

Commonwealth Association of Legislative Counsel

# THE LOOPHOLE



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**THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel**

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## Editor's Notes

This issue brings 2023 to a close with articles from authors in the Caribbean, Canada and Australia as well as a review of a monumental text on statute law in New Zealand.

We begin with an article on the drafting role of legislative counsel and conclude with one on the considerably more recent (and somewhat contested) drafting role of artificial intelligence (AI). Shaquille Newton delves into the analytical stage of drafting in his article focusing on his experience in Barbados, highlighting the importance, if not the necessity, of legislative counsel to analyse legislative proposals and bring their thinking and mental dexterity to bear on drafting it into legislation.

But what of computerized analysis? Guzyal Hill's article on AI bookends the articles in this issue by giving us a taste of a possible future in which legislative texts are generated by applications such as ChatGPT. This software is already upending the world in many respects and there is little reason to think legislative drafting will be spared. This article is an early foray into understanding what AI can (and cannot) do, or might some day do.

Between these two articles are three others dealing with somewhat different matters of interest to legislative counsel.

The first, by Manfred Kohler, describes the work of the Regulatory Institute analysing and developing model laws. In a sense, model laws operate like AI, providing legislative counsel with text for them to consider and potentially adopt in their drafting. Although this article argues forcefully for the use of model laws in drafting, it also acknowledges that one size does not fit all and that adjustments are required, if not adaptation, to produce workable legislation in particular jurisdictions.

Next is a pair of articles by Sven Hombach prompted by a recent decision of the Manitoba Court of Appeal in Canada. This case involved two quite distinct matters: (1) the interpretation of legislation enacted in two languages, and (2) legislation terminating a contract for the lease of a building. The first article highlights the need to consider both language versions of a bilingual text, even when one of them is in a language understood by only a small minority of the population. The other considers how constitutional principles of parliamentary supremacy and the independence of the judiciary interact and the constraints the latter might place on legislative attempts to insulate the intended results of legislation from judicial review.

Finally, Aleks Hynnä reviews the latest (6<sup>th</sup>) edition of *Burrows and Carter Statute Law in New Zealand* by the past Secretary of CALC, Ross Carter. The review surveys the very substantial content of this text and recognizes both the thoroughness of its discussion of statute law and its valuable insight into legislative drafting.

John Mark Keyes  
Ottawa, December, 2023

# Role of Parliamentary Counsel in Barbados: An Assessment Using Thornton's Analysis Stage of the Drafting Process

Shaquille K. Newton<sup>1</sup>



## Abstract

*Within the legal profession in Barbados, the role of parliamentary counsel is not well understood. There exists the fallacy that legislative drafters are mere amanuenses to the Executive and Legislative Arms of Government in transforming policy into legislation. This article uses Thornton's analysis of the drafting process to illustrate the true role of Parliamentary Counsel and the complexity of legislative drafting which is deserving of respect and admiration from the legal profession.*

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## Introduction

Within Barbados, the Office of the Chief Parliamentary Counsel is responsible for the drafting of legislation for the Government. The office is small and is regarded as a specialized department in the Attorney General's Chambers. The role of the office is obscure to the general populace. Regrettably, the experienced and learned attorneys of the office are mistakenly viewed as amanuenses by their peers in the legal profession and the civil service. This is largely attributable to a lack of awareness of the true nature of the legislative drafting process, and the misconception that legislative drafting is simply a 'word polishing' exercise. Moreover, sufficient respect is not accorded to the skillset, specialized training and discipline which must be possessed by parliamentary counsel in order to undertake the vital task of producing legislation.

Crabbe asserts, "transforming government policy into law is the prime function of Parliamentary Counsel."<sup>2</sup> However, he is quick to admonish that "Parliamentary Counsel need not be glorified amanuenses."<sup>3</sup> Since the acceptance of legislative drafting as a sub-discipline of the law worthy of study, debate has ensued as to the proper role of parliamentary counsel. Lord Thring's classical theory states that the drafter considers neither policy nor substance, just form. The other extreme view considers it to be the responsibility of drafters to develop a broad idea into a practical scheme. In other words, to take over from the policy makers by developing incomplete policy into a refined and complete state.

Thornton asserts, "the proper role of a legislative drafter lies somewhere between the two extreme views."<sup>4</sup> He further asserts that:

Drafters do themselves, and those who instruct them, an injustice if they do not recognize the value to the policy makers of their expertise and their knowledge and experience, particularly their analytical skills and their knowledge of the broad legal framework into which the proposed legislation must be shaped to fit comfortably. Their *analysis of the proposals* and the implications and consequences of the proposals should be made available. This is usually welcomed (and if it isn't, it should be!).<sup>5</sup>  
(*emphasis added*)

Unsurprisingly, Thornton has conceptualized 'analysis of the proposal' as the second stage in his five stages of the drafting process. Sequentially the five stages of Thornton's drafting process are as follows:

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<sup>2</sup> VRAC Crabbe, *Legislative Drafting* (Routledge-Cavendish: London, 1993) at 19.

<sup>3</sup> *Ibid* at 21.

<sup>4</sup> Garth Thornton, *Legislative Drafting*, 5<sup>th</sup> ed, (Bloomsbury: Haywards Heath, 2013) at 142.

<sup>5</sup> *Ibid* at 143.

1. Understanding the proposal.
2. Analysing the proposal.
3. Designing the law.
4. Composing and developing the draft.
5. Verifying the draft.

It must be noted that these five stages are not mutually exclusive but are recognizable areas of the drafting process in its entirety.

Against this backdrop, the aim of this paper is to illustrate that the role of parliamentary counsel in Barbados is more than that of an amanuensis. Rather they are the architect of the law. Ikiriza has examined Thornton's analysis stage to determine the role of the legislative drafter in Rwanda.<sup>6</sup> Similarly, I will utilize Thornton's analysis stage of the drafting process to illustrate that the Barbadian parliamentary counsel is more than a mere amanuensis. In so doing, I will demonstrate that because of the complex and rigorous analysis of legislative proposals which they must undertake to produce legislation, their role is more than that of an amanuensis. As such, parliamentary counsel may be aptly considered the architects of the law. The process of drafting legislation requires shaping raw policy into legal rules which give effect to the policy. Invariably, the parliamentary counsel designs and constructs the mechanics of the legislation which will function to give effect to the policy and thus this role is comparable to an architect designing the blueprint for a house.

### **Thornton's Analysis Stage**

In describing the analysis stage Thornton opines, "legislative proposals should be subjected to careful analysis in relation to existing law, special responsibility areas, and practicality."<sup>7</sup> It is submitted that since the stages are not mutually exclusive, analysis of the legislative proposal must occur throughout all the stages of the drafting process to varying degrees. Indeed, Thornton points to the need for analysis and analytical skills by the drafter throughout all of his five stages of drafting.

Laws do not operate in a vacuum.<sup>8</sup> Every law is designed to regulate the conduct of the persons to whom it addresses, with every statute having ramifications. This illustrates that law making is serious business not to be undertaken lightly. As a result, before delving into the areas of analysis outlined by Thornton, the drafter must first analyse whether the

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<sup>6</sup> R Ikiriza, "The role of the Rwandan legislative drafter in the legislative drafting process: analysis stage" in Helen Xanthaki, *Enhancing Legislative Drafting in the Commonwealth* (Routledge: Abingdon, 2015).

<sup>7</sup> Thornton above n. 4 at 151.

<sup>8</sup> Crabbe, above n. 2.



legislative proposal is necessary or whether the policy goal can be achieved via other means. Thornton points to the need for analysis in relation to this preliminary issue in his “design stage”. Recalling that Thornton’s stages are not mutually exclusive, surely this must also be a consideration to be addressed in the “analysis stage”. Additionally, since the analysis stage is heavily concerned with fitting the legislative proposal into the existing legal framework, invariably the natural departure point of analysis must be an analysis of the necessity of the legislation.

Xanthaki correctly asserts that legislation should be a solution of last resort. She sets the task of determining the necessity for more legislation squarely upon the shoulders of the drafters and states:

It is therefore necessary for the drafter to assess whether the identified social need can be addressed by use of alternative means of regulation such as contracts and voluntary agreements, self-regulation, economic incentives and wider dissemination of information. Drafters who strive to be faithful to their trade must begin with an instinctive negation to any request for further legislation, even though the process of legislating has already begun and the preliminary decision to proceed with legislation has already been taken.<sup>9</sup>

In Barbados, the statute book is rapidly increasing, with legislation being utilized by successive governments as a panacea for economic and societal issues. The drafter’s role extends to safeguarding against the unnecessary bloat of the statute book. This may only be achieved by their analysis of the necessity of the legislative proposal. In this author’s experience it is often necessary to advise a sponsoring Ministry that new legislation is not required, or that implementation of existing legislation or amendment of existing legislation will yield the desired result.

### **Existing law**

Thornton notes, “once every new law is regarded as an amending law, the need to be aware of all relevant existing law becomes very clear. The drafter must take pains to know what is being amended.”<sup>10</sup> As previously stated, the drafter may be considered the architect of the law. Dickerson paints a proper visual of the drafter as architect of the law in relation to the drafter’s analysis of existing law. He states:

A competent architect would not dream of remodeling a house without first taking a close look at it. Similarly, the drafter of a legal instrument should closely examine all

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<sup>9</sup> Helen Xanthaki, *Drafting Legislation, Art and Technology of Rules for Regulation* (Hart Publishing Ltd.: Oxford, 2014) at 47.

<sup>10</sup> Thornton, above n. 4 at 152.

relevant instruments, if any, to see what to amend, what to repeal and what to supplement. Failure to do this results in implied repeals, overlaps, and inconsistent terminology; in a word – confusion.<sup>11</sup>

There is a presumption that parliamentary counsel know the state of existing law. The presumption is based on the premise that each piece of legislation enacted by Parliament is an addition to the statute book. Barbados has four main sources of law:

- the constitution,
- common law,
- statute law, and
- international law.

Parliamentary counsel in Barbados must identify and possess knowledge of all the sources of law which the legislative proposal touches and concerns, in an effort to make proposed legislation achieve a proper fit within both the statute book and the overarching legal framework in Barbados. For the purposes of this article, a source of law refers to the origins of legal concepts and ideas which give the law its content and its force.<sup>12</sup>

### ***The Constitution***

Section 1 of the *Constitution of Barbados* declares the Constitution to be the supreme law against which any law inconsistent with the constitution shall be void to the extent of the inconsistency.<sup>13</sup> Consequently, the doctrine of constitutional supremacy must occupy the fore of the drafter's mind to ensure the legislative proposal is not *ultra vires*. Unlike the UK which has the doctrine of parliamentary supremacy, Barbados operates under the doctrine of constitutional supremacy. Thus, the Barbadian parliamentary counsel must engage in a rigorous analysis of every legislative proposal against the provisions of the written constitution of Barbados. The legislative proposal often does not have the oversight of policy officers equipped with knowledge of constitutional law and thus the responsibility for ensuring constitutionality rests squarely upon the shoulders of the parliamentary counsel. Even for this reason alone, they can properly be regarded as the custodians of the rule of law.

### ***Common Law***

Barbados received the common law as it existed in England. Legislative reform in Barbados is often used to abrogate the harshness of the common law and mold the law to suit societal

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<sup>11</sup> Reed Dickerson, *The Fundamentals of Legal Drafting* (Little Brown and Company: Boston, 1965) 40.

<sup>12</sup> See Lon Fuller, *Anatomy of the Law* (The Pall Mall Press: London, 1968).

<sup>13</sup> Available at <http://barbadosparliament-laws.com/en/showdoc/cs/2002>.

realities and needs. Obviously, the parliamentary counsel must know the common law to properly assess whether the legislative proposal will achieve its intent, and to carefully choose the legislative mechanisms to be utilized to do this.

Parliament is presumed to intend that in construing an Act a court should aim to further every aspect of the legislative purpose, by advancing the remedy which is indicated by the words of the Act, for the mischief being dealt with, and the implications arising from those words. A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction.<sup>14</sup> In light of this approach to statutory interpretation, now being the predominant approach throughout the Commonwealth, it is imperative that the parliamentary counsel know the position of the common law where legislation seeks to alter the common law. In such instances it is the state of the law, as developed by the common law, that is the mischief sought to be cured by legislation.

The *Family Law Act, 1981* of Barbados, exemplifies legislative reform to alter the common law to match societal realities of Barbados.<sup>15</sup> Owusu comments upon the Act:

The *Barbados Family Law Act, 1981* is revolutionary in nature and unique in content. Among other things, it seeks to give de facto marriage a new status by defining it as a conjugal relationship other than marriage and conferring on parties to it property and maintenance rights. The statute is unique in content and form because it departs from the traditional style of law reform in the Caribbean. This style has been described as law reform by a means of scissors and paste; that is, legislation by producing carbon copies of English statutes.<sup>16</sup>

In this instance the parliamentary counsel in crafting such an efficacious and effective piece of legislation must have had a sound grasp of the common law on family law, or at least the benefit of consultation with others who detailed the intricacies of the common law which were to be remedied. Simply stated, they had to analyze the common law before commencing the drafting of this piece of legislation; the efficacy and effectiveness of the Act rested upon sound and comprehensive analysis of the common law to craft a suitable legislative solution. Similarly, as Barbados continues to shed the vestiges of its colonial legal system via legislative reform, the Barbadian parliamentary counsel will have to analyze the common law as received by England to craft legislation or legislative solutions well suited to the needs of Barbados.

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<sup>14</sup> Francis Bennion, *Bennion on Statutory Interpretation*, 5<sup>th</sup> ed (Lexis Nexis: London, 2008) 943.

<sup>15</sup> Cap. 214.

<sup>16</sup> Sampson Owusu, "Union Other Than Marriage under the Barbados Family Law Act, 1981" (1992), 21 *Anglo-Am L Rev* 53.

## **Statute**

Dickerson's warning that failure to analyse the state of the existing legal framework would result in "implied repeals, overlaps, and inconsistent terminology; in a word - confusion",<sup>17</sup> perhaps is of greatest significance in relation to existing statutes. Existing statutes must be analyzed for two primary reasons. First, to determine whether the subject matter of a legislative proposal has been entirely or partly legislated upon. Second, whether the legislative proposal necessarily implies amendment or repeal of existing statutes. This is important because the sponsoring Ministry will usually know where possible points of conflict with other legislation are to be found. However, the sponsoring Ministry may not realize that the implications of the legislative proposal could require consequential amendments to other pieces of legislation.

In Barbados the parliamentary counsel shoulders the task of canvassing and analyzing the statute book to pinpoint other statutes which the legislative proposal affects, and must then bring any implications to the attention of the sponsoring Ministry and the Attorney General for their consideration and await their further instruction on how to proceed. The diagram below demonstrates how one statute can possibly have implications on the entirety of the statute book and the complex web of legislation the parliamentary counsel must analyse.

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<sup>17</sup> Dickerson, above n. 11.

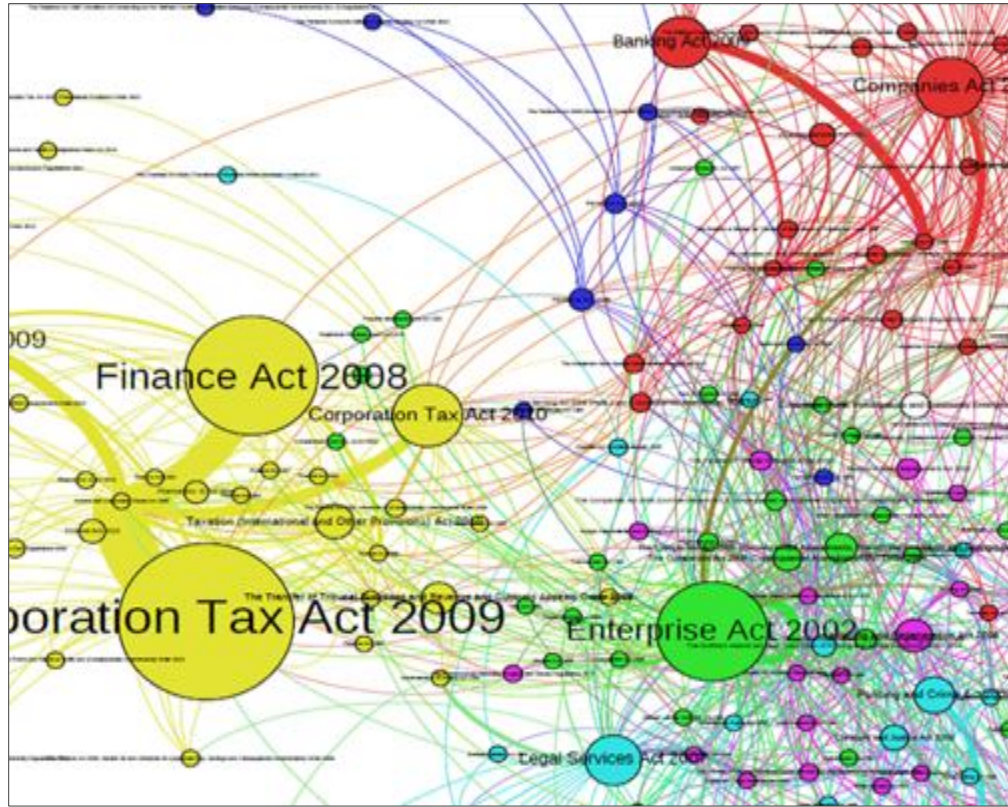


Figure 1: Representation of ‘legal effects’ in the statute book (from legislation.gov.uk)

### ***International Law***

It is becoming increasingly clear that, in modern times, the body of rules and principles which constitutes international law exerts a great influence on municipal legal systems<sup>18</sup>. Barbados is a dualist state that is signatory to numerous international instruments. The incorporation of these international instruments via an Act of Parliament is necessary for Barbados’ international obligations to have binding effect in its national legal system. The parliamentary counsel at the point of incorporation is tasked with achieving a neat fit of the international instrument within the statute book of Barbados. Consequently, they must analyse any inconsistencies or overlaps which could possibly occur in the statute book, and this type of analysis is of crucial importance, in light of the settled position of the courts of not allowing ambiguous legislation to be used as a means to escape international obligations.

