

# **Roles of Legislative Drafting Offices and Drafters**

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## Introduction

This paper is about institutional arrangements for providing legislative drafting services. It looks at the role of a drafting office, including the roles of drafters and others who work in drafting offices.

Legislative drafting has long been recognized as a specialized discipline, dating back to at least the 15th century in England when, according to Craies on Statute Law, a committee of judges, counsellors and officials was charged with drafting statutes based on petitions from one or both Houses of Parliament.<sup>1</sup> From the end of the 15th century conveyancers drafted English statutes, although by 1752 a Commons clerk, Robert Yeates, appears to have been effectively appointed as the first of a series of officials whose responsibilities included legislative drafting, not only for the Commons, but also for the Treasury.<sup>2</sup> From about 1837 the Home Secretary appears to have been responsible for drafting the most important government legislation until, in 1869, the Office of Parliamentary Counsel was established in the Treasury. Thus in England, there appears to be a fairly extensive history of legislative drafting services being provided by individuals who do not merely possess drafting skills, but who enjoy a certain pre-eminence in providing such services and, latterly, work in specialized groups. This institutional model predominates in parliamentary systems today.

In Canada at the federal level, the Law Clerks of the Senate and of the House of Commons provided drafting services to the members of these Houses, including on occasion, to ministers. In a note entitled “History of the Preparation of Government Legislation in Canada”, E.A. Driedger wrote:

“[...] from the time of Confederation until 1920, or thereabouts, an organisation was being built up within the staffs of the two Houses of Parliament for the purpose of drafting Government Legislation. Beginning in the ‘20s, however, the organisation began to disappear until in 1927, or thereabouts, there were only two

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<sup>1</sup> S.G.G. Edgar, *Craies on Statute Law*, 7<sup>th</sup> ed. (Sweet & Maxwell, London: 1971) at 21.

<sup>2</sup> A.G. Donaldson, “The High Priests of the Mystery: A Note on Two Centuries of Parliamentary Draftsmen” [I have a copy of this with a hand-written note from James Ryan saying that he received it from an Northern Ireland drafter, Bill Leitch. I am unsure where it was published.]

officers in the Law Branch of the House of Commons and only one in the Senate”.

Driedger goes on to describe how the drafting of government legislation devolved to the staffs of the various departments responsible for legislation with no centralised control. However, a practice of submitting draft legislation to the Department of Justice “grew in the late ‘30s and early ‘40s until we reached the point where the Department of Justice prepared most of the Government’s legislation.” In the late 1940s and early 1950s, the Cabinet issued a series of directives effectively requiring all government bills to be drafted by the Department.<sup>3</sup>

As for the drafting of regulations at the federal level, the approach has generally been to have them drafted in the various departments responsible for them. However, with the enactment of the Statutory Instruments Act in 1970, all proposed federal regulations were required to be examined by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice.<sup>4</sup> In practice, the examination function is performed by various drafting services sections of the Legislative Services Branch, some of which are now located in the sponsoring departments. The examination function has also in some cases expanded to include complete drafting services.

A little over 25 years ago, the Renton Committee in the UK looked at how drafting services were provided.<sup>5</sup> Its mandate was:

“With a view to achieving greater simplicity and clarity in statute law, to review the form in which Public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme [...]”

The Committee produced a lengthy series of recommendations, many of which related to the organization and maintenance of a drafting office. The Committee recommended retaining the model of centralized

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<sup>3</sup> RC Bergeron, “Legislation Section: 50 Years of Legislative Drafting in Ottawa” (1997), No. 199 *Inter Pares* 4.

<sup>4</sup> RSC 1985, c. S-22, s. 3.

<sup>5</sup> *The Preparation of Legislation, Report of a Committee Appointed by the Lord President of the Council* (Renton Report), Cmnd 6053, London, 1975.

drafting<sup>6</sup> as well as measures for ensuring its ability to provide high quality drafting services.<sup>7</sup>

Today we are considering similar questions, which include both the range of functions that legislative drafting offices can provide, as well as the merits of such an institutional approach to legislative drafting. The objective of this panel discussion is to compare notes on our experience and understanding of the role of a drafting office and drafters.

This paper begins with a general discussion of centralized drafting and the role of a drafting office. This role includes such things as recruiting drafters and other drafting professionals, setting drafting standards, policies and procedures and publishing and revising legislation.

The paper then turns to the role of drafters themselves (which of course depends substantially on what their offices do) and considers various aspects of this role in some detail. It then considers the roles of others who may work in a drafting office, most notably jurilinguists, editors (revisors) and informatics support staff.

The paper fleshes out these roles with reference to the Legislative Services Branch of the Department of Justice (Canada). The objective is not to suggest that this is the ideal arrangement, but rather to provide a fairly detailed example of how these roles can be realized. It is clearly not the only way. Each jurisdiction has its own needs and resources that have to be brought to bear on the matter.

The paper concludes by considering how realistic it is to expect drafting offices and those who work in them to do the things that they are supposed to do, particularly in light of time and resource limitations.

The paper has 5 appendices of reference documents developed by the Legislative Services Branch. They provide examples of how some aspects of the roles of drafters and drafting offices have been elaborated in the Canadian context.

### **What Do Drafting Offices Do?**

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<sup>6</sup> *Ibid.* at 149: "(3) There should be no large scale transfer of drafting work away from the Government draftsmen."

<sup>7</sup> *Ibid.*: "(6) All available methods should be used to recruit and train more draftsmen as a matter of high priority."

