

Articles

BASIC RULES OF LEGISLATIVE DRAFTING

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I. INTRODUCTION

When drafting legislation,

it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand.¹

In order to achieve such precision, it is necessary for one to be totally proficient in the proper use of the rules of grammar and to be able to express thoughts and concepts in intelligible language. This paper is an attempt to explain the basic essentials of writing a legislative draft. It discusses basic research considerations; the general structuring of a statute; matters which should be excluded from a statute but included in regulations; the proper use of definitions; and, the detailed construction of a section.

II. LAYING DOWN THE BASICS

Before a draftsman attempts even a first draft of proposed legislation, he must get certain aspects of the legislation clear in his mind.² Dickerson, in chapter 4 of his book on legal drafting³, refers to this process as the "think" stage of drafting. At this stage the essential considerations are:

- (1) *the purpose of the legislation.* The draftsman must thoroughly understand *what* the legislation is intended to accomplish and *who* it is intended to affect. Further, he must clearly ascertain, in exact detail, *how* it is intended to operate. An understanding of these things is best accomplished through continued conferral with the department initiating the proposed legislation.

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1. Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents*, George N. Moray and Co., Toronto (1902).

2. Harry W. Jones, "Notes for a Legislative Research Checklist," 36 A.B.A.J. 685 (1950).

3. Reed Dickerson, *The Fundamentals of Legal Drafting* (1965).

- (2) *the existing law pertinent to the proposed legislation.* The draftsman should become familiar with the existing statute law (including regulations and departmental directives) and the existing case law of the jurisdiction which affects the area to be reformed. Only by examining the present state of the law can the draftsman determine which laws must be amended or repealed. Further, only such examination will allow him to truly comprehend the legal framework within which the proposed legislation must operate.
- (3) *the legislative experience in other jurisdictions.* Often another legal jurisdiction has passed legislation intended to deal with a problem similar to that being approached by the proposed legislation. If this is the case, then a great deal of the draftsman's job has been done for him. By researching the experience-legislative, administrative, judicial and practical - of another jurisdiction which has enacted legislation dealing with a similar problem, the draftsman can discover the types of provisions that have proven adequate and those which have not. In this way the draftsman can learn from the experience of others and thereby avoid unnecessary pitfalls.
- (4) *the constitutional restraints.* A legislative draftsman must always be conscious of provisions of the constitutions of Canada and the Province which may affect the enactment of the proposed legislation. He must, of course, also be aware of the manner in which such constitutional provisions have been judicially interpreted in recent cases so that he may draft the provisions of the proposed legislation such that they are *intra vires* the Provincial Legislature.

Once the draftsman has completed his research and his initial consultations with the department initiating the proposed legislation, he should completely conceive an organizational pattern. With rather simple legislation, the draftsman may simply formulate an outline in his mind but for more lengthy or complex legislation, it is essential that the draftsman create a rather detailed outline. The making of an outline is very important, for it forces the draftsman to think through the entire problem in a logical manner and thereby detect problem areas. Only after all of these steps have been completed should the draftsman begin to draft the individual sections of the proposed legislation.

The department initiating the legislation can aid the draftsman through these stages in a number of ways. First they should involve the draftsman in discussions of policy and intention early in the planning stages. The earlier the draftsman is involved the better, for this better enables him to clearly understand the "who, what and how" of the proposed legislation. Second, the policy makers should forward their instructions to the draftsman as early as possible. A perennial problem for the legislative draftsman is that the majority of instructions are not received until the second half of the legislative session. This imposes unreasonable time constraints upon the draftsman and often leads to him having to compromise his professional desires for perfection. Finally, the instructions should be in point form, in the form of a memorandum or as recommendations attached to a policy research paper. A layman should never, as a general rule, issue instructions in the form of a draft, for laymen who attempt to write drafts are often more concerned with proper form than content, and words and phrases often take on unintended shades of meaning.

III. STRUCTURING THE STATUTE

Before any writing can take place, the draftsman must have some organizational pattern in mind. A statute is nothing more than "an ordered set in which there are subsets to the order in which each subset expresses an principal less significant than that expressed by its parent set or subset."⁴ The "subsets" are the sections, sub-sections and clauses of a statute while the "ordered set" is the statute as a whole. The key word is "ordered". In order to be useful, a statute must be arranged in a coherent manner. When drafting a statute, the draftsman should write each section on a separate piece of paper. This allows the sections to be rearranged as they are written.

