with grand statements of principle is that although they look good insufficient thought is given (or often can be given) to their effect.

(ii) touchstone for decision makers

A second type of purpose section is to give decision makers a touchstone to which to refer when making decisions in difficult (or easy) cases.

The decision maker may be an administrator, a tribunal, or the courts, depending on the circumstances.

Great care must be taken over the drafting. Purpose sections make good "public relations" but provide legal pitfalls for the decision maker if the decision maker fails to show that all the matters required to be taken into account are not in fact considered.

Depending on the specificity of the list and the information presented to the decision maker, "having regard" to matters in the purpose section may be difficult.

'Touchstones' are a flexible tool for guiding decision makers but their value is

rather dependent on their specificity. This form of purpose section also puts in question how the information is to be provided and by whom.

(iii) reasons

Decision makers can be required to state reasons for their decision. Those reasons might be required to address specific "principles" or purposes.

While the Act might not require certain things to be considered as such, if the reasons for decision must address them the decision makers must direct their mind to them.

(iv) "indirect principles"

This form of purpose section can be used when the intention is for decisions to be made or plans developed with particular objects in mind. The legislation or document directs decision makers or the community to address specific purposes, so indirectly achieves the purposes of the legislation.

The aim with "indirect principles" is to establish a means by which certain issues (i.e., purposes or principles) are ultimately addressed within society without forcing the issue prematurely.

Commentators

1 Early Parliamentary Counsel in the United Kingdom (Thring, Ilbert, Russell) endorse the use of purpose sections. Later Parliamentary Counsel generally oppose them. In Canada they are generally disliked, if not actively opposed, by legislative counsel.

2 The Renton Committee[1] recommended that

> encouragement should be given to the use of statements of principle

3 Sir William Dale drew attention

> to the remarkable fact that, whereas our whole system of case law is founded on the development of principle on the basis of particular fact decisions, an analogous process is virtually absent from legislative activity. The judge is always looking for a principle, the legislator, it seems hardly ever.

4 The judiciary welcomes statements of purpose. The President of the Court of Appeal in New Zealand, in commenting on an "object" section said this:

> Parliament reduced the difficulty by taking the unusual step of declaring a special object for the 1981 Amendment Act: the object of this Act is declared by s.2 to be to recognize and sustain the amenity afforded by waters in their natural state. A statutory guideline is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light. With all respect to the contrary arguments, to treat s.2 as surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and unacceptable a mode of statutory interpretation as that which was ejected in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment.

The object section was:

> *Water and Soil Conservation Amendment Act 1981*
>
> s.2: Object of this Act - The object of this Act is to recognize and sustain the amenity afforded by wastes in their natural state.
>
> *Ashburn Acclimatization Society v. Federated Farmers of New Zealand Inc.* [1988] INZLR p78

Conclusion

In summary:

1 Think and write about the purpose of the legislation "early" in the process;

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1 The Preparation of Legislation (1975, Cmnd. 6053) para 10.13

2 Answer the questions -

> "why do I want to include a purpose section - is it for clarity? because decision makers need guidance? cannot be trusted? to enable a review or appeal? Is it window dressing?

If these questions are answered it will also help decide whether the purpose section will achieve the result - you may need more detail in specific provisions.

3 Answer the questions -

> "what effect do I expect the purpose section to have?"
>
> "will inclusion of the purpose section actually have the desired effect?"
>
> "will inclusion of the purpose section have undesirable side effects?"

And modify the purpose section accordingly.

4 When there is more than one provision in a purpose section, do they conflict? Could they?

If the answer is yes, they may need to be modified, or an indication given of which is to have priority in cases of conflict.

5 Could there be conflict between a "purpose section" and later specific provision?

This is obviously to be avoided, but if conflict is possible which is to prevail - the specific or the general?

6 For further reading see Professor Grant Hammond's article "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence (Hastings Int'l and Comparative Law Review Vol 5 Winter 1982 No.2 323)"

Professor Hammond's synthesis, in brief, is:

(a) statutes having extensive declaratory provisions should only be employed if those declarations are durable in character

(b) drafters should be cautious of mixing objectives (the ends to be met) with policies (the means of attaining the ends)

(c) if conflicts between objectives are not avoided there can be a diluting or paralyzing effect on the legislative scheme

(d) consider who will implement the policy statements - the administrators; tribunals; the courts? Is it sensible for that group to perform a policy development role?

