



INTERVIEW

Norm Larsen: “Draftstoevsky”¹

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- N. Larsen

THE AUTHORS OF OUR LAWS, WHO ARE THESE anonymous scribes? In order to answer this question, we spent an afternoon with Norm Larsen, a man who wrote more than 5 000 pages of the laws we live by in Manitoba. Mr. Larsen practiced law for more than 30 years—the last 13 as a legislative drafter in the office of the Legislative Counsel in the Department of Justice of Manitoba. Now retired, he gives us a window into the work of a drafter.

INTERVIEW WITH NORM LARSEN

Introduction

How is it that you ended your varied legal career as a legislative drafter?

Norm: In 1984 I became an Assistant Deputy Minister (“ADM”) in the Department of Justice. I didn’t enjoy it. Two years later, a blurb came across my desk about a drafting course at the University of Ottawa. I had always wanted to be a writer of some kind—that had been my youthful dream—and so I decided to give it a try. I quit the ADM position, went to Ottawa, took the one-year course, came back in 1987 and became a legislative drafter.

You thought of this as a creative opportunity?

Yes, it was a chance to do what I had always wanted to do, and to make use of all the experience I had gained in the practice of law. Writing law was the only kind of writer I could have been, though I knew drafting wasn’t easy and that drafters are far more

¹ Interviewed by B. Schwartz and D. Rettie (11 September 2001).



important in the legislative process than is generally known. I learned at least that as an ADM.

Did anything surprise you about drafting in the early days?

It was far more difficult than I had thought it would be. I had been a lawyer for 18 years, in about eight different positions—including administrative positions within government. With all that experience and my interest in writing, I thought drafting would be relatively easy for me. It wasn't.

The Art of Drafting

What kind of stylistic or philosophical approach were you taught at the drafting course in Ottawa?

Professor Hilton Mackintosh, a drafter with the federal government, taught the drafting course. He was such a fine man. He died just a few weeks ago. He stressed simplicity and clarity—what others might call “plain language,” a term he didn't like. His attitude was that there was nothing new in the concept of “plain language,” and that writing plainly had always been the goal of the “old-time” drafters. Books on plain language date from the 1940s and 1950s, but the concept seems to be re-invented as something new every few years. When the *Globe and Mail* had an article within the last three or four weeks on plain language, I thought, “Here we go again.” At any rate, the drafting exercises in Hilton's course consisted of taking old legislation and recasting it as simply, clearly and briefly as possible. The eight students would bring their drafts legislation to class, and each draft was critiqued by the professor and students.

Incidentally, the word “legislation” is sometimes used to mean just statutes. I suggest it means enacted law, which in turn means statutes *and* regulations.

As a drafter, were you at times inhibited from using a simple vocabulary?

Old legislation can be inhibiting. For example, statutes that badly need re-doing are *The City of Winnipeg Act*, *The Liquor Control Act*, and *The Evidence Act*. If you were to *amend* any of them, you might have to use wording that is not as plain and simple as you might want it to be—because of the need for consistency with the rest of the Act. Users of the Act are otherwise liable to say, “The Act uses this word in section 2 and this other word in

section 12; when a different word was used, they must have meant something different.” Of course, the drafter could amend both sections, but that might require even more amendments to other sections.

It is difficult to cut and paste on a large scale. Rae Tallin [former Legislative Counsel for Manitoba] tells of what happened when he went to Ottawa to rewrite the *Income Tax Act* in plain language. He met with tax lawyers who said in effect, “It is a wonderful idea to use plain language. But, please don’t change the wording or even the number of section X, since it expresses an old concept that we all know. And any change in Part Y will of course require changes to Parts A, B and Z because the concepts are inter-related”

Are the drafters ever afraid to use plain language because they believe legal language should have a sense of decorum and a difficult quality to it?