### **Range of Possible Roles**

Drafting offices are established to provide an institutional framework for the preparation of legislation. Their establishment recognizes the existence of a specialized body of knowledge and a set of skills that constitute the discipline of legislative drafting. Drafting offices foster this discipline and, arguably, keep it alive in so far as it is largely neglected in academic legal education and in training programs offered by legal professional bodies.

Drafting offices come in many shapes and sizes, even within a single jurisdiction. For example, at the federal level in Canada, we have not only the Legislative Services Branch of the Department of Justice (which drafts Government bills and reviews most regulations) but also various departmental drafting offices that draft regulations and other forms of delegated legislation (for example, Legislative and Regulatory Services at the Department of National Defence). We also have separate offices that draft bills for senators and private members of the House of Commons (the Offices of the Law Clerk and Parliamentary Counsel for each of the Senate and the House of Commons).

A drafting office is usually part of a larger government institution, which frames the scope of its drafting mandate. For example, if it is part of a department that provides legal services generally to a government, then it provides drafting services on a government-wide basis as well. If it is instead part of a department that focuses on a particular subject, for example transport, then its mandate is confined to legislation dealing with this subject.

The role of a drafting office varies considerably depending on the scope of its drafting mandate. For example, an office that drafts bills for private members serves a diverse group with a wide range of different objectives and interests. It may function rather like a private law firm serving the needs of individual clients, rather than any common need. However, it may also serve the corporate needs of the larger institution, which in the United States has been taken to mean that no attorney-client relationship exists between drafters and individual members.<sup>8</sup>

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<sup>8</sup> See D. Brown and D. Cartin, "Position statement on the attorney-client relationship in the legislative employment setting" (1996), 10 *The Legislative Lawyer* 3.

In contrast, when the mandate of a drafting office is government-wide, its clients are institutions like government departments. Its responsibilities usually go beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law. One of its purposes is to ensure the system's coherence, intelligibility and efficiency in achieving policy objectives. These responsibilities may also include the protection of values associated with the entire legal system, such as fairness and equality. These responsibilities are sometimes described in terms of "guarding the statute book".

There are many ways in which a drafting office may meet its responsibilities. They obviously include hiring and training staff who are capable of drafting legislation that accomplishes what it is supposed to. They also extend to setting drafting standards, policies and procedures, publishing and revising legislation and acting as a focal point for ensuring the implementation of other government policies. Each of these is discussed below, first in terms of drafting offices, then (where applicable) in terms of drafters and other drafting professionals.

### **Hiring and Training Staff**

A drafting office will typically seek staff who already have some legislative drafting experience, be it statutes, regulations or municipal by-laws. Failing that, they may engage staff with good potential. In any event, whether experienced in drafting in other jurisdictions or not, new drafters in a drafting office will require training at least in the practices and procedures in the drafting office, if not in basic legislative drafting skills. As well, all drafters – new or experienced – may require updating from time-to-time as practices, procedures and skills change or are otherwise refined.

At a minimum, a drafting office will offer newcomers on-the-job training. The Legislative Services Branch has supplemented this traditional method of training with a more formalized training process. In the Branch, initial training is provided by way of an orientation program, covering not only the Branch, but the Department as a whole. The program is supplemented by a mentor who is available to get the newcomer established and by training in basic legislative skills provided by a group in the Branch especially established for this purpose. The group also provides more specialized training to drafters and, as part of an outreach program, training on the legislative process to those involved in the process elsewhere in the Department or in other Departments.

## Drafting Standards, Policies and Procedures

The objective of developing and applying drafting standards, policies and procedures is not only to capture best drafting practices, but also to bring coherence and consistency to the legislative system. One of the first examples of this is found in the development of Interpretation Acts in the 19th century. They were enacted to shorten the length of legislative provisions by elaborating the content of standard provisions and allowing them to be stated in shortened form in particular Acts.<sup>9</sup> A notable example of interjurisdictional drafting standards are the Legislative Drafting Conventions developed by the Uniform Law Conference of Canada.<sup>10</sup>

Drafting standards, policies and procedures are commonly issued through general instructions to drafters, which may be consolidated into drafting manuals and guides,<sup>11</sup> many of which are now available in the Internet.<sup>12</sup> They may deal with many aspects of legislative drafting, ranging from establishing working relationships and procedures<sup>13</sup> to the wording to be used for particular types of provisions.

They may also be given greater force, as noted above, by being enacted in the form of legislation such as Interpretation Acts or Acts establishing processes for making delegated legislation or by being issued as ministerial directives. For example, in 1999 the Canadian Cabinet issued a general directive on law-making.<sup>14</sup> It deals with such matters as the constitutional framework for law-making, the use of law to achieve

<sup>9</sup> See Law Commission of New Zealand, *A New Interpretation Act, "To Avoid Prolivity and Tautology"* (Wellington : 1990) at 3, citing Lord Brougham's Act of 1850.

<sup>10</sup> [www.law.ualberta.ca/alri/ulc/acts/edraft.htm](http://www.law.ualberta.ca/alri/ulc/acts/edraft.htm).

<sup>11</sup> A list of the main Canadian manuals and guides is contained in Appendix 4.

<sup>12</sup> See, for example the manuals of New Zealand (<http://www.justice.govt.nz/lac/index.html>), the Commonwealth of Australia (<http://www.opc.gov.au/about/documents.htm>) and the State of Queensland (<http://www.legislation.qld.gov.au/LegData.htm>).

<sup>13</sup> See, for example, Appendix 1—The Roles of Legislative Counsel and their Clients in the Drafting of Legislation.

<sup>14</sup> See, for example the *Cabinet Directive on Law-making*: issued by the Canadian Cabinet in 1999: [http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/directive\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/directive_e.htm).



policy objectives, the relationship between Acts and delegated legislation, the need to prepare intelligible laws in both of Canada's official languages and the importance of planning and managing law-making activities.

