

Legislative Building Blocks – Basic Design: Fundamental Choices for Statutes and Regulations

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In the 15th century the Westminster parliamentary body began submitting bills to the King for his assent. Until that time, the parliamentary body debated a problem and petitioned the King for a solution and then the members went home while the law was prepared. Laws were drafted in response to a request for a remedy by the parliamentary body, but the actual terms of the remedy were left to the King and his Council. The law was drafted by a committee of judges, counsellors and officials. As this process was unsatisfactory to members of Parliament, they began crafting the terms of the remedy (that is, the law).²

Have we come full circle? Many new Acts provide for a skeletal framework that leaves much of the detail to the regulations and other subordinate instruments. In essence, the problem or area to be regulated is defined to some degree and the terms and process for the remedy are delegated to the executive branch of government.

This session of the Conference will include a discussion of some of the fundamental choices that need to be considered in designing a legislative scheme.³ As part of that discussion, this paper will identify what

¹ Office of Legislative Counsel, Legal Services Branch, Ministry of Justice (British Columbia). The views expressed in this paper are the views of the author and do not represent the policy or views of the Office of Legislative Counsel, Legal Services Branch, the Ministry of Justice or the Government of British Columbia.

² U.K., *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London: Sweet & Maxwell, 1975) at p. 5. The chairman of the committee was the Rt Hon Sir David Renton and the report is often referred to as the Renton Report.

³ In this paper I will refer to the Act, regulations and other subordinate instruments collectively as the legislative scheme. By referring to these legal instruments as a “scheme”, I mean “a systematic plan or arrangement for work, action, etc” or a “proposed or operational systematic arrangement”. I do not mean “an artful or deceitful plot”. *Oxford Canadian Dictionary* (Toronto: Oxford University Press, 2004).

should go in the statute and what should be left for the regulations.⁴ This paper will also address who makes the decision, or who may provide guidance, as to whether a matter is addressed in the statute or in the regulations. Some factors that can influence that decision will be reviewed. Finally, some comments are provided in relation to determining the appropriate regulation-making authority.

This paper is a general overview of topics that may be covered in more detail during my presentation at the Conference. For convenience and simplicity the paper generally uses provincial terminology to refer to various offices and bodies, but the concepts are relevant in relation to federal and territorial offices and bodies.

Instrument choice — who makes the choice?

What should be provided for in the statute, and what should be in the regulations or other subordinate instruments?⁵ Before opining on what should be provided for in the various instruments, we should step back and consider who is or should be deciding what should be provided for in the various instruments.

The Constitution of Canada does not expressly address this issue nor has it been found to imply any limits on instrument choice.⁶ In practice, the federal Parliament and provincial Legislatures have an unlimited power to delegate when legislating within their jurisdiction. The Supreme Court of Canada has suggested that the power of delegation is limited, but there has been no example articulating the boundary of that limit.⁷

⁴ In this paper I am generally addressing regulations within the meaning of the *Regulations Act*, R.S.B.C. 1996, c. 402, or similar legislation in other jurisdictions, and not regulations in the broader sense articulated in the *Interpretation Act*, R.S.B.C. 1996, c. 238, or similar legislation in other jurisdictions. Other instruments within the latter meaning will be addressed in other presentations during the Conference.

⁵ In this paper I am dealing with choices about what should go in either the statute or the regulations. Matters that should not appear in either the statute or regulations are not considered here – e.g. repeating material covered in the *Interpretation Act*, provisions that have no legal effect (non-legal statements), repeating the common law and addressing administrative matters.

⁶ P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf) (Toronto: Carswell, 2007) at 14-1 to 14-8.1.

⁷ *Ibid.*; *Re Gray* (1918), 57 S.C.R. 150. As noted by P. Hogg, at 14-6, the power to levy taxes may be the one legislative power for which there may be constitutional constraints on the federal Parliament and provincial Legislature's ability to delegate.