(e) is it intended that there be some potential for political input into policy development - or is the statement of policy to be interpreted independent of government input?

(f) a form of "trigger mechanism" is required to enable reviewing courts to activate the full potential of the objectives.

APPENDIX 2

The use of examples in legislation

How we understand what we read

Whenever we read a text we bring to it all our accumulated knowledge. We use that knowledge to help us understand it.

The first time we read a technical text our minds race to understand it as we read. Research (and a moment of personal reflection) tells us that one way in which we interpret texts is by thinking through a series of examples to see what impact the text has on the example.

If we have limited background knowledge about the subject matter of a text it is that much more difficult to understand. It is through the internal processing of examples that we develop a keener understanding of the text.

Even if legislation and legal documents are clearly written they are often difficult to understand because they deal with complicated subject matter. The use of examples in legislation and legal documents can help to make the text more understandable.

Who would be helped by examples?

Examples would help

- *administrators*: Concrete examples would help administrators deal with the day to day administration of legislation or agreements;

- *the general public*: Examples would help the general public understand their rights and obligations and how the legislation or an agreement works;

- *legislators*: Legislators would be helped by understanding how the law will apply in practice. The legislator is then better able to make a decision about the legislation, and to explain it to others;

- *the legal profession*: The legal profession would be helped by a speedier and more complete understanding of the intention of the legislature and how the legislation applies to a matter on which legal advice is sought;

- *the judiciary*: Judges would also have a clearer and more complete understanding of legislative intention which, by analogy, they can apply to issues they must decide.

Examples can help the normal thought process of visualizing how legislation or a document applies to particular situations. The reader is better able to create his or her own examples thanks to the initial stimulus created by the examples. This is much like how a child learns - by context and example.

The bottom line is that examples can help readers understand a text more quickly and completely. They are used in virtually every kind of technical text to help readers with 'difficult to grasp' issues. More use can be made of them in legislation and legal documents.

The next step

If examples are part of the way we internally process a text it is only a short step to including examples in legislation and documents.

A text is constantly tested during drafting by applying a series of examples to it. This is of critical importance in technical texts when a minor change in wording can have a dramatic impact on the effect of the text. It is just a short step to take the examples developed to test a draft and incorporate them as part of the text. Not only will this aid understanding but it will turn dry text into real life situations[1]; they help understanding by creating ideas that the text is intended to affect; and they work with and stimulate readers' typical internal processing of what a text means.

The past use of examples in legislation

Australia

(a) Interpretation Act

The Commonwealth of Australia is sufficiently convinced of the usefulness of examples to deal with two issues that arise when examples are used in legislation.

Section 15AD of the *Interpretation Act of Australia* says:

> *"15AD. Where an Act includes an example of the operation of a provision:*

1 Think of how a series of examples would transform a limitation of actions act into something much more understandable, and meaningful for most readers.

(a) the example shall not be taken to be exhaustive; and

(b) if the example is inconsistent with the provision, the provision prevails."

(b) Drafting instructions

The Australian First Parliamentary Counsel[2], Ian Turnbull, issued a drafting instruction for his office which included these comments:[3]

> *1. . . . After careful consideration I have decided that the use of examples should be one of the "tools" available to drafters to make Bills easier to understand.*
>
> *2. I do not propose any rules on the cases in which examples should be used or not used - the matter should be at the discretion of the drafters involved in drafting and settling the Bills concerned.*
>
> *3. Every care should be taken to ensure that an example has the same effect as the text it illustrates. Also, when amending a provision illustrated by an example, it will be necessary to check the example to see whether consequential alterations are required. If there is no time to alter a complicated example it would be open to the drafter to repeal the example.*
>
> *4. . . .*
>
> *5. Examples should not be treated as a substitute for clear text. Drafters should still try to carry out our general policy of making provisions as simple and clear as possible, while maintaining our standards of precision.*

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2 Mr. Turnbull is the Commonwealth First Parliamentary Counsel - equivalent to Canada's Federal Chief Legislative Counsel. His is one of the most innovative drafting offices in the Commonwealth.

3 Drafting Instruction No. 7 of 1988.

India

The Codes of India

The use of examples was a key element in the development of Codes for India in the late nineteenth century.

