LOCAL GOVERNMENT ADMINISTRATION ASSOCIATION

BYLAW DRAFTING

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1. INTRODUCTION

The effect of a local government bylaw is parallel to the effect of provincial legislation. Under Section 1 of the *Interpretation Act*, RSA 2000, c I-8 (the "*Interpretation Act*"), a bylaw is a regulation, enacted "in execution of a power conferred under an Act". Pursuant to section 1(1)j of the *Municipal Government Act*, RSA 2000, c M-26 (the "MGA"), an enactment includes regulations made under an act of the provincial legislature.

A bylaw has the same effect on persons to whom it is directed as a federal or provincial statute: *Re Tanenbaum and Local Board of Health for Toronto* [1955], OR 622 (ON CA). In *Garfield v Toronto* (1895), 22 OAR 128, Burton JA stated at page 34 that:

> …municipal councils are granted legislative powers; … the Legislature has largely delegated to them the power of enacting laws within their respective limits, and a law passed by them within jurisdiction thus conferred is as binding as an act of Parliament.

According to the Oxford English Dictionary, the word "bylaw" derives from the obsolete Middle English word "bylaw", which in the 1500's meant "local custom". Lord Coke has a different theory. "Bye" is indicative of "place" (e.g. "Hornby", "Gatsby", etc.) such that a bylaw constitutes an enactment of a community.

2. WHEN BYLAW REQUIRED

Provincial legislation stipulates when a local government council must act by bylaw. Section 180(2) of the MGA provides that where a council or a municipality is required or authorized under any enactment to do something by bylaw, it may only be done by bylaw. If the MGA or bylaw does not require Council to act by bylaw, it may act by resolution.

Conversely, if an action can be carried out by resolution, Council may elect to carry out the action by bylaw pursuant to section 180(3) of the MGA.

3. BYLAW VALIDITY

3.1 Introduction

A court may review the local government's authority to enact the bylaw based on the powers and procedures delegated by the provincial legislature and on the Province's jurisdiction under the *Constitution Act, 1867*.

3.2 Bylaw Validity Checklist

For a bylaw to be valid, it must satisfy the following requirements:

- the local government corporation must be validly established
- the Council must be qualified to act (e.g., member not disqualified, or subject to disqualification as a result of not satisfying the prerequisites for nomination or not having

a direct or indirect pecuniary interest or non-pecuniary interest in the subject matter of the bylaw, etc.)

- the bylaw must be enacted by the council at a validly constituted meeting
- there must be a quorum
- statutory conditions precedent must be satisfied (e.g., approval of a minister, the Lieutenant Governor in Council or the electors, as applicable)
- the bylaw must be signed (or in some cases sealed) as required by the MGA
- the bylaw must be enacted within the jurisdiction and authority of the Province and the local government
- the bylaw must not render compliance with a federal or provincial enactment impossible, or be prohibited by provincial enactment
- the bylaw must be enacted in good faith
- the bylaw must not be unreasonable
- the bylaw provisions must not be so nebulous as to permit of no definite meaning
- the bylaw must be published to the extent required by the MGA
- the bylaw must be enacted in a meeting open to the public
- a bylaw is deemed to be valid unless and until it is set aside by a court of competent jurisdiction (after all appeals and subject to stays)
- it has not been declared invalid by a provincial statute or a provincial order made under the authority of a provincial enactment (or)
- the subject bylaw provision has not been repealed or amended by the local government that enacted it.

3.3 Bylaw Attacks

A bylaw may come under attack in the courts as a result of:

- an application to a superior court for judicial review (e.g., the Alberta Court of Queen's Bench pursuant to section 536 of the MGA);
- a challenge by an accused in the context of an enforcement action, proceeding or prosecution (noting that although a provincial court, unlike a superior court, cannot set aside a bylaw, if it finds the accused innocent by virtue of an invalid bylaw, this may be upheld in a superior court on appeal or, at the very least, other citizens may take cognizance of the invalidity and unenforceability).

