DRAFT SPEAKING NOTES FOR DIANNE FLOOD
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"LEGISLATIVE BUILDING BLOCKS – 2 - ALTERNATIVE DESIGN - EMERGING TRENDS IN INSTRUMENT CHOICE"

[May not be delivered as written – intended for use of translators]

Good Afternoon

Thank you, it's a pleasure to be here and to have this opportunity to speak with you about some alternatives that may be available for you to discuss with your clients, when you are being asked to draft legislation.

My comments on this afternoon's topic "Legislative Building Blocks – 2 Alternative Design - Emerging Trends in Instrument Choice" are drawn from a range of experiences: as legal advisor, policy developer, and even drafter [of part of Manitoba's Municipal Act,] and as a client who had to work with new legislation – specifically BC's Administrative Tribunals Act (ATA) [which I had no role in the drafting process] - to work on its implementation by the more than 40 of BC's tribunals it applies to [ranging from the very formal, complex Utilities Commission, to the very informal and relatively simple Employment Assistance Tribunal with thousands of cases every year.]

The AJO paper:
So it was in the context of working to support BC's tribunals and other statutory decision makers that my then office – the Administrative Justice Office (the AJO) - was asked to give consideration to applying a systemic approach, similar to the ATA, to other statutory decision makers [SDMs] within government. We developed a series of papers, including the paper that is the basis for me being asked to be here today: *Development and Use of Policies and Guidelines in the Decision Making Process.*

[Although funding pressures meant the AJO was dissolved, most of its papers, including this paper, are still available on BC's Ministry of Justice website, and I believe that paper is also part of the package of materials that is being made available to you by the conference organizers.]

That paper is directed to the use of policies and guidelines by SDMs in discretionary adjudicative decision-making, but I think, and John Mark Keyes and Phillipe both thought when they asked me to be here, that the concepts the paper raises and discusses are similar to those you may want to think about and possibly raise with a client when addressing some of the challenges they are facing. The paper discusses various aspects and then asks a series of questions about the specific aspects, to prompt discussion. [Unfortunately, the AJO was basically dissolved shortly after the paper was published - this paper was, I believe, the very last document we produced and posted.)

What are Policies, Directives and Guidelines?

Policies, directive and guidelines (which I will generally refer to here as PDG's) can take many forms – from formal - written rules, policy manuals - to the informal - fact sheets, directives, memoranda, emails, but it is the latter that I am addressing today - those for which there may be express or implied statutory authority.

These are documents that provide interpretive and other information on how a thing may be looked at or be done, but do not generally have the level of detail or sophistication of a statute or regulation.

["guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.]

So 2 characteristics: no express statutory authority required and not considered subordinate legislation (like a regulation) – will talk about the legal implications in a few minutes

So why would you, a legislative drafter be interested in these PDG's?

- Because as "soft law" instruments, PDG's may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and avoid the level of drafting time and expertise that is appropriate for legislation.
- provide an effective alternative to legislation and may be a tool you may want to consider recommending to your clients.

Who may make PDG's?

- INTERNAL TO GOVERNMENT – Ministers, DMs, Directors And Others
- ARM'S LENGTH/QUASI-JUDICIAL - Administrative Tribunals, Commissions
- REGULATORS, LICENSING AUTHORITIES - Who may be internal or arm's length to gov't

How are PDGs different from some of the other tools?

- regulations - are more formal and clearly have force of law as legislative documents, but like legislation can be very inflexible, and difficult to change

- incorporation by reference – are perhaps more similar to PDGs [than regulations] but (to my mind) the difference is who develops them and has "ownership" – another entity or the entity who is applying. With ownership, can come greater flexibility (can control the revision process) and also greater accountability and responsibility for content (can't simply pass off as set by another entity).

Why use PDGs?