I never felt that way, and I have never heard other drafters suggest such a thing. In fact, I took great pleasure in taking an old section and reducing it to a bare minimum. I remember taking a section from the Act that deals with “Sunday closing” and reducing it from 25 or 30 lines to about six lines. On a larger scale, as part of the re-enactment process in 1988 I managed to reduce 8 001 numbered pages of municipal law to one volume of about 600 pages. That kind of experience can be fun to do—to see how clearly and briefly you can do it.

Did you ever put an example or diagram in a statute?

Not in a statute. But I did in regulations under *The Oil and Gas Act*.

Given the complexity of legislation, how does a drafter know whether he or she is getting it right?

A drafter relies a good deal on the person who is giving the instructions—the “Instructing Officer”. In the ideal relationship, there is give and take—and some Instructing Officers are better than others. For example, I had complete confidence in the man who instructed me on *The Oil and Gas Act*, but there were times when I wanted to use certain wording and he’d say, “Trust me on this one—that wording won’t work.” At other times he would ask whether my suggested wording included a necessary legal concept, and I would ask him to trust me that it did.



There were other instructing officers who never really appreciated the nature of legislation and the legislative process. It was far too analytic and detailed for them. Some of them would say, “Isn’t this draft good enough?” Drafters are not likely to be satisfied with that standard, given all that can go wrong with even the most perfectly drafted piece of legislation.

A drafter can also call on lawyers from other “branches” of the Department of Justice. The office of Legislative Counsel, which includes about six drafters and two editors, is a branch. Civil Legal Services is another branch, which has about 30 lawyers who advise the various government departments, often on a day-to-day basis. And there is the Constitutional Law branch and the Family Law branch. A drafter can—and often does - call on those branches for help.

Incidentally, do drafters still use “and/or”?

I understand that term was invented by American lawyers in private practice, and they are abandoning it. I don’t think legislative drafters have ever used it—at least not in Canada. Books about drafting commonly have sections on the use of “and” and “or”. One of the best is the American book *Legislative Drafting* by Reed Dickerson, which has 10 or 15 pages on how *and* can mean *or* and *or* can mean *and*, depending on the context. It is something that drafters are certainly sensitive to, but it is not a huge problem. If all else fails, the meaning can be made clear by elaborating.

As a drafter, what audience did you have in mind: lawyers, judges, the general public, politicians?

When drafting a bill, a drafter is always inspired (or intimidated) by the knowledge that the final product will be analyzed by the minister who is sponsoring it, the opposition, lawyers who deal with the legislation every day, a legislative committee, and members of the general public. There is also the matter of how a court might someday interpret it—but very little of the 10 000 pages of statutes and 10 000 pages of regulations of Manitoba ever makes it to court.

More generally, I often thought that I was writing for myself—trying to meet the challenge of doing it as plainly and accurately as possible.

Incidentally, if I might add an anecdote. At a hearing of a legislative committee some years ago, a very confident lawyer made a presentation in which he said, "This is ridiculous. The drafter has produced a 20-page bill. I could have done it in one page." Drafters rarely speak at those hearings, so I just sat there, knowing that a whole mob of people had worked on the bill because the ramifications were so immense if we got it wrong. The lawyer did not see the various legal problems, including constitutional aspects. I took some quiet satisfaction in knowing that he had little idea of what the legislation was about.

In a sense, there is both a craft and beauty here. In the craft, there are the technical details. The beauty is "I made this simple; I made all the parts fit together in the smoothest way possible." Do you think that is how most drafters approach the task?

I think so. We were always trying to do our best. That's why an editor was added to the process, and why we developed a 40-page drafting manual. The manual was a big step forward. Previous to it, there was no common approach. Much of the manual is very specific. For example, it provides the exact wording to be used in amending a section or clause. The manual itself had many drafts before it was finalized. By the way, we always say "draft" and never "write", perhaps because "draft" carries the sense of never quite being finished.

Could I pick up a sample of recent legislation and say "That's Bob's" or "That's Sally's"? Does individual style come through, at the end of the day?

A drafter might recognize the work of another drafter, but I doubt that anyone else could become familiar enough with legislation to be able to say who drafted it. Some drafters use more words than their peers, or put more or less content into one section. Generally, I think the more experienced drafters express themselves more briefly than newer drafters.

