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**HOW TO AMEND A STATUTE:
THE DRAFTING AND INTERPRETATION OF AMENDING LEGISLATION**

by

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LL.M. (Legislation)

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The author is one of the legislative counsel in the Department of Justice
(Canada). The views expressed in this thesis are those of the author only.



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Canada



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Abstract

This thesis looks at the drafting and operation of amending legislation in the light of two paradigms of statute law.

Part One examines the paradigm which developed in Great Britain in the nineteenth century. That paradigm emphasized the fragmentary character of the statute law. Ilbert analysed the techniques of amendment and concluded in favour of the use of indirect amendment and against the use of textual amendment. In the 1960s and 1970s, an attempt was made to bring about a paradigm shift in Great Britain. The most important changes sought were the use of textual amendment and consolidation of the statute law. The debate over these changes was unsatisfactory because it proceeded on the unjustified assumption that there was a conflict between the interests of legislators (who were thought to favour indirect amendment) and the interests of other users (who were thought to favour textual amendment).

Part Two criticizes this assumption on the basis of the situation in Canada, where legislators were responsible for the establishment of a drafting convention requiring the virtually exclusive use of one form of textual amendment (re-enactment). The Part describes the role of a 1923 special joint committee of the Parliament of Canada in establishing that convention. The Canadian history of the royal instructions to colonial governors is examined to refute the argument that those instructions had something to do with the development of contemporary Canadian conventions respecting the drafting of amending legislation.

Another paradigm of statute law developed in the United States, Canada and Australia in the nineteenth century. It emphasizes the potential coherence of the statute law and tries to realise this potential through statute revision and the use of textual amendment. Part Three examines the consequences of the use of textual amendment for the operation of amending enactments. Two doctrines are explored. The first, the doctrine of merger, gives amending enactments the same operation as that of the enactments that they amend. (There is an exception for the temporal operation of amending enactments.) The second, the doctrine of the continuous operation of rules, identifies the rules contained in enactments rather than the enactments themselves as the relevant category for the operation of the statute law. In this way, the use of re-enactment as a technique of amendment does not bring about an interruption in the operation of the statute law.

The thesis also considers the argument that the use of re-enactment as a technique of amendment is undesirable because it opens up for parliamentary amendment more of the act proposed to be amended than do other techniques of amendment. The argument is refuted on the basis of an historical account of the development of the criteria for the admissibility of parliamentary amendments.

Abbreviations

<u>C.J.</u>	Canada, Parliament, House of Commons, <u>Journals</u>
Erskine May	Sir Thomas Erskine May, <u>A Treatise on the Law, Privileges, Proceedings and Usage of Parliament</u> (London) [The footnotes indicate the edition and its year of publication.]
<u>H.C. Debs.</u>	Canada, Parliament, House of Commons, <u>Debates</u>
<u>H.C. Debs.</u> , 5th ser.	Great Britain, Parliament, House of Commons, <u>Debates</u> [The fifth series began in 1901]
<u>H.L. Debs.</u> , 5th ser.	Great Britain, Parliament, House of Lords, <u>Debates</u>
Ilbert	Sir Courtenay Ilbert, <u>Legislative Methods and Forms</u> , (Oxford: Clarendon Press, 1901)
<u>Parl. Debs.</u> , 3rd ser.	<u>Hansard's Parliamentary Debates</u> [The third series contains the debates of the House of Commons and the House of Lords for the period 1830 to 1891.]
<u>Parl. Debs.</u> , 4th ser.	<u>Parliamentary Debates. Authorised Report</u> [The fourth series contains the debates of the House of Commons and the House of Lords for the period 1892 to 1900.]
Radical Simplification	Statute Law Society, <u>Statute Law: A radical simplification, Second Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, being a reproduction of its Memorandum presented in October 1973 to the Committee on the Preparation of Legislation appointed by H.M. Government</u> , (London: Sweet & Maxwell Ltd., 1974)
Renton	Great Britain, <u>The Preparation of Legislation, Report of a Committee Appointed by the Lord President of the Council</u> , (London, H.M.S.O., 1975) Cmnd. 6053
<u>Sen. Debs.</u>	Canada, Parliament, Senate, <u>Debates</u>

Sen. J.

Canada, Parliament, Senate, Journals

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<u>Winnipeg School Division No. 1 v. Craton et al.</u> , [1985] 2 S.C.R. 150, 21 D.L.R.		
(4th) 1	204	
<u>Wright v. Oakley et al.</u> , 5 Met. (46 Mass.) 400 (1843)	166, 197-199, 211	
<u>Yew Bon Tew v. Kenderaan Bas Mara</u> , [1983] 1 A.C. 553, [1982] 3 All E.R. 833,		
P.C.	166	

Introduction

This thesis looks at the drafting and operation of amending legislation in the light of two paradigms of statute law. The one emphasizes the fragmentary character of the statute law and the consequent difficulty of arranging the statute law in a coherent form. The other emphasizes the potential coherence of the statute law. Its two great tools are statute revision, which gives formal expression to the coherence of the statute law, and textual amendment, which maintains that coherence and facilitates the next revision of the statutes.

The concept of a paradigm is taken from Prof. Thomas S. Kuhn's seminal work, The Structure of Scientific Revolutions.¹ First published in 1962, this work presented an account of "normal science", that is, what most scientists do most of the time, and of "scientific revolutions". Prof. Kuhn identifies the triumph of a single paradigm, or way of looking at the world, as the key episode in the emergence of a science.² A single paradigm, by presenting one way of looking at the world, singles out some facts as relevant while dismissing others as unimportant. The focus produced by a paradigm is, according to Kuhn, indispensable for most scientific research ("normal science").³

¹Chicago: University of Chicago Press, 2nd edition, 1970

²Ibid., p. 15

³Ibid., pp. 24-5

Scientific research constantly generates anomalies, and this sometimes creates a crisis in a science when the paradigm is unable to explain an anomaly.⁴ This may lead to a paradigm shift, once someone sees how the anomaly can be explained. Different paradigms are incommensurable: "though the world does not change with a change of paradigm, the scientist afterwards works in a different world."⁵

Prof. Kuhn's work is useful in discussing statute law for a number of reasons. In the first place, the concept of "paradigm" enables us to link together opinions on different issues and see the relation between apparently unrelated opinions. For example, the second of the paradigms mentioned in the first paragraph links statute revision and textual amendment. But (as we shall see in Part One) no such link was made in Great Britain until the 1960s.

⁴Ibid., p. 82

⁵Ibid., p. 121. Consider the following passage, which appears at p. 150:

[T]he proponents of competing paradigms practice their trades in different worlds. One contains constrained bodies that fall slowly, the other pendulums that repeat their motions again and again. In one, solutions are compounds, in the other mixtures. One is embedded in a flat, the other in a curved, matrix of space. Practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction. Again, that is not to say that they can see anything they please. Both are looking at the world, and what they look at has not changed. But in some areas they see different things, and they see them in different relations one to the other. That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another. Equally, it is why, before they can hope to communicate fully, one group or the other must experience the conversion that we have been calling a paradigm shift.

This brings us to our second point, which relates to the existence of different paradigms of statute law. To Canadians, the desirability of textual amendment "seems intuitively obvious" (to borrow Prof. Kuhn's words). It did not seem so obvious to the British in the 1960s. Part One of the thesis traces the emergence of the British paradigm of statute law, which is the first one described in the opening paragraph, and tries to explain why the desirability of textual amendment was not obvious to the British in the 1960s.

The United States, Canada and Australia share a paradigm of statute law that differs from the British one. Our paradigm is the second one described in the opening paragraph. Its consequences for the drafting and operation of amending enactments (what we might call "normal law") are extensively discussed in Part Three.

Both paradigms share a technical vocabulary. This vocabulary will be used throughout the thesis. It is important in using the technical vocabulary to bear in mind that its terms describe concepts that were developed in response to practical questions about the drafting and operation of legislation. In other words, these terms do not have any significance apart from the responses they provide to these practical questions. The different ways of looking at the world characteristic of different paradigms are the result of different answers to the same question.

The first question about the drafting and operation of amending legislation is the extent to which an enactment should state that it affects the operation of a prior enactment. The terms developed here to express the range of different

responses include "express" and "implied" amendment. These terms indicate that the choice to be made is one of the degree of explicitness to be expected in legislation about its effects on prior legislation. The question is one of degree. The following extract from s. 53 of The Civil Service Act, 1918⁶ contains an express amendment of the Post Office Act:⁷

53. Subject to the provisions hereinbefore contained, ... the powers of the Governor in Council and the Postmaster General to appoint or promote postmasters and other officers, clerks and employees under the provisions of the Post Office Act ... are repealed.

This section is explicit about which Act is being amended, although it is not explicit about which of its provisions are being amended. The following, taken from s. 1 of An Act to alter the Duties of Customs and Excise,⁸ is an example of a provision that is not explicit about which Act is being amended:

1. So much of all Acts and parts or schedules of Acts and of all Orders in Council, as imposes any duty of Customs upon goods ... or exempts goods from Customs duty when imported into Canada, or is in any wise inconsistent with this Act, is hereby repealed ...

This provision is explicit about the fact that there is previous legislation on the subject, and it is explicit about its effect on that previous legislation. So the use of terms such as "express" and "implied" amendment do not mean that there is a simply a choice to be made between two alternatives. Instead, those terms focus our attention on the question to be answered, namely, the degree of

⁶S.C. 1918, c. 12

⁷R.S.C. 1906, c. 66

⁸S.C. 1879, c. 15

explicitness to be expected of legislation that affects the operation of prior legislation. Both the paradigms of statute law being contrasted here answer this question in approximately the same way and require a high degree of explicitness.

The two paradigms differ in their answer to a second question. This question assumes that the first question has been answered in favour of at least some degree of explicitness and asks to what extent an enactment that affects the operation of a prior enactment should be integrated with the prior enactment. The terms that have been developed here are "textual amendment" and "indirect amendment". The former expression signifies a higher degree of integration in that the effect of the subsequent enactment on the prior enactment is expressed by changing the text of the prior enactment.

The question here is not entirely one of degree since the concept of "textual amendment" provides a precise criterion for identifying the degree of integration. The Veterans' Land Act⁹ provided for grants of land to veterans of the Second World War. It contained a definition of "veteran". In 1954, the Act was extended to veterans of the Korean War by s. 6 of the Veterans Benefit Act,¹⁰ which provides in part as follows:

6. (1) The Veterans' Land Act applies to members of the Canadian Forces included under subsection (2) in the expression "veteran" therein referred to.

(2) The expression "veteran", as defined in subsection 2(1) of the said Act, includes every person described in paragraphs 4(2)(a), (b), (c) and (d) of this Act.

⁹R.S.C. 1970, c. V-4

¹⁰R.S.C. 1970, c. V-2

This section is highly integrated with the Veterans' Land Act but it does not change the text of that Act and it is not therefore a textual amendment.

The paradigm of statute law shared by the United States, Canada and Australia differs from the British one in that textual amendment has been taken for granted in the United States, Canada and Australia for over a century while the merits of its use in Great Britain were debated at length in the 1960s and 1970s.

If one answers the second question by rejecting textual amendment, one must then consider the degree to which an enactment that affects the operation of a prior enactment should be integrated with it. As we shall see in Part One, it is difficult to distinguish "indirect amendment" from referential legislation and British attempts to deal with the second question often foundered on this point. This problem is illustrated by s. 6 of the Veterans Benefit Act. Should it be seen as an amendment of the Veterans' Land Act or as an extension of its provisions by way of incorporation by reference? It is, of course, impossible to answer this question without knowing why the distinction between indirect amendment and referential legislation is important.

The third question assumes that the second question has been answered in favour of textual amendment and asks how much of the text of the prior enactment should be changed. The terms that have been developed here are "re-enactment" and "'blind' amendment". The latter expression refers to an amendment that changes no more of the text of the prior enactment than is necessary to effect

the change. Since the user of the amending enactment may not know the context for the change, the amendment is said to be "blind". "Re-enactment", on the other hand, refers to an amendment that changes some portion of the prior enactment that is identifiable otherwise than by reference to the words contained in the text of the prior enactment. This technique results in the inclusion in the amending enactment of portions of the text of the prior enactment that are not being changed; these portions are said to be "re-enacted". These portions can range from all of the unchanged portions of the prior enactment to the unchanged portions of an isolated paragraph or subsection.

Since the third question assumes that the second question was answered in favour of textual amendment, neither the third question nor the range of answers to it forms part of the British paradigm of statute law. On the other hand, the third question has had to be answered in the United States, Canada and Australia, and the range of answers to it forms part of the paradigm of statute law shared by those countries.

Little is said in the thesis of the emergence of this second paradigm of statute law. It may therefore be appropriate to make some suggestions here about its emergence. This can be done through a comparison between the British and North American senses of "statute revision". These different senses give us a third reason for resorting to the work of Prof. Kuhn, as they illustrate the incommensurability of the two paradigms.

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The three editions of Statutes Revised that were prepared by the Statute Law Committee" are chronologically arranged. Repealed enactments are omitted. Statute law revision acts have been enacted to repeal enactments that are "obsolete, spent, unnecessary or superseded".¹²

The first six revisions of the New York statutes were chronologically arranged:¹³

None of these so-called revisions was anything more than a mere re-enactment in a consolidated form of the existing statutes as they had been passed from time to time, with some amendments suggested by the Revisers or inserted by the Legislature. They were drawn in separate acts with no attempt at systematic arrangement.

The Revised Statutes, which generally came into force on various dates in 1828 and 1830,¹⁴ were very different:¹⁵

The body of law that emerged from the revision process, known as the Revised Statutes, resulted in a true, if limited, codification of New York law, the first in any common law jurisdiction.

¹¹Renton, p. 21

¹²Ibid., p. 18

¹³William Allen Butler, The Revision of the Statutes of New York and the Revisers: An Address delivered before the Association of the Bar of the City of New York, January 22, 1889, (New York and Albany: Banks and Brothers, 1889), p. 5. Butler mentions five revisions, in 1762, 1774, 1789, 1801 and 1813. There was apparently a revision in 1752 (Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform, (Westport, Conn. and London: Greenwood Press, 1981), p. 155 n. 60

¹⁴Butler, op. cit., pp. 45-6. Some portions of Part I came into force on January 1, 1828, others on May 1, 1828. The balance of Part I and the other parts came into force on January 1, 1830.

¹⁵Cook, supra n. 13, pp. 136, 143-4

...

The statutes [were] classified under the divisions similar to those found in Blackstone's Commentaries. Under the first general head [fell] all laws relating to the internal administration and civil polity of the state. The second [contained] the substantive laws relating to property, domestic relations, and private rights. The third [was] comprised of laws relating to the state's judicial machinery and civil procedure. Criminal law [was] found under the fourth title, and the last [included] all public laws of a local and miscellaneous character.

British North America followed New York's example in the 1850s. The first British North American statute revisions were invariably arranged according to the plan of the New York Revised Statutes. So were the 1886 and 1906 Revised Statutes of Canada.

Statute revision New York style facilitated the use of textual amendment because the revision provided a framework to which subsequent laws could be textually related. There does not seem ever to have been a debate in North America over the comparative merits of indirect amendment and textual amendment. Such debate as there was focussed on the choice between the different kinds of textual amendment. Canadian developments in this area are described in Part Two of the thesis.

Part One

The British Paradigm of Statute Law

Introduction

In the first chapter of this part, we shall examine the British paradigm of statute law as it emerged in the nineteenth century. Men like Austin argued that the statute law of England was fragmentary and intelligible only in terms of its relationship with the common law. The idea of "referential legislation", that is, of statutes that were intelligible only in terms of their relationship with other laws, contained the seed from which the idea of "amendment" later grew. For Ilbert, "amendment" was a special case of referential legislation. He nevertheless produced the clearest statement of the different techniques of amendment. Well into the twentieth century, British jurists such as Carr and Marshall and Marsh were still trying to distinguish referential legislation from amending legislation.

The second chapter traces the attempt made in the third quarter of this century to bring about a paradigm shift in Great Britain, so that statute law might become coherent and intelligible with as little reference as possible to other laws. The principal change advocated was the nearly exclusive use of some form of textual amendment, instead of what had become known in Great Britain as referential or indirect amendment. Ilbert's analysis so influenced the participants in the British debate over this change that the paradigm shift never took place, at least not as a result of any conclusions reached in the debate.

The third chapter begins to assess Ilbert's objections to the use of one form of textual amendment, namely, re-enactment. Specifically, recent Canadian and British statutes are examined in order to scrutinize Ilbert's claim that legislators prefer to minimize rather than magnify their proposals.

The fourth chapter continues this assessment with an examination of parliamentary procedure in Great Britain and Canada in order to refute Ilbert's claim that the use of re-enactment in a bill opens to parliamentary debate and amendment more than the sponsor of the bill might wish.

Chapter One

The Development of the British Paradigm

This chapter traces the development of the British paradigm of statute law from its first appearance in Austin's lectures and its exemplification in the drafting practices of the nineteenth century through Ilbert's 1901 analysis of the techniques of amendment and Carr's supplement to that analysis and on to Marshall and Marsh's initiation of a debate over British use of those techniques.

The Fragmentary Character of the Statute Law

Legislation was conceived of in the nineteenth century as the highest form of law-making, not only the last form historically, but also superior to other, earlier forms. Thus, Sir Henry Maine (1822-1888) wrote in 1861:¹⁶

I confine myself in what follows to the progressive societies. With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. . .

A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fiction, Equity and Legislation. Their historical order is that in which I have placed them...

¹⁶Sir Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas, (New York: Henry Holt & Co., 3rd American, from 5th London Edition, 1888), pp. 23-4, 28

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from Legal Fictions just as Equity differs from them, and it is also distinguished from Equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles.

More than thirty years before, in his lectures delivered while Professor of Jurisprudence in the University of London, John Austin (1790-1859) had analyzed the differences between what he called "judiciary law" and "statute law":¹⁷

The principal or leading difference between those kinds of law, is, I apprehend, the following:

A law made judicially, is made on the occasion of a judicial decision. The direct or proper purpose of its immediate author is, the decision of the specific case to which the rule is applied, and not the establishment of the rule...

But a statute law, or a law made in the way of direct legislation, is made solely, and is made professedly, as a law or rule. It is not the instrument or mean of deciding a specific case, but is intended solely to serve as a rule of conduct, and therefore to guide the tribunals in their decisions upon classes of cases.

The principal difference, therefore, between statute and judiciary law, lies in a difference between the forms in which they are respectively expressed.

Like Maine, Austin considered statute law to be superior as a form of law-making to judiciary law. The first reason Austin gives for the superiority of statute law is its greater accessibility and knowability, as

¹⁷John Austin, Lectures on Jurisprudence, being the Sequel to "The Province of Jurisprudence Determined" (1861), vol. II, pp. 322-3

access to and knowledge of judiciary law involves the "delicate and difficult. . . process of abstraction and induction" of the ratio decidendi of a judicial decision.¹⁸

Austin also seems to have considered statute law superior on account of the directness with which the law could be changed. Although he does not mention this point in his comparison between judiciary law and statute law, Austin makes this point in his discussions both of legal fiction and equity. He describes the equitable right to an injunction to restrain an inequitable common-law proceeding as an "obscure and absurd mode of abrogating law".¹⁹ Later, he notes:²⁰

It is, indeed, extremely difficult to determine why subordinate judges, in innovating an existing law, have so often accomplished their object through the medium of fictions. I incline to impute this curious phaenomenon to two causes.

- 1°. A respect on the part of the innovating judges for the law which they virtually changed. By accomplishing the change through a fiction they rather eluded the existing law, than formally annulled it. . .
- 2°. A wish to conciliate (as far as possible) the friends or lovers of the law which they really annulled.

These two reasons for the superiority of statute law are closely related, for it is precisely because statute law enacts a rule of law directly

¹⁸Ibid., II, p. 360

¹⁹Ibid., II, p. 302

²⁰Ibid., II, pp. 315-6

that the rule is more accessible or knowable than a rule that must be extracted from a judicial decision.

Had this been the extent of Austin's account of the superiority of statute law, one would have expected that a convention of express amendment or repeal in cases of a change in the statute law would have been established. However, Austin also thought that many of the defects in the statute law of his day were due to its relationship with judiciary law. Thus, he wrote that,²¹

wherever much of the law is judiciary law, the statute law which coexists with it, is imperfect, unsystematic, and bulky.

For the judiciary law is, as it were, the nucleus around which the statute law is formed. The judiciary law contains the legal dictionary, or the definitions and expositions (in so far as such exist) of the leading technical terms of the entire legal system. The statute law is not a whole of itself, but is formed or fashioned on the judiciary law, and tacitly refers throughout to those leading terms and principles which are expounded by the judiciary...

Wherever, therefore, much of the law consists of judiciary law, the statute law is not of itself complete, but is merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system. The statute law is not of itself an edifice, but is merely a set of irregular or unsystematic patches stuck from time to time upon the edifice reared by judges.

The implication is that some of the defects of the statute law cannot be resolved by any means short of the codification of the law.

²¹Ibid., II, p. 369

The practice of the British Parliament during the nineteenth century suggests that that Parliament believed, along with Austin, that the statute law was bound to be "partial and irregular" until the law was codified. Consequently, Acts were expressly repealed in connection only with a consolidating statute that travelled some considerable distance along the road to codification. Such express repeals as there were were not usually comprised in the consolidating statute, but rather in a separate, supplementary statute. Thus, the preamble to an Act of 1861²² reads as follows:

Whereas by Six several Acts of the present Session of Parliament, relating respectively to Offences against the Person, Malicious Injuries to Property, Larceny, Forgery, Coining, and Accessories and Abettors, divers Acts and Parts of Acts have been consolidated and amended, and it is expedient to repeal the Enactments so consolidated and amended and certain other Enactments: ...

This approach was not new in 1861. It had already been tried in 1827, when the first steps had been taken towards the codification of the criminal law.²³ Nor was the approach restricted to the criminal law. Henry Thring (1818-1907) employed it in The Merchant Shipping Act, 1854.²⁴ Thring later wrote that he had first tried out his ideas for the improvement of the statute law in drafting that Act.²⁵ The Merchant Shipping Act, 1854 did not expressly

²²24 & 25 Vict., c. 95. The 6 Acts referred to are 24 & 25 Vict., cc. 94 and 96 to 100.

²³7 & 8 Geo. 4, c. 27 (repealing Acts consolidated in 7 & 8 Geo. 4, cc. 28 to 31).

²⁴17 & 18 Vict., c. 104

²⁵Henry, Lord Thring, Practical Legislation; The Composition and Language
(continued...)

repeal any statute; instead it was accompanied by The Merchant Shipping Repeal Act, 1854.²⁶ Again, the 1869 revision of the law relating to bankruptcy and creditors' remedies included two codifying Acts²⁷ as well as The Bankruptcy Repeal and Insolvency Court Act, 1869.²⁸

This is the background to the decision in Hough v. Windus,²⁹ when the Court of Appeal was confronted, apparently for the first time, with an express repeal comprised in the same statute some of whose other provisions superseded and therefore impliedly repealed the statute expressly repealed. The Bankruptcy Act, 1883³⁰ abolished the writ of elegit as a form of execution against the goods of a judgment debtor and also repealed the relevant portion of the statutory basis³¹ for the writ.

The judgment debtor argued that since the repeal was prospective only, the abolition must be given retrospective effect so that it would not be

²⁶(...continued)
of Acts of Parliament and Business Documents, (Toronto: George N. Morang & Co., Ltd., 1902), p. 4

²⁶17 & 18 Vict., c. 120

²⁷32 & 33 Vict., cc. 62 and 71

²⁸32 & 33 Vict., c. 83

²⁹(1884), 12 Q.B.D. 224

³⁰46 & 47 Vict., c. 52

³¹Statute of Westminster II, 13 Edw. 1, c. 18

superfluous. Bowen L.J. (as he then was) dealt with this argument as follows:³²

It appears to me that the answer to this somewhat formidable argument is to be found in a study of the framework of the Bankruptcy Act, 1883, so far as it works a repeal of previous legislation. It does not seem to me to be possible without misunderstanding the scheme of drafting which the legislature has adopted, to treat the repealing s. 169 as an independent section, or one intended to do more than for sake of symmetry to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. I have examined Schedule 5 in detail, which contains the list of previous Acts of Parliament, all or part of which is to be repealed by s. 169, and I have come to the conclusion that the idea upon which the Bankruptcy Act, 1883, has been framed was to enact in the first place a complete code of provisions which, so far as they are inconsistent with any previous legislation, would repeal it by implication, and then over again, at the very last, to clear the statute book, so to speak, by s. 169, and to sweep into one compendious repeal section all the statutes, and sections of statutes, which in the earlier part of the Act had been impliedly done away with already, the Bankruptcy Act, 1869 being itself among the number. [emphasis added - A.C.L.]

Hough v. Windus was the occasion for the famous outburst of Brett M.R.

that³³

the legislature intended in this Act of Parliament to be verbose and tautologous, and intended to express itself twice over... I think this is an extreme case...

³²Q.B.D. 235-6. This passage was quoted with approval by Lord Roskill, on behalf of the House of Lords, in Reg. v. West London Stipendiary Magistrate, ex p. Simeon, [1983] 1 A.C. 234, 241-2, [1982] 2 All E.R. 813, 817 sub nom. Commissioner of Police of the Metropolis v. Simeon.

³³Q.B.D. 232. Sir John Fiennes has remarked upon the singular inappropriateness of the use of this outburst by the Statute Law Society as ammunition in its campaign for textual amendment: Statute Law Society, Statute Law: The Key to Clarity, First Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, (London: Sweet & Maxwell Ltd., 1972), p. 50.

Ilbert's Analysis of the Techniques of Amendment

The late development of a convention of including express repeals in enactments altering the statute law, as well as the belief that some of the defects of the statute law were irremediable by any means short of codification, together formed the context for the first British contribution to the debate about techniques of amendment. Significantly, Sir Courtenay Ilbert (1841-1924) made that contribution as part of his discussion of referential legislation, "a favourite subject of invective with critics of parliamentary procedure."³⁴

Ilbert begins by noting that, "All legislation is obviously referential in the widest sense."³⁵ The reason for this, it seems, is that any particular statute is but a fragment of the whole corpus of the law, which includes both common law and statute law. Ilbert's identification of English legislation as referential is similar to Austin's notion that the form of statute law is dictated by its relationship to the common law. Ilbert seems to say, for example, that English legislation might cease to be referential, or at any rate, its referential quality might be greatly diminished, as a result of codification.³⁶

³⁴Ilbert, p. 254

³⁵Ibid.

³⁶Ibid., pp. 254-5

If the leading rules of the common law were codified, that is to say, expressed in a concise, orderly, and authoritative form; if the provisions of the statute law were consolidated, that is to say, if the statutory provisions on each subject were collected and arranged in a single Act; the outside knowledge required for the interpretation and application of particular Acts would be more easily acquired.

He then characterizes the course of English legislation, showing that it seldom tends towards codification.³⁷

The English legislator rarely, if ever, finds himself in a position to inscribe a brand-new law on a blank sheet of paper. The utmost that he can usually aim at is to remove some blemish from, or to alter or add to some provisions of, an existing law or institution; in other words, to pass an amending Act.

Ilbert uses the notion of "amendment" to describe any alteration of a rule of law, whether that rule is common-law or statutory. The previous discussion of codification, as well as the reference to "an existing law or institution" shows that Ilbert's use of "amendment" is not restricted to changes in the statute law.

³⁷Ibid., p. 255-6

Ilbert discusses three techniques of amendment:

- re-enactment,
- what he calls the "technical form" of amendment (by which he means striking out and inserting words), and
- what he calls the "popular form" of amendment (that is, "to state in the amending Bill the effect of the amendment proposed to be made."³⁸)

Ilbert begins his discussion of the first technique by noting that³⁹

From the point of view of administration the most convenient plan is to repeal the old law, and re-enact it with the necessary modifications.

However, he objects to this technique of amendment because⁴⁰

the law to be amended is often contained in more than one Act, and experience has shown that attempts to combine consolidation with substantial amendment are rarely successful.

This objection is based on the notion that statute law is a series of scattered fragments.

Ilbert's second objection to this form of amendment is its "obscuring" and "distracting" effects on members of the legislature:⁴¹

³⁸Ibid., p. 259

³⁹Ibid., p. 256

⁴⁰Ibid.

⁴¹Ibid.

It gives the proposed legislation an appearance of being more important and more extensive in its scope than it really is, and the prudent legislator will usually prefer to minimize rather than magnify his proposals.

This objection loses its force where re-enactment is the exclusive technique of amendment. In any event, Ilbert's claim only concerns the "usual preference" of the "prudent legislator". But legislators, whether or not prudent, sometimes prefer to "magnify" their proposals. This point is dealt with in greater detail in Chapter Three.

Ilbert's third objection to the technique of re-enactment is that,⁴²

It throws the whole law into the crucible, exposes to amendment not merely the particular provisions which the introducer of the Bill desires to alter, but all other provisions of the law which appear to be in any way open to criticism... The proposal to repeal and re-enact, not the whole of an Act, but merely a particular section of an Act, is often open to similar objections from a parliamentary point of view.

This objection has generally been considered to be insuperable in the United Kingdom.⁴³ Dealing with it requires a detailed consideration of parliamentary procedure, which is undertaken in chapter 4.

⁴²Ibid., pp. 256-7

⁴³See, for example, Mr. Francis Bennion's written evidence to the Renton Committee: Statute Law Society, Renton and the Need for Reform, (London, Sweet & Maxwell Ltd., 1979), pp. 40-1. Thring agreed with Ilbert's point, without drawing the same conclusion (Thring, supra n. 25, pp. 55-6). And see infra, pp. 45-6.

Ilbert's fourth and final objection to the technique of re-enactment is the difficulty of protecting reliance on the former provision:⁴⁴

In some cases also the law embodied in the new enactment is intended to apply only to events and transactions happening after a particular date, leaving events and transactions happening before that date to be governed by the old law, and in such cases, if the old law is repealed, it is often not easy to express the precise operation of the law with respect to occurrences at different dates.

This objection is the result of Ilbert's failure to delineate the concept of "amendment" as anything more precise than a change in the law. Ilbert's instance of statutes relating to the administration of estates⁴⁵ is ironic because it is with the Ontario statutes regulating the devolution of estates that one finds the purely formal concept of "amendment" in its most highly developed form.

The devolution of estates in Ontario is now regulated by Part II of the Succession Law Reform Act,⁴⁶ headed "Intestate Succession". Section 49 provides that Part II "applies to an intestacy upon a death occurring on or after the 31st day of March, 1978." For deaths occurring prior to that date, one must go back to the Act as it read before being consolidated in R.S.O. 1980. Section 50 of The Succession Law Reform Act, 1977⁴⁷ repealed most of

⁴⁴Ilbert, p. 257

⁴⁵Ibid., p. 257 n. 1

⁴⁶R.S.O. 1980, c. 488

⁴⁷S.O. 1977, c. 40

The Devolution of Estates Act,⁴⁸ which had theretofore regulated the devolution of estates. Section 52, which was neither consolidated in nor repealed by R.S.O. 1980, provides as follows:

The enactments repealed or amended by sections 50 and 51 continue in force as if unrepealed or unamended in respect of a death occurring before the 31st day of March, 1978.

The same technique was applied when provincial succession duties and gift taxes were abolished.⁴⁹ This technique differs only slightly from that applied when federal estate tax and gift tax were abolished. Sections 2 and 14 of An Act to amend the Income Tax Act and to make certain provisions and alterations in the statute law related to or consequential upon the amendments to that Act⁵⁰ provide as follows:

2. The Estate Tax Act does not apply in the case of the death of any person whose death occurred after 1971.

...

14. Part IV of the former Act is continued in force but does not apply in respect of gifts made after 1971.

Both of these techniques express precisely the transition between the old law and the new. Ilbert's final objection to the technique of re-enactment is thus ill-founded.

⁴⁸R.S.O. 1970, c. 129

⁴⁹See The Succession Duty Repeal Act, 1979, S.O. 1979, c. 20, and The Gift Tax Repeal Act, 1979, S.O. 1979, c. 21.

⁵⁰S.C. 1970-71-72, c. 63

Having considered re-enactment and found it wanting, Ilbert proceeds:⁵¹

If, for any of these reasons, the method of repeal or re-enactment is not adopted, the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to Bills in Parliament, or like errata or addenda in books, that is to say, in the form of directions to strike out particular words or sentences from an enactment, and to add others.

In the United States, this technique of amendment is known as "blind" amendment, because of its principal defect. As Ilbert points out, the amendment⁵²

is absolutely unintelligible without the text of the enactments which it is proposed to amend.

Ilbert objects to "blind" amendment because a bill using this technique is⁵³

extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in Committee.

In Ilbert's day, as we shall see in chapter four, the committee stage of bills usually took place in a committee of the whole house. Ilbert's reference to the Indian practice of taking the committee stage in a select

⁵¹Ilbert, p. 257

⁵²Ibid., p. 258

⁵³Ibid.

committee suggests that he would have attached less weight to his objection were the Indian practice to be adopted.⁵⁴

Ilbert concludes that⁵⁵

the ordinary mode of amending an Act is to state in the amending Bill the effect of the amendment proposed to be made. This is the commonest mode, and for parliamentary purposes is the most convenient, because under it every member of Parliament who knows anything of the subject learns at once the nature of the amendment proposed.

Ilbert's account of the various techniques of amendment remains today the best ever written. It can be read not so much as a justification for preferring one technique over another as a description of the circumstances giving rise to the use of the various techniques.

Carr's Supplement to Ilbert's Analysis

Nearly half a century after Ilbert, Sir Cecil T. Carr (1878-1966) analysed various efforts to combine the three techniques of amendment. Like Ilbert, Carr analysed statute law amendment in the context of widespread denunciation of referential legislation. Carr distinguished "direct amendment" from "the incorporation of previous enactments".⁵⁶ By "direct amendment" Carr meant an enactment that was formally or textually an

⁵⁴Ibid., p. 258 n. 2

⁵⁵Ibid., pp. 258-9

⁵⁶Sir Cecil T. Carr, "Legislation by Reference and the Technique of Amendment" (1940), 3rd ser., 22 J. Comp. Leg'n & Int'l L. 12, 16

amendment; he did not distinguish between re-enactment and what the Americans call "blind" amendment. Thus, what makes an amendment "direct" is the fact that it is express rather than implied.⁵⁷

After dismissing amendment by implication as a "plunge... back... into the mediaeval methods from which we have painfully emerged",⁵⁸ Carr sets out the difficulties caused by the accumulation of amendments in a single branch of the law and notes that the best way to resolve these difficulties is frequent consolidation.⁵⁹

Carr then discusses three devices to alleviate the incomprehensibility of "blind" amendment. They are:

- the Keeling Schedule; that is, a schedule to an amending Act containing the text of the amended provision as amended,
- the combination in a single clause of a "blind" amendment together with a statement of the amended provision as amended, and
- the preparation of a document not forming part of the amending Act showing the amended provision as amended.

⁵⁷Ibid., p. 12-13

⁵⁸Ibid., p. 12

⁵⁹Ibid., p. 13

So constrained is Carr by the language of referential legislation that he does not perceive that these devices are attempts to combine the respective strengths and weaknesses of "blind" amendment and re-enactment:⁸⁰

A convenient new device has lately been applied to the process of direct amendment. Its advocates are understood to regard it as an antidote to "legislation by reference," if the system of direct amendment of a principal Act can really be described by those three words.

The subsequent British debate about the techniques of amendment was seldom sophisticated enough to assess the strengths and weaknesses of the three devices mentioned by Carr. As late as the middle of this century, participants in the debate were still having difficulty distinguishing amendment of whatever type from referential legislation. Carr still had to write, "it is right and not wrong to refer to a principal Act when amending the law which it contains."⁸¹ The problem was again evident in testimony before the Renton Committee. Lord Denning said that he did "not like incorporation by reference at all" but instead favoured textual amendment. His distinction of the two seems to have been based on the notion that the text of the amended provision as amended should be in one place,⁸² but as the Renton Committee pointed out, this desideratum is irrelevant in the debate about techniques of amendment, since,⁸³

⁸⁰Ibid., p. 14

⁸¹Ibid., p. 15

⁸²Renton, pp. 32-3

⁸³Ibid., pp. 77, 80

whether an Act is amended non-textually or textually, the reader must acquaint himself with the provisions both of the original Act and the amending Act until he is provided with a consolidation of the statute law on the subject in question... Certainly a diligent user with time available can make "scissors and paste" amendments of the parent Act using the textual directions in the amending measure. But until he has done so (and the task would in some cases be laborious), or until the original Act has been reprinted as amended (either in Statutes in Force or otherwise), the user is faced with precisely the same difficulty and inconvenience of constantly having to refer from one Act to another about which there is presently so much complaint.

Marshall and Marsh Initiate the British Debate

In 1965, Messrs H.H. Marshall (1909-1982)⁶⁴ and Norman S. Marsh presented an important paper to the Third Commonwealth and Empire Law Conference. "Case Law, Codification and Statute Law Revision"⁶⁵ analyzed the effects of the common law on the form of statute law in terms similar to those of Austin more than a century before. The paper distinguishes "referential" and "textual" amendment as follows:⁶⁶

Two different methods of drafting amendments appear to be in vogue in the United Kingdom--the referential and the textual. The first method involves the practice of embodying in the text of an Act which amends another Act, not only the amendments to that Act, but also provisions which amend or relate to a third Act concerned with allied subjects. The amendments are drafted in a narrative or discursive style producing an interwoven web of allusion,

⁶⁴Marshall was Attorney General of Northern Nigeria from 1954 to 1962 and Commissioner for the Revision of the Laws of Northern Nigeria from 1962 to 1963. Later, he served as chairman of the Statute Law Society from 1979 to 1980. Who's Who 1932, p. 1471

⁶⁵R.A. Woodman, ed., Record of the Third Commonwealth and Empire Law Conference, Sydney - Australia, 25th August - 1st September, 1965, (Sydney: The Law Book Co. Ltd., 1966), p. 405

⁶⁶Ibid., pp. 424-5

cross-reference and interpretation which effectively prevents the production of a collection of single Acts each relating to a particular subject otherwise than by the legislative processes of consolidation and repeal.

The definition of referential amendment implies that three Acts are involved, which is not necessarily the case.

As noted by Mr. N.J. Jamieson, the paper "professedly distinguishes, but in practice only further confuses non-textual with referential amendment."⁸⁷ This failure of the paper was significant, for many of its arguments and even its examples were taken up by the Statute Law Society in its campaign during the 1970s in favour of textual amendment.⁸⁸

⁸⁷N.J. Jamieson, "The Tradition of Free Expression in Australasian Legislative Drafting" (1980), 9 N.Z.U.L. Rev. 1 n. 3

⁸⁸The following exchange occurred during the oral evidence of the Statute Law Society to the Renton Committee:

"Sir Noël Hutton: A good deal of the Heap Report comes pretty straight from the paper which Mr. Marshall and Mr. Norman Marsh presented to the Commonwealth Law Conference in 1965?

A. (Mr. Marshall): A lot of it, yes."

Statute Law Society, Renton and the Need for Reform, supra n. 43, p. 9

Marshall and Marsh had cited s. 17 of the Agriculture (Miscellaneous Provisions) Act 1963 (U.K.), c. 11, as an instance of referential amendment (supra n. 65, pp. 425-6). The Heap Committee, the Marshall Committee, and Mr. F.A.R. Bennion all cited section 17 for the same purpose: Statute Law Society, Statute Law Deficiencies: Report of the Committee appointed by the Society to examine the failings of the present Statute Law System, (London: Sweet & Maxwell Ltd., 1970), p. 37-8; Radical Simplification, pp. 12-3; F.A.R. Bennion, Statute Law, (London: Oyez Longman Publishing Ltd., 2nd edition, 1983), pp. 131-2.

Messrs. Marshall and Marsh failed to distinguish between incorporation by reference on the one hand, and amendment on the other. In order to make this distinction, amendment of an enactment can be defined as an alteration of the operation of the enactment in cases to which it previously applied. Incorporation by reference extends the operation of an enactment to cases to which it did not previously apply.

Marshall and Marsh's first example was section 17 of the Agriculture (Miscellaneous Provisions) Act 1963:⁶⁹

The powers of the Minister... under section 2(2) of the Improvement of Live Stock (Licensing of Bulls) Act, 1931, or under that section as applied to pigs by section 6 of the Agriculture (Miscellaneous Provisions) Act, 1944, to refuse to grant a licence to keep a bull or boar for breeding purposes shall include power to refuse to grant such a licence if he is not satisfied that the bull or boar conforms to such a standard of suitability for breeding purposes as may be prescribed for bulls or boars respectively under the said Act of 1931...

This provision is said to be "an example of referential amendment of a principal Act contained in an amendment Act":⁷⁰ an unfortunately ambiguous statement. To understand the 1963 Act, it is necessary to know that section 6 of the Agriculture (Miscellaneous Provisions) Act, 1944⁷¹ was not really an amendment to the Improvement of Live Stock (Licensing of Bulls) Act, 1931⁷² at

⁶⁹1963 (U.K.), c. 11

⁷⁰Supra n. 75, p. 425

⁷¹7 & 8 Geo. 6, c. 28 (U.K.)

⁷²21 & 22 Geo. 5, c. 43 (U.K.)

all, but rather referential legislation of the worst kind.⁷³ The 1931 Act had established a scheme for the licensing of bulls for breeding purposes; subsection 6(1) of the 1944 Act applied the 1931 Act to pigs and provided that for that purpose, references to a bull were to be read as references to a boar; subsection 6(3) then modified the application of the 1931 Act to pigs by providing for additional grounds on which the Minister might refuse to grant or revoke a licence.

The operation of the 1931 Act was unaffected by the 1944 Act: the 1931 Act continued to apply in every case in which it had applied before the 1944 Act and that continued effect was in no way dependent on the operation of the 1944 Act. The 1944 Act merely extended the operation of the 1931 Act. From the point of view of the 1963 Act, the 1931 Act and the 1944 Act are equivalent: both are principal Acts amended by the 1963 Act.

The real question is why the 1963 Act was not drafted in the form of an amendment to the 1931 Act. The answer may lie in the absence from the United Kingdom of the rule contained in subsection 40(2) of the Interpretation Act⁷⁴

⁷³Thring, supra n. 25, p. 55:

The referential legislation to be always avoided consists in referring in one Act to provisions of another Act, which do not readily lend themselves to incorporation, and require to be referentially modified before they can be made to harmonise with the incorporating Act.