One of the more innovative ways drafting offices can establish standards, policies and procedures is through specialized drafting projects that form laboratories for developing and testing new drafting techniques. Recent projects have focused on improving the readability of legislation. They have been conducted in a number of countries around the world, including Australia, New Zealand the UK<sup>15</sup> and Canada.<sup>16</sup>

### **Publication and Revision of Legislation**

Global responsibilities also generally extend to the publication and consolidation of legislation. This includes establishing its format and, more recently, preparing and maintaining electronic databases of legislation.<sup>17</sup> Also associated with this role is the preparation of reference material such as indexes and tables to make it easier to find relevant legislation and verify its current state. This aspect of the work of a drafting office is assuming increasing public profile as Legislation becomes more available on the Internet.<sup>18</sup>

Revision is also a function traditionally associated with drafting offices. It goes beyond consolidation to improve the readability of legislation or make other changes that do not alter its substance. A recent and quite ambitious example of this is the Program to Harmonize Federal Legislation with the Civil Law of Quebec.<sup>19</sup> It involves making the English and the French versions of federal legislation consistent with both the common law and the civil law. However, its object is not to change the substantive law or to reform federal legislation.

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<sup>15</sup> See <http://www.inlandrevenue.gov.uk/rewrite/index.htm>.

<sup>16</sup> Canadian projects include the federal *Employment Insurance Act* and the *Highway Safety Code* of Quebec.

<sup>17</sup> See, for example, Part III of the *Statute Revision Act*, enacted by SC 2000, c. 5, s. 71 (not in force).

<sup>18</sup> For example, Canadian legislation is available at [http://www.acjnet.org/cdn\\_law/LegislativeMaterials.cfm](http://www.acjnet.org/cdn_law/LegislativeMaterials.cfm). This topic is also on the agenda of an upcoming Conference of the Canadian Institution for the Administration of Justice in Ottawa, September 2002 (Drafting to Communicate the Law: The State of the Art: <http://www.ciaj-icaj.ca/en/index.html>).

<sup>19</sup> See <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm>.

## **Implementing Government Policy**

A government-wide drafting office may also have a role to play in implementing more specific government policies, such as those relating to gender equality or the implementation of particular international agreements. A drafting office that has a government-wide mandate is an attractive vehicle for implementing policies that are intended to have a broad effect.

The policy implementation role of drafting offices is emphasized in jurisdictions where Cabinet approval is required for the preparation of legislation. In such cases, the office serves the wishes and interests of the Cabinet above those of the particular department responsible for the legislation.

## **Other Factors Affecting their Role**

The role of a drafting office also depends on whether it engages in drafting from general instructions or instead merely reviews legislation that has already been drafted, usually by officials in the department that will administer the legislation. When drafting from instructions, drafters generally have much greater control over the wording of legislation. They also tend to play a more significant role in fine-tuning, if not developing, the policy underlying the legislation. Offices whose role is to review already-drafted legislation generally meet greater resistance in suggesting legislative language and play a role that is more akin to editing than drafting.

Although drafting offices obviously employ drafters, they also usually employ a range of other personnel to support the drafters. These include secretarial assistants, computer specialists, paralegals (such as legislative editors and revisors) and, particularly in bilingual or multilingual jurisdictions, jurilinguists. There may also be specialized legal advisers to provide assistance on the resolution of legal questions that occur frequently in the preparation of legislation, for example relating to the interpretation of legislation, the enabling authority for delegated legislation or the harmonization of legislation with systems of private law (for example, the Civil Code and the Common Law).

## **What Do Drafters Do?**

The drafter's role is to ensure that government policy is expressed effectively in legislation. This link to legislation – a form of law – explains why drafters have traditionally been drawn from the ranks of the legal profession.

Government policy ranges from specific policies that a particular department wants expressed in legislation to broader policies of the government as a whole that should be reflected in all of its legislation. This presupposes that policy and legislation are different, that there is a process for transforming the one into the other and that the drafter is at the heart of this process.

The essential difference between legislation and policy is that one is law and the other is not. Law operates within a relatively closed system of rules superintended by lawyers and judges. It is a tool for implementing policy by creating legal entities or rights, or by ascribing legally enforceable consequences to events or situations. If legislation is not properly drafted, it is unlikely to implement policy effectively.

Legislation must be clear and accurate. This requirement underscores how complex the drafter's role is. The drafter must not only appreciate what the legislation is intended to accomplish, but must also know how language works to convey meaning. In addition, the fact that legislation embodies the law, and does not merely describe it, suggests that a drafter is much more than a stenographer or printer. The drafter plays a critical role in determining the effect that legislation has.

Drafting is not just writing words to express ideas. It begins with understanding what is to be expressed. Drafters are as much an audience for the communication of ideas (by instructing officials) as they are communicators of those ideas. The process of understanding ideas also involves analysing, critiquing and developing them.

The relationship between communication and analysis is easily recognized when one considers how we use written language to take a good look at ideas, whether they are our own or someone else's. It's often only when ideas are written down that they can be seen for what they are. This is especially important with a long or complex series of ideas. By reading a written text, the reader can go over the content of the ideas it conveys and think critically about them and make connections among them or to other ideas. A written text arranges ideas in a particular order. Reading and rereading gives a better sense of how the ideas relate to each other, or how they may be disordered or disjointed.

If writing is useful for developing ideas generally, it is essential when ideas are to be developed by a group of people. It is the medium for exchanging and generating ideas in a definitive form that outlasts the transitory spoken word. In legal matters, documents necessarily apply to groups of people, some or all of whom are involved in their preparation. Draft texts are a means of coordinating their ideas and focusing the efforts of the group.