The editing process smoothes out some of the differences between drafters. Over the last 10 of my drafting years, I had an excellent editor, Linda Pettit. She edits in two ways: anything that is not consistent with the requirements of the Drafting Manual is flagged with, "See Manual, page X." She also comments on substance. She might say something as simple as "I don't understand this!"



The Process Exposed

How many draft versions did you typically do?

The rule of thumb for me was that it took five drafts to get it right. For every time there were three or four drafts, there is one that is six or seven drafts. I think the most I ever did was something like 10 or 11, but at that point you are usually working on a few key sections—not the whole bill. The most I've heard of is 30 drafts. The project apparently got out of control.

Some people think that a drafter can just dash off a bill, but that rarely happens. A few of times in my 13 years I drafted something that looked simple enough to require only one or two drafts—but complications would inevitably arise to expand it to the usual five drafts. I remember drafting an amendment to an Act with full confidence that it was as simple as could be. Then the Legislative Counsel came and said, "The government is not going to go ahead with the amendment, and thank goodness because the policy ramifications are unbelievable." She sat down and explained it to me. I had totally missed its implications—much like the lawyer I mentioned earlier.

Getting it right was your prime concern?

This is always the goal. For that reason, a drafter regularly wonders "What am I missing?" and "Do I fully understand this material?" After doing some five drafts, I would hand it to the editor—confident of my perfect piece of work. And it would inevitably come back covered with comments! I would read each comment and revise as required. I used to say that my editor regularly taught me humility—and occasionally humiliation.

When are bills translated into French?

After I had dealt with the editor's comments. Everything was drafted in English and then translated into French. The translator—like the editor—is new to the words on the page, while the drafter at this stage can be rather tired of the whole thing. And so the translator's fresh reading of the bill can inspire revisions: the translator can't translate the English version if he or she does not understand it. If the translator asked a question to which I could not give a reasonable answer, I was back to drafting and consulting with the Instructing Officer. In Manitoba, legislation can be improved through the translation process.

Was there ever a problem because of the slightly different nuances in meaning between the two languages?

I'm not fluent in French, so I was never able to spot differences between the two versions. Some of the other drafters were fluent and might suggest that the French version was not consistent with the English version. But on the whole we depended on the translators to get it right. After a bill was published, an occasional question might come up, and there might be a correction made at the committee hearing, or in a later bill.

How did you deal with drafting mistakes?

We corrected them. That's why there are "amending bills" for bigger mistakes, and the annual *The Statute Law Amendment Act* for smaller mistakes. I think there are fewer errors now than 10 or 20 years ago, thanks to computers and spell-check and all the scrutiny through the legislative process. It is sometimes said that drafters will never be out of work because they must constantly correct their mistakes.

Do drafters regularly cut and paste sections from existing Acts when they are designing new legislation?

At one time, Manitoba copied a lot of legislation from Ontario. In fact the very first Act passed in Manitoba was *The Interpretation Act*, copied from Ontario, which in turn might have copied it from England. Copying makes good sense, especially when the material has gone through the legislative process of another province, and perhaps has stood the test of time and even court challenges. Ontario has often been a good source of material because of its superior resources in terms of research and personnel. But, one seldom copies *exactly* what another jurisdiction has done. For example, the no-fault auto insurance legislation in Manitoba is based on the Quebec model, but with many variations.

A drafter is always delighted to have instructions that include drafts from other provinces, even if the bill is to be different in some ways. Incidentally, speaking of instructions, the best I ever had were in the reports of the Law Reform Commission. I recall a report on family law that was so beautifully laid out as to *what* the legislation should say - and *why* - that it was a pleasure for my colleague and I to draft it.



Statutes seem increasingly to leave considerable discretion to ministers and boards. What are your views on the amount of discretion written into modern Acts?

The only change that I recall in my 13 years of drafting was the shift from cabinet discretion to ministerial discretion, which is partly a result of the immense and increasing workload of cabinet. Powers that used to be given only to the Lieutenant Governor in Council are now quite routinely given to individual ministers.

