

# **The Changing Role of the Departmental Solicitor in the New Brunswick Legislative Drafting Process**

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C. Clyde SPINNEY\*

This presentation seeks to briefly trace the changing role of the Departmental solicitor in New Brunswick's Legal Services Branch in the legislative drafting process over the past thirty five years in response to a number of factors, including the professionalizing of the delivery of legislative and legal services, formalization of the legislative approval process, as well as increasing specialization in legislative drafting and the delivery of legal services.

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In the beginning... the earth was without form, and void; and darkness was upon the face of the deep.

## **THE 1960s**

In the mid 1960's, the Attorney General's Office in New Brunswick employed very few permanent solicitors and among those who were employed, there was little formal differentiation in the respective roles of the Legislative Counsel and the departmental solicitors. The Legislative counsel was prone to provide legal advice to government departments, and there were few departmental solicitors.

In that era most litigation files and criminal trials and even certain legislative drafting assignments were also contracted out by the Deputy Attorney General to counsel in private practice based in large measure on the degree to which they were known to the government in power. And

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\* Q.C., Assistant Deputy Minister (Legal Services), Fredericton, New Brunswick.

with any change in government there would also be a change in both the Deputy Attorney General, as well as the pool of assigned counsel to whom files would be contracted out. This produced a learning curve with each change of government as the friends of the incoming government became familiar (at government expense) with the legal issues faced by government.

Things first began to change in 1966 with the adoption of the *Crown Prosecutors Act* which provided for the appointment of career Crown Prosecutors and generated the inception of a professional Public Prosecutions Service. By 1971 the Office of the Attorney General in New Brunswick had established three discrete divisions or branches directed at three separate Attorney General functions namely Public Prosecutions, Legal Services and Law Reform including the legislative drafting function.

### **THE 1970S**

My initial employment in the Legal Services Division as it was then known dates back to early 1975 as an articulated student, but I have had the occasion to review branch files dating back many years earlier. Initially the involvement of the Legal Services solicitor would reflect the personal predilections of the individual solicitors in question. Typically senior solicitors were disdainful of the legislative drafting process, and left routine issues of legislative change to the client departments and the drafters. They also avoided commenting on successive drafts of proposed regulations or legislation, because they had not been privy to the instructions given to the drafters, who they viewed as specialists.

On the other hand some junior solicitors in the early years (including the writer) would comment on legislative drafts and indeed, even occasionally agree to produce first drafts of regulation changes or draft proposed legislative amendments for client departments. This was done not to preempt the role of the legislative drafter, but simply as an aid to help the client department formulate and communicate its instructions to the legislative drafters in a comprehensible manner. In those days there was a dearth of competent policy people in the client departments such that professional staff in both the Legal Services and the Law Reform Branches were often called upon to educate staff from client departments on the rudiments of the legislative process, and had to repeatedly impress client departments with the fact that policy decisions were their

responsibility, and not that of the legislative drafter or the departmental solicitor.

The best example of an extraordinary case in which legislation was produced literally overnight with the assistance of the departmental solicitor was the adoption of the *Fish Processing Act* in 1982 when the writer personally took instruction over the phone on the evening of May 17, 1982 from the Minister of Fisheries to produce legislation dealing with an employment crisis in the northern New Brunswick Snow Crab industry caused by an unforeseen demand from Japanese buyers for whole crab, after a collapse of the Alaskan King Crab stocks. The demand for whole crabs meant that the traditional New Brunswick crab meat market which was highly labour intensive was not being served, with the result that the fish plant workers who normally worked in the industry, would not get enough work to qualify for unemployment insurance.

After alerting the then Director of Law Reform of the request, counsel produced a first English draft of the requested legislation at home that evening, which was transmitted to the Law Reform branch very early the next morning, and on that same day, May 18, 2002 the Legislature adopted the *Fish Processing Act* on three readings, and Cabinet also adopted *Regulation 82-91* thereunder which is attached, less the prescribed forms. The *Act* and *Regulation* were literally produced and adopted within twenty four hours, and subsequently withstood a constitutional challenge.

However, as stated, this sort of collaboration in the legislative drafting process was atypical at the time. Nonetheless, senior solicitors could not avoid all involvement. Firstly, the departmental solicitor for a number of departments was routinely requested to sign off indicating their approval on all departmental submissions to Cabinet, not just those dealing with amendments to legislation or regulations. This was not a requirement of the legislative procedure at the time, but an option which some departments followed and which the legislative drafters supported.

Secondly, Legal Services solicitors were assigned to specific client departments, and although they were of necessity generalists in the sense that they provided a full range of legal services to each client department ranging from labour and employment advice to constitutional law advice, litigation and representation in commercial law and property matters, they were also specialists in their clients' business. They knew their clients' business.