3.4 Substantive Grounds for Setting Aside Bylaw

When drafting a bylaw, it is necessary to be aware of the substantive grounds, as opposed to the

procedural defects, that may result in a court setting aside a bylaw. These substantive grounds include unlawful delegation, reference to council, repeating the statutory power, the absence of statutory authority, uncertainty and unreasonableness.

3.4.1 Powers

A local government is an entity created by the provincial government. Therefore, a local government may exercise only those powers delegated to it by this order of government. A local government has no inherent powers or jurisdiction. The Courts may determine that the bylaw content adopted by a local government is beyond its powers. It is therefore necessary for a bylaw to only contain matters falling within the powers and authority delegated to it under the enabling statute. A bylaw which is beyond the powers of the local government in this sense is void from the outset. As such, no rights or liabilities arise under it.

In *Aristate Ltd v Calgary (City),* 2019 ABQB 10, the Court of Queen's Bench declared sections of the City of Calgary's 2016 Business Bylaw invalid. At issue was a decision by the City of Calgary to amend its Business Tax Bylaw to impose a tax on landlords who rent space, including parking and storage, to their tenants. This decision was the latest in several disputes between businesses and the City related to the assessment and taxation of parking in commercial properties. The Court found that the City was not authorized by the MGA to imposed business taxes in the manner contemplated by the bylaw.

After a review of the case law, Romaine J summarized the current rule when it comes to municipal bylaw making power as:

> … the basic proposition that municipalities, as creatures of statute, can only exercise powers that are explicitly conferred on them by provincial legislation, which are authorized or found to be authorized after determining the true meaning of the legislation. If authorization for municipal action is not found in the statute, properly and purposively construed, the action will be held to be ultra vires the municipality: *Shell Canada Products Ltd. v Vancouver (City),* 1994 CanLII 115 (SCC), [1994] 1 SCR 231, [1994] SCJ No 15, at paras 92 and 93, *Robson v Maple Ridge (District),* 2002 BCCA 422 (CanLII), at para 32-35.

There has been a significant evolution in the courts' interpretation of the scope of municipal authority granted by provincial statutes. After *United Tax Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19, the courts have routinely confirmed that the legislation delegating powers to municipality is to be interpreted in a "broad and purposive" manner.

Section 9 of the MGA itself specifically states that the authority to pass bylaws is intended to "give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate." This approach is consistent with section 10 of the *Interpretation Act*, RSA 2000, c I-8, which provides that an enactment must be given a "fair, large and liberal construction and interpretation that best ensures the attainment of its objects".

The MGA authorizes a municipal council to pass bylaws for a wide variety of purposes. In addition to specific bylaw making powers set out throughout the MGA, councils are equally entitled to pass bylaws pursuant to their general bylaw making powers set out in sections 7 and 8. In many cases, the general bylaw making powers are further interpreted with reference to the

municipal purposes set out in section 3 of the MGA. Cumulatively, these sections give municipalities broad but not unlimited power to pass bylaws.

Broad and purpose interpretations of municipal authority have helped municipal bylaws survive challenges in recent case law. The Court of Appeal recently upheld the validity of Lethbridge County business tax bylaw, albeit in a split decision (*Van Raay Paskal Farms Ltd v Lethbridge (County)*, 2019 ABCA 19). Lethbridge Council adopted a business taxation bylaw that imposes business taxes based on the assessed storage capacities of the intensive agricultural businesses within its boundaries. An agricultural operator challenged the bylaw on the basis that it was *ultra vires* the County. Specifically, the operator argued that the MGA did not permit the County to assess agricultural businesses based on storage capacity as that language was only meant to be applied to other types of business such as warehouses.

The majority of the Court of Appeal upheld the bylaw. The Court agreed that the methodology set out the Business Tax Bylaw for assessments of intensive agricultural businesses is consistent with the limits on the County's authority to assess businesses as set out in section 374(1)(b)(ii) of the MGA. Crighton JA, writing on behalf of the majority, confirmed that "the legislature used clear, express and unambiguous language [in the MGA] to delegate to municipalities the power to impose a business tax using a methodology that best captures the business that is carried on within the municipality's boundaries" (*Van Raay Paskal Farms Ltd.*, at para 12).

