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CALC Council

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Message from the President—Geoffrey Bowman[1]

I have no illusions about the reasons for my becoming president of CALC. Alas, I was not elected because of any merit on my part. I was elected because the next Commonwealth Law Conference is to take place in London in 2005, and I happen to be head of the London Parliamentary Counsel Office.[2] But of course, I am very pleased to have been asked to become president.

Discussions are taking place as to what we are to do for the conference in 2005. But I hope it will be a good opportunity for drafters from around the Commonwealth to meet and exchange views with fellow drafters and others. I went to the conference held near Kuala Lumpur in 1999. I thoroughly enjoyed it, mainly because of the people I met.

I suppose people who live in any given age tend to think that it is one of transition, and that in this it is unique. So far as the style of legislative drafting is concerned, I think we shall always be in a period of transition. Or at least I hope we shall. It will be a sorry state of affairs if innovation is ever discouraged. In the United Kingdom, we have moved on a great deal over the last few decades and it is fascinating to see how the styles of individual drafters continue to develop. One trivial example is that some years ago a drafter decided to start a sentence with the word "but". Then somebody started a sentence with the word "and". The real challenge is to start a whole Bill with "but" or "and". Another simple instance of a change in style is that sentences have tended to become shorter. While "Jesus wept" is the shortest sentence in the Bible, I think the shortest sentence in our statute book is "Detinue is abolished." I once gave this example in a talk and somebody asked, "What is detinue?" The answer is: "You don't need to know—it's been abolished."

I have been reading the letters of Lewis Carroll. There is much in them that appeals to the mind of a legislative drafter. For instance, he says: "One of the hardest things in the world is to convey a meaning accurately from one mind to another". And I like this bit of circularity, one of the drafter's worst nightmares: "I'm so glad I don't like asparagus…because if I did like it, I should have to eat it—and I can't bear it!" There is also a lot in his books that appeals to the drafter's mind. Take this exchange from "Through the Looking-Glass":

> "There's nothing like eating hay when you're faint," he remarked to her, as he munched away.
>
> "I should think throwing cold water over you would be better," Alice suggested…
>
> "I didn't say there was nothing *better*," the King replied: "I said there was nothing *like* it."

This edition of Loophole has been compiled by our hard-working and dedicated secretary Duncan Berry, to whom we owe so much.

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1 As well as being President of the Commonwealth Association of Legislative Counsel, Geoffrey Bowman is also First Parliamentary Counsel of the Office of the Parliamentary Counsel in London.

2 I am sure this was only one of the reasons for Geoffrey's election! [Ed]

Editor's Notes

This issue

This issue contains six articles. The first, second and fourth articles are based on papers presented at the CALC conference held in Melbourne in April 2003. The first article, by Jeffrey Barnes, who teaches law at La Trobe University in Melbourne, deals with the use of examples in legislation. The second one, by Lionel Levert, a former Chief Legislative Counsel of Canada, describes the involvement of himself and his colleagues in the Canadian Department of Justice in helping to develop legislative drafting services in Bangladesh. In the fourth article, Lionel's colleague, John Mark Keyes, provides us with a very well researched and erudite discussion of the circumstances in which rule-makers must (and not merely may) make secondary legislation.[1] In another contribution from Canada, Don Revell, who is Chief Legislative Counsel of Ontario, discusses the problems involved in drafting legislation in a multi-lingual environment, with particular reference to his experiences in the recently established Canadian territory of Nunavut. Then, Jonathon Buttimore, a senior advisory counsel in the Irish Attorney General's Office, gives an Irish perspective of the application of the *Carltona* principle. Finally, Dennis Morris, another Irishman and a well-known contributor to the Statute Law Review, provides a somewhat whimsical fable about the bureaucracy surrounding the application of European Union law in the United Kingdom.

Unfortunately, it was not possible to include in this issue all of the papers from last year's CALC conference and another from last year's Legislative Drafting Forum in Jamaica. However, I plan to include articles based on those papers in the next issue of the 'Loophole', which I propose to publish later this year.

CALC EGM 2004

The CALC general meeting held in Melbourne, Australia, in April 2003 approved in principle the adoption of a new constitution, which is essentially a more workable version of the existing one. The meeting authorised the CALC Council to convene a special general meeting to decide whether or not the new constitution should be adopted. An extraordinary general meeting was duly convened and was held in Sydney, Australia, on Friday, 30 January 2004. However, because of communication difficulties and a number of other factors, the meeting was adjourned until 15 March 2004. By the time of the resumption of the adjourned meeting, a clear majority of CALC members (close to 400) had indicated their support for the new constitution, with none against. However, that was not enough, because the existing constitution requires a two-thirds majority of *all* of the members in order to amend or replace it.[2]

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1 I have often wondered why legislatures are not more assiduous in insisting on the inclusion of provisions requiring the rule-making authorities to whom legislative powers are delegated to actually exercise those powers, particularly in cases where the will of the legislature would be frustrated if the powers were not exercised. [Ed]

2 Since at the relevant time, CALC had 657 full members, the number of votes needed to adopt the new constitution was thus 438.

The result is most disappointing, not least for Jeremy Wainwright, Janet Erasmus, Clive Borrowman, Tony Yen, Lionel Levert, Don Colagiuri and others who spent so much of their valuable time and made such a valiant attempt to gather from CALC members the requisite proxies. One must now question the wisdom of the original decision[3] to include such an impossible hurdle to surmount in order to pass a constitutional amendment. It seems to me that if a clear majority of all CALC members vote for a new constitution and none against, it must surely be wrong that the wishes of the majority should be frustrated. Given the immense amount of time and effort put into trying to obtain the requisite two-thirds majority in this instance, whether it will ever be possible for a new CALC constitution to be adopted by constitutional means must be regarded as being highly problematic.

A number of options now appear to be open to members. They are—

- to abandon the present constitution and form a new organisation in accordance with the new constitution;
- to try to gather further proxies from those members who have not completed one and then to reconvene the EGM held earlier this year;
- to make a further attempt to gather the requisite proxies (perhaps in 2005) and to convene another EGM for the purpose of adopting the new constitution;
- to dissolve the existing body in accordance with the present constitution and to form a new association in accordance with the new constitution;
- to do nothing and try to continue under the existing constitution.

For a number of reasons, I think that 'doing nothing' is not an option. Previous CALC general meetings have unanimously adopted resolutions that CALC Councils have purported to implement even though the resolutions were inconsistent with the existing constitution. For example, the 1996 general meeting in Vancouver unanimously agreed to admit associate members. Despite being inconsistent with the existing constitution, CALC now has a significant number of associate members. Another problem is that in the past a liberal view has been taken of the eligibility criteria for membership, so that some applicants were allowed to become members when, although engaged in activities relating to the preparation of legislation, they were not actually engaged in drafting it. Both of these problems could be rectified under the new constitution if it were to be adopted.

Failure to adopt the new constitution would also mean that resolutions passed at future CALC general meetings would, even if unanimous, encounter the same kinds of difficulties, so that that CALC would, from a constitutional point of view, be prevented from engaging in perfectly legitimate activities. And the requirement for a two-thirds majority of *all* members does not just apply to proposed constitutional amendments. A similar constraint applies to

[3] I freely admit to being one of those who participated in the inaugural meeting in Hong Kong at which the existing constitution was approved. However, as I recall it, there was no discussion about the form of clause 9, which provides for how the constitution may be amended.

the winding up of CALC, so that it would, even in the unlikely event of its becoming defunct, be virtually impossible to muster sufficient votes to dissolve it and dispose of its assets.

No doubt some of you will have views on how CALC should deal with the impasse in which it now finds itself. If you have do have views on this issue, please write to me (preferably by e-mail) and I will ensure that your letters are published in the next CALC Newsletter.

Before closing, on behalf of the CALC Council, I should like thank Jeremy Wainwright, Janet Erasmus, Clive Borrowman, Tony Yen, Lionel Levert, Don Colagiuri, Chloe Ashbolt and others who worked so hard to secure the outcome that, although wanted by a clear majority of CALC members, has so far proved to be elusive.

Call for papers

The 14th Commonwealth Law Conference will be held in London, England, mid-September 2005. A CALC conference and meeting will be held in conjunction with the Commonwealth Law Conference. If you would like to give a paper at the CALC conference, please tell the CALC President, Geoffrey Bowman, or me as soon as you can. The relevant e-mail addresses are gbowman@cabinet-office.x.gsi.gov.uk and duncan_berry@ag.irlgov.ie

Congratulations!

On behalf of CALC members, I should like to congratulate our President, Geoffrey Bowman on his recent appointment as Knight Commander of the Order of the Bath in the recent Queen's birthday honours list and Peter Quiggin[4] on his recent appointment as First Parliamentary Counsel in the Australian Commonwealth Office of Parliamentary Counsel. I should also like to take this opportunity of wishing Peter's predecessor and former CALC President, Hilary Penfold, well in her new role in the Australian Commonwealth Parliament.

It would be remiss of me not to mention the retirement of a former colleague, Michael Orpwood, from the New South Wales Parliamentary Counsel's Office. Michael, who served in the Office for 30 years (the last 14 as Deputy Parliamentary Counsel), has now moved from his role of resolving weighty matters of a temporal nature to a new role of a spiritual kind, having been appointed chancellor of the Anglican archdiocese of Sydney. I am sure all CALC members will wish Michael a long and happy retirement.

[4] An article based on the paper that Peter Quiggin gave at the CALC conference held in Melbourne last year will appear in the next issue of the Loophole.

Shining examples[1]

Jeffrey Barnes[2]

"In exposition and in argument, the writer must likewise never lose his hold upon the concrete; and even when he is dealing with general principles, he must furnish particular instances of their application." [3]

Introduction

It is obvious that, just as an Act is no ordinary piece of communication,[4] the legislative drafter is no ordinary writer. As Hackett-Jones has observed, the drafter "has important functions both as a legal theoretician and as an expert in statutory form and expression".[5] Bennion divides the components of an Act into three broad categories:

- "operative components", such as sections and savings clauses;
- "amendable descriptive components", such as examples; and
- "unamendable descriptive components", such as the date of passing.[6]

Examples, the focus of this paper, are clearly not new. As Nick Horn made clear in his presentation to the 2001 Drafting Forum held in Melbourne,[7] examples have long been used in open-ended ("includes") definitions, and in provisions having direct effect ("for example …").[8] However, under the influence of the plain English movement,[9] the use of examples

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1 A revised and expanded version of a paper originally presented at the Conference of the Commonwealth Association of Legislative Counsel (in association with the Commonwealth Law Conference), Melbourne, Australia, 17 April 2003.

2 Senior Lecturer in Law, La Trobe Law, La Trobe University, Victoria, Australia 3086 (e-mail address: J.Barnes@latrobe.edu.au)

3 W Strunk and E B White, *The Elements of Style* (3 edn) (MacMillan, New York: 1979) 22-23.

4 G C Thornton, *Legislative Drafting* (3 edn) (Butterworths, London: 1987) 43.

5 G Hackett-Jones, "The Scar of Odysseus and the Role of Parliamentary Counsel in the Legislative Process" in D St L Kelly (ed), *Essays on Legislative Drafting in Honour of J Q Ewens* (Adelaide Law Review Association, Adelaide: 1988) 43, at 54.

6 FAR Bennion, *Statutory Interpretation: A Code* (3 edn) (Butterworths, London: 1997) 547.

7 "Examples — A Typology (with examples)".

8 Two other uses may be noted. The term "for example" has also been used to indicate the conferral of an open-ended rather than a compendious category. This was by use of such expressions as "may, for example, include"; "may, for example, regulate". For instance, *Petroleum Act 2000* (SA) ss 76(2), 138(2). This usage is synonymous with the expression "but is not limited to". Second, examples have been used in explanatory memorandums, for example the Explanatory Memorandum for the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic)—discussion of proposed section 6.

9 For instance, the report of the Law Reform Commission of Victoria, Plain English and the Law (The Law Reform Commission, Melbourne: 1987) paras 169-170: "The intelligibility of Acts could also be improved by the use of examples showing how provisions apply to particular cases …." (para 169); R Dickerson, The Fundamentals of

has greatly increased in certain Australian jurisdictions, especially in the legislation of the Commonwealth, Victoria, Queensland and the Australian Capital Territory. In most of these jurisdictions, examples are formally part of the Act concerned.[10] They have considerable interpretative force in some cases also.[11]

The main aim of this paper is to undertake an analysis of the functions of examples in contemporary Australian legislation. Examples are seen as one of the "markers" of plain English styles.[12] The analysis can therefore contribute to the debate about the effectiveness of plain English styles in legislation.[13]

In reviewing the Australian legislative experience with examples, it would be a huge task to attempt to locate and examine every example.[14] To make the task more manageable, the legislation was sampled. The *Local Government Act 1993* (NSW) and the *Income Tax Assessment Act 1997* (Cwlth) were examined initially as they are widely considered to be landmarks of plain English legislation. Also examined was legislation nominated by drafting

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Legal Drafting (2 edn) (Little, Brown & Co, Boston: 1986) 204, where they are described as "external reader aids … to enhance the clarity and usability of the instrument"; D Murphy QC, "Plain English in Drafting Legislation and Regulations", Plain Legal Language for Public Sector Administrators conference, Sydney, 29 July 1992, at 7. See also R Sullivan, "Some Implications of Plain Language Drafting" (2001) 22(3) *Statute Law Review* 145 at 169-173, and J H Swaney et al, "Editing for Comprehension: Improving the Process Through Reading Protocols" in E R Steinberg (ed), *Plain English: Principles and Practice* (Wayne State University Press, Detroit: 1991) 173 for discussion of the policy and empirical dimensions of examples respectively.

10 The opinion expressed by Sullivan (R Sullivan, "Some Implications of Plain Language Drafting" (2001) 22(3) *Statute Law Review* 145 at 171), that "the widely held" view is that "descriptive components" such as examples are not formally part of legislation in the sense of declaring the law, is not a generally accurate one in Australia. For Victoria, see *Interpretation of Legislation Act 1984*, section 36(3A) (if placed at foot of a provision under the heading "Example" or "Examples", and after 1 January 2001); Queensland: see *Acts Interpretation Act 1954*, section 14(3); ACT: see *Legislation Act 2001*, section 126(3). The Commonwealth has no such general rule, but some individual Acts formally include examples as part of the Act, e.g. *Income Tax Assessment Act 1997*, ss 2-45, 950-100; *A New Tax System (Goods and Services Tax) Act 1999*, ss 4-10, 182-1; *Social Security Act 1991*, section 39(1A) (inclusion of "notes"). Contra: *Austudy Regulations* (Cwlth), regulation 112 (example in notes not part of Regulations); *Local Government Act 1993* (NSW), section 6: notes do not form part of the Act.

11 The Commonwealth Interpretation Act (*Acts Interpretation Act 1901* section 15AD) and the Queensland version (*Acts Interpretation Act 1954*, section 14D) provide that the provision prevails over the example in the case of inconsistency, but the Victorian and ACT Interpretation Acts concerning the effect of examples contain no such provision; see *Interpretation of Legislation Act 1984* (Vic), section 36A(1); *Legislation Act 2001* (ACT), section 132(1).

12 N Horn, "Legislative Drafting in Australia, New Zealand and Ontario: An Informal Survey", Conference of the Commonwealth Association of Legislative Counsel, Melbourne, 15 April 2003.

13 The article by Professor R Sullivan, "Some Implications of Plain Language Drafting" (2001) 22(3) *Statute Law Review* 145 is a particularly stimulating contribution on a number of fronts.

14 It follows that there are likely to be other functions of examples in addition to those identified in this paper.

offices as sample legislation in the course of Nick Horn's study.[15] Some of this legislation was rich in the use of free standing examples (as in the *Mental Health Act 2000* (Qld)), while some jurisdictions did not employ examples in this way at all (as Nick Horn's study makes clear). In addition, 2001 and 2002 legislation in all Australian jurisdictions was examined.

Roles performed by examples

In Australia, the view has generally been taken of late that free-standing examples do not merely gloss the text from an external point of view; they declare the law.[16] If their status is then clear to this extent,[17] the functional question then arises — what functions do they perform in a structure still dominated by general rules?

A review of recent Australian legislation reveals that examples perform two main inter-related roles: altering the language and structure of legislation, and adding meaning to the message conveyed by the Parliament. Each of these is examined in turn.

Altering the language and structure of legislation

Variety of situations

Examples can be located in a provision of an Act such as a subsection.[18] They can be in a "note".[19] More significantly, they can be free-standing as in the following extract from the *Income Tax Assessment Act 1997* (Cwlth):

> **SECT 900-155 Showing which of your activities were income-producing activities**
>
> (1) You need not record an income-producing activity. But if you don't, the activity cannot be taken into account in working out the extent to which you can deduct an expense you incur for the travel.
>
> Example: If you fly to Los Angeles for the sole purpose of attending a 7 day conference, but you don't record the conference in your travel record, you cannot deduct the cost of the air fare. This is so even if you have written evidence that you paid the fare (e.g. a receipt), as required by Subdivision 900-E.

This example reproduces in concrete form the second but not the first sentence of the generalised rule.[20]

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15 N Horn, "Legislative Drafting in Australia, New Zealand and Ontario: An Informal Survey", paper delivered at the Conference of the Commonwealth Association of Legislative Counsel, Melbourne, 15 April 2003.

16 See note 10 above. Cf. R Sullivan, "Some Implications of Plain Language Drafting" (2001) 22(3) *Statute Law Review* 145 at 169, from whom this distinction is drawn.

17 The provisions set out in note 10 above, concerning the status of examples, are, as far as the author is aware, yet to be judicially interpreted; some doubts still remain about their scope.

18 For instance, *Mental Health Act 2000* (Qld), section 514(1)(b); *Income Tax Assessment Act 1997* (Cwlth), section 900-120(4). These provisions are set out below.

19 For instance, following these provisions: *Local Government Act 1993* (NSW), ss. 124, 220, 540; *Public Service Act 1999* (Cwlth), section 33.

By illustrating the operation of a rule in a free-standing way, examples have been highlighted. They also have been given more opportunity to be used since they do not have to be worked into the main provision.

Variety of structures

The general rule is ordinarily a sentence. An example is not so restricted. It can be a single word as following section 23(4) of the *Major Sports Facilities Act 2001* (Qld), which prescribes certain procedures in relation to meetings of the board of directors of the Major Sports Facilities Authority.

> (4) The board may hold meetings, or allow directors to take part in its meetings, by using any technology allowing reasonably contemporaneous and continuous communication between directors taking part in the meeting.
>
> *Example of 'technology allowing reasonably contemporaneous and continuous communication'—*
>
> Teleconferencing.

Or the example can be a punchy line as in this illustration from the *Income Tax Assessment Act 1997* (Cwlth):

> **SECT 61-360 What is a child event?**
>
> You have a *child event* at a particular time (the *event time*) if:
>
> (a) you become legally responsible for a child at the event time; and
>
> Example: Giving birth is generally an example of becoming legally responsible for a child.
>
> …..

Or, more complex still, an example can be in the form of a narrative. This re-tells a complex legislative message in an easy-to-read-manner. The following illustration comes from section 300 of the *Migration Act 1958* (Cwlth):

> **Automatic continuation of registration**
>
> (1) If:
>
> (a) before the end of the last day (the *expiry day*) of the period of registration of a registered agent, the agent has made a registration application; and
>
> (b) the agent has paid the registration application fee (if any) in respect of the application; and
>
> (c) the Migration Agents Registration Authority has not decided the application before the end of the expiry day;
>
> the agent's registration is taken to continue until the Authority decides the application.
>
> *Application granted if no decision within a certain period*

[20] See also section 43-190 (2) of the *Income Tax Assessment Act 1997* (Cwlth).

(2) However, if the Authority has not decided the registration application before the end of the period of 10 months beginning on the day after the expiry day, the application is taken to have been granted at the end of that period.

When registration takes effect
(3) If the Authority grants the registration application, or the registration application is taken to have been granted under subsection (2), the registration is treated as having taken effect at the end of the expiry day.

Example: An agent's registration is due to end on 31 October (the expiry day). On 20 October the agent applies to be registered again. The Authority has not decided the application by the end of 31 October.

The agent's registration continues automatically past 31 October until the Authority decides the application.

On 15 November, the Authority grants the application. The new 12 month registration is treated as having taken effect at the end of 31 October.[21]

Relationship to rule

The growing importance of the example is demonstrated in the following three cases in which examples to a greater or lesser extent rival the rule for significance.

This can occur first, when an example illustrates *all* the elements of a general rule. In this way, the rule is "translated" to a more concrete form.[22] The following illustration[23] comes from section 12 of the *Mental Health Act 2000* (Qld).

What is "mental illness"
(1) …

(2) However, a person must not be considered to have a mental illness merely because of any 1 or more of the following —

(a) …;
(g) the person takes drugs or alcohol;
…

(3) Subsection (2) does not prevent a person mentioned in the subsection having a mental illness.

Examples for subsection (3) —

[21] For a further illustration, see *Protection Orders Act 2001* (ACT), section 23.

[22] A variation on the above is where an example restates a rule in terms of when it does *not* apply: See, for instance, *Protection Orders Act 2001* (ACT), section 23(1); *Local Government Act 1993* (NSW), section 5.

[23] For other illustrations see *Mental Health Act 2000* (Qld), ss. 13(3), 15; *Income Tax Assessment Act 1997* (Cwlth), ss. 28-115(2), 43-75(5).

1. A person may have a mental illness caused by taking drugs or alcohol.

A second case is where examples restate a concept in the form of a rule. That is, they almost reverse the position whereby the example is second fiddle to the generalised rule. In the example below from the *Mental Health Act 2000* (Qld), the main provision is the concept of "authorised mental health service". It is defined but, as is normal, not in the form of a rule that directly states the consequences for a member of the Act's audience. However, the example does this by being framed in the form of a rule.

15. In this chapter —

'authorised mental health service' means —

…

(b) a public hospital if there is no authorised mental health service readily accessible for a person's examination or assessment.

Example of application of paragraph (b) —

If there is no authorised mental health service in a remote or rural area of the State, the person may be assessed at a public hospital in the area.

Another instance of this phenomenon is in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). Section 70(1) defines "aggregated commercial quantity" and then gives an example in which the legal effect is stated.