To a large extent, the arrangement of a statute is a matter of style. Nevertheless, there are a few standard practises. Each piece of legislation begins with an enacting clause. For Manitoba statutes, the enacting clause is:

HER MAJESTY, by and with the advice and consent of
the Legislative Assembly of Manitoba, enacts as follows

...⁵

4. Dickerson, *op. cit.*, n. 3, p. 59.

5. Interpretation Act, R.S.M. 1970, c. 180, s. 4(1).

Occasionally, a preamble before the enacting clause will be used to explain the considerations made in formulating the policy or the conditions that necessitated the reforms.⁶ A preamble is read as part of the statute and is not merely a guide to assist the reader in the comprehension of the object of the legislation.⁷ Some draftsmen, however, believe that the object of an enactment should be apparent from its contents, and that a preamble should never be used. They feel that if an explanation of purpose is found to be necessary, it should be included in a separate section.⁸

Some other general rules of arrangement are that definitions be placed near the beginning of the legislation if they are to be applied throughout the legislation, general provisions should come before special provisions, more important provisions should come before less important provisions, and permanent provisions should be placed before temporary provisions.

To aid the beginning draftsman, Professor Dickerson has drawn up a list indicating a suggested order for the arrangement of a legislative draft:⁹

- (1) Title, if any.
- (2) Statement of purpose or policy, if any. [Preamble]
- [(2a) Enacting clause]
- [(2b) Short title, if any.]
- (3) Definitions.
- (4) Statement of to whom or to what the instrument applies.
- (5) Most significant general rules and special provisions.
- (6) Subordinate provisions, and exceptions large and important enough to be stated as separate sections.
- (7) Sanctions, if any.
- (8) Temporary provisions
- [(8a) Provision for the making of regulations.]
- (9) Specific repeals and related amendments, if any.
- (10) Severability clause, if any.
- (11) Expiration date, if any.
- (12) Effective date. . .

Some of these items may require a bit of explanation.

6. *Ibid.* s. 4(2)

7. *Ibid.* s. 11

8. *Drafting Conventions* special committee on Legislative Drafting.

9. Dickerson, *op. cit.*, n. 3, pp. 63 - 64.

Conventionally, a statute contains a long title and a short title. Generally, however, the statute is known by its short title. This results in some draftsmen believing that a statute should have only one title — the short title.¹⁰ A good short title should be indicative of the subject matter of legislation so that the relevant statute can be located in an alphabetical listing of statutes.

With the statement of to whom the law applies appearing at the beginning of the legislation, readers can readily discuss whether the enactment applies to them. If the principal provisions — ones which declare the material objects of the Act — are placed first, a reader can obtain a reasonable understanding of the law without “entering upon details involving no question of principle and interesting only to persons actually engaged in [the] legal business.” The detailed aspects of the law should be contained in later, subordinate provisions.¹²

When legislation becomes law, there must be some body empowered to administer its operation. In all cases, it is necessary for the draftsman to separate the law from the power to administer the law. The difficulty arises in trying to decide whether to place the provisions describing the law before or after the provisions describing the administrative aspects. The solution really lays in the relation between the law and the administration. Under normal circumstances, “until the law to be administered has been determined, the proper authority to administer the law cannot be judged of.”¹³ However, occasionally the law is such that it seems to emanate from the existence of an authority. In such a case, it is proper for the administrative authority to be described prior to the description of the new rules to be enacted.

In the suggested organization given above, Dickerson has included “Specific repeals and related amendments” within the statute. Although this can be done, in Manitoba, it is usual to place any amendments or repeals in a separate enactment. And, in addition, each year, a statute which is an amalgamation of diverse statutory amendments is passed. But no matter where the amendment or repeal is included, the draftsman must be certain that the new legislation is not inconsistent in any way with the existing law.

Generally, the choice between whether to amend an existing law or to repeal it is not that of the draftsman. Where a proposed enactment is a vast change over the existing law, the draftsman

10. *Drafting Conventions*.

11. *Thring, op. cit.*, n. 1, p. 43.

12. But remember that a great deal of procedural and administrative detail are more properly the subject of regulations.

13. *Thring, op. cit.*, n. 1, p. 39.

would prefer to repeal that law. It is easier to repeal the existing legislation than to amend it because there is no need to ferret out each inconsistent section and specifically amend it. Politicians, however, believe that the opposition looks less critically upon an amendment than upon the introduction of a new statute accompanied by a repeal of the existing provisions. Therefore, the initiating government department will usually ask the draftsman to make amendments to the existing legislation rather than repeal it.