Another important aspect of legislative drafting is that it recognizes a distinctive role for a drafter in the preparation of a legislation: the person who holds the pen or, nowadays, sits at the keyboard. It establishes a dichotomy between those who give instructions on what legislation is supposed to accomplish (instructing officials, ministers, members of parliament) and those who find the words to meet this objective. A drafter is as critical to drafting as an advocate to a court case or a chairperson to an effective meeting. Drafters stand apart from those who give drafting instructions and finds words to convey their intention to those who will later read the legislation. The drafter's role is to prepare a text that can be understood without knowing or having to remember all the discussion and other context surrounding its preparation.

Appendix 1 contains a statement of the roles of drafters and instructing officials taken from the Legislation Deskbook of my office. It recognizes both the distinctive role of a drafter as well as the fact that the preparation of legislation is a cooperative exercise that also depends on the contributions of other participants in the process.

### **Conformity with Government Policy**

In jurisdictions where legislation is drafted on the basis of instructions from Cabinet, drafters must obviously be aware of Government policies relating to the legislation they draft. This of course includes general Cabinet policies on the preparation of legislation<sup>20</sup> and the policy approved in the Cabinet decision authorizing drafting of legislation.

The drafter must ensure that draft legislation is consistent with the drafting instructions approved by the Cabinet. In Canada at the federal level, sponsoring departments must bring any deviations from the

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<sup>20</sup> Above n. 14.

approved policy to the attention of Cabinet, either in the form of a supplementary memorandum to Cabinet or else when the final draft of the bill is submitted to Cabinet for its approval. Motions to amend a bill must also be brought to the attention of Cabinet if they deviate from the original drafting instructions (see Appendix 2).

The process for giving drafting instructions for legislation varies considerably. However, in many jurisdictions one finds two sets of instructions. The first are formal, written instruction that are approved at the ministerial level. These instructions establish the broad parameters within which the legislation is to be drafted. They also typically leave many details to be filled in at the drafting stage through a second set of less formal instructions provided by officials in the sponsoring department. The drafter's role depends on the scope of these details. If much is left to be worked out at the drafting stage, the drafter may be asked to draft various alternatives and give an opinion on their merits. This task can be especially difficult when more than one department is involved in the preparation of legislation and they disagree about how these policy questions should be resolved.

Additional policy functions for drafters may involve ensuring that other government policies are respected in draft legislation. When an office has a government-wide mandate to draft legislation, it is a logical point to situate these functions. At the federal level in Canada, drafters have a role in ensuring adherence to a variety of government policies relating, for example, to:

- the application of federal legislation in the context of both the *Civil Code of Quebec* and the common law of the other provinces and territories, [see Legislation Deskbook, section 2.07],
- gender equality [see below under Compatibility with Legal Values],
- regulation-making powers [see Cabinet Directive on Law-making [http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/directive\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/directive_e.htm).],
- criminal law and enforcement powers [see Legislation Deskbook, sections 3.09 and 3.11],

- information management (see Treasury Board Policy on the Management of Government Information Holdings at [http://www.tbs-sct.gc.ca/Pubs\\_pol/ciopubs/TB\\_GIH/CHAP3\\_1\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/ciopubs/TB_GIH/CHAP3_1_e.html)).

### **Consistency with the Constitution and International Law**

Drafters are usually expected to ensure that the legislation they draft is consistent with constitutional and international law, particularly relating to human rights and international trade. This responsibility is potentially vast. They cannot, however, be expected to know the details of all this law. Their role is not to be experts, but rather to uncover potential problems and ensure that they are satisfactorily resolved, if need be by enlisting the support of other specialized legal services.

In Canada, the drafter's role in this area is signaled by the fact that the Chief Legislative Counsel discharges the responsibility of the Minister of Justice for examining and certifying bills for consistency with the Canadian Charter of Rights and Freedoms and the *Canadian Bill of Rights*. The primary review is in practice conducted by a drafter in the Legislation Section in consultation with *Charter* specialists in the Human Rights Law Section of the Department. This recognizes that drafters are uniquely placed to appreciate the implications of the legislation they draft and assess its consistency with fundamental rights.

### **Consistency with Other Acts of General Application**

The preceding comments on constitutional and international law also largely apply in relation to other legislation. Drafters should be aware of other legislation of general application. The most obvious example is the relevant interpretive statute (often called the *Interpretation Act*), which contains a series of rules and definitions that need not be repeated when drafting legislation. This has the advantage of both reducing the volume of new legislation and ensuring consistency in federal legislation. Its disadvantage is in its obscurity: few people know of its existence, let alone the details of its provisions.

A list of other important Canadian Acts of general application and a brief indication of how they relate to legislation generally, is included in Appendix 3.

**Compatibility with Systems of Private Law**

In jurisdictions that have more than one system of private law, legislation may have to be harmonized to operate effectively with all such systems. In Canada, the province of Quebec has a civil law system, while the rest of the country operates under the common law. An ambitious revision process is underway to harmonize all federal law with both systems and all new legislation that applies in Quebec and the other provinces must be drafted in a harmonized fashion as well.

## **Compatibility with Legal Values**

As lawyers, drafters have been educated in the values that lie at the heart of our legal system. Although some of these values are now protected by constitutionalized rights, not all of them are, or their protection is quite limited. In Canada, these values include:

- procedural fairness and natural justice;
- access to the courts;
- prospective application of the law;
- property rights;
- parliamentary sovereignty (non-delegation of authority over fundamental matters such as the imposition of taxation or the creation of offences).