Example 1

Jack is in possession of 200 grams of heroin, 200 grams of amphetamine and 800 grams of tetrahydrocannabinol. The individual commercial quantities for each of those drugs is 250 grams, 250 grams and 1 kilogram respectively (as set out in column 2 of Part 3 of Schedule Eleven), so Jack would not be guilty of trafficking in a commercial quantity of each of those individual drugs of dependence.

To aggregate the individual quantities, determine the quantities involved as fractions of the specified commercial quantities: 200/250 (heroin), 200/250 (amphetamine) and 800/1000 (tetrahydrocannabinol) i.e. 4/5 plus 4/5 plus 4/5. The total of the fractions when added together is 12/5 or 2·4 which is a number greater than 1. Jack is therefore in possession of a quantity which is not less than an aggregated commercial quantity of 2 or more drugs of dependence. *(Emphasis added.)*

Thirdly, an example may assume effective prominence where it deals with the usual cases. The "rule" may thereby be relegated to a supporting role for more exceptional cases. The following provision of the *Local Government Act 1993* (NSW) may be an instance of this development:

540 Form of charge

The amount of a charge may be expressed as a single amount or as a rate per unit or as any combination of them.

> **Note.** For example, the amount of a charge for a water supply service could be a fixed amount, a rate per kilolitre, or a combination of them.

Another seeming instance comes from section 4(1) of the *Legislative Instruments Act* 2003 (Cwlth):

> ***original legislative instrument*** means:
>
> (a) the legislative instrument made by the rule-maker; or
>
> (b) an instrument prescribed by the regulations.
>
> Note: Examples of a legislative instrument made by the rule-maker are a signed or sealed instrument**.**

In the above instance, it is difficult to think of examples of legislative instruments made by a rule-maker other than those cited in the note.

Summary

Examples have altered the language and structure of statutes in significant ways. Their separate location after the relevant provision has allowed a variety of means of expression, including most radically, the narrative form. It has also allowed the example to rival the rule for legal or practical significance.

Adding meaning

Examples have come to play a significant role in adding meaning to a statutory provision. This comes about because they address the different levels at which a provision operates, reflecting the various needs of the reader of legislation.

Need for concrete illustrations

General rules often, by necessity, lack concreteness. Drafters have long been alert to what Dickerson calls the "disease of over-vagueness": "creating more vagueness than the substantive policies of the client call for".[24] The simplest level of an example adding meaning responds to the need for some concrete communication to occur in the case of a rule containing a "broad term".[25] In this way, examples can be seen as a half way house between, on the one hand, leaving the rule unelaborated and, on the other, defining or interpreting the rule in a more thoroughgoing way (which may be difficult due to the nature of the term). The *Mental Health Act 2000* (Qld) affords an instance, the case being the troublesome phrase "special circumstances".

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[24] R Dickerson, *The Fundamentals of Legal Drafting* (2 edn) (Little, Brown & Co, Boston: 1986) 41.

[25] Bennion's phrase: see FAR Bennion, *Bennion on Statute Law* (3 edn) (Longman, Harlow: 1990); FAR Bennion, *Statutory Interpretation: A Code* (3 edn) (Butterworths, London: 1997) 905-908.

514 (1) An authorised person or police officer may apply for a warrant for apprehension of the patient (a **"special warrant"**) by phone, fax, radio or another form of communication if the authorised person or police officer considers it necessary because of —

(a) urgent circumstances; or

(b) other special circumstances, including, for example, the remote location of the authorised person or police officer.

Many other broad terms are provided with examples in the Mental Health Act. They include: "necessary support and information to enable the person to exercise rights under this Act" (section 8(c), (f)); "the patient's reasonable needs"(sections 145(b), 158); "sufficient personal interest" (section 223(1)); "relevant material" (section 284(1)); "party to the proceeding" (section 285(2)); "anything else the Director considers appropriate" (section 344(3)); "a person with appropriate knowledge or experience" (sections 410, 462); "standing appropriate to exercise the power" (Schedule 2) "appropriately qualified").[26]

A variation occurs with definitions. In these cases, the example is the *second* attempt to particularise a rule. An instance comes from the *Mental Health Act 2000* (Qld), Schedule 2 definition of "harmful thing":

"harmful thing" means anything —

(a) that may be used to —

(i) threaten the security or good order of an authorised mental health service; or

(ii) threaten a person's health or safety; or

(b) that, if used by a patient in an authorised mental health service, is likely to adversely affect the patient's treatment.

Examples of harmful things —

1. A gun or replica of a gun.
2. A dangerous drug.
3. Alcohol.
4. Medication.[27]

Need for guidance

Examples are not necessarily given to provide concrete illustrations, however, if by concrete we mean specific instances. They can illustrate without being concrete. In so doing, they may explain in *some* depth an otherwise vague legislative concept. In section 18 of the *Legislative Instruments Act 2003* (Cwlth), the broad concept sought to be explained is consultation that may be "unnecessary or inappropriate".

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[26] For illustrations in other Acts see *Protection Orders Act 2001* (ACT), section 13: "someone else with sufficient interest in the protection order"; *Local Government Act 1993* (NSW), section 67(1): "any kind of work that may lawfully be carried out on the land"; *Fair Trading Act 1999* (Vic), section 108(2): "something".

[27] See also *Local Government Act 1993* (NSW), section 125: "nuisance" is defined; additionally, an example is given.

18 Circumstances where consultation may be unnecessary or inappropriate

(1) Despite section 17, the nature of an instrument may be such that consultation may be unnecessary or inappropriate.

(2) The following are examples of instruments having a nature such that the rule-maker may be satisfied that consultation is unnecessary or inappropriate:

(a) an instrument that is of a minor or machinery nature and that does not substantially alter existing arrangements; or

(b) an instrument that is required as a matter of urgency; or

(c) an instrument that gives effect, in terms announced in the Budget, to a decision:

(i) to repeal, impose or adjust a tax, fee or charge; or

(ii) to confer, revoke or alter an entitlement; or

(iii) to impose, revoke or alter an obligation; or

(d) an instrument that is required because of an issue of national security; or

(e) an instrument in relation to which appropriate consultation has already been undertaken by someone other than the rule-maker; or

(f) an instrument that relates to employment; or

(g) an instrument that relates to the management of, or to the service of members of, the Australian Defence Force.

Some of these "examples" are far from specific. For instance, "minor or machinery nature" and "substantially alter" in paragraph (a), and "relates to employment" in paragraph (f), are fairly broad concepts themselves. But they nevertheless provide guidance for administrators and other interested parties.

Need to illustrate value judgements

Examples can illustrate various things. They may be value judgements, such as what amounts to necessary evidence. Section 374 of the *Mental Health Act 2000* (Qld) provides for instance:

Administrator may refuse to allow a person to visit a patient

374. (1) The administrator of an authorised mental health service may refuse to allow a person to visit a patient in the health service if the administrator is satisfied the proposed visit will adversely affect the patient's treatment.

Example of application of subsection (1) —

The administrator may be satisfied a patient's treatment will be adversely affected if, on a previous visit by a person, the patient's mental state deteriorated.

Examples may illustrate other judgements allowed by the statute. Section 74 of the *Pest Management Act 2001* (Qld) confers powers on an inspector who has seized a thing:

> Having seized a thing, an inspector may do 1 or more of the following —
>
> (a) move the thing from the place where it was seized (the "**place of seizure**");
>
> (b) leave the thing at the place of seizure but take reasonable steps to restrict access to it;
>
> *Examples of restricting access to a thing—*
>
> 1. Sealing a thing and marking it to show access to it is restricted.
> 2. Sealing the entrance to a room where the seized thing is situated and marking it to show access to it is restricted.

Example 2 seems to authorise the sealing of a room. It illustrates "reasonable steps" to restrict access to a seized thing.

The *Public Service Act 1999* (Cwlth) gives a further instance of an example being used to guide the exercise of a discretion. It is located in a note to the following section:

> **33 Review of actions**
>
> (1) An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment. However, an APS employee is not entitled to review under this section of APS action that consists of the termination of the employee's employment.
>
> (2) The regulations may prescribe exceptions to the entitlement.
>
> Note: For example, the regulations might provide that there is not entitlement to review if the application for review is frivolous or vexatious.

An example may save an interpreter work. In section 341(1) of the *Mental Health Act 2000* (Qld) the general provision sets out the choices which all "involuntary patients" can make in who may be "the patient's allied person for this Act". The example following the rule sets out which of those choices apply to patients who are minors and in so doing interprets the rule for an important sub-class.

Need to inform discretions

An advantage of being concrete is that the decision maker is told precisely how they may act when exercising a discretion. This may lead to an example being used, possibly, to illustrate a preferred way of doing things. So, while in theory an example does not close off a discretion but merely illustrates it, the example may provide a strong message that it is a desirable or at least a safe course. Consider the following instance from section 512 of the *Mental Health Act 2000* (Qld):

> **Application for warrant for apprehension to patient**
>
> …

(3) The magistrate may refuse to consider the application until the authorised mental health practitioner or police officer gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.

Example —

The magistrate may require additional information supporting the application to be given by statutory declaration.

Need to forge links with related provisions and laws

Of course, no Act, let alone a statutory provision, is a proverbial island. Examples can illustrate relevant provisions to help the reader put the pieces of the statute together, that is, read it contextually. The links may be with other provisions of the same Act as in the following instance from section 279I of the *Racing and Betting Act 1980* (Qld):

(3) Also, a reference in a provision of this Act after the commencement to the Queensland Thoroughbred Racing Board includes, if the context permits, a reference to the Queensland Principal Club or the Interim Thoroughbred Racing Board.

Example of provisions—

1. Section 11G (1) (g)
2. Section 11I (3)

The link may be to other laws. The laws may be the common law as in section 11 of the *Protection Orders Act 2001* (ACT):

11 Who may apply for certain non-emergency orders?

…

(5) This section does not affect any other right of a person to make an application for a protection order for an aggrieved person.

Examples of people with right to make application for protection order

A parent or guardian of a child who is an aggrieved person, or an agent of an aggrieved person.

Or the link may be to provisions of the relevant Interpretation Act as in this note to section 220 of the *Local Government Act 1993* (NSW):

220 Bodies corporate

A council is a body corporate.

Note: Part 8 of the *Interpretation Act 1987* applies to statutory bodies. It contains provisions stating the general attributes of statutory incorporation (for example, perpetual succession, the requirement for a seal, the taking of proceedings, etc), it provides for judicial notice to be taken of a statutory corporation's seal, it creates a presumption of regularity for acts and proceedings of a statutory corporation and contains other provisions.

Or the link may be to other legislation (as in the following section of the *Local Government Act 1993* (NSW)):

124 Orders

A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following Table if the circumstances specified opposite it in Column 2 of the Table exist and the person comes within the description opposite it in Column 3 of the Table.

Note: This section does not affect the power of a council to give an order (or a notice or direction) under the authority of another Act. For example, some of those Acts and the orders (or notices or directions) that may be given include:

Food Act 1989	(by delegation) order for closure of food premises or to cease use of food vehicle
Protection of the Environment Operations Act 1997	environment protection notices
Public Health Act 1991	direction concerning maintenance or use of certain air-conditioning systems
Roads Act 1993	order preventing the passage of traffic along a road or tollway
	order for the removal of an obstruction or encroachment on a road
Swimming Pools Act 1992	order requiring owner of swimming pool to bring it into compliance with the Act

Need for explanatory material

While the classic example, in a concrete or not-so-concrete way, illustrates the application of the rule or an element of it, examples can also illustrate information about the *reason* for the general rule, or other background information that is helpful to understand the rule. Three illustrations can be given. The first is from Victoria. Section 27 of the *Fair Trading Amendment Act 2003* inserts section 62A into the *Fair Trading Act 1999*. Subsection (1) of this provision makes it an offence, except with prior consent, for a supplier or person acting on behalf of a supplier to visit the premises of a person for the purpose of negotiations that may lead to a contract sales agreement or for an incidental or related purpose during certain times. The meaning of "prior consent" is the subject of subsection (2):

(2) For the purposes of this section—

"prior consent to visit" means—

(a) consent given by a person to a supplier or to a person acting on behalf of a supplier other than in the presence of the supplier or person acting on behalf of the supplier, to visit the premises of that person for the purpose of negotiating a contact sales agreement or for an incidental or related purpose;

Example

S, a mobile phone seller, knocks on P's door on Friday afternoon and asks P if she is interested in buying one of S's mobile phones. P tells S she is busy. S asks P if she can come back on Sunday and P reluctantly agrees. This is not prior consent to visit because it was given face-to-face. If S had contacted P by telephone, then it would have been prior consent.

The example not only illustrates the point that "agreement" at one's door step is not a prior consent for the purposes of the section. The reference to "reluctantly agrees" indicates a *reason* for the rule in that if door step tactics are used, under pressure of being face-to-face, true agreements will often not result.

Two further illustrations can be given from Queensland. Section 123(1) of the *Pest Management Act 2001* obliges a pest management technician to give officials notice of the occurrence of a "notifiable incident". Subsection (5) elaborates on this term:

(5) In this section —
"notifiable incident" means an exposure, spillage or other release of a pesticide or fumigant that adversely affects, or is likely to adversely affect, a person's health.

Example of an exposure —
Exposure of a person to a fumigant because of a failure of protective equipment.

Section 38 of the same Act includes an example that may serve to justify the general rule to which it relates. Subsection (1) provides that the section applies "if the chief executive considers the chief executive needs more time to make a decision about the application [*for variation of a technician's licence*] because of the complexity of the matters that need to be considered in deciding the application". Subsection (1) provides that the section applies "if the chief executive considers he or she needs more time to make a decision about the application for variation of a technician's licence because of the complexity of the matters that need to be considered in deciding the application. Now, this provision might be considered to have shades of Sir Humphrey Appleby—an official giving themselves more time—except for the example which makes the case for the statutory power:

Example of an application likely to raise complex matters —
An application requiring the chief executive to obtain and consider further information about the applicant from a foreign regulatory authority.

If legislation contains advice rather than a binding rule, an example can give explanatory material for the advice. The *Income Tax Assessment Act 1997* (Cwlth), section 900-120, is apposite:

Written evidence of depreciating asset expense

….

(2) You must get evidence of the original acquisition of the depreciating asset. It must be a document that you get from the supplier of the asset and that specifies….

(4) If you don't get the document in time, for example because you only decided to use the asset for income-producing purposes several years after you acquired it there are rules that might help you in Subdivision 900-H (Relief from effects of failing to substantiate).

Need for simplicity in legislative expression

Examples do more than just illustrate in one way or another. The drafter might be aware that, for some reason, the statutory language is difficult or complex, and requires some clarification. Examples can help. The drafter may have used abstract language and be of the view that an example is needed. Section 268 of the *Mental Health Act 2000* (Qld) is an instance.

Reasonable doubt person committed offence

268. (1) The Mental Health Court must not make a decision under section 267(1)(a) or (b) if the court is satisfied there is reasonable doubt the person committed the alleged offence (the **"disputed offence").**

…

(3) If elements of the disputed offence are elements of another offence (the **"alternative offence"**), subsection (1) does not prevent the court from making a decision under section 267(1)(a) for the alternative offence.

Example for application of subsection (3) —

If the disputed offence is attempted murder, the court may make a decision in relation to the alternative offence of grievous bodily harm if the alternative offence is not disputed.

Need for precision

Another additional use is to aid precision. It is a well known fact that, left unqualified, the English language is prone to give rise to argument about its effect in law.[28] So, an example may be used to clarify an otherwise ambiguous crucial point. For instance, section 5 of the *Motor Accident Insurance Act 1994* (Qld) includes the following:

[28] This may be gauged by the importance of statutory interpretation in the practice of law: see for instance the views of Kirby J and Spigelman CJ who both rate it the most important aspect of legal and judicial work: see The Hon Justice M Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2002) 48 *Clarity* 3 at 3; J. J. Spigelman AC, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2002) 21 *Australian Bar Review* 224 at 224.

5 Application of this Act

(1) This Act applies to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury —

…

(b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person.

…

(4) For subsection (1) (b), the reference to a wrongful act or omission in respect of the motor vehicle does not include the use of the motor vehicle at the particular time it is being used for the actual doing of an act or making of a threat that is an act of terrorism.

(5) The following is an example of a particular time when a motor vehicle is not being used for the actual doing of an act that is an act of terrorism—

A is the driver of a motor vehicle from a which a bomb is thrown at a government building. It is established that at the time the bomb is thrown the motor vehicle is being used for an act of terrorism. In driving away from the building after the bomb is thrown, A runs into a motor vehicle being driven by B. At the time A's motor vehicle runs into B's motor vehicle A's motor vehicle is not being used for the actual doing of an act of terrorism.

An example may also be used to make certain that the scope of the rule extends to non traditional applications. For example, in the following illustration taken from the *Corrections Act 1986* (Vic) (section 3(1), inserted by *Criminal Justice Legislation (Miscellaneous Amendments) Act 2002* (Vic), section 7(1)), the drafter seems to have chosen the example to clarify that the taking of fingerprints extends to the use of state-of-the-art digital technology.

"fingerprints" includes finger, palm, toe and sole prints, whether taken by impression or by means of a device to obtain a record of the fingerprints;

Example: Fingerprints may be taken by a scanning device to obtain a digital record of the fingerprints.

Need to communicate in an appropriate register

Lastly, examples can aid communication not just by illustrating, but also by pitching the manner of the legislative expression at a convenient level or "register". Expressing a message at a concrete or more concrete level is often an instance of the drafter using a different register to convey the message. Language "register" has been defined as the "semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc)".[29] By their concreteness, examples often place the

[29] *Maunsell v Olins* [1975] AC 373 at 391 per Lord Simon of Glaisdale.

language in the register of the ordinary man or woman. For instance, the *Fair Trading Act 1999* (Vic) has recently been amended to make plain certain identifying details. Section 29(1) requires that a person who gives a document, statement or advertisement that is intended or likely to promote the supply of goods or services in trade or commerce must include in that document the name of the person or the business and—

> "(f) one of the following—
>
> (i) the full address (not being a post box) of the place of business or residence of the person;
>
> (ii) if the person is carrying on a business that is required to be licensed or registered under an Act, the relevant licence or registration number of the business or person;
>
> **Example**
>
> This may include an LMCT number if the person is a car dealer or the person's registration or licence number if the person is a plumber.
>
> (iii) if the person is carrying on a business under a business name registered under the **Business Names Act 1962**, the registered number of the business under that Act.

In this example, the reference to the popular "LMCT number" firmly places the language of the statute at the level of the "man or woman in the street", to paraphrase Lord Simon.

Another instance of an example using the "ordinary man or woman" register is in section 23(4) of the *Major Sports Facilities Act 2001* (Qld) which prescribes certain procedures in relation to meetings of the board of directors of the Major Sports Facilities Authority:

> (4) The board may hold meetings, or allow directors to take part in its meetings, by using any technology allowing reasonably contemporaneous and continuous communication between directors taking part in the meeting.
>
> *Example of 'technology allowing reasonably contemporaneous and continuous communication' —*
>
> Teleconferencing.

Conclusion

Examples, at least in many Australian jurisdictions, no longer languish as a descriptive component of legislation. They form part of the operative components of legislation.

More importantly, examples have been shown to be a versatile tool for developing a more engaging and informative style of legislative writing. Examples illustrate — in concrete or not-so-concrete ways. They illustrate all manner of things, including value judgements, the right way of doing things, relevant provisions, and the reason for the rule. They perform other useful functions too for the reader, such as clarification, aiding precision, and communicating widely.

This development has occurred without any master plan other than the encouragement of plain English advocates. Perhaps it is the accommodating form of the example that provides part of the key to its versatility. Examples can be a word, a single sentence, or a narrative. They are flexible vehicles, able to work with many aspects of the rule. And they are optional, allowing the drafter to use them when appropriate. Freed for a time from the conventional rule structure of imposing duties and conferring rights and powers,[30] drafters have seized the opportunity to fulfil their traditional aim of achieving the "greatest possible clarity".[31]

30 V Robinson, "Codes, Dooms, Constitutions and Statutes: The Emergence of the Legislative Form of Writing" (1994) 1 *Law/Text/Culture* 106 at 127 n5.

31 R Dickerson, *The Fundamentals of Legal Drafting* (2 edn) (Little, Brown & Co, Boston: 1986) 46.

Supporting legislative drafting in Bangladesh

Lionel Levert, QC[1]

Introduction

By way of introduction, it would seem appropriate to provide the reader with some background information concerning the technical legal assistance that is currently being offered by the Department of Justice of Canada to the Ministry of Law, Justice and Parliamentary Affairs of Bangladesh[2] in the area of legislative drafting.

1—Modernisation of Bangladesh' legal framework and institutions

A few years ago, the Government of Bangladesh decided to undertake major reforms with a view to modernising the country's legal framework and institutions. To that end, it sought the assistance of the World Bank and other donors, including the Canadian International Development Agency (CIDA).

After extensive consultations with both the Government of Bangladesh and the World Bank, CIDA decided to actively support the justice reform effort. CIDA's program of assistance in the legal field has two distinct but complementary components. The first of these is implemented by the International Cooperation Group of the Department of Justice of Canada. The second component of CIDA's program is implemented by a consortium headed by the Canadian Bar Association and deals with a number of other issues related to the justice system, including legal aid.

2—The International Co-operation Group of the Department of Justice of Canada

The International Cooperation Group of the Department of Justice of Canada ("ICG") is the foreign assistance arm of the Department. It is responsible for developing and implementing all projects under which the Department provides assistance to foreign countries wishing to reform their systems of justice. ICG comprises lawyers and other professionals who work full-time in advising and assisting states in matters of justice. When appropriate, ICG's initiatives involve experts from the Legislative Services Branch of the Department of Justice of Canada, as well as from other federal departments, the provinces, universities or the private sector.

3—Role of ICG's Special Advisor: Legislative Drafting

The author of this paper, who spent most of his career in the legislative drafting field, including as a drafter and as the Chief Legislative Counsel of Canada from 1995 to 2001, joined the International Cooperation Group of the Department of Justice of Canada as Special Advisor - Legislative Drafting in February 2001. As such, he was tasked with the

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1 Department of Justice, Canada; Former Chief Legislative Counsel of Canada.