Every statute must contain a section which specifies the date on which the statute is to become effective. That date may be specified to be the date of Royal Assent, the date of Proclamation or a particular date. Whichever of these is selected, no statute can be effective until it receives Royal Assent. That is, the statute must be signed by the Lieutenant-Governor before it can become law. If the effective date is specified to be the date of Proclamation, even if the Proclamation is issued by the Lieutenant-Governor in Council and published in the Manitoba Gazette, if the statute has not received Royal Assent, then its provisions are not in effect. On the other hand, even if Royal Assent has been given, if the effective date is specified to be the date of Proclamation or some particular date, then the statute does not become effective until that date is reached. The effective date may be delayed in this manner in order to give the public time to become familiar with changes in the rules that guide their lives or to give the administrative body time to determine the regulations that may be required for the effective operation of the legislation.

IV. REGULATIONS

Most statutes also have a section which confers upon some body the power to make regulations. Basically, in provincial legislation, there are three types of regulations: ministerial regulations, regulations made by the Lieutenant - Governor in Council, and regulations made by Boards and Commissions. The type of regulation used generally depends upon which body is responsible for the administration of the legislation. In any event, the authority to make a regulation must emanate directly from the legislation. That is, every statute which has left procedural and administrative matters to be determined by the administrative body must contain a special "regulations" clause which confers the power to make regulations upon that body. The Income Tax Act (Manitoba), subsection 33(1) is a good example of the type of the phraseology required:

For the purposes of carrying out the provisions of this Act according to their intent, the Lieutenant - Governor in Council may make such regulations and orders as are ancillary thereto and are not inconsistent therewith; and every regulation or order made under, and in accordance with the authority granted by, this section has the force of law and, without restricting the generality of the foregoing, the Lieutenant - Governor in Council may make such regulations and orders, not inconsistent with any other provision of this Act,

- (a) prescribing anything that, by this Act, is to be prescribed or is to be determined or regulated by regulation;
- (b) providing in any case of doubt the circumstances in which, and the extent to which, the federal regulations apply;
- (c) directing municipalities, local government districts and the Commissioner of Northern Affairs to deduct amounts from municipal taxes as described in subsection (10) of section 4.1; and
- (d) respecting the payment by the treasurer to municipalities and local government districts of amounts equal to the amounts deducted by the municipalities and local government districts from municipal taxes in accordance with the regulations including, without limiting the generality of the foregoing, the applications required for such payments, the information to accompany applications for such payments, and the time when such payments shall be made.

It should be noted that the power to make regulations is limited to the specific items enumerated in the statute. And, every regulation is subject to the provisions of the Regulations Act and the regulations passed pursuant thereto. It is important, therefore, that anyone concerned with the formulation of regulations be familiar with the provisions of these enactments.

There are several conventions that govern the use of regulations. The first of these is that regulations must never be used as a means of imposing taxation. The imposition of taxation is traditionally the prerogative of the Legislature. It goes back to the concept of 'no taxation without representation' and no court will sanction an enactment that is contrary to the essence of the democratic system. It follows from this that a regulation must not be used as a means of levying rates, or providing for exemptions or deductions. The exception to this is that a regulation may be used to set fees to be charged for the various steps of an administrative procedure.

Also, a regulation that sub-delegates the power to make rules to another body would be contrary to the constitution of Canada. The provincial government, as a power in its own right created by the British North America Act, has the authority to delegate its powers to a subordinate body. However, that body has no power to sub-delegate its authority to another body. The reason for this lay in the provision of sub-section 92(1) of the B.N.A. Act. There is clearly stated that the Provincial Legislature cannot change the office of the Lieutenant-Governor. That

office is basically to give Royal Assent to statutes passed by the elected representatives. A sub-delegation of rule-making power to a civil servant or an administrative body other than the one appointed by the statute would be changing that office in that the Lieutenant-Governor's signature would no longer be required to make the rules law. Even if this problem could be solved by requiring that all regulations be approved by the Lieutenant-Governor, there is still a rule of law that a delegate cannot further sub-delegate his powers. Similarly, there is a rule that one cannot delegate more authority than that which he possesses.

Generally, it is not too difficult to determine when a regulation should be used. If the matter is *purely* administrative or technical or when it may be necessary to change a rule during a time when the House is not in session, a regulation should be used. In most cases, it is better form to leave procedural matters out of the statute than to include them, for this allows the politicians an opportunity to clearly discern the policy of the legislation and leaves the technical issues to be resolved by those who are responsible for the administration of the legislation. The corollary of this, of course, is that regulations must never contain substantive matters.