In *Salomon v. Customs and Excise* it was stated that if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes

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<sup>18</sup> Rosemarie Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2<sup>nd</sup> ed (Routledge-Cavendish: Abingdon, 2008) 204.

relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law.<sup>19</sup> Moreover, as it relates to the substantive content of legislation, increasingly, international bodies often set the benchmark for best practice legislative solutions encompassed in model legislation and lay drafts. This thrusts a responsibility upon the Barbadian parliamentary counsel to analyse legislative proposals against any existing international best practice model legislation to guard against gaps and deficiencies.

### Special Responsibility Areas

Thornton notes,

It is the ability to see the legislative proposal against the background of the whole structure and panoply of the law that gives the drafter both an advantage and a special responsibility.<sup>20</sup>

He further notes,

the responsibility is particularly great in certain areas of potential danger. The dangers will be apparent to the drafter who has a duty to ensure that instructors are also aware of the danger.<sup>21</sup>

Thornton then lists different kinds or types of proposals which evoke the special responsibility of the drafter. These include proposals *inter alia* affecting personal rights and private rights, delegate the executive power to impose taxation, provide for retrospective legislation etc. This responsibility is not to be taken lightly as failure on the part of the Barbadian drafter to advise the Attorney General and the client Ministry on these areas of special responsibility opens the door to litigation over the legislation which can result in both embarrassment and great financial displacement to the State.

For the purposes of this analysis, the Barbados *Bail (Amendment) Act, 2019-3* shall be examined as the case study for special responsibility areas affecting personal rights. In response to the upsurge in murder and gun crimes, the Honourable Attorney General piloted an amendment to the *Bail Act*, with the regulatory aim to deter gun crimes and to protect society from persons who committed gun crimes. Section 5A(1) of the *Bail (Amendment) Act, 2019-3* prohibited a person charged with murder or an offence under the *Firearms Act, Cap. 179* from applying for bail unless a period of 24 months had expired after that person was charged. In *Lamar Jones v. AG* this legislation was challenged for infringement of the right to life, liberty and security of the person under section 11(a) of the *Barbados*

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<sup>19</sup> [1967] 2 QB 116, (CA).

<sup>20</sup> Thornton above n.4 at 152.

<sup>21</sup> *Ibid.*

*Constitution*.<sup>22</sup> The Court held that the legitimate aim of the legislation was to deter gun crime but the means of restricting the right to bail was not rationally connected or proportionate to the legitimate aim. Consequently section 5A(1) of the *Bail Amendment Act* violated the right to life, liberty and security of the person.

A legislative proposal affecting such a vast array of personal rights requires the parliamentary counsel to undertake much analysis to determine if the aim of the legislation can be achieved whilst avoiding the danger of encroaching on fundamental rights of the citizen such as the right to life, liberty, and security of the person. Furthermore, they must advise on the implications of such legislation. It is quite conceivable that should legislation offend the personal rights of many persons and should the courts display a willingness to award damages for wrongdoing done by the state, then legal proceedings could have disastrous financial implications for the state. Whilst the ethical considerations of parliamentary counsel are outside the ambit of this article, in such circumstances efforts should be made by them to avoid drafting of legislation of such an egregious nature as to offend against the fundamental rights which are constitutionally guaranteed the citizen.

### Practicality

Thornton does not elaborate much on what he means by “practicality”. Perhaps this is an effort to avoid tempting drafters to overstep the parameters of their role and usurp the primary functions of policy officers. Of most significance he writes:

Parliamentary counsel needs at this early stage to study most rigorously the practical aspects of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement.<sup>23</sup>

In assessing this statement, it is possible to discern that a proper analysis on the part of the parliamentary counsel requires conceptually exploring and testing the legislative proposal for its ability to work in practice, to ensure the proposal is not a useless addition to the statute book, becoming mere words on paper of meaningless effect, or worse yet an addition to the statute book that results in anarchy. Llewellyn clearly agrees with Thornton’s position on the role of the parliamentary counsel when he asserts:

one of the statutory draftsman’s major problems is to look into the existent behaviour beforehand, to make sure that his formula, when it becomes official rule, will not merely bask in the sun upon the books. He must so shape it as to *induce its application* ... or else... his blow is spent in air.<sup>24</sup>

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<sup>22</sup> BB2022 HC55

<sup>23</sup> Thornton, above n.4 at 156.

<sup>24</sup> Karl Llewellyn, “A Realistic Jurisprudence - The Next Step” (1930), 30 Colum L. Rev. 431.



As Barbados is a small island developing state with limited resources, the usual experience of the parliamentary counsel in Barbados is that legislative proposals submitted by sponsoring Ministries are largely borrowed from other jurisdictions with differing economic, social and cultural realities to Barbados. Although this is a known fact, the transplanted legislation is expected to function and yield the same regulatory success that occurred in more developed jurisdictions. Hence the parliamentary counsel's analysis of the mechanics of a legislative proposal for practicality is vital to ensure that the machinery of the legislative proposal can actually function, and by extension that the proposal has the capacity to be effective in the context of the domestic circumstances. Should there be any doubt that the machinery of the proposal is incapable or not well suited to function in the local circumstances, there arises a duty on the part of the legislative counsel to draw this to the attention of the sponsoring Ministry.

The main criticism levelled at legislation in Barbados is that it is "toothless" with much legislation yielding no solution or results. Analysis directly contributes to designing a legislative solution which is implementable and capable of achieving the policy goal. The parliamentary counsel must consider the practicability of the proposals, namely whether they are capable of being implemented effectively. Parliamentary counsel become familiar with the administrative implications of different kinds of proposals, and rely upon the experience of civil servants to inform them of what is involved in the day-to-day implementation of particular provisions.<sup>25</sup> As such it is this synergy between the Barbadian drafter and policy officers upon which rests the legislative solution being implementable.

## **Conclusion**

This article has utilized Thornton's analysis stage to illustrate that the role of Barbadian parliamentary counsel is more than that of an amanuensis and may be properly considered the architect of the law. Moreover, because the drafting process is, by and large, the same in all the jurisdictions of the Commonwealth Caribbean, this analysis of the role of parliamentary counsel is of equal application to these jurisdictions. They provide a professional service of transforming policy into statute. As has been demonstrated throughout this article, the process of producing a Bill requires much analysis of the legislative proposal, thinking and mental dexterity on the part of the drafter. It is for this reason that I must agree with Driedger's assertion that the legal drafter is more than a mechanical word polisher and that the hardest part of the draftsman's task in producing a Bill is finished before the drafting of it begins.<sup>26</sup>

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<sup>25</sup> David Miers and Alan Page, *Legislation* (Sweet & Maxwell 1982) at 88.

<sup>26</sup> Elmer Driedger, *The Composition of Legislation*, 2<sup>nd</sup> ed, (Department of Justice: Ottawa, 1975) at 1.



# The Model Laws of the Regulatory Institute

Manfred Kohler<sup>1</sup>



## Abstract

*This article explains why comprehensive, adaptable and modular international model laws that point at regulatory choices instead of anticipating them could bring law-making to another level both in terms of regulatory completeness and output. Such model laws protect diversity in a smart and targeted way. The article claims that there is space for an organisation to serve as an additional regulatory model pole by elaborating and disseminating such model laws.*

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<sup>1</sup> Lawmaking consultant, Founder of the Regulatory Institute.

## **Introduction**

Model laws have existed in the United States since the 19<sup>th</sup> century<sup>2</sup> and in Canada since 1918.<sup>3</sup> They have proven to be useful tools in these two and other federal countries. Model laws provide some alignment and a minimum regulatory quality, namely by listing elements that otherwise might not be reflected in the real-life laws.

Model laws also have been developed internationally.<sup>4</sup> However, such international model laws do not necessarily fit all countries, as there is more diversity around the globe than in one single federal country. Hence, the question arises of how model laws can be better developed for an internationally diverse audience.

To answer this question, we will describe the international landscape of law-making, the shortcomings of current international model laws, the Regulatory Institute's model laws and their utility for jurisdictions and CALC members. Moreover, we outline some strategic and organisational aspects of the development of model laws.

## **Regulatory Institute's Model Laws Project – Initial Observations**

In the early years of the Regulatory Institute (2015 to 2017), it developed, on the basis of public inventories and databases,<sup>5</sup> a matrix with more than 1000 jurisdictions adopting laws (states and intra-state entities like Tamil Nadu in India, Patagonia in Argentina and Colorado in the U.S.) represented in rows. The columns listed more than 1000 topics covered by legislation of at least one jurisdiction. When analysing the matrix, the Regulatory Institute discovered the following:

- In the matrix with more than 1 million fields created by these two parameters, most fields were empty. Very few topics were covered by all jurisdictions.
- There was no logic detected behind the pattern of topics or sectors being covered or not, except that some topics, such as the fight against money laundering, were pushed by international conventions into all jurisdictions and some other topics or sectors<sup>6</sup>, like penal law, are so ancient and basic that we find them everywhere. But generally, and for the bulk of topics, the Regulatory Institute could not identify any reason why a certain topic was relevant for a certain jurisdiction and

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<sup>2</sup> The Uniform Law Commission was established in 1892: see About Us at <https://www.uniformlaws.org/aboutulc/overview>.

<sup>3</sup> The Uniform Law Conference of Canada was established in 1918: see What We Do at <https://www.ulcc-chlc.ca/About-ULCC/What-We-Do>.

<sup>4</sup> See the [Model Laws Library](https://www.howtoregulate.org/model-laws-library/) of the Regulatory Institute, available on its website at <https://www.howtoregulate.org/model-laws-library/>.

<sup>5</sup> At the time, the research was based on the Global Legal Information Network managed by the U.S. Library of Congress, a Chinese website and a commercial legal information service provider (LexisNexis).

<sup>6</sup> We use the term “sector” for a group of thematically close topics.

not for its neighbour jurisdictions with similar conditions. Even paramount topics like the prevention and sanctioning of child abuse have not found a regulatory response in all neighboring jurisdictions, though the sociocultural factors and thus the prevalence of child abuse are similar. Thus, the Regulatory Institute assumed at the time that there is, in quite some jurisdictions, a lack of rationality regarding the selection of topics or sectors to be regulated. This “lack of rationality” hypothesis has in the meantime been, to a modest extent, confirmed by episodic insights into lawmakers’ considerations. It triggered the establishment of a decision making framework for the selection of topics or sectors to be regulated which has recently been published on the Regulatory Institute’s Blog.<sup>7</sup>

- Most jurisdictions had very few laws in total. Roughly speaking, the number of laws correlated with the income of the jurisdictions. Accordingly, the ability to adopt laws and thus to regulate seems to depend on income; it costs to develop and apply laws. The ability or inability of jurisdictions to adopt and apply laws points to a capacity issue. This triggered our interest in the question: How can the capacity of jurisdictions to adopt laws be increased? Here the model laws come into play. Good model laws can reduce the burden of elaboration of regulation and the burden of application/enforcement, for example, in laws permitting enforcement via third parties. By this intra-administrative burden reduction, good model laws can also positively impact the regulatory planning and management capacities of jurisdictions.

### **Why Existing International Model Laws do not Suffice**

Before investing in developing its own model laws, the Regulatory Institute checked which model laws already exist in an international context. It found out that for most topics and sectors, there was no model law. In addition, the existing model laws were mostly incomplete in terms of regulatory techniques.<sup>8</sup> They are lacking important regulatory techniques that would have made the model law more effective.

Where does this bold judgment come from and how is it to be explained? We assume that it comes from a difference of perspectives. Those drafting (model) laws know some or all existing laws of the same sector or topic from different countries/jurisdictions and some laws of their own country for other sectors or topics. But they do mostly not know the many regulatory techniques used in the vastest area of the matrix, the (combined) other countries/jurisdictions and other sectors.

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<sup>7</sup> Available at <https://www.howtoregulate.org/choosing-regulatory-topics/#more-1615>.

<sup>8</sup> This is now confirmed by the Regulatory Institute’s [Model Laws Library](#) in which very few model laws are deemed to be fairly complete.

The Regulatory Institute has inventoried hundreds of regulatory techniques from areas of the matrix that average drafters are not familiar with.<sup>9</sup> This creates a difference in the knowledge base that explains the judgment as “incomplete”. There is thus presumably a knowledge gap between the knowledge the Regulatory Institute operates with when compared to the knowledge of an average drafter of (model) laws. This knowledge gap is thus the first and foremost justification for our model laws.

The second reason is that ever more regulatory topics or entire sectors emerge and merit being addressed by regulation. Take the example of artificial intelligence. Ever more countries see a need to regulate at least certain aspects of the use of artificial intelligence. Of course, the Regulatory Institute could have waited until the first 10 countries have regulated certain aspects of artificial intelligence to combine the respective elements into a model law and to complement that model law with further regulatory techniques from other countries and sectors. But then the Regulatory Institute would have missed an opportunity to make available its cross-country-cross-sector perspective for the first 10 countries. Drafting a model law from scratch gave the Regulatory Institute a better stance. Since then it could refer to precise model provisions in various public consultations. Maybe even the general approach of the model law has been perceived as inspiring here and there.

The Regulatory Institute thus produces both:

- “assembling model laws”, meaning model laws merging elements from various existing laws of the respective sector and complementing the merge with regulatory techniques of completely different sectors, and
- “pioneering model laws”, meaning model laws that had no sector laws as a basis, but that were conceived with structural elements and regulatory techniques of completely alien sectors.

### **Characteristics of Regulatory Institute’s Model Laws**

All model laws have the following in common:

- They use regulatory techniques of the same sector and other sectors.
- They are modular, non-prescriptive, inspirational and offer options, not decisions.

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<sup>9</sup> Admittedly, there might be hundreds of further regulatory techniques that the Regulatory Institute has not yet inventoried. To find them all is a tremendous undertaking. With the same time investment, one can identify the first hundred regulatory techniques, the next 30 or so additional regulatory techniques, the next further 10 or so regulatory techniques and so on. There is a decreasing output per time investment unit. Hopefully, artificial intelligence can help us soon.

- They are rather long and comprehensive<sup>10</sup> because they aim at showing many possibilities so that the drafters can select the appropriate ones and prompt other conscious decisions.
- They are open to extensions or enhancements.
- They are, to the extent possible, policy-neutral, but are of course based on certain policy goals presumably motivating the lawmakers of the respective sector, for example reducing harm.
- They invest in implementation aspects and thus contain *inter alia* comprehensive empowerment lists. They also integrate third-party enforcement as a means to compensate or complement (often weak) enforcement by state authorities.
- They are open to international cooperation because international cooperation benefits us all.
- They are not perfect for formal aspects, as formal aspects vary widely from jurisdiction to jurisdiction and thus are not a worthwhile investment of time and resources for the Regulatory Institute.

### Example – Model Law on Internet Relationships and Virtual Worlds

The model law on internet relationships and virtual worlds<sup>11</sup> is presented with more detail here not least because the sector “internet legislation” replicates a pattern we observe in the legislative landscape in general: countries have largely very different views on which topics merit a law in the first place, and so for most topics there are only a few countries or parts of countries which decide to legislate. Likewise, countries have very different views on which aspects of the internet merit being regulated. Some countries decide to regulate certain aspects, while other regulate at least partly different ones. The Regulatory Institute could not detect any reason for the particular piece-meal approaches and assumes accidental factors as “drivers”, such as a problem highlighted in the media or brought to the attention of a legislator being victimized personally, for example by a certain type of fraud.<sup>12</sup> The Regulatory Institute observed new laws dealing with this or that topic or even just a particular aspect of the internet, all of them only tackling a fringe of the long list of topics or aspects that at least one country or scientist has (rightly!) spotted as meriting regulation. With all due respect to jurisdictions and recognising the many practical difficulties of lawmaking plus the many cultural and political differences, the Regulatory Institute

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<sup>10</sup> However, the Regulatory Institute so far never displayed the full range of regulatory techniques that it disposes of because such full display would render the model laws extremely difficult to digest. Users who wish even more possibilities for enhancement should contact the Regulatory Institute.

<sup>11</sup> Available at [https://www.howtoregulate.org/internet\\_rels/](https://www.howtoregulate.org/internet_rels/).