2 The Ministry is referred to as the "Ministry of Law" throughout this paper.

responsibility of managing all international cooperation projects having legislative drafting as a key component. Currently, his main project is a five-year CIDA funded legal reform project in Bangladesh, as described below in this paper.

General Overview of the Bangladesh Legal Reform Project (Part A)

ICG is directly involved in four main areas: legislative drafting, strengthening of the Ministry of Law, strengthening of the Law Commission, and criminal justice.

1—Legislative drafting

The Bangladesh Ministry of Law, Justice and Parliamentary Affairs, is responsible for drafting all the Bills to be introduced in Parliament by the government. This function is not new, but it has never been strongly structured in the past. In an effort to improve the situation, the Ministry has taken the initiative of making the drafting group a separate administrative unit (called the "Legislative Drafting Wing") headed by a senior official, and recruiting new jurists who are expected to spend their entire career drafting legislation. Up until quite recently, government Bills were drafted by judges who were seconded to the Ministry of Law for two or three years and would subsequently return to the judiciary.

In order to assist the Legislative Drafting Wing in becoming a strong and effective central legislative drafting service, ICG has undertaken a number of initiatives since the inception of the project in August 2001, and will be supporting many more initiatives over the next three years and a half. These initiatives are described below in this paper, under the heading "Supporting the Legislative Drafting Wing of the Ministry of Law of Bangladesh".

2—Ministry of Law

In the context of a general expansion of the state apparatus, the Ministry of Law has not grown considerably. It could even be argued that it has not grown enough to keep pace with the needs for legal reforms. Except as regards the drafting of legislation, no measure has been taken to ensure that the Ministry of Law occupies in the system of justice the central place that it normally should. It needs to reorganise itself to be able to play a more prominent role in that reform effort. Among other things, the Ministry should develop a more focused view of its mandate, introduce modern management principles, and improve the technical skills of its personnel in key areas.

With that in mind, ICG proposes to support a re-thinking of the Ministry's structure and responsibilities. This review will deal with matters such as organisation, policy development, legal advisory role, interaction with other law institutions, administrative functions, support to the Minister, and communications.

3—Law Commission

The Law Commission of Bangladesh was created by the Law Commission Act 1996. The usefulness of having such a law reform agency does not seem to be the object of any dissent

within the Bangladeshi legal community. Everyone is of the view that such a commission is a key instrument for reform. In fact, while a new body, the Commission has already undertaken an impressive amount of work. However, some observers would welcome a broader debate on a number of fundamental matters such as the composition, priorities and methods of operation of the Commission. ICG intends both to encourage such a debate and to provide technical assistance in support of the Commission's activities. We will be assisting the Commission in particular by introducing its personnel to modern consultation and research methodology. We will also be providing assistance on selected substantive issues.

4—Criminal justice

By everyone's admission, including the Law Minister himself, the criminal justice system in Bangladesh is deficient in many regards. Yet, the importance of criminal justice cannot be overstated. A country cannot progress economically without offering to its citizens protection from theft, violence, and other acts against personal security.

ICG cannot possibly tackle the whole field of criminal justice. However, it can and will develop interventions that will permit to engage with Bangladeshi authorities a dialogue on key issues that have the potential of leading to improvements. Such issues include criminal law and criminal procedure, prosecutions and police.

Supporting the Legislative Drafting Wing of the Ministry of Law of Bangladesh

1—Strategic vision document

Building on past discussions with senior officials of the Legislative Drafting Wing of the Law Ministry, and also on our own experience with the reality of a centralised and specialised legislative drafting service, ICG is currently finalising a strategic vision paper that will provide our Bangladeshi counterparts with a conceptual framework on the implications and requirements of a centralised and specialised approach to the drafting of legislation.

This strategy paper will constitute a road map that will, over the duration of our project, inform decisions and choices to be made on how to most effectively support the Legislative Drafting Wing in the delivery of its mandate.

2—Legislative drafting training

Content

Over the five-year duration of the project, formal training will be provided to the Legislative Drafting Wing and will comprise the following elements:

- general principles of constitutional and administrative law relating to the drafting of Bangladeshi laws, including constitutional limits on legislative authority, the scope of subordinate law-making powers;
- general principles applicable to the drafting of laws, including functions of legislation, presentation and format, organisation, sentence structure, word use, drafting in clear language, drafting amendments, and particular types of provisions—supported by drafting exercises;
- law-making processes;
- operation and interpretation of laws;
- training in a number of practical aspects related to the work of the legislative drafter (e.g. how to conduct effective drafting meetings, how to raise the right questions with client ministries);
- general principles of international law, as they relate to the work of the Legislative Drafting Wing (e.g. types of international instruments);
- general principles and best practices applicable to the management of the statute book (e.g. consolidating and revising the statute book);
- study visits to Canada, as deemed appropriate.

ICG's philosophy

ICG's philosophy with respect to training is based on the following key assumptions:

- It is of the utmost importance for ICG to be able to strike a good balance between theory and practical considerations. Principles are always supported by practical examples or exercises, thus encouraging active participation on behalf of the trainees and facilitating their understanding of the matters being discussed.
- ICG strongly encourages diversity. Diversity in terms of the various approaches and models that are discussed with respect to particular drafting problems or issues and with respect to work methods, but also in terms of the experts who are brought in (Canadian experts from various Canadian jurisdictions, thus offering a diversity of models for the consideration of the trainees; local experts from the judiciary, academia or private practice). This approach facilitates the integration of local specificity, but it also offers trainees the possibility of choosing, from among the various models submitted to them, the solutions that will best accommodate their own particular environment.
- Materials are produced for each training session. They are distributed ahead of the training sessions and are adjusted during or following sessions to take into account the results of the discussions held in class. The production of these written materials will provide a lasting record of the knowledge transferred and will in the longer term ensure availability of that knowledge to a larger constituency.

- Training is provided for the most part by Canadian experts, but is supplemented by Bangladeshi experts. For instance, our next training session will be on statutory interpretation and will be provided by a law professor of the University of Ottawa who is a well known expert in the area of statutory interpretation. An essential complement, dealing with major Bangladeshi court decisions relating to the interpretation of legislation, will be provided by a well respected Dhaka lawyer.
- ICG is always looking for opportunities to integrate various other useful elements in its training: presentations by various experts; joint sessions with other groups being trained by other donor countries (e.g. joint sessions between drafters and judges on such matters of common interest as statutory interpretation).
- One very important factor that ICG must keep in mind at all times is that legislation in Bangladesh is drafted in Bengali and not in English. We must therefore avoid putting too much emphasis on English linguistic issues. Rather, we must focus on principles that should guide our Bangladeshi counterparts in establishing their own rules on matters that relate to linguistics, while illustrating our teachings with English examples.
- In all that we do, we build on the expertise that we have gained, and materials that we have developed, through other similar projects managed by our group over the years. The materials developed during our recent two-year legislative drafting project with the Ukraine are a very good illustration of this.

Format and venue

For greater efficiency, most of the training is offered in Dhaka, on ICG's office premises located close to the Ministry of Law's office premises. It is also delivered mostly by Canadian experts, while local specificity is looked after by well known and well respected Bangladeshi experts. In order to disrupt the Legislative Drafting Wing's daily operations as little as possible during training periods, the group of trainees (twenty to twenty five officers) is preferably divided up into two sub-groups. The first part of the training session is offered to the first sub-group on a full-time basis, while the other half of the group does the necessary drafting work back at the office. Roles are then switched between the two sub-groups during the second part of the training session. ICG is also planning to offer both theoretical and practical training in Ottawa at a later stage of the project.

In order to facilitate discussion and interaction generally, modern equipment is used during training sessions.

Series of lectures by local experts

Formal training sessions can only be organised in Dhaka from time to time, essentially every six months or so. In between these sessions, Bangladeshi experts will be invited to deliver lectures to the Law Ministry's drafters, on various topics relating directly or indirectly to the drafting and interpretation of legislation.

Appointment of local trainers

In order to ensure sustained professional development within the Legislative Drafting Wing, the Law Ministry has just appointed two of its legislative drafters to become trainers for their group. They are Moinul Kabir and Reza Ali, both at the senior assistant secretary level, and they are here with us today. Mr. Kabir will be addressing you immediately after this presentation. These two people will be offered more advanced training opportunities than the rest of their colleagues in order to be well prepared to assume their responsibilities in an effective way when ICG has completed its project in Bangladesh at the end of year 2006.

Developing work methods

As an essential complement to formal training, ICG will analyse the current work methods of the Legislative Drafting Wing with a view to supporting the implementation of the most effective work methods. In that regard, the project will be providing assistance in the following areas:

- developing standards for the drafting and the formatting of legislation, largely based on discussions held during training sessions;
- identifying legislative provisions most commonly used in Bangladeshi legislation and developing corresponding model provisions for Bangladeshi legislation;
- supporting the review responsibility of drafters to ensure conformity of legislative proposals to the Constitution and other basic legal requirements, as well as to fundamental government policies, and providing appropriate training in that regard;
- assisting, both financially and technically, the Legislative Drafting Wing with the updating and the revision of their laws, with a view to providing drafters with an essential working tool (i.e. an updated version of the statutes of Bangladesh) and also with a view to establishing a legislative database that will facilitate research, drafting, publishing, consolidation and revision functions within the Wing;
- encouraging a teamwork approach to drafting, thus facilitating on-the-job training;
- in conjunction with management of the Legislative Drafting Wing, examining the advisability of encouraging some form of specialisation in particular areas of the law or by client portfolio.

Conceptual papers

It is part of ICG's training strategy to provide an analysis of a number of selected theoretical matters that are of universal interest for the legislative drafting community.

To the extent possible, some key issues having a direct impact on the drafting of laws should be resolved. These issues include, but are by no means limited to, the following:

- the determination of the respective scope of primary legislation and delegated legislation; legislation by reference;
- retroactivity of legislation;
- the titles of laws;
- the use of preambles, purpose clauses and definitions;
- the utilisation of schedules.

The project will provide information on these matters with a view to encouraging Bangladeshi authorities to take a position on them or to at least be aware of them and to generate interest for the development of such papers which will undoubtedly assist drafters in dealing with legislative drafting or legislative policy issues in the future.

3—Other essential strategies

Training, however essential, needs to be supplemented by a number of other key initiatives and strategies.

Tools

Good work tools are an essential component in any professional environment, but especially in a legislative drafting environment where consistency is of the utmost importance. Work tools will be developed that will encompass the essence of the training modules. They will of course assist in achieving consistency in the way Bangladeshi legislation is drafted, and will undoubtedly constitute a key element in training new recruits in the Legislative Drafting Wing. The following resources either are being or are about to be developed:

- a legislative drafting manual (which covers general principles for drafting laws in Bengali and in English; standards for the drafting of legislation; models and guidance for drafting particular types of provisions; guidance on constitutional and administrative law matters related to drafting Bangladeshi laws, including guidance on determining the scope of subordinate legislative powers and an outline of the processes for making laws and regulations);
- a legislative editing manual;
- an English-Bengali legal lexicon;
- a documentation centre (books on legislative drafting and statutory interpretation, as well as other related areas of the law);
- supporting the publication of an exhaustive index of all the laws (both primary and delegated legislation) of Bangladesh;
- an updated version of the Bangladesh Codes.

Information technology strategy

Since it would be unthinkable in the 21st century to establish a strong and modern legislative drafting office without computerising its functions, we are supporting the following initiatives:

- developing a detailed computerisation plan covering all aspects of the needs of the Legislative Drafting Wing and undertaking an analysis of those needs;
- purchasing the necessary equipment and software;
- supporting the establishment of a local area network (LAN) with reliable storage capacity to maintain a database of Bangladeshi legislation;
- providing access to the Internet for research and training purposes, and supporting the establishment of Internet sites to facilitate public access to Bangladeshi legislation;
- providing necessary computer training with a view to increasing efficiency and consistency, facilitating standardisation (through development of standard formatting styles and macros to perform mechanical tasks, such as renumbering provisions), supporting efforts to improve the quality of language, and contributing to continuity;
- developing an access to the law strategy (largely – but not exclusively – based on technology), including a statute consolidation/revision strategy, and more generally providing support and training for electronic management of the statute book.

Legislative process

ICG will support a review of the legislative process of Bangladesh in order to ensure its effectiveness, both from the standpoint of both the legislative drafters and of all other actors in the process, and also in order to ensure that all those involved fully understands their respective roles as actors in the legislative process. The following initiatives are currently envisaged:

(i) Legislative agenda

ICG will work with central government agencies to encourage more systematic planning of the government's legislative agenda. Currently, there exists no long term legislative planning of government legislative initiatives.

(ii) Guidelines on drafting instructions

Our project will assist the Legislative Drafting Wing with the drafting of clear guidelines meant to facilitate the work of government officials responsible for the preparation of drafting instructions. Better drafted drafting instructions will undoubtedly benefit the legislative drafters and ultimately enhance the quality of the government's legislation.

(iii) Description of the legislative process

ICG will support the publication of a paper on the legislative process in Bangladesh. Work has already begun on this initiative which is meant to provide an opportunity to re-think the current process and to adjust it as needed, to inform all concerned of the various phases and requirements of the legislative process, and finally to inform both the legal community and civil society at large on how the laws of their country are made.

(iv) Support from other key players in the process

In strengthening the capacity of other parts of the Ministry of Law, particularly with respect to the Ministry's legal advisory role, our project will strongly encourage the emergence in the Ministry of specialised legal advisory services that could, inter alia, provide expert advice to legislative drafters, as needed. It is also our intention to encourage the creation of legal service units in each ministry, thereby also facilitating access by drafters to specialised legal advice on issues relating to the drafting of legislation for any given ministry.

(v) Distinguishing policy development and legislative drafting

As part of our assistance on improving the legislative process in Bangladesh, it is our intention to support the idea of a clear distinction between the policy development function and the legislative drafting function. We strongly believe that such a distinction is essential to sound policy-making and to effective legislative drafting.

Legislative reforms

Because capacity-building is the essential focus of our project, we will generally not be involved in the actual drafting of legislation for Bangladesh. However, because of their close relationship to a number of our capacity-building initiatives in the area of legislative drafting, it is our intention to support specific legislative reforms dealing with the process for making subordinate legislation, the law revision process, the publication of legislation, or relating to the interpretation of legislation. Given its impact on the way Bangladeshi legislation ought to be drafted, their *General Clauses Act* will be closely examined and possibly amended with a view to making it a more effective tool for both the drafting and the interpretation of legislation.

Language issues

Support is also made available to the Legislative Drafting Wing to assist them in dealing with a number of particular language issues.

(i) English-Bengali legal lexicon

As mentioned above, Bengali is the official language of Bangladesh. Since many common law concepts do not have any proper or well-accepted equivalents in Bengali, ICG has undertaken to support the creation of an English-Bengali legal lexicon. With

respect to the process to be followed, we will be able to draw on Canadian expertise since Canada has had to undertake a similar exercise several years ago concerning French common law vocabulary. Although this initiative is primarily meant to assist the legislative drafters, it will undoubtedly be extremely useful to the entire Bangladeshi legal community.

(ii) English training

Because legislation was drafted and adopted in English up until 1987, an important portion of Bangladesh' existing legislation is in English and needs to be amended in English. For that reason and also because of the government's policy to establish authentic English translations for Bangladesh's legislation, ICG arranged for English training to be provided to all drafters in 2002, and more advanced English training will likely be offered to the group at a later date.

Recruitment of additional professionals

ICG will assist the Legislative Drafting Wing in identifying whether they might need to recruit additional professional support, such as legislative editors, jurilinguists, translators and other support staff as may be required to support drafters and to ensure the proper management of the statute book, as well as the translation, publication, consolidation and periodic revision of legislation.

International networking

Because legislative drafting is a highly specialised expertise and also because legislative drafting issues are often quite similar from one jurisdiction to another, it is very important to ensure that the Legislative Drafting Wing have opportunities of sharing information and exchanging views with other drafting offices in the region and with other Commonwealth jurisdictions. To that end, ICG has already taken the initiative of arranging for the legislative drafters of the Legislative Drafting Wing to become members of the Commonwealth Association of Legislative Counsel ("CALC)" and has also supported the participation of two Bangladeshi legislative drafters at this conference, and in particular the program put together by CALC. ICG will seek to have other similar opportunities made available to the Legislative Drafting during the three and a half years remaining in the project's duration.

Equipment

A number of computers have already been purchased for the Legislative Drafting Wing, and more such equipment will be provided in the course of the implementation of the information technology strategy described above. Other necessary equipment will also be purchased for the Wing, namely fax machines and photocopiers, as needed.

Conclusion

In conclusion, it may be useful to highlight some of the key assumptions underlying our philosophy with regards to international cooperation:

- We are committed to fully respecting local specificity and to integrating, as much as possible, local ideas and expertise.
- We work on the assumption that our international cooperation projects are mutually beneficial to our respective governments and countries.
- Each of our projects builds on achievements and materials developed in the context of past projects of the same nature, and we manage our projects accordingly.
- We are committed to proposing various approaches, models and ideas, while never imposing our views and always respecting the host country's prerogative to ultimately make all final decisions.
- We fully understand the need to work in close cooperation with other donor countries and organisations with a view to making our respective efforts as effective as possible.
- We offer support to a reflection by our local partners on the structural reforms that might be needed to ensure the long-term impact of the project.
- We actively involve our local partners in the implementation process of our projects so that they understand the rationale of any recommended measures and can subsequently support it.

Multilingualism and the authoring of laws[1]

Donald L. Revell[2]

1—Introduction

Nunavut, located above the tree line of the Arctic, is Canada's newest territory. It has a population of 25,000 people spread across 20% of Canada's landmass. It has four official languages – Inuktitut, Inuinnaqtun, French and English. Under the *Official Languages Act*[3], all bills and regulations must be in English and French. While Inuktitut and Inuinnaqtun are not required languages for legislation, 80% of the population speak one of those two languages. Only 20% of the population are native English speakers and probably not more than 5% of the population speak French as a first language. Considering that Nunavut was created in response to the land claims of the Inuit population who have a desire to strengthen and preserve their cultural inheritance, it must seem ironic to the Inuit that their laws must be authored in the languages of the *Qallunaat*[4].

Nunavut came into existence on 1 April 1999. By 27 March 2002, only one bill had been enacted in quadrilingual form. All other legislation, bills and regulations alike, has been adopted only in English and French.

Are there reasons why Nunavut has not moved quickly to adopt the broadest possible use of Inuit languages in the law? Are there issues raised in Nunavut that have wider implications? I believe that the answer to both questions is "yes" and that the issues may be summarized as follows:

- Politics and culture.
- Financial implications.
- Human resources.

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1 Published in the Revue *Internationale de Langues et de Droit Comparé*, 2001 *(1)* 34

2 Chief Legislative Counsel, Province of Ontario, Canada. This paper is a work in progress. It was first presented at the International Legislative Drafting Institute of the Public Law Center in New Orleans, Louisiana, USA in June 2000. The paper finds its antecedents in a paper first presented at the Legislative Drafting Institute in 1995. The antecedent was published in the *Statute Law Review*, Vol. 19 *(1)* 32-40, 1998 under the title "Bilingual Legislation: the Ontario Experience". The author thanks David Marcello of the Public Law Center for giving him the opportunity to present it. The views expressed are those of the author and are not to be taken as representing the views of the Ontario Legislature or the Government of Ontario.

3 R.S.N.W.T. 1988, c. O-1

4 Outside Canada, the Inuit are frequently referred to as Eskimos. *Qallunaat* is an Inuit term for white people.

- Scope of the task.
- Terminology.
- Procedural matters.
- Priority setting.

This paper examines these issues not only as they arise in Nunavut but also as they arise in a wider Canadian context, most especially in Ontario. This is an increasingly important topic. It is important not just in Nunavut but in existing bilingual and multilingual jurisdictions such as Switzerland and South Africa. It is important in jurisdictions such as Estonia, Latvia and Lithuania that want to become members of the European Union and in those jurisdictions that wish to enter into economic unions under multilingual agreements such as the *North American Free Trade Agreement*.

2—Background

In this section of the paper, I will set the stage for a discussion of the issues noted above with a very brief overview of legislative bilingualism in Ontario and the Canadian context and then I will discuss models for authoring text in more than one language.

2.1—A bit about Ontario and the Canadian context

Ontario is one of Canada's ten provinces. Canada also has three territories. Because of Canada's colonial history and the political situation that prevailed in 1867 at the time of Confederation, French and English became the official languages at the federal level and in Quebec. Ontario, New Brunswick and Nova Scotia did not have "official" languages in 1867 but by default English became the language of the law. Manitoba has been constitutionally bilingual since its creation in 1870.[5] New Brunswick and the territories all became bilingual by simple legislative act. New Brunswick is now constitutionally bilingual. Ontario, as described below, became bilingual for legislative purposes under legislation passed in 1986. Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, Alberta and British Columbia have no requirements to use any language other than English in their legislation.

Approximately 76 per cent of Ontarians have English as their first language, about 5 per cent have French and the remainder have other first languages. For official purposes, Ontario was a unilingual English jurisdiction until the mid-1980s. This arose by convention and accident of history and not by constitutional requirement. Ontario was settled during and shortly after the American Revolution by loyalists from the thirteen former colonies who migrated to Canada to remain under British rule. Nineteenth century settlement was predominantly British. With only

[5] This fact was disregarded from 1890 until the Supreme Court of Canada ruled in 1979 that the law of 1890 declaring the province to be unilingual was *ultra vires*.

a small French-speaking population, official bilingualism was not on the agenda when the *British North America Act* (now cited as the *Constitution Act, 1867*) was passed by the British Parliament in 1867.

In the 1960s and 1970s, Quebec's French-speaking majority demanded full recognition of their language and culture. This led to similar demands in other parts of the country. Fearing that Quebec might separate from Canada, English Canada responded in a variety of ways to demonstrate a willingness to accommodate French Canada's aspirations. In Ontario, a pilot project was established in 1978 to translate into French selected statutes such as the *Evidence Act*, the *Highway Traffic Act* and the *Education Act*. Under the Ontario *Evidence Act* these translations were admissible in court but the English version was the authoritative text. This pilot project took on a much wider scope under the *French Language Services Act, 1986* which required that most existing public general statutes be translated and that new bills be introduced after 1990 in English and French.[6] Both the French and English versions have equal status in law.