The advantage of a regulation is that it can easily be changed if the need arises while a statute cannot. Often, changes are anticipated. This is especially so when it is not clear that a regulation will perform the required function; or if the matter is quite technical and details must be sorted out by a trial-and-error method. Therefore, while regulations are a very useful device in legislative drafting, the draftsman must be aware of their proper place.

V. DEFINITIONS

One thing the beginning draftsman is inclined to do is to attempt to define too many terms in pursuit of clarity. This can lead only to confusion and misinterpretation, for if many terms are defined, it is difficult for the draftsman to remember to use all of the terms consistently. It is best to define as few terms as possible. Definitions should be used only when the word is not being used in its dictionary sense or where the use of an expression will avoid repetition. One should define those terms which must be defined to facilitate understanding and should avoid technical or legalistic terms except where needed to convey meaning precisely. To avoid redundancy, the draftsman should be aware of the words and phrases which are defined in

the Manitoba Interpretation Act.¹⁴ These definitions apply to all provincial enactments.

Often, words that seem very straight forward have to be defined in a special way for the purposes of the statute. This is done quite frequently, for there are a variety of uses for definitions. Driedger¹⁵ lists several uses of definitions in his article on legislative drafting.

(1) *To Delimit*

That is, to set the limits of meaning without altering the normal meaning. This type of definition usually uses the "means" which "effects an exact equation and tends to limit rather than extend the connotation."¹⁶

(eg) "Salary" means the compensation received for the performance of the regular duties of a position or office.

(2) *To Particularize General Descriptions*

That is, to restrict a word to a particular thing without changing its ordinary meaning.

(eg) "Contract" means a contract made before December 22, 1975.

(3) *To Enlarge*

That is, the word retains its ordinary meaning and specifies a certain concept that is to be included, or perhaps it takes on a meaning it would not normally have.

(eg) "Person" includes an association or partnership; "Money" includes negotiable instruments.

(4) *To Settle Doubts*

That is, it is often necessary to define what is included in a given term to allay doubts as to whether the enactment applies or not.

(eg) "Unmarried person" includes a widow, a widower, or a divorced person.

(5) *To Narrow*

This usually means that some meaning that would normally be included will be excluded either by setting limits or by expressly excluding it.

(eg) "Dividend" does not include a stock dividend.

(6) *To Abbreviate or To Shorten and To Simplify Composition.*

(eg) "Minister" means the Minister of Finance.

14. R.S.M. 1970, c. 180, s. 23.

15. Elmer A. Driedger, *Materials on Legislative Drafting*.

16. J.C. Peacock, "Drafting a Proposed Statute", 1 *Prac. Law* 26 (Nov. 19, 1955).

It should be noted that "means" affects an equation and limits a definition while "includes" expands the ordinary definition of a word. Therefore, the phrase "means and includes" should never be used in definitions.

When defining a commonly used term, the draftsman should be careful not to change its ordinary meaning radically. If words are used in a familiar and proper context, the likelihood of the reader misinterpreting the meaning of a provision is diminished.

Once a definition has been drafted, it is necessary to place it within the overall legislative scheme. If a definition is meant to apply to the entire enactment, then it should be placed at the beginning of the statute in a section headed "Definitions" and starting with the phrase: "In this Act: . . .". If a definition is applicable only to a particular section, it should be included within that section and limited by the words "For the purposes of this section . . .".

VI. STRUCTURING THE SECTION

A section or a series of sections is nothing more than a paragraph of prose broken down into numbered sections or subsections. Sections should be numbered "1.", "2.", "3.", and so forth. Each section should rank equally in importance and there should be no introductory words. Subsections are numbered "(1)", "(2)", "(3)", and so on. They provide the detailed aspects of the general provisions contained in the section.¹⁷ This process of enumeration provides a readable form and aids the draftsman in the detection of logical or grammatical errors.

Cooper, in his book entitled *Writing in Law Practice*,¹⁸ warns the draftsman that long sections should be avoided. If one proposition is distinct from another, it should be included in a separate section. But, Cooper also believes that only where a proposition covers a large number of "contingencies, alternatives, requirements or conditions, or is too long to be written as a single paragraph,"¹⁹ should the section be broken into subsections. And, only in rare occasions, should paragraphs be further subdivided.

