

Harmonization

Key legislative drafting techniques and issues

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Principal public policy goals: why harmonize?

Goals:

- Enable uniform practices to be used across jurisdictional lines
- Reduce the regulatory burden on people and businesses without sacrificing other (local) public policy goals

Means:

- Establish common standards in law
- Accommodate the other (local) public policy goals of each jurisdiction

This is what we're doing when we “harmonize” the legislative schemes.

What has changed? Why the increased interest in harmonization?

Harmonization is not a new phenomenon. What has changed?
Some possible factors:

- In past: bilateral harmonization was more routine
- Change: multilateral harmonization is increasingly prevalent – greater emphasis on ‘agreed wording’ to reflect consensus
- Change: increase in multijurisdictional business operations, and integration of economies – increased demand for visibly uniform standards
- Change: greater public policy emphasis on “efficiency”, “burden reduction” – increased demand for uniformity

Harmonization -- “consistency” with what?

Harmonization and legislative drafting both place a high priority on consistency. A key question is “consistency with what?”

- Intuitive preference for common wording to be adopted by all jurisdictions – so that “consistency” with other jurisdictions is visible.
- However, within the statute book of a particular jurisdiction, deviations from typical wording may have unintended consequences in law – lack of “consistency” may impair legal effect
- A drafting challenge: how to ensure appropriate legal effect achieved while maximizing the ‘visible’ consistency of wording?

Interpreting the harmonized law – “consistency”

The harmonization of particular legislative schemes is an important public policy goal – one of the things “intended by the legislature”. This public policy goal is relevant to the interpretation of the legislation.

However, this public policy goal may not be visible in the legislative scheme. As a result, it may not be considered when the legislation is being interpreted.

“Consistency”, in that situation, would focus on consistency of wording within the statute book. Anomalous wording could present problems in that context.

Drafting to promote this interpretation - options

Legislative drafting options for making the 'harmonization' goal visible:

- preamble -- describing the harmonization context
- purpose provision -- stating goal of harmonization
- interpretation provisions
 - mandating an interpretation that promotes harmonization
 - indicating that no inference should be drawn that 'harmonized' wording that differs from 'usual' wording is to be interpreted otherwise than with 'usual' meaning
 - resolving conflicts in favour of harmonization

Proactive options to support harmonization initiatives

Legislative drafting offices are being proactive in helping our clients with their harmonization initiatives. Proactive steps include:

- Training clients about drafting issues associated with harmonization, strategies for successful harmonization
- Developing specialized precedents and checklists for clients to use for more routine/standard initiatives
- Networking to enable the drafting office to identify initiatives where legislative counsel should be involved at an early stage

Drafting to achieve “harmonization”

Let's look at some drafting techniques used to achieve harmonization.

Conceptual approaches to harmonization

Traditionally, two approaches have been used to create consistent (or “harmonized”) legislative schemes:

- using separate, but parallel, enactments
- creating interlocking legislative schemes

Using separate, but parallel, enactments

Separate, but parallel, enactments can involve either of these approaches:

- using the same wording in both enactments
- using different wording intended to achieve the same result in law in both enactments

Using the same wording in both enactments

The technique of using the same words to achieve the same result in law is frequently used :

- when harmonization involves only one jurisdiction – harmonization within the statute book of the jurisdiction, or
- when harmonization involves two or more jurisdictions that have the same system of law and system of government, and
 - the legislative schemes are well-established, and
 - changes are likely to affect multiple interests

‘Agreed wording’

The use of this technique appears to be increasing, especially in multilateral arrangements. Multilateral negotiations can often result in agreed wording to be enacted by each of the parties.

When drafting instructions include ‘agreed wording’, the challenges from a legislative counsel perspective are familiar to us all.

Explicit reference in the legislative scheme to the context – the goal of harmonization – may provide support in law for an appropriate interpretation of the agreed wording.

Getting the same wording through incorp by reference

A variation on the technique of “using the same wording” can be achieved with incorporation by reference. The same text is incorporated into both enactments, resulting in “harmonization”.

When a fixed incorporation is used, the incorporation is often described as a form of ‘drafting shorthand’. That’s because the incorporated text could have been repeated in the enactment, instead of being incorporated by reference.

An aside about terminology: incorporation by reference

While we are all familiar with the concept of “incorporation by reference”, we don’t all use the same terminology when discussing it. Here, for everyone’s convenience, are two key labels that I’ll be using:

- “FIXED” incorporation: refers to the incorporation of a text as it exists on a particular date (one which is no later than the date on which the incorporation by reference takes effect)
- “ROLLING” incorporation: refers to the incorporation of a text as it may be amended in future (after the date on which the incorporation by reference takes effect)

Achieving the same result using different words

Separate, but parallel, enactments often involve achieving the same result in law using different wording in each enactment.

This traditional technique is frequently used:

- when harmonization involves two jurisdictions that have different systems of law or systems of government, or
- when laws are enacted in more than one language, or
- when the regulated sector is accustomed, through experience, to this approach

Recap: conceptual approaches to harmonization

To recap, traditionally two approaches have been used to create consistent (or “harmonized”) legislative schemes:

- using separate, but parallel, enactments
- creating interlocking legislative schemes

Creating interlocking legislative schemes

Interlocking legislative schemes can be created in a variety of ways, such as these:

- incorporation by reference (1) – adopting text from one enactment into the other
- incorporation by reference (2) – adopting the same external (non-legislative) text into both enactments
- enacting reciprocal recognition provisions, for example, in both enactments

Interlocking schemes that incorporate legislative text

One traditional form of incorporation by reference involves incorporating into one enactment a concept from another enactment.