In addition, the Gender Equality Initiative of the Canadian Department of Justice calls on drafters to be especially vigilant that legislation does not have an adverse impact on women or members of other traditionally disadvantaged groups. Drafters should be aware of the Departmental Policy on Gender Equality Analysis and they are encouraged to turn to the gender equality specialists in the Legislative Services Branch for help in identifying these impacts and trying to avoid them.

Drafters have a role to play in ensuring that incursions on these values are fully considered before they are drafted into legislation and that the Cabinet has clearly authorized them. They should look for solutions that achieve the underlying policy objectives without infringing these values.

## **Intelligibility**

This aspect focuses on those who are affected by the legislation and concerns whether they can understand the legislation. This concern has a number of facets, perhaps the most obvious of which involves ambiguity. If an ambiguous word is used to express something, it may end up being interpreted to express something different from what was intended; if a modifier is misplaced, it may end up modifying the wrong part of speech. The drafter's role here is to point out the ambiguity and have the policy officials clarify which meaning is intended.



One of the most important ways in which drafters avoid ambiguity is by ensuring consistency in the way ideas are expressed. Within a single Act, particular expressions should always be used to mean the same thing and different expressions should be used to express different things. Consistency also extends to the use of model provisions, most notably the amending formulae. However, this concern for consistency should not be set up as an impediment to improving the way provisions are drafted, particularly in terms of their intelligibility.

Another aspect of ambiguity relates to the bilingual nature of federal legislation. The requirement for two language versions multiplies the chances of ambiguity, not only because there is twice as much text, but also because both versions must convey the same meaning. Ensuring that they do is one of the drafters' most important responsibilities.

Vagueness is another facet of intelligibility, although it is not necessarily a problem in legislation; in fact it sometimes has to preserve an unavoidable degree of vagueness. Drafters generally try to make legislation as precise as possible, but just as there are limits on the drafter's time, so too there are limits on the degree of precision needed or desired. Just think of the rambling enumerations that bedeck some provisions – they only end up encumbering the text and discouraging readers. There is little point adding details to deal with an event that is highly unlikely. In addition, precision sometimes makes it more difficult to reach agreement on legislation. If a bill is intended to embody an agreement among a number of conflicting parties, some points may have to be left vague in order to secure the approval of all parties. There may not be agreement on every aspect of the conflict and some of the details may have to be left to be worked out later within the framework of general, albeit vague, language.

Drafters also have a role to play in ensuring the readability of legislation. This aspect may have a policy dimension in so far as drafters should discourage unnecessarily complex policy. They should consider whether policy goals can be accomplished in a simpler way and whether elements of a legislative scheme are really needed.

### **Practicality**

The process of transforming policy into law forces those involved to think carefully about the policy how it will be implemented. Policy includes more than general objectives. It must descend to a level of

particularity that allows those affected by it to understand how it affects them.

Drafters cannot hope to understand the subject-matter of draft legislation as well as those who develop or administer the underlying policy. But they can bring a critical point of view that helps avoid practical problems. Often, those who provide instructions focus on the objectives of the document, without appreciating the details of how it will operate in practice. Drafters can stimulate a consideration of these details by asking questions based on the knowledge they have gained in the relevant subject-matter and their experience drafting similar types of provisions.

Commonly overlooked issues involve the implementation and enforcement of legislation. For example, if a proposal involves the creation of a regulatory regime, some thought should be given to the powers that enforcement officials will need to monitor compliance. Here drafters can play a useful role in suggesting models from other legislation and adapting them to the bill in question. Similarly, if a proposal would amend existing legislation or penalize the possession of things that are currently legal, transitional provisions will be needed. Here again, drafters have a wealth of precedents to draw on to be used to work out the details necessary for a smooth transition from the old regime to the new.

Finally, drafters have a role in coordinating amendments to a single piece of legislation from various sources. The pace of a government's legislative agenda may result in a series of bills that amend the same legislation. In these circumstances, it is essential to coordinate the amendments to ensure that they take effect in the proper sequence through appropriately drafted conditional amendments.

### **Information Technology**

In recent years, computers and word processing tools have added a new dimension to the drafter's role. In many jurisdictions, they play a far more direct role in the formatting and printing of legislation. They are expected to prepare an electronic version of their drafts with embedded codes that determine margins and spacing. They also have a wealth of electronic tools for searching their drafts and making corrections as well as searching other databases, particularly those available on the Internet. Many jurisdictions make their legislation available electronically, vastly augmenting the precedents that drafters have to choose from.

Information technology also has much to offer in terms of delivering reference material to drafters. For example, the Government of the Netherlands has developed a system for integrating all of its drafting directives into the word processing programs that its drafters use. When they draft particular types of provisions, they are automatically hyperlinked to the relevant directives.

Finally, it is worth noting that in Canada drafters are increasingly working with instructing officials in rooms equipped with computers. These rooms have four monitors, one for each of the drafters of the two language versions and two for the officials. As they discuss the draft, the drafters make changes that the officials can look at. This has vastly accelerated the speed with which legislation can be drafted, but it also poses difficult questions about stressful working conditions and the quality of draft legislation produced under these conditions.

### **Who Else Works in a Drafting Office?**

Many drafting offices employ other professional staff who work closely with drafters and who perform functions that have often been performed by drafters. This typically occurs in larger offices where economies of scale and resources allow certain aspects associated with drafting to be performed by others.

Most offices of course employ secretarial support staff whose roles have more recently transformed into computer support functions as drafters become computer literate and draft at the keyboard, rather than writing with pen and paper.