One of the most difficult things for the beginning draftsman to remember is that although a section is supposed to cover only one proposition and is to provide the details of its operation and is not to extend beyond this, "there should be no attempt to

17. E.L. Piesse and J.G. Smith, *The Elements of Drafting* (3d), p. 24.

18. Frank E. Cooper, *Writing in Law Practice*, Bobbs-Merrill Co. Inc., Indianapolis (1963).

19. *Ibid.*, p. 313.

confine each section to a single sentence.”²⁰ As pointed out by one authority,

Most readers find one sentence of eighty words more tiring (and confusing) than five with twenty each. The thing to keep down is not the number of lines of type, but the reading time. The easier the style... the shorter the reading time.²¹

So, remember to keep sentences short. Avoid attaching after-thoughts to an already completed sentence. This simply adds complexity and confusion to the legislative draft.

Since proper sentence structure is the key to an intelligible statute, a great deal of time will be spent in describing the method of sentence construction as devised by Coode in 1848.²² This is a worthwhile expenditure of time, for if a well stated statute is merely poorly organized, it may take a good deal of looking to find the relevant provisions, but once it is found, there will be no mistakes as to its meaning. In this situation, at least the law is clear. But, even if the organization of the statute as a whole is perfect, if the provisions are ambiguous, the statute will be ineffective. For although anyone can find the law, no one will be able to understand it.

What follows is a rather abbreviated summary of Coode’s treatise on legislative drafting. Coode describes every legal sentence as consisting of:

- (1) *the case* - (eg): “Where there is a dispute as to responsibility . . .”
- (2) *the condition* - (eg): “. . . if the parties agree . . .”
- (3) *the legal subject* - (eg): “. . . the members of the Arbitration Board . . .”
- (4) *the legal action* - (eg): “. . . may settle the matter.”

In a very simple, universally applicable enactment, only the latter two need be present and hence these will be defined first. No law can be written without these two essential elements.

A right, privilege or power can be conferred only upon a person. An obligation or liability can be imposed only upon a person. The person enabled or commanded to act is the legal subject of a legislative sentence. Occasionally, however, the legal subject is obscure. This is a sign of faulty drafting. Coode emphasizes two rules to be kept in mind with respect to the legal subject:

20. Robert K. Cullen, “Mechanics of Statutory Revision — A Revisers Manual”, 24 Ore. L. Rev. 1.

21. Alfred F. Conrad, “New Ways to Write Laws”, 56 Yale 458 (1947), p. 475.

22. George Coode, *On Legislative Expression: The Language of The Written Law*, T. & J.W. Johnson, Philadelphia (1848.)

- (1) "(K)ee**p** the *legal subject* distinct in form and in place from other parts of the legal sentence;"²³ and
- (2) Do not "permit it to be withdrawn from view, or disguised by the non-description of person, or by the use of impersonal forms of expression."²⁴

If the provision is not conferring a right or privilege or is not imposing an obligation or liability, then the legal subject can be an inanimate thing. This is especially common in the case of definitions where the word or phrase to be defined becomes the subject of the legislative sentence. Other examples abound. A cursory examination of most Manitoba statutes will reveal that the legal subject need not always be a person in order for the meaning to be appropriately conveyed. Examples of such sentences include:

- (1) "This Act may be cited as: 'The Interpretation Act'."²⁵
- (2) "The consolidated and revised regulations shall not come into force until they have been printed and are available for sale to the public."²⁶
- (3) "Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced in each calendar year."²⁷

It should be noted that the latter example is really a case of an obscured legal subject. With a small amount of verbal manipulation, the sentence can be rearranged so that the legal subject is clear:

"The Registrar of Regulations shall number regulations in the order in which they are filed . . ."

Often, however, if rearrangement is not necessary to achieve clarity, it will not be made.

The Legal Action

The legal action is that portion of the sentence which describes what the legal subject is empowered or commanded to do. This element should be immediately obvious in every legal sentence. In the following statutory provisions, the legal action has been underlined:

- (1) "Subject to subsections (2) and (3), the registrar *shall, within one month of the filing thereof, publish every regulation in The Manitoba Gazette.*"²⁸

23. *Ibid.* If one wishes a more detailed description of the elements described, it is suggested that the source be consulted.

24. *Ibid.*, p. 12.

25. The Interpretation Act, R.S.M. 1970, c. 180, s. 1.

26. The Regulations Act, R.S.M. 1970, c. R60, s 14(2).

27. *Ibid.*, s. 7(1).

28. *Ibid.*, s. 4.