So if the legislative drafters sought information or advice in specialized areas such as expropriation or natural resources law, the Departmental solicitor served as a consultant on the specific legal point. However, their involvement in the development of draft legislation or regulations was typically minimal thereafter.

## LANGUAGE

The issue of language has also been part of the picture from the beginning. New Brunswick first produced legislation in both languages in 1969 with the adoption of the *Official Languages of New Brunswick Act*. However, that *Act* was the only statute produced in both official languages until the 1973 *Revised Statutes* were subsequently published in both languages. Thereafter all statutes have been produced in both languages in New Brunswick even though in the early years, the drafting process took place in English and the French version of the statute was a mere translation often leaving much to be desired. Only in the mid 1980s did New Brunswick adopt a true co-drafting legislative process.

Regulations also continued to be produced only in English until 1974 and even then, only new regulations were adopted in both languages. English only regulations continued to be amended for another ten years, well after the adoption of the *Canadian Charter of Rights and Freedoms*.

## 1983

In 1983 the Law Reform Branch was wrestling with the issue of departments which came forward with legislative proposals without having consulted their Departmental solicitors. At their recommendation, the government adopted the policy that no legislation could be proposed without prior consultation with the Departmental solicitor. In effect the practice of Departmental solicitors signing off on all Cabinet submissions for certain departments, became a required practice on all Cabinet submissions involving legislative proposals, including regulations. The purpose was to prevent departments from proposing legislative or regulatory solutions to problems which could be resolved through other means, and avoid having legislative drafters spend time drafting legislation or regulations that were not necessary.

The Departmental solicitor was required to provide written confirmation on three specific legal points, namely whether:

1. The proposed legislation would have the legal effect expressed in the Memorandum;
2. The province had the requisite legislative authority to enact the proposed legislation; and
3. The proposed legislation was consistent with the provisions of the Constitution Act, 1982.

At the time this policy was presented, the senior staff of the Legal Services branch made it clear that by signing off on the need for legislation or regulations, they were not thereby taking on the obligation on behalf of client departments to do a comprehensive, detailed review of each succeeding draft produced by the Law Reform Branch to ensure that it met the objectives of the client department. While they were prepared to continue to consult with legislative drafters on specialized points of law as in the past, they were not prepared to attend departmental meetings with legislative drafters or to review drafts.

However, as with the former practice the extent to which Departmental solicitors chose to consult with the drafters in relation to the succeeding drafts on an ongoing basis varied in accordance with the propensities of the solicitor concerned.

## **1989**

Because of the inconsistent involvement of the Departmental solicitors in the legislative process, in 1989 the Clerk of the Executive Council sought to clarify their role in assisting client Departments with legislative proposals. In some cases the Departmental solicitor who babysat their client departments acted virtually as the policy development person of the client department, to the point of even drafting the Memorandum to the Executive Council for the client department. In other cases however, the Departmental solicitors would refuse to get involved beyond their traditional formal role. Further in some cases where the Departmental solicitor had first pointed out the shortcomings in the legislative regime administered by the client departments or had assisted in policy formulation, the client Departments would come to the Law Reform Branch and advise the legislative drafters this was essentially a “Justice” proposal about which they knew very little.

The result of the review was to identify the need for all client departments to employ competent, dedicated legislative policy and planning coordinators to pursue policy development and the drafting of policy and Cabinet documents as well as the review of draft regulations and legislation. The Office of the Attorney General and the staff of the Executive Council Office continue to stress this need on an on-going basis.

Finally, by 1989 the Legal Services branch had one or more Constitutional Law Specialist positions, who would routinely sign off on the third part of the legal opinion required for legislative purposes, namely that the proposed legislation was not inconsistent with the provisions of the *Constitution Act, 1982*.

### **1993-1994**

With the departure of the former Director of the Law Reform Branch in 1993, Basil Stapleton, Q.C., the Office of the Attorney General discontinued the legal research function being carried on by that branch and re-titled the Branch firstly as the Legislative Drafting Branch and shortly thereafter, as the Legislative Services Branch, as that Branch is known today.

As well in 1994 the Executive Council Office published its first formal Procedures Manual for Executive Council documents. Under that Manual, the role of the Legal Services solicitor was to receive the final form of Memorandum to the Executive Council from the client department, and to provide an opinion on the legislative competence of the Province to enact the proposed legislation and any identify any potential legal problems that might thereby arise.