You ask if we are doing too much of that. In the abstract, there tends to be a fear of a discretionary power. But when a decision has to be made, people are usually quite content to have it made with a discretion that can be influenced, questioned, and appealed. As a criminal lawyer, I used to run into people who wanted stiff prison sentences that were automatic upon conviction—until they had a friend or relative facing sentence. Then they were happy to know that the judge could exercise some discretion.

Would you ever call a stakeholder and say, “What do you think about this?”

That’s not a drafter’s job. But, it is something the drafter wants to know with each piece of new legislation: who does this affect; what are their views? I got a surprise one time with a technical piece of legislation that would affect few people. I thought we’d have an easy ride in the committee hearing. Just before the hearing, the instructing officer told me that the opposition critic used to work in the field and knew the legislation inside out. That increased my anxiety, since I had thought this was going to be one of those legislative committee hearings that would consider and pass five or 10 bills in one evening.

How would you change the legislative process in order to improve the end product?

As a drafter I was generally content with the current process, though there were times when I wondered whether the process would ever end. But the final content of bills was pretty good, 99 times in 100. I did not know the ins and outs of the internal politics of the legislative process in the Legislative Building, other than that there were occasional problems in obtaining instructions from the politicians. From the drafter’s point of view, all the parts of the process we have referred to—like the many drafts, editing, translation, committee hearings—effectively ensure a good product in the end.

Drafting under Pressure

What role does a drafter play after his or her bill is tabled in the legislature?

The bill is tabled by the sponsoring minister and then immediately made available to the rest of the world. If comments are received, the drafter might begin drafting amendments in anticipation of the committee hearing, even though it could be weeks or months before a committee considers the bill. When the committee meets, it usually begins by hearing anyone wishing to make a presentation about the bill. I believe that we are still the only province that does that. This can be a difficult time for the drafter, since any presentation is liable to inspire a request for an amendment from the minister or the opposition critic. Sometimes an amendment must be done then and there because the committee usually wants to complete its hearing that very day. A translator is always standing by.

Is there a drafter at every standing committee hearing?

The drafter is usually there for at least a portion of the time, unless dozens of people are scheduled to make presentations. That's too much time for a drafter to spend at committee, but I would even then wait around to get a sense of what the presentations were about. Sometimes I had finished the bill months before and wouldn't know it any better than others in the room. There is too much legislation for a drafter to remember it all, so that if someone asks why a provision was written in a particular way, there is a good chance that the drafter won't remember.

Incidentally, in my 13 years as a drafter, I figure that I drafted an average of about 400 pages each year. That's a total of 5 000 pages of legislation. I like to think that I wrote *War and Peace* four or five times, though I admit that my prose wasn't quite the equal of Leo Tolstoy's!

Did you ever have to do any emergency drafting?

I mentioned earlier that it occasionally happens that a legislative committee will adjourn for coffee while the drafter prepares an amendment. Under that kind of stress, a drafter is liable to make the most stupid little mistakes, and that is why I always preferred to have another drafter at my elbow.

Another type of "emergency drafting" can occur like a bolt out



of the blue in the midst of a legislative session, when a bill is needed as fast as possible. The request is usually from a minister's office. The most frantic example of fast drafting that I recall occurred in connection with the Supreme Court decision requiring that Manitoba's legislation be re-enacted in English and French. When the deadline for re-enactment was only weeks away, I came across some 20 pages of badly dated legislation that had not been re-enacted because it was slated to be revised before the three year deadline. A committee of 10 to 15 people met every day for a couple of weeks while I struggled to revise it to everyone's satisfaction.

Tell us about your adventures in drafting The Municipal Act (1996.)

I now recall it as the most difficult bill I worked on, though it started out as an apparent "piece of cake". A committee had travelled the province and produced a report on what a new *Municipal Act* should contain. The committee's recommendations were in the form of a draft Act. A lot of people were under the impression that the draft was ready to be enacted, without any further work. Soon after I received the report, I took it home one weekend. My assessment was that it would require at least the usual five drafts, and that one person couldn't do it in the six months' we had been given. So the report was divided among six drafters. I did half of it and five other drafters did the other half.