The Renton Committee correctly classified the 1944 Act as referential legislation rather than an amendment of the 1931 Act but did not explain why it rejected Marshall and Marsh's analysis: Renton, pp. 69-70.

⁷⁴R.S.C. 1985, c. I-21. Note that the opposite problem arises in Canada where it is desired not to apply an amendment in situations where the
(continued...)

that a reference to an Act is to be construed as a reference to the Act as amended. Amending the 1931 Act would not, of itself, amend that Act for the purpose of its application to pigs: it was therefore necessary to refer to the 1944 Act.

Assuming that this problem could have been surmounted, the question would have arisen as to whether different standards could be prescribed for boars or whether the standards for bulls would automatically apply to boars. To ensure that different standards could be prescribed, one would have had to amend the 1944 Act. The 1963 Act concisely achieves this result by the use of the word "respectively". The 1944 Act so complicated the operation of the 1931 Act that it was easier to resort to the technique employed in the 1963 Act than to disentangle the relationship between the two earlier Acts. It was not the technique employed in the 1963 Act that was responsible for this complication.

The 1963 Act shows that referential legislation like the 1944 Act may make it easier not to use textual amendment thereafter. Interestingly, subsequent legislation supports the decision of the legislative counsel who drafted the 1963 Act not to amend textually and disentangle the 1931 and 1944

⁷⁴(...continued)
principal Act applies by virtue of some other enactment. See, for example, subsection 2(2) of the Energy Administration Act, R.S.C. 1985, c. E-6, added R.S.C. 1985, c. 7 (2nd Supp.), subs. 70(2):

Any reference in subsection 10(2), section 13, subsection 60(2) or section 63 to the Excise Tax Act or a provision thereof shall be construed as a reference to the Excise Tax Act or the provision thereof, as it read immediately before [May 1, 1986].

Acts. Section 8 of the Agriculture (Miscellaneous Provisions) Act 1972⁷⁵ provides in part as follows:

8. (1) Section 6(1) of the Agriculture (Miscellaneous Provisions) Act, 1944 (which applies the Improvement of Live Stock (Licensing of Bulls) Act, 1931 to pigs) shall cease to have effect.

(2) The grounds on which a licence to keep a bull for breeding purposes may be refused under section 2(2) of the said Act of 1931 shall cease to include those mentioned in ...

(b) section 17 of the Agriculture (Miscellaneous Provisions) Act 1963 (prescribed standards of suitability);

and accordingly the said [section] 17 shall cease to have effect.

Had the 1963 Act been a textual amendment, it would have been necessary in 1972 to re-enact the 1931 Act as originally enacted. The "narrative or discursive style" of the 1963 Act in fact assists the statute user to conflate the successive Acts in this area.

Conclusion

During the nineteenth century, drafting conventions developed in Great Britain requiring reference in a statute to previous enactments whose operation was altered by the statute. Ilbert had analysed the different techniques for doing so. Carr had distinguished "direct" (or textual) amendment from referential legislation. Despite these achievements, difficulties were still being encountered after the middle of this century in distinguishing indirect (or non-textual) amendment, identified as the most

⁷⁵1972 (U.K.), c. 62

"popular form" of amendment by Ilbert, but ignored by Carr, from incorporation by reference.

Chapter Two

The British Debate About the Techniques of Amendment

This chapter examines the attempt made in Great Britain in the 1960s and 1970s to bring about a paradigm shift. Some of those involved in this episode were aware that the real issue was whether amendments should continue to be drafted so as to be intelligible only in terms of their relationship with the prior law (indirect amendment) or whether, on the other hand, direct or textual amendment should be preferred so as to produce a statement of the new law that would be, as far as possible, intelligible without reference to the prior law. However, issue was instead joined on an alleged conflict between the needs of legislators and the needs of other users. The Renton Committee accepted that there was such a conflict, with the result that its Report did not resolve the real issue. This chapter is therefore skeptical in attributing responsibility for the paradigm shift taking place in Great Britain in the 1970s and 1980s to the Renton Report.

The Mythical Issue: The Alleged Conflict between the Needs of Legislators and those of Other Users

The Heap Committee chose to inject into its report, Statute Law Deficiencies, the notion that draft legislation has two distinct audiences,

namely legislators and "users".⁷⁶ This notion is then used to explain the use of what Marshall and Marsh had termed "a narrative or discursive style":⁷⁷

The quality of Bills... suffers by reason of the inclusion of certain material required only for purposes of Parliamentary procedure... The present system of attempting to marry the text with commentaries and explanations produces confusion and additional bulk.

The evidence in support of this explanation is not impressive. One question in the Committee's questionnaire asked whether respondents favoured a system whereby an authoritative text of enactments as amended would be prepared. According to the Committee, 92% of "users" answered yes, but "only" 81% of parliamentarians.⁷⁸ In response to another question about sources of "difficulty over Acts or instruments", 69% of "users" cited the lack of such authoritative texts, but "only 37%" of parliamentarians.⁷⁹ These statistics do not go very far towards establishing that, in the choice of techniques of amendment, "users" favour one technique, while legislators favour another.

Statute Law: The Key to Clarity, the first (1972) report of the Stow Hill Committee, is a manifesto for consolidation coupled with textual amendment.

⁷⁶Statute Law Society, Statute Law Deficiencies, supra n. 68, p. 21. The Committee derived this notion from, amongst others, Sir Noel Hutton. See his article "Mechanics of Law Reform" (1961), 24 Mod. L. Rev. 18, 21. Hutton's point, however, was that law reform bills seldom have to be drafted with a parliamentary audience in mind. See ibid., p. 22. Nor did Hutton write about "users" of legislation.

⁷⁷Statute Law Society, Statute Law Deficiencies, supra n. 68, pp. 21, 22

⁷⁸Ibid., p. 31

⁷⁹Ibid.

Here again one finds the notion that the "referential system of amendment" produces "temporary matter" which "clutters up the legislation unnecessarily" and with which "most statute users are not concerned."⁸⁰

The Real Issue: Amendments as Changes of the Prior Law or as Statements of the New Law

The report has appended to it a memorandum which Sir John Fiennes, then the First Parliamentary Counsel, submitted to the Select Committee on Procedure of the British House of Commons in 1971.⁸¹ Fiennes stated that techniques of amendment were chosen at that time in the United Kingdom "on the merits" (that is, on a case by case basis) "and with an attempt to balance the often conflicting interests of Parliament and of present and future users of the statute book."⁸² The Chairman of the Committee questioned him about this conflict and Fiennes responded⁸³

I do not believe that there is this conflict of interest; that was not what I meant. Parliament wants to know how the law is being changed and this, on the whole, is what the present user of the statute law wants to know also. The future user wants to know what the law now is in the future.

⁸⁰Statute Law Society, Statute Law: The Key to Clarity, *supra* n. 33, p. 12. In this instance, the Committee is referring to commencement and transitional provisions: no explanation is offered as to why the incidence of these provisions depends on the technique of amendment chosen.

⁸¹Ibid., pp. 47-53

⁸²Ibid., p. 50

⁸³Ibid., pp. 57-8

Mr. Bennion, in his testimony before the same Committee, accepted what Sir John had said and added:⁸⁴

I think it is the difference between the person who wants to know what changes in the law either a Bill proposes or a new Act makes and the person who wants to know the state of the law at a given moment. The interests both of Members of Parliament and of those who want to see what change a new Act makes are much the same in this respect, but we feel that primarily one has to look at the permanent state of the Statute Book.

These passages show that at least some of the participants in the debate recognized that the notion of two distinct audiences for amending legislation was inexact. What was really at issue was whether amending legislation should be drafted so as to express the new law, without reference to the transitory historical circumstances by which and in which that law came to be, or whether it should be drafted so as to express the changes being made. In the short term, the latter alternative seems to be preferable because both "audiences" are aware--or are deemed to be aware--of the current state of the law. However, in the long term, as the historical event of amendment recedes into the past, it is less and less likely that either audience will know the state of the law as of some past date.⁸⁵

⁸⁴Ibid., p. 61

⁸⁵This does not make this knowledge irrelevant, a point that escaped participants in the British debate. Lawyers and judges may need to know in 1990 what the statute law relating to income tax was in its application to, for example, the 1980 taxation year. Likewise, parliamentarians may wish to know the state of the law as of the time when they last held office.

The choice to be made corresponds to the distinction made by Prof. Dickerson between the two senses of the word "Act":⁸⁸

First, it is used to denote a specific legislative action whereby Congress or a state legislature creates new law or changes or repeals existing law. Here, "act" refers to a particular historical event. In this sense, the Miller amendment to the Food Drug Cosmetic Act of 1938 was, as the Act of June 24, 1948, ch. 613, as fully an "act" as the Food Drug Cosmetic Act itself.

The term "act" is also used in another sense. In the title, "Food Drug Cosmetic Act of 1938," the word "Act" means more than what Congress did on June 25, 1938. It is a continuing legislative frame of reference into which new parts may be inserted, and from which existing parts may be removed. It can be compiled and, when compiled, shows each subject in its proper place.

Briefly, an act is, in the former sense, a fleeting event; in the latter, a continuing concept.

One step beyond Dickerson's distinction and we are back in the world of Austin and Maine, grappling with what may be called the dilemma of statute law. Statute law began as a gloss on the common law and continues to presuppose the existence of rules of law that are not statutory. Statute law can thus be seen as a series of historical events, none of which is intelligible save in terms of the pre-existing common law. On the other hand, statute law tends towards systematization, that is, codification and can in many cases be understood without reference to the common law it replaced.

This condition of statute law, emerging from the common law and moving towards codification, produces the dilemma of how a change in its provisions

⁸⁸Reed Dickerson, The Fundamentals of Legal Drafting, (Boston and Toronto: Little, Brown & Co., 2nd edition (incorporating "Legislative Drafting"), 1986), p. 247

should be made. For, if statute law is but a series of historical events, there is no difference between the initial replacement of the common-law rule by a statutory rule and a subsequent substitution of a different statutory rule. In either event, intelligibility lies in the change that is made. If, on the other hand, statute law is itself intelligible, without recourse to the pre-existing law, a change in a statutory rule is merely an historical event: what is legally significant at any point is the system of statute law and not the history of its components.

In Great Britain in 1971 it was difficult for some to see that there was a dilemma. The following exchange between a member of the Select Committee of Procedure and Mr. Bennion shows the difficulty:⁸⁷

Mr. Albu: Are you suggesting that the great majority of Bills are, in a sense, amending Bills owing to the fact that they are amending the Statute Book?

Mr. Bennion: They are amending statutory provisions on a particular subject, unless it is a brand new subject like the first Atomic Energy Bill.

Mr. Albu: In other words, most Bills are, in a sense, amending Bills. These are not very easy matters for laymen to follow.

The Appointment of the Renton Committee and the Evidence Presented To It

The 1971 Report of the Select Committee on Procedure recommended that a government-appointed committee review the form, drafting, amendment and

⁸⁷Statute Law Society, Statute Law: The Key to Clarity, supra n. 33, p. 62

preparation of legislation. As a result, on May 7, 1973, the Lord President of the Council appointed a committee with the following terms of reference:⁸⁸

With a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implication for parliamentary procedure; and to make recommendations.

This Committee and its Report, released in 1975, are generally known as the Renton Committee and Report, after the chairman of the committee, Sir David Renton.⁸⁹ Sir Noël Hutton (1907-1984), who was First Parliamentary Counsel from 1956 to 1968, was one of the Committee members.⁹⁰ Amongst those giving evidence to the Committee were two of Hutton's successors as First Parliamentary Counsel, Sir John Fiennes and Sir Anthony Stainton (1913-1988), as well as Professors Reed Dickerson⁹¹ and Elmer Driedger.

The Statute Law Society also gave evidence to the Renton Committee. Its written evidence, published in 1974 under the title Statute Law: A radical simplification, began with the by-now familiar proposition that British legislative drafting sacrificed the interests of users to those of parliamen-

⁸⁸Renton, p. iii

⁸⁹Sir David was created a life peer in 1979, with the title of Lord Renton. He was called to the Bar of Lincoln's Inn in 1933 and served as Member of Parliament for Huntingdonshire from 1945 to 1979. He is now (since 1980) the President of the Statute Law Society. Who's Who 1990, (London: A & C Black (Publishers) Ltd., London, 1990), p. 1521

⁹⁰Who's Who 1984, p. 1153; Who's Who 1985, p. 44

⁹¹Some of Prof. Dickerson's testimony has been printed in Reed Dickerson, Materials on Legal Drafting, (St. Paul, Minn., West Publishing Co., 1981), pp. 337-8.

tarians.⁹² The recommendations of the Society respecting the techniques of amendment are not however linked to this proposition; rather, they are subsidiary to the Society's proposed resolution of the dilemma of statute law. The Society advocated as a "first step", seeing the statute law "as, potentially, parts of a coherent whole".⁹³

Once this point of view is adopted, "Act" moves from its first sense as an historical event to its second as a systematic body of rules through the realisation of the aim of "one Act: one subject; one subject: one Act".⁹⁴ Titles of bills then become one means of "steering the Bill into its appropriate niche in the existing body of statute law..."⁹⁵

Once statute law is seen as a coherent whole, it becomes possible to envisage the formal expression of its coherence.⁹⁶ Textual amendment then becomes one of the ways to assist in this formal expression.

The success of the One Act: One Subject; and One Subject: One Act principle depends on the use of the system of textual amendment.⁹⁷

⁹²Radical Simplification, p. 8

⁹³Ibid., p. 30

⁹⁴Ibid., p. 31

⁹⁵Ibid., p. 33

⁹⁶Ibid., p. 35

⁹⁷Ibid.

The Society correctly perceived that the effect of textual amendment is to maintain the statute law "in a state of 'perpetual' consolidation."⁹⁸ When it came to the choice between the two techniques of textual amendment, the Society saw no reason to prefer re-enactment over "blind" amendment.⁹⁹

It is only having completed its argument for the use of textual amendment that the Society begins to be affected by the seemingly related notions that there is a need to reconcile the needs of legislators and users and that information provided by referential amendment amounts to "an unnecessary cluttering up of the law."¹⁰⁰ The relation between these notions consists in the further notion that legislators are interested only in the amendment as "a particular historical event", to use Prof. Dickerson's expression, that is, in the change effected by the amendment, while "users" are interested only in the amendment as "a continuing legislative frame of reference".

The Society's rejection of the Keeling Schedule follows from these notions. Because "users" are deemed to be interested only in the law as amended and "the amendment will already have been made in textual form in the main body of the Act[,] there is a duplication."¹⁰¹ The Society thus ignores the point made in the Renton Report that, regardless of which technique of amendment is employed, each user must consolidate the amendment with the original Act unless

⁹⁸Ibid., p. 36

⁹⁹Ibid., p. 37

¹⁰⁰Ibid., p. 40

¹⁰¹Ibid.

a consolidation is provided.¹⁰² The Society favoured "blind" amendment, combined with either a separate memorandum giving the existing and proposed texts or Canadian-style explanatory notes printed with the bill.¹⁰³ The Society's oddly limited perspective on the needs of users prevented it from seeing that this material might be quite valuable to users. Both the Keeling Schedule and the former Ontario practice of combining in a single clause a "blind" amendment and a statement of the provision as amended provide this material to users. So did referential amendment, as practised in the United Kingdom. The Society could see that¹⁰⁴

the introduction of the textual method of drafting would have the effect, if it stood by itself, of giving the legislator even less information than he has under the present system

but could not see that the user would be similarly disadvantaged.

Mr. Francis Bennion's evidence to the Renton Committee¹⁰⁵ was also important in limiting the perspectives available to the Committee. It was Mr. Bennion who

¹⁰²Renton, pp. 77, 80

¹⁰³Radical Simplification, pp. 40-2

¹⁰⁴Ibid., pp. 39-40

¹⁰⁵Reprinted in Statute Law Society, Renton and the Need for Reform, supra n. 43, pp. 27-69

introduced the "four corners doctrine",¹⁰⁶ basing its name on the following passage of Lord Thring:¹⁰⁷

It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the Bill in order to comprehend its meaning.

It was the name only that came from Lord Thring. The sentence preceding the passage¹⁰⁸ shows that Thring's point was the difficulty of understanding referential legislation. Mr. Bennion, on the other hand, continues with Ilbert's explanation of a minister's point of view:¹⁰⁹

His theoretical objections to legislation by reference will often yield to considerations of brevity. He will eschew technical terms, except where they are clearly necessary, remembering that his proposals will have to be expounded to, and understood by, an

¹⁰⁶See ibid., pp. 36-7 where he stated that he was using the expression "for convenience". The Committee quoted from the same passage from Lord Thring as had Mr. Bennion and then quoted from the latter's evidence (Renton, p. 40). The Report does not use the expression except in so quoting. I have not found any earlier use of the expression. Cf. F.W. Maitland, The Constitutional History of England, (Cambridge: Cambridge University Press, 1913), p. 142:

Now were an examiner to ask who introduced the feudal system into England? one very good answer, if properly explained, would be Henry Spelman, and if there followed the question, what was the feudal system? a good answer to that would be, an early essay in comparative jurisprudence.

See J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, (Cambridge: Cambridge University Press, 1957), c. v (pp. 91-123), "The Discovery of Feudalism: Sir Henry Spelman".

¹⁰⁷Thring, supra n. 25, p. 8

¹⁰⁸"Above all, referential legislation must, as far as possible, be avoided."
Ibid.

¹⁰⁹Ilbert, pp. 241-2. Mr. Bennion does not quote the last sentence.

assembly of laymen. He will bear in mind that members of Parliament, like other Englishmen, have a great respect for precedents, and will prefer a form of expression borrowed from, or having an analogy in, another Act of Parliament.

Thring and Ilbert did not agree on the merits of referential legislation. For Thring, it was objectionable because both legislators and other users had difficulty understanding it. Ilbert, on the other hand, looked at referential legislation from the point of view of a minister interested in getting a bill through the house. Ilbert therefore defended the drafting of the Local Government Act, 1888,¹¹⁰ which applied enactments respecting municipalities to the county councils it established, on the ground that "probably ... no other method could have been adopted with any prospect of success."¹¹¹ Thring attacked that Act as too difficult to understand.¹¹² Thring saw that that method had been adopted¹¹³

with a view of facilitating the passing of an Act through Parliament by partially withdrawing from the consideration of the legislature the subject-matter with which it has to deal.

This is not a doctrine, but a debate about the extent to which the interest of a minister in getting a bill through the house should prevail over the interests of legislators and other users in understanding it.

¹¹⁰51 & 52 Vict., c. 41

¹¹¹Ilbert, pp. 263-4

¹¹²Thring, supra n. 25, pp. 55-7

¹¹³Ibid., pp. 55-6

Mr. Bennion agreed with Ilbert's rejection of re-enactment as a technique of amendment.¹¹⁴ The choice therefore lay between indirect amendment and one form only of textual amendment, namely "blind" amendment. The "four corners doctrine", as introduced by Mr. Bennion, ignored the conflict between the interests of ministers, on the one hand, and other legislators on the other. The result of its introduction was to divert attention from this real conflict to the alleged conflict between the interests of legislators and those of other users.

This occurred despite Mr. Bennion's recognition that the myth of two distinct audiences was inexact. In his oral evidence, he was challenged on the key point of conflation; that is, if textual amendment makes it easier to conflate the amendment and the amended enactment, why would this technique not be in the interests of legislators? Mr. Bennion drew a distinction between the amount of information conveyed by the two techniques:¹¹⁵

It is quite true that if we had textual amendment there would be fewer documents to look at in order to see precisely what a Bill does. If a Bill were further amending a principal Act which had already been heavily amended textually we could discover the Bill's precise effect by just looking at one other document--a version of the principal Act printed as previously amended... Under the present system we have to look at the principal Act and each amending Act as well in order to discover the precise effect of the Bill. But the four corners doctrine caters for M.P.'s who only want a rough idea of what the Bill does, and gives them this within the four corners of the Bill so that they need look at no other document.

¹¹⁴Renton and the Need for Reform, supra n. 43, p. 41

¹¹⁵Ibid., p. 74

Mr. Bennion apparently accepted the myth that the interests of legislators and other users were somehow in conflict, as his answer begs the question of why it is in the interests of legislators to get imprecise explanatory material. (For that matter, it also begs the question of why it is not in the interests of at least some users to have that imprecise material.)

The Report of the Renton Committee

The Renton Committee accepted the myth offered by the Statute Law Society of a conflict between the needs of users and the needs of parliamentarians that had implications for the choice of the technique of amendment.¹¹⁶ Acceptance of this myth is evident in the "recommendation" of the Committee that "in principle the interests of the ultimate users should always have priority over those of the legislators."¹¹⁷ In fact, no such principle can generate a conclusion in favour of any one technique of amendment. The myth assumes that "ultimate users" are interested only in the law as it will be as a result of the legislation and that legislators are interested only in the changes being affected by the legislation.¹¹⁸ It therefore apparently generates such a conclusion and so, as it were, resolves the dilemma of statute law.

Acceptance of the myth enabled the Renton Committee to correct a number of errors made by earlier advocates of textual amendment without thereby undermining the ultimate preference for textual amendment. For example, the

¹¹⁶Renton, pp. 33, 37-41

¹¹⁷Ibid., p. 56

¹¹⁸See, for example, ibid., p. 77

Renton Report correctly noted that one of the examples of referential amendment often given by earlier advocates of textual amendment was not in fact an amendment at all.¹¹⁹

More importantly, the Committee was aware of the fundamental defect of the kind of textual amendment being advocated, namely its incomprehensibility.¹²⁰

Does the textual amendment system help the user of the statutes by providing him with clearly stated, easily understood legislation? The amending Act, drafted textually, is by itself just as incomprehensible to the user as the Bill originally was to the legislator... [T]he user is faced with precisely the same difficulty and inconvenience of constantly having to refer from one Act to another about which there is presently so much complaint.

In short, to use the American terminology, the kind of textual amendment being advocated was "blind" amendment. The amendment would have to be made comprehensible through some kind of explanatory material.

Unfortunately, acceptance of the myth meant that the Committee did not consider the possibility that the same explanatory material might be provided to both users and legislators. Instead, it first considered the needs of legislators and concluded that¹²¹

[i]t might... be necessary to present the Bill to Parliament with an accompanying memorandum (a "textual memorandum") which would

¹¹⁹Ibid., pp. 69-70. The example is section 6 of the Agriculture (Miscellaneous Provisions) Act, 1944, 7 & 8 Geo. 6, c. 28 (U.K.)

¹²⁰Ibid., p. 80

¹²¹Ibid., p. 79

indicate the passages in the existing Act to be repealed and the additions and substitutions to be inserted, and thus show how the amended legislation would look if the proposals being considered by Parliament were to be enacted.

The Renton Committee did not mention whether this "textual memorandum" would be made available to other users. If one assumes, as the myth does, that only legislators and not users are interested in the changes being effected by the amendment, the needs of users would not be served by any "textual memorandum". Yet on the same page of its Report, the Renton Committee quotes the evidence of the General Council of the Bar in England and Wales agreeing with the criticisms of the proposals of the Statute Law Society and saying,¹²²

Certainly, if it is not possible to provide the textual memorandum proposed by the Society, direct enactment of the intended change [rather than textual amendment] is more readily assimilated by a lawyer with some knowledge of the existing law.

This evidence was important since it challenged the assumptions of the myth. Here was a group of users asserting their interest in the changes being effected by the amendment as a means of understanding the law as it will be as a result of the amendment and disproving moreover the claim that indirect amendment cluttered up the statute book with material of interest to legislators only.

Had the evidence of the Bar been taken seriously, it would have been necessary to consider what kind of explanatory material should be provided to users (as opposed to legislators) and thus whether the same material should be

¹²²Ibid.

provided to both users and legislators. The Keeling Schedule would then have been seen as an alternative to the proposed textual memorandum. This was the approach of the Statute Law Society (though, as we have seen, it preferred the textual memorandum).¹²³ As the Renton Report stated,¹²⁴

The Keeling technique not only shows, in the Schedule, how the law will look once it is amended, but also makes clear, in the text of the Bill itself, how the law is being amended.

A bill with a Keeling Schedule thus contains within its four corners means of satisfying both those interested in the change being effected by the amendment as well as those interested in the law as it will be as a result of the amendment.

Instead, the Renton Report's treatment of the Keeling Schedule is merely appended to its discussion of techniques of amendment.¹²⁵ The Report recognized that¹²⁶

[a]n important test... of the value to the user of textual amendment is whether it will be possible to give him, fairly soon after the new provisions have become law, an edition of the amended code which will reflect the amendment in a handy form.

¹²³Radical Simplification, p. 40

¹²⁴Renton, p. 83

¹²⁵Ibid., pp. 82-3

¹²⁶Ibid., p. 80

The Keeling Schedule does this as soon as the bill is introduced, but the Renton Committee concluded that¹²⁷

The Keeling Schedule has never been considered to be capable of universal or even wide application. ... [I]t would be quite impracticable, and generally quite useless, to reproduce in a Keeling Schedule all the previous enactments in which merely consequential amendments and repeals are made.

The Renton Committee and the Paradigm Shift Proposed by the Statute Law Society

The Renton Committee rejected the most important recommendations of the Statute Law Society. As we have seen, the Society had seen statute law "as, potentially, ... a coherent whole"¹²⁸ and had advocated consolidation of all enactments dealing with a single subject into a single Act,¹²⁹ and textual amendment as a means of ensuring that the consolidated statute law remains coherent.¹³⁰ The Renton Committee thought that this vision was¹³¹

not... feasible... based on the erroneous assumption that every statute can be completely intelligible as an isolated enactment without reference to the provisions of any other statute... not reasonable... not so simple as it may sound... not... practicable.

¹²⁷Ibid., p. 83

¹²⁸Radical Simplification, p. 30

¹²⁹Ibid., p. 31

¹³⁰Ibid., p. 35

¹³¹Renton, pp. 86-7

The Statute Law Society had already answered this objection:¹³²

If this appears to be a visionary ideal we can only say that this aim was attained many years ago in practically all other Commonwealth countries and, given time and patience, can be attained in the United Kingdom.

The Renton Committee's rejection of the Statute Law Society's vision affected the Committee's views as to the relation between textual amendment and consolidation. For the Statute Law Society, textual amendment was a technique, a means to the end of a compilation of all the statutes: "The success of the One Act: One Subject; and One Subject: One Act principle depends on the use of the system of textual amendment."¹³³ For the Renton Committee, consolidation was a means to the end of textual amendment, an end that, as we have seen, was justified in terms of the interests of "ultimate users":¹³⁴

Opportunities for using the textual method of amendment are greater, in relation to any given matter, if the existing provisions relating to the matter are contained in a consolidated Act than if they are scattered through a number of separate Acts. We have concluded that the use of the textual method of amendment is desirable; it follows that consolidation is also desirable to provide a base for the use of that method of amendment...

The Renton Committee acknowledged that consolidation brought "benefits... on its own account"¹³⁵ but this was obviously a subordinate consideration when one

¹³²Radical Simplification, p. 31

¹³³Ibid., p. 35

¹³⁴Renton, pp. 85-6

¹³⁵Ibid., p. 86

compares the organization of the Report and the evidence of the Statute Law Society. The Society dealt with consolidation first,¹³⁶ then as befits a means, with textual amendment.¹³⁷ The Renton Report, on the other hand, sets out four "heads" of criticism of statute law, one being "arrangement and amendment",¹³⁸ and deals first with the other three¹³⁹ and then with amendment.¹⁴⁰ Consolidation is dealt with once that discussion has been completed.¹⁴¹

The relation between the Renton Report and the preceding debate is paradoxical. The Report worked within the same myth as the other participants in the debate but did not accept the vision of the Statute Law Society. The myth presented a stark conflict between the interests of legislators and the interests of users. The conclusion of the debate--that amendments should be user-friendly--is unsurprising. What is more significant than this ostensible conclusion is the way in which the myth prevented the exploration of the real issues in the debate on the techniques of amendment, namely, the balance to be struck between accessibility to the unamended enactment and accessibility to the enactment as amended (how easy is it to conflate the relevant enactments?) and the balance to be struck between amendments in the form of changes, which are immediately but temporarily intelligible and amendments in the form of restated

¹³⁶Radical Simplification, pp. 31-3

¹³⁷Ibid., pp. 35-9

¹³⁸Renton, p. 27

¹³⁹c. xi (pp. 61-70)

¹⁴⁰c. xiii (pp. 76-84)

¹⁴¹c. xiv (pp. 85-93)

rules. The Keeling Schedule was discussed. Other possible ways of striking a balance by combining techniques of amendment were not even discussed.

The Paradigm Shift in Great Britain

One should not exaggerate the importance of the Renton Report in the evolution of British practice of amendment. While it is apparent that British practice now favours the use of textual amendment,¹⁴² it is not clear why this shift took place. To some extent, it was already taking place as the Renton Report was being prepared.

We quoted earlier from the 1971 statement of Sir John Fiennes, then the First Parliamentary Counsel, that techniques of amendment were chosen "on the merits" (that is, on a case by case basis). This was consistent with Mr. Bennion's evidence to the Renton Committee that¹⁴³

there are a great many instances where textual amendment is perfectly practicable, but is nevertheless not used.

However, the Renton Report commented,¹⁴⁴

We are encouraged and pleased to hear that in fact the Parliamentary draftsmen, having regard to the needs of the user of the statutes,

¹⁴²Bennion, Statute Law, *supra* n. 68, p. 132; G.C. Thornton, Legislative Drafting, (London: Butterworths, 3rd edition, 1987), p. 340

¹⁴³Renton and the Need for Reform, *supra* n. 43, p. 72

¹⁴⁴Renton, p. 82. See also Radical Simplification, p. 39 for evidence that the shift was already taking place.

already make it a practice to amend legislation textually wherever convenience permits. (The adoption of this practice was, we are told, partly prompted by the decision to publish Statutes in Force and by the Law Commissions' suggestion that the draftsmen should take account of the requirements of the new edition).

The Renton criterion of "wherever convenience permits" lets the drafter decide which technique to use.¹⁴⁵

When the House of Lords debated the Renton Report on December 10, 1975, the Lord Chancellor (Lord Elwyn-Jones) made a statement that leaves no doubt that there is now a British drafting convention in favour of textual amendment.¹⁴⁶

Parliamentary Counsel... regard the Committee's recommendations regarding drafting techniques as providing, as a whole, a most valuable summary of the best current drafting practice...

In particular, the Committee's general endorsement of the practice of amending existing Acts by means of textual insertions, instead of by the alternative process known as legislation by reference, is already accepted in the day-to-day work of the Parliamentary Counsel.

In effect, then, the Statute Law Society's vision was to be realised, albeit much more gradually than it had wished. Despite all the discussion about the needs of users, it appears that the shift to textual amendment came about because of the needs of the Queen's Printer. This result accords with the Statute Law Society's view of textual amendment as a means to the end of a compilation of all the statutes (Statutes in Force).

¹⁴⁵D.A.S. Ward, "Current Problems in the Legislative Process" (1976), 3 Otago L. Rev. 529, 539

¹⁴⁶366 H.L. Debs., 5th ser., col. 960

Chapter Three

Ilbert on Re-enactment: Do Legislators Prefer to Minimize Their Proposals?

Ilbert analysed three techniques of amendment. Two of the techniques involve direct or textual amendment (re-enactment and what the Americans call "blind" amendment); the other does not (indirect or referential amendment). Subsequent British debate focussed on the choice between direct and indirect amendment. It did not therefore scrutinize in any detail the comparative merits of the two kinds of textual amendment.

On the other hand, textual amendment has been preferred outside of Great Britain.¹⁴⁷ More attention has therefore been given to the choice between re-enactment and "blind" amendment. Before turning to North American developments in this area, we should deal with some points that Ilbert made about this choice.

It will be recalled that Ilbert thought that¹⁴⁸

the prudent legislator will usually prefer to minimize rather than magnify his proposals.

¹⁴⁷G.C. Thornton, supra n. 142, pp. 338, 340

¹⁴⁸Ilbert, p. 256

While this may have been so in Ilbert's day, contemporary legislators in both Canada and Great Britain often prefer to magnify their proposals.

The Canada Health Act

Before the Canada Health Act¹⁴⁹ was passed, the criteria that provincial medical care insurance plans had to satisfy in order for federal contributions to be payable were set out in section 4 of the Medical Care Act.¹⁵⁰ The criteria that provincial health-care insurance plans now have to satisfy are set out in sections 8 to 12 of the Canada Health Act. These provisions of the two Acts are not so different that the present Act could not have been in the form of amendments to the Medical Care Act. Sections 6 and 7 of the Medical Care Act (the condition of providing the federal government with the necessary information and the determination of whether the criteria and condition are satisfied) can be seen in an altered form in sections 13 to 17 of the Canada Health Act. The new provisions in the Canada Health Act are sections 18 to 21, headed "Extra-Billing and User Charges". Where the conditions set out in sections 18 and 19 are not complied with, deduction from federal contributions is mandatory. On the other hand, where the criteria set out in sections 8 to 12 are not satisfied, deduction is discretionary.¹⁵¹ These criteria seem to be

¹⁴⁹R.S.C. 1985, c. C-6

¹⁵⁰R.S.C. 1970, c. M-8. This Act was repealed by section 32 of the Canada Health Act, S.C. 1984, c. 6.

¹⁵¹Compare subsection 15(1) ("The Governor in Council may, by order, direct that any cash contribution. . . be reduced . . . or . . . withheld") and subsections 20(1) and (2) ("there shall be deducted from the cash contribution to the province").

more important than the conditions¹⁵², but it is only with respect to non-compliance with the conditions that the federal government has put it outside of its power to make full contributions. The explanation lies in the political situation at the time the Act was passed, when extra-billing and user charges were thought to be undermining Canadian health-care policy. In other words, the Canada Health Act is distorted.

Distortion is a vice of statute law which has been described as¹⁵³

the deformity of structure and arrangement induced by text-validation procedures [that is, the process of enactment - A.C.L.]. Considered as operative law, a text might be most helpfully presented in a certain way. One can envisage the possibility of its assuming an ideal form. So far as this is practicable, it is prevented by parliamentary factors...Party-political factors can cause Distortion.

The Canada Health Act is distorted in terms of whether the reduction in federal contributions to provincial health-care insurance plans is mandatory or discretionary. It is also distorted in that it is in the form of a principal Act rather than an amending Act. The reason for this distortion is that extra-billing and user charges were considered to pose such serious threats to the Canadian health-care system as to justify a restatement of federal policy. Canadian legislators, in this instance, preferred to restate the whole of federal policy in this area, thereby magnifying rather than minimizing the scope of the changes made in 1984.

¹⁵²See the "Canadian health care policy" in section 3 of the Act.

¹⁵³F.A.R. Bennion, supra n. 68, pp. 127-28

The Investment Canada Act

The Investment Canada Act¹⁵⁴ replaced the Foreign Investment Review Act.¹⁵⁵ Under the new Act, the establishment of a new business in Canada is subject to notification only (paragraph 11(a)), with the possibility of the Governor in Council determining to subject it to review (section 15). Review was mandatory under the former Act. The threshold for review of the acquisition of control of a Canadian business was increased from \$250,000 worth of assets to \$5,000,000.¹⁵⁶ The criteria as to what constitutes the acquisition of control were altered from five per cent of the shares with voting rights (where the shares were publicly traded) or twenty per cent (where they were not) to fifty per cent.¹⁵⁷ The criteria for review are exactly the same, except that under the present Act, one must consider "the contribution of the investment to Canada's ability to compete in world markets."¹⁵⁸ The review is now performed by the Minister rather than the Governor in Council.¹⁵⁹

¹⁵⁴R.S.C. 1985, c. 28 (1st Supp.)

¹⁵⁵S.C. 1973-74, c. 46. This Act was repealed by section 46 of the Investment Canada Act, S.C. 1985, c. 20.

¹⁵⁶Compare paragraph 5(1)(c) of the former Act with subsection 14(3) of the present Act.

¹⁵⁷Compare paragraph 3(3)(a), subparagraph 3(3)(b)(i) and paragraph 3(3)(c) of the former Act with section 28 of the present Act.

¹⁵⁸Compare subsection 2(2) of the former Act with section 20 of the present Act.

¹⁵⁹Compare sections 8 to 13 of the former Act, headed "Procedure in Relation to Proposed Investments and Actual Investments", with Part IV (sections 14 to 25) of the current Act, headed "Review".

As with the Canada Health Act, there is in the Investment Canada Act an internal distortion that is related to the distortion of the Act having the form of a principal Act. The Investment Canada Act provides for its non-application before it provides for its application.¹⁰⁰ The explanation for this oddity of structure is found in the political circumstances of the enactment of the Act: its sponsors wished to emphasize the extent to which new investment would not be subject either to notification or review.¹⁰¹ They preferred to emphasize the changes in law relating to the review of foreign investment rather than the extent to which it remained the same.

The Trade Union and Labour Relations Act 1974

Section 1 of the Trade Union and Labour Relations Act 1974 is a classic illustration of the occasional preference of legislators to emphasize change rather than continuity:¹⁰²

1. (1) The Industrial Relations Act 1971 is hereby repealed.

(2) Nevertheless, Schedule 1 to this Act shall have effect for re-enacting... the under-mentioned provisions of that Act, ...

¹⁰⁰Part II of the Act, which consists only of section 10, is headed "Exemptions". The application provisions are in sections 11 (notification) and 14 (review).

¹⁰¹It is interesting to note that the first seven exemptions are similar to those under the former Act. The major change was the drawing-together of the exemptions.

Former Act
subparagraphs 3(3)(b)(ii) to (iv)
paragraph 3(3)(e)
paragraphs 5(1)(a) and (b)

Present Act
paragraphs 10(1)(a) to (d)
paragraph 10(1)(e)
paragraphs 10(1)(f) and (g)

¹⁰²1974 (U.K.), c. 52

The provisions mentioned in paragraph 1(2)(b) had provided the former National Industrial Relations Court with seventy-five per cent of its docket; they continued to provide the industrial tribunals (over which that court had exercised an appellate jurisdiction) with eighty per cent of theirs.¹⁶³ Mr. Bennion describes the reasons for the distortion of the 1974 Act as follows:¹⁶⁴

Labour hatred of the Industrial Relations Act 1971 was so acute and bitter that it distorted the Act which followed, the Trade Union and Labour Relations Act 1974. Although Labour wished to retain many features of the 1971 Act, its total repeal had been a leading general election issue. How do you repeal an Act totally, while retaining large parts of it?

Conclusion

The proponents of these three Acts preferred to magnify the extent of the changes being made, to the point where new principal Acts were enacted, instead of amendments to the former principal Acts. This suggests that it is not very convincing to object to the use of re-enactment as a technique for amending particular provisions of an act on Ilbert's ground that this technique exaggerates the extent of the changes being made.

¹⁶³Sir John Donaldson, "Industrial Tribunals", in Derek Mendes da Costa, ed., The Cambridge Lectures: Selected Papers Based upon Lectures Delivered at the Cambridge Conference of the Canadian Institute for Advanced Legal Studies, 1979 (Toronto: Butterworth & Co. (Canada) Ltd., 1981), pp. 133, 135.

¹⁶⁴Bennion, supra n. 68, pp. 159-60. While Mr. Bennion uses the word "distortion", he discusses the Act in chapter 14, entitled "Doubt-factor III: Politic uncertainty". There is no uncertainty about the 1974 Act; it is simply a case of distortion.

Chapter Four

Ilbert on Re-enactment: Parliamentary Procedure and the Techniques of Amendment

In this chapter, we examine whether the choice of technique of amendment of acts has any implications for parliamentary procedure; in particular whether the admissibility of motions to amend a bill depends on the technique of amendment chosen. The position that will be taken is that the criteria for the admissibility of motions to amend are independent of the technique of amendment. The basic criterion for the admissibility of amendments, it will be argued, is whether the proposed motion is consistent with the principle of the bill, which was accepted by the house in giving the bill its second reading. The principle is determined by an examination of the bill in the form in which it was given second reading. The identification of the principle of an amending bill does not depend on the extent to which provisions of acts are "opened up" by the bill.

In examining the criteria for the admissibility of amendments to amending legislation, the ambiguity of "amend" (and its cognates) can cause problems. For that reason, it is proposed in this chapter to use "amend" and "amendments" to refer to amendments to bills, that is, changes that are made to bills by a legislative body in the course of their consideration by the body. "Amending legislation", on the other hand, will be used to refer to bills that, once enacted, have the effect of making changes in the statute law. "Amending" will be used, to the extent possible, as an adjective (usually modifying

"legislation"); it will not be used as a verb because when so used its disambiguation depends on its object (bill or act).

The position that will be taken in this chapter is at variance with the position of Ilbert. According to Ilbert, re-enactment¹⁶⁵

throws the whole law into the crucible, exposes to amendment not merely the particular provisions which the introducer of the Bill desires to alter, but all other provisions of the law which appear to be in any way open to criticism. ... The proposal to repeal and re-enact, not the whole of an Act, but merely a particular section of an Act, is often open to similar objections from a parliamentary point of view.

Thus, Ilbert's view was that amending legislation employing the technique of re-enactment "opened up" for amendment more of an act than did amending legislation employing other techniques. According to him, the drafter of a bill can influence the admissibility of amendments to it through the choice of a technique of amendment. Ilbert's view is widely accepted.¹⁶⁶

The strategy to be adopted in this chapter for dealing with Ilbert's view is to show that the criteria for the admissibility of amendments had only recently been developed when Ilbert was writing in 1901. Ilbert was not aware of the implications of the criteria for amending legislation. After an historical examination of the development of these criteria, we turn to recent decisions of the Speaker of the House of Commons of Canada to show how the

¹⁶⁵Ilbert, pp. 256-7

¹⁶⁶See, for example, Mr Francis Bennion's written evidence to the Renton Committee: Renton and the Need for Reform, supra n. 43, pp. 40-1 and Thornton, supra n. 142, pp. 339-40.

criteria are applied in the case of amending legislation. In so doing, we hope to show that Ilbert's view is not correct, at least in terms of Canadian parliamentary procedure.

Parliamentary Procedure During the Lifetime of Erskine May

The requirement that an amendment be relevant only emerged in the nineteenth century. Sir Thomas Erskine May (1815-1886) did not mention any such requirement in the first eight editions of his work. (Erskine May was Clerk Assistant of the British House of Commons from 1856 to 1871 and Clerk from 1871 to 1886.¹⁶⁷) The editors of the tenth (1893) edition of Erskine May, the first published after his death in 1886, note that "[t]his principle was asserted for the first time in the 9th [1883] edition".¹⁶⁸ The learned editors go on to note

An illustration may be given of the former licence in amendments. To the question for the Speaker's leaving the chair for the committee on the Reform Bill, 6th Aug. 1831, an amendment was moved for the production of papers on the state of Poland; and on an analogous proceeding, 9th May, 1834, the Speaker stated

that according to the forms of the House and the law of Parliament, there was no necessity that the Amendment should be akin to the question.

