

Plain Language Drafting Meets Interpretive Principles and Rules—A Drafter’s Perspective

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Welcoming opportunities for improving readability

A Cabinet Submission requesting legislative amendment is approved and arrives on your desk. Much of the current content of the Act is to remain the same, but one aspect, say the Part dealing with appeals is changed so extensively that many of the provisions in it will be affected. The origins of the Act are a considerable time past, and the drafting style show this.

So, do you leave the text unchanged, except for minimal amendments? Or do you redraft the Part in a more modern language and style?

In our office, with a mandate to use plain language techniques wherever possible, to present the law in a form that is accessible to the persons subject to the law, the answer would be to take do the complete redraft—provided the Part was sufficiently distinct and the time constraints not impossible.

Is there risk in this when the amended legislation comes before the courts? Yes. Do I believe there is a recognition in the courts—and in the rest of the legal community—that more and more legislative change is made primarily for the purpose of improving readability? Yes.

Increasing recognition of amendment for the purpose of improving readability

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Consider the evolving recognition in Canadian interpretation texts when dealing with presumptions related to the purposes of amendments.

In 1974, Elmer Driedger's *The Construction of Statutes*, deals with the issue in short order. First there is the presumption: "In general a change in language on re-enactment of a provision must be presumed to have some significance." Then follows two judicial statements indicating that this presumption may be overridden, one admitting that there may be "internal or external evidence to show that only language polishing was intended."

In 1984, Pierre-André Côté's *The Interpretation of Legislation in Canada*, presents a much fuller discussion of the issue, beginning with an equivalent statement that: "At common law, it is presumed that modifications are specifically intended to change the meaning of an enactment. In other words, the legislator is deemed to modify the law to change its substance, rather than to improve its form...." The following paragraph provides the rational underpinnings for this presumption. First, it is based on experience. "Amendments are rarely undertaken for aesthetic reasons alone," the text tells us. Second, it is based on the rule of effectivity: a legislator who has taken the trouble to modify an enactment "must have done so to change its substance and not simply to improve its written expression." Again, an examination of the circumstances surrounding adoption can help rebut the presumption.

Ten years later, in 1994, Ruth Sullivan's *Driedger on the Construction of Statutes*, begins with a presumption that changes are made for an intelligible purpose. This presumption that change is purposeful is strong, but the presumption that the purpose is to bring about a substantive change in the law is less so. Professor Sullivan indicates that the presumption of substantive change appears to be grounded in British practice, where amendments to improve clarity or consistency are less common. She contrasts this with the situation here: "In Canada, where making formal improvements to the statute book is a minor industry, the presumption of substantive change is weak and easy to rebut."

As one of those engaged in the minor industry of such improvements, I see that governments across the country have not been deaf to public—and increasingly organized—calls for improvement in the way legislation is drafted. Governments have responded and, I think it fair to say, so have legislative drafters. Improved readability has not been

something forced upon us. Many of us are advocates as well as practitioners.

But, as ghost writers of legislative intent, Legislative Counsel craft the words carefully, assist as they navigate their ways through the sometime treacherous shoals of parliamentary debate, then wait to see whether the course on which we thought them set survives (or is assisted by) the winds of judicial interpretation. (OK, OK. Perhaps a bit too much of metaphor, but legislative drafters so seldom get the chance to have a personal voice in their writing.)

The practical reality: changes invite litigation

As drafters, we might wish courts to take more judicial notice that changes aimed at improving the readability of laws are common today. But we do not appear before the court (nor would we want to), and counsel there will use every opportunity to import a change in substance if this will assist their case.

I am minded of a panel discussion held 2 years ago in Victoria as part of the annual joint meeting of Canadian Legislative and Parliamentary Counsel. It was immediately before the Commonwealth Law Conference and so we had the benefit of participants who would not otherwise be there. It was a panel on plain language, with Hilary Penfold, First Parliamentary Counsel for the Australian Commonwealth, David Cohen, Dean of the University of Victoria Law School and the late Mr. Justice John Sopinka of the Supreme Court of Canada. Hilary Penfold gave a vigorous defence and explanation of the evolving approaches to plain language drafting in statutes. Dean Cohen argued that complex policy cannot be delivered in simple language. Mr. Justice Sopinka cautioned that any change to plain language terminology was going to mean re-litigation of matters that had already come before the courts, citing as an example, amendments to the Ontario Rules of Court that changes references to “injunctions” into references to “restraining orders”.