- This harmonization technique is often used within the statute book of one jurisdiction:

“In this Act [the *Municipal Elections Act*], “municipality” has the same meaning as in section 1 of the *Municipal Act*.”

- Typically, these are rolling incorporations.

Interlocking schemes, incorporating legislative text (cont'd)

- This traditional form of incorporation by reference is also used when the enactments of two jurisdictions within a country are jointly administered:

“In this Act [the *Income Tax Act* (Ontario)], “taxable income” has the same meaning as in section 1 of the *Income Tax Act* (Canada).”

- The two legislative schemes are designed to work in tandem and involve extensive administrative collaboration by the two jurisdictions.
- Typically, these are also rolling incorporations.

Linking vs interlocking schemes : fixed incorp by reference

In contrast to these examples, an incorporation of text from an enactment of an unrelated jurisdiction (i.e., from another country) is usually a fixed incorporation.

This use of a fixed incorporation creates a visible link between the legislative schemes.

However, it does not create interlocking schemes because changes made by one jurisdiction to the incorporated text would not automatically be reflected in the other legislative scheme.

Interlocking schemes that incorporate non-legislative text

Interlocking legislative schemes can also be created by adopting the same external (non-legislative) text into both enactments, using a rolling incorporation.

This technique has traditionally been used in connection with internationally-established standards for human rights and similar public policy matters.

It is being increasingly used in connection with internationally-established technical standards.

Interlocking schemes that use other mechanisms

Other ways of creating interlocking legislative schemes include:

- recognizing, in one scheme, status conferred under another scheme (e.g., accreditation in one jurisdiction is valid for the other: labour mobility)
- treating compliance with one scheme as constituting compliance with the other (e.g., filing with one regulator satisfies the requirement to file with the other regulator: securities filings)
- making concurrent appointments to tribunals and holding joint proceedings (e.g., one hearing for multijurisdictional environmental assessments)

Interlocking legislative schemes: some considerations

Interlocking legislative schemes can result in efficient use of legislative time – debate and enactment of one change automatically results in corresponding changes to related schemes

Interlocking legislative schemes can be challenging to draft:

- can involve complex legislative architecture
- accommodating local variations can be difficult – can dramatically increase the complexity of the scheme
- requires well-developed mechanisms for consultation before changes are made to either of the interlocking schemes – otherwise, risk of unintended consequences when one scheme is changed

Recap: conceptual approaches to harmonization

To recap, traditionally two approaches have been used to create consistent (or “harmonized”) legislative schemes:

- using separate, but parallel, enactments – an approach that sometimes includes the use of fixed incorporation by reference
- creating interlocking legislative schemes – an approach that makes extensive use of rolling incorporation by reference

Incorporation by reference: some factors to consider

Legal authority for the incorporation:

- Is the incorporation by reference authorized? (Is every provision of the incorporated text also authorized?)
- Is the incorporation invalidated by, e.g., uncertainty as to what text has been incorporated?
- Process issues – must the incorporated text comply with formal prerequisites (e.g., notice and comment rules, Gazetting)?

Incorporation by reference: factors to consider (cont'd)

Functionality of the incorporation:

- Does the incorporated text 'fit' the legislative scheme?
 - terminology issues
 - scope of the incorporated text vs the legislative scheme
 - for rolling incorporation, how are transitions addressed?
- Is the incorporated text capable of being enforced?
 - how are duties imposed (active vs passive voice)? on whom?
 - unauthorized subdelegation within the incorporated text?

Incorporation by reference: factors to consider (cont'd)

Certainty about what has been incorporated:

- Citation: is the citation sufficient to identify the incorporated text?
- Rolling incorporation:
 - point-in-time certainty about the contents of the incorporated text
 - successor versions of the incorporated text – are they automatically adopted? (and, if so, how do you identify the predecessor/successor relationship?)
 - how are transitions handled?

Evidentiary issues: is the incorporated text published in a manner that enables the court to take judicial notice of the text?

Incorporation by reference: factors to consider (cont'd)

Accessibility to the public:

When the incorporated text is from a document other than another statute or regulation, public access to the incorporated text/document is a key concern.

The situation is especially complicated when it is a rolling incorporation from a non-legislative document.

Incorporation by reference: factors to consider (cont'd)

Accessibility to the public:

- Is the incorporated text readily accessible, without charge, to the public? *Who is responsible for this?*
- Will it continue to be accessible to the public even after it ceases to have effect? *Who is responsible for this?*
- For a rolling incorporation, how can the public determine the effective date(s) of different versions of the text? *Who is responsible for this?*

Incorporation by reference: factors to consider (cont'd)

Institutional arrangements to ensure accessibility:

- The arrangements that ensure ongoing public access to legislation are well established and well maintained, often by the legislative drafting office –
 - publication (and archiving) in Gazettes and other authoritative vehicles
 - access in public libraries and, increasingly, on the Internet
 - periodic consolidation, revision and republication
- Documents incorporated by reference require similar institutional arrangements to be made

Recap: legislative drafting options to support harmonization

- Equip our clients with information and tools so that they are aware of, and can address, drafting concerns associated with harmonization
- Make the goal of ‘harmonization’ explicit in the legislative scheme – to provide support in law for appropriate statutory interpretation of the scheme
- When documents are being incorporated by reference, ensure that appropriate arrangements are in place for ongoing public access to the documents