2.2—Authoring in more than one language

Drafters, draft, drafting—this is the terminology of the traditional process for creating legislation in a unilingual jurisdiction. It describes the function of the person who receives instructions from a policy developer and converts them into the language of the law. It also describes the whole process of creating legislation from the time an idea for legislation is conceived until the time it actually passes into law. It is a terminology that was never intended to include translation. It can hardly apply in a bilingual or multilingual jurisdiction. It is perhaps more appropriate in such jurisdictions to talk of *authoring*.

There are at least three possible models for authoring laws in more than one language:

- Drafting followed by translation (the translation model).
- Co-drafting.
- Double-drafting

2.2.1—The translation model

Ontario and Nunavut use the translation model for authoring bilingual legislation. In both jurisdictions, policy is developed and instructions are prepared in English in the instructing ministry or department. Normally, the actual authoring process begins only after cabinet has approved the policy. In Ontario, a large jurisdiction, instructions come from ministry lawyers. However, in Nunavut, the instructions tend to come directly from either the policy developers or from program managers.

[6] See below under heading 3.4 - *The scope of the task*.

In Ontario, when instructions are received, the chief legislative counsel ensures that an authoring team is assigned to the project. This team will consist of one or more drafters, one or more translators, one or more linguistic revisers and one or more legal revisers. Drafters, even if they are fluently bilingual, draft only in English. When receiving instructions, drafters normally ask the client for any relevant French-language or bilingual materials that the client may have related to the project. The translation team uses this material for terminology and background information. To eliminate unnecessary translation, a drafter may prepare several English-language drafts before he or she is satisfied that the client will be unlikely to require many more amendments to it. At this point, translation begins.

The translator must prepare a text that accurately reflects the original text in law while at the same time being linguistically correct in the target language. This frequently involves consultations between the drafter and the translator. A senior language professional known as a linguistic reviser reviews every draft translation. The linguistic reviser ensures that the French version is accurately and clearly translated in a way that will be accepted by the French-speaking community. The text of both versions is then reviewed and revised by a bilingual lawyer who ensures that both versions are equal in law. Finally, the legislative editors review both versions for spelling, grammar and formatting errors.

Once translation has begun, changes to the English version must be carefully tracked so that they find their way into the French version. If a large number of changes is expected to the English version, translation may stop so as to avoid unnecessary translation. In cases were the changes are reasonable in number, we can track changes with our computer redlining software. This software allows drafting changes to be made to the English version while translation continues on an earlier English version of the text. Before acquiring this software, we had to maintain a careful paper trail of all changes in all drafts. This was very cumbersome[7].

The translation model is probably the most widely used model for authoring laws in more than one language. I believe that the model, as used in Ontario, has checks and balances built into it that ensure high quality legal text in both French and English.

2.2.2—The co-drafting model

Co-drafting is a model for authoring text in French and English that was developed by the Office of Parliamentary Counsel in the Department of Justice for Canada. This model is now also used in New Brunswick.

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[7] See also below under heading under the subheading *File management and version control* under heading 3.6: *Procedural Issues*.

Under this model, two drafters (one English and one French) are assigned to each project. Each receives instructions from the client. One or the other will act as the lead drafter and will prepare the first draft. The other will generally wait until the first draft is finished before beginning to draft. The two drafters are expected to work in collaboration. One might question how close the collaboration could be under the tight deadlines of the parliamentary agenda.

Unlike the translation model where all versions are expected to be mirror images of each other, the same may not hold true in the co-drafting model. Here both versions are considered to be "original" and the drafter in each language has leeway in presenting his or her text so long as at the end of the day, both versions say the same thing overall. That is to say, when both versions are read from top to bottom, they have the same effect. This may be called vertical equality. In the translation model of authoring text, all versions are expected to say the same thing in the same way at the same place in the text. This is called horizontal equality. All translations will have vertical equality if they are truly horizontally equal. Texts that are horizontally equal are easier to compare than texts that have only vertical equality. When texts have horizontal equality, it is easier to catch errors at the authoring stage than is with documents that have only vertical equality. A reduction in errors ultimately reduces enforcement and prosecution costs.

It may be argued that co-drafting ensures that each text is a true original. Hence neither version of the legislation has an inferior status because it is a translation. However, there is no reason why a properly established translation process cannot meet the objective of producing high quality texts in more than one language, thus meeting the linguistic and cultural needs of the jurisdiction without the risks that result from the loss of horizontal equality. Furthermore, co-drafting may lead to a misallocation of resources – it uses lawyers who are not trained in creating documents in two languages to deal with issues that are more properly the domain of translation experts. Finally, while co-drafting may work in a bilingual jurisdiction, it is difficult to imagine it working in a multilingual environment where clients would end up briefing three or more drafters.

2.2.3—Double drafting

In double drafting, one drafter prepares both versions of a bilingual text. Ontario has, except in exceptional circumstances, rejected this model. We found that there normally is not time to have one person draft and polish both versions of a bill. It also leads to a misallocation of resources by requiring lawyers to do work that can be done more efficiently by translators. Finally, the drafter, having already prepared the English version, might convert his or her errors in one text into errors in the other - just as one misses mistakes when proofreading one's own work.

3—The issues

We are now ready to deal with the issues identified at the outset.

3.1—Politics

Language is more than just a cultural issue. One need only look at the Canadian situation to understand the role of politics and culture in determining whether a jurisdiction becomes bilingual or multilingual or remains unilingual.

Canada's first lasting European settlements were French. At the time of Confederation in 1867, all of Quebec, except its far north, was overwhelmingly French speaking. However, it also had a significant and powerful English minority. Parts of Ontario and the Maritime Provinces also had significant French-speaking communities. The American Civil War had raised fears in Canada as had raids from the south by groups known as the Fenians. Even if the American Civil War and the Fenians had not had an impact, desire for an economic union was growing. The provinces entering Confederation needed Quebec if the union were to work. A bilingual federal government and a bilingual Quebec were political necessities. On the other hand, with very small French-speaking populations outside of Quebec, no other province was made officially bilingual in 1867.

Then with the "Quiet Revolution" in Quebec in the 1960s and 1970s, the growing desire of French-speaking Quebec to preserve its language and culture led to attempts to eliminate or reduce the use of English in Quebec or to even separate from the rest of Canada. Some Anglophones, particularly in Ontario, as discussed above, moved politically, to defuse the situation. This led to Ontario enacting legislation that requires all public acts to be bilingual.[8] This is an act of significant political will considering that not more than 5% of Ontario's population speaks French as a first language.

There can be no question that the people of Nunavut want to see the Inuit languages used in their legislation. Nunavut is premised on preserving Inuit culture. Its legislative debates are conducted mostly in Inuktitut. The first bill ever introduced in the Nunavut legislature was in the two languages of the Inuit people as well as in French and English. That bill, which passed all three readings on the first day of the first session of the Legislature, has great symbolic value[9.] Politically, it says the legislature can pass bills in the majority language. Nevertheless, no other bill or piece of subordinate legislation has entered the law book in any language other than French and English.

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8 French Language Services Act, 1986.

9 Flag Act,1999.

The lesson to be learned from these three examples shows that political necessity or desire can lead to bilingualism or multilingualism in the law but it is not necessarily the final determinant.

3.2—Financial implications

Bilingual and multilingual legislation costs money. These costs may be examined under various headings. First there are start-up costs. Second, there are on-going costs and finally there are editing, publishing and data management costs. We do not have time to delve into these issues in detail. However, they may be summarized as follows:

3.2.1—Start-up costs

When a unilingual jurisdiction becomes bilingual, it must do a "catch-up" translation to convert existing unilingual laws to bilingual form. In the case of Ontario, this meant translating over 11,000 pages of existing statutes into French. As part of this process, the English and French versions were revised and consolidated and published as the revised Statutes of Ontario, 1990. The costs (in 1990 Canadian dollars) exceeded, $6,000,000. Not included in the hard costs are soft costs related to staff training and development and related to developing new procedures.

3.2.2— On-going costs

It has been our experience in Ontario, that the cost of translation is approximately 50% of Ontario's cost of authoring text. We use legal translators to do our translation work. This ensures that translation is done by translation specialists and avoids the high cost of using lawyers to do tasks for which they are not trained. We have two types of language professionals in our office – translators and revisers as well as "translation counsel" who check all translations for accuracy.

3.2.3—Editing, publishing and data management costs

The cost of editing, publishing and managing data may more than double when one moves from unilingualism to bilingualism. The demands for accuracy in the law are very high. This demand for accuracy means that texts in more than one language must be accurate in all languages – not just individually but collectively. Because one version of an official law can be used to interpret another, it is imperative that all versions meet the highest possible editing and publishing standards. In today's electronic world, this extends to managing databases in each language – where each database necessarily must correspond to the other.

3.2.4—A final word on costs

In a large jurisdiction like Ontario, the cost of drafting in one language and translating into another represents a very small percentage of the provincial budget. However, the costs become

significant for smaller jurisdictions. Countries from the former Soviet block must translate thousands of pages of their domestic laws into a language of the European Union and tens of thousands more pages of European Union law into the local language as a condition of accession to the Union. Countries such as the Baltic States with small populations must devote comparatively large sums to the undertaking or find foreign aid dollars to proceed. How much more enormous the task will be in terms of finding money in Nunavut with its population of 25,000.

It should also be noted that the failure to find the money to translate may have significant implications elsewhere in the system. For example, it might be argued that more Inuit people would study law and become lawyers if the law and the teaching of the law was done in Inuktitut. It might also be argued that such a development would decrease the need for interpreters in court where virtually none of the lawyers work in the native languages and most of the parties and most witnesses speak little or no English or French.

3.3—Human resource implications

Regardless of the authoring model that is chosen, authoring law in more than one language has human resource implications. First and foremost is the need to hire and retain competent staff or alternatively to find competent outside translators.

Assuming that the translation model is adopted, the authoring office will need drafters who are amenable to working with translators, as well as linguistic and legal revisers. In some jurisdictions, drafters have little or no contact with the translation team. This is likely a mistake. The interaction between drafters and translators can lead to a vastly improved bill as the translators seek to resolve ambiguities and vagueness in the source document.[10] In Ontario and Nunavut, it is expected that drafters will take a team approach in working with translation staff. Initially, in Ontario, we found that it took some work on the part of drafters to recognize the value of this approach.

Hiring of qualified language professionals is difficult. They are generally in short supply and the times when governments most need translators are always the times when others most need the same skilled people. This issue cannot be minimized. In Nunavut, there are few skilled translators available to translate from English to French. There are even fewer available to translate into the Inuit languages. In the case of French translation, it is possible with the use of e-mail to work with translators in other parts of Canada. The same is not true of either Inuit language. While e-mail connects all parts of the Arctic, there are just not enough translators to do all of the work that is required to make Nunavut a quadrilingual jurisdiction. Similar

[10] Wood, Michael J.B, "Drafting Legislation in Canada: Examples of Beneficial Cross-Pollination between the Two Language Versions", *Statute Law Review*, vol. 17, 66-77 (1996).

problems are being faced in the former Soviet block countries as they move toward accession with the European Union. Retaining such scarce resources can be expensive and time consuming. It may lead to the development of internal training programs to attempt to create the necessary expertise. This will be at the cost of slowing down the work of senior staff as they train new staff.

Finally, you must hire people who work well under pressure. Authoring is the last stage in the legislative process before a bill is introduced in the legislature and translation is the last stage of the authoring process. This frequently means long hours of work in order to prepare the bills required for the legislative agenda.

It is not just a matter of hiring bodies. It is a matter of hiring the right people who are willing to work to high standards and who can achieve a high degree of consistency in their work. Outsourcing was alluded to above. It has been Ontario's experience that this works well on catch up translations. However, it may be difficult to find qualified outsiders at the peak of a legislative session.

3.4—The scope of the task

This section of the paper relates to those jurisdictions that are about to become bilingual or multilingual.

Adding a language to the authoring process is not just a matter of deciding that effective on a particular date laws will be authored in an additional language. One must decide whether the decision will apply only to new laws or to both new laws and existing laws. If it is to apply to existing laws, one must decide how far back in history one will go to "catch up" the laws in the additional language or languages.

Nunavut has only one quadrilingual act, the *Flag Act, 1999*. Because of the lack of translation resources, it will take many years to translate all existing laws into Inuktitut and Inuinnaqtun. On the other hand, if it is decided to translate only those laws designated by cabinet or by the legislature, it would have a more manageable project. By carefully and properly defining the scope of the task, Nunavut could give increasing recognition in the law to the Inuit languages while at the same time not overwhelming the available translation resources.

Ontario decided that all public bills introduced into the Assembly after 1 January 1991 would be introduced in English and French. It also decided that it would do a "catch-up" translation of all statutes contained in the Revised Statutes of Ontario, 1980, as amended before 31 December 1990. Translation of subordinate legislation is optional. A team of nearly 25 additional staff was hired to accomplish this work during the last three years of the project. In addition, a great deal of translation was done for the government by an outside agency.

In planning a major translation project, it is necessary to decide how many pages must be translated and the time it takes reasonably proficient language professionals to translate and revise an average page. Then, having regard to the deadline, it becomes possible to determine staffing issues. Alternatively, knowing the number of available language professionals, it becomes possible to determine the time it will take to complete the project.
Without understanding the scope and defining it carefully, it would be virtually impossible to monitor a "catch up" project to determine if it is on schedule and on budget.

3.5—Terminology

Cloud on title[11]*, clog on the equity of redemption, e-mail, mortgage, personal property security interest, separate school board, perpetuity, county warden, prison warden, park warden!* What are these things? How do you translate these terms from English to French or Inuktitut or Estonian? Can all of them really be translated?

It is trite to say that each language has its own unique terminology for dealing with various concepts. Furthermore, one language may have terms for concepts where no concept (let alone a term) exists in another language. For example, to translate the common law property concept of a *cloud on title* literally as *nuage sur titre* would have no meaning in French. Furthermore, the civil law has no legal concept similar to the concept of a *cloud on title*. Issues of terminology abound. The on-going computer revolution breeds new terminology everyday. How do you translate all of this terminology from one language to another? What are the rules for dealing with neologisms? The law is a central focus of a society – the language of the law must respect the culture of the society for which it is written. This means finding appropriate terminology or creating new terminology that respects the norms of the target language.

Despite the abundance of legal terminology in French and English at the federal level and in Quebec, Ontario faced significant terminology issues. The federal government had not developed terminology in those areas of law that are constitutionally under provincial jurisdiction; Quebec, a civil code jurisdiction, had not developed common law terminology. There was a national program to develop a terminology for the common law in French and we were able to take advantage of its work. However, the program was working at a more leisurely pace than we were. As a result, Ontario frequently had to develop its own terminology. Rather than hire terminologists, we decided to rely on our translators and linguistic revisers for this

[11] A cloud on title is anything that calls the vendor's title into question. An old undischarged mortgage would, for example, be a cloud on title if the buyer had not agreed to assume it in the sales agreement. It is defined in DiCastri, at article 313, (Victor Di Castri, *Law of Vendor and Purchaser*, Carswell, Toronto, 1988 (loose leaf)) as "an instrument under a registry act *ex facie* valid and which generates a claim of title and cast doubt or suspicion on the title or is calculated to embarrass the owner in disposing of the property or in maintaining his title".

work. In retrospect, this may have been an error. It distracted translators and revisers from their primary tasks – translation and revision. In a process were time was at premium, this may have been a false economy.

Nunavut, founded to respect the Inuit culture, faces major problems in this area. Neither civil law nor common law concepts apply to many areas that will be regulated by its government. It will have to develop an entirely new terminology that captures common law concepts and the specialized "jargon" of the fields regulated by the law. Concepts such as the rule against perpetuities – little understood by common law lawyers - will have to be faithfully translated into languages that never had a need for such a concept. The translators of occupational health and safety regulations must not only deal with difficult legal concepts but also with difficult technological concepts.

Like all jurisdictions facing the possibility of changing the number of languages used for legislative purposes, Nunavut will have to address the terminology issue. In a major catch up translation project, there is little time to spend on developing terminology. It is something that in many cases has to be done "on the fly". When a terminology issue arises in this type of project, it has to be settled immediately so that work can proceed. One must balance the need for terminology that is linguistically perfect with the need to complete the work in a way that is legally acceptable within the time constraints imposed on the project. Although it may mean using terminology that is less than acceptable to the punctilious, those who want results are more than prepared to accept that.

3.6—Procedural Issues

In an earlier paper on this subject, I wrote:

> In my opinion, the single biggest issue in the authoring process is the failure of clients to realize the complexities of the process. This frequently shows itself in inadequate time for authoring. It is a serious issue when only one language is involved; it becomes even more serious where two or more are used. Time constraints drastically influence all other issues, whether they be plain language or staff morale, and this appears to be a problem in many jurisdictions. The Office of Legislative Counsel in Ontario takes the position that it will do the best job possible in the time available. While a lack of time has a major impact on the drafter, it may have an even greater impact on the translation staff. They are virtually the last stage in the authoring process and as time collapses for drafting it must necessarily collapse even more for those at the end of the process.[12]

My opinion remains unchanged. The only way to avoid these pitfalls is through appropriate procedures. Bilingual and multilingual jurisdictions face procedural issues not faced by their unilingual cousins. They begin with the decision to become bilingual or multilingual and continue forever. I have already touched on several matters that raise procedural issues—e.g.

[12] Revell, Donald L., "Bilingual Legislation: the Ontario Experience" *Statute Law Review*, Vol. 19, 32, at p. 37, (1998).

the translation model to be followed, the use of staff or outside translators and the use of terminologists. However, whether one is working on a catch up translation project or in the authoring office of a fully bilingual or multilingual jurisdiction, procedures must be developed and followed to ensure that quality work is done. I will not go into detail on this subject but here is a list of some of the issues to be considered:

- who opens files?
- when will work move from a drafter to a translator?
- what is the role of legal and linguistic revisers?
- who will develop and implement standards and how will they be enforced?
- how and when will translation staff deal with drafting staff?
- what is the role of terminologists; when is that role performed?
- what method of file management and version control will be used?
- how does one track the work flow?
- how does one ensure that client needs are being met?
- if the office has staff translators, how does it get outside help in an emergency?
- how does one deal with a crisis situation (e.g. the preparation of emergency legislation)?
- how does one deal with the peak load of a legislative session?
- how does one ensure quality work?
- how does one ensure "plain language" in both (or all) languages?

I will explore just three of the listed issues as illustrations of the importance of dealing properly with procedural matters:

File management and version control—A drafter may be working on version 5 of the drafting text while the translator is still on version 1. Because of this, drafters and translators must be able to account for the various drafts and the changes to them. As noted above, Ontario uses comparison software to minimize this problem. However, there remains the possibility of error. A simple manual system of assigning a number to each draft can be effective to ensure that each draft is accounted for but this still leaves room for human error. Ultimately, the answer to file management and version control issues is to be found in computerized solutions. ***Plain language in more than one language—***Drafters and translation staff should author text in plain language. Each language has its own accepted rules and conventions. Bilingual or multilingual legislative texts must respect the linguistic norms of each language. Because language has both political and cultural implications, the failure to use appropriate standards may lead to political embarrassment and it may cause difficulties in understanding the law.

Proximity of staff—Authoring laws is an iterative process based on a dialogue between those involved in the process. It has been my experience in Ontario and Nunavut that the process works best when drafters work in close proximity to their "clients" and are able to meet with them face to face. Likewise, the translation process works best when translation staff have

direct access to drafters. That is not to minimize the importance of telephone and e-mail or other methods of communication, but direct interaction frequently speeds up the finding of solutions. Close proximity allows drafters and translators to develop a deeper understanding of the work performed by each other and this leads to a spirit of teamwork and collegiality. If close proximity is not possible, then steps should be taken to ensure that translators and drafters can deal directly with each other using other techniques.

3.7—Priority setting

Priority setting is a major issue for all governments. The first issue in respect of bilingual or multilingual laws is to decide whether a jurisdiction wants and can afford them. Assuming Nunavut wants multilingual laws, does that project, with its multimillion dollar price tag, take precedence over investing in treatment of substance abuse? Which laws should be translated first – the highway traffic legislation it inherited from the Northwest Territories upon its creation or the land titles legislation? How does the fact that Nunavut comprises 20% of the area of Canada while there are less than 80 kilometres of public highway affect the decision? How does the fact that there are only a handful of trained Inuktitut translators affect the decision? Virtually all of the trained translators have more work than they can handle. If the law is to be translated as a high priority item, how will the government meet its other translation needs? Suppose there are only one or two Inuinnaqtun translators available. How does this affect the decision? How does the fact that 80% of the population are Inuit affect the decision?

These and other priority setting issues must be settled early in the process and are tied up with the determining the scope of the project as discussed above.

4—Conclusion

We can make no conclusions about what will happen in Nunavut but we can conclude that authoring text in more than one language raises major challenges. None of them are insurmountable given the political will and the resources to the work so long as the appropriate professional framework is established for the work at hand.

Required rule-making: When do you have to make delegated legislation?

John Mark Keyes[1]

Abstract / sommaire

This article[2] considers whether a power to make regulations (or any other form of delegated legislation) is ever required to be exercised. Three types of requirement are considered. The first is a direct legal obligation to make delegated legislation, typically enforceable by mandamus. The second arises indirectly in the sense that delegated legislation is required for the enabling statute to operate or take effect. The third is also indirect. It involves delegated legislation that is required for the exercise of administrative powers.

The article concludes that the first type of requirement is rare. The second and third arise with rather greater frequency, although it is often difficult to predict when. They depend on the existence of a variety of factors ranging from the terms of the provision that authorizes delegated legislation to the degree of completeness of the statutory scheme that it complements. It also seems likely that clearer language in the enabling statute can help to resolve these questions.

Cet article traite de l'obligation de prendre des règlements (ou tout autre forme de législation). On y examine trois types de situation. Premièrement, l'obligation peut être imposée expressément par la loi, son exécution pouvant alors être forcée au moyen d'un mandamus. Deuxièmement, l'obligation peut être indirecte en ce que la mise en œuvre de la loi dépend de l'exercice du pouvoir délégué. Enfin, dans le troisième cas – l'obligation est également indirecte –, l'exercice du pouvoir délégué est nécessaire à l'exercice des pouvoirs administratifs.