The Act was completed with a whole hour to spare before the deadline. It came out—if memory serves—at about 500 sections and 250 pages, and I am told that it reads well. I was particularly pleased with its appearance, with lots of centred headings, white space, and whatnot. That was a big challenge for the office. It was also the first time in my life that I developed a rash from stress. My "*Municipal Act Rash*" still flares up occasionally.

Was drafting something that large like connecting a bunch of little beads on a long string?

That analogy might describe putting all the Parts together at the end of the project, but not the drafting process. There is a nice flow to the Act. It is drafted about as clearly and briefly as I think was possible. The old Act was huge. It must have been 600 pages anyway, and a long way from being clear or brief. You can't get a better contrast between old and new styles of drafting and formatting than the old *Municipal Act* and the new one.



As a drafter, were you frustrated by the fact that the better you did your work the less you were noticed and appreciated?

I can't say I ever felt that way, perhaps because I held several high profile positions before I was a drafter. I had my 15 minutes of fame, which was more than enough.

Drafters want to make the politicians look good and to make the democratic process work. People sometimes asked whether my personal political views interfered with what I was drafting. I recall only one time when I thought I wouldn't be able to draft something because I so disagreed with what the legislation would do. As it turned out, the bill had to be assigned to someone else for other reasons.

Legislative drafters occupy an extremely important position within the democratic process. When things got difficult I would remind myself that I was drafting not so much for the current government or minister—but to help make the democratic process work. That's where my loyalty lay.

Drafting Regulations

How much direction were you given in terms of what goes into a statute and what goes into regulations made under the statute?

As you know, the general rule is that the statute should contain the matters of substance, and the regulations should be about details. It's often a question while drafting an Act as to whether to put something into the Act or to make a provision authorizing regulation. And if there is an authorizing provision, how detailed does it have to be in order to make sure there is sufficient authority to do whatever might later be decided to do by regulation.

By the way, it rarely happens that regulations are drafted at the same time as the Act that authorizes them. I mention that because people sometimes show up at committee hearings and ask to see the regulations that are authorized by the bill under consideration. Well, let's first make sure the bill passes, and then we'll worry about the regs. Sometimes the minister sponsoring a bill will give an undertaking as to what the regs will say, or to consult with the opposition before enacting the regs. A few statutes have a provision that requires consultation.



People have the perception that the guts of legislation are now being handled through the regulations. How do you feel about that?

There is no doubt that regulations are more extensive than they once were, but they should not contain what you call “the guts.” The rule of law is that the Act must authorize the regulations. Some Acts have a very long list of authorized regulations, partly because it’s faster and easier to pass and amend regulations. There is usually no requirement to consult anyone—although the government can of course consult if it wishes to—or to conduct public hearings, as is the standard procedure with a bill. I don’t feel that the shift to regulations has gone too far, if that’s what you’re getting at.

Final Thoughts

After drafting for 13 years, can you say, “I understand the laws of this Province”?

I wouldn’t go that far, but I can certainly say I know more about legislation than I did when I began drafting!

What should law students be taught about legislation, drafting and the legislative process?

The most immediately useful course that I took at law school turned out to be a half course on statute interpretation taught by Cam Harvey. Soon after graduation, I had a series of cases under welfare legislation that ended up in the Court of Appeal. The issue in several of them was whether enacted regulations were authorized by the statute under which the regs had been made. That course and those cases made me aware of the importance of legislation, contrary to the impression that I had gained in most law school courses that the common law was far more important than legislation.

My sense is that students still have that mistaken impression and are not given enough instruction on how to read and interpret a statute. I suggest that in a world in which there is legislation involved in virtually every case a lawyer handles, there should be a mandatory course on legislation. It should include drafting and attending hearings of legislative committees. Let the students experience how hard it is to draft even the simplest legislation and how great it can feel to get it right.