Bilingual or multilingual jurisdictions tend to employ translators or jurilinguists. Translators are found in places where drafters work in one language and then have their work translated in the final stages of drafting. Jurilinguists work in places, such as the Legislative Services Branch, where legislation is drafted by drafters working in each language at the same time and there is a need to ensure that each version corresponds to the other. Jurilinguists help drafters achieve, in both official languages, the highest possible quality of language when drafting bills or regulations. They also help drafters ensure that the two official-language versions of bills and regulations are parallel in meaning.

Legislative editors or revisors are also usually members of a drafting office, particularly those that are heavily involved in publishing.

In the Legislative Services Branch, editors and revisors form a unit that provides revising services and legislative paralegal support to drafters. It is also responsible for the official publishing of Acts of Parliament following Royal Assent (and related reference tables) and the consolidation of the Constitution Acts 1867 to 1982. It also maintains the only complete, updated and indexed set of master copies of federal statutes and regulations

In Canada, jurilinguists and legislative editors and revisors provide critical support to drafters in addressing the intelligibility of legislation. They bring an independent perspective and distinctive expertise in language to bear on the preparation of legislation and drafters carefully consider their comments and advice.

Finally, drafting sometimes requires specialized legal advice on matters that come up in the drafting process. A government-wide drafting office usually has access to advisers from specialized legal services in the same government. In the case of the Legislative Services Branch, we have recently established two specialized services within the drafting office. One deals with questions of private law and the harmonization of federal legislation with the Civil Code of Quebec and the common law of the other provinces and territories. The other deals more generally with legal and policy questions on legislative matters, such as the interpretation of legislation and the making of delegated legislation.

### **Can Drafting Offices and Drafters Do All This?**

If all the elements of a drafter's role that have just been discussed were congregated in a single office, they would constitute a daunting list of tasks. One might justifiably ask whether it is realistic, or indeed possible, to assemble a drafting office with personnel, including drafters, who can do all these things. These tasks pose fundamental questions about the structure and resources of drafting offices.

The question about finding drafters who can do all that is expected of them becomes even more pointed when one takes into account the conditions under which legislation is often drafted, most notably short deadlines and pressure to get the job done with quickly with the minimum effort. It is also affected by the stage at which drafters come into the process of preparing legislation. If they arrive at a relatively late stage, with responsibility to review already drafted legislation, they are far less likely to be able to discharge many of the functions outlined in this paper.

In recent years in Canada, drafters have been called upon to spend more and more time on the policy formulation aspects of their role. In addition, government policy increasingly results from negotiations among various departments, other governments and interest groups. These negotiations are often time consuming and focus only on high-profile issues, leaving a host of other matters to be resolved at the drafting stage. The shift to meetings with instructing officials in drafting rooms, discussing and inputting changes simultaneously, has put additional pressure on drafters when the policy has not been established. In these situations, instructing officials use the drafting room as a forum for developing their policy. The Note to Drafters 1997 in Appendix 2 was issued to help drafters address these increased demands.

If drafters and others working in drafting offices are to discharge the responsibilities described in this paper, they require training that goes beyond what has traditionally been given. This is particularly true of responsibilities relating to policy implementation and the use of information technology.

It seems equally clear that individual drafters cannot perform all the roles that may be given to a drafting office. In addition to recruiting drafters and training them, it is essential to consider how staffing and the allocation of resources affects their role. The choice is either to give these roles to others (or perhaps abandon them altogether) or to build an office with the resources to discharge them. This is hardly a new question, as the Renton Report demonstrated in 1976. Plus ça change.

## **Appendix 1 – The Roles of Legislative Counsel and their Clients in the Drafting of Legislation**

(Legislation Deskbook, s. 1.2)

### **Our Role as Legislative Counsel**

We are available to advise and assist you in the development of the policy to be implemented by your legislation.

Promptly after Cabinet authorizes the drafting of your legislation, we will inform you of the names and telephone and fax numbers of the legislative counsel assigned to draft the legislation and endeavour not to change counsel.

We will convene drafting meetings and keep you regularly informed of the progress of your legislation.

We will ensure that legislative counsel in both Official Languages are present at each drafting meeting.

We will work with you in fixing a reasonable completion date for your legislation, taking into account its length and complexity and government priorities.

We will draft your legislation in a timely manner, bearing in mind any completion date, and will promptly inform you of any delays in drafting.

We will draft your legislation in a manner that is legally sound, clear, comprehensive and responsive to your needs and, in particular, we will propose solutions to any legal and drafting problems that may arise in the course of drafting.

### **Your Role as Client**

You should, as much as possible, finalize the policy to be implemented by your legislation before we start drafting it.

Before Cabinet authorizes the drafting of your legislation, you should assemble an instructing team capable of working in both Official Languages and directed by a person who has power to make policy decisions or who has easy access to such a person.

You should make yourself available to attend drafting meetings and otherwise to give drafting instructions on your legislation.

You should ensure that your instructing team at each drafting meeting is capable of discussing the subject-matter in depth in both Official Languages.

You should not fix a completion date for your legislation without consulting us.

You should give drafting instructions and answer questions in a timely manner, bearing in mind any completion date.

You should give drafting instructions that are clear, comprehensive and responsive to any questions put to you.

We will draft your legislation in a manner that is respectful of the rules and spirit of each Official Language and of the Common Law and Civil Law systems.

We will assist you in having your legislation enacted by Parliament and, in particular, we will draft amendments to your legislation for use in Parliament.

We will be accessible in person and by e-mail and voice mail during normal business hours and at other times by arrangement.

You should review both language versions of your legislation thoroughly and not give only a cursory examination to one or the other.

You should advise us as soon as possible if you will require amendments to your legislation for use in Parliament.

You should let us know how we did on your file, in particular by responding to any client satisfaction survey that we may send to you.