Free from traditional constraints, the authors of the Indian Codes wanted to make the law as intelligible as possible.[4] The authors knew that the laws would often be administered by people with no formal legal training and no access to a library; this knowledge stimulated the authors to help readers understand the text.

For example, in the *Indian Evidence Act 1872*, drafted by Sir James Stephen, many sections are explained by describing situations which show how the section works.

For example

> *5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of others.*
>
> *Explanation - This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.*
>
> *Illustrations*
>
> *(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.*
>
> *At A's trial the following facts are in issue:-*

4 I am grateful to Mark Duckworth of the Victoria Law Reform Commission, Australia for bringing this to my attention. Sir Courtenay Ilbert, a UK Parliamentary Counsel, was one of the authors of the Codes.

A's beating B with a club;
A's causing B's death by such beating;
A's intention to cause B's death.

A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

In the introduction to his Digest of the Law of Evidence, Sir James Stephen wrote that

"I have in nearly every instance, taken cases actually decided by the Courts for the purpose . . .[T]hey not only bring into clear light the meaning of abstract generalities, but are, in many cases, themselves the authorities from which rules and principles must be deduced".

The actual status of the illustrations in the statutory text was considered by the Privy Council in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* [1916] 2AC 575. Lord Shaw stated at 581:

. . .it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text . . . [I]t would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not thus be impaired.

Stephen tried to introduce similar legislation in the United Kingdom Parliament, but despite attracting interest neither the Evidence Bill 1873 nor the draft Code of Criminal Law 1878 were successful. Of the Evidence Bill, Stephen wrote that it "contained a certain number of illustrations and Lord Coleridge's person opinion was in their favour" [Lord Coleridge as Attorney-General sponsored the Bill].

However there was concern about whether Parliament would be happy with them.

United Kingdom

(a) Occupiers Liability Act

The *Occupiers Liability Act 1957* used examples.

Section 2 reads in part:

> *(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
>
> *(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases -*
>
> *(a) an occupier must be prepared for children to be less careful than adults; and*
>
> *(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*
>
> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -*
>
> *(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and*
>
> *(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an*

independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(b) Consumer Credit Act 1974

The *Consumer Credit Act 1974* made extensive use of examples.

Section 188 reads:

188 Examples of use of new terminology

(1) Schedule 2 shall have effect for illustrating the use of terminology employed in this Act.

(2) The examples given in Schedule 2 are not exhaustive.

(3) In the case of conflict between Schedule 2 and any other provision of this Act, that other provision shall prevail.

(4) The Secretary of State may by order amend Schedule 2 by adding further examples or in any other way.

Here is how the examples were laid out in Schedule 2 of the Act:

SCHEDULE 2

Section 188(1)

Examples of Use of New Terminology

PART I
LIST OF TERMS

Term	*Defined in section*	*Illustrated by example(s)*
Advertisement	*189(1)*	*2*
Advertiser	*189(1)*	*2*
Antecedent negotiations	*56*	*1,2,3,4*
Cancellable agreement	*67*	*4*
Consumer credit agreement	*8*	*5,6,7,15,19,21*
Consumer hire agreement	*15*	*20,24*
Credit	*9*	*16,19,21*
. . .		

PART II
EXAMPLES

Example 1

Facts. Correspondence passes between an employee of a moneylending company (writing on behalf of the company) and an individual about the terms on which the company would grant him a loan under a regulated agreement.

Analysis. The correspondence constitutes antecedent negotiations falling within section 56(1)(a), the moneylending company being both creditor and negotiator.

Example 2

Facts. Representations are made about goods in a poster displayed by a shopkeeper near the goods, the goods being selected by a customer who has read the poster and then sold by the shopkeeper to a finance company introduced by him (with whom he has a business relationship). The goods are disposed of by the finance company to the customer under a regulated hire-purchase agreement.

Analysis. The representations in the poster constitute antecedent negotiations falling within section 56(1)(b), the shopkeeper being the credit-broker and negotiator and the finance company being the creditor. The poster is an advertisement and the shopkeeper is the advertiser.

Example 3

Facts. Discussions take place between a shopkeeper and a customer about goods the customer wishes to buy using a credit-card issued by the D Bank under a regulated agreement.