L'auteur conclut, d'une part, que les cas où la loi impose expressément l'exercice du pouvoir délégué sont peu fréquents, alors que les deux autres cas se retrouvent plus souvent, mais peuvent être plus difficiles à prévoir. Plusieurs facteurs entrent alors en jeu qui varient du libellé de la disposition habilitante au contenu du texte que la législation déléguée vient compléter. D'autre part, la clarté du libellé de la loi contribue souvent à régler la question.

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2 The views expressed in this paper are those of the author alone and are not made on behalf of the Canadian Department of Justice. I would like to express my thanks to Susan Trylinski, Philippe Hallée and Ruth Sullivan for their generosity in commenting on earlier drafts of this paper and to André Labelle and Lise Poirier for their revision of the French version.

Introduction

Since the mid 1980s, Canada, like many other western democracies, has been on a de-regulatory swing, taking a more critical look at proposed regulations and trying to cut back the regulatory undergrowth. The pendulum may, however, be swinging back with a number of notable regulatory failures, such as the drinking water tragedy in Walkerton, Ontario. The recently released report of the inquiry into this matter has found that some of the blame rested with the failure to enact a regulation to require water test results to be reported to health and environmental authorities.[3]

The Walkerton Inquiry approached the absence of a regulation from a policy stand-point. It did not speculate on whether, as a matter of law, the Ontario Government should have made a regulation. In this article, I will address this side of the coin, which is somewhat neglected in Canada, despite having attracted rather more attention in the US under the rubric of *required rulemaking*.[4] In my experience as a drafter, the question of whether regulations have to be made comes up with some regularity, particularly at the committee stage of the legislative process when parliamentarians and others are interested in knowing what the entire legislative scheme (and not just the Act) will look like.

Required rule-making involves using judicial review to require, either directly or indirectly, the making of delegated legislation. This review is driven by the values of certainty and predictability that flow from legislated rules. It is associated with the rule of law and covers a number of grounds, including the subdelegation or transformation of power[5] and vagueness or uncertainty.[6] There have also been attempts to use section 15 of the Canadian *Charter of Rights and Freedoms*[7] and the doctrine of legitimate expectations[8] to require the enactment of laws. And, finally, civil actions have been brought, albeit without success, for damage alleged to have been caused by a failure to legislate.[9]

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3 Part 1, Chapter 10, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part1/

4 See K.C. Davis & R.J. Pierce, Jr., *Administrative Law Treatise*, (3 edn) vol. 1 (Little, Brown & Co., Boston: 1993) at 266-278.

5 See J.M. Keyes, "*From Delegatus to the Duty to Make Law*" (1987), 33 McGill LJ 49.

6 See J.M. Keyes, "Perils of the Unknown – Fair Notice and the Promulgation of Legislation" (1993), 25 *Ottawa L Rev* 579.

7 *Ferrel v. Ontario* (1998), 42 OR (3d) 97 (CA), *R. v. JP* (2003), 231 DLR 4th 179 (Ont CA).

8 *Les ambulances André Inc .v. Marcoux* [2000] RJQ 731 (CS).

9 See *Lucas v. Toronto Police Service Board* (2001), 54 O.R. (3d) 715 (SCJDC); *Shane v. Canada* [1996] F.C.J. No. 1351 (TD); *Alexander Band No. 134 v. Canada* [1991] 2 FC 3; (1990), 39 FTR 142; *Mahoney v. Canada* (1986), 38 CCLT 21 (FCTD); *Kwong v. Alberta* (1978), 8 CCLT 24-25 (AltaCA), affirmed 12 CCLT 297 (SCC). Note, however, recent developments in liability for negligent rule-making by non-governmental bodies: J. George, "*Watson v. British Boxing Board: Negligent Rule-making in the Court of Appeal*" (2002) 65 Mod. L.R. 106.

This encompasses a great deal of territory, so I will concentrate on three aspects of required rule-making. The first involves whether government authorities ever have a legal obligation to make delegated legislation and, if they do not, whether the courts will order them to make it. As you might imagine, this is a somewhat radical argument, but it has occasionally succeeded.

I will then look at whether statutory provisions can operate without delegated legislation to complete them. This approach is less radical in the sense that the courts are asked to shield people from the application of legislation, as opposed to ordering the government to take legislative action. The requirement to make delegated legislation arises indirectly. It only has to be made if the government wants the statutory provisions to operate. But usually it does.

Finally, I will look at how the absence of delegated legislation may affect the exercise of administrative powers. In some cases, the courts have been asked to conclude that these powers were conferred on the assumption that there would be delegated legislation to govern their exercise. Arguments that decision-makers cannot fetter their discretion with rules are common-place, so this should be an opportunity to consider the question from an opposite, and much less well known, perspective.

Is there ever an obligation to make delegated legislation?

When authority is conferred to make delegated legislation, it usually entails discretion to decide whether to exercise it at all. Although there are many examples of instances when judicial or administrative authority must be exercised,[10] mandatory legislative authority is quite rare.[11] Enabling provisions for delegated legislation usually use permissive language that, as most Interpretation Acts provide, takes the form of the auxiliary verb "may" in English and the verb "*peut*" in French.[12] Authority conferred in these terms is usually interpreted to be permissive.[13]

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[10] See P-A Côté, *Interprétation des Lois*, 3e édn. (Les Éditions Yvon Blais, Cowansville: 1999) at 288-289; P-A Côté, *The Interpretation of Legislation in Canada*, (3 edn) (Carswell, Toronto: 2000) at 228-235.

[11] However, note the *Pilotage Act*, RSC 1985, c. P-14, section 33, *Employment Insurance Act*, SC 1996, c. 23, section 69 and *Ex p. Greenfield* (1951), 51 SR (NSW) 305, discussed below at page 62.

[12] See, for example, *Acts Interpretation Act* (Cwlth), section 33(2A), *Interpretation Act* (NSW), section 9(1), *Interpretation Act* (Can.), section 11; *Interpretation Act* (Ont.), section 30; *Interpretation Act* (Que.), section 51.

[13] However, in *R. v. S.(S.)* [1990] 2 SCR 254 at 274 Dickson, CJC acknowledged that there were occasions when "*may* is to be understood as equivalent to *shall* or *must*." See generally J.M. Keyes, "The Two Faces of *Shall* and Other Words that Tell People What to Do: Principles for Determining Whether Legislative Provisions are Mandatory or Directory" (1998), 3 *Administrative Agency Practice* 121.

The courts have generally been reluctant to recognize obligations to make delegated legislation. This is hardly surprising. The discretion inherent in legislative authority typically goes beyond choosing one of several discrete options. It involves a wide range of measures. Enforcing an obligation to legislate takes the courts into policy-making since they have to determine what legislative measures are, as a minimum, needed to meet the obligation. Despite the rise of judicial activism under the Canadian *Charter of Rights and Freedoms*, courts are still cautious about assuming the role of legislators.[14]

It is also worth noting that there may be good policy reasons for a body that has delegated legislative powers not exercise to them. Sometimes statutes require a great deal of administrative preparation before they can operate. Delays in making regulations may result from difficulties in making administrative arrangements, particularly if these involve other levels of government. Another reason is that a government authority may prefer to rely on other, usually administrative, powers to accomplish its regulatory goals. This is especially attractive in the early stages of administering a regulatory program, when it is difficult to formulate hard and fast rules.[15]

The reluctance of the courts to require delegated legislation to be made is recognized in *Re Pim and Minister of the Environment et al*[16] where it was argued that the Lieutenant Governor in Council of Ontario was required to make regulations under clause 94(7)(ea) of the *Environmental Protection Act, 1971*:

> 94(7) The Lieutenant Governor in Council may make regulations relating to Part VIII …
>
> (ea) providing a schedule for the regulation and the prohibition within five years of the use, offering for sale or sale in Ontario of non-refillable or non-returnable containers for any beverage.[17]

The argument was based on a legislative provision that said:

> 1(2) The regulations made under clause ea of subsection 7 of section 94 of *The Environmental Protection Act, 1971*, as enacted by clause c of subsection 1, shall be filed under The *Regulations Act* not later than the 1st day of July, 1977.[18]

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14 See, for example, *R. v. Sharpe* [2001] SCJ No. 3 dealing with the remedies of reading in and reading down legislation.

15 See the passages quoted below at note 80.

16 (1978), 23 OR (2d) 45 (Div Ct).

17 S.O. 1971, c. 86.

18 S.O. 1976, c. 49.

Although no regulations were filed by the date mentioned in this provision, the Divisional Court refused to order the Government to make the regulations. Hughes, J held that this power was discretionary, as evidenced by the use of "may" in the enabling provision,[19] and concluded:

> I am of the view that this discretion is not in any way impaired by the provisions of subsection. (2) which say that Regulations must be filed on or before July 1, 1977. No Regulations were, in fact, made and the words "if enacted", of course, must be understood in any reasonable interpretation of subsection (2).[20]

Steele, J reached the same conclusion, but went somewhat further by saying that even if the enabling legislation had created an obligation to make regulations, he would have exercised his discretion to refuse the requested relief:

> It may not be necessary to add anything further, but if it is, it is my opinion that I would not exercise the discretion of the Court with respect to the application in the nature of mandamus. I would dismiss that application because even if there had been a mandatory date for the Lieutenant-Governor in Council to enact Regulations which I have found there was not, I believe that it would be totally improper for this Court to order the Lieutenant-Governor in Council to enact Regulations relating to a matter of which the Court has no knowledge. The Court has no concept of what should be included therein or within what time frame they should be made. This is not the type of case where a mandatory order of the Court could properly be enforced by the Court and, therefore, it should not be granted.[21]

Similar views are found in *Alexander Indian Band v. Canada*[22] where Strayer, J refused to find an obligation to make legislation in the fiduciary duties owed to aboriginal peoples. He stated:

> The enactment of regulations must be seen as primarily the performance of a political duty which is not enforceable in the courts.[23]

Pim and *Alexander Band* demonstrate the powerful arguments available to discourage courts from finding an obligation to make delegated legislation.

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19 Many other courts have also relied on this argument when asked to find an obligation to make delegated legislation, for example: *French v. Canada Post Corporation* [1988] 2 FC 389 (CA) at 395; *Thorpe v. Tickner* (1990), 21 ALD 479 (FCA) at 482; *Nova Scotia Dental Technicians Association v. Fall River Dental Lab Ltd* [1994] NSJ No. 665 (SC); *British Columbia v. Reid* [1996] BCJ No. 2619 (SC); *Re Marchment & MacKay* (1997) 149 DLR (4th) 354 (OCGD).

20 See above, note 16.

21 *Ibid*, at 56.

22 Above note 9.

23 *Ibid.* at 148. See also *Sinclair v. Québec* (1990), 28 QAC 86, at 94 interpreting "*décrète*" as "*peut décréter*".

Similar arguments predominate in the United States in the wake of the US Supreme Court's decision in *SEC v. Chenery Corp.* in which Justice Murphy said:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mould of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.[24]

Although many US courts have maintained this position despite the sustained criticism of academic commentators like Professor Davis, there appear to be some cases where courts have been prepared either to enforce statutory time limits on making regulations or otherwise require regulations to be made.[25]

The cases just discussed should not however be taken to mean that courts will never find an obligation to make delegated legislation. If enabling legislation uses mandatory language and defines the content of the delegated legislation with some precision, the contrary arguments are diminished.

For example, in *Re Jacobs,*[26] the Manitoba Court of Appeal upheld a writ of *mandamus* to compel the City of Winnipeg to issue a bylaw requiring the closing of barber shops under subsection 9(1) of the *Barbers Act.*[27] This subsection said that a municipality "*shall* … pass" a bylaw within one month of the submission of an application for such a bylaw signed by at least two-thirds of the proprietors of barber shops in the municipality. The process established by the enabling provision resulted in a precise determination of the content of the bylaw and the court found that little discretion was given to the municipality once the required application had been received.

Re Ontario Nurses Association and Wellesley Hospital[28]provides another example of judicial recognition of an obligation to make delegated legislation. Here, the *Public Hospitals Act*

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24 332 US 194 (1947) at 202-203.

25 See Davis, above note 4. Also see D. Bellis, "Compelled Delegated Legislation at the Federal Level in the United States", unpublished paper delivered at the 2nd Annual Caribbean Legislative Drafting Forum, Montego Bay, Jamaica, July 12-13, 2003 citing *Re United Mine Workers of America International Union* 190 F. 3rd 545 (1999) and *In re Bluewater Network and Ocean Advocates* 234 F. 3rd 1305 (2000).

26 (1974), 45 DLR (3rd) 424 (Man. CA).

27 RSM 1970, c. B10.

28 (1989), 71 OR (2d) 501 (HC).

said that "a hospital *shall* pass bylaws as prescribed by the regulations".[29] Regulations had been made prescribing the matters that were to be provided for in the bylaws. The Court concluded that the required bylaws had not been made and invalidated an election of staff nurses that was supposed to be governed by the bylaws.

In a third case, a Quebec Court in *Chanteur v. Ordre des Audioprothésistes du Québec*[30] recognized that the *Professional Code*[31] imposed an obligation on professional governing bodies to make regulations setting standards for recognizing diplomas from educational institutions outside Quebec. The Ordre des audioprothésistes du Québec had made such a regulation, but had not brought it into force. The court considered that *mandamus* was a possible remedy for failing to make the regulations,[32] but it instead simply ordered a licence to be issued to the applicant to practice the profession in question.

The recognition of an obligation to make delegated legislation in these three cases was undoubtedly facilitated by the legislative framework defining the content of the delegated legislation. However, it is also perhaps no coincidence that none of these cases involved government regulations. Local authorities and professional bodies tend to be subject to stricter legislative constraints, which, in turn, prompt stricter judicial review. The recent judgment of the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson*[33] may signal a shift to a more benevolent approach in the case of municipalities, but this remains to be seen.

Before concluding this discussion of obligations to make delegated legislation, I would note the closely related question of whether there can be an obligation to bring a statute into force. Most statutes are enacted with commencement provisions that say that their provisions come into force on a day or days to be fixed by proclamation or order in council.[34] Although these days are generally fixed within a year of two of royal assent, there are instances of several years, if not decades, elapsing without a commencement day being set.[35] However, Canadian courts have declined to order governments to bring statutes into force in a series of cases

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29 RSO 1980, c. 410, section 9.

30 [1994] RJQ 2341(CS); affirmed [1996] RJQ 539 (CA).

31 LRQ 1977, c. C-26, section 93(c).

32 See note 30 above, at 2349.

33 [2001] SCC 40.

34 See, for example, *Canada Customs and Revenue Agency Act*, SC 1999, c. 17, section 188:

> 188. This Act or any of its provisions comes into force on a day or days to be fixed by order of the Governor in Council.

35 See A. Samuels, "*Is it in Force? Must it be Brought into Force*?" (1996) 17 Statute Law Review 62.

under the Canadian *Charter of Rights and Freedoms*.[36] One also finds the House of Lords refusing to recognize an obligation to bring a statute into force in R. *v. Secretary of State for the Home Department ex p. Fire Brigades Union*[37] where Lord Browne-Wilkinson said:

> Further, if the argument of the applicants is right, there must come a time when the Secretary of State comes under a duty to bring the statutory provisions into force and accordingly the court could grant mandamus against the Secretary of State requiring him to do so. Indeed, the applicants originally sought such an order in the present case. In my judgment, it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision as section 171(1) imposes a legally enforceable statutory duty on the Secretary of State.[38]

He and two of his colleagues in the case went on to decide that, even though the statute was not in force, it nevertheless limited the Secretary of State's prerogative powers relating to the same subject matter:

> In public law the fact that a scheme approved by Parliament was on the statute book and would come into force as law if and when the Secretary of State so determined is in my judgment directly relevant to the question whether the Secretary of State could in the lawful exercise of prerogative powers both decide to bring in the tariff scheme and refuse properly to exercise his discretion under section 171(1) to bring the statutory provisions into force.
>
> … By introducing the tariff scheme, he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended. For these reasons, in my judgment the decision to introduce the tariff scheme at a time when the statutory provisions and his power under section 171(1) were on the statute book was unlawful and an abuse of the prerogative power.[39]

This aspect of the decision leads into the next section of this paper where I discuss whether delegated legislation can be required to be made as a prerequisite for the operation of statutory provisions.

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[36] See *R. v.* Cornell [1988] 1 SCR 461; R. *v. Paquette* [1988] 2 WWR 44 (AltaCA); *R. v. Bussière* [1990] 2 WWR 577 (Sask CA); *R. v. Van Vliet* (1988), 38 CRR 133 (BCCA); *R. v. Alton* (1989), 36 OAC 252 (CA); *R. v. Langille* [1992] NSJ No. 500 (CA); *R. v. Lunn* 1997 PEIJ No. 45 (CA), leave to appeal to SCC dismissed November 7, 1997.

[37] [1995] 2 All ER 244 (HL); [1995] HLJ No. 7.

[38] *Ibid.*, para. 22.

[39] *Ibid.* at paras. 31 and 33.

Is delegated legislation ever needed for statutory provisions to operate?

The answer to this question is "yes", but only sometimes. The need for delegated legislation appears to arise only when the statutory provisions expressly refer to the delegated legislation, although even then it is not necessarily needed. In Australia, Professor Pearce has characterized the approach of the courts as "essentially pragmatic" and suggested that it "leads to some uncertainty."[40] Canadian case law leads to the same conclusion.

In principle, one might think that if a statutory provision says that one of its elements is to be provided by delegated legislation, then the provision cannot operate without the delegated legislation. For example, in *Cameron v. Deputy Federal Commissioner of Taxation*[41] an income tax statute provided that income included the "prescribed" value of certain property. The High Court of Australia decided that the value of the property could not be included if no value had been prescribed.[42] Similarly, in *Canada v. Giguère*[43] the Federal Court of Appeal looked at the definition "interruption in earnings" in the *Unemployment Insurance Act*.[44] This concept was the trigger for benefits under the Act. The definition said that it included a "reduction in … hours of work for that employer resulting in a *prescribed* reduction in earnings". Pratte, J concluded that:

> the effect of the new definition was subordinated by Parliament itself to the adoption of appropriate regulations. In the absence of such regulations, I consider that the definition is devoid of any effect.[45]

Although these cases suggest that the absence of regulations will make a related statutory provision ineffective, this is hardly a general rule. Legislation is frequently brought into force piece-meal and the courts have recognized that some provisions can very often operate without others.[46] A power to bring different provisions into force at different times clearly demonstrates this.[47]

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40 D. Pearce and S. Argument, *Delegated Legislation in Australia* (2 edn) (Butterworths: Sydney, 1999) at 105.

41 (1924), 34 CLR 8.

42 *Ibid.* at 20.

43 [1979] 1 FC 823 (C.A.).

44 SC 1970-71-72, c. 48, section 2(1).

45 Above, note 43 at para. 6. See also *Office Municipal des Mont v. Gasse*, C.P. Gaspé, no 130-02-000234-832, 12/10/84, discussed in J-M Robert, "L'Application des directives dans l'administration des legislations sociale" (1985), 45 Rev. du Bar. 587, at 590-591.

46 Reference re Proclamation of section 16 of the *Criminal Law Amendment Act, 1968-69* [1970] SCR 777.

47 For a critique of such powers, see R. Tremblay, *L'entrée en vigueur des lois: principes et techniques* (Les Éditions Yvon Blais, Cowansville: 1997) at 54 ff.

The point is also demonstrated by a number of other cases dealing with provisions that referred to delegated legislation. For example, in *Irving Oil v. New Brunswick,*[48] the Supreme Court of Canada considered a provision that provided a tax exemption for

> (o) machinery and apparatus *as defined by the Minister*, and complete parts thereof, which in the opinion of the Minister are to be used directly in the process of manufacture or production of goods for sale or use;[49]

The Minister had never issued a definition under this provision. However, Pigeon, J held that "it would be a usurpation of power for the Minister to suppress the exemption by issuing no definition"[50] and concluded:

> The question therefore is whether, in the absence of a ministerial definition, the exemption avails for all machinery and apparatus coming within the class specified in para. (o). It is obvious that this class of goods is sufficiently described to be ascertainable without a definition. It is not the kind of indefinite expression which requires a definition in order to make sense. The defining power is by no means indispensable for proper application. In fact, it has not been included in the re-enacted federal *Excise Tax Act* exemption (Schedule III, Part XIII, para. 1(a) (S.C. 1973-74, c. 12, section 25).[51]

Irving has been recently applied by in *Nova Scotia Dental Technicians Association v. Fall River Dental Lab Ltd.*[52] Glube, J found that a provision allowing a corporation to "engage in the practice of dentistry *in accordance with the regulations*" did not require regulations to operate. She relied on the fact that the relevant regulation-making power was cast in permissive language ("*may* make regulations"). Citing *Irving*, she said:

> I am satisfied that where the passing of regulations is permissive, the failure to do so will not affect the validity or operation of the statutory provision to which the regulations relate.[53]

In another recent case involving similar language, one finds a rather puzzling result. In *Tswwassen Indian Band v. Canada,*[54] the Federal Court considered whether subsection 8(1)

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48 [1980] 1 SCR 787.

49 Social Services and Education Tax Act, RSNB 1973, c. S-10, section 27.

50 *Ibid.* at 795.

51 *Ibid.* at 794.

52 [1994] NSJ No. 665 (SC). Also note *Re Campbell* (1984), 7 DLR (4th) 560 (BCSC) involving a regulation-making power to establish a ceiling for the application of rent control on residential tenancies. A regulation was made setting the ceiling at $1, effectively eliminating rent control. The Court found this to be a valid use of the regulation-making power, concluding "s. 64(2) leaves to the discretion of the Cabinet to impose rent controls by prescribing an amount by regulation. … If the Cabinet does not prescribe an amount, then section 64(2) has no application and a landlord can collect whatever the market will bear."

53 *Ibid.* at par 33.