The decisions cited in support of a requirement that amendments be relevant begin in the 1880s. The 1880s were the great decade in which the organized campaign of obstruction of parliamentary business by the Irish

¹⁶⁷37 D.N.B., pp. 145-6

¹⁶⁸Erskine May, 10th edition, 1893, p. 278 n. 5

Nationalists compelled the British House of Commons to reform its procedures.¹⁶⁹ We shall return to this point about the significance of the 1880s for the development of parliamentary procedure. For the moment, it is sufficient to note that before that decade, relevance was not required of any amendments, including amendments to bills.

Unlike "relevance", "scope" was already a recognised notion in the parliamentary procedure of the early nineteenth century. The scope of a bill was governed by its title. There were two consequences to this notion.

First, a bill was irregular if it included provisions that were beyond its scope, that is, not included within the title. Erskine May noted that¹⁷⁰

In preparing bills, care must be taken that they do not contain provisions not authorised by the order of leave, that their titles correspond with the order of leave, and that they are prepared in proper form; for, if it should appear, during the progress of a bill, that these rules have not been observed, the house will order it to be withdrawn... [Such objections, however, should be taken before the second reading; for it has not been the practice to order bills to be withdrawn after they are committed, on account of any

¹⁶⁹For an account of the key episode, in which a debate on a motion for leave to introduce a bill, which had lasted for forty-one hours, was unilaterally terminated by the Speaker, see Josef Redlich, Recht und Technik des Englischen Parlamentarismus: Die Geschäftsordnung des House of Commons in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt, (Leipzig, 1905), trans. A. Ernest Steinthal, The Procedure of the House of Commons: A Study of its History and Present Form, (New York: AMS Press, Inc., 1969 [reprint of 1908 edition]), vol. I, pp. 153-163. Redlich characterized the Speaker's decision as "the celebrated coup d'état of the Speaker" (*ibid.*, p. 153).

¹⁷⁰8th edition, 1879, p. 497, 7th edition, 1873, pp. 481-2, 6th edition, 1868, pp. 451-2, 5th edition, 1863, p. 454, 4th edition, 1859, p. 430 and 3rd edition, 1855, p. 368

irregularity which can be cured, while the bill is in committee, or on re-commitment.]¹⁷¹

Secondly, a committee did not have the power to enlarge the scope of the bill. An amendment was therefore inadmissible if was beyond the scope of the bill. But this rule was not so much a rule about the admissibility of amendments as a rule about the limited powers of committees. The rule only applied to amendments made in committee and even then could be overcome by an instruction from the house.¹⁷²

As May noted in his first edition (1844)¹⁷³

Instructions are sometimes given by the house to committees on bills, in compliance with which they receive clauses, or make provision in the bills committed to them, which they could not otherwise have considered, as being extraneous to the titles.

¹⁷¹The parenthesized passage appeared for the first time in the fourth edition (1859).

¹⁷²As instructions have grown out of use, it is perhaps worth noting that "instructions" pertaining to bills are permissive and not mandatory. See Erskine May, 9th edition, 1883, p. 553:

According to the rules and general practice of Parliament, an instruction does not order a committee to make any provision: but merely instructs them "that they have power" to make it. In the Lords, indeed, mandatory or imperative instructions are occasionally given concerning the provisions of bills. And in the Commons such instructions were formerly not without recognition. But, according to modern practice, mandatory instructions are now confined to proceedings unconnected with the provisions of bills.

¹⁷³p. 281

This limitation on committees' powers to amend bills was removed by a standing order made on July 19, 1854¹⁷⁴

That it be an instruction to all committees of the whole house to which bills may be committed, that they have power to make such amendment therein as they shall think fit; provided they be relevant to the subject-matter of the bill; but that if any such amendments shall not be within the title of the bill, they do amend the title accordingly, and do report the same specially to the house.

This standing order was one of nine recommended by an 1854 select committee on public business.¹⁷⁵ As a result of this standing order, relevance became for the first time a criterion for the admissibility of amendments. However, the requirement of relevance was, like the rule about scope it replaced, a rule limiting committees' powers. Erskine May pointed out, in the last edition of his work published in his lifetime, that it was open to the house to empower a committee to consider irrelevant amendments:¹⁷⁶

[B]efore the house resolves itself into committee, an instruction may be given to the committee, empowering them to make provision for any matters not relevant to the subject-matter of the bill.

The house itself could attach irrelevant amendments to bills. Erskine May was quite explicit about this power.¹⁷⁷

¹⁷⁴Erskine May, 10th edition, 1893, p. 830. This standing order is still in force in a slightly altered form in the British House of Commons.

¹⁷⁵Redlich, supra n. 169, vol. I, pp. 88-97

¹⁷⁶Erskine May, 9th edition, 1883, pp. 552-3

¹⁷⁷Erskine May, 9th edition, 1883, p. 573. This passage first appeared in the fourth edition (1859) and was not thereafter altered. See the 8th edition, (continued...)

When the bill, as amended by the committee is considered, the entire bill is open to consideration, and new clauses may be added, and amendments made, whether they be within the scope and title, or even relevant to the subject-matter of the bill, or not. The vicious practice of adding provisions to bills, quite foreign to their object, which was formerly not uncommon, is now very rarely tolerated: but the house has not imposed any formal restraint upon its own discretion, in admitting whatever amendments it may think proper, though not within the title, which may be afterwards amended, on the third reading. The house may exercise, directly, the same power which it sometimes grants to committees, by way of instruction.

At the time of Erskine May's death in 1886, the criteria for admissibility of amendments could be summarized as follows. Scope was no longer a criterion, as a result of the standing order of July 19, 1854. Committees could now make any amendments, regardless of whether they were within the scope of the bill, so long as the amendments were relevant to the subject-matter of the bill. The house itself could make any amendments a committee could make. It could also make amendments that were not relevant to the subject-matter of the bill and thus beyond the powers of a committee under the 1854 standing order or authorize committees by instructions to make such amendments. In other words, the house could make any amendments it wanted to.

¹⁷⁷(...continued)

1879, p. 529, the 7th edition, 1873, p. 512, the 6th edition, 1868, p. 478, the 5th edition, 1863, pp. 476-7 and the 4th edition, 1859, pp. 450-1. In the third edition (1855), p. 380, it was said that

When the bill as amended by the committee is considered, the house may not only agree or disagree to the amendments, but may make fresh amendments and add new clauses, whether they be within the title or not; but the practice of adding clauses at this time is inconvenient, and should be avoided as far as possible.

Developments Since the Death of Erskine May

Two developments in the 1880s and 1890s changed the criteria. In the first place, by a standing order of February 28, 1888, the house imposed upon itself the "formal restraint" the absence of which Erskine May had noted. The standing order, which is still part of the standing orders of the British House, originally read as follows:¹⁷⁸

That upon the report stage of any bill, no amendment may be proposed which could not have been proposed in committee without an instruction from the house.

The effect of this standing order, for our purposes, was to make relevance to the subject-matter of the bill the test for admissibility of amendments, both in committee and in the house. Since the house was now bound by the same criteria as its committees, it no longer made sense to view the relevance rule as a rule limiting the powers of committees.

¹⁷⁸Erskine May, 10th edition, 1893, p. 830

Redlich, writing in 1905, confirms that there had been an important change in the criteria for the admissibility of amendments in the 1880s and 1890s.¹⁷⁹

Further evidence as to the nature and timing of these changes can be found in the works of Sir John Bourinot (1837-1902). Bourinot was Clerk of the Canadian House of Commons from 1880 to 1902.¹⁸⁰ The two editions of Bourinot's work Parliamentary Procedure and Practice published during his lifetime both reflect the British situation before the developments of the 1880s and 1890s. His discussion on the admissibility of amendments assumes that the criteria for admissibility function as limitations on committees' powers. He points out that¹⁸¹

¹⁷⁹Redlich, supra n. 169, vol. I, pp. 93-4:

An amendment is irregular if it is not relevant to the bill before the committee, or if it forms part of an amendment previously rejected, or if it is inconsistent with the whole policy of the bill, or again if it is merely ironical. The requirement of relevancy extends to an insistence upon each amendment being related to the particular clause in connection with which it is moved. A study of the practice of the last twenty years will undoubtedly lead to the conclusion that the discretion of the chair has been materially increasing in this particular direction: the precedents formed show that the chairman is not now bound to put a strict interpretation on his powers.

¹⁸⁰D.N.B. 1901-1911, p. 198

¹⁸¹Sir John George Bourinot, Parliamentary Procedure and practice with an introductory account of the origin and growth of parliamentary institutions in the Dominion of Canada, (Montreal: Dawson Brothers, 1st edition, 1884), p. 533; Parliamentary Procedure and Practice with a review of the origin, growth, and operation of parliamentary institutions in the Dominion of Canada, (Montreal: Dawson Brothers, 2nd edition, 1892), p. 608. This passage was retained in the two posthumous editions of Bourinot's work: Thomas Barnard Flint, editor, Parliamentary Procedure and Practice in the Dominion of Canada with historical introduction and an appendix, (Toronto: Canada Law Book Co., 3rd edition, 1903), (continued...)

If the subject-matter of an instruction is relevant to the subject-matter, and within the scope and title of a bill, then such instruction is irregular since the committee has the power to make the required amendment.

And he refers to the 1854 standing order of the British House of Commons.¹⁸² Apart from such references, Bourinot's work contains nothing on the criteria for the admissibility of amendments. This suggests that, like Erskine May, Bourinot saw these criteria in terms of limitations (or the lack of them) on committees' powers.

It was only with the third edition of Bourinot's work, published in 1903, that there is an explicit statement of the criteria for the admissibility of amendments.¹⁸³

Amendments are irregular when irrelevant to a bill or any of its provisions; governed by amendments already negatived: inconsistent with or contradictory to the bill as agreed to by the committee; or tendered in a spirit of mockery. The chairman will decline to put such questions from the chair.

¹⁸¹(...continued)

p. 652; Thomas Barnard Flint, editor, Parliamentary Procedure and Practice in the Dominion of Canada, (Toronto: Canada Law Book Co., 4th edition, 1916), p. 513

¹⁸²Ibid., 1st edition, p. 543; 2nd edition, p. 618; 3rd edition, p. 663; 4th edition, p. 523

¹⁸³Ibid., 3rd edition, p. 665; 4th edition, p. 525

As the footnotes disclose, the statement is in fact based on a similar statement in the posthumous editions of Erskine May.¹⁸⁴

An examination of the second development, namely, a change in the criteria for admissibility of instructions to committees, also confirms that what we now regard as the criteria for the admissibility of amendments developed in the 1880s and 1890s.

Until the revival in 1888 of the standing committees for the consideration of bills relating to law, courts of justice and legal procedure, and to trade, shipping and manufactures, all bills were considered in committees of the whole house. Furthermore, it was not until 1907 that a standing order combined the second reading and commitment stages by providing that a bill, other than a taxation or appropriation bill, that had been read a second time should stand referred to a standing committee.¹⁸⁵ When bills were still referred to committees of the whole house, there was a further stage after commitment. This occurred when the order of the day was reached for the house to resolve itself into a committee of the whole. The Speaker would then put the question "That I do now

¹⁸⁴Erskine May, 10th edition, 1893, p. 458

¹⁸⁵See Standing Orders 46 to 50 as they read in 1893 (Erskine May, 10th edition, 1893, pp. 831-2) and as they read in 1917 (ibid., 12th edition, 1917, pp. 817-8). Erskine May had recommended this reform to the 1854 committee: Redlich, supra n. 169, vol. I, p. 91. It was not until 1968 that the Canadian House of Commons combined the second reading and commitment stages: Canada, Parliament, House of Commons, Annotated Standing Orders of the House of Commons 1989, (Ottawa: Queen's Printer, 1989), p. 225

leave the Chair".¹⁸⁶ This was the stage to move that an instruction be given to the committee.¹⁸⁷

Another standing order of February 28, 1888, made in order to reduce opportunities for obstructing the business of the House, required the Speaker to leave the Chair without putting any question¹⁸⁸

whenever an order of the day is read for the house to resolve itself into committee ... , unless notice of an instruction ... has been given, when such instruction shall be first disposed of.

As a result, instructions were often moved as a way of preventing the Speaker from leaving the Chair. It had long been established that a motion for an instruction permitting an amendment to be made was inadmissible, if the proposed amendment were within the committee's powers.¹⁸⁹ As the house could no

¹⁸⁶Redlich, supra n. 169, vol. I, p. 65 n. 1

¹⁸⁷Erskine May, 1883, 9th edition, p. 552

¹⁸⁸Erskine May, 10th edition, 1893, p. 832. The house had already, by a standing order of August 5, 1853, done away with putting any question for the Speaker to leave the Chair

when a bill or other matter (except supply, or ways and means) has been partly considered in committee, and the chairman has been directed to report progress, and ask leave to sit again, and the house shall have ordered that the committee shall sit again on a particular day ...

Ibid., p. 832

¹⁸⁹In terms of the criteria applicable in the 1880s,

If the proposed provision be relevant, it cannot be the subject of an instruction, which would be nugatory, as the committee would already have the power which it is the object of the instruction to confer.

(continued...)

longer make irrelevant amendments while committees could make all relevant amendments, there seemed to be little room left for an amendment that would be beyond the powers of the committee but within the powers of the house. The Speaker frequently confronted the need to reconcile the developing criterion of relevance and the likelihood that its application to motions for instructions permitting amendments would render most such motions inadmissible.

The Speaker attempted to resolve the conflict by the development of a new criterion, namely, that the instruction must not conflict with the principle of the bill, which had been accepted by the house at second reading:¹⁸⁰

In the last few years a Standing Order has been passed stating that when the House is prepared to go into Committee the Speaker is to leave the Chair without question put; but there is a reservation made with regard to Instructions to the Committee. It would be obvious to the House that if an Instruction moved on that occasion were to traverse the principle of the Bill, or go so far outside the limits and scope and framework of the Bill as to set up an alternative scheme, or a counter proposition to the Bill, that would virtually be a Second Reading Debate over again. It would be an Amendment to the principle of the Bill, and would therefore reduce to a minimum, and would nullify altogether, the provision which the House has passed in the Standing Orders, which states that, when the House is prepared to go into Committee, I should leave the Chair at once without any Question put.

The Speaker made other attempts to explain how some amendments could be irrelevant to the subject-matter of the bill (and thus beyond the powers of a committee under the 1854 standing order) yet consistent with the principle of

¹⁸⁰(...continued)

Erskine May, 9th edition, 1883, p. 553

¹⁸⁰345 Parl. Debs., 3rd ser., cols. 348-9 (June 9, 1890)

the bill, as disclosed in the second reading debate (with the result that an instruction to empower the committee to make the amendment would be admissible). The Speaker made the following statement on the motions for instructions on the 1893 home rule bill (the Government of Ireland Bill):¹⁹¹

The principles which guide and limit the system of Instructions on going into Committee may be thus stated: --First, an Instruction must empower the Committee to do something which the Committee is not otherwise empowered to do; secondly, the purpose of the Instruction must be supplementary and ancillary to the purpose of the Bill, and must fall within the general scope and framework of the Bill; thirdly, it is irregular to introduce into the Bill by an Instruction to the Committee a subject which should properly form the substance of a distinct measure, having regard to usage and the general practice of enacting distinct Statutes for distinct branches of law.

Successive editions of Erskine May also attempted to resolve the dilemma. The tortured language of the tenth and eleventh editions, published in 1893 and 1906, respectively, testifies eloquently to the difficulty of reconciling the criteria for the admissibility of amendments and instructions with these new developments in the 1880s and 1890s.¹⁹²

In entertaining an instruction, the house is subject to this primary condition, namely, that the amendments to be sanctioned by an instruction must come within a fair interpretation of the rule laid down by [the 1854] standing order, namely, that those amendments should be relevant to the subject-matter of the bill.¹⁹³ Thus as the subject-matter of a bill, as disclosed by the contents thereof, when read a second time, has, since 1854, formed the order of reference

¹⁹¹12 Parl. Debs., 4th ser., col. 205 (May 5, 1893)

¹⁹²Erskine May, 10th edition, 1893, pp. 453-4; 11th edition, 1906, pp. 479-80; 12th edition, 1917, p. 365; 13th edition, 1924, pp. 398-9

¹⁹³This passage does not appear in the twelfth (1917) and subsequent editions.

which governs the proceedings of the committee thereon, it follows that the objects sought by an instruction should be pertinent to the terms of that order; and that the amendments, which an instruction proposes to sanction, must be such as would further the general purpose and intention of the house in the appointment of the committee. The object of an instruction is, therefore, to endow a committee with power whereby the committee can perfect and complete the legislation defined by the contents of the bill, or extend the provisions of a bill to cognate objects; and an attempt to engraft novel principles into a bill, which would be irrelevant, foreign or contradictory to the decision of the house taken on the introduction and second reading of the bill, is not within the due province of an instruction. Accordingly, an instruction can be moved that authorizes the introduction of amendments into a bill which extends¹⁰⁴ its provisions to objects not contained therein, if those objects are relevant to the subject-matter thereof, or which would augment the legislative machinery whereby the bill is to be put into force ... ; whilst, on the other hand, no instruction is permissible which is irrelevant, foreign or contradictory to the contents of the bill, or that seeks the subversion thereof, by substituting another scheme for the mode of operation therein prescribed.

This passage bristles with difficulties. For one thing, the putative "primary condition" is inconsistent with the purpose of an instruction, which was to give the committee a power it did not already have (whether by virtue of the 1854 standing order or otherwise). Not surprisingly, therefore, the opening sentence was dropped after two editions.

But other language in the passage is problematical. How can the objects sought by the instruction be "pertinent" to the committee's terms of reference without being relevant to the bill referred to the committee? Why is it necessary to get an instruction to extend a bill to "relevant" objects? If an instruction "irrelevant ... to the contents of [a] bill" is inadmissible, how can any instruction be admissible?

¹⁰⁴sic, as to the tenth and eleventh editions. Beginning with the twelfth edition, editors assumed that the subject of this verb was "amendments" and accordingly put the verb into its plural form.

To be fair to the learned editors of Erskine May, the paragraph preceding the quoted passage stated that the 1854 standing order met "all ordinary occasions".¹⁹⁵ The learned editor of fourteenth edition, published in 1946, admitted that instructions were of little contemporary significance.¹⁹⁶

The effect of [the 1854] standing order, though it was perhaps not felt immediately, has been to reduce the number of occasions when it is necessary to widen the powers of a committee by an instruction, and, in modern times, the rulings of the Chair on instructions are tending to become much stricter than formerly. Frequently an instruction is proposed which is unnecessary, as the amendments which it is designed to admit, could be considered by the committee under the general instruction given by [the standing order]. Occasions, however, continue to arise, though perhaps more rarely, when it is desired to propose amendments in committee of wider scope than those contemplated in the standing order, which the committee could not consider without a special instruction from the House empowering them to do so.

Contemporary Criteria for the Admissibility of Amendments to Bills

The posthumous editions of Erskine May stated the criteria for the admissibility of amendments in the following terms:¹⁹⁷

¹⁹⁵Erskine May, 10th edition, 1893, p. 453; 11th edition, 1906, p. 479; 12th edition, 1917, p. 365; 13th edition, 1924, p. 398

¹⁹⁶Ibid., 14th edition, 1946, pp. 508-9. Redlich had already noted in 1905 that the effect of the 1854 standing order was that

most instructions proposed by members are unnecessary and therefore are ruled out of order by the Speaker.

Supra n. 169, vol. III, p. 91

¹⁹⁷Erskine May, 10th edition, 1893, p. 458; 11th edition, 1906, pp. 485-6; 12th edition, 1917, pp. 370-1; 13th edition, 1924, pp. 404-5

Amendments are out of order that are -- irrelevant to the bill [or beyond the scope of the bill]¹⁹⁸ [or of the clause under consideration]¹⁹⁹; governed by [or dependent upon]²⁰⁰ amendments already negated; inconsistent with, or contradictory to, the bill as agreed to by the committee; [inconsistent with a decision to which the committee has come upon a former amendment;]²⁰¹ [offered at a wrong place in the bill]²⁰² or that are tendered to the committee in a spirit of mockery. [An amendment which is equivalent to a negative of the bill, or of the clause under consideration, is out of order.]²⁰³ [Amendments have also been ruled out of order on the ground of vagueness or because they were trifling.]²⁰⁴ The chairman would decline to propose such amendments from the chair.

This statement reintroduces, with the twelfth edition of Erskine May (1917), the notion that the scope of the bill affords one criterion for the admissibility of amendments. This reintroduction of at least language about scope was faithfully reproduced in the works of Arthur Beauchesne (1876-1959), the Clerk of the Canadian House of Commons from 1925 to 1949.²⁰⁵

¹⁹⁸This passage first appears in the twelfth edition (1917).

¹⁹⁹This passage first appears in the thirteenth edition (1924).

²⁰⁰This passage first appears in the eleventh edition (1906).

²⁰¹This passage first appears in the twelfth edition (1917).

²⁰²This passage first appears in the eleventh edition (1906).

²⁰³This passage appears for the first time in the thirteenth edition (1924).

²⁰⁴This passage first appears in the twelfth edition (1917).

²⁰⁵Rules and Forms of the House of Commons of Canada with Annotations and an Extensive Index: A Compendium of Canadian Parliamentary Practice Prepared for the Use of Members of Parliament, (Toronto: Canada Law Book Co., Ltd., 2nd edition, 1927), p. 223 (s. 781); Rules and Forms of the House of Commons of Canada with Annotations, Comments and Precedents: A Compendium of Canadian Parliamentary Practice Prepared for the Use of Members of Parliament, (Toronto: Canada Law Book Co., Ltd., 3rd edition, 1943), p. 233 (s. 679) and Rules and Forms of the House of Commons of Canada with Annotations, Comments and Precedents: A Compendium of Canadian Parliamentary Practice Prepared for the Use of Members of Parliament, (Toronto: The Carswell Co. Ltd., 4th edition, 1958), p. 285 (s. 406)

The meaning of "scope", as reintroduced into the parliamentary lexicon in the early part of this century, is not obvious, since the 1854 standing order empowered committees to make all "relevant" amendments. Many of the decisions relied upon by the learned editors of Erskine May contain no more than a statement by the committee chairman that a given amendment was inadmissible because it was "beyond the scope" of the bill.²⁰⁶ At least some of the decisions do not even mention the word "scope".²⁰⁷

Some of the more reasoned of the decisions treat "scope" and "relevance" as different formulations of a single criterion. For example, one of the decisions dealt with an attempt to amend the annual mutiny bill in order to prohibit the use of the army in labour disputes. Erskine May cites the following passage as a decision about scope:²⁰⁸

If the hon. Member for Salford had been in the House earlier he would have heard me deal with that point which was raised by the hon. Member for Merthyr Tydvil. The Rule of the House is as I then stated. It is the duty of the Chair if in the course of a discussion it appears to him that the question is outside the scope of the Bill before the Committee of the House, to intervene and withdraw the matter for [from ?] consideration.

²⁰⁶147 Parl. Debs., 4th ser., col. 311 (May 30, 1905); 158 Parl. Debs., 4th ser., cols. 355-6 (May 29, 1906); 41 H.C. Debs., 5th ser., cols. 2859-62 (August 5, 1912); 61 H.C. Debs., 5th ser., col. 128 (April 14, 1914); 78 H.C. Debs., 5th ser., col. 661 (January 20, 1916); 99 H.C. Debs., 5th ser., col. 526 (November 14, 1917); 121 H.C. Debs., 5th ser., col. 1985 (November 27, 1919); 165 H.C. Debs., 5th ser., cols. 1356-7 (June 19, 1923) and 196 H.C. Debs., 5th ser., cols. 1627-31 (June 9, 1926)

²⁰⁷68 H.C. Debs., 5th ser., col. 745 (November 20, 1914) and 264 H.C. Debs., 5th ser., col. 595 (April 11, 1932)

²⁰⁸61 H.C. Debs., 5th ser., col. 1070 (April 22, 1914)

However, what the Chairman of the Committee had said earlier was this:²⁰⁰

[W]here it appears in the course of a Debate to the Chairman that a matter is out of order and not relevant to the question before the Committee, it his duty to withdraw it from the consideration of the Committee.

A large number of the decisions on "scope" cited in Erskine May have to do with attempts to amend amending legislation. This may be because "scope" is more metaphorical and less abstract than "relevance". Language about "scope" speaks of some amendments being "within the scope of the bill", while others are said to be "outside the scope of the bill". This language is especially tempting in the case of amending legislation, because it is so easy to characterize an attempt to introduce another amendment into amending legislation as "outside its scope", whereas it is more difficult to determine whether such an amendment is "relevant" to the subject-matter of the bill. In the case of legislation other than amending legislation, it is not as easy to characterize amendments as "within" or "beyond" the scope of a bill, and in attempting to characterize an amendment, language about "scope" and "relevance" tends to become interchangeable.

The tendency to resort to "scope" as the criterion for the admissibility of amendments is apparent in a line of decisions holding that an amendment is not admissible by reason only that it would, if made a part of the bill, amend the same Act as other parts of the bill. Amongst these decisions are a 1924

²⁰⁰61 H.C. Debs., 5th ser., col. 1020 (April 22, 1914)

British decision by the Chairman of Ways and Means²¹⁰ and a 1930 British decision by the Deputy Chairman of Ways and Means.²¹¹

At this stage, the decisions have not yet broken the link with the nineteenth-century notion of scope, because the title is still regarded as an important indication of scope.²¹² In the next, or Canadian stage, this link is broken.

According to Driedger, Canadian practice relaxed the rule about relevance in debate and the criteria governing the admissibility of amendments, and, as

²¹⁰169 H.C. Debs., 5th ser., col. 1593 (February 19, 1924):

There is a new Clause on the Paper ... which I must rule out of order, as it is outside the scope of the Bill. The Bill seeks to repeal Proviso 2 of Section 2 of the Act of 1923, and the Amendment deals with another matter altogether, namely, Section 4.

²¹¹234 H.C. Debs., 5th ser., col. 2123 (February 6, 1930):

This part of the Bill, that is Part II, is restricted in its scope. It deals with a temporary amendment of Section 3 of the Coal Mines Regulation Act, 1908. The only Amendments, therefore, to this part of the Bill which can be in order are those which propose to make temporary amendments to that Section, and any Amendments proposing to amend any other statutory provision, or even to amend that Section otherwise than temporarily, must be ruled out of order.

²¹²The titles of the 1924 and 1930 bills were An Act to repeal proviso (2) to section 2 of the Unemployment Insurance Act, 1923, 14 & 15 Geo. 5 (U.K.), c. 1, and An Act to provide for regulating and facilitating the production, supply and sale of coal by owners of coal mines; for the temporary amendment of section 3 of the Coal Mines Regulation Act, 1908; for the constitution and functions of a Coal Mines National Industrial Board; and for purposes connected with the matters aforesaid, 20 & 21 Geo. 5 (U.K.), c. 34.

a result of this relaxation, Canadian titles became shorter.²¹³ This theory is not correct in the case of amending legislation. Canadian practice has always entitled amending legislation "An Act to amend [a specified Act]".²¹⁴ It is likely that the peculiarly Canadian developments about to be described were greatly influenced by this longstanding practice.

Sometimes in Canada the scope of a bill is determined by distinguishing between an amendment to the bill and an amendment to the Act to be amended by the bill. The Speaker of the Canadian House of Commons put it this way in 1970:²¹⁵

²¹³Elmer A. Driedger, The Composition of Legislation and Legislative Forms and Precedents, (Ottawa: Queen's Printer, 2nd edition, 1976), p. 153:

Strict parliamentary rules have been developed in the United Kingdom as to the contents of a bill in relation to its title. ... At one time the United Kingdom parliamentary rules respecting titles to bills were closely followed in Canada, but lately there has been considerable relaxation. A wide range of discussion is permitted on any bill, even though it may not be strictly relevant to the terms of the bill, and amendments are generally permitted even though they do not fall strictly within the terms of the bill. The result is that titles have become shorter and more general.

²¹⁴The Speaker has confirmed Driedger's view, expressed idem, that "respecting" is a word of broad import whose use in a title makes it unnecessary to mention that the bill amends Acts of Parliament. In his decision on the admissibility of the bill to implement the Canada--United States Free Trade Agreement, the Speaker said that Driedger's work

may not have the same weight as Beauchesne or Erskine May, but it is a respected authority in legislative drafting.

At the same time, the Speaker wondered

if including all of the statutes [to be amended] in the title of the Bill would thus make it any more acceptable to those who oppose it.

H.C. Debs., p. 16257 (June 8, 1988)

²¹⁵116 C.J. 993 (June 11, 1970)

My impression is that in a way the honourable Member has sought to amend more than the bill which is before us. He has sought to go behind this bill to amend the Corporations Act. In other words he has sought to make a change which would not only affect the bill before us but also the act which the bill seeks to amend.

In a contemporaneous decision, the Speaker, aware that the link between scope and the title had been broken, rejected an argument that an amendment must be admissible as it proposed to amend the Act mentioned in the title of the bill. At the same time, he rejected Driedger's theory that there had been any relaxation in the criteria governing the admissibility of amendments.²¹⁶

In 1977, the Deputy Speaker said that certain amendments "[went] beyond the scope of the bill itself and amend[ed] the parent act, and thus would not be acceptable", while others "[went] beyond the bill and [were] not relevant to the subject matter of the bill as adopted by the House at second reading stage. They also [sought] to amend the main act."²¹⁷ In both of these decisions, the title of the bill was wide enough to cover the proposed amendments.

In the nineteenth century, "scope" related to the order of the house for leave to introduce a bill. In the twentieth century, "scope" has come to serve the same function as in the nineteenth century, namely, that of controlling what matters can be debated, but in a different way. Now the emphasis lies, not on

²¹⁶See Mr Nielsen's argument, H.C. Debs., pp. 8367-8 (June 19, 1970) and the Speaker's decision, H.C. Debs., pp. 8368-9.

²¹⁷H.C. Debs., p. 1905 (December 15, 1977)

the order of the house granting leave, but rather on the decision of the house on the second reading of the bill.

Two British decisions of 1918 illustrate this change in emphasis. In the one, the Chairman said²¹⁸

I am bound to take the meaning of the Bill as approved on the Second Reading, and when leave was asked to introduce it. I take the scope of the Bill which was to limit a landlord in the definition of time. I am certain it is not my duty to admit as coming within the scope of the Bill this kind of Amendment which is going far beyond its scope as defined on the Second Reading.

And in the other, the Chairman said that²¹⁹

it would be much too far beyond the title of the Bill and the conditions in which the House agreed to give the Bill a Second Reading to bring in such a proposition as this.

Once again, in the next, or Canadian stage, the transition is complete and the link between scope and the title is broken. The decision of the Speaker of the Canadian House of Commons on Bill C-43, entitled "An Act respecting abortion", illustrates the twentieth-century notion of scope and its link to the decision of the house on the second reading of the bill. That Bill proposed to repeal sections 287 and 288 of the Criminal Code²²⁰ and substitute a prohibition on abortions,

²¹⁸105 H.C. Debs., 5th ser., col. 1071 (April 24, 1918)

²¹⁹108 H.C. Debs., 5th ser., col. 2046 (July 25, 1918)

²²⁰R.S.C. 1985, c. C-46

unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.

An amendment to limit the prohibition to abortions performed after the twentieth week of pregnancy was unsuccessful. The Speaker said²²¹

In ruling Motion No. 1 out of order in committee, the chairman of the legislative committee stated the proposed amendment would go beyond the principle of the bill as it was agreed to by this House at second reading and also adds a new concept. I concur with the chairman's ruling.

Other amendments, which proposed to limit the exception to abortions performed in hospitals or medical clinics approved by the provincial minister of health, to abortions performed after the medical practitioner received the advice of another medical practitioner or to abortions performed where the medical practitioner was of the opinion that the life (and not the health only) of the female person would be likely to be threatened or where the pregnancy resulted from incest or sexual assault, were also ruled inadmissible. The Speaker stated²²²

Committees enjoy considerable power over a bill but procedural authorities are clear that there are some general limitations over [by ?] which they are bound. First, a committee is bound by the decision of the House given at second reading of a bill and second, an amendment that is beyond the "scope" of the bill is out of order. For further clarification of and information about these points I

²²¹H.C. Debs., p. 10767 (April 27, 1990)

²²²Ibid., p. 10768

would refer the House to May, twentieth edition, pages 549 and 550 and pages 555 to 558; Beauchesne's fifth edition, citations 763, 764, 773 and 774 cover the same ground.

Motions Nos. 4A, 7, 8, 11, 13A and 18A are thus not in order as they attempt to add new concepts to the bill. They are beyond the scope of Bill C-43. As hon. members are aware, this is not an admissible type of amendment.

From one point of view, this decision of the Speaker shows that the link between scope and title has been broken. The amendments in question were all within the title of the bill, yet were held to be beyond its scope. From another point of view, the decision shows the link between scope, relevance and the principle of the bill, as agreed to by the house on the second reading of the bill. The "subject-matter" of the bill is narrowly construed, by reference to the contents of the bill at the time of the second-reading debate. Thus, it was not enough for an amendment to Bill C-43 to relate to abortion; the amendment had to relate to the particular way that Bill C-43 proposed to deal with abortion. This is sometimes expressed by stating that an amendment is not admissible if it proposes an alternative scheme.

The decision also shows that the use of re-enactment as a technique of amendment does not enlarge the scope of the bill. The scope of the bill is determined, not by the technique of amendment employed, but by reference to the rules proposed to be enacted as part of the statute law. Thus, in the case of Bill C-43, the fact that the Bill proposed to re-enact the provisions of the Criminal Code respecting abortion did not mean that any amendment that also proposed to re-enact those provisions was in order. On the contrary, amendments that were relevant to the topic of abortion were ruled out of order. The

admissibility of amendments is determined by reference to the "principle" of the bill.

Ilbert's views on the use of re-enactment as enlarging the scope of the bill are not correct, at least not in Canada in the late twentieth century. This is not surprising. Ilbert was writing in 1901. At that time, proceduralists were only just beginning to accept that there were criteria for the admissibility of an amendment that were not simply limitations on the powers of committees. Proceduralists had yet to work out the implications of the rise in relevance as a criterion for all amendments. Moreover, there was still a link between the scope and the title of a bill at the time Ilbert was writing.

A Canadian Problem: The "Parent-Act" Rule

This is not to say that the use of re-enactment as a technique of amendment does not create problems in terms of the admissibility of amendments. It does. But the problems are the exact opposite of the ones mentioned by Ilbert. Rather than unduly enlarging the scope of the bill, re-enactment may unduly reduce the scope. We already noted that "scope" is more metaphorical and less abstract than "relevance" and that this makes it tempting to resort to language about "scope" in the case of amending legislation and thereby to conclude that attempts to introduce new amendments into the bill are "outside its scope".

The learned editors of the posthumous editions of Beauchesne have succumbed to this temptation.²²³ According to them, no new clauses can ever be added to amending legislation (unless the clauses contain transitional or commencement provisions). We have already quoted from some of the decisions cited in support of this position. Although those decisions refer only to criteria like "relevance" and "scope", the learned editors cite them in support of a separate rule governing the admissibility of amendments to amending legislation.

This rule is known as the "parent-act rule", since it relies for such plausibility as it has on the distinction between an amendment to a bill and an amendment to the so-called "parent act" (the act to be amended by the bill). The use of metaphorical language about the "parent act" is evidence of a failure to disambiguate "amend" and its cognates along the lines suggested at the beginning of this chapter. The metaphor purports to distinguish, but only confuses the difference between, an amending act and amending a bill. The metaphor regards the act to be amended as the parent and the bill that, if enacted, would amend it, as its child. Amendments to add new clauses to the bill in order (if the bill is enacted) to amend provisions of the act not proposed to be amended by other clauses of the bill are regarded as inadmissible on the curious ground that the new clauses do not amend the bill but only the act.

²²³Alastair Fraser et al., Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents, (Toronto: The Carswell Co. Ltd., 5th edition, 1978), p. 233 (s. 773(8)). The same passage is repeated in the 6th edition (1989), p. 207 (s. 698(8)). There is no trace of any such conclusion in the four editions published during Beauchesne's lifetime.

This explanation makes no sense. The new clauses, if accepted, would amend the bill. Indeed, it is only because the new clauses would become part of the bill (and thus amend it) that they can accomplish what proceduralists solemnly assert is their only effect, namely, the amendment of the act. In fact, any amendment to an existing clause of an amending bill (other than a clause that contains a transitional or commencement provision) has the same double effect. It amends the bill and, if the bill is enacted, it has the effect of amending the act. Canadian proceduralists have not so far suggested that amendments to existing clauses of amending bills are inadmissible because they would have the effect of amending the "parent act". The metaphor of the "parent act" is thus confusing because it makes a spurious distinction between amendments to existing clauses and amendments that add new clauses.

The extent to which the metaphor is misconceived becomes still more apparent when one realizes that there can be a parent without a child. The rule treats as inadmissible an amendment to add a new clause for the purpose of amending (if the bill is enacted) an act that would not be amended by any other clause of the bill. The act is said to be a parent act even though it has no child in the form of a clause of the bill.

The parent-act rule is an attempt to cope with the difficulty of using the titles to amending bills in order to determine their scope. It does so by identifying the scope of an amending bill with amendments to provisions proposed to be amended by the bill on its second reading. It is at best an incomplete statement of what is within or outside the scope of an amending bill, for, as we saw with Bill C-43, the fact that an amendment proposes to amend an existing

clause and through it the same provision as that proposed to be amended by the clause does not mean that the amendment is admissible.

There seems to be no good reason why the opposite proposition should not also be true; that is, the fact that an amendment proposes to amend an amending bill and through it a provision not proposed to be amended by the bill does not mean that the amendment is inadmissible. This proposition is inconsistent with the parent-act rule. In what follows, I discuss some of the problems with this rule, with a view to establishing persuasive grounds for its rejection in favour of criteria for admissibility of an amendment based exclusively on its relation to the rules proposed to be enacted as part of the statute law by the bill. If the amendment is relevant to those rules, then it is admissible, regardless of whether the amendment is to an existing clause or involves the addition of a new clause and regardless of whether the amendment proposes to amend a provision not otherwise proposed to be amended by the bill.

The first problem with the parent-act rule is that it arbitrarily operates on sections not provisions generally. A strict reading of the rule would render inadmissible an amendment proposing to amend any provision not otherwise proposed to be amended by the bill. However, it seems now to be accepted that an amendment proposing to amend, for example, a subsection will be admissible so long as the bill already proposes to amend another subsection of the same section.²²⁴ While this approach is more flexible than the strict reading of the rule, it is even less justified since it makes the admissibility of amendments turn on the presence of a possibly unrelated amendment to the same section. The

²²⁴Sen. Debs., pp. 1673-4 and 1686-92 (August 11, 1987)

writer took advantage of this relaxation to propose an amendment to a definition not otherwise proposed to be amended that was considered admissible because another unrelated definition in the same section was proposed to be amended.²²⁵

The second problem with the parent-act rule is that, while it is easy to get around, the techniques for avoiding it have an adverse impact on the clarity and intelligibility of the statute law. In one case, an amendment should have been made to section 4 of the Maritime Freight Rates Act.²²⁶ However, the Bill proposed to amend section 6 of that Act for unrelated reasons, so the amendment was inserted into section 6, where it did not belong.²²⁷ It clearly belonged in section 4.

In another case, the application of section 35 of the National Transportation Act, 1987²²⁸ needed to be restricted in consequence of the enactment of the Railway Safety Act.²²⁹ Rather than proceeding in a straightforward way by amending section 35, it was necessary to add new subsections to the Railway Safety Act deeming certain things not to be referred

²²⁵See the First Report of the Standing Committee on Transport [for the Second Session of the Thirty-third Parliament] presented to the House of Commons on April 27, 1987, 129 C.J. 776 (re clause 302 of Bill C-18). See now section 299 of the National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.).

²²⁶Then R.S.C. 1970, c. M-3; now R.S.C. 1985, c. M-1

²²⁷See Canada, Parliament, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Transport, pp. 36:137-8 (April 14, 1987). The amendment was made to clause 296 of Bill C-18. See the Committee's Report, supra n. 225, 129 C.J. 776. See now section 294 of the National Transportation Act, 1987, ibid.

²²⁸Then S.C. 1987, c. 34. See now R.S.C. 1985, c. 28 (3rd Supp.)

²²⁹Originally S.C. 1988, c. 40; now R.S.C. 1985, c. 32 (4th Supp.)

to in section 35.²³⁰ It is difficult to see why the statute law should be cluttered up with unintelligible provisions inserted in the wrong places, sometimes even in the wrong acts, simply because of a confused and confusing procedural rule.

The third problem with the parent-act rule is that it is not really a rule; that is, its results are so arbitrary and lacking in justification that it is often (deliberately or otherwise) not applied.²³¹ It is noteworthy that one of the first invocations of the rule created such consternation in the House that some of the amendments ruled out of order by the Deputy Speaker were in fact made with the unanimous consent of the House.²³² The Speaker has recognised that the rule can be overcome by unanimous consent.²³³ It is not clear whether this is the case in committee, as the Speaker has on at least one occasion claimed a power to rule out of order at the report stage amendments accepted by

²³⁰See Canada, Parliament, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Transport, pp. 58:30-1 (April 20, 1988). The amendments were made to clauses 16 and 26 of Bill C-105. See the Fourth Report of the Standing Committee on Transport [for the Second Session of the Thirty-third Parliament] presented to the House of Commons on May 4, 1988, 129 C.J. 2618, 2619. See now subsections 16(7) and 26(6) of the Railway Safety Act, *supra* n. 229.

²³¹A recent example of its non-application is Bill C-44, where the legislative committee amended a clause by adding a new clause (!) amending a section not otherwise proposed to be amended by the Bill and (more conventionally) added three new clauses to amend sections not otherwise proposed to be amended. (C.J. 1885-7 (June 13, 1990)) For an earlier example, where a minister was permitted at report stage to amend a clause that would have amended one section so that the clause amended in addition another section that happened to be contiguous and new clauses were added with unanimous consent amending other sections of the "parent Act", see H.C. Debs., pp. 4255, 4261 and 4262, and 123 C.J. 586-7, 591 and 592 (April 7, 1978).