Mr. Justice Sopinka’s practicality was entirely right—we must accept as a fact of legal life that changes to legislation provide opportunities for litigation and, inevitably, litigation in fact.

From the perspective of a plain language proponent, we need to ask: what can we do in our drafting to assist courts in resolving such litigation expeditiously—and in favour of a result that does not import

substantive change into amendments that are intended only to be improving to the readability of the legislation?

Reducing risks

In other words, what can we do to reduce the risk of unintended interpretations?

One approach is to encourage our governments to introduce a (this time substantive) amendment to our respective *Interpretation Act*, along the lines of that added to the Australian Commonwealth *Acts Interpretation Act 1901* in 1987:

15AC Changes to style not to affect meaning

Where:

- (a) an Act has expressed an idea in a particular form of words; and
- (b) a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style;

the ideas shall not be taken to be different merely because different forms of words were used.

But I do not know of any jurisdiction in Canada that is considering such an amendment. Nor how effective it would be in reducing litigation. It *would* provide support for argument in rebutting the perhaps weakening presumption of substantive change.

Failing a direct statement of law addressing the presumption, I suggest that we choose our risks carefully. In making these choices, I am going to further suggest that changes in language are the easiest to make—and the riskiest in terms of judicial interpretation—while changes in style are more demanding for the drafter, more effective in improving readability—but, if done with care, less risky when they come before the courts.

What I want to do here is describe a few examples of changes made by our recent statute revision in British Columbia. Then I am hoping that my fellow panelists will provide their views on whether my sense on this is correct.

The B.C. Statute Revision

The revision started in 1992 and was completed in 1997. It was prepared entirely within the Office of Legislative Counsel, with one drafter assigned full time to coordinating the process and doing the bulk of the first revision drafts, and our other drafters assisting around the edges of their Bill and regulation drafting responsibilities.

From the start, improving the readability of our statutes was a key goal. To do this, we planned to:

- use document design principles to develop a better format,
- redraft using gender neutral language, and
- to the extent that time and our *Statute Revision Act* allowed, apply other plain language principles to redrafting the laws.

In addition to the standard authorities for renumbering and rearrangement, the improved readability goal was expressly mandated in our *Statute Revision Act*, which provided:

- 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
 - (d) alter language and punctuation to achieve a clear, consistent and gender neutral style;
 - (e) make minor amendments to clarify the intent of the Legislature, to reconcile inconsistent provisions or to correct grammatical or typographical errors;

We used these powers to change both language and style. We accepted that the changes would allow new interpretation arguments to be made in court, but were comforted by the *Statute Revision Act* direction that:

- 8 (1) A revision does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the Acts and provisions replaced by the revision.

With over one and a half years now passed since the revision came into force, I expected to come today with at least a few judicial pronouncements to share—but I only have one, which I shall come to shortly.

Perhaps part of the reason for this paucity of judicial consideration is that we were cautious in using the admittedly broad authority of the Act. Did we do a plain language revision? No. Did we use plain language principles. Yes. Did we improve the readability of the law without changing its substance? We hope so, and certainly intended to.

Changes to language – the easy stuff

When people criticize legislation or other legal writing, they most often criticize its formal, out-dated, legalistic language. Indeed, the *Gage Canadian Dictionary* even provides a definition for this language:

legalese *n.* the jargon of the legal profession commonly used in legal documents, legal submissions and forms, etc., especially when thought of as incomprehensible or excessively finicky.

Now, I agree with Professor Ed Berry, author of *Writing Judgments, A Handbook for Judges*, that the problem of legalese comes not so much from using a difficult vocabulary, but from using one that is overly formal—a vocabulary that is artificial and alienating for general readers. And the easiest response to the criticism is quite straightforward: change the words.