Analysis. The discussions constitute antecedent negotiations falling within section 56(1)(c), the shopkeeper being the supplier and negotiator and the D Bank the Creditor. The credit-card is a credit-token as defined in section 14(1), and the regulated agreement under which it was issued is a credit-token agreement as defined in section 14(2).

(c) Race Relations Act

The *Race Relations Act 1976* also contains examples. Section 20 says:

> ***Discrimination in provision of goods, facilities or services***
>
> *20.-(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services -*
>
> *(a) by refusing or deliberately omitting to provide him with any of them; or*
>
> *(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in the first-mentioned person's case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.*
>
> *(2) The following are examples of the facilities and services mentioned in subsection (1) -*
>
> *(a) access to and use of any place which members of the public are permitted to enter;*

(b) *accommodation in a hotel, boarding house or other similar establishment;*

(c) *facilities by way of banking or insurance or for grants, loans, credit or finance;*

(d) *facilities for education;*

(e) *facilities for entertainment, recreation or refreshment;*

(f) *facilities for transport or travel;*

(g) *the services of any profession or trade, or any local or other public authority.*

Section 29(2) of the *Sex Discrimination Act* has similar examples.

Commentators on the use of examples

Renton Committee

The Committee Report on The Preparation of Legislation[5] chaired by Sir David Renton said:

> *10.6 The demand for elaboration comes not only from the government and the instructing department but also from Parliament itself. First Parliamentary Counsel put the position to us in these words -*
>
> > *"For good reason, Parliament is rarely ready to accept a simplification if it means potential injustice in any class of case, however small. In particular, this is true of everything in a Bill which intervenes in private life, or in business. Powers of entry, and powers of obtaining information, will be looked at jealously. And much detail will often be needed*

5 Comand 6053 (1975), known as the Renton Report.

before the Government is likely to be able to persuade Parliament that in this field no more than essential powers are being taken by the proposed legislation . . . In many of the fields in which legislation is frequent, broad propositions may be, or may appear to be, oppressive. Parliament may insist that the rights of the citizen should be spelt out precisely and may well refuse to accept the argument that the way the legislation is to be worked out can be left to the courts."

On the other hand we have not failed to notice that individual Parliamentarians are often vehement in their condemnation of detail and elaboration. As we said in paragraph 1.10, they cannot have it both ways.

10.7 The draftsman is at present often constrained by this approach to include a good deal of detail, in order to provide expressly for different combinations of circumstances, and so to express himself as to eliminate or reduce to the minimum the need for clarification by the courts and the risk of judicial interpretation in a sense contrary to that intended. Of course, judges endeavour in the interpretation of Acts of Parliament to give effect to the intentions of the legislature as expressed in the Act, but in modern times when the State intervenes to regulate the life of the individual with very great minuteness those intentions will not necessarily be clear unless spelt out in very great detail. At any rate that feeling is undoubtedly held in some quarters, and has influenced the style of much contemporary legislation. In a recent case Lord Simon of Glaisdale, supported by Lord Kilbrandon, repeated a suggestion he had made in evidence to us that -

> *"Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject matter of specific statutory enactment - unless, indeed, it were too obvious to need expression".*

If, as we recommend (paragraph 19.26), there is to be no change in the rule about the non-admissibility of Parliamentary proceedings for interpretation, such a convention might seem to be helpful to the courts; but it would at the same time tend to add a further element of undesirable elaboration to the statutes. This effect could perhaps be mitigated, and the number of occasions on which the convention would operate to be kept to the minimum, if more use were made of examples showing how a Bill was intended to work in particular situations, and if such examples were ordinarily set out in Schedules as we recommend, for matters of detail generally, in paragraph 10.13.

Francis Bennion

Francis Bennion, the Parliamentary Counsel who drafted the *Consumer Credit Act 1974* says:[6]

> *Where an Act includes examples of its operation, these are to be treated as detailed indications of how Parliament intended the enactment to operate in practice. If however an example contradicts the clear meaning of the enactment the latter is accorded preference, it being assumed in the absence of indication to the contrary that the framer of the example was in error.*
>
> *COMMENTARY*
>
> *If parliament thinks fit to include in an Act examples of how the Act is intended to operate, these are clearly of strong persuasive authority. They show how Parliament itself contemplated the Act would work.*

Bennion concludes his comments on the use of examples in the *Consumer Credit Act 1974* with this:

> *On this Schedule, the Australian Attorney-General, Mr. Peter Durack, Q.C., commented: 'The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both'. {Symposium on Statutory Interpretation (Canberra 1983) para 5.10.}*
>
> *For an instance of examples in regulations see the University Elections (Single Transferable Vote) Regulations 1918 (S R & O 1918 No 1348) Sch 1.*
>
> *Repugnant example: Where an example contradicts the clear meaning of an enactment the latter is accorded preference, it being assumed that the framer of the example was in error. This does not mean that the 'clear' meaning will always be followed however. There are cases when the court will apply a strained construction, and an example may support the reasons for doing so. A repugnant example cannot in itself justify departure from the literal meaning of an operative provision however.*

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6 FAR Bennion Statutory Interpretation 1984 Butterworths, 583-585.

{Mahomed Syedal Ariffin v. Yeoh Ooi Gark [1916] 2 AC 575, at p 581. See also consumer Credit Act 1974 s 188(3) (cited above), which is thought to express the general rule.}

RWM Dias

RWM Dias writing about statutory interpretation in Jurisprudence 4 ed. 1985 said:

> *. . . legislators might perhaps give more thought than they do to the remedy in relation to the mischief. In particular, it would be helpful if they provide examples of the sort of thing that is designed to be covered.*[7] *Arguing by analogy from such examples should have a powerful appeal to judges, who are well versed in this technique of reasoning.*

Report to the English Law Commission

In 1985 a report was made to the English Law Commission on the Codification of the Criminal Law.[8] The draft Code included a series of illustrations. Commenting on these illustrations the report said:

> *3.6 The context of the Act: illustrations. Legislation must be stated in general terms. However well this is done, in a matter of complexity - and the Code has to deal with some very complex matters - the purpose and effect of the resulting abstract propositions may, at first sight, be obscure even to the experienced reader of statutes. Every teacher knows that the quickest and most effective way of illuminating any abstract proposition is by an example. We have therefore provided in Schedule 1 a series of illustrations of the functioning of the clauses of the Code wherever we think it will be helpful to the reader. We believe that the illustrations would be of value to*

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7 Lord Denning in Escoign Properties Ltd. v. IRC [1958] AC 549 at 565-566, [1958] 1 All ER 406 at 414. See also London Transport Executive v. Betts [1959] AC 213 at 240, [1958] 2 All ER 636 at 651. Examples are incorporated into sections of the Consumer Credit Act 1974, and the Torts (Interference with Goods) Act 1977.

8 Law Com. No 143.

members of Parliament in enabling them to appreciate the effects of the law in the making to members of the profession in apply the law, to students in leaving it, and to everyone concerned in understanding it.

Here are a few of the illustrations used in the Report:

15(1)(d)(ii)	15(viii)	An information alleges that D, a motorist, was exceeding the speed limit in Leicester at 11 p.m. on April 1, 1984. D has been convicted of reckless driving at that time and place after the court heard evidence that he was driving at an excessive speed. The allegations in the information do not include all the elements of the offence of which he has been convicted and the trial must proceed unless stayed on the ground that it would be an abuse of the process of the court.
18(a)	18(i)	D sets fire to a house in which, as he knows, P is asleep. P dies in the fire. There was an obvious risk that this would occur. But a finding either that D intended P's death or that he was aware that it might occur depends on a consideration of all the evidence, including the fact that that result was probable and any evidence given by D as to his state of mind.
18(b)	18(ii)	D buys from E, at a very favourable price, goods which E describes to him as "hot". D is charged with receiving stolen goods knowing or believing them to be stolen. The court or jury may be satisfied that most people would have realized from the use of the word "hot" that the goods were stolen. If so, they will take this into account in deciding whether D realized that fact, though they will not be bound to conclude that he did.
18(c)	18(iii)	D is charged with assaulting P. D in evidence says that he misinterpreted a gesture made by P as an act of violence and that he hit P in self-defence. The court or jury are satisfied that there were no reasonable grounds for the mistake D claims to have made. They will take this into account in deciding whether it is possible that D did make that mistake.