²³²H.C. Debs., pp. 1904-9 and 1923-31 (December 15, 1977)

²³³H.C. Debs., p. 10246 (December 20, 1975)

the committee.²³⁴ The result is that it is difficult to predict when the rule will be invoked.

²³⁴H.C. Debs., pp. 5841-2 and 5845 and 119 C.J. 499-501 (July 20, 1973). See also the remarkably unilluminating exchange between the Speaker and Mr. Ouellet, reported in H.C. Debs., p. 14545 (June 17, 1986) on the question of whether the unanimous consent of a committee is sufficient to overcome the rule. The Speaker declined to answer the question.

Part Two

The Canadian Situation

Introduction

This part examines Canadian and American use of the different techniques of amendment, in order to reach some conclusions about which technique is preferable, in light of the British debate described in Chapter Two of Part One.

The first chapter traces the rise of re-enactment to its present position as the nearly exclusive technique of amendment for Canadian federal statutes.

The second chapter describes the present conventions and practices surrounding the use of re-enactment in Canadian federal legislation.

The third chapter responds to occasional suggestions that the royal instructions to colonial governors were responsible for the rise of textual amendment in Canada and other former British colonies.

The fourth chapter attempts to draw some conclusions about the British debate and about the techniques of amendment, based on Canadian and American experiences.

Chapter One

The Rise of Re-enactment in Canada

In this chapter, the development of the Canadian system of re-enactment will be traced; it will be shown that the driving force behind the adoption of re-enactment as the preferred technique of amendment was the interests of parliamentarians, most notably their interest in understanding the effect of proposed amendments.

Early Canadian Practice

Canadian practice in the decades following Confederation was a hodge-podge of re-enactment, "blind" textual amendment and assorted devices of exclusion and application. Early Canadian banking legislation furnishes illustrations. The first general statute was enacted in 1871.²³⁵ Section 1 continued until July 1, 1881 certain provisions of the pre-Confederation charters and Acts of the banks listed in the schedule while certain other of those provisions were repealed and replaced by the provisions of the Act. An Act of 1880²³⁶ textually amended this Act, sometimes by re-enactment,²³⁷ other times by

²³⁵An Act relating to Banks and Banking, S.C. 1871, c. 5

²³⁶An Act to amend "An Act relating to Banks and Banking" and to continue for a limited time the charters of certain Banks to which the said Act applies, S.C. 1880, c. 22

²³⁷Sections 4, 7 and 8

striking out and inserting words.²³⁸ It then went on to enact independent provisions which, however, made no sense except in the context of the 1871 Act. Thus, section 10 prohibited the use of the word "bank" as a business name except where authorized by the 1871 Act or the 1880 Act "or by some other Act in force in that behalf". Section 11 continued the charters or Acts of the banks listed in the schedule until July 1, 1891. As the schedule included all the banks listed in the schedule to the 1871 Act, section 11 in fact superseded section 1 of the 1871 Act, but section 1 was not referred to or repealed. An Act of 1883²³⁹ then amended the 1871 Act, sometimes by re-enactment,²⁴⁰ sometimes by striking out and inserting words.²⁴¹ It also amended the 1880 Act by striking out and inserting words.²⁴² It then enacted more independent provisions, which again made no sense except in the context of the 1871 Act. For example, section 9 made banks punishable by fine for contraventions of certain specified provisions of the 1871 Act. Those who prepared the Revised Statutes of Canada, 1886 then consolidated these three with other Acts, under the title of the Bank Act.²⁴³

Parliamentarians first became discontented with this practice as it affected private acts. On June 23, 1887, the House of Commons adopted a standing order respecting private acts incorporating railway companies or amending such

²³⁸Sections 3, 5 and 6

²³⁹An Act further to amend an Act intituled "An Act relating to Banks and Banking," and the several Acts amending the same, S.C. 1883, c. 20

²⁴⁰Section 2

²⁴¹Section 7

²⁴²Sections 5 and 8

²⁴³R.S.C. 1886, c. 120

acts.²⁴⁴ At that time, the only way to incorporate a railway company was by Act of Parliament.²⁴⁵ The principal object of the standing order was to require private bills to be based on a model bill "copies of which can be obtained from the Clerk of the House".²⁴⁶ But it also provided that

any sections of existing Acts which are proposed to be amended shall be reprinted in full with the amendments inserted in their proper places and between brackets.

In presenting the Committee report recommending the new standing order, Sir Hector Langevin explained the basis for this provision as follows:²⁴⁷

We have found that some promoters of Bills come down with amendments to a long clause of the Railway Act, such as leaving out one word, so that one cannot tell what the provisions of the Act are unless he has it before him. Therefore, we provide that both the clause that is wanted and the clause that is proposed to be amended must be printed in full.

The 1921 Special Senate Committee

In the 1920s, the principles of the 1887 standing orders respecting private bills were applied to public bills. Napoléon-Antoine Belcourt, better

²⁴⁴21 C.J. 313-4, 412

²⁴⁵See section 3 of the Companies Act, R.S.C. 1886, c. 119

²⁴⁶The model bill is printed as Appendix K in Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada, *supra* n. 181, 2nd edition, 1892, pp. 880-1. It is not included in the third or fourth edition.

²⁴⁷H.C. Debs., p. 1115 (June 18, 1887)

known to Canadian history as the leader of the Franco-Ontarians,²⁴⁸ was the leading proponent of re-enactment as the exclusive technique of amendment.²⁴⁹ It was Belcourt who was the chairman of a special Senate Committee which reported to the Senate on May 24, 1921, in the following terms:²⁵⁰

Your Committee recommend that all Bills which propose to amend or repeal any existing statute shall, when first printed, have in parallel columns the sections of the Act proposed to be repealed or amended, and the sections as it is proposed to amend them, showing in brackets the words to be deleted in the existing Act, and showing in brackets the words to be added by said amendment.

²⁴⁸He argued the two crucial cases before the Privy Council on Ontario minority language educational rights under The British North America Act, 1867 (U.K.), 30 & 31 Vict., c. 3 (as it then was). In Ottawa Separate School Trustees v. Mackell, [1917] A.C. 62, 32 D.L.R. 1 (Ont.), the Privy Council decided that Ontario could prohibit French-language education. However, in the companion case of Ottawa Separate School Trustees v. City of Ottawa; Ottawa Separate School Trustees v. Quebec Bank, [1917] A.C. 76, 32 D.L.R. 10 (Ont.), the same tribunal decided that the powers of elected trustees could not be suspended or abolished when they refused to implement the provincial policy.

²⁴⁹Born Sept. 15, 1860; died Aug. 7, 1932. As the Dictionary of Canadian Biography has not reached the twentieth century, it may not be inappropriate to include an outline of Belcourt's life. Some of the information given in Who's Who in Canada, B.M. Greene, editor (Toronto: International Press Ltd., 20th edition, 1929), p. 1642 is wrong. Belcourt was not Speaker of the House of Commons from 1904 to 1906, but only in 1904, as his successor was elected at the beginning of the 1905 session. The following is based on the obituaries which appeared in Le Devoir and The Globe on the day following his death. He received his LL.M. from Laval in 1882 and was called to the Quebec Bar in 1884. In 1894, Belcourt became Clerk of the Peace and Crown Attorney for Carleton County, Ontario. He was elected to the House of Commons to represent the City of Ottawa in 1896 and re-elected in 1900 and 1904. Perhaps as a consolation prize for not remaining Speaker, he was summoned to the King's Privy Council for Canada in 1905, although he was never a minister. Belcourt took silk in both Quebec and Ontario, in 1898 and 1899, respectively. He was summoned to the Senate in 1907 and at the time of his death was the senior Ontario senator. Belcourt was also an officer of the Légion d'Honneur.

²⁵⁰53 Sen. J. 346

The report was adopted,²⁵¹ but the debate makes clear the limited scope of what was accomplished. The Rules of the Senate were not thereby amended because the procedure for amending them had not been followed.²⁵² The Leader of the Government in the Senate (Sir James Loughheed) also pointed out the desirability of uniformity in practice between the two Houses in this respect.²⁵³

Nothing, however, was then done beyond sending a copy of the report to the Speaker of the House of Commons.²⁵⁴ In 1923 a dispute arose about the application of the 1921 Report to bills originating in the House of Commons.

On April 27, the Leader of the Government in the Senate (Hon. Raoul Dandurand) moved the second reading of Bill 84, An Act to amend the Industrial Disputes Investigation Act, 1907, which had originated in the House of Commons. An Opposition Senator (Rt. Hon. Sir George E. Foster) interjected:²⁵⁵

Honourable gentlemen, just one word before the Bill is read the second time. Take section 2, for instance. It is a very blind piece of work to find out what is meant by that. Here you are amending "section 57 of the Act, as amended by section 5 of Chapter 29 of the Statutes of 1910, and as further amended by section 5 of Chapter 29 of the Statutes of 1920." After all this, you go on to say that it is further amended by sticking in a phrase here, a phrase there, and a phrase in another place. No Philadelphia lawyer that I know of could make himself equal to this thing. Why is it that when we are amending a statute we do not simply put in black

²⁵¹Ibid.

²⁵²Sen. Debs., p. 552 (May 24, 1921)

²⁵³Ibid., p. 551

²⁵⁴53 Sen. J. 346 (May 24, 1921)

²⁵⁵Sen. Debs., pp. 347-8 (April 27, 1923)

and white before the Chamber what the law will be when the statute is amended?

The Leader of the Government referred the Senate to the text of the bill as read a first time in the House of Commons, where the existing provision was printed, with explanatory notes in which the passages proposed to be changed were italicised. However, the Opposition retorted that this text would only be of use if the Bill had not been amended in the House. This raised the question of the applicability of the 1921 Report to bills received from the House. Belcourt gave notice that²⁵⁶

[i]n the case of every Bill that comes up to this House, if the regulation [the 1921 Report] is not complied with, I am going to ask that the Bill be not considered.

The Speaker then intervened, pointing out that²⁵⁷

in the case of Bills coming from the House of Commons, unless we have them reprinted, we have no control over the form in which they are presented to us. We cannot insist that the House of Commons shall have them printed in a certain way.

The Leader of the Government admitted that, to comply with the Report,²⁵⁸

we would have to strike out that clause entirely and follow a practice which would be much better, by stating: "Section 57 is repealed and the following is substituted therefor."

²⁵⁶Ibid., p. 348

²⁵⁷Ibid., pp. 348-9

²⁵⁸Ibid., p. 349

But even this, he indicated, would not suffice because the Report required the existing provision to be printed in an explanatory note on the opposite page. The balance of the debate focussed on this latter point with senators apparently inclined to treat the whole matter as simply an omission by the Government Printing Bureau.²⁵⁹

A subsequent debate on another bill later in the same session also revolved around the problems caused for senators by the absence from the texts of bills as passed by the House of Commons of explanatory notes containing the existing provisions.²⁶⁰ Again, the Leader of the Government argued that the 1921 Report only applied to bills originating in the Senate. Belcourt put forward the contrary position:²⁶¹

I understand that when a Bill passes the House of Commons it is again sent to the Printing Bureau and is reprinted as passed by the House of Commons. Now, why at that moment our rule should not be observed I cannot understand... When a Bill passes the House of Commons why is it not sent here before being sent to the Bureau, in order that our officers may see to the fulfilment of the resolution of this House?... If the House of Commons does not choose to follow the example and adopt a rule similar to ours, are we going to abandon the rule?

²⁵⁹Ibid.

²⁶⁰Sen. Debs., pp. 360-4 (May 1, 1923)

²⁶¹Ibid., pp. 362, 363

The 1923 Special Joint Committee

A week after this debate, the Leader of the Government in the Senate proposed that a special joint committee consider, amongst other matters, "the forms of Bills and the best means of affording information and assistance in the consideration thereof at all stages of legislation in both Houses of Parliament."²⁶²

The recommendations of the Special Joint Committee were as follows:²⁶³

That the Rules of the Senate and the House of Commons respectively be amended to provide as follows:--

(1) In the preparation of Bills amending existing enactments the amendments shall not ordinarily be made by clauses which add or leave out words or substitute words for others, but by clauses which re-enact the section, subsection or other minor division, as it is amended.

(2) In the text of the Bill, on the left hand page, new matter shall be indicated by such typographical means as may best suit the varying circumstances of each case, such as brackets, italics, underlining, asterisks, etc. Opposite each clause, on the right hand page, the enactment amended thereby, or so much thereof as is essential, shall be printed with the proposed changes to be made therein similarly indicated.

(3) When a clause repeals an existing section, subsection or other minor division of a section, that section, subsection or division, or so much thereof as is essential shall be printed opposite the clause.

(4) A memorandum by the draftsman explaining briefly the reasons for each clause, shall be appended to the Bill, or distributed therewith. Whenever practicable the memorandum shall be printed on the right hand page of the Bill, in paragraphs opposite the clauses referred to and numbered correspondingly.

²⁶²60 Sen. J. 316 (May 8, 1923) and 60 C.J. 373 (May 16, 1923)

²⁶³Ibid., 469-70 (June 14, 1923)

(5) The above rules shall also as far as practicable apply to the reprinting of Bills.

"I think," said Senator Belcourt,²⁶⁴

we have at last succeeded in getting in very clear, definite and concrete language just what ought to be done with regard to the printing and reprinting of Bills coming before this House...

The Senate adopted the Report on June 15²⁶⁵ and on June 21, on Belcourt's motion, the Senate added Rule 60A to its Rules, which was virtually identical to the Committee's recommendations.²⁶⁶ The Commons concurred in the Report on June 18²⁶⁷ but, as Mr. G.H. Boivin (Lib.-Shefford, P.Q.), the Committee member who moved concurrence, explained,²⁶⁸

it was not thought by the committee that the rules [of the House of Commons] should be amended at this late stage of the session.

In 1927, the Rules of the House of Commons were revised and were henceforth known exclusively as the Standing Orders of the House of Commons. In the process of revision, the 1887 standing order was amended so as to incorporate

²⁶⁴Sen. Debs., pp. 874-5 (June 15, 1923)

²⁶⁵Ibid., p. 875

²⁶⁶60 Sen. J. 470

²⁶⁷60 C.J. 511

²⁶⁸H.C. Debs., p. 4007 (June 18, 1923)

the substance of the recommendations of the 1923 committee.²⁶⁹ It will be recalled that the 1887 standing order applied only to private bills; so did the relevant standing order after its revision in 1927, and it has never been subsequently amended.²⁷⁰

The concurrence of the House did not suffice to make the recommendations of the 1923 Special Joint Committee standing orders, as there was nothing in the concurrence to indicate that the recommendations were thereby made standing orders.²⁷¹

The Senate rule has been slightly amended since 1923. In 1968, the rule was amended to restrict it to bills originating in the Senate and to require them to be in both official languages.²⁷² This requirement was deleted in 1975, but the restriction of the rule to bills originating in the Senate was retained.²⁷³

²⁶⁹See the portion dealing with Rule 92 of the Report of the Special Committee appointed to revise the Rules of the House of Commons, 64 C.J. 233, 268-269 (March 15, 1927).

²⁷⁰See now Standing Order 136(3) to (5) of the Annotated Standing Orders of the House of Commons, 1989, supra n. 185

²⁷¹As to the requirement of an express indication that an order is to be "standing" (that is, not merely sessional), see Erskine May, 21st edition, 1989, pp. 3-4.

²⁷²See the Fourth Report of the Special Committee of the Senate on the Rules of the Senate, 115 Sen. J. 436, 462 (Nov. 28, 1968), adopted ibid., 514 (Dec. 10, 1968).

²⁷³See the Report of the Standing Committee on Standing Rules and Orders, 121 Sen. J. 521, 523 (Oct. 29, 1975), adopted ibid., 592 (Nov. 26, 1975).

The result is that the Senate has a rule which applies only to bills originating in that House while the House of Commons has a standing order which applies only to private bills. There is no rule or standing order that applies to public bills originating in the House of Commons.²⁷⁴ The vast majority of Acts of Parliament result from the enactment of public bills originating in the House of Commons.²⁷⁵

This has not prevented attempts from being made to rely on the recommendations of the 1923 Special Joint Committee in order to rule bills not complying with them out of order. Where an amending bill included "blind" amendments rather than re-enactments of the provision amended, the Speaker was "inclined to sustain" an objection to the bill.²⁷⁶ Later, the Speaker allowed the second-reading debate to proceed, although the bill did not comply with "the rules".²⁷⁷

Treating "the rules" as directory was apparently unsuccessful in securing compliance with them and on May 10, 1938, the Speaker declared that an amending bill printed without any explanatory notes was out of order. He treated the

²⁷⁴Part IV of the Appendix to the late Elmer Driedger's Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation (Ottawa: King's Printer, 1951) includes the text of the 1923 Report but (erroneously) says that the text comprises "rules as to the preparation and printing of Bills... adopted by the House of Commons of Canada on the 14th day of June, 1923." (p. 38) In fact, all that happened on that day was that the Report was presented to that House.

²⁷⁵R.V. Stewart Hyson, "The Role of the Backbencher -- An Analysis of Private Members' Bills in the Canadian House of Commons" (1974), 27 Parliamentary Affairs 262

²⁷⁶H.C. Debs., pp. 1514-7 (May 12, 1931)

²⁷⁷Ibid., p. 1655 (May 15, 1931)

recommendations of the 1923 Special Joint Committee as part of the rules of the House.²⁷⁸ This decision affected a number of bills; the Speaker later ruled that amending bills introduced without explanatory notes but reprinted with explanatory notes after the decision were in order.²⁷⁹ In the latter decision, the Speaker stated that amending bills without explanatory notes were not "in blank or ... imperfect shape" so as not to meet the requirement of Standing Order 68(3) of the House of Commons.²⁸⁰

More recently the Speaker has ruled that amending bills without explanatory notes are in order as they are not "in blank or ... imperfect shape". The Speaker then denied that the practice of following the recommendations of the 1923 Special Joint Committee could, without more, make those recommendations binding on the House.²⁸¹ This later decision is somewhat unsatisfactory in that it does not refer to the May 10, 1938 decision.

It now seems clear that the recommendations of the 1923 Special Joint Committee are not binding; that is, bills not drafted in accordance with them will not be ruled out of order if a point of order is raised.

²⁷⁸Ibid., pp. 2738-9 (May 10, 1938). The decision also appears at 76 C.J. 322.

²⁷⁹H.C. Debs., pp. 3849-50; 76 C.J. 450-1 (June 14, 1938)

²⁸⁰The Standing Order, unchanged since the First Session of the First Parliament (1867-68), provides that

No bill may be introduced either in blank or in an imperfect shape.

Supra n. 185

²⁸¹H.C. Debs., pp. 1267-8 (March 29, 1972)

Chapter Two

The Present Use of Re-enactment in Canada

This chapter examines the present practices and conventions respecting the use of re-enactment in Canadian federal legislation. As a result of the change since the 1920s in the venue of most legislative drafting, the Legislation Section of the Department of Justice has become the guardian of the recommendations of the 1923 Special Joint Committee, which have assumed the guise of drafting conventions. This role is not reflected in the Standing Orders of the House of Commons, which provide otherwise. Ever since the 1927 revision of the Standing Orders of the House of Commons, the duties of the "Joint Law Clerks of the House"²⁸² have included²⁸³

²⁸²There can be few instances of the House's neglect of its own procedures more striking than the continued reference to the "Joint Law Clerks of the House". As Driedger pointed out ("History of the Preparation of Government Legislation in Canada", Nov. 7, 1951, p. 6, National Archives of Canada, MG 31 E 39, Driedger Papers, vol. 7), one of the Joint Law Clerks retired in 1951 and was not replaced. Maurice Ollivier, who had been appointed one of the Joint Law Clerks in 1925 (see G. Pierre Normandin, ed., The Canadian Parliamentary Guide 1955 (Ottawa: 1955), pp. 272-3, later assumed the title of "Law Clerk and Parliamentary Counsel of the House of Commons" and retained this title until his retirement in 1970. This is the present title of the position. Ollivier's longevity of tenure was equalled only by J. G. A. Creighton, who was Law Clerk of the Senate from 1882 to 1932 (see Major A.L. Normandin, ed., The Canadian Parliamentary Guide 1930 (Ottawa: 1930), p. 113. Creighton was not replaced until 1935. His successor, W. G. O'Connor, seems to have been the first to use the present title of "Law Clerk and Parliamentary Counsel of the Senate".

²⁸³Standing Order 156 of the Standing Orders of the House of Commons, *supra* n. 185. For the changes made in 1927, see the portion dealing with Rule 64 of the Report of the Special Committee appointed to revise the Rules of the House of Commons, 64 C.J. 233, 252-3 (March 15, 1927).

- assist[ing] members of the House and deputy heads in drafting legislation;
- prepar[ing] Bills for the Senate after they have been passed by the House;
- revis[ing] before the third reading all amendments made by Select Committees, or in Committees of the Whole...

Driedger notes that even before 1927, when the Rules of the House made no express provision for the Law Clerk to draft legislation,²⁸⁴

the Law Clerk deemed it his duty to assist members of the House of Commons in the drafting of legislation and he assisted not only private and opposition members but also members of the Government. It seems, therefore, that when a minister wanted a Bill he could either submit to the Government a Bill drafted by himself, or by officials of his own department or by the Law Clerk. ... He could then go to the Government with this Bill, and when approved by the Government, would be the official Government measure.

Following Driedger's appointment to the Department of Justice as Parliamentary Counsel in 1944, the drafting of government legislation was progressively centralized in what was to become the Legislation Section of the Department. Driedger himself described this evolution as follows:²⁸⁵

In 1948 the government established the rule that no bills should be submitted to the government unless they had first been approved by the Department of Justice. Two years later the rule was laid down that, before the Department of Justice could be instructed to prepare a bill, a memorandum outlining the major questions of policy

²⁸⁴"History of the Preparation of Government Legislation in Canada", supra n. 282, p. 2

²⁸⁵"The Preparation of Legislation" (1953), 31 Can. Bar Rev. 34, 46

involved should be submitted to the Cabinet for approval. Finally, in 1952, the Cabinet Committee on Legislation was established.

The contours of the drafting conventions respecting the form of amending bills have in fact shifted over the years in ways that cannot be accounted for simply as applications of the recommendations of the 1923 Committee. Thus, for example, the Report seems originally to have been understood to require explanatory notes for all clauses of all bills, regardless of whether the clauses were amendments. Driedger explained the practice of the 1950s as follows:²⁸⁶

In a bill for a new Act it is not usual to have an explanatory note for each clause; one general note for the whole bill is sufficient.

The Legislation Section has subsequently discontinued this practice in relation to government bills. Only clauses of a government bill that propose to amend or repeal an enactment have explanatory notes.

Another change which has taken place since the 1950s is that reprints of bills "as passed by the House of Commons" are not printed in accordance with the recommendations of the 1923 Committee, as they neither indicate the new matter by underlining it nor contain explanatory notes.²⁸⁷ This twist is ironic given the origin of the convention in the concern of senators that they could not

²⁸⁶Elmer A. Driedger, The Composition of Legislation, (Ottawa: Queen's Printer, 1957), p. 95

²⁸⁷In the 1950s, "as passed" copies of bills were printed in accordance with the Report and contained explanatory notes: see the copies in National Archives of Canada, RG 14 D3 vol. 677.

determine the effect of amending legislation from the copies of the bill "as passed by the House of Commons". The 1923 Joint Committee was only struck because the format of bills printed as passed by one House had to conform to the dictates of the other House. Recently, there have been complaints in the Senate that senators must conflate three copies of a bill in order to understand it:

- the "first reading" copy in the House,
- the "reprinted as amended by a legislative committee" copy in the House, and
- the "as passed by the House" copy.²⁸⁸

The first of these contains the whole apparatus of explanatory notes and underlining (or sidelining). The second of these is ordered by the House committee if it amends the bill. According to the standard form of the committee report, the reprint is for the use of the House at report stage. In fact, its use is not so restricted since it underlines (or sidelines) all the amendments made in committee thereby identifying them. The third "as passed" copy contains no underlining (or sidelining) and thus does not identify amendments made at report stage; these can only be found in the Journals of the House. The apparatus of explanatory notes in the "first reading" copy is thus useless for Senators (and anyone else) unless the other two copies are at hand and are read together with it.

The Legislation Section has recently made another change: the affected portions of the provisions quoted in the explanatory notes are no longer (though

²⁸⁸Sen. Debs., p. 1984 (Feb. 11, 1986) (Sen. Eymard Corbin, Lib.-New Brunswick)

they were formerly) italicized. The new or altered portions of the provisions are still underlined (or sidelined) in the text of the bill. If, therefore, a portion of a provision has been dropped, this is only apparent after a comparison of the text of the bill and the explanatory note.

It is not always apparent how the recommendations of the 1923 Report are to be applied. The present practice can therefore be regarded as a gloss on those recommendations. For example, the Report only recommended that amendments "shall not ordinarily be made by" blind amendments. Present practice permits the use of "blind" amendments in at least two cases, consequential amendments, and terminological changes in the English or French version only. These cases are similar in that the amendments in question are legally unnecessary; there is therefore no need to reproduce the entire amended provision in order to inform parliamentarians of the effect of the amendment.

On the other hand, the recommendations of the 1923 Report have gradually been applied to regulations. The federal Regulations Act was enacted in 1950.²⁸⁹ Section 4 of the first Regulations made under that Act provided as follows:²⁹⁰

Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the standards established in the Statutes of Canada.

²⁸⁹S.C. 1950, c. 50; consolidated as R.S.C. 1952, c. 235 and R.S.C. 1970, c. R-5; repealed by S.C. 1970-71-72, c. 38, s. 34

²⁹⁰SOR/50-572, 1951 Canada Gazette Part II, p. 4; revoked by SOR/54-569, 1954 Canada Gazette Part II, p. 1807

This provision was carried into the next set of regulations, except that the form and draftsmanship were now simply to be "in accordance with the established standards", without any further specification.²⁹¹ This criterion for examination was carried into the Statutory Instruments Act,²⁹² which replaced the Regulations Act. Subsection 3(2) of the Statutory Instruments Act now provides in part as follows:

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that ...

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

While this wording is even more indefinite by reason of the omission of the article "the", there is only one standard so far as techniques of amendment are concerned. The standard is the one established in the Statutes of Canada. Re-enactment is the only technique of amendment used in Canadian delegated legislation that is subject to examination under the Statutory Instruments Act. Delegated legislation not so subject sometimes uses the technique of "blind" amendment.²⁹³

²⁹¹SOR/54-569, ibid. These Regulations have never been expressly revoked but presumably ceased to have effect on January 1, 1972 when the Statutory Instruments Act, which repealed the Regulations Act, came into force.

²⁹²S.C. 1970-71-72, c. 38; consolidated as R.S.C. 1985, c. S-22

²⁹³This was sometimes the case, for example, with the Regulations for the Transportation of Dangerous Commodities by Rail, made under section 305 of the Railway Act, R.S.C. 1985, c. R-3; repealed, R.S.C. 1985, c. 32 (4th Supp.), s. 99; regulations applicable to all railway companies continue to have effect as if they were regulations made by the Governor in Council (ibid., subs. 119(1)); regulations applicable to particular railway companies continue to have effect (continued...)

The extension of the technique of re-enactment to regulations was not inevitable. In 1963, Driedger could still write that the technique of blind amendment, though "rarely used in the Statutes of Canada", was "frequently used in regulations".²⁹⁴ By 1976, he could only state that it was "occasionally used in regulations."²⁹⁵

This extension of re-enactment illustrates how well established is the drafting convention favouring this technique, for regulations have only a general explanatory note. Nor are amending regulations printed in such a way as to indicate the affected portions of the amended regulation. In short, Canadian regulations employ none of the devices necessary to make textual amendments intelligible.

²⁹³(...continued)
as if they were orders made by the Minister of Transport (ibid., subs. 119(2)). The regulations were exempt from publication and so exempt from examination: see paragraphs 3(b) and 15(2)(g) of the Statutory Instruments Regulations, C.R.C. 1978, c. 1509. They were not, however, exempt from registration and the dates and registration numbers of amendments to them are set out each quarter in the Consolidated Index of Statutory Instruments.

²⁹⁴E.A. Driedger, Legislative Forms and Precedents, (Ottawa: Queen's Printer, 1963), p. 21

²⁹⁵Supra n. 213, p. 172

Chapter Three

The Relevance of the Royal Instructions to Colonial Governors

We saw in Chapter One that Canadian parliamentarians were responsible for the rise of re-enactment in Canada. An argument is sometimes made for another historical basis for present Canadian practices. Mr. F.A.R. Bennion, in his evidence to the Renton Committee, accounted for the prevalence of textual amendment everywhere in the Commonwealth except in Great Britain as follows:²⁹⁶

Naturally the methods they were taught from London when they were colonies have continued to be used by self-governing nations like Canada and Australia.

The royal instructions to colonial governors of the eighteenth and nineteenth centuries required express amendment and repeal of colonial laws.²⁹⁷

²⁹⁶Renton and the Need for Reform, *supra* n. 43, p. 33

²⁹⁷There is at least one case where the royal instructions still require express amendment and repeal. H.H. Marshall and K.R. Simmonds quote part of article XXV of the Hong Kong Royal Instructions 1917 to 1967 as follows ("The Future of Legislation in the United Kingdom", in Proceedings and Papers of the Fifth Commonwealth Law Conference: Edinburgh, Scotland, 24th - 29th July 1977, (Edinburgh: Fifth Commonwealth Law Conference, n.d.), pp. 69, 74-5):

In the passing of Ordinances the Governor and the Council shall observe, as far as practicable, the following Rules --

...

3. Each different matter shall be provided for by a different Ordinance, without intermixing in one and the same Ordinance such things as have no
(continued...)

However, the clauses in use in British North America were changed to such an extent that they could not, after about 1850,²⁹⁸ have accounted for developments in British North American legislative drafting.

The eighteenth-century royal instructions contained some variant of the following:²⁹⁹

You are to observe in the passing of laws that the style of enacting the same be "By the governor, council, and assembly", and no other. You are also as much as possible to observe in the passing of all laws that whatever may be requisite upon each different matter be accordingly provided for by a different law without intermixing in one and the same act such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports; and that no perpetual clause be part of any temporary law; and that no act whatever be suspended, altered, revived, confirmed, or repealed by

²⁹⁷(...continued)

proper relation to each other; and no clause is to be inserted in or annexed to any Ordinance which shall be foreign to what the title of such Ordinance imparts [*sic*], and no perpetual clause shall be part of any temporary Ordinance.

²⁹⁸It may or may not be relevant that the changes coincide with the advent of responsible government.

²⁹⁹Leonard Woods Labaree, Royal Instructions to British Colonial Governors 1670-1776, (New York: Octagon Books, Inc., 1967 [reprint of 1935 edition]), pp. 126-7. According to Labaree, the clause appeared in the instructions to the governors of the following colonies, the asterisk indicating the use of a variant in which the words "in the enacting part" were omitted:

Bahamas (1729-1740*, 1740 to at least 1776); Barbados (1710-1742*, 1742 to at least 1776); Bermuda (1713-1738*, 1738 to at least 1776); Georgia (1754-1776); Grenada (1771 to at least 1776); Jamaica (1710-1738*, 1738 to at least 1776); Leeward Islands (1711-1753*, 1753 to at least 1776); Maryland (1714-1715*); Massachusetts (1715-1741*, 1741-1776, from 1730-1776, the instructions referred to the "House of Representatives" rather than the Assembly); New Hampshire (1715-1741*, 1741-1776); New Jersey (1708-1738*, 1738-1776); New York (1703-1741*, 1741-1776); North Carolina (1730-1754*, 1754-1776); Nova Scotia (1749-1764); South Carolina (1720-1738*, 1738-1776) and Virginia (1710-1738*, 1738-1776)

general words but that the title and date of such act so suspended, altered, revived, confirmed, or repealed be particularly mentioned in the enacting part.

The closing portion requires express amendment and repeal of colonial laws.

Influence of the Royal Instructions

The legal status of the royal instructions was unclear, although eighteenth-century opinion tended not to regard a failure to comply with their terms as to the enactment of legislation as invalidating the same.³⁰⁰ The appellant in Camm v. Hansford³⁰¹ raised the issue, but the Privy Council dismissed the appeal for reasons that are unclear.³⁰²

Section 4 of the Colonial Laws Validity Act, 1865³⁰³ clarified the legal status of the royal instructions to colonial governors. The clarification, though retroactive, was irrelevant for Upper and Lower Canada (after 1840, the

³⁰⁰Joseph Henry Smith, Appeals to the Privy Council from the American Plantations, (New York: Columbia University Press, 1950), pp. 604-5. Smith mentions a 1744 bill, which did not proceed beyond a first reading in the House of Commons, that would have rendered colonial statutes invalid where enacted in contravention of the instructions (pp. 599-600).

³⁰¹November 27, 1766. See Smith, supra n. 300, pp. 608-624, and George Adrian Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776, vol. CV, no. 2, Studies in History, Economics and Public Law edited by the Faculty of Political Science of Columbia University, (New York: AMS Press, Inc., 1967 [reprint of 1922 edition]), pp. 159-60.

³⁰²Smith, supra n. 300, pp. 623-4

³⁰³28 & 29 Vict., c. 63

Province of Canada) and for the Dominion of Canada because their constitutions, including the provisions authorizing their governors to assent to laws, were contained in Acts of the British Parliament. Since these Acts made the power to assent "subject to Her Majesty's Instructions",³⁰⁴ it is probable that the royal instructions constituted a form of delegated legislation.³⁰⁵ Put another way, there would have been a conflict between section 4 of the Colonial Laws Validity Act, 1865 and the various Constitution Acts, in terms of how to resolve a conflict between the royal instructions and a colonial law. The legal status of the royal instructions to the governors of Upper and Lower Canada and to the Governor General of Canada was not therefore resolved by the enactment of section 4.

Apart from the possibility that failure to comply with their terms invalidated legislation, the royal instructions to colonial governors could have been relevant in other ways. For example, all colonial legislation was reviewed by the Colonial Office and it was only towards the middle of the nineteenth

³⁰⁴Section 55 of the Constitution Act, 1867, 30 & 31 Vict., c. 3, repeating the earlier provisions found in 31 Geo. 3, c. 31, s. 30 (1791) and 3 & 4 Vict., c. 35, s. 37 (1840). Australia and New Zealand were in the same position. See (for Australia) ss. 31 and 40 of the Australian Constitutions Act 1842, 5 & 6 Vict., c. 76, applied to Victoria, "Van Diemen's Land", South Australia and Western Australia by s. 12 of the Australian Constitutions Act 1850, 13 & 14 Vict., c. 59, and to Queensland by s. 35 of the same Act. See also s. 3 of the New South Wales Constitution Act 1855, 18 & 19 Vict., c. 54, s. 3 of the Victoria Constitution Act 1855, 18 & 19 Vict., c. 55, s. 2 of the Western Australia Constitution Act 1890, 53 & 54 Vict., c. 26, and s. 1 of the Australian States Constitution Act 1907, 7 Edw. 7, c. 7. See now ss. 8 and 9 of the Australia Act 1986 (U.K.), c. 2. See (for New Zealand) s. 56 of The New Zealand Constitution Act 1852, 15 & 16 Vict., c. 72; repealed in part, 1973 (N.Z.), No. 114, subs. 3(2); residue ceased to have effect as part of the law of New Zealand, 1986 (N.Z.), No. 114, s. 26.

³⁰⁵Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law, (New York and Washington: Frederick A Praeger Inc., 1966), p. 147.

century that the power to disallow colonial legislation fell into disuse.³⁰⁶ The review was minute.³⁰⁷ The clauses in the instructions requiring different laws for different subjects and prohibiting clauses foreign to the title were discussed as possible bases for disallowing the first Nova Scotia and New Brunswick Acts for the revision of the statutes of those two colonies.³⁰⁸

Also, the instructions, by requiring express amendment or repeal, facilitated the development of the Canadian convention respecting marginal notes for amending acts.³⁰⁹ The convention is of statutory origin, having been created in 1851 by an act of the late Province of Canada.³¹⁰ The convention continued to

³⁰⁶D.B. Swinfen, Imperial control of colonial legislation 1813-1865: A Study of British Policy towards Colonial Legislative Powers, (Oxford: Clarendon Press, 1970), p. 41

³⁰⁷Ibid., pp. 132-3:

[William] Selwyn [counsel to the Colonial Office from 1782 to 1796] remarked [that] bad spelling was the least of the faults to be found with the statutes submitted by Prince Edward Island, and the form and phraseology of the acts of the Bahamas and New Brunswick were frequently the subject of complaint.

³⁰⁸Ibid., p. 87

³⁰⁹Driedger, The Composition of Legislation and Legislative Forms and Precedents, supra n. 213, 2nd edition, 1976, p. 170:

The citation of the principal Act and all its previous amendments is ... set out in a marginal note opposite the enacting clause; and in addition, if a particular provision is being amended a second or subsequent time, the marginal note to the amending enactment includes a reference to the previous amendments.

³¹⁰S.C. 1851, c. 81, s. 2; consolidated as C.S.C. (1859), c. 5, s. 11

have a statutory basis until 1969, in the case of federal statutes,³¹¹ and 1907, in the case of Ontario statutes.³¹² The convention still has a statutory basis in Quebec in section 17 of that Province's Interpretation Act.³¹³

The royal instructions to colonial governors were therefore possibly of significance for the development of legislative drafting in British North America (and elsewhere in the British Empire). But this significance ceased, at least in British North America, after about 1850.

The Development of the Royal Instructions to Governors of Canada

The royal instructions to the Governors of Upper and Lower Canada were a variant of the eighteenth-century instructions quoted earlier.³¹⁴

³¹¹S.C. 1867-68, c. 1, s. 13; consolidated as R.S.C. 1886, c. 2, s. 13; R.S.C. 1906, c. 2, s. 14; S.C. 1925, c. 22, s. 11; consolidated as R.S.C. 1927, c. 2, s. 11; R.S.C. 1952, c. 230, s. 11; repealed S.C. 1968-69, c. 2, s. 2

³¹²S.O. 1867-68, c. 1, s. 13; consolidated as R.S.O. 1877, c. 2, s. 1; R.S.O. 1887, c. 2, s. 1; R.S.O. 1897, c. 2, s. 1; repealed S.O. 1907, c. 3, s. 4

³¹³L.R.Q. 1977, ch. I-16; consolidating S.Q. 1867-68, ch. 6, art. 6 and S.Q. 1886, ch. 95, art. 49; earlier consolidated as S.R.Q. 1888, art. 47; S.R.Q. 1909, art. 48; S.R.Q. 1925, ch. 1, art. 17; S.R.Q. 1941, ch. 1, art. 17; S.R.Q. 1964, ch. 1, art. 17

³¹⁴They are reprinted in Canada, Parliament, House of Commons, Report concerning Canadian Archives for the Year 1905, Sessional Paper No. 18, 2nd Session, 10th Parliament (1906), "Instructions to Governors: Part II" under the headings "Lower Canada Instructions to Governors 1791-1839", pp. 5-54, and "Upper Canada Instructions to Governors 1791-1839", pp. 55-114.

The relevant clause is as follows:

And for the Execution of so much of the Powers vested in you, by Our said Commission [the letters patent appointing the governor], and by virtue of the said Act [31 Geo. 3, c. 31], as relates to the declaring that you assent in Our Name to Bills passed by the Legislative Council and House
(continued...)

In 1840, Upper and Lower Canada were re-united. At first, the instructions to the Governor General of Canada simply repeated the earlier instructions, except that no particular enacting clause was required.³¹⁵ Beginning with the September 20, 1854 instructions to Sir Edmund Walker Head, the clause requiring express amendment and repeal was omitted. The remaining clauses respecting legislative forms were omitted from the June 1, 1867 instructions to Viscount Monck as Governor General of the new Dominion.³¹⁶

³¹⁴(...continued)

of Assembly, or that you withhold [sic] Our Assent therefrom, or that you reserve such Bills for the Signification of Our Royal Pleasure thereon, It is Our Will and Pleasure that you do carefully observe the following Rules, Directions and Instructions vizt

That the Style of enacting all the said Laws, Statutes and Ordinances, shall be by Us, Our Heirs, or Successors, by and with the Advice and Consent of the Legislative Council and Assembly of Our Province of Lower [or Upper] Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled [title of 31 Geo. 3, c. 31], and that no Bill in any other form shall be assented to by you in Our Name.

That each different matter be provided for by a different Law, without including in one and the same Act such Things as have no proper Relation to each other.

That no Clause be inserted in any Act or Ordinance which shall be foreign to what the Title of it imports, and that no perpetual Clause be part of any temporary Laws.

That no Law or Ordinance whatever be suspended, altered, continued, revived, or repealed by general Words; but that the Title and Date of such Law or Ordinance be particularly mentioned in the enacting part.

³¹⁵The instructions are reprinted in Canada, Parliament, House of Commons, Report concerning Canadian Archives for the Year 1905, Sessional Paper No. 18, 2nd Session, 10th Parliament, "Instructions to Governors: Part II" under the heading "United Provinces Instructions to Governors 1840-1867", pp. 115-35

³¹⁶Ibid., pp. 133-5

In 1875, the Colonial Office decided to issue standing letters patent constituting an office of governor or governor general for each colony.³¹⁷ Standing instructions were issued at the same time. Unlike previous instructions, the 1878 letters patent and instructions contained no provision requiring the veto or reservation of certain classes of bills;³¹⁸ the power to withhold assent from bills passed by both Houses of Parliament or to reserve them for the signification of the Queen's pleasure has not been used since.

New letters patent and instructions were issued in 1905³¹⁹ and 1931.³²⁰ The present letters patent³²¹ revoked the 1931 letters patent and the 1931 instructions and incorporated the few clauses of the instructions that were still relevant.