- (2) "The Lieutenant-Governor in Council may make regulations. . ." ²⁹

If the legal subject is obliged to perform an act, then the imperative form - "shall" - must be used. On the other hand, if the legal subject is merely to be empowered to perform the legal action, the facultative form - "may" is used. The practical difference of these two forms is most easily emphasized by reference to the above two examples. In the first case, the registrar is absolutely required to publish every regulation in The Manitoba Gazette unless it comes within any of the exceptions proscribed in the remainder of the section. In the second example, it is not requisite that the Lieutenant-Governor in Council make regulations respecting the listed items. It may be that no regulation is ever made.

Not all sentences, however, are subject to the same analysis. Coode is not entirely clear as to how he would describe the type of sentence found in most definition sections or penalty sections. Examples of such sentences include:

- (1) "'registrar' means the Registrar of Regulations appointed under this Act . . ." ³⁰
- (2) "Every person who fails to file a return as required by subsection (3) of section 12 is liable to a penalty of ten dollars for each day of default but not exceeding fifty dollars." ³¹
- (3) "Unless expressly provided to contrary in another Act, a regulation that is not filed as herein provided has no effect." ³²

In the above sentences, there is no real legal action although the impact of each sentence is quite clear.

The Case

Although the legal subject and the legal action are the most important parts of the legislative sentence, in very few cases will the law be simple enough to be capable of expression solely by means of these two elements. "Whenever the law is intended to operate only in certain circumstances, these circumstances should be invariably described *before* any other part of the enactment is expressed." ³³ The words that describe such circumstances are called *the case*. According to Coode, these

29. *Ibid.*, s. 9.

30. *Ibid.*, s. 2(1)(3).

31. The Income Tax Act (Manitoba), R.S.M. 1970, c. 110, s. 22(2).

32. The Regulations Act, *op. cit.*, n. 26, s. 3(3).

33. Coode, *op. cit.*, n. 22, p. 25.

must be the first words in the sentence, and not included as an afterthought either parenthetically or in a proviso. The case can usually be easily distinguished in a sentence for it is generally introduced by the word "when" or "where" or "upon" which may be read to mean: "if the following circumstances exist". In the following examples, the case has been *underlined*:

- (1) *Where a regulation or a register is replaced*, the registrar shall attach or affix to, or endorse on, the duplicate an affidavit, made by himself, and stating that the duplicate is a true copy of the original of which it purports to be a true copy."³⁴
- (2) *"When an amount has been deducted or withheld under subsection (1)*, it shall, for all purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions, or other amounts were paid."³⁵
- (3) *"Upon receipt of the notice of objection*, the treasurer shall with all due despatch reconsider the assessment and vacate, confirm, or vary the assessment or reassess; and he shall thereupon notify the taxpayer of his action by registered mail."³⁶

The case should be placed at the very beginning of the legislative sentence, so that a person looking through the statute can tell immediately whether or not the provision applies to his case. If it does not, then he need not read through the entire section and can proceed to seek the law applicable to the circumstances of his case.

The Condition

Occasionally, there are certain conditions which must be fulfilled before the provision operates. Since conditions are not often performed simultaneously, it is good form to list the conditions in chronological order, for the action of the law cannot take place until the conditions are fulfilled. Since the legal action cannot act upon the legal subject until the conditions have been performed or complied with, "*the expression of the condition ought immediately to precede that of the legal subject.*"³⁷ A condition can be identified by the existence of the word "if", "unless", or "until":

34. Revised Regulation, R60 — R1, s. 3(4).

35. The Income Tax Act (Manitoba), R.S.M. 1970, c. I10, s. 15(3).

36. *Ibid.*, s. 25(3)

37. Coode, *op. cit.*, n. 22, p. 23.

- (1) "Unless expressly provided to the contrary in another Act, a regulation that is not filed as herein provided has no effect."³⁸
- (2) "Where a landlord is required to refund excess rent under subsection (1),
 - (a) if the tenant to whom the refund is payable no longer occupies the residential premises, the landlord shall pay the amount of the refund directly to the tenant within 2 months after the coming into force of this Act; and
 - (b) if the tenant to whom the refund is payable continues to occupy the premises, the landlord shall
 - (i) pay the amount of the refund directly to the tenant within 2 months after the coming into force of this Act, or
 - (ii) refund the amount of the refund by abating the rent in the first rental payment period commencing after the expiry of 2 months after the coming into force of this Act and the succeeding 3 rental payment periods in 4 equal amounts, and if the tenant ceases to occupy the residential premises before the full amount of the refund is so abated, the landlord shall forthwith pay the balance of the amount of the refund directly to the tenant."³⁹

A sentence which is limited to one class of cases, one class of legal subjects and one class of legal actions is more easily understood than a sentence which rambles on with a large number of subjects and actions mixed with several different cases. Therefore, do not worry about repeating a phrase if it will avoid ambiguity. Also, use enumeration freely, for this is an excellent medium for creating clarity.