20	20(i)	D and E, the parents of a child, P, do not feed P, intending that he shall die. If P dies as a result of not being fed, D and E are guilty of murder (s.56). If P survives but sustains serious injury, they are guilty of intentional serious injury (s.74). If the omission is "more than merely preparatory" to the commission of murder, they are also guilty of attempted murder (s.53(1) and (3)).
	20(ii)	As in illustration 20(i) except that D and E do not intend P to die but they are aware that there is a risk that he will sustain serious injury. It is, in the circumstances known to them, unreasonable to take this risk. If P dies as a result of not being fed, D and E are guilty of manslaughter (s.57(1)(c)(ii)). If P survives but sustains serious injury, they are not guilty of reckless serious injury (s.75).
	20(iii)	P is about to cross a frozen lake, believing it to be safe to walk on the ice. D knows the ice to be fragile but does not give the warning which he could give to P. P falls through the ice and D does not take any steps to save him from drowning. P is seriously injured or killed. Unless D is a person mentioned in subsection (2), he commits no offence.

The report on the Codification of the Criminal Law says that it was the *Consumer Credit Act 1974* which acted as a 'persuasive precedent' for the authors of the report.

Judicial comment

Judges have welcomed the use of examples in legislation. In addition to Lord Shaw's remarks in the *Mahomed Syedol Ariffin* case others have also welcomed the use of illustrations.

Lord Denning MR said:

> *". . . one of the best ways, I find, of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it. This is especially the case with a Finance Act. I cannot understand it by*

simply reading it through. But when an instance is given, it becomes plain. I can say at once: 'Yes, that is the sort of thing Parliament intended to cover'."

{Escoign Properties Ltd. v. IRC [1958] AC 549, at pp 565-6. See also London Transport Executive v. Betts {1959] AC 213, at p 240.}

Bennion remarks:

Where statutory examples are given it is the duty of the court to accept their guidance. Unless this is unavoidable, they should not be rejected on the ground that they are repugnant to the operative provisions of the Act. As the Judicial Committee of the Privy Council said in Mahomed Syedal Ariffin v. Yeoh Ooi Gark {[1916] 2 AC 575, at p 581.} -

'The great usefulness of the illustrations, which have, though not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired.'

Commenting on the use of examples in section 29(2) of the *Sex Discrimination Act*, Lord Fraser of Tullybelton said:[9] [10]

Section 29 provides:

'(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide her with any of them, or (b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section.

(2) The following are examples of the facilities and services mentioned in subsection (1) - (a) access to any use of any place which members of the public

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9 Lord Fraser of Tullybelton, speaking for the majority of the House of Lords in Amin v. Entry Clearance Officer, Bombay {[1983] 2 All ER 864, at p 872.}

10 Bennion comments that "These examples were also relied on by Ackner LJ in Kassam v. Immigration Appeal Tribunal [1980] 2 All ER 330 at p 335.

or a section of the public are permitted to enter; (b) accommodation in a hotel, boarding house or other similar establishment; (c) facilities by way of banking or insurance or for grants, loans, credit or finance; (d) facilities for education; (e) facilities for entertainment, recreation or refreshment; (f) facilities for transport or travel; (g) the services of any profession or trade, or any local or other public authority . . .'

It was said that the granting of special vouchers for entry into the United Kingdom was the provision of facilities or services to a section of the public, and that the wide general words of sub-s(1) of s 29 were not cut down by the examples given in sub-s(2), which are only 'examples' and are not an exhaustive list of the circumstances in which the section applies. Reliance was also placed on para (g) of s 29(2), which expressly refers to the services of a public authority and which has been held to apply to the Inland Revenue: see Savjani v. IRC [1981] 1 All ER 1121, [1981] QB 458.

My Lords, I accept that the examples in s 29(2) are not exhaustive, but they are, in my opinion, useful pointers to aid in the construction of sub-s(1). Section 29 as a whole seems to me to apply to the direct provision of facilities or services, and not to the mere grant of permission to use facilities. That is in accordance with the words of sub-s(1), and it is reinforced by some of the examples in sub-s(2). The example in para (a) is 'access to and use of any place' and the words that I have emphasized indicated that the paragraph contemplates actual provision of facilities which the person will use. The example in para (d) refers, in my view, to the actual provision of schools and other facilities for education, but not to the mere grant of an entry certificate or a special coucher to enable a student to enter the United Kingdom in order to study here. The example in para (g) seems to me to be contemplating things such as medical services, or library facilities, which can be directly provided by local or other public authorities.