³¹⁷Alpheus Todd, Parliamentary Government in the British Colonies, (London: Longmans, Green & Co., 2nd edition, 1894), p. 109

³¹⁸Letters Patent, dated October 5, 1878, passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General of the Dominion of Canada, S.R. & O. Rev. 1904, Canada, p. 94. The letters patent and instructions were printed as Canada, Parliament, House of Commons, Sessional Paper No. 14, 1st Session, 4th Parliament (1879)

³¹⁹Letters Patent, dated June 15, 1905, passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Dominion of Canada, S.R. & O. 1905, p. 1440. See also 40 Canada Gazette, pp. 253-4 (August 4, 1906)

³²⁰Letters Patent, dated March 23, 1931, passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Dominion of Canada, S.R. & O. 1931, p. 1445. See also 65 Canada Gazette, pp. 182-4 (July 25, 1931). The 1931 letters patent were amended in 1935: S.R. & O. 1935, p. 1785

³²¹Letters Patent, dated September 8, 1947, constituting the Office of Governor-General of Canada, S.R. & O. 1947, p. 2679. See also 1947 Canada Gazette Part I, pp. 3014-6 and R.S.C. 1985, App. II, No. 31

The Decline in the Use of Express Amendment and Repeal

There was a decline in the standards of Canadian legislative drafting when the instructions ceased to be relevant after about 1850. Their subsequent rise cannot be attributed to the instructions. The succession of Ontario municipal statutes illustrates this decline and rise. The first Act, that of 1849,³²² was accompanied by an Act to expressly repeal the various special Acts that had been enacted piecemeal.³²³ The 1849 Act was expressly repealed in 1858 by the next general municipal law.³²⁴ However, the next four general municipal laws--those of 1866, 1873, 1883 and 1892--only contained general provisions repealing inconsistent enactments, without identifying them.³²⁵ It was not until 1903 that Ontario again attained the standard, originally set by the royal instructions, of identifying the enactments to be repealed.³²⁶

³²²An Act to provide, by one general law, for the erection of Municipal Corporations, and the establishment of Regulations of Police, in and for the several Counties, Cities, Towns, Townships and Villages in Upper-Canada, S.C. 1849, c. 81

³²³An Act to repeal the Acts in force in Upper-Canada, relative to the Establishment of Local and Municipal Authorities, and other matters of a like nature, S.C. 1849, c. 80

³²⁴An Act respecting the Municipal Institutions of Upper Canada, S.C. 1858, c. 99 (see s. 403).

³²⁵An Act respecting the Municipal Institutions of Upper Canada, S.C. 1866, c. 51 (see s. 428); An Act respecting Municipal Institutions in the Province of Ontario, S.O. 1873, c. 48 (see s. 515); The Consolidated Municipal Act, 1883, S.O. 1883, c. 18 (see s. 668); and The Consolidated Municipal Act, 1892, S.O. 1892, c. 42 (see s. 674).

³²⁶See s. 758 of The Consolidated Municipal Act, 1903, S.O. 1903, c. 19.

A similar decline and rise is apparent in the law of civil procedure. The Common Law Procedure Act, 1856³²⁷ contains an extensive list of enactments that were expressly repealed.³²⁸ The Ontario Judicature Act, 1881,³²⁹ which replaced it, merely repealed inconsistent enactments, without identifying them.³³⁰ The merger of the three superior courts and of the Court of Appeal as the Supreme Court of Judicature for Ontario was bound to affect three Acts³³¹ and, to the extent that they survived the 1881 Act, their provisions were consolidated together with it in R.S.O. 1887.³³² The task of identifying the extent to which The Common Law Procedure Act³³³ was consistent with the new Act and rules of court was left to those who prepared R.S.O. 1887.³³⁴ It was only with the enactment of The Judicature Act, 1895³³⁵ that Ontario re-attained the standards respecting express repeals originally reached a half-century earlier.³³⁶

³²⁷S.C. 1856, c. 43

³²⁸See s. 318.

³²⁹S.O. 1881, c. 5

³³⁰See s. 90.

³³¹The Court of Appeal Act, R.S.O. 1877, c. 38; The Superior Courts of Law Act, R.S.O. 1877, c. 39; and The Chancery Act, R.S.O. 1877, c. 40

³³²The Judicature Act, R.S.O. 1887, c. 44

³³³R.S.O. 1877, c. 50

³³⁴See Appendix A to R.S.O. 1887, pp. 2692-6.

³³⁵S.O. 1895, c. 12

³³⁶See s. 192.

Conclusion

The present use of re-enactment as a technique of amendment in Canada developed here as a result of forces internal to the Canadian political system. Whatever may be the case for the other successor states to the British Empire, Canadian drafters fell below the standards set by the royal instructions as soon as they were free to do so. It was only in the late nineteenth century, after such instructions were no longer relevant in the Canadian system of responsible government, that the present techniques began to be consistently applied.³³⁷

³³⁷Textual amendment seems to have become the dominant technique of amendment in New Zealand for reasons unrelated to New Zealand's status as a former British colony. See Ward, supra n. 145, pp. 541-2 (attributing the rise of textual amendment to dominance to H.G.R. Mason (1885-1975), Attorney General and Minister of Justice from 1935 to 1949 and again from 1957 to 1960).

Chapter Four

Some Conclusions on the Techniques of Amendment

The development of re-enactment as the dominant technique of amendment in Canada shows how parochial was the British debate of the 1960s and 1970s on the techniques of amendment. A New Zealander remarked on this at the time:³³⁸

One of the curious aspects of the Renton Report is that, although the committee received written or oral evidence from six overseas experts, including an informal discussion with the then Chief Parliamentary Counsel of New Zealand (Mr J.P. McVeagh), it does not seem to have explored the situation in the major Commonwealth countries (outside Britain), where the textual amendment system is the rule rather than the exception, to see whether it works well and gives satisfaction to the statute users as well as the legislators.

We have already suggested that most of the participants in the British debate accepted a myth that opposed the interests of legislators and users.

The plausibility of the opposition derives from its reduction of the number of possible techniques of amendment to two. The parochialism of the British debate was indispensable in maintaining this reduction. Ilbert and Mr. Bennion, a century apart, concurred in their rejection of re-enactment. Textual amendment was therefore identified with only one of its forms, "blind" amendment. Any awareness of another form, such as re-enactment, would have

³³⁸Ward, supra n. 145, p. 539

called into question the two equations of users' interests with one form of textual amendment and of legislators' interests with indirect amendment.

Likewise, the plausibility of the equations depends on there being only two sorts of interests at stake, those of users and those of legislators. In the United States, many state constitutions require the exclusive use of re-enactment in amending legislation. The first such constitutional requirement was enacted in Louisiana in 1845³³⁹ and by 1914 about one third of the states had a provision along the following lines in their constitutions:³⁴⁰

No law shall be revived or amended by reference to its title, but in such case the act revived or section amended shall be re-enacted and published at length.

A leading American legal historian has written that³⁴¹

The persistent theme of the limitations written into state constitutions after the 1840s was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of "special" and "local" legislation. The related fear, that special favors would be sought under cover was expressed in requirements that every bill bear a title clearly stating its subject matter, and that every bill deal with but one subject. The same fear was behind insistence upon many requirements, hopefully designated to insure full publicity and open deliberation of the merits of legislation, through three readings, reference to the committee, recording of the yeas and nays, and the like.

³³⁹Ernst Freund, Standards of American Legislation: An Estimate of Restrictive and Constructive Factors, (Chicago: University of Chicago Press, 1917), p. 155

³⁴⁰Chester Lloyd Jones, Statute Law Making in the United States, (Boston: The Boston Book Co., 1912), pp. 56, 178-7

³⁴¹James Willard Hurst, The Growth of American Law: The Law Makers, (Boston: Little, Brown & Co., 1950), pp. 241-2

To satisfy their desire to ensure democratic accountability for the elected legislature, American state constitutional conventions seem to have turned to the old instructions to the colonial governors. For example, the "one Act one subject" rule was first constitutionalized by New Jersey in 1844³⁴² in terms that are strongly reminiscent of a clause that first appeared in certain 1702 instructions, including those to the Governor of New Jersey, and that soon was included in the instructions to the governors of most of the colonies.³⁴³ The New Jersey provision of 1844 is quoted first, followed by the clause from the instructions. The common portions are underlined.

To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

You are also as much as possible to observe in the passing of all laws that whatever may be requisite upon each different matter be accordingly provided for by a different law without intermixing in one and the same act such things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports...

Canadian and American experience denies the truth of the equations made in the British debate. In Canada, legislators assumed that re-enactment was in their interests. In the United States, re-enactment was preferred by those who thought that there was an opposition between the interests of the people and of their representatives. On the other hand, they also thought that legislators

³⁴²Freund, supra n. 339, p. 155

³⁴³Labaree, supra n. 299, pp. 126-7

would prefer "blind" amendment, although it was Canadian legislators who were responsible for the end of the use of "blind" amendment in Canada, while in Great Britain, it was assumed that "blind" amendment, as a form of textual amendment, was not in the interests of legislators.

There does not seem to be any consistency in the way in which the interests of certain groups are identified with any given technique of amendment. It therefore seems appropriate to abandon attempts to identify such interests as a way of choosing a technique of amendment.

We have already argued that the real issues in the British debate involved striking a balance both between accessibility to the unamended enactment and accessibility to the enactment as amended and between amendments in the form of the change being made and amendments in the form of the new rule. These two issues suggest opposite conclusions on the merits of different techniques of amendment, with the result that it is impossible to validly reach a conclusion that favours any one technique of amendment.

On the first issue, the use of some form of textual amendment promotes accessibility to the text of the enactment as amended. Re-enactment involves the production of the text of the enactment as amended and "blind" amendment makes the production of the text a mechanical one. The Statute Law Society correctly noted that one result of the use of indirect amendment in Great Britain was that the consolidation of an enactment with its amendments became a task that only a specialist could accomplish.

Re-enactment promotes accessibility to the text of the enactment as amended better than does "blind" amendment. It is unnecessary to engage in the mechanical task of conflating the "blind" amendment into the text of the enactment. More importantly, re-enactment produces the text of the enactment as amended every time that the enactment is amended; "blind" amendment does not. This defect of "blind" amendment was the principal reason for its rejection by Canadian legislators in the 1920s. That is, where an enactment undergoes successive amendments, it becomes more and more difficult to produce the text of the enactment as amended.

If the only issue were that of accessibility to the text of the enactment as amended, it would be possible to envisage the techniques of amendment as a continuum, with re-enactment as the best technique, indirect amendment as the worst and "blind" amendment somewhere in the middle.

The other issue in the debate on the techniques of amendment, that is, the balance to be struck between amendments in the form of the change being made and amendments in the form of the new rule, suggests an opposite conclusion. Re-enactment makes it difficult to identify the change being made; in the absence of explanatory material, one must conflate the text of the enactment as amended and the text of the enactment as it read before the amendment. "Blind" amendment, on the other hand, identifies the change being made, as does indirect amendment.

It is less easy to envisage a continuum showing indirect amendment as the best technique of amendment and re-enactment as the worst, because it is not

clear whether identification of the change being made by an amendment is more or less important than restating the rule after the change is made. In the British debate on the techniques of amendment, the General Council of the Bar in England and Wales correctly noted that it is easier for those who know the previous rule to have the amendment made in the form of a change. But this is necessarily a temporary phenomenon. As time goes on and the amendment recedes into the past, there are fewer and fewer who know the previous rule and those who do not must, in order to understand the present rule, learn first the previous rule and then the change made by the amendment. This situation is analogous to Austin's description of the statute law in coexistence with "judiciary law" or common law. While it may be necessary to learn first the common law and then the change made in it by a statute, it is unnecessary for this situation to obtain in the case of a rule of statute law that has been amended. For this reason, the continuum of indirect amendment, "blind" amendment and re-enactment produces not so much a preference for a given technique as a basis for an informed decision depending on whether one focusses on the needs of the present generation or on those of future generations.

In view of the difficulty of determining which technique of amendment is preferable, it is interesting how often commentators prefer the combination in a single clause of a "blind" amendment, which identifies the change being made, and the text of the amended provision as amended, which states the new rule (at least in part). Ilbert noted a century ago that³⁴⁴

³⁴⁴Ilbert, p. 259

There are cases in which it may be possible to combine what may be called the popular and the technical mode of amendment, by stating at the beginning of a clause the substance of the amendment proposed to be made, and adding, in a separate subsection or otherwise, technical amendments, which make the requisite alterations in the language of the enactment amended.

In his evidence to the Select Committee on Procedure in 1971, Sir John Fiennes had also mentioned the British practice of sometimes combining both forms.³⁴⁵ Also, American commentators tend to prefer this device when not constrained by constitutional requirements.³⁴⁶

The frequency with which this combination of different techniques is favourably discussed supports the position that no single technique is better than the others in all circumstances. Which technique should be preferred will depend on factors that will vary from place to place and from time. For example, Canadian legislators favoured the adoption of re-enactment in the 1920s because it facilitated access to the text of an enactment as amended. But in another place, or at another time, it might be reasonable to prefer some other technique of amendment. It might be, for example, that the text of an enactment as amended is readily accessible because of a continuing consolidation, in the form of a loose-leaf edition or a data base or in some other form. The use of

³⁴⁵Statute Law Society, Statute Law: The Key to Clarity, supra n. 33, p. 57

³⁴⁶See, for example, Jacob van der Zee (1884-?), "Form and Language of Statutes in Iowa", Benjamin F. Shambaugh, ed., Statute Law-Making in Iowa, vol. III, Iowa Applied History Series, (Iowa City, Iowa, State Historical Society of Iowa, 1916), p. 335; Ashton R. Willard (1858-1918), A Legislative Handbook relating to the preparation of statutes with a chapter on the publication of statutes, (Boston and New York, Houghton, Mifflin & Co., 1890), pp. 74-6. This device seems to have been in use in Massachusetts when Willard was writing (see p. 77). This may be significant in accounting for the use of the same device in Ontario from the 1920s to the 1970s.

re-enactment in those circumstances would have the disadvantage of obscuring the changes being made in the law by amending legislation without any corresponding advantages in terms of facilitating the production of the text of an enactment as amended. If, in addition, no explanatory materials were available for identifying the changes, or if the explanatory materials available were inadequate for that purpose, it is difficult to see how the use of re-enactment could be justified.

Part Three

The Operation of Amending Enactments

Introduction

In this part, we shall examine the principal issues respecting the operation of amending enactments. The part consists of four chapters.

The first is about the general rule for the operation of amending enactments. Generally, amending enactments operate in the same manner and to the same extent as the enactments they amend. This rule is most easily understood by imagining that amending enactments become part of, or merge with, the enactments they amend. The rule is therefore referred to as the doctrine of merger.

The doctrine of merger is subject to an exception with respect to the temporal operation of amending enactments. Were the doctrine of merger applicable here, amending enactments would be retroactive to the commencement of the enactments they amend. Instead, however, amending enactments are treated as separate enactments for the purposes of determining their temporal operation. This exception to the doctrine of merger is dealt with in the second chapter.

The third chapter introduces the doctrine of the continuous operation of the rules contained in enactments. According to this doctrine, the operation of a rule contained in an enactment is not interrupted by reason only that the enactment is amended or repealed. In order to determine whether the operation of a rule contained in an enactment is altered or affected by a subsequent

enactment, it is necessary to examine the rule contained in the subsequent enactment. To the extent that the rules are the same, the subsequent enactment has no effect on the operation of the rule. This doctrine, which is applicable in Canada and elsewhere both as a matter of common law and statute law, replaces an earlier common-law rule pursuant to which the operation of a rule contained in an enactment was interrupted by the repeal of the enactment, regardless of whether the same rule was also contained in the repealing enactment.

The doctrine of the continuous operation of rules contained in enactments requires a distinction to be made between enactments and the rules they contain. This creates possible problems in construing references in an enactment to another enactment. Enactments seldom refer directly to the rules contained in other enactments; they usually refer only to the enactments containing the rules. The continuous operation doctrine requires a reference in an enactment to another enactment to be understood as a reference to the enactment containing the relevant rule. One aspect of this requirement is well known, namely, that a reference to a repealed enactment is to be construed, as regards matters subsequent to the repeal, as a reference to the enactment, if any, substituted for the repealed enactment. Its other aspect is less well known, namely, that a reference to a substituted enactment is to be construed, as regards matters prior to the repeal, as a reference to repealed enactment. Both of these particular applications of the continuous operation doctrine are dealt with in the fourth chapter.

Chapter One

The Doctrine of Merger³⁴⁷

This chapter deals with the doctrine of merger, that is, the rule that amending enactments operate in the same manner and to the same extent as the enactments they amend. After describing some applications of this doctrine, I consider the implications of the doctrine for the drafting of legislation. Finally, I consider the source of the doctrine.

The Application, Operation and Interpretation of Amending Enactments

According to subsection 42(3) of the Interpretation Act,³⁴⁸

An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

³⁴⁷An earlier version of a portion of this chapter was published under the title "The Location of Textual Amendments in Bills" in [1988] Statute Law Review 27. That article was written in response to a point made by Timothy Millett, "A Comparison of British and French Legislative Drafting (with particular reference to their respective Nationality Laws)", [1986] Statute Law Review 130. For Mr Millett's reply and my rejoinder, see [1988] Statute Law Review 197 and [1989] Statute Law Review 148.

³⁴⁸Supra n. 74

This provision, originally enacted in 1906,³⁴⁹ codifies the common law. As early as 1873, Canadian courts applied the doctrine of merger. In that year, the two Ontario superior courts of common law both decided that an amending enactment did not apply to persons to whom the enactment that it amended applied.

Allan v. Great Western Railway Co.³⁵⁰ and Scott et al. v. Great Western Railway Co.³⁵¹ both involved an 1871 Act that amended an 1868 Act. The 1868 Act did not apply to the Great Western Railway Company, but the 1871 Act did. The application of the 1871 Act was regarded as irrelevant in the case of those of its provisions that amended the 1868 Act. In the latter decision, Gwynne J. wrote:³⁵²

Now when the fifth section of the Act of 1871, is annexed to the fourth subsection of the twentieth section of the Act of 1868, this fifth section so annexed becomes a part of the Act of 1868, and so the second object of the Act of 1871 is perfected, and the fifth section had fulfilled the purpose for which it was enacted.

The same doctrine lies behind the rule contained in subsection 8(2) of the Interpretation Act.³⁵³ This rule, which was originally enacted in 1875,³⁵⁴ states that an amending enactment has the same territorial operation as the enactment that it amends.

³⁴⁹S.C. 1906, c. 21, s. 3

³⁵⁰(1873), 33 U.C.Q.B. 483

³⁵¹(1873), 23 U.C.C.P. 182

³⁵²Ibid., p. 188

³⁵³Supra n. 74

³⁵⁴S.C. 1875, c. 1, s. 3

It is more difficult to determine whether an amending enactment binds the Crown if the enactment that it amends binds the Crown. This question involves an apparent conflict between section 17 of the Interpretation Act, which states that enactments do not bind the Crown, and subsection 42(3), which codifies the doctrine of merger. But the conflict is apparent only. Once one treats the amending enactment as part of the enactment that it amends, the condition stated in section 17 for an enactment to bind the Crown is satisfied, since the Crown is referred to.

The three situations just described all involved an issue as to the application of an amending enactment. In all three, the doctrine of merger resolves the issue by reference to the application of the amended enactment.

The doctrine of merger also resolves a number of issues as to the operation of an enactment. It was used, for example, by the British Columbia Court of Appeal in Potter Distilleries Ltd. v. The Queen in right of British Columbia³⁵⁵ to resolve the question of whether section 61 of the Liquor Control and Licensing Act³⁵⁶ was in force. Section 93 of that Act provided that its provisions came into force on proclamation. In 1976, the Act was brought into force with the exception of several provisions including section 61. In 1977, section 61 was re-enacted.³⁵⁷ Section 34 of the amending Act provided that its provisions came into force on proclamation. The whole of the amending Act was

³⁵⁵(1981), 34 B.C.L.R. 399, [1982] 1 W.W.R. 186, 132 D.L.R. (3d) 190

³⁵⁶S.B.C. 1975, c. 38

³⁵⁷S.B.C. 1977, c. 38, s. 23

then brought into force. The Court held that this did not bring section 61 into force. At first instance, Gould J. wrote:³⁵⁸

Not surprisingly, counsel for the defendants was unable to cite any case in support of his proposition that in the chronology here "repeal and substitute" could have the effect of automatically proclaiming unproclaimed legislation.

In Potter Distilleries Ltd., the Court treated an amending enactment as not in force because the enactment that it amended was not in force.³⁵⁹ The case therefore involves an application of the doctrine of merger.³⁶⁰

If Potter Distilleries Ltd. applies the doctrine of merger to determine whether an enactment had come into force, the decision of the Appeal Division of the Supreme Court of New Brunswick in Board of Assessors of the Parish of Lancaster v. City of Saint John³⁶¹ applies the doctrine to determine whether an enactment had ceased to have effect. A 1924 Act had repealed a 1913 Act, along with several amending Acts, but had made no mention of a 1915 amending Act. The Court held that the 1915 Act had ceased to have effect. According to Harrison J.³⁶²

³⁵⁸111 D.L.R. (3d) 167, 171

³⁵⁹The Australian decision of Re Fogg; Mordue v. Mordue et al., [1972] 1 N.S.W.L.R. 416, 420 is to the same effect.

³⁶⁰The case was not concerned with the date of the coming into force of the amending enactment.

³⁶¹[1954] 4 D.L.R. 501

³⁶²Ibid., p. 508

There is no doubt that amendments to an Act become part of the Act, and it therefore follows that the repeal of c. 21 of 1913 carries with it the repeal of all amendments to that Act. It is not necessary to list the amending Acts in the repealing section and the omission of the amending Act, c. 84 of 1915 in such repealing section cannot operate to keep it in force.

The Revised Statutes do not count as repealing enactments for the purposes of this rule, that is, the repeal of an enactment by the Revised Statutes does not cause the amendments to the enactment to cease to have effect: Reg. v. Blake.³⁶³ In 1974, Prince Edward Island abolished the grand jury by way of amendments to its Judicature Act³⁶⁴ and Jury Act.³⁶⁵ The amending Acts were brought into force in 1976. In the mean time, R.S.P.E.I. 1974 came into force. The Judicature Act and the Jury Act were consolidated without the 1974 amendments.

The accused argued on the strength of Board of Assessors of the Parish of Lancaster v. City of Saint John that R.S.P.E.I. 1974, in repealing the R.S.P.E.I. 1951 versions of the Judicature Act and the Jury Act, had caused the 1974 amendments to cease to have effect, including their commencement provisions, with the result, according to the accused, that they could not be brought into force after the coming into force of R.S.P.E.I. 1974. The accused had not therefore been validly indicted. The Court rejected these arguments.

³⁶³(1978), 39 C.C.C. (2d) 138, S.C.P.E.I. App. Div.

³⁶⁴R.S.P.E.I. 1951, c. 79

³⁶⁵R.S.P.E.I. 1951, c. 81

The Court's rejection of the accused's argument was based on the fact that R.S.P.E.I. 1974 included a schedule of Acts not consolidated and not repealed by R.S.P.E.I. 1974.³⁶⁶ It is submitted, however, that the Court's decision ought to be applied even where there is no such schedule.

Statute revision, as practised in Canada today, produces two legal effects. First, the instrument known as the Revised Statutes come into force and have effect as if enacted by the relevant legislature.³⁶⁷ Secondly, the Acts set out in the repeals schedule are repealed on the day on which the Revised Statutes come into force.³⁶⁸ It follows that an Act can be related to a subsequent statute revision in one of three ways.³⁶⁹ First, the Act can be consolidated in the Revised Statutes and included in the repeals schedule. Secondly, the Act can be included in the repeals schedule without being consolidated in the Revised Statutes. Such an Act is said to be "omitted" from the Revised Statutes. This possibility must not be confused with the third possibility, namely, that the Act is not consolidated in the Revised Statutes nor included in the repeals schedule.

³⁶⁶Supra n. 363, p. 143

³⁶⁷See, for example, section 2 of the Revised Statutes of Canada, 1985 Act, R.S.C. 1985, c. 40 (3rd Supp.)

³⁶⁸See, for example, section 3 of the Revised Statutes of Canada, 1985 Act, ibid.

³⁶⁹There is in fact a fourth possibility, namely, that the Act is consolidated in the Revised Statutes without being included in the repeals schedule. This has happened on occasion, but only where a mistake is made. It is therefore of no theoretical interest.

It is possible to prepare a list of Acts in the third category by comparing the Acts examined by those responsible for the statute revision with the repeals schedule. Such a list is simply a negative of the repeals schedule. It is therefore difficult to attach legal significance to the fact that sometimes those responsible for the statute revision themselves prepare such a list for the convenience of the user.

The decision in Blake is correct, when one considers that the invariable practice in the preparation of repeals schedules in Canadian statute revisions has been not to apply the doctrine of merger. That is, amending Acts cease to have effect on the coming into force of the Revised Statutes only to the extent that they are included in the repeals schedule.

There are three reasons for this practice. The historical reason is that the practice antedates the doctrine of merger.³⁷⁰

One contemporary justification for the practice is the need to examine all Acts, including amending Acts, with a view to identifying spent provisions that are to be "omitted". (In the case of amending Acts, this class consists mainly of transitional and commencement provisions.) Since these provisions must be included in the repeals schedule, it would be artificial and even misleading for the repeals schedule to simply ignore the other provisions of amending Acts, where they consist of provisions that are in fact being consolidated.

³⁷⁰The first decisions applying the doctrine of merger are the 1873 decisions cited supra nn. 350 and 351. The first statutory enunciation of the doctrine was the 1906 amendment to the Interpretation Act cited supra n. 349.

Another contemporary justification for the practice lies in two transitional problems confronted by those responsible for preparing the Revised Statutes. The first, exemplified by the situation in Blake, is that of the Act enacted but not yet in force. It is often preferable to exclude amending Acts that are not yet in force from the Revised Statutes in order to produce a complete consolidation of the law that is in force. The second situation is that of the Act enacted after the cut-off date for consolidation in the Revised Statutes. It would be unfortunate, to say the least, if the penalty for the existence of a period between the cut-off date and the date on which the Revised Statutes come into force were that all amending Acts enacted during that period ceased to have effect.

For these reasons, the repeals schedules of Revised Statutes constitute an exception to the rule that the operation of amending enactments is the same as that of the enactments they amend.

Besides issues of the operation of amending enactments, the doctrine of merger is also used to resolve a number of issues as to the interpretation of amending enactments. There is, for example, a line of cases in both the United States³⁷¹ and Australia³⁷² deciding that the words "this Act" in the amended provision refer to the enactment amended and not to the amending enactment. To the like effect are the American cases holding that words such as "hereafter"

³⁷¹Sutherland Stat. Const. s. 22.35 (4th edition, 1985)

³⁷²The Trustees Executors and Agency Co. Ltd. v. Gleeson (1959), 102 C.L.R. 334 (Vict.) and Ocean Road Motel Pty. Ltd. v. Pacific Acceptance Corp. Ltd. et al. (1963), 109 C.L.R. 276 (Vict.)

and "after the coming into force of this Act" refer to the period beginning with the coming into force of the enactment amended.³⁷³

The doctrine of merger is subject to the expression of a contrary intention.³⁷⁴ The very purpose of an amending enactment may be to extend the application of the enactment amended to persons to whom or to provinces to which that enactment did not previously apply. Driedger notes that drafters sometimes make the mistake of assuming that "the coming into force of this Act" refers to the coming into force of the amending Act, rather than to the coming into force of the Act that it amends.³⁷⁵ Where such mistakes are made, the courts are prepared to find a contrary intention.³⁷⁶

³⁷³Sutherland Stat. Const. s. 22.33 (4th edition, 1985)

³⁷⁴Subsection 42(3) of the Interpretation Act, supra n. 74, is expressed to apply only "as far as consistent with the tenor" of the amending enactment. Subsection 8(2) also contains its own exception. In addition, subsections 8(2) and 42(3) are subject to "a contrary intention" pursuant to subsection 3(1).

³⁷⁵Driedger, The Composition of Legislation and Legislative Forms and Precedents, supra n. 213, 2nd edition, 1976, p. 110

³⁷⁶In Associated Pulp and Paper Mills Ltd. v. Bramich, [1960] Tas. S.R. 165, the Court held that a reference to "the coming into force of this section" referred to the coming into force of the amendment as the amendment would otherwise have been legally ineffective.

Implications of the Doctrine for the Drafting of Legislation

The doctrine of merger has three principal implications for the drafting of legislation. First, amendments in a bill that enacts a new statute should be located so that³⁷⁷

they can be omitted on revision without affecting other provisions or cross-references within the statute.

In other words, amendments (along with repeals) should be located after transitional or temporary provisions that relate to the whole of the new Act but before the commencement provision.³⁷⁸

Secondly, it is not necessary to repeal an amending enactment when one is repealing the enactment it amends, as the amending enactment will cease to have effect by operation of law.

Thirdly, an amendment to a provision that has already been amended takes the form of an amendment to the provision (and not the form of an amendment to the earlier amendment) and need not even refer to the earlier amendment.

³⁷⁷Uniform Law Conference of Canada, Proceedings of the sixtieth annual meeting held at St. John's, Newfoundland, August, 1978, p. 75. The quotation is taken from the commentary on the 1978 Canadian Legislative Drafting Conventions, *ibid.*, p. 64, by James Ryan, Q.C. and Arthur Stone, Q.C. "Omitted" is used in its ordinary sense, not its technical, statute-revision sense.

³⁷⁸See section 12 of the 1989 Canadian Legislative Drafting Conventions, Uniform Law Conference of Canada, Proceedings of the seventy-first annual meeting held at Yellowknife, Northwest Territories, August, 1989, pp. 25, 31.

In the United States, this particular implication is exhibited by a distinction between the "original-act theory" and the "replacement-act theory". According to the former,³⁷⁹

a statute which has been amended is to be read in the future as though it were originally enacted in the amended form.

The "original-act theory", which is accepted in most American states,³⁸⁰ is an American version of what is being referred to here as the doctrine of merger.

According to the "replacement-act theory", on the other hand,³⁸¹

The amendatory act supersedes the original statute. The original act or section is treated as repealed and no longer subject to amendment.

Although Canadian practice overwhelmingly favours the "original-act theory", there are traces of the "replacement-act theory". For example, the invariable practice in the preparation of history and disposal tables in Canadian statute revisions is to treat an amendment as effecting a repeal of the provision amended. The original provision has then been accounted for; in order to discover how the amended provision has been dealt with, one must consult that part of the table dealing with the amending Act. This practice is related to

³⁷⁹Sutherland Stat. Const. s. 22.10 (4th edition, 1985)

³⁸⁰Reed Dickerson, Legislative Drafting, (Boston and Toronto: Little, Brown & Co., 1954), p. 103

³⁸¹Sutherland Stat. Const. s. 22.10 (4th edition, 1985)

the practice followed in the preparation of repeals schedules, which, as we noted earlier, also forms an exception to the doctrine of merger.

Another trace of the "replacement-act theory" is the occasional practice of drafting amendments to provisions that have already been amended in the form of an amendment to the earlier amendment, where the earlier amendment is not yet in force. This practice appears to be based on a piece of Department of Justice folklore according to which the merger takes place at the time the amending enactment comes into force. Between the enactment of an amending enactment and its commencement, it is said, the amending enactment has not yet become part of the enactment that it amends.

This bit of folklore does not seem to have any basis in law. In Blake, where, it will be recalled, the amending Acts only came into force in 1976, the Court said³⁸²

Both of the above amendments were assented to by the Lieutenant-Governor on June 12, 1974, and thereupon were immediately incorporated into and became parts of their respective Acts.

Also, Driedger, having noted that "[t]here is a difference between the enactment of an Act and its commencement", goes on to state³⁸³

Some statutes become spent the moment they are enacted. For example, an amending Act that adds another section to an existing

³⁸²Supra n. 363, p. 141, per M.J. McQuaid J., Large and C.R. McQuaid JJ. concurring

³⁸³Driedger, supra n. 213, p. 110

Act is spent the moment it becomes law. At that time the original Act has been altered, the directions in the amending Act have been fulfilled and the latter is spent.

This passage is inconsistent with the merger being postponed from enactment to commencement.

There is no legal obstacle to drafting amendments to provisions that have already been amended in the form of an amendment to the provision, even if the earlier amendment is not yet in force.

There is sometimes a practical problem, in that there may be two provisions with the same number, one being the provision in its unamended form and the other being the provision in its amended form. Depending on the purpose of the further amendment, it may be necessary to amend one or the other or both of the provisions. Since the provisions have the same number, a simple reference to the number would be ambiguous. The reference can be made unambiguous by adding "as enacted by".

This suggestion represents an exception to the usual practice, which is as stated by Driedger:³⁸⁴

At one time the references to previous amendments were included in the text of the amending statute, but the practice was discontinued. The reference tended to clutter up the statute and, if a mistake were made, it would be a mistake in law with possibly serious consequences. Transfer of the citations to the margin clears the statute of unnecessary material and, if a mistake is made, no harm is done because marginal notes do not form part of the Act.

³⁸⁴Ibid., p. 170

The usual practice in drafting amendments to provisions that have already been amended is based on the doctrine of merger, or the "original-act theory". It would be possible to draft all amendments in the form of amendments to the provisions they amend. It is not possible to omit a reference to the earlier amendment where the result of that earlier amendment is two provisions bearing the same number. Outside of this relatively uncommon situation, the doctrine of merger makes it unnecessary to refer to earlier amendments.

Source and Evolution of the Doctrine of Merger

It took a long time for the connection to be made between the theoretical possibilities of the doctrine of merger and its practical implications. The length of the interval gives rise to questions about the historical and legal significance of provisions such as subsection 42(3) of the Interpretation Act, which are commonly supposed to be the legal basis of the doctrine of merger.

In the balance of this chapter, I trace the history of statutory provisions like subsection 42(3), noting their appearance after the first judicial intimations of the doctrine of merger, and conclude that it is probably inaccurate as a matter of both history and law to view such provisions as the source of the doctrine.

Subsection 42(3) of the Interpretation Act is the earliest statutory version of the doctrine of merger in Canada.³⁸⁵ It was originally enacted in 1906.³⁸⁶ Section 34 of the British Columbia Act is the only other provision of comparable age, having been originally enacted in 1907.³⁸⁷

The other provinces that have such a provision seem to have adopted it as a result of the inclusion of a version of it in the Uniform Interpretation Act.³⁸⁸

³⁸⁵Subsection 42(3) may have Australian and New Zealand antecedents. Section 5 of An Act to amend and extend the Act passed for shortening Acts of the Legislature, 22 Vic. [1858] No. 12 (N.S.W.), provided

Every Act amending an Act shall be construed with the amended Act and as part thereof, unless the contrary be declared in the amending Act.

Section 15 of the Australian federal Acts Interpretation Act 1901 is to the like effect, as is section 22 of The Acts Interpretation Act of 1954 (Queensland), 3 Eliz. 2 No. 3. More verbose statutory versions of the doctrine of merger were enacted in South Australia (section 20 of the Acts Interpretation Act, 1915-1975, repealed by section 15 of the Acts Interpretation Act Amendment Act, 1983, No. 41 of 1983), Western Australia (section 22 of the Interpretation Act, 1918-1957, since repealed by the Interpretation Act 1984, No. 12 of 1984) and New Zealand (section 5 of The Interpretation Act 1888, 1888, No. 15, consolidated as section 6 of The Acts Interpretation Act 1908, 1908, No. 1 and section 5 of the Acts Interpretation Act 1924, 1924, No. 11).

³⁸⁶S.C. 1906, c. 21, s. 3; R.S.C. 1906, c. 1, s. 22; R.S.C. 1927, c. 1, s. 22; R.S.C. 1952, c. 158, s. 22; S.C. 1967-68, c. 7, subs. 35(3); R.S.C. 1970, c. I-23, subs. 34(3); R.S.C. 1985, c. I-21, subs. 42(3)

³⁸⁷S.B.C. 1907, c. 1, s. 3, adding subs. 6(2); R.S.B.C. 1911, c. 1, s. 12; R.S.B.C. 1924, c. 1, s. 18; R.S.B.C. 1936, c. 1, s. 18; R.S.B.C. 1948, c. 1, s. 18; R.S.B.C. 1960, c. 199, s. 18; S.B.C. 1974, c. 42, s. 29; R.S.B.C. 1979, c. 206, s. 34

³⁸⁸Subs. 21(3) of the 1941 "Draft of Uniform Interpretation Act Sections", Proceedings of the twenty-third annual meeting of the Conference of Commissioners on uniformity of legislation in Canada held at Toronto September 5th, 6th, 8th, 9th and 10th, 1941, Appendix G, pp. 48, 55 and subs. 22(3) of the 1953 "Uniform Interpretation Act", Proceedings of the thirty-fifth annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada held at Quebec, P.Q. September 1st to 5th, 1953, Appendix P, pp. 118, 126. Although the first Uniform Interpretation Act was not adopted by the Uniform Law Conference (continued...)

In any event, the provisions in these provinces date from the middle third of this century.³⁸⁹ Ontario and Quebec have never had such a provision in their Interpretation Acts.

³⁸⁸(...continued)

of Canada until 1941, the Conference had been discussing drafts since 1934. These drafts included a provision based on the federal and British Columbia provisions. See, for example, subsection 22(3) of the Preliminary Draft appended to the Report of Committee on the Interpretation Acts, Proceedings of the seventeenth annual meeting of the Conference of Commissioners on uniformity of legislation in Canada held at Montreal August 30th, 31st, September 1st, 3rd, 4th, 1934, Appendix B, pp. 23, 36. Most of the provisions that were included in the 1941 Uniform Interpretation Act, including the provision under discussion here, had been recommended to the provincial legislatures for enactment in 1938. See Proceedings of the twenty-first annual meeting of the Conference of Commissioners on uniformity of legislation in Canada held at Vancouver August 11th, 12th, 13th, 15th and 16th, 1938, pp. 18, 63.

³⁸⁹Alberta: S.A. 1958, c. 32, subs. 22(3); R.S.A. 1970, c. 189, subs. 22(3); S.A. 1980, c. 70, s. 30; R.S.A. 1980, c. I-7, s. 30

Manitoba: S.M. 1939, c. 34, subs. 24(3); R.S.M. 1940, c. 105, subs. 24(3); R.S.M. 1954, c. 128, subs. 24(3); S.M. 1957, c. 33, subs. 24(3); R.S.M. 1970, c. 180, subs. 24(3); R.S.M. 1987, c. 180, subs. 23(3)

New Brunswick: S.N.B. 1973, c. 74, subs. 45(1), adding subs. 7(3); R.S.N.B. 1973, c. I-13, subs. 7(3)

Newfoundland: S.N. 1951, No. 4, subs. 27(3); R.S.N. 1952, c. 1, subs. 27(3); R.S.N. 1970, c. 182, subs. 27(3)

Northwest Territories: O.N.W.T. 1948, c. 5, s. 21; R.O.N.W.T. 1956, c. 52, s. 21; O.N.W.T. 1963 (2nd Sess.), c. 12, s. 3, enacting subs. 21(3); R.O.N.W.T. 1974, c. I-3, subs. 23(3)

Nova Scotia: S.N.S. 1954, c. 2, subs. 21(3); R.S.N.S. 1954, c. 136, subs. 21(3); R.S.N.S. 1967, c. 151, subs. 21(3); R.S.N.S. 1989, c. 235, subs. 22(3)

Prince Edward Island: S.P.E.I. 1939, c. 23, subs. 31(3); R.S.P.E.I. 1951, c. 1, subs. 30(3); R.S.P.E.I. 1974, c. I-6, subs. 30(3); S.P.E.I. 1981, c. 18, s. 30; R.S.P.E.I. 1988, c. I-8, s. 30

Saskatchewan: S.S. 1943, c. 2, subs. 21(3); R.S.S. 1953, c. 1, subs. 21(3); R.S.S. 1965, c. 1, subs. 22(3); R.S.S. 1978, c. I-11, subs. 22(3)

The most important decisions establishing the doctrine of merger were made before the relevant jurisdiction had any statutory basis for the doctrine. Allan v. Great Western Railway Co.³⁹⁰ and Scott et al. v. Great Western Railway Co.³⁹¹ applied the doctrine to federal legislation in 1873, although there was no federal statutory basis for the doctrine until 1906. Board of Assessors of the Parish of Lancaster v. City of Saint John³⁹² applied the doctrine to New Brunswick legislation in 1954, although there was no statutory basis for the doctrine in New Brunswick until 1973. The doctrine of merger is therefore part of the common law and the statutory provisions do no more than codify the doctrine.

A lengthy period elapsed between the codification of the doctrine of merger and its practical application to the drafting of legislation. For example, it was not until the middle of the twentieth century that federal legislation ceased to repeal amending enactments.³⁹³

It was not until the 1950s that federal legislation ceased to refer to earlier amendments when amending provisions that had already been amended. Driedger, writing in 1951, stated that³⁹⁴

³⁹⁰Supra n. 350

³⁹¹Supra n. 351

³⁹²Supra n. 361

³⁹³For an example of a federal statute repealing both an Act and the Acts amending it, see the schedule to The Judges Act, 1946, S.C. 1946, c. 56.

³⁹⁴Driedger, supra n. 274, p. 14

It is ... customary to give the legislative history of a section; this is ... unnecessary, but ... the practice is firmly established. For example

Section six of the said Act, as enacted by section ... of chapter ... of the statutes of ..., is repealed.

In later works, Driedger pointed out that "the practice" had been "discontinued".³⁹⁵

Why, then, was subsection 42(3) of the Interpretation Act enacted? For, as we have seen, the judicial decisions establishing the doctrine of merger antedate the enactment of subsection 42(3) in 1906 and the drafting implications of the doctrine were not put into practice for another half a century.

One may conjecture that subsection 42(3) was enacted as a way of choosing between the "original-act theory" and the "replacement-act theory". Early Canadian practice was sometimes (deliberately?) consistent with both theories. For example, a subsequent amendment of an enactment that had already been amended was often in the following terms:³⁹⁶

The subsection substituted by section 4 of chapter 32 of the statutes of 1898 for subsection 2 of section 33 of the Land Titles Act, 1894, is repealed, and the following is substituted therefor:-

³⁹⁵Supra n. 384

³⁹⁶Section 1 of An Act to amend the Land Titles Act, 1894, S.C. 1904, c. 19

Sometimes, however, the "replacement-act theory" was applied. That is, the original enactment was treated as already having been repealed and the subsequent amendment was drafted in terms of the earlier amendment:³⁹⁷

Section 4 of chapter 35 of the statutes of 1894 is repealed, and the following is enacted as section 192 of The Inland Revenue Act:--

After the enactment of subsection 42(3) of the Interpretation Act³⁹⁸ in 1906, Canadian practice gradually ceases to apply the "replacement-act theory" until only a few vestiges of this theory still survive. It is not, however, certain whether there is a causal connection. The reasons for the enactment of subsection 42(3) remain conjectural.

Conclusion

The doctrine of merger is a coherent means of dealing with issues relating to the application, operation and interpretation of amending enactments. It is also generates a number of practical suggestions for those responsible for preparing amending enactments. The doctrine has both common-law and statutory bases.