The B.C. Statute Revision did a considerable amount of this. Early in the process, we established a long list of words that were to be changed or at least considered for change. For example:

<i>pre-revision</i>		<i>became</i>
“shall” (in its imperative sense)		“must”
“where” (describing circumstances)		“if”
“notwithstanding”		“despite” or “as an exception to” or “although”
“fix”		“establish” or “set”
“in lieu of”		“in place of” or “instead of”
“ <i>ex parte</i> ”		“without notice to any other person”

Although these changes were the easiest, we remained cautious. “Commence” changed generally to “begin” — but not for legal

proceedings. “Affix” became “attach”—except when it was used in relation to a legal seal. “Forthwith” was carefully reviewed in each occurrence, then changed to one of “promptly”, “immediately”, “without delay” or “at once”.

The language changes we did not make

We did not attempt “shirt-sleeved” language. “Notify” did not become “tell”. “Receive” did not become “get”. “Bringing an action” did not become “starting a law suit”.

Full plain language proponents may criticize us for lacking the courage of our convictions. To this I will answer that, as Legislative Counsel, words are the fundamental stuff with which we work. We appreciate the nuanced differences between using one word or another. Even with the broad authority of the *Statute Revision Act*, we were reluctant to give up precision for the benefit of simplicity when it came to language.

There is a formal aspect to law, one that should not be treated lightly when a legal obligation or right is, by definition, enforceable through the mechanism of our public justice system. And informal language, the type we use in day to day conversation, is often less precise, its effective meaning taken as much from the context in which it spoken as from the words themselves. This context is absent in the refined world of legislation, where text must apply to all relevant circumstances (and, one aims when drafting, no others).

Consider, for example, the change of “notify” to “tell”. The former implies bringing something to the attention of someone else by an official announcement or other formal process. “Tell” encompasses far less structured exchanges of information, with images of a casual mention during a social gathering. Would you consider you had been properly informed if, over a summer barbecue, your neighbour laughingly says he does not like having an above ground power line and is going to apply for an easement through your property to run it underground? Clearly not.

By saying this, you might think I am admitting (in the terms of the description for this conference session) that plain language techniques are *not* capable of achieving the degree of precision and certainty that legislation demands. Not so. I am suggesting that the tool of simplified language is like a hammer: a blunt instrument, easy to use (with good

“bang for the buck” in our statute revision), often needed—and one that can cause a great deal of damage if applied indiscriminately.

Deconstructing the legislative sentence

Simplified language is only one of the techniques available in the plain language tool kit. I incline to the view that others are more effective for improving readability. For example, there is great benefit in grammatically deconstructing the complex form of traditional legislative sentence. “Grammatically deconstructing”—a mouthful, I know. By it I mean use the tool of grammar to split the classic legislative sentence into its components by subject.

Sometimes the rule expressed by a legislative provision is simple: “A person must not vote more than once in an election.” But more often it is complex, sometimes extremely complex.

Given this complexity, the traditional form of legislative statement often looks like the end result of a Wheel of Fortune game where you have to use punctuation as well as letters—and commas come cheap but periods are horrendously expensive. In other words, they are designed as single sentences that go on and on and on.

We are all familiar with the sort I mean:

“Notwithstanding” (some other section),
 “where (this, that and another circumstance exists)
 “a person who” (comes within this, that or the other description)
 “the person shall/may” (do this, that and/or the next thing,
 within this time period, in this form and subject to these
 approvals)
 “except where” (some other circumstances exists some other rule
 applies).

Compact, yes, efficient, yes, but if you accept the plain language rubric that readers start losing the sense of a complete sentence at around word 25, you can see this form creates a substantial barrier to comprehension.

In undertaking the statute revision, for a limited number of selected Acts, we attempted a fuller plain language revision than simply making the standard language and gender neutral redraft changes. Our targets were those that had high public use and were most in need of improvement. Again I admit we were cautious.

***Social Service Tax Act* example**

As an example, one of these targeted Acts was our provincial sales tax legislation, the *Social Service Tax Act*. Our Ministry of Finance was initially resistant to the idea of any revision whatsoever. Their primary concern was with losing the security of legal precedents that have developed over many years of litigation. In the face of a statement that their deputy minister was going to write our deputy minister requesting a complete exemption from the revision, we persuaded them to at least first take a look at a revision draft (marked to show all changes). Our approach would be one of aggressive delicacy—“aggressive” in that we wanted to invest the time needed to make a significant improvement in readability, “delicate” in that we appreciated the sensitivity needed to avoid substantive change to tax law in the process. The result was a revision that made relatively limited change to language and substantial change to organization and sentence construction.