Conclusion

Legislators and the judiciary have welcomed the use of examples in legislation. Other readers would surely be equally welcoming.

APPENDIX 3

A brief history of the development of the numbering and structure of legislation

In the first 600 years of the Acts of Parliament only printers seemed concerned about a minimal breaking up of solid pages of text. Then ...

The first official recommendations (1796)

A House of Commons Committee Report on the Promulgation of the Statutes dated 5 December 1796 suggested

> The numbering of the sections upon the draft of every bill would facilitate the reference to its several parts pending its progress; and after each bill had received the Royal Assent, the numbering the section on the roll would furnish the means of correct citation; any confusion which might otherwise arise by the insertion or the addition of amendments or riders being obviated by deferring to number the sections upon the roll itself until after the passing of the act.
>
> The addition of marginal abstracts to each clause would furnish the most ready breviate for the Speaker in the first instance; would afterwards render the bill more easily understood for debate; and ultimately afford the readiest means of rendering the public acquainted with the contents of each act.

Jeremy Bentham (1811-1836)

During this period Bentham poured scorn on the format and language of legislation. Pointing out that even the bible was broken into verses he showed no mercy in his comments.

Sir Henry Seton's suggestions (1836)

The following observations were submitted to the Committee of the House of Commons on the Statute Law in 1836. They were prepared by Sir Henry Seton who was described after his death as someone who

> Amongst those who have directed their attention to the reformation of the statute book, and to an improved mode of framing future statutes, none have shown more zeal, learning, and patient research, or have expounded clearer views on the subject, that Sir Henry Seton.

Sir Henry Seton mentioned the 1796 Committee recommendations and said

> It is greatly to be wished that the practice of numbering the chapters and sections (so convenient for the purposes of reference) should rest upon some authority beyond that of the King's Printer.
>
> The consequence of the absence of such authority is that the only legal mode of referring to an act of parliament is by the year of the reign and the title, and there is no legal mode of referring to a part of an act of parliament, except generally, or by actual recital of the part referred to, a mode, particularly in the repeal of statutes attended with the utmost inconvenience.

Among other things, Sir Henry recommended

> That the numbering of the chapters of the acts of each session, and the numbering of the sections of each chapter, should be fixed by authority.

Arthur Symonds (1838)

The Editor of Bentham's of Nomography said in a note to the Collection of

a few improvements have been made in the preparation of British Statutes, the most important of which is perhaps the introduction of the interpretation clause. There has been, however, up to the present time (January 1839), no such general alteration, as to render the remarks in the following pages less applicable to the subject, than they were at the time when they were written. It deserves to be noticed, however, that the subject has at last attracted the attention of Government. In August 1838, a plan for the general amendment of the system, prepared by Mr Arthur Symonds of the Board of Trade, accompanied with specimens and other documents, and termed, "Papers relative to the Drawing of Acts of Parliament, and to the means of insuring the uniformity thereof, in language, in form, in arrangement, and in matter," was laid before Parliament by command of her Majesty. The principal amendments recommended by Mr Symonds are

- The contents of each section to be placed across the line, and not to contain an abridgment of the section, but a mere indication of its subject-matter.

- Each section to be divided into paragraphs, and each paragraph into sentences, so that each sentence may have but one enacting verb.

- Each paragraph to be numbered and titled, and each sentence to have a sub-title.

- The general title of each section, and the respective titles of paragraphs, and sub-titles of sentences, to be printed in their order, as an analysis of the act, either at the beginning or the end, and so distinguished by figures and difference of type, that each indicates by its form and position the part of the act embraced by it.

- Authority to be given to a body of persons to frame regulations, for the purpose of obtaining uniformity in statutes.

- A public officer to revise all statutes, and see that they conform with the regulations.

Responsible officers appointed for several departments, each to revise the statutes connected with his department, and those portions of other

statutes which incidentally affect it.

- A brief mode of referring from one statute to another.
- An authoritative classed index or catalogue of the whole Statute Law.

An Act for shortening the Language used in Acts of Parliament (1850)[11]

This Act demanded

> That all Acts shall be divided into sections if there be more Enactments than One, which Sections shall be deemed to be substantive Enactments, without any introductory words.

Lord Henry Thring

In his book Practical Legislation Lord Thring describes how, in 1854 he followed "in some degree the example of the American codes" by dividing the Merchant Shipping Bill into parts "and then divided the parts under separate titles, arranging the clauses of the Bill in a logical order ..."