³⁹⁷Section 3 of An Act to further amend the Inland Revenue Act, S.C. 1904, c. 18

³⁹⁸Supra n. 74

Chapter Two

The Temporal Operation of Amending Enactments

This chapter deals with the temporal operation of amending enactments. The temporal operation of amending enactments is generally determined in the same way as the temporal operation of other enactments. This rule constitutes an exception to the doctrine of merger.

I first examine how the doctrine of merger leads to the conclusion that amending enactments are retroactive to the commencement of the enactments they amend. Then I cite the decisions of the Supreme Court of Canada and the High Court of Australia to show that this conclusion has not been accepted. Finally, I examine the way in which a contrary intention can appear, so that the amending enactment does operate retroactively to the commencement date of the enactment that it amends.

The Application of the Doctrine of Merger to the Temporal Operation of Amending Enactments

As the doctrine of merger developed, it was perhaps inevitable that attempts would be made to apply it to determine the temporal operation of

amending enactments. The New York Court of Appeals rejected such an attempt in Ely et al. v. Holton, where Denio C.J. wrote:³⁹⁹

It is contended, by the counsel who seek to maintain these appeals, that the amended section should be considered as though it had been originally enacted several years ago, in the same language which it now contains. ...

The form in which amendments, both of the Code and of the Revised Statutes, have generally been made, by declaring that particular sections shall be amended so as to read in a given way, was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete, the different parts might be put together without further revision, and thus form a perfect code. ...

The theory of amendments, made in the form adopted in the present instance, we take to be this : The portions of the section which are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect. In short, we attribute no effect to the plan of dove-tailing the amendment into the original section, except the one above suggested, of preserving a harmonious text, so that when future editions shall be published the scattered members shall easily adjust themselves to each other.

An amended enactment has, according to Ely et al. v. Holton, at least two commencement dates: the first, the date of the coming into force of the original enactment, and the second and subsequent dates, the dates of the coming into force of the amending enactments. The second and subsequent dates do not supersede the earlier commencement dates, which continue to apply in respect of the portions introduced on those earlier dates.

³⁹⁹15 N.Y. (1 Smith) 595, 597-8, 599 (1857)

In Reg. v. Secretary of State for the Home Department, ex p. Margueritte,⁴⁰⁰ the English Court of Appeal did not appreciate that an amended enactment has at least two commencement dates. Fearing that the doctrine of merger would require amending enactments to be treated as retroactive, the Court refused to use the doctrine to determine whether the ambiguous expression "any provision of this Act" included a provision added by that Act to another Act. The applicant was entitled to be registered as a citizen of the United Kingdom and Colonies if⁴⁰¹

throughout the period of five years ending with the date of his application to be registered ... he [had] been ordinarily resident in the United Kingdom ...

The applicant had remained in the United Kingdom unlawfully and the issue was whether he had been "ordinarily resident" there in light of subs. 33(2) of the Immigration Act 1971,⁴⁰² which provided

... that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws.

The English Court of Appeal had great difficulty in seeing how the provision quoted above conferring the right to be registered as a citizen could be other than a provision of the 1971 Act, that is, the amending Act. The Court seemed to think that holding it to be a provision of the British Nationality

⁴⁰⁰[1983] Q.B. 180, [1982] 3 All E.R. 909

⁴⁰¹subs. 5A(3) of the British Nationality Act, 1948, 11 & 12 Geo. 6 (U.K.), c. 56, added by par. 1(a) of Sch. 1 to the Immigration Act 1971 (U.K.), c. 77

⁴⁰²(U.K.), c. 77

Act, 1948,⁴⁰³ to which it had been added, would involve treating it as retroactive to the commencement of the 1948 Act.

According to Oliver L.J. (as he then was),⁴⁰⁴

[T]he legislature set about dealing with future applications ... by the device of inserting into the Act of 1948 an entirely new section, and it is quite clear that, in doing so, it can hardly have looked at the matter through 1948 eyes, for the new section itself contains a reference to the Immigration Act 1971.

His Lordship does not explain why treating an amendment to the 1948 Act as a provision of that Act rather than of the 1971 amending Act involves "looking at the matter through 1948 eyes". The same fallacy characterises the reasoning of Kerr L.J.⁴⁰⁵

His Lordship seems to assume that treating the amendment as a provision of the 1948 Act involves giving it the operation it would have had if it had been enacted in 1948 along with the other provisions of the Act. This is not so. The amendment was enacted in 1971. Giving it such an operation is to make

⁴⁰³11 & 12 Geo. 6 (U.K.), c. 56

⁴⁰⁴Q.B. 188, All E.R. 914

⁴⁰⁵"Since the provision in question relates more to nationality than to immigration, [the drafter] presumably considered that this provision had to be enacted by way of amendment of the Act of 1948 and not as a substantive provision of the Act of 1971. But in the context of the Act of 1948 it would have been impossible to qualify the words 'ordinarily resident' on the same lines as in section 7(2) and paragraph 2 of Schedule 1 to the Act of 1971, where it is made clear that these words are respectively subject to 'the immigration laws' and to 'any law relating to immigration'. The reason is that these laws were not yet in existence in 1948, and that the then existing laws in the same field have long ago been repealed and superseded by a great deal of subsequent legislation." Q.B. 191, All E.R. 917

it operate retroactively. There was nothing in the 1971 Act to indicate that the amendment was to operate retroactively. But once it came into force, it was thereafter to be treated, in terms of its operation, as a provision of the 1948 Act.⁴⁰⁶

In these decisions, the New York Court of Appeals and the English Court of Appeal confronted the retroactivity apparently inherent in the doctrine of merger. The New York Court of Appeals recognized that an amended enactment must be treated as having two or more commencement dates; the English Court of Appeal did not. Both of the decisions show how the doctrine of merger is at first misunderstood as implying that amending enactments are retroactive.

The Rule in Canada and Australia

In Canada and Australia, the temporal operation of amending enactments is determined in the same way as the temporal operation of other enactments. Although the decision of the New York Court of Appeals in Ely et al. v. Holton⁴⁰⁷ does not appear to have been referred to in any Canadian or Australian case, the authorities in both Canada and Australia are consistent with both its conclusions and its reasoning.

⁴⁰⁶Compare Sutherland Stat. Const. s. 22.33 (4th Ed., 1985): "[T]he provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect."

⁴⁰⁷Supra n. 399

The Supreme Court of Canada rejected the notion that amendments were retroactive in Ville de Montréal c. I.L.G.W.U. Center (sic).⁴⁰⁸ In that case, a specific property used by a union had been exempted in 1954 from tax. The property was expropriated and the union argued that another property, acquired to replace the expropriated property, was also tax exempt. The Union based this argument on the alleged retroactivity of a 1963 re-enactment of the provision in question so as to exempt the replacement property.

According to the late Pigeon J.⁴⁰⁹

L'intimée invoque ... le fait que le texte de 1963 décrète que l'article de 1954 « est remplacé » par le nouveau. Partant de là, elle veut qu'on en déduise qu'il faut lui donner le même effet que s'il avait été originairement édicté dans cette forme. Cela ne manque pas d'ingéniosité, mais ce n'est pas conforme au texte qui remplace aujourd'hui l'ancien article et n'est certainement pas rétroactif ...

Dans le cas présent, il est clair que la modification apportée par la loi de 1963 n'est pas de la nature d'une refonte. C'est un remplacement, non pas par une disposition substantiellement identique mais par une disposition qui comporte une différence importante. On est donc en présence d'un changement de substance et non pas d'une reproduction en termes identiques ou substantiellement identiques.

The High Court of Australia has approached the issue of the temporal operation of amending enactments in a manner similar to that of the Supreme Court of Canada in I.L.G.W.U. Centre Inc.

⁴⁰⁸[1974] S.C.R. 59, 24 D.L.R. (3d) 694 sub nom. City of Montreal v. I.L.G.W.U. Centre Inc. et al.

⁴⁰⁹S.C.R. 76-7, D.L.R. 707. Abbott, Ritchie and Hall JJ. concurred with Pigeon J.

Maxwell v. Murphy⁴¹⁰ involved the application of a new limitation period to a cause of action that had become statute-barred by reason of the expiration of the former period before the coming into force of the enactment establishing the new period. Many jurists in the common-law world considered statutes of limitations as procedural only, as barring the remedy without extinguishing the right, and therefore retrospective in their operation. At that time, the relevant interpretation act contained no provision that a repeal did not revive any thing not in force or existing at the time of the repeal. Maxwell v. Murphy is a landmark decision establishing that a defence that has arisen under the statute of limitations is a vested right and so is unaffected by subsequent changes in the law.

The presumption against the retrospective operation of enactments is not rebutted, according to Dixon C.J., by the use of an amending enactment:⁴¹¹

Section 5 of the Act 1897-1946 provided that ... every ... action should be commenced within twelve months after the death of [the] deceased person. Section 2(a) of Act No. 33 of 1953 provided simply that in this provision the words "twelve months" should be omitted and the words "six years" inserted instead.

...

In a sense the matter is governed by the interpretation of the amending statute. But the interpretation can hardly be accomplished by attempting to extract from the terms of that enactment an actual meaning or intention with reference to such a question. For it is unfortunately only too plain from the brief words substituting one period of time for the other that there was never any advertence to the effect the amendment would or might have in relation to deaths that had already occurred. The interpretation must depend upon presumption or rules of construction.

⁴¹⁰(1957), 96 C.L.R. 261 (N.S.W.)

⁴¹¹C.L.R. 266

Maxwell v. Murphy has been followed by the House of Lords,⁴¹² the Privy Council⁴¹³ and the Supreme Court of Canada⁴¹⁴ on the question of whether a defence that has arisen under the statute of limitations is a vested right.⁴¹⁵

These two decisions of the Supreme Court of Canada and the High Court of Australia establish that the usual rules and presumptions for determining the temporal operation of enactments apply in the case of amending enactments. The fact that an enactment is an amendment has, as a general rule, no bearing on the question of whether it operates retrospectively or retroactively.

Another line of cases also serves to emphasize that the doctrine of merger does not apply in determining the temporal operation of amending enactments. We saw in the previous chapter that the doctrine is sometimes expressed by the statement that an amending enactment becomes spent as soon as it comes into force, as it has then had its only effect, namely, amending another enactment. The commencement provisions of amending enactments, on the other hand, do not become spent as soon as they come into force. They remain applicable for the purpose of determining the temporal operation of the enactment. This result

⁴¹²Arnold v. Central Electricity Generating Board, [1988] A.C. 228, [1987] 3 All E.R. 694

⁴¹³Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553, [1982] 3 All E.R. 833

⁴¹⁴Martin v. Perrie, [1986] 1 S.C.R. 41, 24 D.L.R. (4th) 1

⁴¹⁵The American courts had long ago reached the same conclusion: see Wright v. Oakley et al., 5 Met. (46 Mass.) 400 (1843)

shows that the doctrine of merger, which treats amending enactments as spent, is not applied for the purpose of determining their temporal operation.

The Australian case is straightforward: commencement provisions remain applicable for determining temporal operation, even if they are repealed.⁴¹⁶

The Canadian cases are not so straightforward. They concern the repeal by the Revised Statutes of Canada, 1927 of a commencement provision, which had provided for the application to the 1925 and subsequent taxation years of a 1926 amendment⁴¹⁷ to the spousal attribution rule whereby the income of property that is transferred by a person to the person's spouse is treated as that person's income. Before the amendment, the rule contained an exception in the case of a transfer that the Minister was satisfied was not made for the purpose of avoiding income tax.⁴¹⁸ The effect of the amendment was to delete the exception.

In Minister of National Revenue v. Molson et al.,⁴¹⁹ the Supreme Court of Canada held that the effect of the repeal of the commencement provision was to shift the commencement of the 1926 amendment to the day on which the amendment received royal assent. Since the case concerned a 1925 transfer, it was held

⁴¹⁶Jones et al. v. Commissioner of Taxes, [1942] Tas. S.R. 1, app. dismd. (1943), 66 C.L.R. 675n.

⁴¹⁷S.C. 1926, c. 10, s. 7

⁴¹⁸See subs. 4(4) of The Income War Tax Act, 1917 (Can.), c. 28

⁴¹⁹[1938] S.C.R. 213, [1938] 2 D.L.R. 481, [1938-39] C.T.C. 20, 1 D.T.C. 350

that the new spousal attribution rule was inapplicable, as it no longer had retroactive effect.⁴²⁰

According to the Supreme Court of Canada, the former spousal attribution rule was also inapplicable, as the case concerned taxation years after 1926. That is, the 1926 amendment had effectively repealed the earlier version of the rule.

In Executors of the Estate of David Fasken v. Minister of National Revenue,⁴²¹ Thorson P. held that the reasoning of the Supreme Court of Canada as to the commencement of the 1926 amendment "cannot possibly ... be correct" and held that the 1926 amendment remained applicable to the 1925 and subsequent taxation years, despite the repeal of its commencement provision.⁴²² Thorson P., it is submitted, was right.

As Thorson P. pointed out,⁴²³

It is a fundamental principle that the validity of an income tax assessment and the liability of the taxpayer thereunder must be determined according to the law in force in the period for which the assessment was made and in which the liability, if any, of the taxpayer was incurred.

⁴²⁰On this point, the result of the case is the opposite of that in Jones, supra n. 416.

⁴²¹[1948] Ex. C.R. 580, [1949] 1 D.L.R. 810, [1948] C.T.C. 265, 49 D.T.C. 491

⁴²²Ex. C.R. 602, D.L.R. 831, C.T.C. 288, D.T.C. 502. On this point, the result of Fasken is the same as that in Jones, supra n. 416.

⁴²³Ex. C.R. 603, D.L.R. 832, C.T.C. 289

The Supreme Court noted in Molson that there was no "acquired, accrued, accruing or incurred" liability of the taxpayer on the coming into force of the Revised Statutes of Canada, 1927.⁴²⁴ The Court drew the conclusion that nothing was saved as to the application of the 1926 amendment to the 1925 transfer. But, as Molson involved a taxation year subsequent to the coming into force of the 1927 statute revision, the date of the transfer ought to have been irrelevant so long as it occurred during or before the taxation year in question. That is, because of Thorson P.'s "fundamental principle", there was no need to save anything as to the application of the 1926 amendment.

In Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,⁴²⁵ the Supreme Court of Canada refused to analyse the operation of the Income Tax Act in terms of taxpayers' rights or liabilities, but with a result opposite to that reached in Molson. In the following passage, Dickson J. (as he then was) has accepted Thorson P.'s "fundamental principle":⁴²⁶

The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect.

⁴²⁴supra n. 419, S.C.R. 220-2, 228-33, D.L.R. 485-7, 494-8, C.T.C. 26-7, 34-9

⁴²⁵[1977] 1 S.C.R. 271, 66 D.L.R. (3rd) 449, [1976] C.T.C. 1

⁴²⁶ibid., S.C.R. 281, D.L.R. 461, C.T.C. 8

In Gustavson Drilling, the Supreme Court held that a taxpayer could not deduct its own exploration and development expenses because, under a 1960 re-organization, the taxpayer's parent had acquired "all or substantially all" of the taxpayer's property, thereby entitling the parent to deduct from its income, and disentitling the taxpayer to deduct from its income, the taxpayer's exploration and development expenses incurred before the re-organization. Immediately after the re-organization, however, the parent was not so entitled, and the taxpayer was not so disentitled, because of certain restrictions then in force on the kinds of re-organizations entitling successor corporations to deduct predecessor corporations' exploration and development expenses. Those restrictions were removed in 1962, and the Court held that the 1962 amendment was not given a retrospective operation in being applied to disentitle the taxpayer from deducting, in the 1965 to 1968 taxation years, its pre-1960 exploration and development expenses, even though before the 1962 amendment the taxpayer was entitled to deduct them.

The result of Fasken and Gustavson Drilling is that taxable income during a taxation year is the criterion for the temporal operation of the income tax; an enactment that applies only to the determination of taxable income during the current or subsequent taxation years does not operate retrospectively. Applying this criterion, it did not matter when the transfer at issue in Molson took place. During the relevant taxation year, the statute provided for attributing to the taxpayer income of property transferred by the taxpayer to the taxpayer's spouse and the transfer had taken place before that taxation year.

The confusion in Molson arises from the failure to specify the criterion for the temporal operation of the income tax. Without this criterion, it is impossible to determine the significance of the repeal by the Revised Statutes of Canada, 1927 of the commencement provision for the 1926 amendment. The criterion, as specified in Fasken and Gustavson Drilling, is to apply enactments to the current and subsequent taxation years. The Revised Statutes of Canada, 1927 came into force in 1928; they therefore applied to the 1928 and subsequent taxation years.

The questions of the relationship between commencement provisions and the temporal operation of enactments, and of determining when commencement provisions become spent, are not peculiar to amending enactments. That such questions are thought to arise at all in the case of amending enactments shows that questions about the temporal operation of amending enactments are not answered in Canada today through the doctrine of merger.

An Exception to the Rule

The rule that the temporal operation of amending enactments is determined in the same way as the temporal operation of other enactments is subject to the expression of a contrary intention. Amending enactments are sometimes drafted so that it is impossible to ascribe two or more commencement dates to the amended enactment. In such cases, the amendment must be retroactive to the only available commencement date, namely, that of the original enactment.

The decision of the Supreme Court of Canada in Healey c. Procureur général du Québec⁴²⁷ is such a case. It concerned the ownership of the three-chain reserve in Quebec. The first paragraph of article 2252 of S.R.Q. 1909 read as follows:

Les ventes et octrois gratuits des terres de la couronne sont, et ont été depuis le 1^{er} juin 1884, sujets à une réserve, pour fins de pêche, de trois chaînes en profondeur des terres bordant les rivières et les lacs non navigables de la province.

The provision was first enacted in 1888⁴²⁸ and was made retroactive to 1884 in 1899.⁴²⁹ Doubts were expressed as to whether the provision did not merely confer on the Crown a servitude and in 1919 the Legislature adopted the following amendment:⁴³⁰

L'article 2252 des Statuts refondus, 1909, est amendé :

- a. En remplaçant les mots : « pour fins de pêche », dans la troisième ligne, par les mots : « en pleine propriété en faveur de la couronne » ...

The Supreme Court held that the 1919 amendment was retroactive to 1884. Chouinard J. formulated the issue as follows:⁴³¹

⁴²⁷[1987] 1 S.C.R. 158

⁴²⁸S.Q. 1888, c. 17, s. 1

⁴²⁹S.Q. 1899, c. 23, s. 4

⁴³⁰S.Q. 1919, c. 31, s. 1

⁴³¹S.C.R. 165 [my emphasis - A.C.L.]

Quelle était l'intention du législateur? La loi de 1919 est-elle elle-même rétroactive? Est-ce une loi simplement interprétative ou est-elle déclaratoire et par conséquent rétroactive? Ou peut-on trouver autrement l'intention du législateur de la faire rétroactive?

The Court concluded that the amendment was not declaratory because it altered rather than declared the previous law:⁴³²

Deux jugements de la Cour supérieure, MacLaren [v. Attorney General for Quebec], unreported decision, but see MacLaren v. Attorney General for Quebec, [1914] A.C. 258, P.C.] et Patenaude [v. W.C. Edwards & Co.] (1915), 21 R.L. n.s. 523] avaient écarté la prétention du gouvernement selon laquelle il avait conservé son droit de propriété et décidaient que la réserve de trois chaînes n'était qu'une servitude de pêche. Le législateur intervient pour affirmer le droit de propriété de l'État.

Instead, the Court concluded that the amendment was retroactive because it amended an already retroactive provision and did not express any intention that there be two different commencement dates:⁴³³

Il y procède en modifiant la loi qui établit cette réserve et qui a effet depuis le 1^{er} juin 1884. Le législateur ne modifie pas la date. Il y substitue simplement les mots "en pleine propriété en faveur de la couronne" aux mots "pour fins de pêche", sans aucune autre modification. Ces indices suffisent, à mon avis, pour démontrer l'intention du législature de déclarer sans équivoque la nature de ce droit ab initio. Il résulterait autrement du même art. 2252, tel que modifié, deux régimes, l'un avant 1919, l'autre après. Rien dans cette loi de 1919 me paraît manifester une telle intention.

⁴³²S.C.R. 178

⁴³³S.C.R. 178

Healey was a case where, in the words of Chouinard J., "the procedure employed by" the legislature⁴³⁴ sufficiently expressed an intention that the rule against the retroactive operation of enactments not apply. That intention was inferred from two features of the enactments there in issue. First, the enactment that was amended already contained a retroactive commencement date. Secondly, the amendment did not alter or suppress the retroactive commencement date. In these somewhat exceptional circumstances, the amendment was held to be retroactive.

Conclusion

Although it is tempting to use the doctrine of merger to create a rule about the temporal operation of amending enactments that is peculiar to those enactments, this temptation has been resisted in the United States, Canada and Australia, where amended enactments are regarded as having at least two commencement dates. Sometimes, however, it is impossible to treat the amending enactment as having its own commencement date. In those exceptional circumstances the amending enactment is regarded as having the same commencement date as the enactment that it amended, that is, it operates retroactively.

⁴³⁴S.C.R. 178

Chapter Three

The Doctrine of the Continuous Operation of Rules

This chapter develops a doctrine, referred to here as the doctrine of the continuous operation of rules, in order to deal with such apparent discontinuities in a system of statute law as amendments and repeals. The chapter begins by describing the former common-law rule prescribing the temporal operation of repealing enactments.

Next, I explore a number of attempts to limit that rule. First of all, there is the development of the provisions, found in the Interpretation Act of most Canadian jurisdictions, which were enacted to overcome the rule. Secondly, there is a line of cases which, in order to deal with the gap caused by the former common-law rule, treats substituted enactments as declaratory of the prior law and thus retrospective. Thirdly, another line of cases deals with the same problem by restricting the common-law rule to enactments that in substance are repealing enactments, thereby excluding the rule where the enactment is in form only a repealing enactment.

Finally, I attempt to synthesize some of these statutory and common-law rules in the doctrine of the continuous operation of rules. This doctrine treats enactments as the expression of rules. The temporal operation of enactments can, it will be suggested, be determined wholly by reference to the rules they

contain. To the extent that the relevant rule is the same before and after the commencement of an enactment, there is no change in the law. The rule therefore has a continuous operation, regardless of whether the effect of the coming into force of the enactment was to amend or repeal another enactment. Likewise, to the extent that the relevant rule differs before and after the commencement of an enactment, the temporal operation of the rule is determined without reference to whether the effect of the coming into force of the enactment was to amend or repeal another enactment.

The Former Common-Law Rule about the Temporal Operation of Repealing Enactments

The temporal operation of enactments is a vast subject, of which the merest sketch will be provided. This area of the law may be said to involve three elements:

- a commencement date,
- a criterion (or set of criteria) for attaching acts and events to particular times, and
- the presumption that an enactment does not operate in respect of acts and events that took place before its commencement date.

The presumption is of great antiquity in English law. Commenting on the Statute of Merton⁴³⁵ in the early thirteenth century, Henry de Bracton noted that⁴³⁶

⁴³⁵20 Hen. 3

⁴³⁶Bracton de Legibus et Consuetudinibus Angliae, fol. 228. This passage is translated as follows in Bracton on the Laws and Customs of England, translated, (continued...)

tempus spectandum erit cum omnis nova constitutio futuris formam
imponere debeat et non praeteritis.

In the early seventeenth century, Sir Edward Coke relied on this passage from Bracton and elevated it to the status of "a rule of law of Parliament" or, as we should now say, a canon of construction.⁴³⁷

Bracton's comment is still being relied on: Cartwright J. (as he then was) referred to it as a "well known maxim" in Western Minerals Ltd. et al. v. Gaumont et al.⁴³⁸

The commencement date is prescribed by law. In the case of federal statutes, the commencement date is fixed by subsection 5(1) of the Interpretation Act⁴³⁹ as the date on which the Act receives royal assent.

⁴³⁶(...continued)
with revisions and notes, by Samuel E. Thorne (Cambridge, Mass. The Belknap Press of Harvard University Press, 1977, vol. 3, p. 181):

Time must be considered, [since every new enactment ought to impose a rule on future [matters] not on past,]...

⁴³⁷2 Co. Inst. 292

⁴³⁸[1953] 1 S.C.R. 345, 369, [1953] 3 D.L.R. 245, 265

⁴³⁹R.S.C. 1985, c. I-21

The criterion (or set of criteria) for attaching acts and events to particular times is less straightforward. In what follows, I rely on a classic twentieth-century French doctrinal work, that of Paul Roubier.⁴⁴⁰

If we suppose the simple situation of the accrual of a cause of action before the commencement of an enactment, one criterion would identify the accrual as the relevant event and thus exclude the operation of the enactment on the cause of action. This criterion is in fact the principal criterion in use today.⁴⁴¹

Another criterion would ignore the accrual of the cause of action as such and use the commencement of proceedings as the relevant event. This criterion would exclude the operation of the enactment on proceedings in respect of the cause of action that were pending on the commencement of the enactment. On the other hand, the enactment would operate in respect of proceedings that were commenced after the coming into force of the enactment.⁴⁴²

A third criterion would ignore both the accrual of the cause of action and the commencement of proceedings and identify the rendering of judgment as the relevant event. This criterion would exclude the operation of the enactment on judgments that were rendered before the commencement of the enactment. The

⁴⁴⁰Le droit transitoire : Conflits des lois dans le temps (Paris : Éditions Dalloz et Sirey, 1929, 1960)

⁴⁴¹Sun Alliance Insurance Co. v. Angus, [1988] 2 S.C.R. 256, 52 D.L.R. (4th) 193. In Roubier's terminology, this involves the effet immédiat of the enactment: supra n. 440, p. 291 n. 1

⁴⁴²Roubier refers to this possibility as rétroactivité tempérée: ibid.

enactment would operate in respect not only of proceedings that were commenced after the coming into force of the enactment but also in respect of proceedings that were pending on the coming into force of the enactment.⁴⁴³

In the case of repealing enactments, the common law formerly applied the third of these criteria, that is, the rendering of judgment. Repealing enactments applied to proceedings that were commenced after the repeal or were pending on the repeal. They did not apply so as to re-open judgments that had already been rendered before the repeal.

In the case of enactments other than repealing enactments, the common law has always applied the first of these criteria, that is, the accrual of a cause of action. Enactments do not apply to proceedings that involve a cause of action that accrued before the coming into force of the enactment and that are either commenced after or pending on that coming into force.

The result of the application of different criteria for the temporal operation of repealing and other enactments was to create gaps in the law, where the former enactment could not be applied as it had been repealed yet neither could the new as it was not retrospective. One can see this gap in cases such as Rex v. Mackenzie.⁴⁴⁴ That was a case of theft of goods valued at one pound three shillings. At the time of the crime, the theft of goods whose value was

⁴⁴³Roubier refers to this possibility as rétroactivité ordinaire: ibid. A fourth possibility, not relevant here, deals with enactments that reopen judgments already rendered. Roubier calls this rétroactivité restitutive. A statute that operates retroactively does not usually have this effect: see Lemm v. Mitchell, [1912] A.C. 400, P.C. (H.K.)

⁴⁴⁴(1820), Russ. & Ry. 429 (168 E.R. 881), C.C.R.

at least five shillings was punishable by death. After the crime was committed but before the trial, the statute creating the crime was repealed. The amount of fifteen pounds became relevant for the first time, as only those who stole goods whose value was at least fifteen pounds were to be sentenced to death. In cases of theft where the value of the stolen goods was at least five shillings and not more than fifteen pounds, the accused was now liable to be sentenced to transportation for life.

In the result, neither enactment was applied and the accused was instead convicted of theft of goods whose value was less than five shillings. The basis for the decision was that the new enactment could not be applied in respect of offences committed before its coming into force, as that would be to give it a retrospective operation. On the other hand, the old enactment could not be applied either as it had been repealed before the trial. It happened that the accused could be convicted of a lesser included offence. This is a matter of happenstance. Had no such lesser included offence existed, the accused would have been acquitted altogether although at all relevant times an enactment was in force that called for an offender to be sentenced at the least to transportation for life. The gap is one between the operation of enactments and not one between the periods during which enactments are in force. In cases such as Rex v. Mackenzie, there is no gap of the latter kind; the new enactment repeals the old while substituting new rules and the repeal and the substitution both come into force at the same time.

From about the middle of the nineteenth century, there was a reaction on the part of both legislators and judges against the common-law rule about the temporal operation of repeals.

Legislative Attempts to Abolish the Common-Law Rule

The first British Interpretation Act contained a provision that where an enactment was repealed and another substituted, the repeal did not come into force until the substituted enactment did.⁴⁴⁵ This provision was imitated in some Canadian jurisdictions,⁴⁴⁶ but was not included in the first (1941) Uniform

⁴⁴⁵13 & 14 Vict., c. 21, s. 6; 52 & 53 Vict., c. 63, subs. 11(2); 1978 (U.K.), c. 30, subs. 17(1)

⁴⁴⁶Alberta, Manitoba and Ontario have never had such a provision in their acts. Nor has there ever been such a provision in the federal act.

New Brunswick's act had such a provision when originally enacted. See: S.N.B. 1851, c. 18, s. 4. The provision was omitted from R.S.N.B. 1854, c. 162, but was inserted in C.S.N.B. 1903, c. 1 as s. 26. It has remained in subsequent New Brunswick acts. See: R.S.N.B. 1927, c. 1, s. 28; S.N.B. 1950, c. 140, s. 10; R.S.N.B. 1952, c. 114, s. 10 and R.S.N.B. 1973, C. I-13, s. 10

Newfoundland's act has had such a provision since its revision after becoming a province. See: S.N. 1951 No. 4, s. 31; R.S.N. 1952, c. 1, s. 31 and R.S.N. 1970, c. 182, s. 31

The Northwest Territories' ordinance has had such a provision since 1948. See: O.N.W.T. 1948, c. 5, s. 25; R.O.N.W.T. 1956, c. 52, s. 25 and R.O.N.W.T. 1974, c. I-3, s. 27

Quebec's act has always contained such a provision. See: S.Q. 1867-68, ch. 7, art. 11; S.Q. 1886, ch. 95, art. 8; S.R.Q. 1888, art. 8; S.R.Q. 1909, art. 8; S.R.Q. 1925, ch. 1, art. 9; S.R.Q. 1941, ch. 1, art. 9; S.R.Q. 1964, ch. 1, art. 8 and L.R.Q. 1977, ch. I-16, art. 8

Saskatchewan's act has always contained such a provision. See: S.S. 1907, c. 4, s. 16; R.S.S. 1909, c. 1, s. 16; R.S.S. 1920, c. 1, s. 45; R.S.S. 1930, c. 1, s. 44; R.S.S. 1940, c. 1, s. 44; S.S. 1943, c. 2, s. 25; R.S.S. 1953, c. 1, s. 25; R.S.S. 1965, c. 1, s. 26 and R.S.S. 1978, c. I-11, s. 26

(continued...)

Interpretation Act.⁴⁴⁷ The reason for its exclusion was that some viewed it as an unnecessary adjunct to the ordinary commencement provision of the substituted enactment.⁴⁴⁸ This reasoning points to the basic flaw in the provision, assuming that it was conceived of as a way of dealing with the gap caused by the common-law approach to repealing enactments. As we saw above, the common-law rule was about the operation of repeals, not about their commencement. Because of the rule, there was a gap even where the commencement dates of the repeal and of the substituted enactment were the same. If the Interpretation Act provision was intended to deal with this problem, it was misconceived.

The exclusion of the provision from the Uniform Interpretation Act proved to be crucial, as most of the jurisdictions that have revised their interpretation acts since the adoption of the first Uniform Act have taken the opportunity to rid themselves of the provision.⁴⁴⁹

⁴⁴⁶(...continued)

The Yukon Territory's ordinance has contained such a provision since 1954. See: O.Y.T. 1954 (3rd Sess.) No. 1, s. 25; R.O.Y.T. 1958, c. 58, s. 25; R.O.Y.T. 1971, c. I-3, s. 25 and R.S.Y.T. 1986, c. 93, s. 26

⁴⁴⁷Supra n. 388

⁴⁴⁸"Supplementary Report of Manitoba Commissioners on Uniform Sections for Inclusion in Interpretation Acts", Proceedings of the Eighteenth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, held at Winnipeg, August 22nd, 23rd, 24th, 26th and 27th, 1935, Appendix G, p. 35

⁴⁴⁹British Columbia's act had such a provision from 1897 to 1974, when it was omitted. See: R.S.B.C. 1897, c. 1, s. 8; R.S.B.C. 1911, c. 1, s. 15; R.S.B.C. 1924, c. 1, s. 11; R.S.B.C. 1936, c. 1, s. 11; R.S.B.C. 1948, c. 1, s. 11; R.S.B.C. 1960, c. 199, s. 11

Nova Scotia's act had such a provision from 1900 until 1954 when it was omitted. See: R.S.N.S. 1900, c. 1, s. 16 and R.S.N.S. 1923, c. 1, s. 16

Prince Edward Island's act had such a provision from 1851 until 1939 when it was omitted. See: S.P.E.I. 1851, c. 4, s. 6 and S.P.E.I. 1878, c. 22, s. 6.

Canadian interpretation acts, unlike the British one, have developed a detailed series of prescriptions dealing with the consequences of a change in the statute law. The development has, however, been somewhat haphazard and the Canadian statutes lack any explicit conceptualization of the nature of what counts as a change in the statute law.

It is well known⁴⁵⁰ that the late Province of Canada enacted an interpretation act one year before Great Britain did.⁴⁵¹ However, this Act contains no provisions respecting the effect of repeals or indeed governing any aspect of the temporal operation of enactments.

What is not so well known is that two years before that, the Province of Nova Scotia had enacted what was presumably the first interpretation act in the British Empire.⁴⁵² It abolished the rule that the repeal of a repeal operated so as to revive the enactment first repealed,⁴⁵³ but contains nothing else that pertains to our topic. When Nova Scotia revised its statutes for the first time, in 1851, those responsible for the revision inserted in chapter 1, Of the Promulgation and Construction of Statutes, the following provision:⁴⁵⁴

⁴⁵⁰Eric Tucker, "The Gospel of Statutory Rules requiring Liberal Interpretation according to St. Peter's" (1985), 35 U.T.L.J. 113, 126-7

⁴⁵¹S.C. 1849, c. 10; consolidated as C.S.C. (1859), c. 5

⁴⁵²S.N.S. 1847, c. 7

⁴⁵³Ibid., s. 3

⁴⁵⁴R.S.N.S. (1st ser.)(1851), c. 1, s. 6

Where an act shall be repealed in whole or in part, and other provisions substituted, all persons acting under the old law shall continue to act as if appointed under the new law, until others are appointed in their stead, and all proceedings taken under the old law shall be taken up and continued under the new when not inconsistent therewith, and all penalties may be recovered and proceedings had in relation to matters which have happened before the repeal in the same manner as if the law were still in force.

The provision was repeated verbatim in subsequent revisions down to and including R.S.N.S. 1923.⁴⁵⁵

Meanwhile, the Province of New Brunswick, in its first statute revision, in 1854, had copied the Nova Scotia provision⁴⁵⁶ and introduced into British North America the rule that a reduction in punishment between the date of the commission of an offence and the date of sentence applies in respect of the sentence imposed for the offence.⁴⁵⁷ New Brunswick also provided for the continuity of regulations.⁴⁵⁸

Newfoundland, too, in its first statute revision, in 1872, copied the Nova Scotia provision.⁴⁵⁹

⁴⁵⁵R.S.N.S. (2nd ser.)(1859), c. 1, s. 6; R.S.N.S. (3rd ser.)(1864), c. 1, s. 6; R.S.N.S. (4th ser.)(1873), c. 1, s. 6; R.S.N.S. (5th ser.)(1884), c. 1, s. 6; R.S.N.S. 1900, c. 1, s. 15; R.S.N.S. 1923, c. 1, s. 15

⁴⁵⁶R.S.N.B. 1854, c. 162, s. 7; C.S.N.B. 1877, c. 120, s. 7; C.S.N.B. 1903, c. 1, s. 27; R.S.N.B. 1927, c. 1, s. 29

⁴⁵⁷R.S.N.B. 1854, c. 162, s. 9; C.S.N.B. 1877, c. 120, s. 9; C.S.N.B. 1903, c. 1, s. 29; R.S.N.B. 1927, c. 1, s. 31

⁴⁵⁸R.S.N.B. 1854, c. 162, s. 10; C.S.N.B. 1877, c. 120, s. 10; C.S.N.B. 1903, c. 1, s. 30; R.S.N.B. 1927, c. 1, s. 32

⁴⁵⁹C.S.N. (1st ser.)(1872), c. 1, s. 7; C.S.N. (2nd ser.)(1892), c. 1, s. 7(a); C.S.N. (3rd ser.) (1916), c. 1, s. 8(a)

The new Dominion of Canada reproduced in its first interpretation act the rule about appointments, proceedings and penalties.⁴⁸⁰ It also introduced the mitigation of punishment rule.⁴⁸¹ Not surprisingly, the first interpretation ordinance of the Northwest Territories followed the federal act closely.⁴⁸² Most other Canadian jurisdictions reproduced not only these two rules but also the rule providing for continuity of regulations.⁴⁸³

In 1883, Parliament amended the Interpretation Act in order to introduce the rule as to continuity of regulations and to provide for the construction of references to "provisions... substituted by way of amendment, revision or consolidation".⁴⁸⁴ The Northwest Territories imitated the federal amendments.⁴⁸⁵

⁴⁸⁰S.C. 1867-68, c. 1, s. 7(35); R.S.C. 1886, c. 1, s. 7(49)

⁴⁸¹Ibid., s. 7(37); R.S.C. 1886, c. 1, s. 7(53)

⁴⁸²O.N.W.T. 1879 No. 10, s. 3(34) (added by O.N.W.T. 1887 No. 6, s. 2) and s. 4(21); R.O.N.W.T. 1888, c. 1, s. 8(37) and (41); C.O.N.W.T. 1898, c. 1, s. 8(45) and (52)

⁴⁸³British Columbia: S.B.C. 1872, No. 1, s. 7(32), (34) and (35); C.S.B.C. 1877, c. 2, s. 7(32), (34) and (35); C.A.B.C. 1888, c. 1, s. 8(38), (40) and (41); R.S.B.C. 1897, c. 1, s. 10(42), (45) and (46); R.S.B.C. 1911, c. 1, ss. 13, 16 and 20; R.S.B.C. 1924, c. 1, ss. 12, 14 and 16; R.S.B.C. 1936, c. 1, ss. 12, 14 and 16; R.S.B.C. 1948, c. 1, ss. 12, 14 and 16; R.S.B.C. 1960, c. 199, ss. 12, 14 and 16

Manitoba: S.M. 1871, c. 1, s. 7(29), (31) and (32); C.S.M. 1880, c. 1, s. 7(32), (34) and (35); R.S.M. 1892, c. 78, ss. 11, 13 and 14; R.S.M. 1902, c. 89, ss. 11, 13 and 14; R.S.M. 1913, c. 105, ss. 30, 32 and 33

Newfoundland: C.S.N. (2nd ser.)(1892), c. 1, s. 7(a) and (c); C.S.N. (3rd ser.) (1916), c. 1, s. 8(a) and (c)

Ontario: S.O. 1868, c. 1, s. 7(33), (35) and (36); R.S.O. 1877, c. 1, s. 7(41), (43) and (44); R.S.O. 1887, c. 1, s. 8(42), (44) and (45); R.S.O. 1897, c. 1, s. 8(49), (51) and (52)

⁴⁸⁴S.C. 1883, c. 1, s. 2; R.S.C. 1886, c. 1, s. 7(50) and (51)

When they were formed, the Provinces of Alberta and Saskatchewan and the Yukon Territory incorporated these provisions, as well as the rule about appointments, proceedings and penalties and the mitigation of punishments rule, into their interpretation acts.⁴⁶⁶

Those Canadian jurisdictions which already had the rule respecting continuity of regulations now added the rule respecting the construction of references.⁴⁶⁷

Nova Scotia, which had not revised its interpretation act since its first statute revision in 1851, introduced all of these rules in its revision of 1900.⁴⁶⁸

⁴⁶⁵(...continued)

⁴⁶⁶O.N.W.T. 1887 No. 6, s. 2; R.O.N.W.T. 1888, c. 1, s. 8(38) and (39); C.O.N.W.T. 1898, c. 1, s. 8(46) and (47)

⁴⁶⁶Alberta: S.A. 1906, c. 3, s. 7(45), (46), (47) and (52)

Saskatchewan: S.S. 1907, c. 4, ss. 11, 12, 13 and 15; R.S.S. 1909, c. 1, ss. 11, 12, 13 and 15; R.S.S. 1920, c. 1, ss. 40, 41, 42 and 44; R.S.S. 1930, c. 1, ss. 39, 40, 41 and 43; R.S.S. 1940, c. 1, ss. 39, 40, 41 and 43

Yukon Territory: C.O.Y.T. 1902, c. 1, s. 8(44), (45), (46) and (51); C.O.Y.T. 1914, c. 1, s. 8(44), (45), (46) and (52)

⁴⁶⁷British Columbia: S.B.C. 1893, c. 19, s. 2; R.S.B.C. 1897, c. 1, s. 10(43); R.S.B.C. 1911, c. 1, s. 14; R.S.B.C. 1924, c. 1, s. 17; R.S.B.C. 1936, c. 1, s. 17; R.S.B.C. 1948, c. 1, s. 17; R.S.B.C. 1960, c. 199, s. 17

Manitoba: S.M. 1883, c. 48, s. 3; R.S.M. 1892, c. 78, s. 15; R.S.M. 1902, c. 89, s. 15; R.S.M. 1913, c. 105, s. 34

New Brunswick: C.S.N.B. 1903, c. 1, s. 25; R.S.N.B. 1927, c. 1, s. 27

Ontario: S.O. 1897, c. 2, s. 6; R.S.O. 1897, c. 1, s. 8(47)

⁴⁶⁸R.S.N.S. 1900, c. 1, ss. 9, 12 and 14; R.S.N.S. 1923, c. 1, ss. 9, 12 and

The second British Interpretation Act was enacted in 1889.⁴⁶⁹ Its subsection 38(1) provided for the construction of references to repealed and re-enacted provisions. Subsection 38(2) brought together various rules about the effect of repeals. It did not however contain any provision equivalent to any other of the Canadian provisions that we have just described.