By splitting a complex sentence into its various components (“letting the light in” as I have been known to call it), the provision becomes easier for a reader to comprehend—and the changes are accomplished through relatively straightforward exercises in grammar.

Consider this pre-revised example from the *Social Service Tax Act*, shortened somewhat for the purposes of not rambling on too long here,—a provision having to do with vehicles initially taxed as being used only partially in B.C. when they became fully used in B.C.:

- (15) Where a vehicle in respect of which tax has been paid under section X is subsequently licensed for use solely within the Province,
 - (a) the owner shall pay to Her Majesty in right of the Province at the time of that licensing a tax at the rate of 7% on the depreciated value of the vehicle, and
 - (b) the commissioner, on application and on receipt of evidence satisfactory to the commissioner, shall provide to the owner a credit against the tax payable under this section, which credit shall be calculated and provided in accordance with the regulations.

There are a number of elements here: the circumstances in which this section applies, the obligation to pay tax, when the tax is to be paid, the basis for calculating the tax, an authority to provide a credit against the tax, how to get the credit and the way in which it is to be calculated and provided.

One can improve the readability markedly simply by replacing conjunctions with periods, to separate the obligation to pay tax:

- (1) If a vehicle in respect of which tax has been paid under section X is subsequently licensed for use solely within British Columbia, the owner must pay to the government, at the time of that licensing, a tax at the rate of 7% on the depreciated value of the vehicle.

from the eligibility for a credit:

- (2) On application and on receipt of evidence satisfactory to the commissioner, the commissioner must provide to the owner a credit against the tax payable under this subsection (1).

from how the amount of the credit is to be determined:

- (3) The credit under subsection (2) must be calculated and provided in accordance with the regulations.

There would be other ways to split the sentence, or to split it further, but I trust you get the sense of what I am describing. Such changes would, I suggest, have minimal impact on interpretation.

Another technique we used in the revision was somewhat more aggressive. Often legislative sentences start with complex statements of who the provision applies to or in what circumstances, or both. To separate this element from the legal rule, we converted it into an express statement of application:

This section applies if (this, that and another circumstance exists)
or
This section applies to a person who (comes within this, that or the other description)

With this approach, a reader knows at the very start whether the provision is relevant to his or her situation—a good benefit on the readability side. I admit it makes me somewhat more nervous on the interpretation side – a statement of legal effect is added, although one that is, I suggest, implicit in the original sentence.

A similar technique was used for provisions that had complex statements of how one was to do something. I will use here the example of an appeal provision that, in addition to providing the right of appeal, incorporated the time limit, basis for appeal, means of starting the appeal and who is to be notified of the appeal. The right of appeal would be separated into an initial statement, with the tag end “in accordance with this section”, leaving the rest to be separated in following statements.

Again, we were adding words that were not previously there—and I will be interested in hearing how a court might consider such an addition.

When I describe examples of specific changes, they may sound mechanistic, as though we followed some template of deconstruction. Not so. The goal was to separate elements in some logical manner. The approach very much depended on the length of the initial sentence, the complexity of concepts and the relationships between them. The end result was, of course, that the legislation got longer at least in terms of paper length. In a revision one does not have the opportunity for simplification of the legislative scheme itself.

So—we completed our revision, presented it to a Standing Committee of our Legislative Assembly, saw it brought into force and waited to see how it would be received by the courts.

Judicial consideration of our revision

As I mentioned earlier, we have only one case to date that discusses a revision change: *Lovick v. Brough* (B.C.S.C., 10 March 1998, Vancouver Registry F970404). The change in issue was “shall” to “must”.

To give you a little more context, this change in drafting language began a number of years before the revision. At the same time that the new *Statute Revision Act* was introduced in 1992, supporting amendments to the *Interpretation Act* were made. The current provision that “shall is to be construed as imperative” was supplemented by a provision that “must is to be construed as imperative”. New Acts were drafted using “must”. With the revision, the change was made throughout the statutes.

The case involved an application under our *Family Relations Act*. One party to a marriage breakdown was asking the court for an injunction to restrain the other party from disposing of property that was alleged to be a family asset. The Act, before revision, provided that:

- (1) On application by a party to a proceeding under this Part, the court shall make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part until or unless the other party establishes that a claim made by the applicant under this Part will not be defeated or substantially impaired by the disposal of that family asset or other property.