The legislative body may provide guidance or provide direction as to what should be provided for in various instruments. In British Columbia, the Legislature has not provided express guidance or direction in statute nor has the Legislative Assembly addressed this issue in its Standing Orders. For government bills, Cabinet may provide guidance or set policy as to what should go in the statute or the regulations. As well, Cabinet committees responsible for reviewing draft legislation may provide guidance informally as they review and vet the drafts.⁸ An example of express guidance is provided in the Federal *Cabinet Directive on Law-making*:

Matters of fundamental importance should be dealt with in the bill so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation-making powers to matters that are best left to subordinate law-making delegates and processes.⁹

A unique example of guidance comes from New Zealand. *Guidelines on Process and Content of Legislation* have been prepared by a Legislation Advisory Committee and approved by the New Zealand Cabinet.¹⁰ This document appears to be an excellent resource if you are looking for further information on this topic.

Absent guidance from Cabinet, the Attorney General as chief legal advisor to the government may establish policy or provide guidelines as to what should go in the statute or the regulations. These policies or guidelines may be established by the Chief Legislative Counsel or the Office of Legislative Counsel and may form part of an office manual. As an example of this type of guideline, although not a formal office manual, see *A Guide to Legislation and Legislative Process in British Columbia*.¹¹

⁸ I have not generally reviewed the 14 jurisdictions in Canada in relation to guidance provided by the legislative body or the Cabinet.

⁹ Canada, Cabinet Directive on Law-making in the *Guide to Making Federal Acts and Regulations* (Ottawa: Government of Canada, 2001) at 9. Available at <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/table-eng.htm>.

¹⁰ New Zealand, Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, 2001 ed. & amendments (Wellington: Ministry of Justice) (the “*New Zealand Guidelines*”). Available at <http://www2.justice.govt.nz/lac/>. In particular, see chapter 10, Delegated Legislation.

¹¹ British Columbia, Office of Legislative Counsel (Ministry of Attorney General), *A Guide to Legislation and Legislative Process in British Columbia*, 2006 (the “*BC Guide*”). Available at http://www.crownpub.bc.ca/Product/Details/7665005851_S and <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/408512/index.htm>.

Regardless of any guidance or direction given in relation to instrument choice, ultimately it is Parliament or the Legislature that makes the final choice in each statute that it enacts.

Instrument choice

The statute (or Act) should contain the fundamental framework and the main principles for the legislative scheme. The regulations should contain matters of a legislative nature that are subordinate to the main principles of the Act. Other subordinate instruments should be used for matters required to be dealt with on a case-by-case basis (e.g. licences, permits, authorizations or contracts). In this section of the paper I will discuss in further detail what should be provided for in the Act,

Statute

The main principles and purposes of the legislative scheme must be included or discernable from the Act, either by direct expression or by implication. The interpretation of any part of the legislative scheme should be guided by the framework of the Act.

The following matters are usually dealt with in the Act:

- controversial matters that should be addressed by the legislative body, examples include
 - provisions that affect rights or freedom protected by the *Charter of Rights and Freedoms* or that significantly affect other personal rights or freedoms (e.g. altering or abolishing common law rights);
 - retroactive provisions;
 - validation of provisions that have been struck down by a court;
 - power to expropriate property;
 - power to subdelegate regulation-making powers;
 - power to grant exemptions from the legislation;
 - provisions that exclude the jurisdiction of the courts;
 - power to amend the Act or another Act by regulation (Henry VIII);
 - regulation-making powers for matters that are usually dealt with in Acts;
 - provisions that operate despite other significant legislation (e.g. Acts relating to information and privacy, human rights or financial administration);

- provisions establishing the structure of public bodies or providing for senior appointments;
- provisions that substantially affect personal rights (e.g. search and seizure powers, penalties for serious offences and expropriations);
- provisions that establish a tax;
- transitional provisions required for implementing new legislation;
- consequential amendments to other Acts.¹²

In addition to the above list, the following matters are usually dealt with in the Act:

- provisions relating to the courts or judicial review;
- appropriations not otherwise authorized by statute or intended to be covered under another appropriation;
- provisions relating to civil liability, including immunity from civil liability.