54 (1998), 145 FTR 1; affirmed (2001), 270 NR 145 (FCA).

of the *Canadian Environmental Assessment Act*[55] could operate without regulations. This provision said that a Crown corporation performing certain duties in relation to a project

> … shall ensure that an assessment of the environmental effects of the project is conducted in accordance with any regulations made for that purpose under paragraph 59(j)…

The court concluded:

> Where a statute provides that something is to be done in accordance with regulations, and there are no regulations in place, it is not the function of the court to create regulations. Until such time as appropriate regulations have been passed pursuant to paragraph 59(j) of the Act, Crown corporations are exempt from the general assessment requirements of the CEAA.[56]

However, the court went on to hold that

> … up and until regulations under paragraph 59(j) are in place, Crown corporations are only required to ensure that an assessment of environmental effects of a project is undertaken.[57]

Thus, it appears that subsection 8(1) had some effect without regulations. Although regulations were needed to impose a requirement of a full environmental assessment, a lesser form of assessment was still required.

How does one explain the differing results in the cases just discussed? The decisions themselves offer little general guidance, but it may be possible to distinguish two types of references to delegated legislation. In the first kind, delegated legislation defines an essential element of the statutory provision that mentions it. Thus, "prescribed value" and "prescribed reduction" have no meaning if nothing is prescribed. Regulations are needed to define the value and the reduction. In the second kind of reference, the regulations merely qualify something that is already has meaning. "[M]achinery", "engage in the practice of dentistry" and "assessment of the environmental effects" mean something on their own. The purpose of the delegated legislation is to augment, but not fully define, their meaning.
Another basis for explaining the cases is to look at what matters they involved. The common theme in the two tax cases may be that the government cannot rely on the absence of regulations to charge tax. Professor Pearce suggests that this can be generalized to other provisions that impose obligations and that in such cases "the details of that obligation will have to be spelled out".[58]

In the *Dental Technicians* case, a common law right to do business was in issue and the government was not allowed to suppress it without regulations. This represents the other side of the coin and may explain the differing results: delegated legislation will not be needed

[55] SC 1992, c. 37.

[56] See above, note 54 at para. 75.

[57] *Ibid* at para 82.

[58] See above, note 40.

to allow people to exercise their rights. The *Giguère* case stands out as a result that favoured the government, perhaps because unemployment benefits were not seen as a right. However, this is increasingly doubtful with more recent jurisprudence suggesting that interpretive doubts about social welfare legislation should be resolved in favour of those seeking benefits.[59]

Finally, I would note that, in drafting legislation, it is usually a simple matter to signal the optional character of delegated legislation by adding the words "if any".[60] Contrariwise, when regulations are to be required, this too can also be indicated clearly, for example by saying that a rule applies only "if regulations have been made".[61] Given the uncertainties surrounding this aspect of delegated legislative powers, consideration should be given to avoiding doubts in this way.

Is delegated legislation ever needed for administrative powers to be exercised?

This question too can be answered with a "yes" but, as with the previous question, it is often difficult to say when. There is also one important feature of the administrative powers cases that distinguishes them from other statutory provisions: requirements for delegated legislation sometimes arise without any express reference to delegated legislation in the provisions that confer the administrative powers. Accordingly, I will deal first with empowering provisions that contain express references and then with those that do not.

Express references to delegated legislation

There is no shortage of examples of when the courts concluded that delegated legislation was needed to provide a critical element for the exercise of administrative powers. A good example of this is found in a decision of the Quebec Court of Appeal in *Garderie Blanche-*

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59 See R. Sullivan, *Driedger on the Construction of Statutes*, (3 edn) (Butterworths: Toronto, 1994) at 376-379.

60 See, for example, the *Transportation of Dangerous Goods Act, 1992*, SC 1992, c. 34, section 13(3):

> (3) For greater certainty, a direction referred to in subsection (2) is not a statutory instrument for the purposes of the *Statutory Instruments Act*, but no person shall be convicted of an offence under that subsection unless the person was notified of the direction and, *if any applicable regulations have been* made under paragraph 27(1)(t), the notification was in accordance with the regulations.

Also see the *Farm Debt Mediation Act*, SC 1997, c. 21, section 4(2):

> (2) The Minister may, in accordance with the regulations, if any, and on such terms and conditions as the Minister may specify, designate any person, other than an employee within the meaning of the *Public Service Employment Act*, as an administrator for the purposes of this Act.

61 See, for example, Bill C-19 (An Act to amend the *Canadian Environmental Assessment Act*), introduced on March 20, 2001 in the 1st session of the 37th Parliament, section 8.

neige Inc. v. Office des Services de garde à l'enfance.[62] This decision involved a power to provide grants "in the cases and under the conditions, circumstances and terms *determined by regulation*".[63] The Court found that this power was "inoperative in the absence of regulations" and that administrative directives were insufficient to make it operative.[64] The latter conclusion relates to a suggestion accepted in some other cases, to which I will turn to in a moment, holding that quasi-legislation can go some distance towards addressing the concern that administrative powers not be exercised without sufficient legislative guidance in place.[65]

Another example of required delegated legislation involved a planning scheme in *R. v. Secretary of State for the Environment, ex p. Greater London Council*.[66] The scheme required the body recommending a plan for ministerial approval to "consider any representations made to them within the *prescribed* period". The court concluded that it was difficult to see how the Secretary of State could exercise this duty in the absence of regulations. Accordingly, no recommendations could be made unless a period had been prescribed.

In a third case, *Browne v. Commissioner for Railways*,[67] the enabling statute provided that "the officer at the head of such branch may in the *prescribed* manner ... dismiss or suspend" an employee. The court held that, in the absence of regulations prescribing a manner, the officer could not rely on the provision.

In all of these cases, the court held that delegated legislation was supposed to define a critical element of the powers in question. In *Blanche-neige*, these elements consisted of the cases, circumstances, conditions and terms for making grants. In *Greater London Council* and *Browne*, they had to do with procedural, but nonetheless vital, aspects of the powers.

In many other instances it is less clear whether the elements provided by the delegated legislation are essential. This particularly occurs when something is to be done "in accordance with the regulations". Does this mean that there must be regulations to accord with, or does it mean that if there are no regulations, there is nothing to accord with?

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62 [1993] RJQ 729 (CA); leave to appeal to SCC refused July 16, 1993.

63 Loi sur les services de garde à l'enfance, LRQ 1977, c. S-4.1, section 31.

64 Above note 89 at 736.

65 See below, notes 76 and 80.

66 The Times, 2 December 1983.

67 (1935), 36 SR (NSW) 21.

In *Swan v. Canada*,[68] Reid, J held that a reference to "such security measures as may be approved by the Minister *in accordance with the regulations*" meant that the Minister could not approve the measures in the absence of regulations:

> I read this description as meaning that the Minister has authority to approve security measures for the purposes of section 3.7(2) (c) only within the context of a regulatory framework set out by the Governor in Council. I do not read the reference as referring to some more unbridled authority which belongs to the Minister.[69]

Swan can be contrasted with *British Columbia v. Reid* [70] where Allan, J found that a power to—

> direct that a party to the appeal proceeding pay the actual costs *within prescribed limits*, as calculated by the Provincial Board…

could be exercised without any prescribed limits. He cited the *Dental Technicians* case discussed above[71] and relied on the permissive language of the provision that authorized the limits to be established.

It is difficult to see how *Swan* and *Reid* can be reconciled. In fact, the contrast is also reflected in cases where the provisions conferring administrative powers did not refer to delegated legislation. I will consider these cases next.

No express references

Arguments that delegated legislation was needed for the exercise of administrative powers have met mixed success when the provisions conferring those powers made no reference to delegated legislation.

For example, in *Ex p. Greenfield*,[72] the court held that the absence of regulations governing competitions for promotions in a railway did not prevent the competitions from being held. The enabling authority merely said: "whenever promotions to higher grades are to be made, the Commissioner shall cause competitive examinations to be held by the examiners." Although the Act provided that "The Commissioner *shall* make regulations ... for regulating the relative rank, position, or grade in the duties and conduct of the officers," the court did not consider this to affect the Commissioner's authority to hold competitions. The principal

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68 (1990), 67 DLR (4th) 390 (FCTD).

69 *Ibid.* at 408.

70 See above, note 19.

71 See above, note 52.

72 (1951), 51 SR (NSW) 305.

reason was because the provision conferring this authority did not refer to any matter that was to be dealt with by the regulations.[73]

Similar results have also been reached in decisions that involved enabling provisions cast in permissive language. Some, like *Greenfield*, involve powers or duties to grant benefits. The courts have been reluctant to see these provisions nullified by an absence of delegated legislation. For example, in *Doré v. Commission scolaire de Drummondville*[74] a school board was required to provide "special education services" to disabled children. Although the Quebec Government was authorized to make regulations defining these services, no regulations had been made. The court held that this did not negate the duty to provide the services.

Beyond the realm of social benefits cases, courts have also held that the absence of delegated legislation did not prevent the powers in question from being exercised.[75] Perhaps the most prominent of these is *CRTC v. CTV*[76]. It involved the power to make regulations under section 16 of the *Broadcasting Act*[77] and the power to issue broadcasting licences under section 17 of that Act. Rather than making regulations, the CRTC issued quasi-legislative guidelines indicating how it intended to exercise its licensing authority. Laskin, CJC rejected the argument that regulations had to be made governing the exercise of the licensing powers, quoting with approval the following passage from the Federal Court of Appeal judgment in the same case:

> It was not argued that the subject could properly be dealt with by regulations under subparagraph 16(1)(b)(ix), but assuming that it could be, I think it is apparent from the reference in that subparagraph to "the furtherance of its objects" and the reference to the same

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73 Ibid. at 311 and 314, distinguishing *Browne*, above note67. In addition, Dwyer, J at 315 referred to a number of other provisions conferring appointment authority on the Commissioner and concluded:

> The imperative expressed or implied in these sections renders inescapable the conclusion that, however, desirable they may be, regulations are not as a matter of law essential to the holding of competitive examinations under ss. 69, 71 or 73. Nor in my mind are they essential to the validity of examinations under section 77.

74 [1981] CS 160.

75 *Lynch v. Rainbird* [1968] Tas SR 30 (analysis of breath samples for the purposes of prosecuting impaired driving); *French*, above note 19 (closure of post offices); *Matthews and Board of Directors of Physiotherapy* (1986), 54 OR (2d) 375; 26 DLR (4th) 626 (Div Ct) (professional disciplinary proceedings).

76 [1982] 1 SCR 530. See also *R. v. Huovinen* [2000] BCJ No. 1365 (CA) where the Court said:

> 29 It is important to recognize that the grant of regulation making power under the Fisheries Act to the Governor in Council permits the making of regulations respecting the issuance of licences. It does not require regulations before licences can be issued.

77 RSC 1970, c. B-11.

> objects in section 17, that at least until the power to make regulations under subparagraph 16(1)(b)(ix) has been exercised, the power under section 17 to deal with the subject-matter on an individual basis is not ousted by subparagraph 16(1)(b)(ix).[78]

An important backdrop to this conclusion is *Capital Cities Inc. v. Canadian Radio-Television and Telecommunications Commission.*[79] In this decision, the Supreme Court recognized the propriety of using quasi-legislative guidelines to indicate how the CRTC intended to exercise its licensing authority under the *Broadcasting Act*. Laskin, CJC suggested that such guidelines could go some distance towards meeting the objects of notice and transparency that might have otherwise been achieved by making delegated legislation:

> In my opinion, having regard to the embracive objects committed to the Commission under section 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act," it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.[80]

Although the cases discussed above demonstrate judicial reluctance at requiring delegated legislation for the exercise of administrative powers, they do not tell the whole story. Counterpoised against them are several other decisions where courts have prohibited the exercise of administrative powers in the absence of regulations.

In *Singh v. Secretary of State for the Home Department*[81] the House of Lords decided that the Secretary of State for the Home Department was required to make regulations under subsection 18(1) of the *Immigration Act, 1971* to provide for written notice to be given of decisions made under the Act. The Court was not deterred in reaching this conclusion by the fact that the regulation-making power was drafted in permissive terms ("may make

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78 See above, note 76. See also *Rochon v. Nu-Pharm Inc.* [2000] RJQ 2478 (CA) at 2484.

79 [1978] 2 SCR 141.

80 *Ibid.*, at 171. A few years later, McIntyre, J in *Maple Lodge Farms v. Canada* [1982] 2 SCR 2 at 6-7 elaborated on this view:

> There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be.

81 [1992] HLJ No. 35; [1992] 1 WLR 1052, [1992] 4 All ER 673.

regulations"). Lord Jauncey of Tullichettle adopted the following reasoning of Bridge, LJ in the Court of Appeal:

> When I look at section 18(1), with all respect to the Divisional Court, I gravely doubt whether that is right and whether it can be said that Parliament intended to leave it to the Secretary of State to decide whether any regulations at all should be made under this section. I attach particular significance to paragraphs (b) and (c) of subsection (1). Paragraph (b) says that the regulations may provide for a notice to include a statement of the reasons for the decision, and by subsection (2) such a statement is made conclusive of the ground on which the decision was made. Under paragraph (c) provision may be made for the notice to be accompanied by a statement containing particulars which are designed to provide important safeguards for potential appellants of the rights of appeal available. Looking at these provisions, it seems to me that one should construe subsection (1) not as leaving it open to the Secretary of State's discretion whether he makes any regulations at all, but as requiring him to make regulations under the subsection.[82]

To this he added his own comments:

> My Lords, I entirely agree with the views of Bridge LJ on this matter and indeed would go further. Sections 13-16 of the Act confer rights of appeal upon persons in relation to various actions and decisions affecting them, such as refusal of leave to enter the United Kingdom, variations of limited leave to enter the United Kingdom, deportation orders and directions for removal. If those rights are to be effective the persons concerned must, where possible, be given such notice as will enable them to exercise the rights. In my view Parliament intended that the Secretary of State should be required to make regulations which would ensure, so far as practicable, that persons upon whom the rights of appeal had been conferred should be enabled effectively to exercise those rights. It follows that the Secretary of State does not have a discretion as to whether or not he shall make regulations.[83]

The issues and result in *Singh* are quite similar to those in an Australian case: *Colpitts v. Australian Telecommunications Commission*.[84] The exercise of power to discipline officers of the Commission under subsection 56(1) of the *Telecommunications Act 1975* was held to require that regulations be made under subsection 56(2). Although the decision-making power in subsection 56(1) did not refer to the regulations, the court found that its exercise depended on the establishment of review procedures in the regulations. This conclusion flowed out of the effect that the exercise of power could have on the employment rights of officers and the need to ensure that natural justice was accorded. The proximity of the regulation-making power and its mandatory wording ("The regulations *shall* make provision

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82 *Ibid.* at All ER at 676-678.

83 *Ibid.* at 677.

84 (1986), 9 ALN N82 (FCA).

for or in relation to the review of a decision of the Commission under this section") also supported the requirement of regulations.

Singh and *Colpitts* also demonstrate an important implication of finding a requirement to make regulations: the courts may have to define the minimum regulatory content needed to meet the requirement. In both cases, regulations had been made and so the courts had to consider the further issue of whether the regulations contained what was required. The court in *Singh* found that regulations for providing notice of decisions met the requirement. The court in *Colpitts* found that regulations providing for an internal review of decisions did not: independent review was required.

These two cases provide a sound indication of how courts should decide whether delegated legislation must be made before administrative powers can be exercised. They involved enabling Acts that established a solid framework for the regulations. They also dealt with a subject-matter that is familiar to the courts: procedures for making decisions. Thus, it is hardly surprising that they would venture to recognize and define rule-making obligations in this area. These cases stand in stark contrast to cases like *CRTC v. CTV* that involve broad statutory frameworks that leave a great deal of discretion to the regulating bodies to deal with subjects that are quite removed from decision-making procedure.

If *Singh* and *Colpitts* provide sound reasons for requiring delegated legislation for the exercise of administrative powers, two Canadian cases reach similar conclusions on much less convincing bases. The first was decided by the Prince Edward Island Supreme Court not long before *CRTC v. CTV*. *Re Garden of the Gulf Court & Motel Inc.*[85] involved a power under subsection 33(2) of the *Electric Power and Telephone Act*[86] relating to the connection of privately owned telephone equipment. The Public Utilities Commission was authorized to "make such order thereon as appears reasonable and just". The Commission refused an application for an order permitting the installation of the applicant's telephone equipment. Given the absence of any regulations governing the exercise of this power, the Court ordered the Commission to make regulations and stayed the application until they were made. Nicholson, CJPEI said:

> the right of a customer to connect privately owned terminal equipment to the facilities of a utility is one which is recognized and regulated throughout the industry in other parts of Canada and section 33(2) of the *Electric Power and Telephone Act* recognizes such rights in this Province.
>
> …applications by customers to connect privately owned terminal equipment should be suspended until suitable regulations governing such connections have been established. The

[85] (1981), 126 DLR (3d) 281 (PEISC).

[86] RSPEI 1974, c. E-3, section 33(2).

> question is too important to be decided on one isolated application made at a time when no suitable regulations are in existence.
>
> … It is neither fair nor practical that such an important part of the telecommunications industry in this Province be without specific regulations.[87]

The Court did not, however, discuss what the authority might be for the regulations. Neither the *Electric Power and Telephone Act* nor the *Public Utilities Commission Act*[88] contained any express regulation-making powers. The only possible source appears to have been subsection 13(1) of the *Public Utilities Commission Act*, but it merely conferred

> all additional and incidental powers which may be necessary to carry out, effect, perform and execute all the powers of this Act or any other Act specified, mentioned and indicated.

A second case where delegated legislation was required for the exercise of administrative powers is from the Quebec Court of Appeal in *Thibodeau-Labée v. Régie de permis d'alcool du Québec*.[89] It involved a statutory provision requiring a liquor board to refuse a permit "if it judges the issuance of the permit to be contrary to the public interest or harmful to public peace".[90] Although this provision did not refer to regulations authorized under another provision, the Court struck down the suspension of a liquor licence because no regulations had been made to elaborate criteria governing the liquor board's power to refuse a permit. LeBel, J declined to follow a decision the Court had made three years earlier[91] and based his decision on the conclusion that:

> …the other provisions of section 2, relating to the issuance of permits, create in principle a right to the permit when a certain number of objective conditions are met. As a whole, this system aims to bind the jurisdiction of the Régie through a group of factors, generally objective, that will determine as precisely as possible when a permit can be issued.
>
> By proceeding on a case by case basis when defining and applying the notion of public peace, the Régie avoids the creation of objective and predetermined criteria. One finds oneself faced with a situation where the respondent make its own rules in each file. This occasionally works against those who seek a permit. This absence of regulations could also injure the interests of third parties who might contest a permit application on the basis that it would harm public peace. (*trans*)[92]

He went on to hold that

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87 See above, note 85 at 292.

88 RSPEI 1974, c. P-31.

89 [1991] RJQ 731 (CA). See also *Office municipal des Monts v. Gasse*, above note 45.

90 *Loi sur hôtellerie*, LRQ c. H-3, section 41.

91 Régie de permis d'alcool du Québec v. Hôtel Motel Cabaret Pont Frontenac (1980) Inc. [1988] RJQ 1184 (CA).

92 See above, note 89 at 737.

> …this absence of regulations substantially modifies the spirit itself of the statute and its application on an important point regarding its implementation (*trans.*).[93]

The decisions in *Garden of the Gulf* and *Thibodeau-Labée* reflect a deep distrust of unfettered discretion in the face of what the courts characterized as a right to connect telephone equipment and a right to a liquor permit. They also reflect a firm belief in delegated legislation as the way to control that discretion. In *Thibodeau-Labée*, LeBel, J drew support for this view from cases such as *Canadian Institute of Real Estate Brokers v. Toronto*[94] where courts have invalidated delegated legislation that created decision-making powers without imposing standards.

Once again, we see quite different approaches to required rule-making. The decision in *Thibodeau-Labée* does not mention *CRTC v. CTV*. Can they be distinguished on the basis that the power in *CRTC v. CTV* was structured by quasi-legislative policy guidelines? Would such guidelines have been sufficient to allow the exercise of the power in *Thibodeau-Labée*? Or does the difference lie in the kinds of interests involved: the management of a public resource (radio waves) in one case and private "rights" in the others?

The cases do not answer these questions. They also do not address an uneasy relationship between required rulemaking and the countervailing doctrine that prohibits fettering discretion through the application of rules made without legislative authority. This doctrine seeks to preserve discretion, rather than limit it, and is well illustrated by *Ainsley Financial Corp. v. Ontario Securities Commission*.[95]

In this case, the Ontario Securities Commission attempted to use a policy statement to structure its powers under subsection 27(1) of the *Securities Act*[96] to discipline registered securities dealers "in the public interest". The Court of Appeal found that the policy statement had, through the exercise of this power, become mandatory and an attempt by the Commission to impose on the respondents a *de facto* legislative scheme complete with detailed substantive requirements. The Commission could not impose such a scheme without the appropriate statutory authority. None existed. Policy Statement 1.10 is invalid.[97]

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93 Ibid.

94 [1979] 2 SCR 2.

95 (1994), 21 OR (3d) 104 (CA).

96 RSO 1990, c. S-5.

97 See above, note 95.

Ainsley and the substantial body of case law prohibiting the fettering of discretion[98] seem to be opposed to the values of predictability and certainty promoted by required rulemaking. Or perhaps more accurately, they recognize that sometimes Legislatures choose to favour discretion and adjudicative participation over hard and fast rules. But the question remains: how do courts decide which legislative choice has been made?

Conclusion

The case law on requiring the making of delegated legislation illustrates two sets of contending factors. On one side is judicial discomfort at taking on the role of legislator. This is supported by a recognition that regulatory flexibility is often needed to deal with complex problems. And rules may not be needed because abuses of discretion can be controlled through judicial review.

On the other side is the conviction that statutory schemes are often intended to be fleshed out with a minimum of delegated legislation. One of the conditions for their operation is that their basic features will be communicated in the form of legislated rules to the regulated public so that they can organize their affairs accordingly.

Unfortunately, the case law provides only limited guidance on which of these contending views will prevail in any given case. Although arguments for required delegated legislation are frequently disposed of on the basis of permissive language in the enabling provision,[99] this reason is scarcely satisfying and does not account for the substantial number of cases where courts have required delegated legislation in the face of such enabling provisions.