The single revision to this provision was changing “shall” to “must”. The defendant argued that, despite the mandatory nature of the statement, the section was subject to the same tests as any other interim injunction, citing two earlier cases. One of these dated back to a time when the provision used “may” rather than “shall”, and the other dealt with a related provision that also used “may”—so the following comments of the court regarding our revision change are arguably not *ratio*:

[7] I am bound to ask myself why the legislature made so limited a change in the wording. I conclude that it could only have been to strengthen the imposition of the duty on a Judge to take the action mentioned there. I reject Mr. Mortimer’s contention that in this context “must” means precisely the same as “shall”. In my opinion “must” entails a more mandatory obligation admitting of less discretion in the Court. I am therefore of the opinion that the two cases are not authority for the interpretation of the section as it now stands.

The court granted the requested restraining order. There appears to have been no recognition that this was a global change and no argument made regarding the construction rules established by the *Statute Revision Act*. I can assure you we did not intend to make our laws more mandatory than they were before the revision. The case is a most cautionary example of Mr. Justice Sopinka’s concern: change a word and you invite litigation and reinterpretation.

Is the risk worth it? Going back to the example of our *Social Service Tax Act*, our Ministry of Finance would say yes. They point to the revision when outlining service improvement the ministry has made for business. They have received numerous compliments from tax professionals on how much easier it is to find and understand the relevant provisions. They anticipate needing fewer interpretive bulletins that re-explain the legislation. They hope for improved compliance with the self-reporting tax regime. And, with luck, only a minimum of legal challenges based on revision changes.

Reference notes

(Toronto: Butterworths, 1974), at pp. 104-105.

Bathurst Paper Ltd. v. Minister of Municipal Affairs (1971), 22 D.L.R. (3d) 115 (Ont. H.C.) at 119.

(Cowansville: Les Éditions Yvon Blais, 1984), at pp. 336-338.

3rd ed. (Toronto: Butterworths, 1994), at pp. 450 to 451.

This is in contrast to our previous 1979 Statute Revision, done under the direction of a retired Deputy Attorney General appointed as “Revision Commissioner”, working with the assistance of lawyers (generally without Legislative Counsel experience) specifically hired for the revision.

Yes, this included the “more white space” principle, but almost equally important were subtle considerations like font size, increased kerning between lines, variation in spacing above paragraphs of different provision level and running heads for quick access to information.

Gender neutral language is both an equity issue and a plain language issue — if a law reads as though it applies to only half your audience, then you are not communicating effectively with your readers. From 1989, our new Acts had been drafted in a gender neutral form, so the revision was used as an opportunity to update older legislation.

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

Statute Revision Act, section 2 (1) (d) and (e).

Just to be clear, the English version of this has a dangling preposition at the end of the sentence. Plain language and suitable, I suggest, for this presentation — but not one I would use when drafting a statute.

So that barber school signs are now “attached” in an conspicuous place near their entrances: *Barbers Act*, R.S.B.C. 1996, c. 24, s. 23.

As described by Tadgell J.A. of the Supreme Court of Victoria, Court of Appeal, in *Halwood Corporation v. Roads Corporation* (30 June 1997).

With a nod to Max Weber, who established the proposition that a legal right is an increase in the probability that an expectation will be met, where that increase is derived from access to the enforcement mechanisms of the state’s legal system.

The *Gage Canadian Dictionary* tells us that “inform”, “acquaint” and “notify” are synonyms of each other meaning “tell or let someone know”:

Inform emphasizes telling or passing along directly to a person facts or knowledge of any kind.... **Acquaint** emphasizes introducing someone to facts or knowledge that he or she has not known before.... **Notify** = inform someone, by an official announcement or formal notice, of something he or she ought to or needs to know.

Now R.S.B.C. 1996, c. 431.

This is derived from *Social Service Tax Act*, R.S.B.C. 1979, c. 388, s. 2.06 (15).

Statute Revision Miscellaneous Amendment Act, 1992, S.B.C. 1992, c. 55.

Family Relations Act, R.S.B.C. 1979, c. 121, s. 53 (1), now R.S.B.C. 1996, c. 128, s. 67 (1).