<sup>12</sup> Likewise, the policy paper research led to the result that there are very few issues, such as protection of minors from grooming, which are in the limelight virtually everywhere, but for most aspects, there is only an erratic awareness here and there, whilst there is absolutely no reason why they should not be prevalent in most countries.

supposes that there is some margin towards more rational legislative management. Some jurisdictions at least could have a better look at the full list of topics and aspects that might merit being regulated, make a selection on that basis and plan how best to regulate in a coordinated way for the selected topics and aspects.

Of course it is not up to the Regulatory Institute to close that margin. It can at best try to show a path towards more rational legislative management. In the case of the internet, we chose a brutal path: demonstrating that there is no need for an incomplete piece-meal approach in terms of topics and aspects, but that all (potentially) regulated topics and aspects can be integrated into one single piece of legislation. That piece of legislation, however, would need to refer to existing domestic legislation so that an integrated legal fabric emerges in which the internet is not exempted from the ordinary national legal order, but fully integrated into it. This legal strategy is, in our view, the only viable way to regulate the internet. Creating a completely separate legal sphere would create permanent friction and unjustified differences between internet-based and other activities, which is even more problematic as there are also hybrid activities.

The model law on internet relationships and virtual worlds became pioneering in two senses:

- establishing quite a comprehensive list of topics and aspects that could or even should be regulated, facilitating the choice for jurisdictions,
- suggesting an adaptable partly stand-alone and partly pure interface legal structure that is open to the integration of ever more and future aspects to be regulated.

Readers of the model law hopefully come to the insight: yes, it is possible to embed the “internet” into a classic national legal order. Yes, we can put an end to what some call “the internet Wild West”.

We note here that at least the second pioneering function could not have been reached by a classic Regulatory Institute article that presents suitable regulatory techniques for a certain sector.<sup>13</sup> This added value is also one of the reasons why the Regulatory Institute slightly shifts its activities from those comparative articles on regulatory techniques in a certain sector to model laws, whilst the latter, too, are based on comparative research where laws already exist.

### **How Jurisdictions can Benefit from Model Laws**

Jurisdictions and their drafters have two advantages when using fairly complete model laws:

- Easier production of laws because drafters do not need to start from scratch and are offered from the beginning important elements for their law,

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<sup>13</sup> Such articles are presented on the Institute’s Blog, available at <https://www.howtoregulate.org/category/sector-specific/>.

- More conscious choices and more regulatory techniques and thereby better laws.

To illustrate, let us look at professional wear, for example, professional wear for high mountain regions. Of course, it is nice that local clothing traditions survive. But it might come at a cost. If Andean mountain-wear tailors were to say “We are fine with our tradition, we do not need to learn from our Nepalese colleagues”, some persons wearing the Andean clothing might not survive because the Andean clothing does not protect body parts from freezing as effectively; and of course vice versa: the Nepalese colleagues might learn from their Andean colleagues. Moreover, despite their respective great tailor traditions and historic experience, both the Andean and the Nepalese tailors might learn from Western or Chinese high mountain clothing manufacturers using new materials with higher insulating values and better release of humidity; and of course vice versa – there is a reason why Western and Chinese mountain clothing manufacturers studied the Nepalese and Andean tailor traditions. Nobody is protected from the need to learn. To put it bluntly: not even considering tailor solutions developed elsewhere may cause casualties.

We believe the same is true for regulation. Regulating on life-impacting sectors<sup>14</sup> without taking at least into consideration regulatory techniques that have proven to increase the efficiency of regulation from other sectors and countries is equivalent to saying, “We are fine with our tradition, we do not need to learn from our Nepalese colleagues and even less so from Western or Chinese high mountain equipment manufacturers.” It also causes casualties sooner or later, because the enforcement of requirements is weaker and the laws less effective than what they could be, as the Regulatory Institute noted for the many laws on alcohol and tobacco control that it evaluated.<sup>15</sup> At least at this point, our instinctive sympathy for diversity and traditions in legislation should be subject to second thoughts. Features of high mountain clothing, increasing warmth coming from elsewhere should at least be considered, but mostly they should simply be integrated into the tailor’s design. The same applies to many regulatory techniques that can make legislation more effective.

This does not mean that the Regulatory Institute favours uniform legislation per se, its model laws consciously point to so many choices. Western suits become a problem in India and elsewhere where, all of a sudden, there is a need to cool down offices to compensate for the additional layers of fabric. The same applies to regulation. Regulation imported from better resourced jurisdictions requiring important administrative resources for its enforcement can easily do more harm than benefit in jurisdictions that lack these

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<sup>14</sup> The Regulatory Institute estimates that there are more than 50 such regulatory topics, going from arms control, over various environmental regulations, over several dozen product regulations, to medical legislation, elderly care legislation, minor protection legislation etc.

<sup>15</sup> The evaluation took place when elaborating the following articles: [Alcohol Regulation \(2018\)](#), [Tobacco Control Regulations \(2018\)](#), [Drawing a clear health line under addictive products regulations Part 1 \(2021\)](#), [Drawing a clear health line under addictive products regulations Part 2 \(2022\)](#).



administrative resources. But again, referring to a wider range of regulatory techniques can help. There are now systems designed to create a mutual control and check of interdependent economic actors that do not require much administrative resources. With the help of these regulatory techniques, the difficulty of lacking administrative resources can at least partly be overcome. These regulatory techniques are also displayed in the Regulatory Institute's model laws. Double-checking a legislative project with the help of the Regulatory Institute's Handbook "How to regulate?"<sup>16</sup> and the model laws can thus – in the case of life-saving legislation – by itself save lives. It is thus a quality control and quality-increasing measure to refer to model laws and to use the Handbook at least for these effectiveness-enhancing regulatory techniques.<sup>17</sup>

A desired side-effect of the use of model laws is that lawmaking becomes more efficient. Instead of wasting time on basic design questions and looking for elements to be placed, the design can be chosen from a range of model designs<sup>18</sup> and the particular elements to be integrated as well – both for clothing and regulation. Thereby, the tailors or drafters save time to focus on what adaptation to the local context is required. Or they can produce more regulation, to cover ever more topics of life that require regulation, whilst regulatory human resources are scarce.

Not to be misunderstood: the Regulatory Institute does not advocate for a one-size-fits-all policy. No model law should be cast into regulation as is. A legislative draft based on model laws and inventories of regulatory techniques that can be added will provide better results than today's predominant production mode of starting from scratch or with the previous legislation on the topic. Laws based on high-quality modular model laws and inventories of regulatory techniques such as the Handbook will be diverse for good reasons, and this diversity will be based on conscious decisions; it is not certain that they will be more uniform than laws today.<sup>19</sup> However, they will not be haphazardly diverse due to a particular tradition or a perspective necessarily limited to what one can see from a single field in the more than 1.000.000 fields matrix combining jurisdictions and topics. Drafters, understandably, are usually familiar with the legislation of their jurisdiction and some legislation of other jurisdictions regarding their specific topic or sector.<sup>20</sup> They are rarely

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<sup>16</sup> Available at <https://www.howtoregulate.org/the-handbook/>.

<sup>17</sup> The Handbook offers also a comprehensive quality control chapter that encompasses many more aspects.

<sup>18</sup> In particular the Model Laws Library provides a variety of models.

<sup>19</sup> This statement might be regarded as counter-intuitive: Normally model laws trigger harmonisation of laws across jurisdictions. But if the model laws are modular, pointing at various possibilities and if there are inventories of regulatory techniques to beef them up, the finally adopted laws might content-wise heavily deviate one from another.

<sup>20</sup> As a reminder of Footnote 6: We use the term "sector" for a group of topics.



aware of regulatory techniques used in other topics/sectors and other jurisdictions at the same time, thus in more than 99.9% of the matrix.

The unique cross-topic and cross-jurisdictions perspective that emerged with the Handbook is also shaping the model laws; it would become even stronger with the involvement of CALC members in the elaboration of future model laws. Imagine how rich model laws would be if even just 1/10 of CALC members were to contribute their respective knowledge. A noteworthy contribution from CALC members could also adapt the model laws to formal requirements of the largest community of lawmaking practitioners, rendering them more user-friendly.

### **Strategic Aspects of Model Laws**

Currently, there are three trading blocks<sup>21</sup> drawing others behind them for certain types of regulation. All three trading blocks link strategic interests to the dissemination of their domestic regulation.<sup>22</sup> They do not strive for the dissemination of the best possible regulation for the respective jurisdiction, but simply of their own, which still has scope for improvement, at least in terms of regulatory techniques. The three trading blocks are partly also followed by other states without there being any compelling reasons; thus just because their regulation is readily accessible, translated and known.<sup>23</sup> The three trading blocks serve thus as poles that provide orientation and that attract others.

We claim that the three poles are partly also followed because there is no well-publicised alternative in terms of good regulatory examples. Only some Latin American states try to systematically build up regional regulatory alternatives, with remarkable smartness and success<sup>24</sup>. But, at least for the rest of the world, there is still room for a fourth regulatory model pole, which is striving to disseminate the best possible regulation with the best possible adaptation to the respective jurisdiction, regardless of where the regulatory elements originate from and regardless of strategic or commercial interests.

The Regulatory Institute shortly examined the question of whether it could become a modest, mini-nucleus of a future fourth regulatory model pole. As ridiculous as the idea might seem at first, there are some pros, such as our striving for regulatory quality. The

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<sup>21</sup> We refer here to (1) the North American Free Trade Agreement zone including the United States of America, (2) the European Economic Area, surrounded by Switzerland, Türkiye and certain East European states and (3) the People's Republic of China plus states dependent on it.

<sup>22</sup> See for example, Anu BRADFORD, "Digital Empires: The Global Battle to Regulate Technology", 2023, Oxford University Press.

<sup>23</sup> The mechanisms of such voluntary following are described in Anu BRADFORD's earlier publication "[The Brussels Effect](#)", 2020, Oxford University Press.

<sup>24</sup> See <https://parlatino.org/> and in particular the model laws displayed at <https://parlatino.org/leyes-modelo-aprobadas-por-el-parlatino> (both links are at times very slow, but work).

Regulatory Institute is not bound by particular traditions and even less so by political or financial affiliation. It has no particular commercial or strategic interests and is striving for the best possible integration of needs and conditions from countries around the world.

However, in terms of standing and resources, the Regulatory Institute is anything but ideal. It operates with extremely scarce resources and without any surveillance structure. It is not institutionally embedded. Its reputation is still not widely known. Therefore, it is clear that, if it were to become the future fourth regulatory model pole, the Regulatory Institute would require a solid institutional embedding. It is unlikely that any financially powerful institution would take over the Regulatory Institute so that it can fulfil this role. As long as the Regulatory Institute stands alone, it definitively cannot become the fourth regulatory model pole.

Therefore the Regulatory Institute looks for another organisation with a better international standing that could become that fourth regulatory model pole; and to which the Regulatory Institute would simply contribute to the extent it was required to by the other organisation. Ideally, that organisation has already a broad outreach, whilst not being overshadowed by too heavy diplomatic in-fighting and bureaucracy. To be credible and to avoid resistance, the organisation should not have any strong political agenda and should be oriented towards regulatory quality.

### **What is in it for Individual CALC Members?**

Let us leave behind these high-flying considerations and answer the concrete and grounded question: what is really in the Regulatory Institute's model laws for individual CALC members? There are two potential gains for CALC members, one as recipient and one as actor:

- As recipients, CALC members can obtain a model law on demand. The Regulatory Institute has long term goals, but it decides only at the very last moment which model law is to be developed next. It reacts to needs expressed by regulators. By expressing need-based requirements for new model laws, CALC members can obtain a model law useful for their upcoming legislative activity<sup>25</sup>.
- As actors, CALC members can disseminate their knowledge via the Regulatory Institute's model laws. Whether you are a specialist for a certain sector dealt with in a model law, a specialist of another sector or just a generalist, you can always

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<sup>25</sup> In addition, CALC members can of course also use the Regulatory Institute's [Model Laws Library](https://www.howtoregulate.org/model-laws-library/) (available at <https://www.howtoregulate.org/model-laws-library/>) which collects model laws developed by others. Most of the collected model laws do not fulfil our quality expectations, but to use them is mostly still better than drafting from scratch: generally speaking, you are less likely to miss important elements when using model laws. Moreover, the collected model laws have different structures from which drafters might wish to choose.

comment on draft model laws and suggest amendments. As the Regulatory Institute wishes to integrate knowledge from as many sectors and jurisdictions as it can, your comments and suggestions will all be carefully examined and mostly be integrated into the final version of the model laws. If you wish to suggest an entirely new model law, you are welcome to as well. Either path enables CALC members to become part of the thrilling adventure that constitutes the Regulatory Institute's model law project.

### **Next Model Laws - unless You Change the Priorities**

Besides the expressed or presumed needs of regulators, the Regulatory Institute tries to estimate what the added value of a new model law would be. Currently, two sectors are under investigation. The two sectors are not new at all, but the Regulatory Institute supposes that, due to periodic updating, there will both be a consistently high need for respective model laws and a quite important added value that new model laws could bring along:

- *Animal protection*: In this sector, the Regulatory Institute observes again that the aspects regulated by the various jurisdictions vary quite widely and it seems that hardly any legislation encompasses more than half of the aspects worthwhile being regulated. Therefore, the elements of a comprehensive animal protection model law might serve well to complete the legislation in many jurisdictions.
- *Public tenders* with special focus on mining licenses and public infrastructure work: The Regulatory Institute supposes that much can be won for quite some countries around the world that still attribute mining licenses and public infrastructure work without neutral, abuse-resilient public tender procedures. Moreover, the Regulatory Institute envisages combining classic public tender law with regulatory techniques reducing corruption and means to reduce environmental burden. The model law might thus be innovative by intertwining different policies to render them all more efficient and mutually supportive. Let's see whether the Regulatory Institute manages to levy this potential which, again, could not be levied by its classic articles comparing regulatory techniques of a certain sector.

### **Summary**

The main points advanced in this article can be summarized as follows:

- Not so much systematic analysis and reflection, but rather accidental factors seem to determine (a) the sectors and topics that jurisdictions regulate,<sup>26</sup> (b) the aspects

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<sup>26</sup> See above, Strategic Aspects of Model Laws and Next Model Laws - unless You Change the Priorities.

that regulation covers<sup>27</sup> and (c) the regulatory techniques and other elements that jurisdictions use when regulating. Model laws increase the rationality of decisions at levels (b) and (c) and, indirectly, the range of options for the selection of sectors and topics (level (a)).<sup>28</sup>

- The Regulatory Institute has started developing comprehensive, adaptable and modular model laws that point at regulatory choices instead of anticipating them.
- Comprehensive, adaptable and modular model laws can make laws better and more effective, and in doing so save and improve lives at a quite important scale.
- A shift in the production of regulation from a craftsman-like, tradition-based approach with an accidental selection of (and thus often missing) elements/regulatory techniques to a production, based on comprehensive, adaptable and modular model laws, which of course need adaptation to the respective jurisdiction so that diversity is not necessarily reduced, but preserved in a smarter, better targeted, non-accidental but conscious way. In addition, inventories of regulatory techniques such as those in the Handbook “*How to regulate?*” should be used.<sup>29</sup>
- The suggested shift would improve the quality of laws/regulation and increase the capacity of jurisdictions to cover more regulatory topics or sectors which emerge as a consequence of new technological, economic and societal developments.
- An organisation other than the Regulatory Institute should become the hub for comprehensive, high-quality, neutral, modular and adaptive model laws and thereby a fourth regulatory model pole, complementing the pole functions of the current three large trade blocks and thus closing a loophole in today’s regulatory landscape.

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<sup>27</sup> For example, see above Next Model Laws - unless You Change the Priorities.

<sup>28</sup> See above the last paragraph of Next Model Laws - unless You Change the Priorities.

<sup>29</sup> As explained above in n. 14, the model laws cannot display all possibly suitable regulatory techniques. Therefore, there is room for further improvement.

# Bilingual Interpretation in a Unilingual Environment

Sven Hombach<sup>1</sup>



## Abstract

*This article describes the challenges faced in a largely unilingual jurisdiction (Manitoba, Canada) whose statute book is officially bilingual and is subject to bilingual interpretation requirements and the “equal authenticity” rule. It illustrates the growing impatience of the court system with bilingual interpretation being treated as an afterthought, culminating in a formal court practice direction in 2023 that any argument involving statutory interpretation must include bilingual interpretation.*

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## Introduction

Several Commonwealth jurisdictions publish their laws in bilingual format or in more than one language. That includes Canada's federal government,<sup>2</sup> several Canadian provinces,<sup>3</sup> Canada's territories,<sup>4</sup> Guernsey,<sup>5</sup> Jersey,<sup>6</sup> Wales,<sup>7</sup> and New Zealand.<sup>8</sup> Of these jurisdictions, Canada has one of the most well-developed bodies of jurisprudence on bilingual interpretation, including an academic textbook dedicated to the issue co-authored by a former Supreme Court justice.<sup>9</sup> But official bilingualism rarely translates into bilingualism in practice, as each country or jurisdiction has a dominant *lingua franca*. This article describes the resulting legal friction using recent developments in Manitoba, Canada.