1. To supply greater detail or flesh out the legislation, if:
    - there is simply too much detail: legislation simply cannot address all of the details – this applies particularly in commercial, industrial, or trade regulatory schemes, with licenses, permits, permissions, etc.
    - the matter is highly technical – the terminology, standards and other aspects demand a high degree of specific knowledge – for example in medical or scientific fields

2. To meet a need for flexibility that legislation just cannot provide:
    - a high level of variation - there is "too many possibilities": legislation cannot anticipate all factors or combinations, plus there will be numerous persons making numerous decisions affecting a wide variety of persons.
    - things are always changing – so to avoid "freezing" at a given point in time – for example, in telecommunications and pharmacological
    - there are still too many unknowns – the matter being addressed is new and evolving, matters not thought of today will be needed to addressed tomorrow, and a high level of change may be anticipated.

3. To provide consistency, with flexibility
    - to try to ensure as much as possible that like circumstances are decided alike, while ensuring individual circumstances are reflected
    - to provide a clear statement of how the SDM itself interprets it legislation and how it will apply it – valuable especially when lots of variation, numerous persons making decisions – for example , BC's Liqour Licensing Policy manual sets out how the Branch will issue licenses and what licensees responsibilities are.

4. To communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular, serving as an education and training tool, giving information and guidance to both the SDM making the decision and for the persons to whom the decision applies.

- to assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly,
- to enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

5. Ease of Process

- No set process required to be followed
- May be by internal document
- Do not need or require the level of drafting expertise, or the level of instructions
- Can be fast, and easy to change
- May remove or distance from political arena

PDGs can be substantive or procedural –

- What are the rights, benefits, protections, or obligations
- Rules or steps on how to exercise or obtain them

An example:

- very topical right now- the right of persons to not have information obtained by torture shared with other countries - According to news stories [in the Winnipeg Free Press] just released CSIS documents reveal that a [recently formed] "Information Sharing Evaluation Committee" determines what use CSIS will make of suspect material and also whether to send information to foreign agencies where that information might lead to mistreatment [torture]. Apparently the committee has been given detailed instructions [to look at databases, to consult human rights reports,] and weigh the particular circumstance to arrive at a decision. If the decision is that information is likely to have been derived from torture, then the CSIS director decides whether sending the information to a foreign agency could result in someone being abused.
- As the paper described it, these instructions "put the flesh on the bones" of a directive issued by the Public Safety Minister that outlined conditions for deciding whether to share information when there is a substantial risk that in so doing, a person in custody may be abused.
- CSIS says the directions "provide a tool to their employees" to ensure they comply with the legislation.
- And in response to follow up news stories about to similar directives issued to the Border Serices Agency and the RCMP, the government has described its objectives as "establishing a coherent and consistent approach across the government of Canada" [in deciding whether or not to send on such information]. Civil rights groups have described the directive as allowing a structure to determine something that should never be allowed [sharing of information that could result in torture]. So lots of press – not so much about the use of a PDG, but in terms of its content.

- So minister's 4 page directive is the statement of the obligation [on government agencies to share information], and CSIS's own document is the guide on how that is to be done.

Other less controversial examples include BC Liqour Control and Licensing Branch Guide for Licensees. And I am sure you can all think of many others.

Some problems with PDG's

Legal status:

I do want to note that my comments are based, substantially on the law as it stood in 2009, and are subject to what your speaker tomorrow morning – Ruth Sullivan – will tell you about Legislative Case Law Update.

So if specifically authorized by legislation, PDGs may be considered "hard law" and enforceable - for example the Canadian Human Rights Tribunal policies in Bell [2003] 1 SCR 884],

But PDG's are not required to be expressly authorized by legislation and generally, not intended to be binding, so have a more questionable status as "soft law" or "quasi-law",

Ainsley Financial Corp. v. Ontario Securities Commission 1994 CanLII 2621 (ON CA), (1994), 21 O.R. (3d) 104 (C.A.):

> "There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline", just as no definitive conclusion can be drawn from the use of the word "regulate". An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages."