The Legal Services solicitor then provided the proposal to the Constitutional Law Specialist who provided an opinion on the compatibility (or the lack thereof) of the proposed legislation with the Canadian Charter of Rights and Freedoms. The requirement to involve the Constitutional Law Specialist could only be waived in the clearest of cases, such as the repeal of legislation.

The Manual also specified that drafting would be carried out in consultation with the contact person in the sponsoring department, and the Legal Services departmental solicitor. This standardized the involvement of the Departmental solicitor. Their role was not to ensure the quality of

the legislative drafting itself, but to ensure that the drafts adequately addressed the fundamental issue that the reform sought to deal with. If required, the constitutional Law Specialist or staff of the Public Prosecutions Branch would be consulted on specialized issues.

While the Procedures Manual provided for a system of priority assignments by the Policy and Priorities Committee of Cabinet to remove competing pressures from the drafting teams, it also thrust more responsibility on the drafting teams by expressly empowering them to direct departments to go back to the Policy and Priorities Committee if they felt that the actual provisions that were being sought by the department in the drafting process exceeded or did not reflect the Committee decision that had been obtained. It also expressly charged the drafting team with the responsibility of ensuring themselves through the drafting process, that the proposed legislation would have the intended effect and did not violate the Charter and that it was not otherwise unconstitutional.

## **2000 AND BEYOND**

In 2000 a more detailed Procedures Manual was published by the Executive Council Office. It essentially maintained the respective roles of the Legal Services lawyer as well as of the legislative drafting teams. However, it did identify for the departments the additional need in consultation with the Legal Services lawyer, to identify in the policy development process, any relevant legal material and known legal difficulties including court decisions, legal opinions and legal reports and papers as well as any current acts and regulations relevant to the proposal, whether from New Brunswick or elsewhere. The Policy Manual has been accessible to departments on line since 2003.

In 2001–2002 a voluntary early retirement program decimated the staffing of the Legal Services Branch. Approximately sixty per cent (60%) of the Branch lawyers (including the Branch Director) who were between the ages of 55 and 65 all retired within one year, and a lot of corporate history and knowledge was lost especially in the area of Crown law. Qualified replacements with the same amount of comparable experience were not available, with the result that the profile of the average Legal Service solicitor went overnight from a 55+ year old Anglophone male to a 30 year old francophone female.

The Legislative Services branch also lost a significant number of mature, accomplished drafting professionals and was under a similar pressure to obtain (or more fittingly, to train) replacements.

Partially in response to this major shift in demographics and partly in response to the increasing specialization in the practice, the Legal Branch in April 2002 moved away from the Department Assignment system of work allocation, to a Practice Group service delivery model. Four practice area work groups were created in the Legal Services Branch namely: a Litigation Practice Group, an Administrative and Employment Law Practice Group, a Corporate, Commercial and Property Law Practice Group, and a Government Services Practice Group, which also contains the Constitutional Law Unit. The intent of the change was to encourage not only specialization, but also greater teaming and sharing of knowledge among group members.

The result has been that client departments no longer have two or more solicitors assigned specifically to their department whom they could routinely consult as they wished on departmental issues. They are now required to contact the coordinator of the practice group in question in order to have a solicitor assigned to their specific issue. The result of these changes is that the solicitor in the Legal Services Branch is no longer necessarily expert in the affairs of a number of specific client departments, and hence may not be as valuable a consultation resource to the legislative drafting team.

As time passes this shortfall in familiarity with client departments is gradually being overcome in the Government Services Practice Group, which has been attempting to assign work to solicitors based on portfolio assignments of client departments with like functions. However, the legislative drafting teams themselves have also been assigned to client departments for drafting purposes based on portfolio assignments, so that today they are equally familiar with the operations of the client departments as are the Legal Services solicitors.

One final significant change has occurred in recent years. That is, the drafting teams themselves are more directly involved in reviewing the legislative proposals before they go to the Policy and Priorities Committee for approval. The responsibility for preparing the requisite legal opinion about the need for and effect of the proposed amendment has been transferred to the Legislative Services Branch, and the Constitutional Specialist in the Legal Services Branch is the only Legal



Services solicitor who is necessarily always consulted in the legislative approval process.

#### **AT PRESENT**

The result is that at present the legislative drafting process in New Brunswick is very much a marriage between equals, with specialized knowledge found in both the Legislative Services and Legal Services branches. Consultations on particular issues continue to occur between the branches, but the model is no longer one in which the Legal Services solicitor is necessarily considered a specialist or resource person in the client department's business.

Rather, both branches have a lot to bring to the table to ensure the best legislative product possible. Legal Services solicitors continue to be consulted on finer points of law in areas within their particular legal specialty, but it is the legislative drafting team that today must ensure that the draft language does not produce unwanted impacts on the client departments.