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<sup>2</sup> All federal primary and subordinate legislation in Canada is published in bilingual, dual-columned format, with English on the left and French on the right. At the federal level, subsection 18(1) of the [Canadian Charter of Rights and Freedoms](#) states that the English and French versions are equally authoritative.

<sup>3</sup> Manitoba, New Brunswick and Ontario enact and publish their legislation in bilingual format. The Manitoba approach is discussed in more detail in this article. For New Brunswick, subsection 18(2) of the [Canadian Charter of Rights and Freedoms](#) states that the English and French versions are equally authoritative.

Nova Scotia has enacted bilingual versions of several statutes relating to the delivery of services in French, the operation of French-language educational institutions, and a provincial holiday dedicated to Acadians. The remainder of its statutes are unilingual.

<sup>4</sup> Canada's three territories (the Northwest Territories, Nunavut, and Yukon) enact and publish their legislation in bilingual English and French format. Translations into other official languages (such as Inuktitut in the case of Nunavut) do not have authoritative status.

<sup>5</sup> Guernsey publishes new legislation in English only. However, a number of older statutes are still written in French. A listing of laws written in French can be accessed through the following hyperlink: [French Legislation Search – Guernsey](#). The [Interpretation and Standard Provisions \(Bailiwick of Guernsey\) Law 2016](#) is silent on interpretational issues related to language.

<sup>6</sup> Jersey publishes new legislation in English only. However, a number of older statutes are still written in French, with English translations provided. A listing of laws written in French can be accessed through the following hyperlink: [French Legislation Search – Jersey](#). The [Interpretation \(Jersey\) Law 1954](#) is silent on interpretational issues related to language.

<sup>7</sup> Wales publishes acts laid before the Senedd Cymru and subordinate legislation made by ministers in both English and Welsh. However, there are separate versions of the documents. The rules for bills are set out in Articles 7.105 to 7.120 of the [Legislation Handbook on Assembly Bills](#). The rules for regulations are set out in Article 4.11 of the [Legislation Handbook on Subordinate Legislation](#).

Under section 5 of the [Legislation \(Wales\) Act 2019](#), the Welsh and English version have equal status.

<sup>8</sup> New Zealand's first bilingual statute was the [Mokomoko \(Restoration of Character, Mana, and Reputation\) Act 2013](#). The English and Māori texts are printed in sequence. The [Legislation Act 2019](#) is silent on interpretational issues related to language.

<sup>9</sup> See Metallic, Bastarache, Morris and Essert, *The Law of Bilingual Interpretation* (Toronto: Butterworths, 2008). An earlier textbook (Rémi Michel Beaupré, *On Construing Bilingual Legislation* (Toronto: Butterworths, 1981)), has not been updated to reflect current jurisprudence. Beaupré's textbook was developed from an even earlier publication, [On Constructing Bilingual Legislation in Canada](#), published in 1979.

## A Brief Foray into Manitoba's History

Manitoba is a province in the centre of Canada. It has a landmass about 2 ½ times the size of the U.K. but a population of only 1.35 million people. While it has been populated by successive waves of immigrants, the legal bar is primarily anglophone. As of December 31, 2022, there were 2,186 practicing lawyers in Manitoba, of which only 78 self-identified as francophone.<sup>10</sup> While this likely understates the number of lawyers who can read French at a professional level, it illustrates that the French language has a clear minority status among the Manitoba bar.

The province of Manitoba was settled by British settlers as the Red River Colony around 1811 but already had an expanding population of Métis, descendants of European (primarily French) settlers who married Indigenous individuals. The origin of Manitoba as a province was a lengthy political struggle between English settlers, French settlers, and the Métis people. After a rebellion led by Métis leader Louis Riel (known as the Red River Rebellion), the Province of Manitoba was founded in 1870 under *The Manitoba Act, 1870*, a federal statute that now forms part of the constitution of Canada.<sup>11</sup> Section 23 of *The Manitoba Act, 1870* enshrined the following language rights:

**23.** Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Despite the above provision, in 1890, the provincial legislature enacted *The Official Language Act*. This statute stated that:

Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.<sup>12</sup>

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<sup>10</sup> Law Society of Manitoba 2022 Annual Report, available at <https://lawsociety.mb.ca/wp-content/uploads/2023/07/2023-Annual-Report.pdf>.

<sup>11</sup> *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba*, 1870, 33 Vict. c. 3.

<sup>12</sup> *An Act to Provide that the English Language Shall be the Official Language of the Province of Manitoba*, S.M. 1890, c. 14, s. 1.

Once the statute passed, the provincial legislature began to publish only unilingual versions of statutes. However, by the late 1970s, Manitoba's francophone community began to assert its language rights more forcefully. In 1979, following the challenge of a unilingual parking ticket, the Supreme Court of Canada ruled that the provision of *The Official Languages Act* reproduced above was unconstitutional.<sup>13</sup> In 1985, the provincial government brought a reference case to the Supreme Court of Canada to determine Manitoba's language obligations. The court concluded that the province did have an obligation to publish legislation in both English and French, ending almost a century of unilingualism.<sup>14</sup> While the court found that the unilingual legislation was invalid, it deemed the legislation to be valid on a temporary basis to allow for the statute book to be translated and re-enacted in bilingual format.

In the late 1980s, Manitoba spent several years translating its statute book and re-enacting statutes and Cabinet regulations in bilingual format. Some of the most experienced legislative drafters in Manitoba who still provide services on a consulting basis began their careers as part of the 1980s translation project and the resulting hiring spree at the time.

### **The Current State of Bilingual Statutes and Regulations**

Manitoba now enacts and publishes all statutes and most regulations in a bilingual dual-column format. Regulations that are not made by Cabinet and that do not require Cabinet approval are published in English only.

The translation process in Canada has undergone an evolution. Historically, translation took place after drafters of the English-language version finished their work, with minimal discussion between drafters and translators ("*en vase clos*"). While Quebec (a province in which French is the predominant language) was one of the last jurisdictions favouring this approach, using it to prepare English versions of French drafts until a few years ago,<sup>15</sup> translation *en vase clos* has now fallen out of favour across Canada.

At the federal level, statutes and regulations have been co-drafted for several decades, with anglophone and francophone drafters working together in the same drafting room in real-time.<sup>16</sup> In a small jurisdiction such as Manitoba, such an approach is impracticable. Instead, laws are translated by a process of cooperative translation, in which the initial draft is

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<sup>13</sup> *Attorney General of Manitoba v. Forest*, [1979] 2 SCR 1032.

<sup>14</sup> *Re Manitoba Language Rights* [1985] 1 SCR 721.

<sup>15</sup> Karine McLaren, "Bilinguisme législatif: regard sur l'interprétation et la rédaction des lois bilingues au Canada" (2015) 45:1 *Ottawa Law Review* 21, at page 25.

<sup>16</sup> For a more detailed description of this approach, and the stylistic differences that may result from "two originals", see Susan Šarčević, "The Quest for Legislative Bilingualism and Multilingualism: Co-Drafting in Canada and Switzerland", in Jean-Claude G  mar and Nicholas Kasirer, eds, *Jurilinguistique: entre langues et droits* (Montr  al:   ditions Th  mis, 2004), at page 277.



prepared by anglophone lawyers and translated by translators working in the same office, who can discuss any questions on the draft with the person who prepared it. A bilingual translation counsel provides a final legal review. While this may not match the federal “gold standard” of co-drafting, it is a significant improvement over the historical approach of solitary translation and has resulted in a bilingual statute book that approximates the quality of the federal version.

The Uniform Law Conference of Canada (ULCC) recently revised its drafting conventions to recognize both co-drafting and cooperative translation as valid approaches to creating bilingual legislation, making it clear that “translators must have access to the drafter of the original version and relevant material to ensure they understand the original”.<sup>17</sup> The revisions also make it clear that the translation process benefits from the involvement of a jurilinguist (a specialist in legal language) and a legal counsel who reviews each version.<sup>18</sup>

### The Law on Bilingual Interpretation

Canada has a well-developed body of caselaw on the bilingual interpretation of statutes, most of which arises from disputes over federal legislation. Legally, both versions have equal authority, and either may be used. This is known as the “equal authenticity” rule. In Manitoba, the rule is enshrined in section 7 of *The Interpretation Act*:<sup>19</sup>

#### Bilingual Versions

**7** The English and French versions of Acts and regulations are equally authoritative, in accordance with section 23 of the *Manitoba Act, 1870*.

#### Versions bilingues

**7** Les versions française et anglaise des lois et des règlements font pareillement autorité, en conformité avec l'article 23 de la *Loi de 1870 sur le Manitoba*.

The only province with a bilingual statute book that currently does not apply the equal authenticity rule is Quebec, which resolves any potential inconsistency by giving primacy to the French version. Specifically, in 2022 Quebec enacted an amendment to the *Charte de la langue française* [Charter of the French Language] that states that in the case of a discrepancy between the French and English versions of legislation that cannot be properly resolved using the ordinary rules of interpretation, the French text prevails.<sup>20</sup>

Quebec’s solution of giving primacy to the French language is constitutionally questionable and unlikely to stand the test of time. Under section 133 of Canada’s *Constitution Act, 1867* the Legislature of Quebec is required to print and publish enactments in both English and

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<sup>17</sup> Uniform Law Conference of Canada, [Revision of the Drafting Conventions](#) (August 22, 2023), p. 42

<sup>18</sup> *Ibid.*, p. 43

<sup>19</sup> *The Interpretation Act*, [C.C.S.M. c. 180](#).

<sup>20</sup> See section 7.1 of the *Charte de la langue française*, [CQLR c. C-11](#).

French.<sup>21</sup> In the 1970s, when the *Charte de la langue française* was first enacted, Quebec included a provision stating that only the French text of the statutes and regulations is official.<sup>22</sup> The Supreme Court of Canada held this to be unconstitutional.<sup>23</sup> While the 2022 amendment aims for primacy rather than exclusivity, it may eventually meet a similar fate as the original provision.

The current approach to bilingual interpretation of statutes in jurisdictions that apply the equal authenticity rule was established by the Supreme Court of Canada in *R. v. Daoust*.<sup>24</sup> The *Daoust* judgment was written by Michel Bastarache, one of the co-authors of the 2008 textbook *The Law of Bilingual Interpretation*, published a few months before his retirement from the Supreme Court.<sup>25</sup> That book attempts to paraphrase the test as follows:

1. The first step consists in examining the two versions to determine whether there is a discordance between the two versions. “Discordance” here has the same meaning as “conflict” does in any of the earlier cases: If the two versions are the same, there is really no issue. If there is a discordance, the interpreter must proceed to the next step.
2. The second step consists in determining the nature of the discordance, and determining the shared meaning. There are three possibilities here:
  - a. The versions are in “absolute conflict”. Each is clear and no shared meaning can be found.
  - b. One version is ambiguous and the other clear. The clear version provides the shared meaning.
  - c. One version is broad and the other narrow. The narrow version provides the shared meaning.
3. At the conclusion of the second step, the interpreter is armed either with (i) a shared meaning, arising out of (b) or (c), or (ii) a conclusion that no shared meaning exists, arising out of (a).
4. The third step consists of an appeal to extrinsic methods of determining the intention of the legislator with respect to the provision. There are two possibilities here:
  - a. The extrinsic evidence of intent allows for a choice between the two conflicting versions as to which provides the true meaning of the provision.

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<sup>21</sup> *Constitution Act, 1867*, [30 & 31 Victoria, c. 3 \(U.K.\)](#), s. 133.

<sup>22</sup> *Charte de la langue française*, [L.Q. 1977, c. 5](#), s. 9.

<sup>23</sup> *Att. Gen. of Quebec v. Blaikie et al.*, [\[1979\] 2 SCR 1016](#).

<sup>24</sup> *R. v. Daoust*, [2004 SCC 6](#), at paras. 27-31.

<sup>25</sup> *The Law of Bilingual Interpretation*, *supra*, at note 8.

- b. [or c.] The extrinsic evidence of intent is examined to ensure that the shared meaning is not inconsistent with it.<sup>26</sup>

In *Daoust*, the issue was whether the owner of a pawn shop was guilty of purchasing stolen merchandise. In a sting operation, a police officer disguised as a disadvantaged individual repeatedly sold new or slightly used video players and other merchandise to the pawn shop, following which Mr. Daoust was charged. Both the English and French versions of the Criminal Code listed prohibited actions concerning stolen property, but the English version also made it an offence “to otherwise deal with it in any manner and by any means”. The court found that both versions were unambiguous but irreconcilable, settling on the more restrictive French version. Mr. Daoust was acquitted as a result.

The *Daoust* decision was released in 2004 and has received some academic criticism. In particular, Salembier has argued that if the narrow meaning is adopted 100% of the time, statistically the outcome will be wrong 50% of the time.<sup>27</sup> While this may be a gross simplification, there is some merit to Salembier’s criticism. A rule mandating a narrow interpretation by default presupposes that the legislature intended to minimize the intrusion of legislation on the rights of affected parties. However, the rule ignores that a difference in meaning is most likely the result of a drafting mistake or misunderstanding and that the broader meaning could very well be what was intended in the first place. Minimizing the intrusion on rights may be good policy, but it is unlikely to lead to an accurate reflection of legislative intent.

Sullivan has similarly noted that when the existence of a shared meaning gives rise to a presumption in favour of the shared meaning, it transforms the interpretive question from “what is the best or most plausible meaning having regard to the purpose and context?” into “is there other evidence of legislative intent that is sufficient to rebut the presumption?”<sup>28</sup> Her criticism further highlights the difficulty of resolving the meaning of legislation through default rules.

The *Daoust* approach is, however, currently deeply entrenched in Canadian case law. As explained below, practical difficulties generally arise not from the application of the rule itself, but rather from insufficient language skills to enable a nuanced determination of the meaning of the French provisions in the first place.

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<sup>26</sup> *Ibid.*, at pp. 47-48.

<sup>27</sup> Paul Salembier, “Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule” (2003) *Ottawa Law Review* 75, at page 86.

<sup>28</sup> Ruth Sullivan, “Some Problems with the Shared Meaning Rule as Formulated in *R v. Daoust* and The Law of Bilingual Interpretation” (2010) 21:1 *Ottawa Law Review* 71, at page 79.

## Practical Difficulties Faced by the Bar

While the purpose of bilingual legislation is to make the law accessible to more people and to respect both languages in an officially bilingual jurisdiction, the evolution of complicated bilingual interpretation rules may have undermined that purpose. This irony has not escaped academic experts on statute law. McLaren has noted a paradox in that the aim of bilingual legislation is to make it accessible to the biggest number of readers, but the principles of statutory interpretation are accessible only to the small number of people who can read and understand both versions.<sup>29</sup> Similarly, Côté has noted that:

Pour [l]es tribunaux, en effet, l'uniformité d'interprétation et d'application de la loi constitue un impératif, alors que son intelligibilité ne représente qu'un idéal.<sup>30</sup>

[For the courts, in effect, uniformity in the way the law is interpreted and applied is imperative, but understandability is a mere aspiration.]

Statutory interpretation is a matter of nuance, as clear and unambiguous provisions rarely lead to disputes about meaning. But language cannot be divorced from its cultural context, nor can legal terms be divorced from their history. Sometimes, this is obvious. For example, many English legal doublets such as “null and void” have their origins in the Norman conquest of England and the blending of the Norman and Anglo-Saxon legal systems.<sup>31</sup> Similarly, the use of doublets such as “mortgage or hypothec” in Canadian federal statutes reflects the use of both the common law term (mortgage) and the civil law term for use in Quebec (hypothec).<sup>32</sup> But cultural impacts can also be more subtle, especially when a language traditionally reserved for civil law is superimposed on the common law.

In the opinion of the writer, common law is extrapolative while civil law is interpolative. Common law relies on a body of case law precedents being applied to new fact scenarios that may not have been contemplated. In contrast, civil law (as exemplified by the *Code civil du Québec*) relies on a set of broad rules that are generic enough to apply to new situations. In effect, English common law evolved as a bottom-up legal system, while French civil law evolved as a top-down legal system.

To some extent, the distinction between the two legal systems has been reduced over the years as both primary and secondary legislation has become increasingly prescriptive.

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<sup>29</sup> McLaren, *supra* at note 14, at page 39.

<sup>30</sup> Pierre-André Côté, “La tension entre l’intelligibilité et l’uniformité dans l’interprétation des lois plurilingues” in Jean-Claude G  mar and Nicholas Kasirer, eds, *Jurilinguistique: entre langues et droits* (Montreal:   ditions Th  mis, 2004), at page 136.

<sup>31</sup> For other examples, see Malcom Harvey, “Pardon my French: The Influence of French on Legal English”, in Jean-Claude G  mar and Nicholas Kasirer, eds, *Jurilinguistique: entre langues et droits* (Montr  al:   ditions Th  mis, 2004), at p. 261.

<sup>32</sup> *Interest Act* (Canada), [R.S.C. 1985, c. I-15](#).