The Statute Revision Commission that prepared the Canadian statute revision of 1906 recast the federal provisions respecting repeals along the lines of subsection 38(2) of the Interpretation Act, 1889.⁴⁷⁰ The remaining provisions were brought together and then distributed amongst two provisions, one stating the effect of repeals "if other provisions are substituted",⁴⁷¹ the other stating the effect of substitutions "by way of amendment, revision or consolidation".⁴⁷²

The federal example proved to be influential and was later included in the first (1941) and second (1953) Uniform Interpretation Acts.⁴⁷³ Canadian statutes gradually fell into a pattern of three separate provisions, the first dealing with the effects of repeals, the second dealing with those effects "if other

⁴⁶⁹52 & 53 Vict., c. 63

⁴⁷⁰R.S.C. 1906, c. 1, subs. 19(1); R.S.C. 1927, c. 1, subs. 19(1); R.S.C. 1952, c. 158, subs. 19(1)

⁴⁷¹R.S.C. 1906, c. 1, subs. 19(2); R.S.C. 1927, c. 1, subs. 19(2); R.S.C. 1952, c. 158, subs. 19(2)

⁴⁷²R.S.C. 1906, c. 1, s. 20; R.S.C. 1927, c. 1, s. 20; R.S.C. 1952, c. 158, s. 20

⁴⁷³See sections 22 and 23 of the "Draft of Uniform Interpretation Act Sections", supra n. 388 and sections 23 and 24 of the "Uniform Interpretation Act", ibid.

provisions (were) substituted", while the third dealt with the effects of substitutions "by way of amendment, revision or consolidation".⁴⁷⁴

The 1967 revision of the federal Interpretation Act reduced these three provisions to two, one dealing with the effect of a repeal, the other with that of a repeal and substitution.⁴⁷⁵ Subsequent revisions of the Uniform

⁴⁷⁴Alberta: R.S.A. 1922, c. 1, ss. 13 to 15; R.S.A. 1942, c. 1, ss. 18 to 20; R.S.A. 1955, c. 160, ss. 18 to 20; S.A. 1958, c. 32, ss. 23 and 24; R.S.A. 1970, c. 189, ss. 23 and 24

Manitoba: S.M. 1939, c. 34, ss. 25 and 26; R.S.M. 1940, c. 105, ss. 25 and 26; R.S.M. 1954, c. 128, ss. 25 and 26; S.M. 1957, c. 33, ss. 25 and 26; R.S.M. 1970, c. 180, ss. 25 and 26; R.S.M. 1987, c. 180, ss. 24 and 25

New Brunswick: S.N.B. 1950, c. 140, ss. 8 and 9; R.S.N.B. 1952, c. 114, ss. 8 and 9; R.S.N.B. 1973, c. I-13, ss. 8 and 9

Newfoundland: S.N. 1951 No. 4, ss. 28 and 29; R.S.N. 1952, c. 1, ss. 28 and 29; R.S.N. 1970, c. 182, ss. 28 and 29

Northwest Territories: O.N.W.T. 1948, c. 5, ss. 22 and 23; R.O.N.W.T. 1956, c. 52, ss. 22 and 23; R.O.N.W.T. 1974, c. I-3, ss. 24 and 25

Nova Scotia: S.N.S. 1954, c. 2, ss. 22 and 23; R.S.N.S. 1954, c. 136, ss. 22 and 23; R.S.N.S. 1967, c. 151, ss. 22 and 23; R.S.N.S. 1989, c. 235, ss. 23 and 24

Ontario: S.O. 1907, c. 2, s. 7(46) to (48); R.S.O. 1914, c. 1, ss. 14 to 16; R.S.O. 1927, c. 1, ss. 13 to 15; R.S.O. 1937, c. 1, ss. 14 to 16; R.S.O. 1950, c. 184, ss. 14 and 15; R.S.O. 1960, c. 191, ss. 14 and 15; R.S.O. 1970, c. 225, ss. 14 and 15; R.S.O. 1980, c. 219, ss. 14 and 15

Prince Edward Island: S.P.E.I. 1939, c. 23, ss. 32 and 33; R.S.P.E.I. 1951, c. 1, ss. 31 and 32; R.S.P.E.I. 1974, c. I-6, ss. 31 and 32

Saskatchewan: S.S. 1943, c. 2, ss. 22 and 23; R.S.S. 1953, c. 1, ss. 22 and 23; R.S.S. 1965, c. 1, ss. 23 and 24; R.S.S. 1978, c. I-11, ss. 23 and 24

Yukon Territory: O.Y.T. 1954 (3rd Sess.) No. 1, ss. 22 and 23; R.O.Y.T. 1958, c. 58, ss. 22 and 23; R.O.Y.T. 1971, c. I-3, ss. 22 and 23; R.S.Y.T. 1986, c. 93, ss. 23 and 24

⁴⁷⁵S.C. 1967-68, c. 7, ss. 35 and 36; R.S.C. 1970, c. I-23, ss. 35 and 36; R.S.C. 1985, c. I-21, ss. 43 and 44

Interpretation Act have followed this pattern of two provisions,⁴⁷⁶ as have the provinces that have recently revised their interpretation acts.⁴⁷⁷

Quebec's act also follows this pattern of two provisions but in its case, their development was different: that dealing with repeals goes back to the nineteenth century⁴⁷⁸ while that dealing with "replacements" was enacted as recently as 1941.⁴⁷⁹ The mitigation of punishment rule did not become part of the law of Quebec until 1982, when Quebec opted out of paragraph 11(i) of the Canadian Charter of Rights and Freedoms yet added an equivalent provision to its Charter of Human Rights and Freedoms.⁴⁸⁰ It was only in 1986, nearly a century

⁴⁷⁶Section 31 and subsection 32(1) of "The Interpretation Act", Proceedings of the Fifty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, held at Victoria, B.C., August 20th to August 24th, 1973, Appendix M (pp. 275 to 291) and section 30 and subsection 31(1) of the "Uniform Interpretation Act", Uniform Law Conference of Canada, Proceedings of the Sixty-sixth Annual Meeting, held at Calgary, Alberta, August, 1984, Appendix H (pp. 123 to 135)

⁴⁷⁷Alberta: S.A. 1980, c. 70, ss. 31 and 32; R.S.A. 1980, c. I-7, ss. 31 and 32

British Columbia: S.B.C. 1974, c. 42, ss. 30 and 31; R.S.B.C. 1979, c. 206, ss. 35 and 36

Prince Edward Island: S.P.E.I. 1981, c. 18, s. 32 and subs. 33(1); R.S.P.E.I. 1988, c. I-8, s. 32 and subs. 33(1)

⁴⁷⁸S.Q. 1867-68, ch. 7, art. 12; S.Q. 1886, ch. 95, art. 11; S.R.Q. 1888, art. 11; S.R.Q. 1909, art. 11; S.R.Q. 1925, ch. 1, art. 12; S.R.Q. 1941, ch. 1, art. 12; S.R.Q. 1964, ch. 1, art. 12; L.R.Q. 1977, ch. I-16, art. 12

⁴⁷⁹S.Q. 1941, ch. 14, art. 1; S.R.Q. 1941, ch. 1, art. 13; S.R.Q. 1964, ch. 1, art. 13; L.R.Q. 1977, ch. I-16, art. 13

⁴⁸⁰See s. 37.2 of the Quebec Charter, L.R.Q. 1977, ch. C-12, added by L.Q. 1982, ch. 61, art. 14. The opting-out provision, enacted under s. 33 of the Canadian Charter of Rights and Freedoms, 1982 (U.K.), c. 11, Sch. B, was L.Q. 1982, ch. 21, art. 1. It ceased to have effect on April 17, 1987, pursuant to subs. 33(3) of the Canadian Charter of Rights and Freedoms.

after every other Canadian jurisdiction, that Quebec provided in a general way for the continuity of regulations.⁴⁸¹

Most Canadian interpretation act provisions dealing with the effects of repeals and substitutions can be traced back to the middle of the nineteenth century. Although their form has been progressively refined, their substance has not, and they are still a series of particular responses to perceived problems with the common-law approach to the operation of repealing enactments. It remains to be seen whether it is possible to enunciate a coherent theory about the operation of amending enactments from this "wilderness of single instances".

In 1967, Parliament hazarded a generalization about the effects of a repeal and substitution. Paragraph 44(f) of the Interpretation Act⁴⁸² now provides as follows:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

⁴⁸¹See L.Q. 1986, ch. 22, art. 30, amending art. 13 of the Loi d'interprétation, L.R.Q. 1977, ch. I-16

⁴⁸²Supra n. 74

This provision was modelled on one customarily inserted in acts respecting statute revisions.⁴⁸³

Paragraph 44(f) has had little or no influence on subsequent Canadian legislation or jurisprudence. Only rarely referred to by the courts, no equivalent to the provision has been added to the Uniform Interpretation Act while the provinces that have revised their acts since 1967 have ignored it.

This is not surprising. Because Canadian legislation lacked a general principle about the operation of amending enactments for more than a century, the courts were compelled to develop their own, in order to deal with situations not covered by the particular provisions of interpretation acts. This process was complete by the middle of the twentieth century.

One Judicial Attempt to Change the Common-Law Rule: Substituted Enactments as Declaratory Enactments

Paragraph 44(f) of the Interpretation Act is declaratory of the common law. There is a well established line of cases treating substituted enactments as declaratory of the law where the rule expressed in both the repealed and the substituted enactment is the same. The substituted enactment can then be treated as retroactive. The retroactive operation of the substituted enactment fills the gap created by the common-law rule about the temporal operation of repealing enactments.

⁴⁸³S.C. 1886, c. 4, subs. 8(1); S.C. 1907, c. 43, subs. 7(1); S.C. 1924, c. 65, subs. 8(1); S.C. 1948, c. 67, subs. 10(1); S.C. 1964-65, c. 48, subs. 9(1); R.S.C. 1985, c. 40 (3rd Supp.), s. 4

The first in this line of cases is the decision of the English Court of Appeal in Ex parte Todd; Re Ashcroft (1887).⁴⁸⁴ At issue was whether a deed executed in 1877 could be set aside under the Bankruptcy Act, 1883.⁴⁸⁵ The Court held that it could not, but two of the judges indicated that the decision would have been different had the deed been liable to be set aside under the Bankruptcy Act, 1869,⁴⁸⁶ which had been repealed by the 1883 Act. Lord Esher M.R. wrote⁴⁸⁷

As a general rule an Act of Parliament which affects rights is not retrospective... But, if that part of s. 47 which is old be not retrospective, what would be the result? The Act of 1869 is repealed, and a number of settlements to which it applied would be left untouched by reason of the repeal... [I]t is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act - who had been doing that which the legislature thought to be wrong - should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act... [I]t is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new.

Fry L.J. disagreed with this approach:⁴⁸⁸

To say that a section of an Act is in part retrospective and in part not, strikes me as a somewhat novel mode of interpretation, and I

⁴⁸⁴19 Q.B.D. 186

⁴⁸⁵Supra n. 30

⁴⁸⁶32 & 33 Vict. (U.K.), c. 71

⁴⁸⁷at p. 195

⁴⁸⁸at p. 198

am not sure that the preservation of the provisions of s. 91 of the Bankruptcy Act of 1869 with regard to settlements executed before it was repealed is not rather to be looked for in the saving clause, s. 169, of the Act of 1883.

Nowadays, Fry L.J.'s point would be put in terms, not of a particular savings clause, but of the provision of the interpretation act preserving, on the repeal of an enactment, legal situations that arose under it. However, this solution is not always possible, as the decision of the Supreme Court of Canada in Trans-Canada Insurance Co. v. Winter shows.⁴⁸⁰

In 1930, Ontario amended The Highway Traffic Act⁴⁸⁰ to provide victims of motor vehicle accidents with a cause of action against the insurer of the tortfeasor.⁴⁸¹ The legislation applied in respect of motor vehicle liability policies issued after its coming into force. It accordingly applied in respect of a 1931 policy insuring one Axford who was responsible for a 1932 accident in which the female respondent was injured. Before she commenced an action against Axford, much less obtained a judgment against him, the relevant provisions of The Highway Traffic Act were repealed.⁴⁸² At the same time, The Insurance Act⁴⁸³ was amended to provide victims of motor vehicle accidents with a cause of action against the insurer of the tortfeasor.⁴⁸⁴ The effect of the 1932 repeal and

⁴⁸⁰[1935] S.C.R. 184, [1935] 1 D.L.R. 272

⁴⁸⁰R.S.O. 1927, c. 251

⁴⁸¹clause 87(4)(a), added by S.O. 1930, c. 47, s. 6

⁴⁸²S.O. 1932, c. 32, s. 9

⁴⁸³R.S.O. 1927, c. 222

⁴⁸⁴section 183h, added by S.O. 1932, c. 25, s. 2

amendment was to transfer the provisions added in 1930 to The Highway Traffic Act from that Act to The Insurance Act. The 1932 amendment also applied in respect of motor vehicle liability policies issued after its coming into force.

The difficulty for the victim was that while she had a vested right (sounding in damages) against Axford and Axford had a vested right (to indemnification) by his insurer, the victim's right against the insurer did not vest until she obtained a judgment against Axford. As that right had not vested before the time of the repeal, it could not be preserved on the repeal.⁴⁹⁵

The solution, according to the Supreme Court of Canada, was to apply the Insurance Act provisions retroactively. The clause applying those provisions to subsequently issued motor vehicle policies⁴⁹⁶

should not be construed as necessarily restrictive [that is, as restricting their application to such policies - A.C.L.] It is inconceivable that the legislature intended to cut off claims of third parties in all policies expired or in force at the time of the repeal of 87(4) and the enactment of 183h. Such a conclusion would mean that the potential claims or rights in futuro of third parties in policies issued as late as August 31st, 1932, would be barred although the whole term of the policy with the exception of the day of delivery was within the time covered by the new enactment.

The line of cases just canvassed affords a common-law (as opposed to statutory) basis for the temporal operation of amending enactments. To the extent that the provisions of a substituted enactment are in substance the same

⁴⁹⁵See the decision of the Ontario Court of Appeal on this point sub nom. Winter et al. v. Trans-Canada Insurance Co., [1934] O.R. 318, [1934] 3 D.L.R. 17

⁴⁹⁶S.C.R. 190, D.L.R. 276, per Hughes J.

as those of an enactment repealed by it, the provisions of the substituted enactment are retroactive to the commencement of the repealed enactment. This rule is contained in paragraph 44(f) of the Interpretation Act but is more explicit than that paragraph, in that it specifies how the substituted enactment can "have effect as a consolidation and as declaratory of the law as contained in the (repealed) enactment".

Another Judicial Attempt to Change the Common-Law Rule: The Distinction Between Substance and Form in the Identification of Repealing Enactments

Another line of cases restricts the operation of the former common-law rule prescribing the temporal operation of repeals to enactments that are, in substance, repeals. The rule then ceases to apply to enactments that only, in form, repeal earlier enactments.

An example of this approach is the Australian case of Beaumont v. Yeomans.⁴⁹⁷ The relevant interpretation act did not provide for the continuity of regulations and it was alleged that a proclamation had ceased to have effect as the Legislature had "repealed" the provision under which it was issued while "inserting" other provisions "in lieu thereof". The Supreme Court of New South Wales held that the earlier provision had not in substance been repealed, so that the common-law rule according to which regulations cease to have effect on the repeal of the statutory provisions under which they are made had no application. Jordan C.J. wrote⁴⁹⁸

⁴⁹⁷(1934), 34 S.R. (N.S.W.) 562

⁴⁹⁸p. 569

[W]hen the Legislature repeals an Act, or part of an Act, the presumption is that it intends that it shall no longer be operative; but ... when it amends an Act the presumption is that it intends that it shall continue to be operative but, as from the date of the amendment, in its amended form.

Whether an Act has been repealed or amended is a matter of substance and not one of form only.

His Honour then interpreted Ex parte Todd; Re Ashcroft⁴⁹⁹ as having determined that the Bankruptcy Act, 1883⁵⁰⁰ was in substance an amendment of the Bankruptcy Act, 1869,⁵⁰¹ though it in form repealed it.⁵⁰²

At its most sophisticated, this approach recognises that the statute law may be conceived of both as rules and as enactments. The rules can be conceived of abstractly, apart from their expression in enactments, just as the rules of the common law exist independently of their formulation by the judges. There is a need for rules about the temporal operation of the statute law because the statute law (like the common law) changes through time. But the rules about the temporal operation of the statute law relate to statute law as rules. Applying the rules about the temporal operation of the statute law to enactments involves a category mistake. Enactments come and go but this does not matter if the rules expressed by those enactments do not change. If the statute law has not

⁴⁹⁹Supra n. 484

⁵⁰⁰Supra n. 30

⁵⁰¹Supra n. 486

⁵⁰²p. 570

changed, in the sense that the rules have not changed, there is no need to apply any rule about their temporal operation.

The irrelevance of the rules about temporal operation to enactments as such is easiest to appreciate in the context of statute revision, as statute revisions do not for the most part change the rules of the statute law.

Wright v. Oakley et al.⁵⁰³ is an early American case, recognised in Canada as authoritative,⁵⁰⁴ on the special nature of repeals effected in the course of statute revision. The case arose out of an action on a bill of exchange drawn by a non-resident that had become statute-barred before the Revised Statutes (1835) came into force changing the law by providing that time only ran while the defendant was resident in the state. The Court accepted that statutes of limitation barred the remedy without extinguishing the right and that, were the statute to be repealed, all causes of action that had previously been barred would thereupon revive.⁵⁰⁵ Shaw C.J. wrote for the Court as follows:⁵⁰⁶

In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution, to avoid giving an effect to these acts, which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were

⁵⁰³supra n. 415

⁵⁰⁴See Licence Commissioners for the Licence Dist. of Frontenac v. County of Frontenac (1887), 14 O.R. 741, 745-6, Ch.D. The Ontario decision was in turn approved by the Supreme Court of Canada in Minister of National Revenue v. Molson et al., supra n. 419, S.C.R. 218-20, D.L.R. 484-5, C.T.C. 24-5, D.T.C. 351-2

⁵⁰⁵pp. 405-6

⁵⁰⁶pp. 406, 410

intended to replace them, with such modifications as were intended to be made by that revision. There was no moment, in which the repealing act stood in force, without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the reenactment of new ones.

...

The object, we think it manifest, was, not to any considerable extent to change the law, but to remove doubts, to reconcile discrepancies and contradictory enactments, to give the sanction of positive law to rules which before stood on the authority of usage, reasonable deduction and judicial decision, and to render all the enactments of the statute law more clear, concise and practical. But we think it was not intended to alter to any considerable extent the rules of law affecting the rights of parties ...

[A]lthough it cannot be said in technical strictness that a man has a vested right to plead the statute of limitations, so that it could not be taken away by an express act of the legislature; yet here we are inquiring what the legislature intended by the use of language, not repealing or professing to repeal the statute, but modifying and continuing it, with a general saving of all rights accruing or accrued, and not affecting any act done; and we are of opinion, that the legislature did not intend to take away the right, power or privilege of being protected, for the future, against actions then actually barred by the preexisting law.

Like the New South Wales Court in Beaumont v. Yeomans, the Massachusetts Court in Wright v. Oakley avoids the former common-law rule about the temporal operation of repealing enactments by treating the enactment before it as only in form a repealing enactment. In substance, according to the court, the enactment was "a continuance and modification of old laws". The issue was not whether the rules of the statute law before and after the enactment in question were identical, but whether the enactment had the effect of interrupting the operation of those rules. As noted above, the Revised Statutes had modified the relevant rules.

Viewed in this light, there is no reason to restrict Wright v. Oakley to its context of statute revision. In fact, within a generation, American courts were using Wright v. Oakley to justify a general rule about the continuous operation of rules, even where the legislature "repealed" an enactment.⁵⁰⁷ This general rule was essential in the United States, given the entrenchment in most state constitutions of a requirement to use the technique of re-enactment. As that technique involves the repetition of the unchanged portion of the amended enactment, it was necessary to ensure that its use did not interrupt the operation of the statute law, to the extent that it was unchanged.

The present American position has been described as follows:⁵⁰⁸

Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or section is expressly declared to be repealed.

This approach is similar to that of the Australian courts. It involves the creation of a new category of enactments, namely, amending enactments. These are distinguished from repealing enactments on the basis of the existence of an unchanged portion. Canadian courts have recognized the existence of a category of amending enactments. These enactments, even when they use the language of "repeal", are not treated as repealing enactments.

⁵⁰⁷The Pacific Mail Steamship Co. v. Joliffe, 2 Wall. (69 U.S.) 450 (1865)

⁵⁰⁸Sutherland Stat. Const., s. 22.33 (4th Ed., 1985)

In Reg. v. Crown Zellerbach Canada Ltd.,⁵⁰⁰ Manson J. of the British Columbia Supreme Court was faced with an argument that the effect of a "repeal and substitution" was to interrupt the operation of the enactment or, rather, that there were two enactments, one of which had been repealed and was therefore no longer applicable and the other of which could not be applied retrospectively. The case involved a prosecution under s. 498 of the Criminal Code⁵¹⁰ for an offence alleged to have been committed before 1952. The Crown sought to rely on s. 41 of the Combines Investigation Act.⁵¹¹ First enacted in 1949 as s. 39A,⁵¹² the section provided for the admissibility of documents seized on the premises of an accused, regardless of whether the documents could be proved. As originally enacted, s. 39A applied to prosecutions under, amongst other enactments, s. 498 of the Criminal Code. On December 29, 1951, part of s. 39A was "repealed and substituted" in order to extend its application to prosecutions under another enactment that came into force on the same day.⁵¹³ On November 1, 1952, s. 39A was renumbered as s. 41 and the same part of it was again "repealed and substituted" in consequence of the renumbering of another enactment.⁵¹⁴

⁵⁰⁰(1954), 14 W.W.R. 433, 111 C.C.C. 54, 21 C.R. 94

⁵¹⁰R.S.C. 1927, c. 36

⁵¹¹R.S.C. 1952, c. 314

⁵¹²S.C. 1949 (2nd Sess.), c. 12, s. 3

⁵¹³S. 37A of the Combines Investigation Act. See S.C. 1951 (2nd Sess.), c. 30, ss. 1 and 2

⁵¹⁴S. 37A was renumbered as section 34. See S.C. 1952, c. 39, ss. 4, 6 and

According to counsel for the accused,⁵¹⁵

the use of the word "repeal" results in putting an end to the section repealed and a starting de novo with a new section.

The Supreme Court of Canada subsequently decided a very similar point by applying what is now paragraph 44(c) of the Interpretation Act.⁵¹⁶ That approach will be discussed in the next chapter. In Crown Zellerbach, Manson J. relied on the Interpretation Act as an alternative basis only for his decision, as he was of the view that there was no true "repeal" of s. 41 in 1951 or 1952.⁵¹⁷ His Lordship considered that there was no interruption in the operation of section 41 because the 1951 and 1952 Acts were amending enactments.⁵¹⁸

If, as Mr. Guild [counsel for the accused] contends, [there is no decision on the point from] British or Canadian courts, the explanation is to be found in the fact that it is so obviously true that it did not require to be said in our courts.

As it seems to me, there has been a fundamental fallacy in the argument of Mr. Guild with respect to the effect of the language used in the Acts of [P]arliament in making alterations to the Combines Investigation Act and the Criminal Code. He seems to be unfamiliar with the change that has taken place in the draftsman's art in amending statutes. I well recall that when I entered the legislature of this province in 1916 and prior to that time the method of amending was to strike out words in this line or that and substitute therefor. The result was that over the years an important section amended from year to year came to be a perfect patchwork. It was a painful business to put a repeatedly amended section into readable and understandable shape.

⁵¹⁵W.W.R. 443, C.C.C. 62, C.R. 104

⁵¹⁶Howard Smith Paper Mills Ltd. et al. v. The Queen, [1957] S.C.R. 403, 8 D.L.R. (2d) 449, 116 C.C.C. 321, 26 C.R. 1

⁵¹⁷W.W.R. 445, C.C.C. 64, C.R. 105-6

⁵¹⁸W.W.R. 443, 444, C.C.C. 61-2, 63, C.R. 103-4, 105

During the years that I had the honour of being Attorney General for this province I was fortunate in having as my legislative counsel a man who was known from one end of Canada to the other as an extremely competent legislative draftsman. I refer to Mr. A. V. Pineo, now retired. I think, perhaps, to him is due the adoption of the device of amending by repeal and re-enactment. The advantages of that method of amendment are obvious. That device has been extensively used in this province since the early twenties, and the other provinces and the Dominion have come to use it.

(Manson J. was the M.L.A. for Omineca, B.C. from 1916 to 1936, when he was appointed to the Bench, and was Attorney General of British Columbia from 1922 to 1928.)⁵¹⁰

Here, then, is a Canadian decision recognising that "repeal and substitution" is but a technique of amendment and that the reason the technique is used has nothing to do with the operation of either the "repealed" or the "substituted" enactment.

The purpose of creating a new category of enactments known as amending enactments was to escape from the former common-law rule about the temporal operation of repealing enactments. Once one recognizes this purpose, one passes beyond all such categories. The rules about temporal operation are then seen to be independent of whether an enactment happens to repeal or amend another enactment, because they operate on the rules expressed by enactments and not on the enactments themselves.

⁵¹⁰The Canadian Who's Who, vol. 9, (Toronto: Trans-Canada Press, 1963), p. 712

The History of Rules

It is sometimes necessary to determine the chronological order of enactments. The way in which our courts determine this issue is an example of looking at the rules expressed by enactments rather than at the enactments themselves. Alternatively, these decisions illustrate the consequences of classifying an enactment as an amending enactment.

Where two apparently inconsistent enactments cannot be reconciled, it is necessary to determine which enactment came first, so that it can be held to have been impliedly amended or repealed by the subsequent enactment. Section 28 of the Federal Court Act,⁵²⁰ originally enacted in 1970,⁵²¹ provides for the judicial review of decisions and orders of federal boards, commissions and tribunals. It overrides the privative clause in subsection 101(1) of the Public Service Staff Relations Act,⁵²² which protects decisions of the Public Service Staff Relations Board, and which was originally enacted in 1967.⁵²³ In 1975, subsection 101(1) was re-enacted in consequence of a change in the constitution of bodies other than the Public Service Staff Relations Board that are protected by the same privative clause.⁵²⁴ In Attorney General of Canada v. Public Service Staff Relations Board,⁵²⁵ the Court raised the question of its jurisdiction to

⁵²⁰R.S.C. 1985, c. F-7

⁵²¹S.C. 1970-71-72, c. 1, s. 28

⁵²²R.S.C. 1985, c. P-35

⁵²³S.C. 1966-67, c. 72, subs. 100(1)

⁵²⁴S.C. 1974-75-76, c. 67, s. 29

⁵²⁵[1977] 2 F.C. 663, 74 D.L.R. (3d) 307, C.A.

hear an application for judicial review of a decision of the Public Service Staff Relations Board. The Court was concerned that, by re-enacting a pre-1970 privative clause, the 1975 amendment might be taken to have impliedly amended section 28 of the Federal Court Act. However, after argument, the Court was satisfied that paragraph 44(f) of the Interpretation Act required the Court to consider the re-enacted subsection "as declaratory of the law as contained in" the original subsection. Thus, despite the 1975 amendment, subsection 101(1) of the Public Service Staff Relations Act should not be taken to have been enacted after section 28 of the Federal Court Act. Section 28 therefore continued to override the privative clause.⁵²⁰

⁵²⁰The rule may be different where an enactment expressly provides that its effect on other enactments depends on whether they were enacted before or after a given date.

Section 52 of the (Quebec) Charter of Human Rights and Freedoms, *supra* n. 480, originally provided that the Charter prevailed over "subsequent" inconsistent acts. In 1982, section 52 was amended to provide that, effective January 1, 1986, the Charter would prevail over prior inconsistent acts. (S.Q. 1982, c. 61, ss. 16 and 34). Section 58 of the Charter of the French Language, R.S.Q. 1977, c. C-11, was enacted in 1977 (S.Q. 1977, c. 5) and "replaced" in 1983 (S.Q. 1983, c. 56, s. 12).

In Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, 745-7, 54 D.L.R. (4th) 577, 601-3, the Supreme Court of Canada held that section 58 was a "subsequent" inconsistent act. The Quebec Court of Appeal had concluded that it was not, based on the theory that substituted enactments are declaratory and thus retroactive: [1987] R.J.Q. 80, 89-90, 36 D.L.R. (4th) 374, 389-90 *sub nom. Procureur général du Québec c. La Chaussure Brown's Inc.*

See also Winnipeg School Division No. 1 v. Craton et al., [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1.

"Repeal" versus "Repeal and Substitution"

The creation of a category known as amending enactments to escape from the former common-law rule about the temporal operation of repealing enactments is not without its dangers. The exception has not entirely swallowed up the rule. The interpretation act provisions, enacted to abolish the rule, now suggest, by their separation of the consequences of a "repeal" from those of a "repeal and substitution", a continuing need to distinguish repealing from amending enactments.

This need is more apparent than real as the courts have now assimilated the temporal operation of repealing enactments to that of other enactments.

In Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,⁵²⁷ Dickson J. (as he then was) stated that what are now paragraphs 43(b) and (c) of the Interpretation Act,⁵²⁸ dealing with the effect of repeals on vested or accrued rights, codify the common law. In fact, the paragraphs were enacted to substitute a criterion of the vesting or accrual of rights for the criterion of the rendering of judgments as the relevant act or event for the temporal operation of repealing enactments and so assimilate their temporal operation to that of other enactments.

⁵²⁷Supra n. 425, S.C.R. 283, D.L.R. 463, C.T.C. 9

⁵²⁸Supra n. 74

This decision of the Supreme Court of Canada is binding authority as to what constitutes the common law in Canada today. The former common-law rule is therefore no longer in force.

It is at once unfortunate and unnecessary that the interpretation act provisions that were enacted to assimilate the temporal operation of repealing enactments to that of other enactments are occasionally used to perpetuate differences between the temporal operation of repealing enactments and that of amending enactments.

The decision of the Court of Appeal for Ontario in Reg. v. Allan⁵²⁹ is an example. At the time of the commission of a certain driving offence, one of the possible (cumulative) sentences was an order prohibiting the offender from driving. By the time the offender was sentenced, that possibility no longer existed, but the Court held that the order could nevertheless be made. According to the Court, this change in the law constituted a "repeal" governed by paragraph 43(c) of the Interpretation Act rather than a "repeal and substitution" governed by paragraph 44(e) of that Act. The Court declined to apply the mitigation of punishment rule in paragraph 44(e) because the possibility of a prohibition order happened to be set out in a separate section of the Criminal Code and Parliament had eliminated the possibility simply by repealing the section. The Court held that the mitigation of punishment rule only applied where there was a "repeal and substitution" and here no provision was "substituted".

⁵²⁹(1979), 45 C.C.C. (2d) 524

This reasoning is no longer acceptable in light of paragraph 11(i) of the Canadian Charter of Rights and Freedoms, which, unlike paragraph 44(e) of the Interpretation Act, does not tie the application of the mitigation of punishments rule to cases of "repeal and substitution". Apart, however, from the Charter, the decision is implausible. If Parliament were to add a provision setting out an additional possible sentence, the decision in Allan would have us apply the common-law rule⁵³⁰ and impose in an appropriate case the additional sentence, even for offences committed before the provision was added. If however there happened to be a spelling mistake in an existing provision and Parliament by a single provision "repealed and substituted" that provision in order to correct the mistake and introduce another provision setting out an additional possible sentence, lo and behold, the additional sentence would be available only for offences committed afterwards since there would be a "repeal and substitution".

Moreover, the reasons for applying the incurred liability rule in paragraph 43(c) of the Interpretation Act are just as unsatisfactory. They confuse concepts appropriate to civil liability with those appropriate to criminal liability. The Court treated an offender as having "incurred" a "liability", but this liability can only be either the liability of an offender to be tried and convicted, which is specifically dealt with in paragraph 43(d)

⁵³⁰The law in force on the day of sentencing governs: see D.P.P. v. Lamb, [1941] 2 K.B. 89, [1941] 2 All E.R. 499, D.C., Buckman v. Button, [1943] K.B. 405, [1943] 2 All E.R. 82, D.C. and Rex v. Oliver, [1944] K.B. 68, [1943] 2 All E.R. 800, C.A.

of the Interpretation Act, or the liability of an offender to be punished, which arises only upon conviction.⁵³¹

Allan shows what happens when one assumes that the words "repeal" and "repeal and substitution", as used in sections 43 and 44 of the Interpretation Act, have the same denotation as those same words when used in enactments. A more imaginative approach would have been to recognize that, if before the coming into force of an enactment there are three possible sentences for an offence and after there are only two, there has been a repeal of the rule providing for three possible sentences and a substitution of a rule providing for only two.

The courts have recognized that other words used in the provisions of the Interpretation Act do not have to be used in an enactment in order for those provisions to apply. For example, some jurisdictions still have a provision expressed to be applicable in cases of repeal and substitution "by way of amendment, revision or consolidation". These words might appear to imply that there could be cases of repeal and substitution otherwise than "by way of amendment, revision or consolidation". This was one of the arguments in Reg. v. Parrott⁵³² and the reaction of the Court in that case was typical. The Court held that an enactment could be a "consolidation" without that word appearing in it. To the extent that the new enactment differed from the old, it was

⁵³¹paragraph 6(1)(a) of the Criminal Code, supra n. 220

⁵³²(1967), 62 W.W.R. 235, [1968] 3 C.C.C. 56, Alta. Mag. Ct.

substituted "by way of amendment"; to the extent that it did not, it was substituted "by way of consolidation".⁵³³

Similarly, in Reg. ex rel. O'Mulvenny v. National Grocers Co. Ltd.,⁵³⁴ it was held that a new act was substituted for an old "by way of revision" and that "revision" in this context was not restricted to the preparation of the revised statutes. In Re Jang Sue Yee,⁵³⁵ another attempt to restrict the meaning of "revision" was unsuccessful. In that case, Davey C.J.B.C. first discussed the "narrower" sense of revision, exemplified by the preparation of the revised statutes and concluded that "revision" must be given its broader sense as⁵³⁶

[s]o much of our re-enacting takes this form that the operation of s. 20 of the Interpretation Act will be extremely restricted if revision is construed in its narrower sense.

Similarly, the identification, for the purposes of section 44 of the Interpretation Act, of the "substituted" enactment is not dependent on the language used in the amending enactment. Reg. v. Carnation Co. Ltd.⁵³⁷ involved a prosecution under s. 412 of the Criminal Code⁵³⁸ for an offence alleged to have been committed before the coming into force of a 1960 enactment repealing s. 412

⁵³³Ibid. W.W.R. 240, C.C.C. 61

⁵³⁴(1956), 117 C.C.C. 112, Ont. Mag. Ct.

⁵³⁵(1968), 68 D.L.R. (2d) 137, 64 W.W.R. 23, [1970] 2 C.C.C. 316, B.C.C.A.

⁵³⁶D.L.R. 139, W.W.R. 26, C.C.C. 319

⁵³⁷[1969] 3 C.C.C. 43, S.C.Alta., App. Div.

⁵³⁸S.C. 1953-54, c. 51

but adding to the Combines Investigation Act an identical provision as s. 33A.⁵³⁹ The Crown sought to rely on s. 41 of the Combines Investigation Act, which was referred to in our discussion of Reg. v. Crown Zellerbach Canada Ltd. Before the coming into force of the 1960 enactment, s. 41 applied to prosecutions under s. 412 of the Criminal Code. The 1960 enactment "repealed and substituted" part of s. 41 so as to delete the reference to s. 412 of the Criminal Code and insert a reference to Part V of the Combines Investigation Act, which included s. 33A.⁵⁴⁰

The accused, charged after the coming into force of the 1960 enactment, argued that s. 41 no longer applied to prosecutions under s. 412 and was thus inapplicable. Faced with the decision of the Supreme Court of Canada in Howard Smith Paper Mills applying the Interpretation Act to overcome the difficulty,⁵⁴¹ the accused noted that s. 33A had been added by an enactment "repealing and substituting" ss. 32 and 33. Thus, it argued, the new ss. 32, 33 and 33A were "substituted" for the old ss. 32 and 33. Section 33A could not therefore also have been "substituted" for s. 412 of the Criminal Code, so that s. 44 of the Interpretation Act had no application. The Appellate Division rejected this argument, holding that the substance of the new provision determines whether it has been "substituted" for the old provision and not the form.⁵⁴²

⁵³⁹S.C. 1960, c. 45, ss. 13 (adding s. 33A) and 21 (repealing s. 412)

⁵⁴⁰S.C. 1960, c. 45, s. 18

⁵⁴¹As noted, supra, this case will be discussed in the following chapter.

⁵⁴²C.C.C. 55

In Re Eskay Metalware Ltd. (in liquidation),⁵⁴³ Richardson J., on behalf of the New Zealand Court of Appeal, discussed whether an enactment had been "substituted" for another in these terms:⁵⁴⁴

Section 21 is a broadly expressed provision. The criterion to be applied is whether the subsequent enactment was passed "in substitution for" the repealed provision. ... [Section 21] cannot extend to a new provision that is essentially different in kind. To be "in substitution for" means to be put in the place or stand in the stead of the repealed provision. It follows that the new enactment must be of the same character as its predecessor: it must have the same kind of function and the subject-matter must be essentially the same without necessarily being identical in its scope. But, provided the new provision is directed to the same end, there need not be precise correspondence in the manner of dealing with the subject matter. ... The process of evaluation and comparison of the two provisions will ultimately lead to a judgment as to whether, in the particular case, the later provision is in substitution for the repealed section, or amounts to a new and different provision.

These decisions constitute a judicial rejection of a piece of Department of Justice folklore according to which the use of the words "repeal and substitute" in an amending enactment are both necessary and sufficient for the application of s. 44 of the Interpretation Act.

What is common to these cases is a judicial willingness to disregard the words used in an enactment when determining its operation. The use of the word "repeal" did not prevent the Court in Beaumont v. Yeomans from determining that the enactment there in issue was not a repeal. The use of the same word did not prevent the Court in Wright v. Oakley from determining that the then common-

⁵⁴³[1978] 2 N.Z.L.R. 46

⁵⁴⁴p. 49

law rule about the temporal operation of repealing enactments was not applicable. The use of the expression "repeal and substitute" did not prevent the Court in Reg. v. Carnation Co. Ltd. from identifying another enactment as the substituted enactment. Likewise, the decision in Re Eskay Metalware Ltd. does not treat the use of particular words in an enactment as determinative of whether another enactment has been substituted, and if so, which. Similarly, the omission of words like "amendment", "revision" and "consolidation" did not prevent the Courts in Reg. v. Parrott, Reg. ex rel. O'Mulvenny v. National Grocers Co. Ltd. and Re Jang Sue Yee from determining that there had been an amendment, revision or consolidation. The decision in Reg. v. Allan, treating the use of the word "repeal" as excluding the application of the "repeal and substitution" provision of the Interpretation Act, is distinctly anomalous.

The Operation of Rules

Somewhat ironically, this chapter has so far emphasized the extent to which amending enactments do not change the law. This emphasis was necessary in order to arrive at a conception of statute law as rules. This conception, as noted above, provides a means of escaping from the former common-law rule about the temporal operation of repealing enactments and of determining the chronological order of enactments. The conception of statute law as rules does this by identifying something (rules) that sometimes continue while enactments come and go.

The conception is sufficiently abstract that it can take into account the opposite situation, where enactments continue while the rules they express

change. In this section, I explore this conception, attempting to relate it to the notion of "amendment". An examination of various cases where the meaning of an enactment changes while its text does not leads us to an analysis of the problematical decision of the English Court of Appeal in Attorney General v. Lamplough,⁵⁴⁵ which on one view establishes that the meaning of an enactment cannot change if its text remains unchanged.

The conception of statute law as rules loosens the link between the meaning of an enactment and its text. Once this link is loosened, one can see that the effect of a new enactment on other enactments may not be restricted to those that it amends or repeals.

The French jurist, Patrice Level, puts it this way:⁵⁴⁶

Si, dans une optique qui rappellera celle de Kelsen nous considérons l'ordre juridique comme un composé de normes, il faut préciser que le remplacement d'une règle par une autre atteint l'ordre juridique dans son ensemble. Si une loi nouvelle ne semble intéresser matériellement qu'une fraction très limitée du milieu juridique, on ne doit pas perdre de vue que sa situation au sein de l'ordonnement des normes exerce une influence profonde sur l'ensemble. Il n'y a pas de transformation de l'ordre, mais substitution de l'un à l'autre. La confrontation dans le temps de deux lois particulières appelle donc l'opposition de deux ordres successifs. Le caractère inchangé d'une partie considérable de l'ensemble n'est pas de nature à infirmer cette proposition, pas plus que la similitude entre des dispositions relevant d'ordres juridiques distincts dans l'espace diminue en quoi que ce soit le particularisme spatial de chaque ensemble. L'ordre juridique ne se présente pas comme un jeu de construction aux pièces interchangeables. La norme ne se conçoit pas hors de l'ordre dans

⁵⁴⁵(1878), 3 Ex.D. 214

⁵⁴⁶Essai sur les conflits de lois dans le temps. Contribution à la théorie générale du droit transitoire, (Paris: L.G.D.J., 1959), pp. 5-6

lequel elle s'insère, car c'est à leurs contacts qu'on interprète l'une et qu'on connaît l'autre.

In determining whether the rules of the statute law are the same before and after the coming into force of an enactment, one must in principle examine the whole corpus of the statute law, for the meaning of an enactment may be changed without its text being changed. Another way of expressing the same idea is to define "amend" so broadly as to include any change in the meaning of an enactment. "To amend an ... enactment is to alter its legal meaning."⁵⁴⁷

An example of such an indirect amendment was the Australian federal legislation abolishing capital punishment and substituting sentences of imprisonment for life for death sentences. An Act affected by, though not specifically mentioned in, the legislation contained a provision enabling sentences of imprisonment for terms of less than life to be imposed "[w]here by this Act an offender is made liable to imprisonment for life". The Federal Court of Australia held that the provision was applicable in cases where by the Act an offender was made liable to capital punishment.⁵⁴⁸ The Court reasoned that, the operation of the Act having been changed by the legislation abolishing capital punishment, that legislation was in substance an amending enactment and thus, under the Australian equivalent of subs. 42(3) of the Interpretation Act, to be construed as part of the Act. The expression "this Act" was therefore

⁵⁴⁷F.A.R. Bennion, Statutory Interpretation Codified, with a Critical Commentary, (London: Butterworths, 1984), p. 418

⁵⁴⁸Reg. v. Wheeldon (1978), 33 F.L.R. 402, 18 A.L.R. 619

interpreted to include the legislation abolishing capital punishment.⁵⁴⁹ This reasoning is consistent with the case law analysing the meaning of "repeal", "repeal and substitution" and "amendment, revision or consolidation" in the context of other interpretation-act provisions.