One guide to this question may be whether a statutory provision includes an element that is to be fully defined by delegated legislation or that is instead merely qualified by it. This approach seems to explain many of the cases, but it sometimes breaks down, particularly when a provision says that something is to be done "in accordance with" delegated legislation. This phrase has been interpreted to require delegated legislation in some cases,[100] but not in others.[101]

Much also seems to depend on how the courts characterize the interests of the regulated public, either as rights that need to be protected by legislative rules, or instead as some lesser

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98 See, for example, D.J. Mullan, *Administrative Law* (3 edn) (Carswell, Toronto: 1996) at 422-426; D.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada* (Canvassback Publishing, Toronto: 1998) at 12-35 to 12-48.

99 See above note 19.

100 See *Swan*, above note 68.

101 See *NS Dental Technicians*, above note 52 and *Tswwassen*, above note 54.

interests subject to discretionary powers that may or may not be encumbered by such rules. On the one hand, when it comes to decision-making procedure for the protection of rights, the courts seem particularly inclined to require delegated legislation.[102] On the other hand, the courts are reluctant to prevent individuals from exercising rights and entitlements just because delegated legislation is lacking.[103]

Beyond this, it is difficult to discern a principled approach, particularly when provisions creating administrative powers do not expressly refer to delegated legislation. The Supreme Court of Canada has recognized that the CRTC is free to decide whether or not to encumber its administrative powers under the *Broadcasting Act* with regulations.[104] Appellate courts in Quebec and PEI have reached the opposite conclusion in relation to similarly broad discretionary powers there.[105] I would argue that the deference the Supreme Court has shown for the CRTC's choice of regulatory action is to be preferred, particularly given the backdrop of quasi-legislative policy directives to structure the CRTC's discretion.
When all else fails, might we not turn to legislators? There is little difficulty drafting enabling statutes that clearly indicate whether delegated legislation is required for them to o operate. Yet, this is seldom done. Perhaps it is time to review our drafting practices.

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102 See *Singh*, above note 81 and *Colpitts*, above note 84.

103 See *Irving Oil*, above note 48 and *Doré*, above note 74.

104 See *CRTC v. CTV*, above note 76.

105 See *Thibodeau-Labée*, above note 89 and *Garden of the Gulf*, above note 85.

Developments in the delegation of legislative powers in Ireland

Jonathan Buttimore[1]

Introduction

Article 15.2 of the Irish Constitution 1937 states that:

> 1. The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has powers to make laws for the State.
>
> 2. Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

It is permissible for the Oireachtas (Irish Parliament) to delegate the power to make secondary legislation to a subordinate authority, in order to implement the purpose of the law which the Oireachtas has enacted. Such secondary legislation is invalid if it does more than implement the principles and policies set out in primary legislation i.e. make regulations to deal with administrative, regulatory and technical matters to give effect to the principles and policies set out in the primary legislation.

Previous case law:

Previous cases such as *Cityview Press Limited v An Comhairle Oiliúna*[2], and *Laurentiu* –v- *Minister for Justice, Equality and Law Reform*[3] have confirmed the legal principle that the provisions of Article 15.2.1 of the Irish Constitution only authorise the making of delegated legislation within the principles and policies set out in primary legislation and this precludes the Oireachtas from delegating the power to make, repeal or amend legislation.

Cityview Press Ltd v. An Chomhairle Oiliúna

This 1980 Supreme Court judgment arose out of a claim arising from the imposition of a levy on Cityview Press Limited by AnCo. The Court held that the *Industrial Training Act 196*7 contained a clear declaration of the legislature's policy that a levy should be imposed on certain employers and secondly, it provided an opportunity for each House of the Oireachtas to annul a levy order made by AnCo. Consequently, as the legislative policy allowed for the

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[2] [1980] IR 381.

[3] [1999] 4 IR 26.

imposition of a levy, the provisions of the Act were not an unlawful delegation of legislative power in contravention of Article 15 of the Constitution. O'Higgins C.J. at p. 399, stated:

> In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power.

Recent commentators have indicated the difficulties of this test. At page 248 of the fourth edition of Kelly's Constitution (par. 4.2.34) the learned editors state (in the context of *Cityview Press*):

> …it is probably impossible to devise any a priori test whereby the sufficiency of the legislative articulation can be judged. Much depends on the context of the legislation at issue and whether the powers assigned to the Minister are, in truth, no more than filling in the details of principles and policies already articulated by the Oireachtas.

Laurentiu v. Minister for Justice, Equality and Law Reform

This 1999 Supreme Court judgment arose from a claim by a Romanian national, who was refused refugee status by the Minister on the grounds that the circumstances put forward by the applicant did not themselves amount to persecution under the United Nations Refugee Convention of 1951. The applicant claimed that section 5 of the *Aliens Act 1935* gave excessive legislative powers to the Minister and did not set out any general principles on which the Minister was to act.

The Supreme Court held that the Oireachtas was the sole body with power to legislate and it was for the Oireachtas to establish the principles and policies in primary legislation. Only administrative, regulatory and technical matters may be delegated to Ministers to implement by way of secondary legislation.

The Supreme Court further held that the Minister for Justice did not have legislative power relating to deportation when the policies or principles on foot of which he was to act were not set out in primary legislation, and that the general power conferred on the Minister for Justice by Article 13 of the *Aliens Order 1946* had been conferred by a statutory instrument and not by the Act itself. Therefore, Article 13(1) of the *Aliens Order 1946* contained substantive legislation which was prohibited by Article 15.2 of the Constitution and thereby rendered section 5(1)(e) of the *Aliens Act 1935*, and any orders made under the Act, inconsistent with the Constitution.

Recent developments

Mulcreevy v. Minister for Environment, Heritage and Local Government and Dun Laoghaire-Rathdown County Council[4]

The judgment of the Supreme Court in *Mulcreevy*, concerning an interlocutory motion for an injunction, related to the construction of the South Eastern Motorway which route traverses part of Carrickmines Castle, County Dublin, a national monument within the meaning of the *National Monument Acts 1930 to 1994*, is strong legal authority that Transfer of Functions Orders (i.e. orders transferring statutory functions from one Minister to another) simpliciter can still be made provided the scheme of the Act in question is not altered in any manner.

The judgment relates to the valid and effective transfer of functions to different Ministers. Where the scheme of primary legislation provides for a role in a decision making process for two or more Ministers or agencies, a Transfer of Functions Order cannot abrogate the role of two or more Ministers or agencies exercising independent statutory functions. Therefore, it is not open to amend a legislative scheme in primary legislation by means of a Transfer of Functions Order. Keane C.J. commented as follows:[5]

> It is well established that the exclusive role assigned to the Oireachtas in the making of laws by this Article (15.2) does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purpose of carrying in to effect the principles and policies of the parent legislation. (See *Cityview Press v. An Comhairle Oiliúna* [1980] IR 381. But it also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution.

Under the original heritage legislation (s.14 of the *National Monuments Act 1930*) before works could proceed, the joint consent of the Environment Minister, as successor of the Commissioners of Public Works, and the local authority were needed. Thus, the consent of two distinct and independent statutory bodies with different remits was required. The result of the amendment (s.15 of the *National Monuments Act (Amendment) Act 1994*) was to require the consent of a third statutory body, again with a different statutory remit, i.e. the Minister for Arts, Culture and the Gaeltacht –hereafter the Arts Minister. The Minister for the Environment and the local authority could consent only if it were in the interests of archaeology to do so. In any other case, their consent was ineffective unless it was approved by the Arts Minister who in turn needed the approval of both houses of the Oireachtas if his consent was not grounded on public health or safety grounds. After the relevant Transfer of Functions Orders, the Arts Minister was required to give the joint consent with the local

4 Unreported (Supreme Court, 27/01/04: High Court 29/01/04).

5 At page 29.

authority and the approval of the joint decision. The effect of the Transfer of Functions Orders purported to replace the hierarchy of controls requiring the consent or approval of three entirely distinct and independent statutory bodies with different remits by a different system of control requiring the approval or consent of two bodies only.

Following the judgment delivered by the Supreme Court on the 27/01/04, Kearns J. on 30/01/04 in the High Court held that the essential point is that subordinate legislation cannot amend primary legislation. Accordingly, he made a declaration that the *Heritage (Transfer of Functions of Commissioners of Public Works) Order 1996* (SI 61 of 1966) is *ultra vires* and invalid to the extent that it purports to transfer the consent function of the Commissioners of Public Works created by section 14 of *the National Monuments Acts 1930-1994* to the Minister for Arts, Culture and the Gaeltacht.

In my opinion, the judgment of the Supreme Court in Mulcreevy is strong legal authority for two propositions:

(a) Firstly, transfer of functions orders can be made provided the scheme of the Act in question is not altered in any manner.

(b) Secondly, if the effect of making a transfer of functions order (i.e. order transferring statutory functions from one Minister or agency to another) would be to alter the scheme of the Act in any other way then such an alteration can only be made by primary legislation.

It follows that it is still open to the legislature to solve any problem that currently exists by way of primary legislation. In other words, should the effect of a transfer of functions order be one that, by necessary implication, amends the scheme of primary legislation then the problem can be solved by amending that primary legislation to give proper effect to the transfer. Where such problems are corrected by amending primary legislation, there is no guarantee that such amendments will have retrospective effect.

The ratio of the decision of the High Court and the Supreme Court in *Mulcreevy* in essence reduces itself to a simple proposition. That is where the scheme of primary legislation provides for a role in a decision making process for two or more ministers or agencies a transfer of functions order cannot abrogate the scheme of two or more ministers or agencies exercising independent statutory functions. In other words, if a decision can only be made by Minister A with the consent of Minister B (or some agency) a transfer order cannot for instance have the effect of vesting the power to give the consent in Minister A so that there is only one minister in the decision making process. If the scheme of the legislation provides for two or more ministers (or agencies), being participants in that decision making process then that can only be altered by primary legislation.

Therefore, it is not open to legislate, by secondary legislation, to effect the transfer of functions that is inconsistent with the scheme of primary legislation. In my view, it is clear that the legal basis for the decision in *Mulcreevy* is that one cannot amend primary legislation by secondary legislation, which is a sound legal proposition.

It should be noted that the laying of a Regulation before both Houses of the Oireachtas either by way of a positive or negative resolution to approve the Regulation is not likely to save any possible violation of Article 15.2. In *Lovett v Minister for Education*[6] at p. 99 of the judgment Kelly J. stated:

> Whilst this (the positive resolution procedure) provided a safeguard of sorts, the responsibility rests with the Courts to ensure that the exclusive authority of the Oireachtas in the field of law making is not eroded by a delegation of power which is neither contemplated not permitted by the Constitution."

Furthermore, I consider in light of the Mulcreevy decision that the specification of a time-limit for amending primary legislation by way of secondary legislation is not sufficient to save the validity of such Regulations.

Leontjava v. The Minister for Justice

This recent Judgment of Finlay Geoghegan J.[7] is in a case concerning non-nationals. The decision, which concerned the constitutionality of particular provisions of the *Aliens Act 1935* and the *Aliens Order 1946*, ruled that section 2 of the *Immigration Act 1999* was unconstitutional, which provided:

> 2. (1) Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions of orders specified in the Schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.
>
> (2) If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect.

This provision was argued to elevate Aliens Orders under the 1935 Act, including the 1946 Order, to the status of primary legislation. This mechanism was used in the 1999 Act following the decision of the Supreme Court in *Laurentiu*, which decided a particular provision of the *Aliens Act 1935* was unconstitutional and also raised doubts about other provisions of the Act. In effect, section 2 sought to save the *Aliens Order1946.*

The High Court ruled that section 2 was contrary to Articles 15, 20, 25 and 26 of the Constitution, since it was the Court's view that it was not enough to incorporate the Aliens

6 1997 11.L.R.M. 89.

7 Unreported, High Court, 30 January 2004.

Orders by reference but that each provision of the Aliens Orders should have been set out in the 1999 Act. Without section 2 of the 1999 Act, the power to demand identification papers or to impose restrictions on entry did not meet the principles and policies test since nothing in the 1935 Act or the 1999 Act enabled such powers to be made by secondary legislation. Finlay Geoghegan J. held at p. 29 as follows:

> There does not appear to me to be anything in the Constitution which authorises or permits the Oireachtas to determine that a provision which is, (and is accepted continues to be) secondary legislation made by a person other then the Oireachtas pursuant to a power conferred on him by statute should henceforth be treated in he legal order of the State "as if it were an Act of the Oireachtas" or a law within the meaning of Article 15.2.1. On the contrary it appears top me that it follows form Articles 15, 20 and 25 of the Constitution that the only provisions which may be treated as "law" within the meaning of Article 15 and have the legal status attributable to such a law are laws which have been made by the Oireachtas pursuant to their exclusive law making powers i.e. provisions which are contained in a Bill, passed or deemed to be passed by both Houses, signed by the President and promulgated as a law.[8]

Section 3 of the European Communities Act 1972

This is the most utilised exception to the principle in Art 15.2.1 and has been upheld by the Supreme Court in *Meagher v. Minister for Agriculture*[9]. This Section, dealing with implementation of European Union legislation, allows secondary legislation to directly amend primary legislation for that purposes. Denham J. in the Supreme Court in that case held at p. 366 that:

> If the directive left to the national authority matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a "result to be achieved" wherein there is now no choice between the policy and the national act. The policy of the directive must succeed. Thus, where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy then it would require legislation by the Oireachtas.

[8] The matter has been recently heard on appeal in the Supreme Court. The judgment of the Supreme Court which has been reserved is awaited.

[9] [1994] 1 IR 329.

Conclusion

These recent cases have focused particularly on the issue of what powers may be delegated by the legislature to Ministers by way of secondary legislation. As a result of which, legislators have to be extremely cautious in this evolving area of law. It can now be said that the following general principles are established:

Transfer of functions orders can be made provided the scheme of the Act in question is not altered in any manner.

If the effect of making a transfer of functions order (i.e. order transferring statutory functions from one Minister or agency to another) would be to alter the scheme of the Act in any other way, then such an alteration can be made only by primary legislation.

Secondary legislation should not amend directly or indirectly primary legislation, with the exception of the *European Communities Act 1972*.

"Union" Jack and the GM Beanstalk—A European Union fable

Dennis Morris[1]

Once upon a time, there were several families named Union who lived in or around Derbyshire.[2] They were mostly sheep farmers who had been tenant farmers of the Dukes of Devonshire for at least ten generations. On of the families, unlike their forebears, made a good living. This was because Edward (Ted) Union's father, Isaac, realised that there could well be more money to be made from cheese than wool. And so he started experimenting and eventually developed a splendid product made from a mixture of ewe's and cow's milk. People round about, and beyond, soon got to know of the cheese and ere long demand outstripped supply. But Isaac was an astute and generous man and so he soon founded and developed a local cheese marketing co-operative, which several other tenant farmers thereabouts joined. In time, there was intense competition between them but most admitted that Isaac's cheeses were usually just that little bit smoother - an outsider would never notice.

Things went so well for more than thirty years that the local village, Baslow, became as well known for its cheese as nearby Bakewell continues to be for its tarts. However, the first signs of impending doom appeared when the Eurocrats in Brussels issued a Directive on cheese making whereby the use of earthenware vessels was prohibited and instead stainless steel insisted on. In vain did the farmers argue with the zealous local, and totally ignorant of cheese making, bureaucrats from both Manchester's Food Standards and its Health and Safety sub-offices - who demanded substantial "advisory fees"- that the stainless steel, unlike earthenware, was prone to sudden temperature changes and this made the first and absolutely vital initial stages of Baslow cheese making virtually impossible to regulate. However, after many a sleepless night and spending very large sums of money on the installation of elaborate controlling computers, to say nothing of the advisory fees incurred, the problem was largely solved (though like pre- and post phylloxera wines, arguments raged, both locally and elsewhere, as to whether the "post-earthenware" cheeses were as good as their predecessors). There was also the battle to convince the consumer that the newly processed Baslow was the equal of the old. These difficulties were surmounted and, after two years of difficult negotiations in Brussels, it was agreed that the European Economic Community (as it then was) would pay 97.2% of the cost, both direct and indirect, of re-equipping the many Baslow cheese parlours. There were also very generous European Economic Community allowances towards the costs of research and re-marketing, all of

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2 Which is a county in the English East Midlands.

which were of course eventually funded by the British taxpayer. And so Baslow's cheese making farmers were well content, if rather weary.

But the EU grants had hardly been paid when true disaster struck. For the reason for Baslow cheese's extraordinary rich quality - it had won prizes all over Europe - was the fact that it was made from unpasteurised milk. But Brussels issued a Directive prohibiting the use of unpasteurised milk in cheese making anywhere in the EU. Despite widespread public discontent Brussels, in its usual way, blundered on. And as far as the people of Baslow were concerned, this meant ruin. For try as its cheese makers did, it was impossible to produce Baslow cheese from pasteurised milk. So not only did several of its farmers lose their principal livelihood but their marketing co-operative also folded. And things became even worse. Within a year, the European Commission in Brussels issued a Directive on certain toilet products that caused a small business run by the Fairfax family in Baslow to close. For more than 130 years, the family had been successfully making toilet soaps and creams that were unique in that they contained an essence made from herbs gathered on the nearby moors. In fact, the recipe was a closely guarded family secret. To comply with the Directive would have cost more than £500,000, which the Fairfax family simply did not have. So with a heavy heart they sold the business, but not the secret, to a large combine that, despite its solemn promises, closed it down after about nine months. The secret was revealed to the Fairfax trustees who were instructed to use it—which they did very successfully - to supplement the pensions of the business' former employees. But, between the closure of both the co-operative and the Fairfax business, 51 jobs were lost which, in a village of less than 250 souls, was catastrophic. As a result, most of these former employees were either "on the wellbeing" or had to endure long and expensive daily bus journeys to and from work. Indeed, even those going to work by car fared scarcely better because of the very high price of petrol.

Ted Union continued to keep sheep and a few cattle and, being in receipt of several European Union subsidies, again via the British taxpayer, his income fell by only a little. But each time he looked at his or others' meadows, particularly in springtime, his heart, like that of many a neighbour, sank. "What wonderful milk they would produce for Baslow cheese" he thought. And of course being under grazed their grass, clover, buttercups and other wild flowers looked more luscious than ever. He also greatly missed the company of his ewes and cows at milking time. This caused Margaret, his wife, great distress, as did the disappearance of his previously wonderful spirit. Though a churchwarden, Ted rarely went to Church and the local Parish Council, of which he had been a keen member, had been abolished and its functions transferred to an enormous self-serving bureaucracy in Liverpool. Margaret urged him to see the local and very popular country doctor, but to no avail.

And then one day, a social worker from Chesterfield[3] arrived out of the blue. Without being asked, she barged into the Union home and proceeded to interview Ted in a most interfering manner. Margaret was completely ignored and, within an hour or two of leaving, the social worker reappeared, this time along with a doctor who was completely unknown to either Tom or his wife. Again, protests were ignored: Ted was perfunctorily examined and it was decided that the poor man was suffering from chronic mental depression and must be removed forthwith to the local psychiatric hospital. And so Ted was taken to the hospital under heavy sedation, rather in the manner a wild animal is taken to a zoo.

Margaret, heartbroken, did everything in her power to get her beloved Ted discharged. She even started proceedings in the High Court but in a perverse judgment the judge concerned declared that Tom must be detained indefinitely as he had obviously been causing his wife "subconscious distress" (called "Snodgrass's syndrome" after Ms Tracey Snodgrass who was the Minister politically in charge of the UK's Regional Department of Wellbeing at the time it had announced the condition's discovery by its professional staff). However, unknown to Margaret, the real cause behind Ted's detention was the fact that the psychiatric hospital had too many empty beds and, because of an imminent official inspection, if at least some of these were not occupied immediately the grant from the local Health Board would be cut.

Tom and Margaret had six children and several grandchildren. All but one, Mary, were married. Unfortunately, Jack's wife, Jennifer, had been killed in an air crash and Jack, who adored her, never remarried. Jack, nick-named "Union Jack", was her younger son and had no children. And so it was to him that Margaret turned in her distress. He had been a clever and industrious boy and had won a scholarship to an Oxbridge college[4] and graduated with great distinction as a biologist. Though doing important research in the United States on genetically modified seeds, he came home almost immediately.

Jack and his mother, who were very close, had two fads in common. Both were inordinately fond of beans of any kind. They also smoked moderately. Margaret promised to give up the cigarettes, so long as "God would allow her to live until she reached 90". She then had eight years to go.

Mary, who had also been diligent, lived a few miles from her mother and was very kind and devoted to her. While at Oxbridge, she was rather left-wing, probably because she had been hopelessly in love with a weirdo of the home-knitted muesli brigade. But she soon saw through him, particularly his utter selfishness, and her infatuation faded. However, Mary had to get a job and knowing every twist and turn in the ecology lobby she used this to her advantage, ending up as an RCEO of an European Union subsidised body having its UK Regional HQ in not too distant

[3] A town in North Derbyshire.

[4] I.e. a college of either Oxford University or Cambridge University.

Buxton:[5] The European Union Cream Bun and Edible Grass Task Force ("EUCBEGTF"). She was very well paid and, like all other European Union employees, had enviable tax privileges. She had to organise and manage EUCBEGTF's UK regional inspectorate of several hundred whose job was to ensure that, as far as possible, every cream bun sold in the UK contained low fat cream, or preferably no cream at all, and little sugar. She was also responsible for supervising a very intensive and never ending advertising campaign warning consumers of the dangers lurking within full fat cream buns. On the edible grass side, her remit was to convince the public of the benefit of the "McSlim strategy" which condemned its devotees to a constant diet solely of lettuce, spinach and boiled grass. She also had to get well-known cookery experts to devise dishes such as boiled grass soufflé or lettuce mousse and actually get people to agree to eat them. However, Mary had long realised that the dangers referred to were probably non-existent and that Dr. Constantine McSlim was almost certainly a charlatan. But she felt, probably rightly, that she would do a great deal less harm to the public's health as EUCEGTF's RCEO than any of the zealots of whom one would, she was pretty certain, replace her. And so, bearing this consideration constantly in mind, she was content with her lot (as no doubt were the politicians who made up EUCEGTF's board of governors with theirs). Nonetheless, though self-assured, she thought it would be better if Jack were around to advise his mother as regards the family farm's future. In this she was right for in no time Jack, who seemed to know everybody within a radius of miles, had the land let to a neighbouring farmer at a satisfactory rent.