However, linguistic nuances continue to exist. By way of an illustration, in 2018 a private member introduced a bill in Manitoba to expand the scope of *The Intoxicated Persons Detention Act* to include people under the influence of drugs as well as alcohol. The English term “intoxicated” is sufficiently broad to capture both of these meanings. However, in the French version of the statute, “*en état d’ébriété*” [in a state of inebriation] needed to be changed to “*ivres ou droguées*” [drunk or under the influence of drugs], necessitating the following French-only provision to change the title of the statute:<sup>33</sup>

2 The title of the French version is amended by striking out “EN ÉTAT D’ÉBRIÉTÉ” and substituting “IVRES OU DROGUÉES”.

2 Le titre de la version française est modifié par substitution, à « EN ÉTAT D’ÉBRIÉTÉ », de « IVRES OU DROGUÉES ».

Understanding these types of nuances requires lawyers to be fluently bilingual. On the Canadian prairies, not many are.

At both the federal and provincial levels, those who create the law have worked hard to make the terminology fit and facilitate a statute book in which the provisions are truly equal. In the 1980s, the federal government began an initiative to create glossaries of French private law terms.<sup>34</sup> Similarly, in Manitoba, the Centre de ressources en français juridique has created several subject-specific dictionaries of legal terminology.<sup>35</sup> In 2013, the Law Society of Manitoba further sponsored a primer for practitioners on the interpretation of bilingual legal documents in Manitoba, presented jointly with L’Association des juristes d’expression française du Manitoba (AJEFM).<sup>36</sup> However, bilingual interpretation remained a niche issue among the largely unilingual bar, until Manitoba’s courts lost their patience.

### **Manitoba’s Courts — From Self-Initiated Bilingual Interpretation to a Formal Practice Directive**

A series of Manitoba court decisions beginning in 2014 has demonstrated a growing impatience with the absence of bilingual interpretation arguments when a statutory provision may be ambiguous. This ultimately led the Manitoba Court of King’s Bench to issue a practice direction in 2023 that requires lawyers to address bilingual interpretation issues as part of any argument involving statutory interpretation.

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<sup>33</sup> [Bill 229](#), *The Intoxicated Persons Detention Amendment Act*, 3<sup>rd</sup> Session, 41<sup>st</sup> Legislature, 2018.

<sup>34</sup> See e.g., [Bulletin BT-266 – Law of Contracts and Law of Torts \(Common Law\)](#).

<sup>35</sup> See: [Centre de ressources en français juridiques \(ustboniface.ca\)](#).

<sup>36</sup> Law Society of Manitoba, [Interpretation of Bilingual Legal Documents: A Primer for Practitioners](#), February 15, 2013.

In *Winnipeg School Division v. Winnipeg*, the question was whether a school division had to pay municipal property tax for a school parking lot the division owned.<sup>37</sup> At issue was the following exemption provision:<sup>38</sup>

**Real property partial exemptions**

**22(1)** Subject to sections 25 and 26, real property is exempt from taxation levied by a municipality, other than for local improvements, where the real property

[...]

(d) is used for a public school within the meaning of *The Public Schools Act* or a private school within the meaning of *The Education Administration Act*, to a maximum exemption of 4.047 hectares;

**Exemptions partielles**

**22(1)** Sous réserve des articles 25 et 26, les biens réels sont exempts de la taxe municipale, à l'exception de la taxe pour les travaux d'améliorations locales, dans les cas suivants :

[...]

d) ils sont utilisés pour les besoins d'une école publique au sens de la *Loi sur les écoles publiques* ou d'une école privée au sens de la *Loi sur l'administration scolaire*, la superficie maximale exemptée étant de 4,047 hectares;

After commenting that none of the parties had flagged any differences between the English and French versions of the statute, the court on its own initiative noted that the English version of clause 22(1)(d) exempts property “used for a public school” while the French version (“*utilisés pour les besoins d'une école*”) exempts property “used for the needs of a public school” (emphasis added). The court ultimately concluded that the two versions could be read together harmoniously and ruled that the parking lot was exempt from property tax.<sup>39</sup>

In *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board) et al.* the question was whether Manitoba's public utilities regulator had the authority to order the provincial electric utility to establish a reduced rate for First Nations (Indigenous) residential customers living on reserves.<sup>40</sup> One of the legislative provisions at issue read as follows:<sup>41</sup>

**Factors to be considered, hearings**

**25(4)** In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

[...]

**Éléments à considérer**

**25(4)** Afin de prendre une décision en vertu de la présente partie, la Régie des services publics peut:

a) tenir compte :

[...]

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<sup>37</sup> *Winnipeg School Division v. Winnipeg*, [2014 MBCA 50](#).

<sup>38</sup> *The Municipal Assessment Act*, [C.C.S.M. c. M226](#).

<sup>39</sup> *Winnipeg School Division*, *supra* at note 27, at paras. 24-28.

<sup>40</sup> *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board) et al.*, [2020 MBCA 60](#).

<sup>41</sup> *The Crown Corporations Governance and Accountability Act*, [C.C.S.M. c. C336](#).

(viii) any compelling policy considerations that the board considers relevant to the matter, and

(ix) any other factors that the board considers relevant to the matter.

(viii) des considérations de principe importantes qu'elle estime pertinentes à l'affaire,

(ix) des autres éléments qu'elle estime pertinents à l'affaire;

The court pointed out that the French version of subclause 25(a)(viii) (“*des considérations de principe importantes qu'elle estime pertinentes à l'affaire*”) was broader than the English version and allowed the consideration of “important policy considerations”, which could arguably influence the interpretation of “compelling policy considerations”. The court then noted that the matter was not argued before it and it would not comment further on the issue.

In April 2022, Manitoba’s Court of King’s Bench (the court of first instance) added the following provision to its rules of practice:<sup>42</sup>

**Bilingual statutory provisions in brief**

**37.08(4.1)** If a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

**Dispositions législatives bilingues dans le mémoire**

**37.08(4.1)** La partie qui entend invoquer une disposition législative dont la loi exige l'impression et la publication en français et en anglais inclut ces deux versions dans son mémoire.

In August 2022, the Manitoba Court of Appeal followed suit, adding the following requirement in its rules of procedure:<sup>43</sup>

If a statute, regulation, rule, ordinance or by-law contained in a factum or case book is required by law to be printed and published in English and French, a bilingual version must be included in the factum or case book or deposited with the court.

[L]es passages des lois, règlements, règles, ordonnances ou arrêtés municipaux cités ou invoqués dans les arguments qui sont jugés connexes au règlement de l'appel doivent être soit inclus dans le mémoire ou le recueil de textes jurisprudentiels, soit déposés au tribunal en trois copies et si la loi exige l'impression et la publication de ces passages en français et en anglais, ces deux versions doivent être incluses ou déposées, selon le cas[.]

As these rule amendments came into effect, a politically sensitive case was winding its way through the Manitoba court system. In *5185603 Manitoba Ltd et al v. Government of Manitoba et al*, the Manitoba Court of Appeal was asked to interpret the impact of a statutory termination of a lease. At issue was a lease between a private corporation and a

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<sup>42</sup> *Court of Queen’s Bench Rules, amendment*, [Man. Reg. 44/2022](#).

<sup>43</sup> *Court of Appeal Rules, amendment*, [Man. Reg. 117/2022](#), s. 2.



government-funded Indigenous child welfare agency.<sup>44</sup> After a change in government and failed negotiations to end the lease on a consensual basis, the government unilaterally terminated the lease, resulting in the landlord suing the government, the Premier, and the responsible Deputy Minister for misfeasance in public office, interference with economic relations, and defamation. Through targeted legislation, the legislative assembly subsequently enacted a statutory termination of the lease that included the following bar to litigation:

**Proceedings barred**

**230(6)** No action or other proceeding, including but not limited to any action or proceeding in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, that is directly or indirectly based on or related to the application of this section may be brought or maintained against any person.

**Proceedings dismissed**

**230(9)** Any action or other proceeding referred to in subsection (6) commenced before the day this section comes into force is deemed to have been dismissed, without costs, on the day this section comes into force, including, without limitation, Court of Queen's Bench File No. C19-01-21887.

**Irrecevabilité de certaines instances**

**230(6)** Sont irrecevables les instances — liées notamment à la rupture d'obligations en matière contractuelle, délictuelle, fiduciaire ou de restitution ou à une mauvaise exécution ou à un acte de mauvaise foi — qui ont pour objet ou fondement, direct ou indirect, l'application du présent article.

**Rejet d'instances**

**230(9)** Les instances visées au paragraphe (6) qui sont introduites avant le jour de l'entrée en vigueur du présent article, y compris le dossier de la Cour du Banc de la Reine du Manitoba numéro C19-01-21887, sont réputées avoir été rejetées, sans dépens, ce jour-là.

A motion to dismiss the litigation proceeded first to a master of the Court of King's Bench and then, by way of appeal, to a judge of the Court of King's Bench who struck the claim.<sup>45</sup> When the matter was appealed to the Court of Appeal, that court was critical of the lower court's failure to conduct a bilingual interpretation of the provision. In the Court of Appeal's view, the lower court conducted a plain reading of the English version of the statute but did not consider the French version. The Court of Appeal then found that subsection 230(6) of the English version of the statute barred actions "directly or indirectly based on or related to" the lease, while the French version ("*qui ont pour objet ou fondement, direct ou indirect*") is narrower and only bars actions based on or founded on the legislated termination of the lease, but not actions related to it.<sup>46</sup> The Court of Appeal ultimately found

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<sup>44</sup> 5185603 Manitoba Ltd et al v. Government of Manitoba et al, [2023 MBCA 47](#).

<sup>45</sup> 5185603 Manitoba Ltd. et al. v. Government of Manitoba et al., [2022 MBQB 36](#).

<sup>46</sup> 5185603 Manitoba Ltd., *supra* at note 34, at paras. 25 to 27.



that the defamation action was not “based on or founded on” the legislated termination of the lease, and overturned the lower court’s dismissal of that portion of the claim.

Procedurally, it should be noted that while the Court of Appeal judgment in this case was delivered after the court rules were amended, the lower court decision preceded both amendments.

Approximately a month after the release of the Manitoba Court of Appeal’s decision in *5185603 Manitoba Ltd.*, the Court of King’s Bench issued the following practice direction to Manitoba’s legal profession on June 25, 2023, specifically referencing the Manitoba Court of Appeal’s finding:

As noted in *5185603 Manitoba Ltd et al v Government of Manitoba et al*, 2023 MBCA 47, Manitoba statutes are, by virtue of section 23 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, constitutionally mandated to be bilingual in French and English (see also section 7 of *The Interpretation Act*, C.C.S.M. c. I80). As also noted in this decision, the law relating to bilingual interpretation of legislation involves a search for the shared meaning of the English and French versions. In order to ensure that proper consideration is given to both the French and English versions of legislation where a case involves an issue of statutory interpretation, counsel or a self-represented litigant are to address in their related submissions whether there is discrepancy between the English and French versions. If there is discrepancy, this discrepancy is to be addressed in the submissions regarding the proper interpretation of the statutory provision(s) at issue in accordance with the approach outlined in *5185603 Manitoba Ltd et al v Government of Manitoba et al*.

[...]

This Practice Direction comes into effect immediately.<sup>47</sup>

Practice directions are not uncommon, but they are usually limited to procedural matters.<sup>48</sup> It is very unusual for a court to direct, by way of a practice direction, that lawyers must address a specific substantive issue when arguing a case. The unusual practice direction reproduced above suggests that the court was frustrated with the Manitoba bar treating the issue of bilingual interpretation as an afterthought.

### **The Future of Bilingual Interpretation in Manitoba**

Shortly after the release of the practice direction on bilingual interpretation, the writer’s firm instituted a policy that any litigator intending to rely on a statutory interpretation argument

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<sup>47</sup> Court of King’s Bench of Manitoba [Practice Direction re: Cases Involving Statutory Interpretation](#) (June 25, 2023).

<sup>48</sup> A list of all [Practice Directions](#) currently in effect is available on the court’s website.

in a case must involve one of several designated French-speaking lawyers (which includes the writer) in a review of the statutory or regulatory provision. That lawyer is to flag any potential inconsistency in meaning. The policy is intended to address any such inconsistency early and allow for adequate research and writing time to develop a potential argument.

Large Manitoba firms who have bilingual lawyers on staff are likely well-positioned to comply with the new practice direction and deliver well-developed arguments on issues of bilingual interpretation. However, for smaller firms and sole practitioners, this may prove to be a challenge. It is entirely foreseeable that a year from now courts will once again become exasperated, only this time by lawyers who use translation software to comply with the practice direction but miss the linguistic and stylistic nuances between Manitoba's two official languages.

In any case, it appears that the days of bilingual interpretation being the realm of a handful of linguistic pedants are over. Luckily Robson Hall, Manitoba's only law school, has been steadily increasing the number of French-language law courses and other resources.<sup>49</sup> A little more than 35 years ago, Manitoba's statute book became bilingual when the *Reference re Manitoba Language Rights* made it clear that minority language rights cannot be sacrificed for administrative convenience. Now, Manitoba's lawyers may have to make a concerted effort to become bilingual as well.

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<sup>49</sup> See: [Concentration in Access to Justice in French | Faculty of Law | University of Manitoba \(umanitoba.ca\)](#). See also: [Learn Law in French at Robson Hall — YouTube](#).

# Terminating Contracts by Legislation – Where Does Parliamentary Supremacy End and Judicial Independence Begin?

Sven Hombach<sup>1</sup>



## Abstract

*When controversial projects go awry, governments may be tempted to terminate contractual arrangements by legislation. Canadian courts have upheld the legality of this practice under the doctrine of parliamentary supremacy. But what happens when a government goes one step further and also terminates any underlying litigation by statute? Where does parliamentary supremacy end and judicial independence begin? This article explores the issue in the context of recent jurisprudence by the Manitoba Court of Appeal in 5185603 Manitoba Ltd. v. Government of Manitoba.*

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## Introduction

Canadians are routinely surprised to learn that, unlike the U.S. Constitution, the *Canadian Charter of Rights and Freedoms* does not protect property rights.<sup>2</sup> While statutes regulating the expropriation of land (i.e., eminent domain) exist in all provinces and there are well-established compensation regimes for expropriation claims, there is no constitutional right to property. As a result, there is an aspect of sovereign risk in contracts with governmental counterparties that tends to rear its head when high-profile infrastructure projects go wrong — the termination of contracts by legislation. Canadian courts have routinely upheld such terminations under the doctrine of parliamentary supremacy. But what if governments go one step further and terminate the resulting litigation by statute as well? This article explores that issue using the recent Manitoba Court of Appeal case in *5185603 Manitoba Ltd. et al v. Government of Manitoba et al.*<sup>3</sup>

## Termination by Legislation — A Utility Lawyer’s Lived Reality

Termination by legislation usually arises with infrastructure projects, with a disproportionate number of such cases arising in the energy and utility sector. Lawyers advising project proponents or regulated utilities know to point out the sovereign risk aspect of such projects.

In the mid-1990s, the issue arose with respect to the Lester B. Pearson International Airport in Toronto. In 1994, the federal government introduced Bill C-22 to terminate several contracts relating to the redevelopment of Canada’s largest airport.<sup>4</sup> The bill purported to declare the contracts “not to have come into force and to have no legal effect”.<sup>5</sup> The bill also included an exclusion from liability, indicating that no action or other proceeding may be instituted based on or in relation to the contracts.<sup>6</sup> The proposed legislation was

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<sup>2</sup> For a discussion of how and why property rights came to be excluded, see Dwight Newman and Lorelle Binion, “The Exclusion of Property Rights from the Charter: Correcting the Historical Record” ([2015](#)) 52:3 *Alberta Law Review* 543.

<sup>3</sup> *5185603 Manitoba Ltd et al v. Government of Manitoba et al*, 2023 MBCA 47.

<sup>4</sup> Bill C-22, *An Act respecting certain agreements concerning the redevelopment and operation of Terminals 1 and 2 at the Lester B. Pearson International Airport*, 1<sup>st</sup> Sess., 35<sup>th</sup> Parl., 1994.

<sup>5</sup> *Ibid.*, s. 3.

<sup>6</sup> *Ibid.*, s. 4.

controversial and, after several attempts of amending it to pass the Senate (Canada's upper legislative chamber), was defeated.<sup>7</sup>

More recently, termination by legislation was used to cancel a large windfarm development in Ontario. In 2009, Ontario's Liberal government introduced legislation to facilitate renewable energy projects and establish a feed-in-tariff (FIT) under which the provincial government would enter into 20-year power purchase agreements at a fixed price per kilowatt-hour (kWh). In addition, the legislation established higher rates for small-scale projects under a regime called microFIT that paid rates of up to 80.2 cents per kWh for solar photovoltaic projects, which was more than 10 times the prevailing retail electricity rate. Because of the substantial provincial subsidies involved, the energy policy underpinning FIT and microFIT soon became controversial. In a prescient 2014 research bulletin issued while the Liberal government was in the middle of its second term, the Fraser Institute (a conservative Canadian think tank) stated that:

Government contracts are indeed contracts. In the normal course, their terms may be enforced and the Crown is held liable for a breach. But matters are not always in the normal course. Government contracts are not the ironclad agreements they appear to be because governments may change or cancel them by enacting legislation. The Liberals have been returned to a majority government in Ontario. The people of that province will not see whether and to what extent the provincial Tories and NDP would have pursued their campaign musings to revisit renewable energy deals that the Liberals put in place, but they certainly would have had the power to do so had they been elected.<sup>8</sup>

In Ontario's 2018 election, energy policy (especially the reliance on wind subsidies) became an election issue and the outgoing Liberal government lost the election to a new Progressive Conservative government. One of the first legislative acts of the new government was to pass the *Urgent Priorities Act, 2018*,<sup>9</sup> which included the *White Pines Wind Project Termination Act, 2018*.<sup>10</sup> That statute terminated the power purchase agreement for an 18.45 MW wind farm between Ontario's Independent Electricity System Operator (IESO) and a German consortium.<sup>11</sup> The *Urgent Priorities Act, 2018* was fast-tracked through the legislature. The election took place on June 7, 2018. The Act received 1<sup>st</sup> reading on July 16,

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<sup>7</sup> For a history of this bill, see Patrick J. Monahan, "Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33:3 *Osgoode Hall Law Review* 411.