Miscellaneous Problems:

(1) Reference Words

While a sound knowledge of basic sentence structure as described by Coode will enable the draftsman to avoid many of the pitfalls of legislative drafting, there are a variety of other minor points which, if ignored, could lead to the misinterpretation of an otherwise well-written enactment. One such point is to avoid using such words as "aforesaid", "beforementioned", "same", or "said". These words force the reader to remember precisely what has been previously described while at the same time trying to understand the new provision. This only leads to

39. The Rent Stabilization Act, S.M. 1976, c. R85, s. 13(3).

confusion. Therefore, when it is possible, such words should not be used.

When making a cross - reference by section number, it is no longer necessary to use the full phraseology of "subsection (1) of section 12." Now, it is acceptable (and even preferable) form to refer simply to subsection 12(1). However, it should be remembered that sectional cross - references, like reference words, tend to be confusing to the reader who is trying to absorb new material.⁴⁰ Therefore, they should be used sparingly.

(2) *Ambiguities of Language and Punctuation*

Ambiguities of language and punctuation may also cause misinterpretation. One major source of difficulty evolves around the use of modifying adjectives. In the phrase "charitable institutions or organizations", it is difficult to ascertain whether "charitable" modifies both nouns or merely the first. If it's meant to modify only "institutions", then invert the phrase so that it reads: "organizations or charitable institutions". If it is meant to modify both the nouns, simply repeat the adjective: "charitable organizations or charitable institutions". Another solution is to enumerate the items:

"This section applies to charitable:

- (a) institutions; or
- (b) organizations."

The same principle holds true for modifying phrases and adverbs.

Punctuation may cause ambiguity if it is used incorrectly. A draftsman should never use punctuation to convey meaning, for through many rewritings and retypings, punctuation marks can be left out easily. If this happens, the corresponding meaning is also lost.

Since draftsmen are very careful to use punctuation correctly, examples of this problem are hard to find in a statute. However, one often finds misplaced punctuation in other writings. For example, due to a misplaced comma, this sentence:

"People, who overindulge in alcohol and then drive a motor vehicle, are a menace."

implies that all people overindulge in alcohol and then drive and, therefore, all people are a menace. An example where a missing comma creates unwanted results can be seen in this sentence:

"Helping at the picnic will be the Chairman's wife, who is cooking the ham and their four children."

40. Cross-references can also become confusing to the draftsman if there are several revisions of the draft, for, with most revisions comes a rearrangement of sections. This necessitates renumbering and therefore, cross-references must be checked constantly and even then may easily be missed.

If the punctuation is corrected, the sentence reads:

“Helping at the picnic will be the Chairman’s wife, who is cooking the ham, and their four children.”

and attendance at the picnic should be greatly improved.

(3) *References to Dates*

Another problem area relates to the use of dates when referring to times by which an event must take place. A draftsman must be sure to include all dates that are intended to be included. This is not always as simple as it may seem. For example, does the phrase “from January 1, 1972 to June 30, 1975” include the two specified dates? The use of such phrases as “up to and including . . .”, “. . . to June 30, 1975 inclusive . . .”, or “. . . on or before June 30, 1975” may alleviate some of the possible confusions.

(4) *Statutory Construction*

Statutory construction refers to the manner in which the courts interpret the words of an enactment. While a draftsman should never rely upon the doctrines of construction to convey his meaning, he should be aware of the way in which his words might be construed. Two very important rules of interpretation of which the draftsman should be aware are: (1) the words of a taxation enactment are strictly construed; and (2) *ejusdem generis*,

The latter rule is applied in situations where the draftsman has mentioned a list of items followed by general words. An example of this would be: “. . . oranges, limes, lemons and other fruits”. Because of the *ejusdem generis* rule of statutory interpretation, the term “other fruits” would be read as “other citrus fruits”. To avoid the operation of this rule, the draftsman should use such a phrase as “. . . any other fruit whether of the same kind as the fruits before enumerated or not . . .” or “. . . without effecting the generality of the foregoing . . .”.