On his journey from Texas, Jack had taken a small sack of the very latest GM beans, many of which he and his mother had consumed with relish. Then not long before he was due to return, he suggested that a few be planted in the farm's paddock to see "how they'd do?". His mother agreed and the seeds were sown. In a few days, they sprouted and one of the resulting beanstalks was of gigantic proportions. Jack and his mother were amazed, as was Mary, for the phenomenon seemed the same as in the oft told fairytale. So, determined to see if this was indeed so, Jack also climbed the (this time GM) beanstalk. Sure enough he shortly arrived in front of an enormous castle around which a very large flock of geese gaggled. But their eggs, which lay strewn about, were like no others - except those in the fairytale of course - being made of gold. Jack had hardly noticed this when there was an enormous commotion as the castle's drawbridge started to lower. Thus, he immediately decided to retreat but before doing so grabbed one of the flock and with it shinned down the beanstalk which he thereupon felled. There followed a lot of celestial huffing and puffing, but apart from that nothing happened. Fortunately the purloined fowl was not a gander and so Jack, Mary and their mother were thrilled when after an hour or two she laid an 999.9 (bullion) golden egg , the first of an unfailing daily delivery. Not unreasonably, mother, son and daughter each concluded all their worries were now in the past. Jack left for Texas after a few more days. Mother and daughter became extremely attached to, and pampered, the goose that they called Matilda. But little did they know their troubles were only beginning!

[5] A spa town in north-west Derbyshire.

With a 999.9 golden egg to dispose of daily, the Union family's finances should have improved dramatically. But because of taxation, they were forced to engage the services of lawyers and accountants and to form a limited company. Though all Margaret's children were allotted company shares, only Margaret, Mary and Jack were its directors. It was called the Matilda Company though it did not own the goose. The family were advised that, for European Union tax reasons, she must be a company employee. However, all the children agreed that it was up to their mother to do what she thought best with the eggs or the proceeds from them.

The first signs of trouble appeared in the form of a letter from the Inland Revenue. Nobody objected to having to pay corporation tax (or even income tax) but the question was whether the Matilda Company was producing an agricultural or industrial product. The Inland Revenue insisted on the latter (because the rate of European Union tax was higher) while the accountants maintained that it was the former. However, both were agreed on one thing; the question was most difficult and so must be settled by the courts. And thus a long and unbelievably expensive legal process was started. The High Court decided in favour of the Inland Revenue, but on appeal, the Court of Appeal sided with the accountants. The Court of Appeal's decision was upheld by the Supreme Court, which by then had replaced the appellate division of the House of Lords. The "non-elitist" European Court in Luxembourg, after castigating the four British judges who had delivered judgments, declared (in Estonian, the court's official language changed every three months) that the Matilda Company was providing a service (at least that was the lawyers' agreed interpretation after long and costly deliberation) and so the company was liable to the highest European Union tax rate of all. The Inland Revenue was naturally delighted, as were the lawyers who said the case had been both stimulating and fascinating. But it took the proceeds from a great deal of Matilda's eggs to pay the bill they eventually presented.

Margaret's difficulties caused by the Revenue were not yet over. Having several godchildren, she gave each a Matilda egg, as she did also to several elderly and hard-pressed pensioners in the parish. Though very pleased initially as not only were the eggs of the purest gold but they were also decorated à la mode Fabergé, poor Margaret's great generosity later incurred their common wrath as each received Inland Revenue demands for European Union capital transfer tax. Furthermore, Margaret received a letter from the Registrar of Companies charging her with wrongfully disposing of the Matilda Company's assets. However, after more payments to the lawyers and accountants and lawyers, these matters were resolved. But so far, neither Margaret nor her children had received a penny from the Matilda Company. For despite substantial payments into its bank account, the company had so far only made a small operating surplus, because of the fees and other expenses it had incurred.

A further, and very imperious, letter from the Registrar of Companies (the newly appointed Ms. Pippa Peabody) was the final straw. It asked three questions. First, "why had a company with a

substantial turnover only one employee (adding; "The company's return thus seems fraudulent.")? Second, why was the sole employee described as Miss Matilda Goessens instead of Ms.? Did "Ms. Union" not know it was it not alone an affront to women, but also a serious criminal offence, to use either "Miss" or "Mrs." in any official document? And third, why was "N/A" entered in the box that required details of Ms. Goessen's dental records? Ms. Peabody ended by saying that unless satisfactory answers were received forthwith, criminal proceedings would be instituted without delay. For Margaret this was too much and, more in distraction than anger, she wrung poor Matilda's neck.

Having quickly got a friendly neighbour to bury the hapless bird, naturally Margaret was terribly upset at what she had done. But as her sympathetic and selfless children pointed out, poor Matilda's eggs had brought them all nothing but expense. Gradually, Margaret became less depressed, though still very troubled by Ted's continued incarceration in the psychiatric hospital. She went to see him most days. Mary visited him quite often too. Their visits were his only consolation and probably prevented him from going made. The calm lasted for about 14 months.

One morning late in the following summer, four oddly dressed and rather fierce looking strangers suddenly arrived at Margaret's front door. They more or less barged in and told Margaret and her daughter Mary, who happened to be there, that they were from the European Union People's Inquisition, which was located in Rostock (which incidentally is an area of high unemployment) in the former DDR.[6] On their arrival, Margaret, being well-bred, formally asked "How do you do?" of their obvious leader - as she learned later, the Oberfûhrer, a Herr Fritz Flik. Herr Flik, who was a very rough type indeed, immediately proceeded to complain of the Manchester five star hotel where they had lodged overnight and how he would see it lost four of them immediately on his return to Eastern Germany. Having added that the Matilda Company would be paying the hotel's bill, he then proceeded to tell Margaret and Mary that his "task force" had come to get an explanation as to why Ms. Peabody's letter mentioned above had not been answered. They also wanted to know why no return as regards the Matilda Company had been made to the Companies Office, now located in Frankfurt, for the current year. By way of encouraging the two terrified women, he explained that he had power to arrest anyone he considered uncooperative and had arranged for accommodation to be available at Strangeways prison, should such be needed. Both women were thunderstruck and related in detail the story of the beanstalk, Matilda and the golden eggs. The task force maintained a stony silence except for a harridan who screeched: "What about cross-pollination?" Mary tried to explain to her mother what Flick & Co were talking about. Turning to Herr Flik, she also endeavoured to point out that in view of the fact that the beanstalk was but a few days old when felled, the question of cross-pollination could not arise; she was ignored. After what seemed an eternity Herr Flik and his colleagues left but in doing so warned both near-paralysed women that they would be hearing from Rostock and probably elsewhere, as indeed they did.

[6] I.e. Eastern Germany before the collapse of the Berlin Wall in 1989.

Margaret was prosecuted under the European Union Bullion Directive for selling gold otherwise than through the European Union Central Bank in Frankfurt. Though at her trial in Buxton,[7] she was acquitted by the jury, the People's Prosecutor, exercising his rights under the European Union criminal code which had supplanted English criminal law, appealed against the acquittal and took the case right up to Luxembourg. Every English court dismissed his appeals, as did the European Union Court in Luxembourg (the latter reluctantly on a technicality). For having first condemned Margaret as morally culpable in not having sold the gold to the ECB at the fixed price of €333 ($33) an ounce, the presiding judge went on to say that, in the court's view, Matilda's eggs were *objets d'art* and so not covered by the Bullion Directive. However, he added that in the court's opinion the European Union law should be appropriately amended. And so prosecution followed prosecution. There was one for establishing a gold mine without a European Union licence and another for closing it without permission and, in addition, failing to make a redundancy payment to Matilda's next of kin. Further criminal proceedings were issued as regards the manner of Matilda's death. She should have been sent to a recognised abattoir to be poisoned or electrocuted and, because she probably had some unlaid golden eggs, burying her contravened the European Union Directive prohibiting the hiding of precious metals. Still more prosecutions related to planting of GM seeds and unlawfully disposing of the beanstalks they produced, but not one succeeded.

While, because she had free legal aid, not one of these cases cost Margaret a penny, they did impose considerable stress on both her and Ted, but they soon managed to put the cases to the back of their minds. Not so, the UK's Exchequer, which had, it was commonly believed, to fork out between €2,000,000 and €3,000,000 in legal fees. As for Margaret's godchildren and the pensioners, each had to pay European Union capital transfer tax plus large penalties imposed by the Inland Revenue. But happily they had the means and, unlike Margaret and her children, had something left.

Before concluding this tale, I feel the political philosophy behind the European Union law enabling one of the yet unmentioned prosecutions Margaret had to face is worth a mention. Apart from the aforesaid criminal trials as regards Matilda's bodily disposal, there were other related proceedings. These concerned the bird's feathers. For it was a criminal offence to dispose of a goose's carcass anywhere in the EU, by sale or otherwise, without first removing all its quill-feathers, which of course Margaret had failed to do and so again found herself in court. After removal, the feathers were required to be sent to the UK branch of European Union Environmental Agency, which then occupied Wilton House in Wiltshire. There they would be suitably treated and turned into pens. This was one of the European Union's several novel "job-creation schemes". But, like European Union butter and wine, through lack of sales there were serious storage problems. In England alone, Wilton's famous double-cube drawing room (its unique and wonderful contents had long

[7] Buxton is located in the Derbyshire Peak District.

since been dispersed among various large Eurocratic palaces) was crammed from floor to ceiling with large boxes of quill-pens. However, at about this time the now fully self-serving MEPs were, just as they had previously been as regards the Commission's original proposal, busily engaged making a single transferable speech of congratulation to that body on its latest plan to deal with the European Union's "quill-pen mountain". The scheme, which was eventually adopted unanimously with MEP acclamation, had two legs. The first, to issue a Directive (the Poisoned Pen Directive) banning the use of any fountain pen "save pursuant to, and in accordance with, a licence in that behalf". The measure was, said the Commission, justified because such pens, being capable of being filled with a noxious substance, were a health hazard. The scheme's second tactic was a further Directive (the EuroPencil Directive) prohibiting the use of any pencil wholly or partly made from wood or graphite... save in accordance with and so forth ... on the grounds that such pencils were environmentally hostile. Both Directives of course imposed serious penalties for non-compliance. Incidentally, ball-point pens presented no problem as they had previously been totally banned (as potential WMDs) as indeed had unlicensed cigarette lighters (a valiant but unsuccessful attempt to save the European Union's ailing match industry). And last but perhaps not least, no European Union manufacturer has yet succeeded in producing an implement satisfying the demanding EuroPencil specification, though a Taiwan business enterprise claims to be very close to success. However, a serious obstacle has been created by Brussels, which has already threatened to ban European Union imports because the proposed product, which under European Union law would be deemed a fruit, contravenes the European Union's Fruit (Straight Bananas and Straight Cucumbers) Directive.

Unlike many fables, this one has a happy ending. Margaret became an excellent witness, for she quickly learnt that answering nothing but the questions asked usually put her cross-examiners at a serious disadvantage. In fact, she rather enjoyed their distress. Also, she lived to fulfil her vow as regards the cigs. As, for Ted, he was soon discharged from the psychiatric hospital where he had, at least, been well and kindly treated. But his continued detention was no longer required as beds began to be filled by executives driven to penury by ever more repressive European Union Directives and Regulations. Mary had enough of EUCETF and so resigned. She is now happily married with several children and Jack, following her example, re-married. For the European Union People's Prosecutor, things remained not quite so rosy. With European Union revenues falling due to a shrinking economy, he was directed to stop appealing against acquittals. Regarding the other lawyers, despite fewer appeals, European Union prosecutions greatly increased across the board, and so they fared as well as ever. But perhaps the most content of all was Mary's successor as RCEO at EUCETF's office in Buxton, Derbyshire. Being a humourless zealot, he pursued a policy of zero tolerance regarding full fat cream buns and, within a year or two, it was very difficult to find one, even in the remotest corners of Cornwall or Wales. As for the bureaucrats, they were happy to carry on making a general nuisance of themselves. But what if they had not killed the goose that laid the golden eggs? It is impossible to say. However, one thing seems certain. Had Jack sown his rogue GM seed in Texas, the American enterprise culture would have ensured proper

exploitation of the new and incredibly rich source of the wonderful metal so that the circumstances of many, including the US Internal Revenue Service, would have significantly improved.

Vale—Donald Maurais

Don Maurais

Donald Maurais, a long-time employee of the Department of Justice of Canada, suddenly passed away on Monday April 19, 2004. Don first joined Justice Canada as an articling student in 1972. He subsequently joined the Legislation Section of the Department as a legislative counsel in 1974. He rose in the Department as a senior practitioner, was appointed Senior General Counsel in 1991 and became Deputy Chief Legislative Counsel in 1995. In that capacity, Don headed the Legislation Section from 1995 to 2002. That section is responsible for the drafting of all of the government's primary legislation.

After more than 31 years of service with the Department and 32 years in the Public Service of Canada, he retired on 30 December 2003.

Don was undoubtedly one of our best and most respected legislative drafters. Whenever a difficult or urgent bill had to be drafted, his name would automatically come up as one of the potential co-drafters of the bill. Colleagues and friends will remember him for his remarkable sense of humour and his contagious "joie de vivre."

He will be sorely missed by his wife Wanda, his family and friends, and all those who enjoyed working with him during all these years and whom he also considered as his friends.

Lionel Levert

CALC ties

With the impending retirement of David Morris from the Hong Kong Department of Justice, Tony Yen, the Hong Kong Law Draftsman and CALC Council member, has agreed to assume responsibility for the custody and sale of CALC ties. If you would like a CALC tie, please contact Tony Yen at the Law Drafting Division, Department of Justice, Queensway Government Offices, 66 Queensway, Hong Kong. The ties retail at £8 sterling each (or HK$90).

Forthcoming conferences

Third annual Caribbean legislative drafting forum: "Interpreting legal texts in the 21st Century"

To be held 14-16 July 2004 at the St Kitts Marriott Resort in Saint Kitts and Nevis, West Indies.

This year's program focuses on statutory interpretation. On Wednesday, 14 July, Professor Ruth Sullivan of the University of Ottawa will deliver her statutory interpretation training course. Ruth is author of Statutory Interpretation, of Sullivan and Driedger on the Construction of Statutes, and of several articles on legal drafting and interpretation.

On 15 and 16 July, the Forum continues the interpretation theme and includes:

- *Constitutional interpretation:* Speakers include Richard Kay, George and Helen England Professor of Law, University of Connecticut School of Law, Hartford CT; and Professor Simeon McIntosh, University of the West Indies Faculty of Law, Barbados;
- *What drafters can learn from statutory interpretation:* Speakers include Ruth Sullivan and Doug Bellis, Deputy Legislative Counsel, US House of Representatives, Washington DC; and
- *The interpretive roles of non-judicial bodies and officials*: Speakers include John Mark Keyes of the federal Department of Justice in Ottawa and Doug Bellis.

Registration fee: US $650

Contact details: Further information can be obtained from Ms. Lorna Payne, Faculty of Law, University of the West Indies, Cave Hill Campus, PO Box Bridgetown, Barbados.

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Canadian Institute for the Administration of Justice Conference: "Legislative Drafting in Perspective"

To be held on 9 and 10 September 2004, Parliament Buildings, Ottawa, Canada

Program—Thursday, 9 September

Conference Opening

Katharine MacCormick, Chief Legislative Counsel, Canadian Department of Justice, and CIAJ Legal Drafting Committee Co-Chair; Ottawa Judith Keating, QC, Chief Legislative Counsel, Government of New Brunswick.

Ethics and drafting

What professional responsibility do legislative drafters have, whether as members of a legal profession (lawyers and notaries), as parliamentary or governmental employees or as private sector consultants? Particular issues

include: To whom are these responsibilities owed (who is the 'client'?), conflict of interest, confidentiality, and standards of behaviour.

Introduction: Pierre Charbonneau, Notary, Legal and Legislative Services Branch, Quebec, Department of Justice, Quebec City. *Speakers*: Louis Sormany, Deputy Secretary, Ethics and Legislation, Executive Council, Government of Quebec; Deborah McNair, Corporate Counsel, Department of Justice Canada; Beverley G. Smith, Professor Emeritus, Faculty of Law, University of New Brunswick.

Case studies on ethics and drafting

Session leader: Deborah McNair, Corporate Counsel, Department of Justice Canada, in collaboration with Louis Sormany, Deputy Secretary, Ethics and Legislation, Executive Council, Government of Quebec and Beverley G. Smith, Professor Emeritus, Faculty of Law, University of New Brunswick.

Moving from novice to expert

This session focuses on how legislative drafters learn most effectively in order to move from novice to expert. Recent studies have examined differences in the performance of novices and experts, exploring how professionals learn within a community of practice. This session highlights current trends in educating professionals and discusses some implications of these trends for legislative drafting offices.

Introduction: Laura Hopkins, Legislative Counsel, Ministry of the Attorney General of Ontario,
Speaker: Erika Abner, Barrister and Solicitor, Ontario Institute for Studies in Education, University of Toronto.

Perspectives from the judiciary, the politician, and the regulator

How do those responsible for interpreting the law as well as politicians and regulators see the role of the legislative counsel? What are the necessary qualities of a good 'drafter'? How do these qualities influence the written law and ultimately legislative interpretation or outcome?

Panel: Chair Judith Keating, QC, Chief Legislative Counsel, Government of New Brunswick,
Panel: The Hon. Michel Bastarache, Justice, Supreme Court of Canada, Ottawa; Paul Bégin, Former Quebec Minister of Justice; Louis Borgeat, Deputy Secretary General, Legislative Branch, Executive Council, Government of Quebec.

Program for Friday, 10 September

The medium is still the message

Access to legislative texts is not just about good drafting. Formal aspects of the document greatly influence the effectiveness of legislative communication. Two expert document designers will suggest some paths to follow.

Introduction: Philippe Hallée, Senior Counsel, Legislative Services Branch, Department of Justice Canada, Ottawa. *Speakers:* Karen Schriver, President, KSA Document Design and Research, Pittsburgh; Lucie Lacava, President, Lacava Design, Montreal.

Masters class

What elements are common to all good legislation? How much room is there for individuality in drafting? Four expert drafters demonstrate the answers to these and other questions by presenting their revisions to a base text

definitely in need of improvement. One English common law drafter and one French civil law drafter will draft independently, while one English and one French drafter will work as a team. How diverse is genius? Who will be your drafting idol?

Introduction: Mark Audcent, Law Clerk and Parliamentary Counsel, Senate of Canada, Ottawa.
Panel of Four Legislative Drafters: Jean-Paul Chapdelaine, Senior Counsel, Legislative Services Branch, Department of Justice Canada; Edgar Schmidt, Senior Counsel, Legislative Services Branch, Department of Justice Canada; Corinne Swystun, Legislative Counsel, Ministry of the Attorney General of British Columbia.

Best practices to communicate the law

Based on some examples given to participants on Friday morning, each group will analyze the drafting techniques used to better communicate the law. The sessions will deal with stylistic choices, including general *vs.* specific, text; structure and organization and reference techniques.

Simultaneous session

Co-ordinated by Nicole Fernbach, President, Juricom, Montreal; Janet Erasmus, Legislative Counsel, Attorney General's Office of British Columbia; David Elliot, Lawyer, Editor in Chief, Clarity; Richard Tremblay, Coordinator, Legislative Development and Training Group, Government Legislation Branch, Quebec Department of Justice.

Who has the last word on legislative interpretation?

Courts accord varying levels of deference to administrative agencies and government departments that interpret or apply legislation. How should drafters take into account their interpretive roles and the potential for multiple interpretations?

Introduction: John Mark Keyes, Director, Legislative Policy & Development, Department of Justice Canada, Ottawa. *Speakers:* Ann Chaplin, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada, Ottawa; Suzanne Comtois, Professor, Faculty of Law, Université de Sherbrooke, Sherbrooke; Justice Thomas A. Cromwell, Nova Scotia Court of Appeal.

Registration: Further information (including details of registration) can be obtained from the Canadian Institute for the Administration of Justice, Faculty of Law, University of Montreal, PO Box 6128, Station "Centre Ville", 3101 Chemin de la Tour, Rm. 3421, Montreal, Quebec, Canada, H3C 3J7; Tel.: 1 (514) 343-6157 Fax :1 (514) 343-6296; e-mail: ciaj@ciaj-icaj.ca; URL: http://www.ciaj-icaj.ca.

International Conference Clarity and Obscurity in Legal Language

To be held 5-9 July 2005, Université du Littoral Côte d'Opale, Boulogne-sur-Mer, France

Organised under the auspices of CERCLE, équipe VolTer (Vocabulaire, Lexique et Terminologie) and of LARJ (Laboratoire de Recherches Juridiques)—Université du Littoral— Côte d'Opale in collaboration with Clarity.

Main topics of the conference

Plenary sessions (English and French)

- The quest for clarity in law: historical overview. Why the complexity? How to change it and make clarity mainstream. Overcoming the obstacles to plain language.
- The clarity toolbox: best practices in legal writing and drafting. How to clarify legal texts. The influence of technology. Learning and teaching viewed by professionals in legal writing and drafting.
- Plain language in a multidisciplinary context (Law, Linguistics, Semiotics, Communications, Information Design).
- Plain language in the judicial context: speech acts in courts; court decisions and jury instructions; social equality aspects.
- Common Law and Civil law: differences in their approach to clarity?

Roundtables (English and French)

- International development of the Plain Language network. History of the movement towards clarity in law, its scope, theoretical aspects and practical achievements.
- Multilingual law and the search for clarity in translation and authoring.

Conference contact details

Anne Wagner Département Droit Université du Littoral Côte d'Opale 21, rue Saint-Louis, BP 774 62327 Boulogne sur Mer Cédex, France.

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George Tanner (New Zealand), Don Colaguiri (New South Wales), Geoff Hackett-Jones (South Australia) [partially obscured] and Eamonn Moran (Victoria) demonstrating their master drafting skills at the CALC conference April 2003

CALC Council member: Leigh Glover and Danielle Thurstan (New South Wales) [centre left] and other CALC members at the CALC dinner, April 2003