<sup>8</sup> Bruce Pardy, "Cancelling Contracts: The Power of Governments to Unilaterally Alter Agreements", Fraser Research Bulletin, October 2014.

<sup>9</sup> *An Act respecting Hydro One Limited, the termination of the White Pines Wind Project and the labour disputes between York University and Canadian Union of Public Employees, Local 3903* (short title: *Urgent Priorities Act, 2018*), S.O. 2018, c. 10 S.O. 2018, c. 10.

<sup>10</sup> *Ibid.*, Schedule 2.

<sup>11</sup> *Ibid.*, Schedule 2, s. 3.

2018 (less than six weeks later) and Royal Assent nine days after it was introduced. Unsurprisingly, this heavy-handed approach triggered an immediate protest by the German government.<sup>12</sup>

Ontario's bill included a "scorched earth" provision that also cancelled the regulatory approvals for the project (making the underlying power purchase agreement worthless even if it were to survive the legislation). In addition, the legislation included an express statement that the termination did not amount to expropriation. However, the legislation included a compensation provision that largely mirrored the early termination provisions set out in the standard agreements.<sup>13</sup> As such, the project proponent was left with some recourse to compensation, with the consortium indicating that it would seek at least \$100M under the formula.<sup>14</sup>

### Cementing the Orthodoxy of Parliamentary Supremacy

In a twist of irony, when Ontario's new government cancelled an eight-figure wind project by legislation less than two months after coming into power, the staunchest critic of the Toronto airport legislation a decade earlier had just been appointed to the bench. In 1995, Patrick Monahan (then a law professor at Osgoode Hall Law School) wrote a scathing article in the *Osgoode Hall Law Journal* called "Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government".<sup>15</sup> In that article, Monahan challenged the orthodoxy that "[t]he prohibition '[t]hou shalt not steal', has no legal force upon the sovereign body."<sup>16</sup> He based his view on the rule of law:

The traditional or orthodox position is that Parliament may authorize the Crown to "skip out" on a contract *for any reason whatsoever*. In effect, it is an assertion that the word of government means nothing, that the state can solemnly promise something one day and renege on that promise the next, without any legal consequences, as long as such arbitrary action is ratified by statute. Because such a doctrine flatly contradicts the whole notion of government according to law, it must be contrary to the principle of the rule of law.<sup>17</sup>

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<sup>12</sup> Shawn McCarthy, "Cancellation of German-owned Ontario wind project prompts warning from Berlin", [The Globe and Mail](#), July 23, 2018.

<sup>13</sup> *Urgent Priorities Act*, 2018, *supra*, at note 9, s. 6.

<sup>14</sup> Shawn McCarthy, "German company to seek damages after Ontario wind project cancelled", *The Globe and Mail*, July 18, 2018.

<sup>15</sup> *Monahan*, *supra*, note 7.

<sup>16</sup> *Ibid.* at p. 412, citing *Florence Mining Co v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at 279 (C.A.).

<sup>17</sup> *Ibid.* at 432.

In Monahan's view, there had been a shift beginning in 1985 towards a new approach to parliamentary supremacy, beginning with the *Reference re Manitoba Language Rights* (discussed in more detail in the preceding article, "Bilingual Interpretation in a Unilingual Environment") in which the Supreme Court of Canada found that:

The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one government by the rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.<sup>18</sup>

Critics of termination by legislation have not confined themselves to rule of law arguments. For example, Posner and Vermeulen have taken a law & economics approach, arguing that "entrenchment", i.e., the ability to bind future governments, enables a government to make a credible commitment that a future government will not repudiate a contract, ultimately resulting in cheaper public contracts.<sup>19</sup>

However, cases decided since the mid-1990s have not borne out Monahan's view that the *Reference re Manitoba Language Rights* marked a shift in the approach to parliamentary supremacy. Instead, the orthodox view of parliamentary supremacy has been further cemented in Canadian law.

*Wells v. Newfoundland*, decided in 1999, involved a lawsuit by a former commissioner and consumer representative of the Newfoundland Public Utilities Board whose position had been abolished by statute.<sup>20</sup> With the deregulation of the trucking industry in the 1980s and a Supreme Court of Canada decision that the federal Canadian Radio-television and Telecommunications Commission (CRTC) had jurisdiction over telephone utilities, the work for the Newfoundland board had dwindled and the provincial government decided to reconstitute a leaner (and ultimately meaner) board. By legislation, the provincial government eliminated the position of consumer representative and terminated Mr. Wells' position.<sup>21</sup> The Supreme Court of Canada affirmed that the government had the right to eliminate the board and to deny Mr. Wells compensation.<sup>22</sup> However, on the facts of the case, the court found that the legislation was not clear and unambiguous enough to deny him compensation.<sup>23</sup>

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<sup>18</sup> Ibid. at 421-422, citing *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

<sup>19</sup> Eric A. Posner and Adrian Vermeulen, "Legislative Entrenchment: A Reappraisal", 2002:111 *The Yale Law Journal* 1665, at p. 1671.

<sup>20</sup> *Wells v. Newfoundland*, [1999] 3 SCR 199.

<sup>21</sup> *Public Utilities Act*, 1989, S.N. 1989, c. 37.

<sup>22</sup> *Wells*, supra at note 20, para. 41.

<sup>23</sup> Ibid., para. 55. Despite the litigation, things went well for Mr. Wells. He eventually became the mayor of St. John's (the capital of Newfoundland) for more than ten years and, also a twist of irony, was appointed as

A more recent case is *Clitheroe v. Hydro One Inc.*, decided in 2009.<sup>24</sup> Hydro One Inc. is a publicly listed energy utility in Ontario that resulted from the privatization of the electricity sector in the late 1990s and was initially owned by the province. In 2002, the Ontario government passed the *Hydro One Inc. Directors and Officers Act, 2002* that, among other things, limited the pension entitlement for the utility's designated officers.<sup>25</sup> Ontario Hydro's CFO attacked the legislation in court, which dismissed the claim and affirmed that the legislature can divest a person of contractual rights if those rights are expressed in clear and unambiguous terms.

In the view of the writer, the existing judicial approach to termination by legislation is likely to continue. Governments are not private actors and many commercial agreements have a longer shelf life than the governments that signed them. In Ontario's example, the impugned power purchase agreement was for 20 years. While private entities can arrange corporate structures to shelter liabilities, governments do not have that option. The flip side of Posner and Vermeulen's arguments is that, in the absence of the parliamentary supremacy doctrine, outgoing governments would have the ability to saddle incoming governments with "poison pill" arrangements that ultimately would be to the detriment of taxpayers.

Nonetheless, more than 35 years after the *Reference re Manitoba Language Rights*, Manitoba has recently been testing the outer bounds of parliamentary supremacy and when that doctrine begins to conflict with the doctrine of judicial independence. At issue was whether a government could use the doctrine of parliamentary supremacy to terminate not just a contract, but litigation surrounding that contract as well.

### Three Attempts to Terminate a Lease by Legislation

Like most terminations by legislation, the case of *5185603 Manitoba Ltd. et al. v. Government of Manitoba et al.* had its origin in political controversy. In the late 2000s, Manitoba's New Democratic Party government was under pressure for the number of Indigenous children in care being housed in hotels.<sup>26</sup> At the time, the Southern First Nations Network of Care, also known as the Southern Authority, was an Indigenous child welfare agency that had been placed under government administration.<sup>27</sup> The provincial government,

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chair of the new Public Utilities Board in 2008, almost 20 after having been legislatively terminated from the old one.

<sup>24</sup> *Clitheroe v. Hydro One Inc.*, 2009 CanLII 33029 (ON SC).

<sup>25</sup> *Hydro One Inc. Directors and Officers Act, 2002*, S.O. 2002, c. 3.

<sup>26</sup> More than 90% of children in care in Manitoba are Indigenous. See Lise Milner, Alessia Petrela & Nico Tromé, "Manitoba's Child Welfare System", *Canadian Child Welfare Research Portal*, January 2023.

<sup>27</sup> For background, see "First Nation CFS authority taken over by province", CBC News, November 23, 2023.



in its role as administrator entered into a 20-year sole-sourced building lease for the agency to house children in care.

In 2016, administration of the Southern Authority was returned from the provincial government to a new board. According to media reports, an auditor appointed by the new board raised red flags and determined that the lease rate was twice the market rate.<sup>28</sup> The audit also determined that a termination provision had been removed late in the negotiation process. The matter received a significant degree of media attention as a result of the building owner allegedly receiving \$10 million over the term of the lease against an investment of approximately \$2.5 million and the new CEO of the child welfare agency going on record to indicate that the Authority could not afford the approximately \$500,000 per year lease payments.

Failing attempts by the new government to negotiate a termination of the lease, the government introduced Bill 32, *An Act Concerning the Leasing of 800 Adele Avenue, Winnipeg*.<sup>29</sup> Bill 32 purported to terminate the lease, bar any cause of action or legal proceeding, and deem any proceeding commenced before the Bill received Royal Assent to be dismissed. It also specifically indicated that no compensation was payable as a result of the termination.

Bill 32 never received Royal Assent. Instead, it “died on the Order Paper” as a result of a peculiarity in Manitoba’s rules for committee debates. In Manitoba, like in most Commonwealth jurisdictions, bills must be referred to committee after 2<sup>nd</sup> reading for the bills to continue to move through the legislature. However, in Manitoba, members of the public also have the right to make public presentations of up to 10 minutes on bills, with an additional five minutes allocated for questions.<sup>30</sup> Committee begins at 6:00 PM and must stop at midnight unless there is unanimous consent to continue.<sup>31</sup> Accordingly, it is possible to filibuster a bill at committee by having an adequate number of presenters. This is exactly what happened when Bill 32 went to committee. In what was most likely a well-organized filibuster, the committee clock was run out until midnight, ending the passage of Bill 32.<sup>32</sup>

The rule that public presenters must be allowed to speak on a bill does not apply to Manitoba’s finance bills that are debated in Committee of the Whole in the Legislative Assembly. Accordingly, the next version of the statute was included in Manitoba’s budget

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<sup>28</sup> For background, see “Child welfare agency signed \$10M untendered lease with company party owned by Peter Ginakes: audit”, CBC News, 2016.

<sup>29</sup> Bill 32, *An Act Concerning the Leasing of 800 Adele Avenue, Winnipeg*, 4<sup>th</sup> Session, 41<sup>st</sup> Legislature.

<sup>30</sup> *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba*, s. 92(2).

<sup>31</sup> *Ibid.*, s. 92(4) – (6).

<sup>32</sup> Hansard, Standing Committee on Social and Economic Development, [Wednesday, May 29, 2019](#).

bill, *The Budget Implementation and Tax Statutes Amendment Act, 2020*.<sup>33</sup> By this time, the lawsuit in *5185603 Manitoba Inc. v. Government of Manitoba et al.* had been filed, and the second iteration of the legislation included an express dismissal of the litigation that had already been commenced:

**Proceedings dismissed**

**83(9)** Any action or other proceeding referred to in subsection (6) commenced before the day this section comes into force is deemed to have been dismissed, without costs, on the day this section comes into force, including, without limitation, Court of Queen's Bench File No. CI19-01-21887.

**Rejet d'instances**

**83(9)** Les instances visées au paragraphe (6) qui sont introduites avant le jour de l'entrée en vigueur du présent article, y compris le dossier de la Cour du Banc de la Reine du Manitoba numéro CI19-01-21887, sont réputées avoir été rejetées, sans dépens, ce jour-là.

The second iteration of the legislation died on the Order Paper as well when the Legislature was prorogued in the spring of 2020 as a result of the COVID-19 pandemic. However, on reintroduction later that year, the legislation eventually passed and received Royal Assent on November 6, 2020.<sup>34</sup> As of that date, the lease was officially terminated.

In the absence of clear statutory compensation mechanisms, terminations by legislation usually result in litigation. The 800 Adele matter is no exception. However, while Manitoba's lower courts have accepted the orthodoxy of parliamentary supremacy so far, the Manitoba Court of Appeal has, on its own initiative, begun to question where parliamentary supremacy ends and judicial independence begins.

### **Accepting the Orthodoxy of Parliamentary Supremacy — The Decisions of the Lower Courts**

On July 3, 2019, 5185603 Manitoba Ltd. and its two principals filed suit against the Government of Manitoba, the Premier, the Minister of Finance, and the Deputy Minister of Crown Services for misfeasance in public office, unlawful interference with economic relations, and defamation. Before the filing of any defence, the government brought a motion to a Master of the Court of Queen's Bench, requesting an order to strike the claim for failing to disclose a cause of action. The Master struck out the claims relating to the termination of the lease agreement by legislation because the legislation had not yet been enacted, but he refused to strike out claims relating to the order requiring the subtenant to vacate the premises and alleged defamation.

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<sup>33</sup> Bill 34, *The Budget Implementation and Tax Statutes Amendment Act, 2020*, 2<sup>nd</sup> Session, 42<sup>nd</sup> Legislature, Part 9, Division 7.

<sup>34</sup> *The Budget Implementation and Tax Statutes Amendment Act, 2020*, S.M. 2020, c. 21, s. 230.

In Manitoba, decisions of a Master can be appealed to a judge as a fresh hearing without any deference being owed to the Master's decision, and the plaintiffs filed such an appeal. By the time the judge who heard the appeal rendered their decision, the third iteration of the legislation terminating the lease had received Royal Assent. In the appeal decision, the judge found that the Master had erred in finding that damage had not yet occurred, but also found that the Legislature had validly terminated the lease and dismissed the litigation. After referring to both the *Clitheroe* and *Wells* cases discussed earlier in this article,<sup>35</sup> the judge ruled that:

[51] ... Instead of defending the plaintiffs' action on its merits, the Government used its extraordinary power to enact legislation, s. 230(9) of BITSA, which expresses in clear and unambiguous terms that the action is deemed to have been dismissed on the day the section came into force, November 6, 2020. The Government is under no legal obligation to justify its use of this extraordinary power even where, as here, it is used to abrogate the plaintiffs' important right to seek a determination of their properly pleaded action. The legislative intent of s. 230(9), particularly considered in the context of s. 230 as a whole, is clear. The authorities to which I have referred require this court to respect and give effect to that legislative intent.

[52] The plaintiffs' action is therefore declared to have been dismissed, without costs, effective November 6, 2020.<sup>36</sup>

### **Challenging the Bounds of Parliamentary Supremacy — The Decision of the Manitoba Court of Appeal**

The plaintiffs further appealed the judge's decision to the Manitoba Court of Appeal, arguing that the damages incurred predated the passing of legislation and were not included in the legislated termination. The plaintiffs also argued that the defamation claim was not related to the termination of the lease and therefore not included in the legislative bar against litigation.

On hearing the appeal, the Manitoba Court of Appeal took an unusually interventionist approach.<sup>37</sup> After carefully clarifying that they were not "new issues" outside the court's jurisdiction, the court — on its own initiative and without these matters being argued by the parties — raised the following two issues relating to statutory interpretation:

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<sup>35</sup> *Clitheroe*, *supra*, note 24, and *Wells*, *supra*, note 20.

<sup>36</sup> *5185603 Manitoba Ltd. et al. v. Government of Manitoba*, 2022 MBQB 36, at paras. 51 and 52.

<sup>37</sup> *5085603 Manitoba Ltd.*, *supra*, note 3.

- (a) Whether a proper interpretation of section 230(6) [the dismissal of the action], including its French version, would lead to the same conclusion that the motion judge reached?
- (b) Whether the effect of seeking to dismiss pre-emptorily a matter which was in the hands of the courts could be considered an infringement of the judicial function?<sup>38</sup>

The first of these issues is discussed in more detail in the preceding article, “Bilingual Interpretation in a Unilingual Environment”. This article focuses on the second issue.