## **Appendix 2 – Note to Drafters 1997-6**

The drafter's principal role is to take policy others have devised and fashion it into legislation. Ideally, that policy will have been completely formulated when presented to the drafter, but this rarely occurs in practice. The drafter will normally have to assist in filling gaps in policy. This allied policy role of the drafter can arise either before or after the policy has been approved by Cabinet.

### **Policy role before Cabinet approval**

The drafter's policy role is usually played out after Cabinet has approved the policy as evidenced by a Record of Decision. However, drafters are occasionally consulted before this. For example, drafters may be called upon to comment on a draft MC. This can be useful in giving a drafter's point of view to policy makers (for example, by pointing out that the first step to plain language legislation is simple policy and by indicating a reasonable time-frame for drafting). It also gives drafters a better understanding of the policy they could eventually be asked to draft into legislation. The problem is that it can be very time-consuming and compromise the drafter's sense of critical detachment from the policy to be implemented. In light of those considerations and our limited resources to perform our principal role, drafters will not normally be assigned to do this early policy work and, when so assigned, they will be expected to give priority to their drafting work.

### **Policy role after Cabinet approval**

Even after Cabinet approval of the policy, the drafter's policy role can be very time-consuming. Major details may have been unresolved at the Cabinet table or not even raised. Although the Cabinet process is supposed to force departments to develop their policy before submitting it for approval, the process has been less than effective in many instances in the recent past. As well, the policy formulation role of the government generally has suffered in recent years with the widespread downsizing of the public service and was the subject of a recent Deputy Ministers' Task Force. Finally, the shift to meetings with officials in drafting rooms, discussing and inputting changes simultaneously, has put additional



pressure on drafters when the policy has not been established. How is the drafter to cope? Here are some suggestions:

- Policy-making is the responsibility of the instructing officials, not the drafter. Drafters can help them see the options, but they cannot select one.
- Drafting time should not be spent exploring a series of distinct and complex possibilities. If in a drafting meeting, it becomes apparent that the instructing officials disagree about the policy on a particular point, the point should be deferred and the disagreement settled elsewhere.
- Drafters should not draft alternative provisions if requested to do so because of a disagreement or indecision over policy. Get the policy settled and then do the drafting, not vice versa.
- Drafters should not draft a provision on the request of the instructing officials "to see what it would look like". Policy should be settled on principle, not form.
- It is not the drafter's role to defend the client department's policy in the face of objections from other departments. Drafters may try to clarify the issues, but should remain as neutral as possible. It is the responsibility of the Legislation and House Planning Secretariat to mediate disputes among departments.
- Drafters should not hesitate to call other members of the Department of Justice or officials in other departments to help resolve questions. Consideration of the relevant matters should be deferred until this assistance is obtained.
- If drafters appear before parliamentary committees, they must confine their comments to drafting matters and technical provisions such as conditional amendments and must not try to explain or defend the policy underlying the bill.

## **Appendix 3 – List of Canadian Legislation of General Application**

### **Access to Information Act and Privacy Act**

The Acts govern the disclosure of information held by the Government. They are especially relevant to provisions that either prevent or require the disclosure of this information. If provisions restricting access to government information conflict with the Access to Information Act, they will be overridden by section 4 of that Act, unless they are listed in Schedule II as exceptions. Such provisions should only be included when they differ from the provisions of these Acts and the differences are justifiable. Before including them, drafters should consult the Access to Information and Privacy Section.

### **Canadian Environmental Assessment Act**

This Act requires assessments of the likely environmental impact of a wide range of proposed Government decisions and activities.

### **Canadian Human Rights Act and Official Languages Act**

These Acts protect the basic rights of individuals, including linguistic rights. They are regarded as quasi-constitutional and contain provisions stating that they prevail over all other legislation in cases of inconsistency.

### **Criminal Code and Contraventions Act**

These Acts provide an administrative framework for offences created by federal legislation. This framework includes investigatory powers and procedures for prosecution or other disposition of offences.

Canada Evidence Act, Crown Liability and Proceedings Act and Federal Court Act

These Acts deal with court proceedings relating to the administration of federal legislation or the Federal Crown.

**Financial Administration Act**

This Act deals with the financial affairs of the Government of Canada, including the collection and expenditure of public money and an accountability framework for Crown corporations. Drafters should particularly note sections 11, 41 and 87, which operate despite any other Act.

**Public Service Rearrangement and Transfer of Duties Act**

This Act allows the Governor in Council to reorganize the public service, including the creation and amalgamation of departments and the reassignment of ministers.

*Public Service Employment Act, Public Service Staff Relations Act and Public Service Superannuation Act*

These Acts deal with the employment of public servants, including hiring, dismissal and the negotiation of terms and conditions of employment.

**Oceans Act**

This Act provides for the application of Canadian law in the offshore areas surrounding Canada's land mass.

*Publication of Statutes Act, Statutory Instruments Act and Statute Revision Act*

These Acts provide for the promulgation of federal legislation.

Drafters should be aware of these Acts since they deal with issues that frequently arise in drafting legislation. Some provide supplementary rules that need not be repeated in other legislation. For example, the *Criminal Code* provides rules about the investigation and prosecution of offences while the *Oceans Act* provides rules about the application of Canadian law in the waters surrounding Canada.

## Appendix 4 – Drafter's Checklist

This checklist of questions highlights the main aspect of a drafter's role discussed in this paper.