Another situation in which the meaning of enactments is altered without their texts being changed is a change in the Interpretation Act. In Pacific Simpson Lumber Ltd. et al. v. Kaisha et al.,⁵⁵⁰ the British Columbia Court of Appeal had to deal with the meaning of the word "year" in a federal regulation. At the time the regulation was made, the (former) Interpretation Act defined "year" to mean "calendar year".⁵⁵¹ The (present) Interpretation Act defines "year" to mean "any period of twelve consecutive months".⁵⁵² The Court concluded that "year" in the regulation meant "calendar year". The fact that the regulation was made at a time when the Interpretation Act so defined year was only one reason for the Court's conclusion that a "contrary intention appear[ed]", so that the (present) Interpretation Act did not apply.⁵⁵³

When definitions in statutes are changed, similar problems arise because of the rule that expressions used in regulations have the same meanings as in

⁵⁴⁹This is not the situation that was discussed in Chapter One, where the expression "this Act", when used in an amending enactment, is interpreted as a reference to the enactment that it amends.

⁵⁵⁰(1982), 129 D.L.R. (4th) 236, [1982] 3 W.W.R. 194

⁵⁵¹R.S.C. 1952, c. 158, s. 35

⁵⁵²R.S.C. 1985, c. I-21, subs. 37(1)

⁵⁵³See subs. 3(1) of the Interpretation Act, supra n. 74.

the statutes under which they are made.⁵⁵⁴ In Reg. v. Royka,⁵⁵⁵ the Ontario Court of Appeal concluded that a "contrary intention appear[ed]" and refused to apply the statutory definition in construing a regulation. The fact that the definition of the expression had only been added to the statute after the making of the regulation was only one reason for that conclusion.⁵⁵⁶

Australian jurisprudence on this issue is divided. On the one hand, in Birch v. Allen,⁵⁵⁷ the High Court decided that definitions in statutes were ambulatory in their application to regulations. The effect, then, of repealing a statutory definition was to give the defined word where used in the regulations its ordinary meaning. On the other hand, in Kostrzewa v. Southern Electric Authority of Queensland,⁵⁵⁸ the High Court, without reference to its own previous decision, concluded that the meaning of a word used in a regulation was fixed as of the day the regulation was made and was unaffected by subsequent amendments to the enabling statute.

⁵⁵⁴This rule, now found in s. 16 of the federal Interpretation Act, *supra* n. 74, finds its origins in s. 31 of the (British) Interpretation Act, 1889, *supra* n. 469. Beginning with Ontario in 1897 (c. 2, s. 5), this rule has been introduced into every Canadian jurisdiction except Quebec. The British rule is now found in s. 11 of the Interpretation Act 1978 (U.K.), c. 30.

⁵⁵⁵(1980), 52 C.C.C. (2d) 368

⁵⁵⁶It has been suggested that applying the definition would give it a retroactive effect. This is not so, as there is no question of applying the definition in respect of the period before it was added to the statute.

⁵⁵⁷(1942), 65 C.L.R. 621

⁵⁵⁸(1969), 120 C.L.R. 653

Prof. Dennis Pearce prefers Birch⁵⁵⁰ and it is submitted that his view is correct. The Kostrzewa Court seemed to be confusing the issue with another quite distinct one, namely, the effect of linguistic change on the operation of enactments. Where as a matter of usage the meaning of a word used in an enactment changes between the commencement of the enactment and the time that it falls to be applied, it is well established that it is the meaning of the word at the commencement of the enactment that governs.⁵⁶⁰ All that this rule means is that the operation of an enactment can only be altered by another enactment and not by the secular evolution of the language of the enactment. The rule does not mean that the meaning of an enactment is fixed as of its coming into force and can only be altered by another enactment that amends or repeals its text.

At first sight, the decision of the Quebec Court of Appeal in Communauté Urbaine de Montréal c. Commission de la Santé et de la Sécurité du Travail⁵⁶¹ appears to accord with the notion that the meanings of words in regulations are fixed as of the day the regulations are made and are unaffected by subsequent changes in the interpretation provisions of the statutes under which the regulations are made. That case dealt with the continuity of regulations made under the Loi des établissements industriels et commerciaux.⁵⁶² That Act defined établissement industriel and établissement commercial in such a way as to

⁵⁵⁰Dennis Charles Pearce, Statutory Interpretation in Australia, (Sydney, etc., Butterworths, 1988 (3rd edition), p. 124

⁵⁶⁰Perka et al. v. The Queen, [1984] 2 S.C.R. 232, 262-7, 13 D.L.R. (4th) 1, 24-8, 14 C.C.C. (3d) 385, 408-12

⁵⁶¹[1987] R.J.Q. 272

⁵⁶²L.R.Q. 1977, ch. E-15, replaced by L.Q. 1979, ch. 63, art. 285

exclude a police station. The Règlement sur les établissements industriels et commerciaux⁵⁶³ defined « établissement » as « établissement industriel et commercial tel que défini dans la Loi ». That definition served not only to make possible the use of one word instead of two expressions, it also amounted to a particular provision incorporating by reference the statutory definitions. (Quebec lacks any generally applicable equivalent to s. 16 of the federal Interpretation Act.) The new Act, the Loi sur la santé et la sécurité du travail,⁵⁶⁴ defined « établissement » in such a way as to include a police station.

The Court held that the Regulation had survived the replacement of the former Act by the new but that the meaning of the word « établissement » in it was restricted to a commercial or industrial establishment within the meaning of the former Act. Rothman J.A. wrote for the Court⁵⁶⁵ that

the Regulation was intended to apply to industrial and commercial establishments and its scope depended on the legislative definition of those terms. ... Since there was no such definition in the new Act, the Court had to look to the old Act.

As his Lordship makes clear in the second sentence, fixing the meaning of the word as of the day the Regulation was made was a default approach

⁵⁶³R.R.Q. 1981, ch. S-2.1, r. 9

⁵⁶⁴L.Q. 1979, ch. 63, now L.R.Q. 1977, ch. S-2.1

⁵⁶⁵Supra n. 561, p. 274

necessitated by the absence of definitions of the expressions from the new Act.

As one commentator has pointed out,⁵⁶⁶

la Cour d'appel n'affirme pas, dans l'affaire C.U.M., qu'un règlement dont la survie est assurée législativement ne pourra jamais avoir une portée plus large que celle découlant de son ancienne loi habilitante.

Dans la mesure, en effet, où la nouvelle loi reprend les mêmes concepts que ceux stipulés au règlement, nous croyons que ce règlement--qui est presumé avoir été édicté en vertu de la nouvelle loi--pourrait embrasser le champ d'application, même plus large, de la nouvelle loi et ce, par analogie, tout comme si la portée du règlement était modifiée par un amendement à sa loi mère.

Il ne nous paraît donc pas impossible qu'un règlement, dont la portée est limitée par une définition mentionnée à sa loi habilitante, subsiste et connaisse même des variations au niveau de son étendue. Toutefois, comme la Cour d'appel l'a correctement décidé selon nous, le règlement ne pourra s'affranchir de sa portée originale si la nouvelle loi ne reprend pas les mêmes termes pour en préciser l'étendue.

Where I part company with Prof. Nadeau is in his belief in the « caractère forcément précaire entourant la situation d'un règlement dont la loi habilitante a été remplacée ».⁵⁶⁷ He argues that once the Regulation referred to a definition that was no longer in force, there was an inconsistency between the Regulation and the new Act, with the result that the Court ought to have decided that the Regulation had ceased to have effect.⁵⁶⁸ I disagree. The reason it is necessary to provide for the continuity of regulations is the rule that regulations cease

⁵⁶⁶Denis Nadeau, "Droit administratif - La « survie » des règlements et l'« élasticité » de leur portée : Un exemple en matière de santé et de sécurité au travail" (1987), 47 R. du B. 331, 335

⁵⁶⁷Ibid., p. 334

⁵⁶⁸Ibid., pp. 335-6

to have effect on the repeal of the enactments under which they were made.⁵⁶⁹ Accordingly, the correct analysis is that outlined above: regulations operate continuously where the rules of the statute law, in this case rules enabling regulations to be made, are the same before and after the coming into force of an enactment. Specifically, a regulation continues in force if it could be made after the coming into force of the enactment.⁵⁷⁰ Since there was no reason why a regulation under the new Act had to apply to all establishments, there was no inconsistency between the new Act and the Regulation, which applied to some but not all establishments. As Rothman J.A. noted,⁵⁷¹

Doubtless, a new regulation governing establishments of all kinds could have been adopted under the new Act or the definition in the new Act could have been made to conform to the old Regulation. But neither of these things was done.

The jurisprudence on the effect on all enactments of a change in the Interpretation Act and the effect on regulations of a change in the interpretation provisions of the statutes under which they are made shows that the effect of an enactment may not be restricted to those enactments whose texts it amends or repeals. Likewise, the case of indirect amendment shows that the meanings of enactments are not fixed as of their commencement dates, as their

⁵⁶⁹Watson v. Winch, [1916] 1 K.B. 688, D.C.

⁵⁷⁰Richelieu Election Case; Paradis v. Cardin (1913), 48 S.C.R. 625, 637-8, 646-7, 15 D.L.R. 831 sub nom. Richelieu Dominion Election; Paradis v. Cardin. (The D.L.R. report has been drastically abridged and is but a note.) This case involved a requirement prescribed by rule of court that was more onerous than that prescribed by the new statute. See John Mark Keyes, "Now You See It Now You Don't: Re Telecommunication Workers Union and B.C. Telephone Co. and The Rule Against Conflicts Between Statutes and Delegated Legislation" (1987), 12 Queen's L.J. 49, 60-3

⁵⁷¹Supra n. 561, p. 274

meanings can be altered by another enactment that does not amend or repeal their texts.

Mr. Bennion argues that the decision of the English Court of Appeal in Attorney General v. Lamplough⁵⁷² established a rule that in the case of textual amendments the effect of an enactment is fixed as of the day of its coming into force, in the sense that its meaning cannot be altered by another enactment that only amends or repeals the text of some other enactment.⁵⁷³ This alleged "rule in Attorney General v. Lamplough" would contradict the rule we are seeking to establish, namely, that it is necessary, at least in principle, to re-examine the whole corpus of the statute law in order to determine the operation of any enactment.

Attorney General v. Lamplough involved the operation of two statutes. The first imposed a duty on certain goods, which were enumerated in the schedule.⁵⁷⁴ Two items of the schedule were relevant. One referred to

all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters.

It was established at the trial that Lamplough's Pyretic Saline fell within this description. The last item of the schedule referred to

⁵⁷²Supra n. 545

⁵⁷³Bennion, supra n. 547, p. 420

⁵⁷⁴52 Geo. 3 (U.K.), c. 150

all other ... medicated herbs and waters ... whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief, of any disorder or complaint incident to or in anywise affecting the human body ...

The second statute, entitled in part An Act ... to exempt from Stamp Duty artificial Mineral Waters in Great Britain, expressly repealed the first relevant item of the schedule.⁵⁷⁵

The Crown argued that Lamplough's Pyretic Saline was dutiable as falling within the last item of the schedule. The Crown was successful at first instance, the Exchequer Division reasoning that the effect of the repeal was that the balance of the statute was to be construed as if the repealed portion had never been enacted.⁵⁷⁶ In the absence of the repealed item, Lamplough's Pyretic Saline fell within the last item of the schedule.

The taxpayer's appeal was allowed by the Court of Appeal. Bramwell, Brett and Cotton L.JJ. (as they then were) all pointed out that the issue was one of the construction of the second, repealing enactment⁵⁷⁷ and not therefore one of the construction of the first, partially repealed enactment. This approach is similar to that advocated in the previous chapter, namely determining the temporal operation of amending enactments in the same way as the temporal operation of other enactments. (Both approaches involve two commencement dates,

⁵⁷⁵ 3 & 4 Wm. 4 (U.K.), c. 97, s. 20

⁵⁷⁶ Supra n. 545, pp. 217-8

⁵⁷⁷ Ibid., pp. 228, 231, 234

and the second can only be determined from the second enactment.) The Exchequer Division, on the other hand, had cited the usual authorities for the former common-law rule about the temporal operation of repealing enactments. To this extent, the decision of the Court of Appeal forms part of the reaction against the former common-law rule which we described earlier in this chapter.

As Brett L.J. pointed out, the use of the words "all other ... medicated herbs and waters" shows that the last item of the schedule referred to goods not otherwise enumerated.⁵⁷⁸ The enlargement of the last item of the schedule to include mineral waters could only have come about as a result of the repeal of the earlier relevant item. It is true that the result of that repeal was that mineral waters were no longer otherwise enumerated. But it would be implausible to construe a statute whose avowed purpose, as disclosed by its title, was "to exempt from Stamp Duty artificial Mineral Waters" as having had the effect of continuing the liability to duty of mineral waters.

It is submitted that the decision in Attorney General v. Lamplough turns on the singular circumstance, unlikely to be present in a contemporary statute, of the purpose of the repeal having been stated in the title. Had this not been the case, the Crown could have argued that the purpose of the repeal was merely to excise a redundancy from the statute law and was not to change the liability to duty of any goods.

It must be conceded that Attorney General v. Lamplough established that the repealed portions of an enactment remain part of the context of its

⁵⁷⁸ibid., pp. 229-30

unrepealed portions in the sense of being relevant to their construction. But Mr. Bennion states the effect of the decision much too widely when he claims that it establishes that a textual amendment of an enactment never alters the meaning of another enactment not textually amended. Such a rule would be anomalous since indirect amendments are not so restricted in their operation and there does not seem to be any reason to distinguish between textual and other amendments as far as their operation is concerned. The putative rule amounts to an application to textual amendments of the maxim "expressio unius est exclusio alterius", as it would exclude their altering the meaning of enactments not referred to. There does not seem to be any reason to apply that maxim in this context. It is not clear, for example, why an enactment cannot be both a textual and an indirect amendment.

Attorney General v. Lamplough can therefore be restricted in such a way as to interfere only slightly with Mr. Bennion's own statement of the effect of textual amendments:⁵⁷⁹

[U]nder modern practice the intention of Parliament when effecting textual amendment of an Act is to produce a revised text of the Act which is thereafter to be construed as a whole. [Bennion's emphasis]

This statement expresses the idea that amending enactments (or at least textual amendments) merge with the enactments they amend.⁵⁸⁰

⁵⁷⁹Bennion, supra n. 547, p. 420

⁵⁸⁰Mr. Bennion appears to recognize that the doctrine of merger is not to be applied to the temporal operation of enactments. This is implied by the word "thereafter" in the passage just quoted and is more explicitly stated in the following passage (Ibid., p. 421):

(continued...)

Conclusion

Once upon a time, the common law prescribed different rules for the temporal operation of repealing enactments and other enactments. One effect of the different rules was the existence of gaps in which no enactment operated.

The Interpretation Act has filled most of the gaps. Parliament eventually adopted the theory that amending enactments are declaratory to the extent that they do not change the law. The courts had already adopted this theory in order to fill the gap by making the substituted enactment retroactive. The courts have also adopted the theory that there is a category of enactments, identified by their not changing the law, which do not count as repealing enactments for the purposes of the former common-law rule.

All of this case law supports a doctrine of the continuous operation of rules. According to this doctrine, it is necessary to compare the law before and after the coming into force of an enactment in order to determine the operation of the enactment. To the extent that the enactment does not change the law, there is no interruption in the operation of the law and no commencement or transitional problem. The courts are already familiar with this

⁵⁸⁰(...continued)

[T]he function of the amending Act is to serve as an instrument for altering the text of the earlier Act, subject only to the need for commencement and transitional provisions.

kind of analysis because they use it when they have to determine when a given provision was enacted.

The former common-law rule is no longer in force and with it has gone the need for the theories developed in order to limit its scope. The operation of an enactment does not now depend on its classification as a repealing enactment or as an amending enactment. Nor does the application of ss. 43 and 44 of the Interpretation Act depend on the use of any particular words in an enactment.

The result of a comparison of the law before and after the coming into force of an enactment may be that the enactment has changed the law. An enactment that amends or repeals the text of another enactment may also alter the meaning of a third enactment. To the extent that that enactment changes the law, its temporal operation will be determined in accordance with rules that do not vary depending on the classification of the enactment as amending or repealing.

Chapter Four

The Construction of References to Enactments

It was suggested in the previous chapter that the statute law could be conceived of as rules and that these rules operate continuously where, before and after the coming into force of an enactment, the relevant rules are the same. But the rules of the statute law are contained in enactments and the practice in drafting legislation is to refer to enactments as such rather than to the rules they contain. As the same rule may be contained in different enactments at different points in its history, a reference in one enactment to another enactment that contains a rule is to be construed as a reference to the enactment that contains the rule at the relevant time.

This rule of construction operates forwards and backwards. The forward construction of references has been codified in subsection 40(2) and paragraph 44(h) of the Interpretation Act.⁵⁶¹ This aspect of the rule is well known. Accordingly, after a brief examination of it, we turn to cases involving the backward construction of references.

⁵⁶¹Supra n. 74

The Forward Construction of References

Paragraph 44(h) of the Interpretation Act reads as follows:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

The history of this paragraph was outlined in the previous chapter. To recapitulate, it was introduced into Canada by an 1883 amendment⁵⁸² to the federal Interpretation Act. By 1900, all of the provinces and territories had followed the federal example. There were two exceptions to this: Prince Edward Island, which waited until 1939, and Quebec, which still does not have such a provision.

Subsection 40(2) of the Interpretation Act contains a similar rule:

A citation of or reference to an enactment is deemed to be a citation of or reference to the enactment as amended.

⁵⁸²S.C. 1883, c. 1, s. 2

This subsection was introduced into Canada in 1906,⁵⁶³ at the same time as subsection 42(3), the present statutory basis for the doctrine of merger. And, as with subsection 42(3), most of the provinces now have such a provision.⁵⁶⁴ Once again, the inclusion of a version of subsection 40(2) in the Uniform

⁵⁶³S.C. 1906, c. 21, s. 6; R.S.C. 1906, c. 1, s. 39; R.S.C. 1927, c. 1, s. 42; R.S.C. 1952, c. 158, subs. 40(2); S.C. 1967-68, c. 7, subs. 33(2); R.S.C. 1970, c. I-23, subs. 32(2); R.S.C. 1985, c. I-21, subs. 40(2)

⁵⁶⁴Alberta: S.A. 1958, c. 32, subs. 19(2); R.S.A. 1970, c. 189, subs. 19(2); S.A. 1980, c. 70, s. 27; R.S.A. 1980, c. I-7, s. 27

British Columbia: S.B.C. 1907, c. 1, s. 6, adding subs. 13(2); R.S.B.C. 1911, c. 1, subs. 51(2); R.S.B.C. 1924, c. 1, subs. 52(4); R.S.B.C. 1936, c. 1, subs. 54(4); R.S.B.C. 1948, c. 1, subs. 54(4); R.S.B.C. 1960, c. 199, subs. 54(4); S.B.C. 1974, c. 42, s. 27; R.S.B.C. 1979, c. 206, s. 32

Manitoba: S.M. 1924, c. 37, s. 4, adding subs. 26(4); S.M. 1939, c. 34, subs. 21(2); R.S.M. 1940, c. 105, subs. 21(2); R.S.M. 1954, c. 128, subs. 21(2); S.M. 1957, c. 33, subs. 21(2); R.S.M. 1970, c. 180, subs. 21(2); R.S.M. 1987, c. 180, subs. 20(2)

New Brunswick: S.N.B. 1973, c. 74, subs. 45(5), adding subs. 39(2); R.S.N.B. 1973, c. I-13, subs. 39(2)

Newfoundland: S.N. 1951, No. 4, s. 24; R.S.N. 1952, c. 1, s. 24; R.S.N. 1970, c. 182, s. 24

Northwest Territories: O.N.W.T. 1948, c. 5, s. 18; R.O.N.W.T. 1956, c. 52, s. 18; O.N.W.T. 1963 (2nd Sess.), c. 12, s. 2, enacting subs. 18(2); R.O.N.W.T. 1974, c. I-3, subs. 19(2)

Nova Scotia: S.N.S. 1915, c. 14, s. 1, adding subs. 30(2); S.N.S. 1921, c. 21, s. 3 (subs. 30(2) rep. & sub.); R.S.N.S. 1923, c. 1, subs. 30(2); S.N.S. 1954, c. 2, subs. 19(2); R.S.N.S. 1954, c. 136, subs. 19(2); R.S.N.S. 1967, c. 151, subs. 19(2); R.S.N.S. 1989, c. 235, subs. 20(2)

Prince Edward Island: S.P.E.I. 1939, c. 23, subs. 22(2); R.S.P.E.I. 1951, c. 1, subs. 21(2); R.S.P.E.I. 1974, c. I-6, subs. 21(2); S.P.E.I. 1981, c. 18, subs. 28(3); R.S.P.E.I. 1988, c. I-8, subs. 28(3)

Saskatchewan: S.S. 1943, c. 2, s. 18; R.S.S. 1953, c. 1, s. 18; R.S.S. 1965, c. 1, s. 18; R.S.S. 1978, c. I-11, s. 18

Yukon Territory: R.O.Y.T. 1958, c. 58, subs. 18(2); R.O.Y.T. 1971, c. I-3, subs. 18(2); R.S.Y.T. 1986, c. 93, subs. 19(1)

Interpretation Act seems to have been responsible at least in part for this.⁵⁸⁵ And again, it is Ontario and Quebec that have never had such a provision in their Interpretation Acts.

The application of provisions such as paragraph 44(h) is what one might expect, given the language of the provisions.⁵⁸⁶ The result is that it is impossible to rely on the literal meaning of a reference in an enactment to another enactment. In theory, one must examine the enactment that is referred to as it read on the day that the reference was enacted (in order to identify the rule it contained) and then determine what enactment contained the rule at the relevant time. In practice, however, the difficulty of this theoretically necessary task is lessened by a drafting convention pursuant to which enactments that refer to other enactments are consequentially amended so that the references remain current.

⁵⁸⁵Subs. 18(2) of the 1941 "Draft of Uniform Interpretation Act Sections", *supra* n. 388, pp. 48, 53 and subs. 19(2) of the 1953 "Uniform Interpretation Act", *ibid.*, pp. 118, 123. Although the first Uniform Interpretation Act was not adopted by the Uniform Law Conference of Canada until 1941, the Conference had been discussing drafts since 1934. These drafts included a provision based on the federal and British Columbia provisions. See, for example, subsection 18(2) of the Preliminary Draft appended to the Report of Committee on the Interpretation Acts, *ibid.*, pp. 23, 33. Most of the provisions that were included in the 1941 Uniform Interpretation Act, including the provision under discussion here, had been recommended to the provincial legislatures for enactment in 1938. See Proceedings of the twenty-first annual meeting of the Conference of Commissioners on uniformity of legislation in Canada held at Vancouver August 11th, 12th, 13th, 15th and 16th, 1938, pp. 18, 60.

⁵⁸⁶For an example of a case applying one such provision so as to include in a reference to an enactment amendments made after the reference was enacted, see Kilgour v. London Street Ry. Co. (1914), 30 O.L.R. 603, 19 D.L.R. 827, App.Div.

The Backward Construction of References

The drafting convention requiring consequential amendments to enactments that contain references to other enactments creates difficulties of its own. The rules respecting the temporal operation of enactments may attach an act or event to a particular time in the past and thus prescribe the law in force at that time as the proper law. The drafting convention makes it more difficult to determine what the rules were at that time.

It has occasionally been argued that the effect of the drafting convention is to make the effect of the reference depend on the temporal operation of the enactment that consequentially amended the reference. In Howard Smith Paper Mills Ltd. et al. v. The Queen,⁵⁸⁷ the Supreme Court of Canada considered the effect of the reference in s. 41 of the Combines Investigation Act⁵⁸⁸ to s. 498 of the Criminal Code.⁵⁸⁹ It will be recalled from our discussion of the earlier decision in Reg. v. Crown Zellerbach Canada Ltd.⁵⁹⁰ that s. 41 had been amended in 1952 in consequence of the renumbering of another enactment. According to the Court,⁵⁹¹

The contention is that the words "section four hundred and ninety-eight" in subs. (2) of s. 41 refer to the s. 498 enacted by the statute of 1952 and, accordingly, that even though s. 41 is to be

⁵⁸⁷Supra n. 516

⁵⁸⁸Supra n. 511

⁵⁸⁹Supra n. 510

⁵⁹⁰Supra n. 509

⁵⁹¹Supra n. 516, S.C.R. 416-7

considered a procedural enactment, it is expressly made applicable only to prosecutions under the new s. 498. It is therefore said also that, as the prosecution here in question is in respect of the period ending with October 31, 1952, to which s. 498 of the Criminal Code as it stood on that date is the applicable section, resort cannot be had to the antecedent of s. 41, namely, s. 39A, enacted in 1949 ... as that section, although continued by s. 6 of the 1952 legislation as s. 41, ceased, by reason its amendment by s. 8 of the same statute, to have any application to a prosecution under the old s. 498.

The Court rejected this argument on the basis that what is now paragraph 44(c) of the Interpretation Act required the proceedings to "be taken up and continued under and in conformity with the new enactment."⁵⁰²

Another line of cases reaches similar results by construing a reference to an enactment as including a reference to a predecessor enactment, that is, a prior enactment that contained the same rule. For example, in Reg. v. Parrott,⁵⁰³ the defendant was charged with an offence under a provision of a 1967 act that prohibited driving at a speed in excess of the maximum designated by signs erected pursuant to a municipal by-law made under the act. The signs had been erected pursuant to a municipal by-law validly made under an earlier act which had been consequentially repealed by the 1967 act. The issue, then, was whether it was possible to construe the reference in the prohibition as including municipal by-laws made under earlier acts. The Court held that it could and convicted the defendant. MacKenzie P.M. wrote as follows:⁵⁰⁴

⁵⁰²Ibid., S.C.R. 417

⁵⁰³Supra n. 532

⁵⁰⁴W.W.R. 237-8, C.C.C. 59

In effect all the legislature has really done in enacting The Highway Traffic Act and repealing sec. 283 of The City Act is, with a few changes, to simply lift the legislation enabling a city council to pass traffic by-laws from one Act and place it in another. No doubt the legislature was simply trying to gather together as many laws as possible relating to motor-vehicle traffic into one enactment. If that was the intention of the legislature can it be said that at the same time it intended to do away with all by-laws passed pursuant to sec. 283 of The City Act or did it intend that sec. 220 should be interpreted as having a retrospective effect? I would hold the latter as being the proper conclusion and I believe I am supported by the Supreme Court of Canada in Trans-Canada Insurance Co. v. Winter, [1935] S.C.R. 184, [1935] 1 D.L.R. 272. That case in my opinion stands for the proposition that when a new Act which repeals a former Act contains certain provisions of the repealed Act, then the new Act should be held to be retrospective so far as it is a repetition of the former enactment but it is not retrospective so far as it is new.

Likewise, it was held in Re Hood⁵⁰⁵ that a reference to an "order under this Act" included an order made under another Act consolidating some but not all of the provisions of the Act in which the reference occurred.

On the other hand, in Barillari v. Registrar of Motor Vehicles et al.,⁵⁰⁶ the Ontario High Court of Justice considered that a reference to an enactment was at the least ambiguous as to whether a reference to a predecessor of the enactment was included and that the ambiguity was to be resolved in favour of the liberty of the subject. Despite what was said in Barillari, the case was not really distinguishable from the previous decision of the same court in Odell v. Registrar of Motor Vehicles et al.⁵⁰⁷ Barillari is inconsistent with the

⁵⁰⁵[1962] S.A.S.R. 173

⁵⁰⁶(1982), 37 O.R. (2d) 74, 135 D.L.R. (3d) 269, 66 C.C.C. (2d) 467

⁵⁰⁷(1979), 26 O.R. (2d) 178, 102 D.L.R. (3d) 147, 49 C.C.C. (2d) 566

previous decision of the Supreme Court of Canada in Johnston v. The Queen⁵⁰⁰ and ought not to be followed for that reason alone.

In Johnston v. The Queen, the Supreme Court of Canada resolved the question, which had divided Canadian courts for sixty years,⁵⁰⁰ whether a greater punishment may be imposed where the first or second offence was committed at a time when no greater punishment was prescribed for a second or subsequent offence. The case arose out of the introduction in 1976 of a minimum term of imprisonment of fourteen days for a second impaired driving offence.⁵⁰⁰ Johnston had been convicted of impaired driving in 1975 and, after the coming into force of the new provision, committed the same offence.

The Supreme Court adopted the reasons of Clement J.A. in the Northwest Territories Court of Appeal. His Lordship had written:⁵⁰¹

I find no change whatsoever in the constituent elements of the offence to which each is directed: it is precisely the same offence that both deal with. There is continuity in time: at the instant of repeal of the former section, the new section is "substituted" for it. I think that the use by Parliament of this word in the

⁵⁰⁰[1978] 2 S.C.R. 391, 39 C.C.C. (2d) 479n., 4 C.R. (3d) 269

⁵⁰⁰Rex v. Fox (1918), 13 Alta. L.R. 535, 42 D.L.R. 650, [1918] 3 W.W.R. 197, 30 C.C.C. 232, App.Div.; Rex v. Boguslansky, [1935] O.R. 203, [1935] 2 D.L.R. 224, 63 C.C.C. 365, C.A.; Re Green; Re Jamael, [1936] 2 D.L.R. 153, 10 M.P.R. 335, 65 C.C.C. 353, N.S.S.C.; Campbell v. The King (1949), 23 M.P.R. 322, 95 C.C.C. 63, 8 C.R. 306; Reg. v. Ross (1956), 19 W.W.R. 148, 115 C.C.C. 31, 24 C.R. 271, B.C.C.A.; Reg. v. Lelievre, [1956] O.W.N. 198, 115 C.C.C. 404, H.C.J.; Reg. v. Todd, [1977] 2 W.W.R. 168, 34 C.C.C. (2d) 238, 37 C.R.N.S. 292, B.C.C.A.

⁵⁰⁰Section 236 of the Criminal Code, R.S.C. 1970, c. C-34, rep. and sub., S.C. 1974-75-76, c. 93, s. 17

⁵⁰¹sub nom. Reg. v. Johnston, [1977] 2 W.W.R. 613, 619, 34 C.C.C. (2d) 325, 331, 37 C.R.N.S. 234, 250

amending statute evidences an intention not to sever the operation of the new from the effects of the operation of the old. The operation of the new is prospective, but in respect of [punishment] takes into account past offences.

The reasoning of Clement J.A. in Johnston endorses the notion that there is no interruption in the continuity of the rules of the statute law that are the same before and after the coming into force of an enactment. Changes in references do not constitute changes in those rules if before and after the coming into force of the enactment the references are to enactments that contain the same rule.

Bibliography

Texts and Monographs

Beauchesne, Arthur (1876-1959); Rules and Forms of the House of Commons of Canada with Annotations and an Extensive Index: A Compendium of Canadian Parliamentary Practice Prepared for the Use of Members of Parliament, (Toronto: Canada Law Book Co., Ltd., 2nd edition, 1927)

-----; Rules and Forms of the House of Commons of Canada with Annotations, Comments and Precedents: A Compendium of Canadian Parliamentary Practice Prepared for the Use of Members of Parliament, (Toronto: Canada Law Book Co., Ltd., 3rd and 4th editions, 1943 and 1958)

Bennion, F. A. R.; Statute Law, (London: Oyez Longman Publishing Ltd., 2nd edition, 1983)

-----; Statutory Interpretation Codified, with a Critical Commentary, (London: Butterworths, 1984)

Bourinot, Sir John George (1837-1902); Parliamentary Procedure and practice with an introductory account of the origin and growth of parliamentary institutions in the Dominion of Canada, (Montreal: Dawson Brothers, 1st edition, 1884)

-----; Parliamentary Procedure and Practice with a review of the origin, growth, and operation of parliamentary institutions in the Dominion of Canada, (Montreal: Dawson Brothers, 2nd edition, 1892)

-----; Thomas Barnard Flint, editor, Parliamentary Procedure and Practice in the Dominion of Canada with historical introduction and an appendix, (Toronto: Canada Law Book Co., 3rd edition, 1903)

-----; Parliamentary Procedure and Practice in the Dominion of Canada, (Toronto: Canada Law Book Co., 4th edition, 1916)

Côté, Pierre-André; Interprétation des Lois, (Cowansville (Qc): Les Éditions Yvon Blais Inc., 1982)

Dickerson, Reed (1909-1991); Legislative Drafting, (Boston and Toronto: Little, Brown & Co., 1954)

-----; Materials on Legal Drafting, (St. Paul, Minnesota: West Publishing Co., 1981)

-----; The Fundamentals of Legal Drafting, (Boston and Toronto: Little, Brown & Co., 2nd edition (incorporating Legislative Drafting), 1986)

Driedger, Elmer (1913-1985); Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation, (Ottawa: The King's Printer, 1951)

-----; The Composition of Legislation, (Ottawa: Queen's Printer, 1st edition, 1957)

- ; The Composition of Legislation and Legislative Forms and Precedents, (Ottawa: Department of Justice, 2nd edition, 1976)
- Freund, Ernst (1864-1932); Standards of American Legislation: An Estimate of Restrictive and Constructive Factors, (Chicago: The University of Chicago Press, 1917)
- Ilbert, Sir Courtenay (1841-1924); Legislative Methods and Forms, (Oxford: Clarendon Press, 1901)
- ; The Mechanics of Law Making, (New York: Columbia University Press, 1914)
- Jones, Chester Lloyd; Statute Law Making in the United States, (Boston: The Boston Book Co., 1912)
- Level, Patrice; Essai sur les conflits de lois dans le temps. Contribution à la théorie générale du droit transitoire, (Paris: L.G.D.J., 1959)
- May, Sir Thomas Erskine (1815-1886); A Treatise on the Law, Privileges, Proceedings and Usage of Parliament, (London) The following editions: 1st edition, 1844; 3rd edition, 1855; 4th edition, 1859; 5th edition, 1863; 6th edition, 1868; 7th edition, 1873; 8th edition, 1879; 9th edition, 1883; Sir Reginald F.D. Palgrave and Alfred Bonham-Carter, editors, 10th edition, 1893; T. Lonsdale Webster and William Edward Grey, editors, 11th edition, 1906; T. Lonsdale Webster, editor, 12th edition, 1917; Sir T. Lonsdale Webster, editor, 13th edition, 1924; Sir Gilbert Campion, editor, 14th edition, 1946; C.J. Boulton, editor, 21st edition, 1989
- Pearce, D[ennis] C[hables]; Statutory Interpretation in Australia, (Sydney, etc.: Butterworths, 3rd edition, 1988)
- Redlich, Josef; Recht und Technik des Englischen Parlamentarismus: Die Geschäftsordnung des House of Commons in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt, (Leipzig: 1905), trans. A. Ernest Steinthal, The Procedure of the House of Commons: A Study of its History and Present Form, (New York: AMS Press, Inc., 1969 [reprint of 1908 edition])
- Roubier, Paul; Le droit transitoire : Conflits des lois dans le temps, (Paris: Éditions Dalloz et Sirey, 1^{re} édition, 1929, 2^e édition, 1960)
- Russell, Sir William Alison (1875-1948); Legislative Drafting and Forms, (London, etc.: Butterworth & Co. (Publishers) Ltd., 4th edition, 1938)
- Statute Law Society; Renton and the Need for Reform, (London: Sweet & Maxwell Ltd., 1979)
- Sutherland; Stat. Const. (4th edition, 1985)
- Thornton, G. C.; Legislative Drafting, (London: Butterworths, 3rd edition, 1987)

Thring, Henry Thring, first Lord (1818-1907); Practical Legislation; The Composition and Language of Acts of Parliament and Business Documents, (Toronto: George N. Morang & Co., Ltd., 2nd edition, 1902)

Willard, Ashton Rollins (1858-1918); A Legislative Handbook relating to the preparation of statutes with a chapter on the publication of statutes, (Boston and New York: Houghton, Mifflin & Co., 1890)

Articles

- Anon.; "'Constitutional' Limitations on Amendments in Indiana", 28 Ind. L. J. 65 (1952)
- Anon.; "L'abrogation et le remplacement des lois" (1982), 2 Légistique : Bulletin de rédaction législative et réglementaire 1
- Anon.; "Legislation - Drafting Amendatory Statutes", 43 Harv. L. Rev. 1143 (1930)
- Anon.; "Legislation - The Form of Amendatory Statutes", 43 Harv. L. Rev. 482 (1930)
- Anon.; "State Statutes: Constitutional Subject-Title and Amendatory Requirements", 24 U. Chi. L. Rev. 722 (1957)
- Carr, Sir Cecil T. (1878-1966); "Legislation by Reference and the Technique of Amendment" (1940), 3rd ser., 22 J. Comp. Leg. & Int. L. 12
- ; "Referential Legislation" (1940), 3rd ser., 22 J. Comp. Leg. & Int. L. 191
- ; "The Mechanics of Law Making", [1951] Current Legal Problems 122
- Driedger, Elmer (1913-1985); "Legislative Drafting" (1949), 27 Can. Bar Rev. 291
- ; "History of the Preparation of Government Legislation in Canada", November 7, 1951, National Archives of Canada, MG 31 E 39, Driedger Papers, vol. 7
- ; "The Preparation of Legislation" (1953), 31 Can. Bar Rev. 33
- Freund, Ernst (1864-1932); "Supplemental Acts: A Chapter in Constitutional Construction", 8 Ill. L. Rev. 507 (1914)
- Graham-Harrison, Sir William Montagu (1871-1949); "An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement", [1935] J. S. P. T. L. 9
- Horack, Frank E., Jr. (1907-1957); "Constitutional Limitations on Legislative Procedure in West Virginia", 39 W. Va. L. Q. 294 (1933)
- Hutton, Sir Noël (1907-1984); "Mechanics of Law Reform" (1961), 24 Mod. L. Rev. 18
- Jamieson, N. J.; "The Tradition of Free Expression in Australasian Legislative Drafting" (1980), 9 N. Z. U. L. Rev. 1
- Lee, Frederic P. (1893-1968); "The Office of the Legislative Counsel", 29 Col. L. Rev. 381 (1929)

- Marshall, H. H. (1909-1982), and Norman S. Marsh; "Case Law, Codification and Statute Law Revision", R. A. Woodman, ed., Record of the Third Commonwealth and Empire Law Conference, Sydney - Australia, 25th August - 1st September, 1965, (Sydney: The Law Book Co., Ltd., 1966), pp. 407ff.
- Mason, Paul; "Legislative Bill Drafting", 14 Cal. L. Rev. 298, 379 (1926)
- Menard, Albert R., Jr.; "Legislative Bill Drafting", 23 Rocky Mtn. L. Rev. 127 (1950)
- Nadeau, Denis; "Le remplacement d'une disposition législative : une abrogation méconnue?" (1987), 18 Rev. gen. dr. 377
- ; "La « survie » des règlements et l'« élasticité » de leur portée: Un exemple en matière de santé et de sécurité au travail" (1987), 47 R. du B. 331
- Ram, Sir Granville (1885-1952); "The Improvement of the Statute Book" (1951), 1 J.S.P.T.L. 442
- Read, Horace Emerson; "Is Referential Legislation Worth While?" (1940), 18 Can. Bar Rev. 415
- van der Zee, Jacob (1884-?); "Form and Language of Statutes in Iowa", Benjamin F. Shambaugh, ed., Statute Law-Making in Iowa, vol. III, Iowa Applied History Series, (Iowa City, Iowa: State Historical Society of Iowa, 1916), pp. 285-395
- Ward, D.A.S.; "Current Problems in the Legislative Process" (1976), 3 Otago L. Rev. 529

Reports and other Official Documents

Canada, Parliament, House of Commons; Annotated Standing Orders of the House of Commons, (Ottawa: Queen's Printer, 1989)

Conference of Commissioners on uniformity of legislation in Canada [now the Uniform Law Conference of Canada]; "Draft of Uniform Interpretation Act Sections", Proceedings of the twenty-third annual meeting of the Conference of Commissioners on uniformity of legislation in Canada held at Toronto September 5th, 6th, 8th, 9th and 10th, 1941, Appendix G

-----; "Uniform Interpretation Act", Proceedings of the thirty-fifth annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada held at Quebec, P.Q. September 1st to 5th, 1953, Appendix P

-----; "The Interpretation Act", Proceedings of the Fifty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, held at Victoria, B.C., August 20th to August 24th, 1973, Appendix M

Great Britain; The Preparation of Legislation, Report of a Committee Appointed by the Lord President of the Council, (London: H.M.S.O., 1975) Cmnd. 6053

Runciman, J. P.; Uniformity of Legislation in Canada - An Outline - and Rules of Drafting, (Conference of Commissioners on Uniformity of Legislation in Canada [now the Uniform Law Conference of Canada], 1949)

Runciman, J. P., and E. H. Silk; Rules of Drafting together with Observations and Suggestions on the Drafting of Legislation adopted by the Conference, (Conference of Commissioners on Uniformity of Legislation in Canada, 1942)

Statute Law Society, Statute Law Deficiencies: Report of the Committee appointed by the Society to examine the failings of the present Statute Law System, (London: Sweet & Maxwell Ltd., 1970)

-----; Statute Law: The Key to Clarity, First Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, (London: Sweet & Maxwell Ltd., 1972)

-----; Statute Law: a radical simplification, Second Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom, being a reproduction of its Memorandum presented in October 1973 to the Committee on the Preparation of Legislation appointed by H.M. Government, (London: Sweet & Maxwell Ltd., 1974)

Tremblay, Richard, et al.; Guide de rédaction législative, (Québec: Société québécoise d'information juridique, 1984).

Uniform Law Conference of Canada; "Uniform Interpretation Act", Proceedings of the Sixty-sixth Annual Meeting, held at Calgary, Alberta, August, 1984, Appendix H

-----; Legislative Drafting Section; "Canadian Legislative Drafting Conventions", Proceedings of the sixtieth annual meeting held at St. John's, Newfoundland, August 1978, Appendix B, pp. 64-90

-----; -----; "Canadian Legislative Drafting Conventions", Proceedings of the seventy-first annual meeting held at Yellowknife, Northwest Territories, August, 1989, pp. 25ff.