The court began by stating that the Supreme Court of Canada has affirmed the principle of parliamentary supremacy on many occasions, including situations where the Legislature alters the rights or obligations of litigants in both pending or concluded court disputes.<sup>39</sup> It then acknowledged that there have been cases where a court upheld retroactive legislation which declared any cause of action relating to the new enactment to be extinguished.<sup>40</sup> This included referencing a 1943 British Privy Council case in which a specific legal action was stayed.<sup>41</sup>

After drawing a distinction between a stay of proceedings and a dismissal of proceedings, the court noted that it had been unable to find any decisions commenting on the constitutional validity of Canadian legislation which has deemed a court proceeding to be dismissed, other than another recent Manitoba decision, *Flette et al v. The Government of Manitoba et al.*<sup>42</sup> The court acknowledged that other legislation existed which purported to deem court proceedings dismissed, but noted that there was no case law that considered whether the legislated dismissal of court proceedings was unconstitutional or violated the principle of judicial independence.<sup>43</sup>

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<sup>38</sup> *Ibid.*, at para. 16.

<sup>39</sup> *Ibid.*, para. 39.

<sup>40</sup> *Ibid.*, at para. 42.

<sup>41</sup> *Ibid.*, at para. 43, citing *Abitibi P & P Co v. Montreal Trust Co* [1943] 3 DLR 1 (PC (Eng)). The Judicial Committee of the Privy Council was the final instance for Canadian judgments until 1949, when the role was taken over by the Supreme Court of Canada.

<sup>42</sup> *Ibid.*, at para. 45, citing *Flette et al v. The Government of Manitoba et al.*, 2022 MBQB 104. *Flette* was another decision involving legislation included in the same statute that ultimately terminated the 800 Adele lease. The provision addressed a funding dispute for Indigenous child welfare agencies relating to a claw-back of federal benefits by the provincial government that had given rise to class-action litigation. The Government of Manitoba addressed the matter by legislation creating a deemed overpayment and dismissing the legal action in much the same manner as for the 800 Adele lease, which had the effect of ratifying the existing funding practice. The court in that proceeding ruled that the legislation was inoperative on constitutional grounds because it infringed on federal powers and also violated equality rights under the Canadian Charter of Rights and Freedoms, without addressing the issue of judicial independence.

<sup>43</sup> *Ibid.*, at para. 46.

Following this comment, the court drew a clear distinction between legislation that bars a civil cause of action and legislation that dismisses an actual court proceeding, stating that:

[50] The distinction lies in the difference between the Legislature's role in the passage of legislation and the Court's adjudicative role; the difference between dealing with substantive rights which are at issue in the proceedings; and interfering with the judicial process itself. As stated by the Court in *Barbour* (at para 32):

. . . While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication. The difference between amending the law and interfering with the adjudicative function is fundamental to the proper roles of the legislature and courts in our parliamentary democracy.

Canadian case law on the intersection of parliamentary supremacy and judicial independence is rare. It includes a challenge of provincially legislated court fees,<sup>44</sup> a challenge of legislation removing justices of the peace who did not meet certain qualifications,<sup>45</sup> and a challenge to legislation making it easier for governments to sue tobacco companies for health care costs.<sup>46</sup> The last such case originating in Manitoba was decided by the Supreme Court of Canada in 1997 and involved the government legislating unpaid days off for the civil service.<sup>47</sup> This included Provincial Court judges, a decision that was challenged by the Manitoba Provincial Judges Association. The association argued that the decision to include court staff amounted to interference with the court's judicial independence. In *Manitoba Provincial Judges Assn v. Manitoba (Minister of Justice)*, the Manitoba Court of Appeal agreed with that argument.<sup>48</sup>

In the 800 Adele litigation, the Manitoba Court of Appeal was clearly uneasy with the Legislature's attempt to dismiss the existing litigation involving the lease and the impact this had on judicial independence. It stated that:

[57] Section 230(9) of the *BITSA Act* does not appear to allow the Court the freedom to "perform its adjudicative role without interference" (*Imperial Tobacco* at para 47) or to "apply the law" (at para 50) to a case brought before it. Rather, the Legislature has deemed the entire action dismissed, thereby, it would seem, by-passing "the essential 'authority and function' . . . of the court" (at para 45). The Court, by this legislation, is

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<sup>44</sup> *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59.

<sup>45</sup> *Ell v. Alberta*, 2003 SCC 35.

<sup>46</sup> *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

<sup>47</sup> These continue to be remembered as "Filmon Fridays", named after Gary Filmon, Manitoba's premier at the time.

<sup>48</sup> *Manitoba Provincial Judges Assn v. Manitoba (Minister of Justice)*, 1995 CanLII 6257 (MB CA).

prevented from performing its adjudicative role in relation to this pending action — it cannot assess the evidence in the claim, nor determine its weight, nor determine if the other provisions of the *BITSA Act* apply to the plaintiffs' claim. All the Court need do is verify the file number and act no further since the Legislature has stated that "Court of Queen's Bench File No. CI19-01-21887" is "deemed to have been dismissed, without costs" (the *BITSA Act* at section 230(9)).<sup>49</sup>

Given the dearth of Canadian jurisprudence on the issue, the court scoured the remainder of the Commonwealth for such cases, referring to two decisions of the High Court of Australia — a successful challenge of legislation directing the court not to release a "designated person",<sup>50</sup> and a successful challenge of legislation establishing preventive detention orders also directing the court to make such an order against a specific person.<sup>51</sup>

The Manitoba Court of Appeal ultimately decided that the issue of judicial independence had not been adequately canvassed in the proceeding and sent the matter back for a redetermination. As of the writing of this article, the matter is scheduled for judicially assisted dispute resolution (mediation led by a judge) in late October 2023, so it is not certain whether there will be a final court decision on the issue.<sup>52</sup>

### But Does it Matter?

Much like Monahan has criticized Canadian orthodoxy with respect to the legislative termination of contracts on rule of law grounds,<sup>53</sup> a former Australian judge has concluded that the *Kable* decision cited by the Manitoba Court of Appeal in its international review of case law "can be seen ... to have entrenched within the State sphere an aspect of the rule of law, namely, a constraint on the exercise of political power."<sup>54</sup>

Regardless of where courts land on the issue, the practical question is, "Does it matter?"

Any person can unilaterally bring a contract to an end by breaching it and repudiating further obligations. However, doing so usually leads to a successful claim for damages by the aggrieved counterparty. There is no benefit to a government to repudiate by legislation

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<sup>49</sup> 5185603 *Manitoba Ltd.*, *supra*, at note 3, para. 57.

<sup>50</sup> *Chu Kheng Lim v. Minister for Immigration Local Government and Ethnic Affairs*, [1992] HCA 64. The designation was applied to so-called "boat people", i.e., people who had entered Australia illegally.

<sup>51</sup> *Kable v. Director of Public Prosecutions* (NSW) [1996] HCA 24. For a description of the case and the court's ruling, see Brendan Lim, "Attributes and Attribution of State Courts — Federalism and the Kable Principle", [2012] *FedLawRw* 2, at pp. 42-44.

<sup>52</sup> Based on current file information publicly available in the Court Registry at <https://web43.gov.mb.ca/Registry/FileNumberSearch/SearchResults?FileNumber=CI19-01-21887>.

<sup>53</sup> Monahan, *supra*, at note 7.

<sup>54</sup> Hon. Kevin Lindgren, *Kable's Case and the Rule of Law*, available at <https://www.ruleoflaw.org.au/kables-case-and-the-rule-of-law/>.

when a letter from a lawyer would do. The benefit rather lies in the ability to legislate away claims for compensation (as was done in the recent Manitoba legislation), or to tightly circumscribe what compensation is available (as was done in Ontario's legislative termination of a wind project).

What, then, would be the practical outcome of jurisprudence that continues to allow the legislative termination of contracts but not the termination of underlying litigation? The recent Manitoba jurisprudence suggests that such a limitation would leave the courts with more discretion to assess the scope of litigation and its causal nexus to the legislation at issue. An example would be the defamation claim included in the Manitoba lawsuit which the court concluded, based on an examination of the French text as described in the previous article, to be outside the scope of the legislative termination.

The court's ability to independently assess the scope of legislation, and to evaluate different causes of action and their nexus to the litigation, is removed if an entire lawsuit is dismissed with a stroke of the pen, or, more aptly, a string of text between some XML code. The Supreme Court of Canada has emphasized the need for individual judges to be able to make decisions in discrete cases free from external interference or influence.<sup>55</sup> As one academic put it, "We simply do not expect the government to close the doors of the court".<sup>56</sup> The fact that in *5185603 Manitoba Ltd.*, the Manitoba Court of Appeal conducted significant research without input from the parties suggests that the judiciary is very uncomfortable with such a perceived attack on its independence.

It is too early to determine whether there will be jurisprudence in Manitoba's future that holds that the legislated dismissal of litigation is unconstitutional because it violated the independence of the judiciary. However, if such jurisprudence should arise, it may prove to be a Pyrrhic victory for aggrieved counterparties to contracts terminated by legislation. By the time a government decides to proceed with such legislation, the gloves have usually come off and the battle is fought in court, in the media, and on the floor of the Assembly at the same time. This likely means that legislative drafters will be instructed to prepare more detailed clauses barring specific enumerated causes of action, if necessary, retroactively. While this may not prevent successful claims for causes of action only peripherally related to the terminated agreements (such as the defamation claim in the Manitoba litigation), it will make it harder for plaintiffs to successfully establish such claims.

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<sup>55</sup> *The Queen v. Beauregard*, [1986] 2 SCR 56, at para. 22.

<sup>56</sup> Patricia Hughes, "Judicial Independence: Contemporary Pressures and Appropriate Responses", [2001:80 Canadian Bar Review 181](#), at p. 191.

# Legislation for AI, Legislation with AI: Round No 1 ChatGPT v Australian Law Council

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## Abstract

*This article examines the legal drafting produced by AI using as an example the development of a definition for domestic violence. Domestic violence is a deeply human problem, and use of AI allows us to uncover categories and links in behaviour. The AI drafting itself is still inferior to the human process, but the quality of work at the stage of ideation is likely to contribute to the purely human ideation process. In this first match between the Australian Law Council and ChatGPT, the Australian Law Council won, but the research and development of AI continues in both improving the prompts and AI applications for legislative counsel of today and tomorrow.*

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<sup>1</sup> Trained as a legislative drafter, I am now working as a legal academic researching drafting. This paper is based on the presentation at PCC/CALC Conference. My book on national uniform legislation can be found here <https://link.springer.com/book/10.1007/978-981-19-3292-2> and full list of publications is available here <https://researchers.cdu.edu.au/en/persons/guzyal-hill>. I can be reached at [guzyal.hill@cdu.edu.au](mailto:guzyal.hill@cdu.edu.au).



## Introduction

Artificial intelligence (AI) has been much in the legal news of late, including in relation to its possible applications to legal study and practice. This research examines the quality of legal draft work produced by ChatGPT in comparison to that produced by the Australian Law Council. While this examination can take place on any topic, the topic of this research is domestic violence legislation.

All Australian federal jurisdictions (Commonwealth and eight States and Territories) signed the national plan to end violence against women and children in one generation. This vision was shared in the National Plan 2022-2032.<sup>2</sup> Australia among other Commonwealth countries is committing resources to resolving this deep social issue. For instance, in Canada, there have been numerous inquiries producing recommendations to end violence against women and children.<sup>3</sup> The issue of domestic violence is a deeply human problem, so it was interesting to use AI to work with legislation regulating it, as AI can uncover the links and patterns that are less obvious to people.

Emerging AI tools – Perplexity.AI<sup>4</sup> and ChatGPT<sup>5</sup> – have the potential of transforming the process of policy development and legislative drafting. Perplexity.AI does not require registration and can produce text with reliable references. For the task, Perplexity.AI, however, produced inferior results with references drawn from the commentary, not primary legislation, in contrast with ChatGPT. In other words, it seems the developers of Perplexity.AI did not use legislation to train it, while developers of ChatGPT used legislation, including legislation up to 2021. Therefore, the research primarily focuses on ChatGPT. AI tools must be used cautiously, as evidenced by Centrelink's Robodebt fiasco (an example of the abuse of automated decision-making that resulted in hardship and suicides).<sup>6</sup>

I bring my professional judgement and experience in this research as a qualified lawyer and legislative drafter in the past, prior to becoming a legal academic.

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<sup>2</sup> Department of Social Services, Australian Government, 'The National Plan to End Violence against Women and Children 2022-2032' (17 August 2022) <<https://www.dss.gov.au/ending-violence>>.

<sup>3</sup> National Inquiry into Missing Indigenous Women and Girls: <<https://www.mmiwg-ffada.ca/final-report/>> and a House of Commons report on eliminating intimate partner violence: <[https://publications.gc.ca/collections/collection\\_2022/parl/xc71-1/XC71-1-1-441-4-eng.pdf](https://publications.gc.ca/collections/collection_2022/parl/xc71-1/XC71-1-1-441-4-eng.pdf)>

<sup>4</sup> <https://www.perplexity.ai/>.

<sup>5</sup> <https://chat.openai.com/>.

<sup>6</sup> Catherine Holmes, *The Royal Commission Report into the Robodebt Scheme* (7 July 2023) <<https://robodebt.royalcommission.gov.au/publications/report>>.

This research progresses in three main parts:

- (1) a comparison of legislation using AI at different time points;
- (2) the analysis of the definition presented by the Australian Law Council; and
- (3) an attempt to bring the ChatGPT produced policy in line with existing legislation and Australian Law Council definition.

### Comparison of legislation

Australian legislation on domestic violence falls into family and criminal law areas of national uniform legislation, which are particularly difficult to harmonize.<sup>7</sup> Therefore, this legislation is drafted in mirror structure.<sup>8</sup> That means State and Territory jurisdictions produce legislation on an appropriate definition in each local jurisdiction. With domestic violence being a national problem, the federal government is trying to bring jurisdictions to a model definition to ensure that the victim-survivors have equal protection.

Therefore, the first step is to compare existing legislation.

Results were produced by ChatGPT on 15 February 2023 for the following request: “compare domestic violence definition in Northern Territory, Queensland and Victoria, include references to sections of relevant legislation”:

**Northern Territory:** Domestic violence is defined in Section 6 of the Domestic and Family Violence Act 2007 as "conduct by a person towards a family member of the person that is violent, threatening, or controlling, or causes the family member to be fearful." The Act also lists examples of behavior that may be considered domestic violence, such as physical assault, sexual assault, and psychological abuse (Section 7).

**Queensland:** Under the Domestic and Family Violence Protection Act 2012, domestic violence is defined in Section 8 as "behavior by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that is physically, sexually, emotionally, psychologically, or economically abusive, or is threatening or

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<sup>7</sup> Guzyal Hill, *National Uniform Legislation* (Springer Nature, 2022); Guzyal Hill, "How Does the Area of Law Predict the Prospects of Harmonisation?" (2020), 41(1) *Adelaide Law Review* 267.

<sup>8</sup> Guzyal Hill, "Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation" (2019, 31 *Bond Law Review* 81 <https://blr.scholasticahq.com/article/10865-referred-applied-and-mirror-legislation-as-primary-structures-of-national-uniform-legislation>).

coercive." The Act also includes examples of abusive behavior, such as stalking, harassment, and intimidation (Section 11).

**Victoria:** In Victoria, the definition of family violence can be found in Section 5 of the Family Violence Protection Act 2008. Family violence is defined as "behaviour by a person towards a family member of that person if that behaviour is physically or sexually abusive, or is emotionally or psychologically abusive, or is economically abusive, or is threatening, coercive or in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person." The Act also outlines specific types of behaviour that may constitute family violence, such as assault, stalking, and financial abuse (Section 5).

This comparison by ChatGPT produced realistic and accurate results.

When compared again on 20 November 2023, ChatGPT produced inferior results without pinpoint references but with the disclosures aimed at non-lawyers. The results produced by ChatGPT for the same request were as follows:

I can provide you with a general overview of domestic violence definitions in the Northern Territory, Queensland, and Victoria as of my last knowledge update in January 2022. However, please note that laws and definitions can change, so it's crucial to refer to the latest versions of the relevant legislation for the most accurate and up-to-date information.

**Northern Territory:**

In the Northern Territory, domestic violence is addressed under the Domestic and Family Violence Act 2007. The Act defines domestic violence broadly and includes physical, sexual, emotional, and economic abuse. It also encompasses behavior that is controlling or coercive.

Domestic and Family Violence Act 2007 (NT)

**Queensland:**

Queensland addresses domestic violence through the Domestic and Family Violence Protection Act 2012. This legislation defines domestic violence as behavior that is physically, sexually, emotionally, psychologically, or economically abusive, and can include threatening, coercive, or controlling conduct.

Domestic and Family Violence Protection Act 2012 (Qld)

**Victoria:**

In Victoria, the primary legislation addressing domestic violence is the Family Violence Protection Act 2008. The Act defines family violence broadly and includes physical, sexual, emotional, psychological, and economic abuse, as well as behavior that controls or dominates another person and causes them to feel fear for their safety.

Family Violence Protection Act 2008 (Vic)

It's essential to check the latest versions of these acts or any amendments that may have occurred since my last update, as legislative changes can impact definitions and legal frameworks. Additionally, you may want to consult legal professionals or official government sources for the most accurate and current information.

While results of the later request are inferior as the depth of comparison and nuance is lost in higher generalisation, they are still mostly accurate. The difference in results is due to the way ChatGPT is being updated by the company that owns it, OpenAI, and we do not have control over these updates.