### Conformity with Government Policies:

- Is the bill drafted in accordance with the drafting instructions in the Cabinet Record of Decision?
- Have deviations from the RD in the bill or any subsequent motions to amend it been discussed with the Legislation and House Planning Secretariat? (Notes to Drafters 1996-7 and 1997-4)
- is the bill drafted in conformity with the Justice Policy on Legislative Bijuralism?
- has the bill been drafted taking into account gender equality considerations? (see Diversity and Justice : Gender Perspectives, A Guide to Gender Equality Analysis)
- are any regulation-making powers drafted in accordance with the Cabinet Directive on Law-making of March, 1999?
- are any provisions dealing with records inconsistent with the Treasury Board Policy on the Management of Government Information Holdings at [http://www.tbs-sct.gc.ca/Pubs\\_pol/ciopubs/TB\\_GIH/CHAP3\\_1\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/ciopubs/TB_GIH/CHAP3_1_e.html)?
- do any provisions undermine the confidentiality of income tax returns?
- have any provisions restricting rights under the Access to Information Act been discussed with the Information and Privacy Law Section? (Notes to drafters 1987-10 and 1993-2)
- are offence provisions and enforcement powers consistent with the Departmental guidelines in the Criminal Law in Society and Notes to Drafters 1988-1: Guidelines for the granting of enforcement powers; 1990-3: Minimum punishments; 1992-5: Enforcement and penalty provisions in non-criminal legislation?
- have any provisions requiring documents to be tabled in Parliament been discussed with the Legislation and House Planning Secretariat? (Note to drafters 1987-4)
- has any aboriginal rights non-derogation clause been discussed with the Native Law Section? (Note to Drafters 1995-1)

- are powers conferred on a Minister of State? (Note to Drafters 1987-1)

### **Consistency with the Constitution and other Laws**

- is there constitutional authority for the bill or amendment?
- is it compatible with the Canadian *Charter of Rights and Freedoms*, the *Canadian Bill of Rights* and the *International Covenant on Human Rights*?
- are any provisions unnecessary repetitions of provisions in the *Interpretation Act*, the *Criminal Code*, the *Oceans Act* or any other Acts of general application?
- do any provisions conflict with other legislation?
- is the bill or amendment harmonized with both the common law and civil law systems?

### **Compatibility with legal values**

- does the bill or amendment infringe principles of natural justice and fairness?
- does it deny access to the courts?
- does it expropriate property without adequate compensation?
- does it apply retroactively?
- does it delegate authority over matters that Parliament should deal with, such as taxation or the creation of offences?
- does it have an adverse impact on women and other traditionally disadvantaged groups?
- is the bill drafted in gender neutral language?

### **Intelligibility**

- is the bill or amendment ambiguous?
- is it unduly vague?
- is it drafted as clearly and simply as possible?
- do both language versions say the same thing?

**Practicality**

- can the bill or amendment be implemented?
- are there adequate enforcement powers?
- are there adequate transitional provisions?
- are any conditional amendments needed to take account of other bills?

## Appendix 5 – Canadian Manuals and Guides

The most general reference document on the preparation of legislation is the Guide to Making Federal Acts and Regulations, published by the Privy Council Office, 2001. Additional material is set out in the tables below.

### Preparing Legislation

Title	Author	Reference and Language	Assessment
The Role and Structure of the Privy Council Office, current	Privy Council Office	<a href="http://www.pco-bcp.gc.ca/default.asp?Page=Publications&amp;Language=E&amp;doc=Role/role_e.htm">http://www.pco-bcp.gc.ca/default.asp?Page=Publications&amp;Language=E&amp;doc=Role/role_e.htm</a> Bilingual	Easily understood
Memoranda to Cabinet: A Drafters' Guide	Privy Council Office	<a href="http://www.pco-bcp.gc.ca/default.asp?Language=E&amp;Page=publications&amp;Sub=mc&amp;Doc=mc_e.htm">http://www.pco-bcp.gc.ca/default.asp?Language=E&amp;Page=publications&amp;Sub=mc&amp;Doc=mc_e.htm</a> Bilingual	Easily understood
Responsibility in the Constitution, 1993	Privy Council Office	ISBN 0-662-58782-0 Bilingual	Easily understood
Designing Regulatory Laws that Work	Department of Justice (Constitutional and Administrative Law Section)	Printed Bilingual	Detailed and technical
Manual for Designing Administrative Tribunals, 1998	Department of Justice (Constitutional and Administrative Law Section)	Electronic version available on the Department of Justice Intranet Bilingual	Detailed and technical
Composition of Legislation, 2nd ed., 1976	E. A. Driedger	ISBN 0-660-00443-7 English	Detailed and technical
Legislation Deskbook	Department of Justice (Legislative	Electronic version available on the Department of Justice Intranet	Detailed and technical

Title	Author	Reference and Language	Assessment
	Services Branch)	Bilingual	
Guide canadien de rédaction française	Department of Justice (Legislative Services Branch)	Printed French	Detailed guidance on drafting in French
Legistics	Department of Justice (Legislative Services Branch)	Printed English	Detailed guidance on drafting in English



### Regulatory Process

Title	Author	Reference and Language	Assessment
Government of Canada Regulatory Policy	Privy Council Office (Regulatory Affairs and Orders in Council Secretariat)	Bilingual <a href="http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications&amp;Sub=GovernmentofCanadaRegula">http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications&amp;Sub=GovernmentofCanadaRegula</a>	Easily understood
Guide to the Regulatory Process	Privy Council Office (Regulatory Affairs and Orders in Council Secretariat)	Bilingual <a href="http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications&amp;Sub=RegulatoryProcessGuide">http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications&amp;Sub=RegulatoryProcessGuide</a>	Easily understood
Federal Regulations Manual, 1998	Department of Justice (Regulations Section)	Bilingual	Technical, but easily understood