Many of the matters identified above deal with subjects that must be addressed to some degree in the Act because the law or the presumptions of interpretation require express mention in order to depart from what would otherwise be the law or relate to authorizing regulations that would otherwise not be within the authority of the regulation-making authority. Other matters identified above appear to clearly fall within the description of matters of “fundamental importance” (e.g. establishing a tax or affecting rights and freedoms).¹³

Regulations

Regulations should deal with those matters of a legislative nature or of general application that are necessary to provide essential support to the main principles expressed in the Act. These matters often deal with precise detail that may change with some frequency and are not seen as requiring meaningful debate in the Legislative Assembly once the main principles of the Act are approved.

¹² *Ibid.* at Part 3, p. 17, 18 and 21-23.

¹³ For further information on this topic, see the *New Zealand Guidelines*, *supra* note 10, and J.M. Keyes, *Executive Legislation*, 2d ed. (LexisNexis: Markham, 2010) at 63ff.

Regulations are appropriate for dealing with the following matters:

- procedural matters (e.g. how to apply for a licence, what must be submitted when applying for a licence or the time limits in a staged process);
- matters that need or are subject to frequent adjustment (e.g. setting fees or interest rates);
- technical matters that involve scientific or other expertise (e.g. prescribing classes of organic pollutants, respecting the construction and operation of a treatment plant);
- setting qualifications (e.g. qualifications to receive a benefit or permit).¹⁴

Orders-in-Council

I will deal specifically with one other type of subordinate instrument: orders-in-council. An order-in-council is an order of the Lieutenant Governor in Council or Governor General in Council. Orders-in-council are generally appropriate for dealing with matters that have a limited application in time or that are effectively spent once made or for designating or approving matters for particular purposes. The following are examples of matters that may be appropriately dealt with by an order-in-council:

- appointing officials or board members;
- approving agreements or bylaws;
- designating facilities, parks or institutions;
- transferring powers between ministers;
- making regulations.

Factors influencing the design of the legislative scheme

There are a number of factors that can influence whether a matter is addressed in the statute or in the regulations. Below is a non-exhaustive list of factors that can influence the design of a legislative scheme. These factors are grouped according to whether they generally support addressing the matter in

¹⁴ *BC Guide*, *supra* note 11, at Part 3, p. 18.

the statute or in the regulations. The factors can be practical, legal or political. A factor may override other considerations and place the matter where it would not otherwise be addressed.

Factors — matters addressed in the Act

1. subject-matter

The subject-matter of the legislation can influence the design of the legislative scheme. Some subject-matters lend themselves to a greater use of the statute than the regulations. For these purposes I have identified 2 categories of subject-matter.

The first category contains some of the historical categories of law: trusts, wills, estates, property law, criminal law. When legislating in these areas, the legislative body may be overriding the common law or dealing with an area of significant social and legal importance that is not considered appropriate to delegate. There is generally no regulatory body performing functions in these areas.

The second category includes legislation relating to subject-matters such as elections, taxation, corporations, local government and education. These areas of legislation may have a significant amount of the scheme in the regulations, but the statute contains a significant level of detail that may not be present in the schemes for other subject-matters. The reasons that these legislative schemes appear to be weighted in favour of using the statute may relate to the relative importance of the matter to the members of the legislative body (e.g. elections) or the prior experience of members on a municipal council or school board.

2. legal risk or vulnerability

Matters that may be spread across the statute and the regulations may be consolidated, likely in the statute, if there is a constitutional risk or another legal concern identified during the development of the legislation. Consolidating the relevant provisions in one instrument and organizing them in an appropriate manner may clarify the context and the policy goals to be achieved and mitigate the legal risk. For example, provisions that provide for what appears to otherwise be some minor exceptions may be included in the statute and be integrated into the provisions that impose duties to clarify and mitigate the risk that a provision could be found to have extraterritorial effects beyond the competence of the

Legislature. In a similar manner, provisions that could be relevant to a section 1 analysis under the *Charter of Rights and Freedoms* may be consolidated and organized appropriately in the statute.

3. minority government

In a minority government situation opposition parties may have greater influence on the development of the bill that will be proposed by the government or may have a greater likelihood of amending the bill to add provisions to the Act as it proceeds through the Legislative Assembly.

4. strategic reasons

Although there are likely many strategic (that is, political) reasons for including a provision in the statute, I will briefly discuss 3 strategic reasons for including a provision in the statute.