In both cases, comparison was not full and included restatement, rather than comparison. Therefore, the next step included asking for differences. When asked to focus on differences, using the following request “find the differences in domestic violence definition in Australian Capital Territory, Western Australia, New South Wales, Tasmania, Northern Territory, Queensland, South Australia and Victoria, include references to sections of relevant legislation”, ChatGPT produced the following results on 1 March 2023:

1. **Type of relationship covered:** The definitions of domestic violence in all states and territories cover violence in intimate relationships. However, some states and territories also include violence in other family relationships. For example, Tasmania's definition covers violence by a "close family member" (Section 3 of the Family Violence Act 2004), while the definition in Victoria covers violence by a "family member" (Section 5 of the Family Violence Protection Act 2008).
2. **Types of abuse:** While all definitions include physical, sexual, emotional, psychological, and economic abuse, some states and territories also include other types of behaviour that can be abusive. For example, the definitions in New South Wales (Section 11 of the Crimes (Domestic and Personal Violence) Act 2007) and Queensland (Section

8 of the Domestic and Family Violence Protection Act 2012) both include "coercive" behaviour, while the definition in South Australia (Section 8 of the Domestic Violence and Intervention Orders Act 2018) includes "behaviour that is threatening or coercive."

3. **Factors causing fear:** The definitions in all states and territories include behaviour that causes a person to fear for their safety or wellbeing. However, some states and territories also include behaviour that causes fear for the safety or wellbeing of another person. For example, the definition in the Australian Capital Territory (Section 7 of the Domestic Violence and Protection Orders Act 2020) covers behaviour that causes a family member to fear for the safety or wellbeing of "the family member or another person," while the definition in the Northern Territory (Section 4 of the Domestic and Family Violence Act 2007) covers behaviour that causes "harm or fear of harm" to a family member.
4. **Nature of the behaviour:** The definitions in all states and territories cover behaviour that is violent, threatening, or abusive. However, some definitions provide more detail about the specific types of behaviour that are covered. For example, the definition in Victoria (Section 5 of the Family Violence Protection Act 2008) includes "controlling" behaviour, while the definition in Western Australia (Section 6 of the Restraining Orders Act 1997) includes behaviour that "intimidates" or "harasses."

This comparison is not comprehensive: ChatGPT identified the main differences but missed some important distinctions that can be observed by a lawyer through a more granular perspective. However, what ChatGPT did is classify the behaviour, which allows humans to see the more important patterns in the compared text. This was a useful "value added" by ChatGPT. The comparison in November 2023, was similarly inferior to that in March.

### Developing definition – ChatGPT

The ultimate goal of comparison of legislation is the synthesis of the model legislation for all jurisdictions, which is why ChatGPT was next asked to prepare the best definition of domestic violence based on the existing definitions, ChatGPT produced the following result on 1 March 2023:

**Domestic violence**, also known as intimate partner violence, is a pattern of behaviour by one person towards another person who is, or has been, in a domestic relationship with them, including but not limited to a spouse, partner, family member, or carer. This pattern of behaviour includes physical, sexual, emotional, psychological, and economic abuse, or

behaviour that is threatening, coercive, or controlling. It can take many forms, including but not limited to:

**Physical abuse:** such as hitting, slapping, kicking, choking, or using weapons;

**Sexual abuse:** such as forced sexual activity;

**Emotional abuse:** such as belittling, name-calling, humiliation, or isolating the victim from family and friends;

**Psychological abuse:** such as manipulation, gaslighting, or using children as pawns in the relationship;

**Economic abuse:** such as controlling the victim's finances or preventing them from working or pursuing education.

For the same request in November 2023, ChatGPT produced results that were even less focused on legal issues. The latest definition produced a description of a definition of the social phenomenon.

Domestic violence is a pattern of behavior within an intimate relationship where one partner seeks to exert power and control over the other through physical, sexual, emotional, psychological, or economic means. This abusive behavior may manifest through acts of intimidation, coercion, isolation, threats, or actual violence, causing the victim to experience fear, degradation, and a pervasive sense of harm. Domestic violence is not limited to specific demographics and can affect individuals regardless of age, gender, socioeconomic status, or cultural background. It encompasses a continuum of behaviors, ranging from subtle manipulation to severe physical harm, and is a violation of the fundamental human right to live free from violence and abuse. Effective responses to domestic violence involve support for survivors, legal interventions, and community efforts aimed at prevention and education.

### Developing the definition – Australian Law Council

The Australian Law Council worked extensively with the community on developing the uniform definition in 2021. In particular, the Law Council of Australia hosted a National Roundtable entitled “Family Violence: Awareness, Education and Training” with community (sector) representatives who participated extensively with the key issue of discussing a nationally consistent definition of family violence, due to the difficulties caused

“by the differing definitions of family violence between jurisdictions”.<sup>9</sup> The following definition was developed by the Australian Law Council:

***Meaning of family violence***

(1) For the purposes of this Act, family violence is—

- (a) behaviour by a person towards a family member of that person if that behaviour—
  - (i) is physically or sexually abusive; or
  - (ii) is emotionally or psychologically abusive; or
  - (iii) is economically abusive; or
  - (iv) is threatening; or
  - (v) is coercive; or
  - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).<sup>10</sup>

The model definition developed by the Australian Law Council further details what kind of behaviour could be included in the definition of family violence, for instance,

- “assaulting or causing personal injury to a family member or threatening to do so”,
- “unlawfully stalking or cyber stalking a person”,
- “taking without consent or distributing without consent an intimate image of the family member, or threatening to distribute the image”.<sup>11</sup>

This more granular perspective was certainly not identified by ChatGPT and was only developed due to the extensive work of law reformers, stakeholders and lawyers in the development of the definition. However, the definition developed by AI would be suitable as a starting point for discussion. It would require a lot of refinement, however, given the current state of development of AI.

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<sup>9</sup> Law Council of Australia, ‘Model Definition of “Family Violence”’, *Law Council of Australia* (4 August 2023) <<https://lawcouncil.au/policy-agenda/advancing-the-profession/model-definition-of-family-violence>>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

## Not up to the task yet

When asked to draft definition in the Northern Territory style and with subsections, ChatGPT produced the following text, that looks sufficiently close for a non-lawyer but does not resemble the Australian legislation in reality. The useful ideas were proposed, confirming usefulness of AI for the stage of ideation and policy development, rather than drafting at this stage.

### **Domestic and Family Violence Definition Act 2023 (Example - NT)**

#### **Section 1: Definition of Domestic Violence**

**1.1 Coercive and Controlling Behavior** For the purposes of this Act, "domestic violence" shall mean a systematic and intentional pattern of coercive and controlling behavior within an intimate relationship.

**1.2 Forms of Abuse** Such behavior includes, but is not limited to, physical, sexual, emotional, and economic abuse.

#### **Section 2: Purpose and Intent of Abuser**

**2.1 Dominance and Isolation** The intent of the abuser is to establish and maintain dominance over the victim, achieved through deliberate isolation from external support networks.

**2.2 Instilling Fear** Furthermore, the abuser seeks to instill fear in the victim, creating an environment in which the victim feels unsafe and apprehensive.

#### **Section 3: Applicability**

**3.1 Demographic Neutrality** This definition recognizes that domestic violence is not restricted by demographic factors, applying universally irrespective of gender, age, cultural background, or socioeconomic status.

#### **Section 4: Human Rights Violation**

The definition acknowledges domestic violence as a profound violation of fundamental human rights.

#### **Section 5: Comprehensive Redress**



**5.1 Legal Framework** Addressing domestic violence necessitates a legal framework, incorporating interventions and legal measures for effective resolution.

**5.2 Support Mechanisms** In addition, comprehensive redress encompasses the provision of support mechanisms tailored to the unique needs of victims.

**5.3 Community Education Initiatives** Furthermore, to prevent and mitigate instances of domestic violence, this Act emphasizes the importance of community education initiatives aimed at raising awareness and fostering a culture intolerant of such behavior.

This Act may be cited as the "Domestic and Family Violence Definition Act 2023."

The next stages of research might continue improving the prompts or trialing specific law focused AI such as SpellBook AI.

### **What should legislative drafters and law reformers learn from this round?**

While ChatGPT lost this round to the Australian Law Council, we cannot be confident that the results will be the same going forward. Therefore, all legislative drafters, policy makers and law reformers must start working on skills to improve their ability to work with AI. Contrary to the common theme of existential risk, many organizations are more invested in building ethical and human-centric AI and it is important to have the voices heard while the systems are being built.

Without any doubt, AI poses serious risks and threats, if used unchecked. The stance proposed by this research is practical, cautious, and yet curious. The explored systems are an augmentation of human acuity rather than an abrogation of drafting talent. Existing lawyers have an opportunity to inhabit this new AI domain that has the potential for transforming law and the way we approach law globally. Eluding or ignoring AI has many unpredictable drawbacks and at least several predictable dangers, including:

- (1) major mistakes in misuse of AI automated decision making, as demonstrated by the Robodebt Royal Commission;<sup>12</sup>
- (2) missing an opportunity to lead the international debate and development of law with the emergence of AI; and

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<sup>12</sup> Above, n. 6.

(3) allowing experts from other fields to occupy new niches with an opportunity to develop solutions that do not take into account fundamental human rights or that contradict foundational principles of rule of law.

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## Book Review

### *Burrows and Carter Statute Law in New Zealand, 6th ed*

By RI Carter, published by LexisNexis NZ Ltd, 2021

**Reviewed by Aleksander Hynnä<sup>1</sup>**

*Burrows and Carter Statute Law in New Zealand*, 6th ed., is authored by Ross Carter, who will of course be well known to readers of *The Loophole* as parliamentary counsel in the New Zealand Parliamentary Counsel Office as well as the former Secretary of CALC.

Reviewing a work like *Burrows and Carter* is a daunting task. The work is magisterial in scope: coming in at 904 pages, it provides a comprehensive and detailed overview of all aspects of statute law. New Zealand courts have frequently cited this work (and its previous editions) in their decisions.<sup>2</sup> New Zealand readers of this publication will likely already know the work's worth. A Canadian reviewer like myself could not possibly comment meaningfully on the many nuanced discussions of substantive New Zealand law included in the work. Instead, I will aim my comments primarily at readers from jurisdictions other than New Zealand, and provide a general description of the work's contents while pointing out features that may be especially relevant to them.

*Burrows and Carter* offers such readers plenty of content to assist them as they perform their duties. Because of the commonalities in the law of statutory interpretation among Commonwealth jurisdictions, readers will be able to gain insight into their jurisdiction's own law. In addition, as the work veers frequently from matters of pure statute law into matters of drafting and parliamentary practice, legislative counsel from other jurisdictions will find all kinds of practical discussions and tips on legislative practice from which to draw inspiration.

Part I of *Burrows and Carter* is entitled "The Nature of Legislation". The first chapter briefly touches on the history of law-making in New Zealand and describes the types of legislation found in that country (public, local and private Acts; imperial Acts that remain in force in the country under the *Imperial Laws Application Act 1988*; some remaining provincial ordinances, enacted prior to the abolition of the provinces in 1876; and secondary legislation). The second chapter discusses the nature of parliamentary sovereignty in New Zealand which, unlike in some jurisdictions (such as my own), is particularly robust given that the courts have no authority to strike down statutes.

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<sup>1</sup> Representative for the Americas on the CALC Council and General Counsel, Legislation Section, Department of Justice Canada. Any views expressed are my own and not those of the Department of Justice Canada.

<sup>2</sup> See, for example, the results of a search for "burrows and carter" in the decisions of the New Zealand Supreme Court, Court of Appeal and High Court, using the Judicial Decisions Online database on New Zealand's Ministry of Justice website: <https://www.justice.govt.nz/courts/decisions/jdo>.

Part II concerns the preparation and presentation of legislation. It contains an extensive review of how Acts are made in New Zealand, and also includes chapters on drafting and access to legislation. It is this Part that may be of particular interest to readers of *The Loophole*. Parliamentary officers may be interested in the detailed examination of the New Zealand process by which policy becomes law in order to compare and contrast it with their own jurisdiction's process. Legislative counsel may be interested in the New Zealand experience with issues such as traditional vs. plain language drafting, the publication of legislation, consolidations and revisions, and access to published legislation, among others. Legislative counsel from multilingual or multijural jurisdictions may be especially interested in the ongoing project of incorporating Māori concepts and language in legislation, reviewed in section (i) of Chapter 4.

The work pivots to more purely legal matters in Parts III to V, which focus on the interpretation and application of legislation. While quite naturally relying heavily on New Zealand court decisions, these Parts also cite a large number of United Kingdom decisions. This reliance on UK caselaw can perhaps be attributed to the fact that appeals from New Zealand to the Judicial Committee of the Privy Council ended relatively recently, in 2003. Readers in jurisdictions in which court decisions from the United Kingdom are binding or particularly persuasive will benefit from this reliance on UK caselaw.

Part III, "Interpretation — General", sets out the basic principles used in interpreting statutes, and readers will not be surprised to find chapters on the key interpretive elements of statutory purpose (Chapter 8), internal and external context (Chapter 9) and the statutory text itself (Chapter 10). These core chapters are followed by an examination in Chapter 11 of the impact of the common law and the *New Zealand Bill of Rights Act 1990* on statutory interpretation.

This Part is bookended by two very helpful chapters that touch on matters of particular interest to legislative counsel. Chapter 6, "The Need for Interpretation", is a neat encapsulation of the reasons why interpretation of statutes will always be required, no matter how well the statutes are drafted. For example, the chapter sets out the potential pitfalls in drafting that may lead to practical difficulties in interpretation, such as the effects of political compromises made during the legislative process, overly precise drafting, ambiguity and vagueness, and conflicts with other statutory provisions. At the end of Part III, Chapter 12 discusses the effects of time on statutory interpretation, and how changes in social or legal context can affect how a statute is interpreted; the chapter serves as a salutary reminder of how fluid and mutable statutory interpretation may be.

Part IV, "Interpretation — Specific", addresses more targeted interpretation questions. Chapter 13 examines interpretation and deeming provisions, provisos, schedules, and the use of ranking words (words like "subject to"). Chapter 14 delves into greater detail on one of the enduring problems mentioned in Chapter 6, namely interpreting statutes in light of

inconsistencies in the same Act or in a different Act. Chapter 16 considers the impact of the common law on statute law and vice versa.

Chapter 15, also in Part IV, reviews consolidation Acts and revisions and provides practical advice on how to implement international treaties in domestic legislation. The chapter also discusses the importance of the Treaty of Waitangi in interpreting New Zealand legislation (the Treaty being the agreement concluded in 1840 between Māori chiefs and the British Crown that has been described as New Zealand’s founding document<sup>3</sup>). The New Zealand experience in the ongoing integration of Indigenous legal concepts with the settler legal system will no doubt be of interest to readers from other jurisdictions who are grappling with the same issue.

The final section of Chapter 15 engages in a thoughtful discussion of the considerations that may arise in relation to statutory grants of discretionary powers to a court. The author starts the section by reciting objections to such grants that question whether discretionary powers are proper for courts. But framing the mere fact of a statute granting a discretion to a court as still subject to debate seems unnecessary at this point. The inclusion of such provisions in statutes is well established and eminently justifiable, as the author points out. Legislatures have plenary authority to grant discretionary powers to a court, and doing so may be entirely appropriate in cases where the court, with its formalized decision-making process, is the suitable forum for the exercise of the power. Perhaps there is no longer a need to frame any statutory grant of discretion to a court as something that must be justified.

Part V, “The Duration of Legislation”, ends the work with a review of issues related to the temporal application of legislation. The Part covers coming into force, retrospective legislation, the repeal of legislation and issues related to the amendment of legislation.

*Burrows and Carter* provides readers with a wealth of information and is lucidly written. The one quibble with the work as a whole that I might raise is with respect to its presentation. Some aspects of the work’s presentation hinder readability. For example, the text of the work threatens at times to be overwhelmed by the extensive footnotes: a reader may struggle to follow the thread of a discussion when their attention is constantly being drawn down to the bottom of (or middle of, or one quarter of the way down) a page. Another example is found in Chapter 3 (on the preparation of legislation and parliamentary procedure), in which the work uses numerous acronyms to refer to various groups or concepts: the reader can find themselves flipping back and forth through the pages to find where the acronym was defined. A last example is the many instances in which the author lists sequential points: even though the “first”, “secondly”, etc., that mark each point are helpfully italicized, by the time the text, several pages later, gets to “seventhly”, even the

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<sup>3</sup> “The Treaty in brief”, URL: <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>, (New Zealand Ministry for Culture and Heritage), updated 17-May-2017.

most attentive of readers might struggle to remember the issue under discussion. A little more attention to sign-posting and ensuring that the text is more digestible would assist readers in situating themselves when consulting the work.

Ultimately, of course, such a quibble does not detract from the authority and value of *Burrows and Carter*. Legislative counsel from all jurisdictions will benefit from the work's thorough discussion of statute law and the insight into drafting that it offers. *Burrows and Carter* is a worthy addition to the library of any Commonwealth drafting or parliamentary office.

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