The fundamental rules of statutory construction for the draftsman of taxation enactments to keep in mind is that the words of taxation statutes are strictly construed. That is, only their literal meaning is considered. The effect of this rule can be most dramatically seen by the interpretation which the court has placed upon para. 110(1)(e.1) of the Income Tax Act.⁴¹ That paragraph provides that a taxpayer is entitled to a \$1000 deduction from income if his spouse “was, throughout any 12-month period ending in the year, necessarily confined for a substantial period of time each day, by reason of illness, injury or

41. S.C. 1970 — 71 — 72, c. 63 as amended.

affliction, to a bed or wheel chair.”⁴² When this section came to be considered by the Court, it was held that ‘wheel chair’ meant a chair with wheels and no other. Therefore, a taxpayer whose spouse required nursing care constantly throughout the day but who could sit up during the day in an easy chair was not entitled to the deduction because the easy chair was not a *wheel* chair.

A further rule of statutory interpretation of which the draftsman should be aware is that that which is not expressly excluded is deemed to be included. Therefore, if the word “dividend” would normally include a stock dividend, every time the word “dividend” was used, a stock dividend would be deemed included unless expressly excluded.

(5) *Miscellaneous*

Several other rules to keep in mind when drafting a legislative sentence are:

- (1) Since a statute is construed as always speaking, use the present tense.

That is, say: “money” includes negotiable instruments.

not: “money” will include negotiable instruments.

Remember that “shall” is indicative not of the present tense but of a command.

- (2) Only where the statute directs some person to do something should the imperative — “shall” — be used. If the rule is merely conferring a right or a power to act, the draftsman should be sure to use the facultative form — “may”.

- (3) Avoid using the subjunctive mood. Try, where possible, to use the indicative mood. The indicative states an actual fact while the subjunctive refers to a desired situation. For example,

Indicative mood: “Every resident in Canada is a Canadian.”

Subjunctive mood: “This Act applies to a resident American as though he were a Canadian.”

- (4) Use the singular rather than the plural form. That is, say: “Every person shall . . .”
not: “All persons shall . . .”
- (5) Use the active voice rather than the passive voice. That is,

⁴² *Ibid.*, para. 110(1)(e).

say: "Every person shall submit his tax return . . ."
not: "Tax returns shall be submitted by every person . . ."
."

- (6) Where possible, state matters positively rather than negatively. That is,
say: "Errors are common . . ."
not: "Errors are not uncommon . . ."
- (7) Use active verbs rather than the noun equivalent. For example,
say: "The Minister shall determine . . ."
not: "The Minister shall make a determination . . ."
- (8) Beware of ambiguities resulting from the use of pronouns. This problem is often avoided by repeating the noun rather than using a pronoun.
- (9) Remember that a sentence which states the reason for its provisions is often more clear when the reason precedes the provision. However, this practice is not common in modern Canadian statute drafts.
- (10) Finally, but most importantly, try to conceive every possible misinterpretation that could be placed upon the words.

VII. CONCLUSION

Once the writing has been completed and the sections have been placed in a logical order and correctly numbered, the draftsman may wish to add guides to help the reader through the statute. Although some draftsmen believe that these guides should be used sparingly, it is common practise in Manitoba to use headings and sub-titles to facilitate the identification of provisions relevant to a particular situation. Marginal notes are also useful in this respect if they concisely express the main object of the sections and give an indication of the subject matter covered by each without actually summarizing the provision. It should be noted, however, that marginal notes are very rarely used. The Interpretation Act makes it clear that headings, sub-titles and marginal notes are solely to facilitate reference and are not part of the enactment,⁴³ even though they are in place through all stages of the legislative process.

When the draft is completed, the draftsman should carefully read over his work to be certain that it accomplishes what it is meant to accomplish. Often, this review should be done in consultation with the department initiating the enactment or with

43. Interpretation Act, R.S.M. 1970, c. 180, s. 12.

another draftsman. A fresh opinion at this stage may result in the detection of errors which the draftsman himself would not notice. When the draft is examined by Cabinet and later by the House and Committees of the House, the draftsman must be prepared to make revisions. But if one adheres to the methods described in this paper, there should be few major problems encountered. Unfortunately, however, the English language is not a perfect medium for the expression of concepts. Therefore, although every draftsman strives for perfection, he is acutely aware that at some point in the future, someone will declare 'his' statute (or parts of it) to be ill-conceived, badly expressed, vague, ambiguous or poorly written. The only solution is to adhere as closely as possible to the strict rules of grammar, to the type of sentence structure described by Coode, and to the proper use of vocabulary within the enactment. This is the most that any draftsman can be expected to do.