First, if the government is proposing legislation that deals with a subject-matter in a manner that is opposed by a vocal, persistent or well-resourced interest group or lobby, the government may wish to avoid having regulations that will allow for a second or third front for the group opposed to the legislation. Providing authority to make regulations can allow the group that is opposed to the change to continue its battle by lobbying the regulation-making authority before any regulations required for the legislative scheme are enacted. If those regulations are made, the group can continue its fight to have them repealed. Placing the matter in the statute allows for the government to attempt to put some closure to the matter.

Second, the government may know that it will not always be the government and have control over the person exercising delegated authority. If the governing party loses power, they may not want a fundamental change in direction to be carried out by enacting a regulation. They will want the new government to bring forward the proposed change in a bill that will undergo scrutiny by the legislative body.

Third, the matter may be placed in the Act if the government wants the matter to be the subject of debate to illustrate that it is acting on an issue of public importance or to highlight a difference of views between the government and opposition. If the matter leads to favourable coverage for the government or is beneficial to rallying key supporters of the governing party, the matter may be desired for a bill in order to

continue to reap these benefits. The matter may even lead the government to regularly bringing forward legislative amendments that propose minor tweaks to the Act.

Factors — matters addressed in the regulations

1. lack of time

The amount of time available, or not available, can have a significant influence on the design of the legislative scheme. Generally this factor is a one-way street. The matter is addressed in the regulations if there is insufficient time to address the matter in the statute within the time constraints imposed on the drafting project. Essentially, this is drafting by triage.

2. delayed decision

Related to the amount of time available is whether the government has determined what it wants to do. The government may not know definitively in what direction it may wish to go but it may want to set up a framework in order to consult with various groups representing a range of divergent interests. Alternatively, the government may not be prepared to make a decision until a later date.

3. convenience

The legislative process requires a significant amount of time and resources. There can be pressure to have a greater breadth of matters delegated or broader discretion given in order to avoid having to try to get the matter on the government's legislative agenda and go back to the Legislature in order to have amendments made to the Act to address the unknown. This factor may also appear in the context of choosing an instrument in which to enact subordinate legislation.

4. strategic reasons

There may be a desire to place the matter in the regulations if the matter is perceived as embarrassing to the government or may result in the exercise of a power in a manner that is contrary to what is perceived as the desire of the public. The matter may also be placed in the regulations in order to defer the matter if the members of the governing party are divided on the matter.

Determining the appropriate regulation-making authority

Who is the appropriate person to be given the power to make regulations? Initially the power to make regulations was generally given to the Lieutenant Governor in Council. Now the power to make regulations is often given to a minister, a ministry official or to an organization. It may be appropriate for the power to be assigned to the minister, a ministry official or to an organization if

- the matter is administrative or technical, or
- the matter is of concern only to the ministry, a portion of the ministry or the organization involved.

There are a few circumstances in which consideration should be given to having the Lieutenant Governor in Council exercise the power to make regulations. The first circumstance is if there is a significant public interest component to the matter (e.g. a breach of the regulations is an offence with serious consequences). The second circumstance is if the interests of more than one ministry are involved. This is particularly relevant if the interests of the ministries may not allow for collaboration or a single consistent policy. The ministries may even have competing or conflicting interests. The potential for these circumstances should necessitate that the Lieutenant Governor in Council provide coherent direction from the government. Third, the Lieutenant Governor in Council should be the regulation-making authority if particular interest groups that will be affected by, or that have an interest in, the regulation may be able to exert considerable pressure on a minister or any other person who could be authorized to make the regulations. Assigning the regulation-making authority to the Lieutenant Governor in Council may insulate the minister or other persons from undue pressure. Finally, if the power to make regulations provides authority to significantly depart from or override the Act (e.g. a broad exemption power or a Henry VIII provision), the Lieutenant Governor in Council should be the regulation-making authority. Issues of fundamental application and policy should be addressed by the Lieutenant Governor in Council or a high level regulation-making authority.

Conclusion

This paper has provided a general overview of some of the fundamental choices that need to be considered in designing a legislative scheme and some of the factors that can influence those choices. In that context I want to conclude by allowing you to ponder the question posed at the outset – have we

come full circle in that parliamentary bodies have possibly returned to a time when the terms of the remedy are often left to the executive branch?