But it was not until 1869, when Lord Thring was appointed as First Parliamentary Counsel, that he was able to develop his ideas on the structure and format of legislation.

A glance of the United Kingdom statute book of the time shows how the divisions into sections, subsections and paragraphs gradually evolved.

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11 13 and 14 Vict. cxx1, 1850.
The Act also included provisions that are now commonly included in Interpretation Acts.

In Canada

There was similar experimentation with the structure of legislation in Canada.

By 1867 Federal statutes headings for groups of sections (they would be divided into Parts now). Lists were often numbered (not lettered). 10 years later what we would now recognize as subsections and numbered paragraphs were in use. By 1920 the numbering system was settled.

Ontario's numbering system seems to have been settled by 1888, Quebec by 1907 and Manitoba by 1900.

The margin lines for subsections, paragraphs and clauses have varied from time to time and from Province to Province; similarly the location of marginal notes or section headings varies from Province to Province.

APPENDIX 4

A check on quality and form

"the expression of the law, to be well understood, ought to be written in a language directly accessible to the mind".

This form provides a means by which the drafter or another can check the quality of the substance of a draft and the way in which it is written.

(name of draft)

PART 1

THE QUALITY OF THE SUBSTANCE OF A DRAFT

	Review points	Sections Requiring Action	Recommendation
1	Purpose - expressed clearly? - with accuracy? - needed?		
2	Harmony with the law Does the draft harmonize with - the common law? - related Acts? - Interpretation Act? - international law? - fundamental values? If not, is that intended?		

3	Discriminatory aspects - is there interference with vested rights - retroactivity Is it intended?		
4	Charter of rights and freedoms - has there been a charter review? - any charter issues?		
5	Sanctions - is there a sanction for every contravention? - is a guilty intent needed to convict?		
6	Definitions - are they <u>all really</u> needed? - is there anything substantive in them? - can any be moved to the text?		
7	The Crown - bound? - agent of?		
8	Cross references - are they precise? - but are they needed?		
9	Transitional - is old law continuing? - are there conflicts? - the Interpretation Act?		
10	Consequential amendments - are they all textual? - if not, why?		
11	Commencement - is it clear?		

PART 2

THE QUALITY OF THE FORM OF A DRAFT

Review points	Sections Requiring Action	Recommendation
12 The Plan - is there a discernible structure? - overall? - for each part?		
13 The Logic - does the draft flow from the general to the particular? - the essence to the detail? - the principal followed by limitation? Does the logic apply equally to the whole Act, to Parts, to sections?		
14 Sections - does each section contain one legislative thought? - are sections short; simple; positive? - is the present tense and active voice used whenever possible? - are the exceptions acceptable?		
15 Words and expressions - are ordinary meanings used? - no synonyms or superfluous words? - neutral gender?		

16	Is the plan, logic, sections and word order - drafted for readers? - who are the most likely readers?		
17	"and" and "or" - any ambiguity?		
18	Punctuation - confirm with style manual? - does it change meaning?		
19	Titles - is the title concise yet descriptive? - are Part and other headings concise yet descriptive? - the marginal notes?		
20	Draft# dated: Date reviewed: By:		

APPENDIX 5

Example of a computer analysis

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========================== Grammatik IV ==========================

Summary for B:\ottawa

Problems marked/detected: 0/395

Readability Statistics

  Flesch Reading Ease:  51
  Gunning's Fog Index:  14
  Flesch-Kincaid Grade Level: 11

Paragraph Statistics

  Number of paragraphs: 1
  Average length:       403.0 sentences

Sentence Statistics

  Number of sentences:  403
  Average length:       19.7 words
  End with '?':         35
  End with '!':         1
  Passive voice:        74
  Short (< 14 words):   108
  Long  (> 30 words):   77

Word Statistics

  Number of words:      7970
  Prepositions:         917
  Average length:       4.84 letters
  Syllables per word:   1.60

Count categories

    0 - Counting rule 1
    0 - Counting rule 2
    0 - Counting rule 3
    0 - Counting rule 4
    0 - Counting rule 5
    0 - Counting rule 6
    0 - Counting rule 7
    0 - Counting rule 8
    0 - Counting rule 9

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