The court in that case found the "guidelines" were an attempt by the Commission to impose on the respondents a de facto legislative scheme - "complete with detailed substantive requirements"

> "Guidelines connote general statements of principles, standards, criteria or factors intended to elucidate and give direction. Policy Statement 1.10 sets out a minutely detailed regime complete with prescribed forms, exemptions from the regime, and exceptions to the exemptions. Policy Statement 1.10 reads like a statute or Regulation setting down a code of conduct (the phrase used in the Commission minutes to describe Policy Statement 1.10) and not like a statement of guiding principles."

The Commission could not impose such a scheme without the appropriate statutory authority.

So it's a bit of "if it looks like a duck and quacks like a duck" then it might be an attempt to pass off a guideline as if a regulation and thus be declared invalid.

However, "enforceability" may vary depending on who is trying to enforce what and why. So if government or one of its agencies sets up a procedural policy that in effect tells citizens that government will follow a process in making a decision that affects the person, that give the individual an opportunity to participate in the process, then the courts may consider whether that was done in deciding if a decision was reasonable – Baker

Similarly, if an agency, under a guideline, sets up a process that fetters the exercise of discretion, then the courts will look at that - [Thamotharem]

Potential Lack of Transparency and Accountability:
One of the beauties of PDGs is the ability to adopt and change them much more easily than legislation, but to some this may be a disadvantage.

> The lack of a formal process means that the PDG's may be developed and possibly implemented without any public or stakeholder process – CSIS directions referred to above is an example
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> The problem for individuals to know policies exist and where to find them. While the Internet has made access somewhat easier, effective public access remains a problem and the CSIS directive is again an example of this.

Potential Gaps or inconsistencies between the legislation and the PDG's

> Frequently, the persons responsible for proving the directions on drafting the legislation are not the same or even in communication with the persons who develop the PDG's that implement the legislation, and there can be gaps in the understanding of what was intended when the legislation was drafted.
>
> This can be especially problematic if the person applying the policy treats it as if the policy was the legislation and applies it without reference to the Act or regulations.

Other observations
I don't think that PDG's are only for statutory decision makers – I think they can be used effectively in a broader, developmental context. And while I do appreciate that

for many of you, that may seem to be counter to your instincts – to consider suggesting clients not establish a statutory scheme but instead to take a more evolutionary approach using "soft law", but I think as long as they are aware of some of the limitations of enforcing that, in some cases this may be a preferable way to go, so my comments today should perhaps be considered from that perspective.

It may be that clients are really only at a stage where there is a desire to develop or provide a sense of where government may be going, which may then evolve over time into something with a statutory basis.

- for example – land use policies that don't simply state what can be done in terms of uses of agricultural land, but that also call for voluntary mitigation of environmental impacts to watersheds which can serve to provide direction and guidance that might, over time become accepted as a normative and appropriate activity ,and at that stage become incorporated by reference or adopted by a regulation making power.

Conclusion:
So like incorporation by reference, policies, directives and guidelines can flesh out a statutory scheme, and provide the detailed, technical information that will support a consistent approach while providing much needed flexibility in individual circumstances and the ability to adapt and change as programs and schemes evolve and develop. PDGS can also be the next step or building block for future amendments or more formal adoption processes, which convert them to a more hard law status.

So keeping in mind that PDGs are soft law or quasi law – which means the ability to enforce them may be limited (other than perhaps more of a judicial inclination to enforce the policy against governments than to allow government to rely on them against an individual or corporation.) But the non-binding nature of PDG's are exactly the attraction to using them – they provide a framework for decisions to be made or action to be taken, so that persons affected have a sense of what is expected of them and how their situation may be dealt with, but the flexibility to make those decisions or take those actions taking into consideration some or all of the many different factors of the particular situation.

As we all know, it seems that more and more frequently clients are asking for more and more complex legislation to be drafted in less and less time, often with less advance policy work being undertaken, and even sometimes with the policy being developed as the legislation is being drafted. So in some cases, where the issues or matters are so complex or so technical and detailed, or are evolving, or perhaps even not yet known, the ability to address them in the drafting process is simply not possible or advisable and this is where the soft law or quasi-law of policies, guidelines and directives may be a valuable alternative.

Thank You