In another recent decision related to the validity of municipal bylaws, the Alberta Court of Appeal overturned a decision of the Court of Queen's Bench to invalidate Lacombe County's bylaw regulating communal sanitary sewage collection (*Kozak v Lacombe (County)*, 2017 ABCA 351). At issue was the ability of a municipal council to compel private landowners to connect their private sewage systems to the County's system at their own cost.

The Court of Appeal confirmed that the MGA authorized Council to pass such a bylaw. Significantly, the Court confirmed that specific bylaw making powers only derogate from general bylaw making powers in the event of a conflict. If no provisions direct Council to exercise its authority in a particular manner, Council may exercise its discretion and rely on its general bylaw making power to impose legislation even where the MGA may include related provisions.

A bylaw may also be *ultra vires* a municipality when it attempts to extend the powers of the council beyond the municipal boundaries where this is not authorized by statute. See *Sifton v Toronto* (1929), SCR 484.

The Courts may also find a bylaw to be *ultra vires* if the provincial legislature did not have the power to delegate authority to the municipality. For example, provincial legislation authorizing a municipal council to enact a bylaw prohibiting disorderly houses and providing for the punishment of a person in relation thereto is *ultra vires*. Prohibiting disorderly houses and providing punishment of the inmates thereof are criminal law matters and may be regulated only by the federal government pursuant to the division of powers under the *Constitution Act*, 1867. See *R v McGregor* (1902), 4 OLR 198 (Ont.CA).

The power exercised by bylaw cannot exceed the power granted by provincial legislation. In *Howison Amusements Ltd v City of Gloucester* (1989), 46 MPLR 206, the Ontario Supreme Court found the City's video game and pin ball machine bylaw invalid. The City passed a bylaw requiring that all "premises where mechanical or electronic games are operated" be licenced. The Ontario *Municipal Act* only authorized the municipality to regulate and licence all places of amusement. The bylaw controlled "all premises" in the City which had one or more video games. The purpose of the bylaw was to regulate video arcades. The wording of the bylaw suggested that places other than video arcades could be regulated provided they operated at least one video game. Accordingly, the City exceeded its jurisdiction by attempting to broaden its definition of "place of amusement".

In *Clark v Fairvale (Village)* (1990), 47 MPLR 230, the New Brunswick Court of Appeal set aside a water rate bylaw. The legislation provided that the rate should be calculated based on usage. The Court held that the classes of the user provided under the bylaw were required to be distinguishable based on usage. However, the bylaw did not establish different classes of water service users in relation to usage. Instead it set up a scheme of different types of units related to types of entrances of the premises for either residential or commercial purposes. Because of this arbitrary distinction which went beyond the authority set out in the legislation, the bylaw was held to be invalid.

Questions often arise as to the scope of municipal powers in the areas of land use planning and taxation. In *R v Greenbaum*, [1993] 1 SCR 674, the Supreme Court of Canada found that a municipality's jurisdiction is limited to authority expressly delegated by the provincial legislature and that the benevolent construction is to be employed *except* where the power restricts common law or civil rights. In the *Greenbaum* case, the Supreme Court of Canada quoted Davies J in *Hamilton v Hamilton Distiller Co* (1907), 39 SCR 239, at p 249:

> In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Cruse* v. *Johnson* [[1898] 2 Q.B. 91], at p.99, a "benevolent construction", and if the language used fell short of expressly conferring the powers claimed, but did not confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.

This "somewhat stricter rule" was also applied by the British Columbia Court of Appeal in *Denman Island Local Trust Committee v 4064 Investments Ltd,* (2001) BCCA 736 and in the dissent in *Van Raay Paskal Farms Ltd v Lethbridge (County)*, 2019 ABCA 19.

3.4.2 Consistency with Provincial & Federal Legislation

According to section 13 of the MGA, a bylaw only has effect to the extent it does not conflict or is not inconsistent with any provincial or federal act. For example, if a bylaw is in conflict or inconsistent with the MGA, it is of no effect to the extent of the conflict or inconsistency. In other words, a municipality cannot override the provisions of the MGA and "do indirectly what it cannot do directly" *Osman Auction Inc v Edmonton (City)*, 2016 ABCA 166 (CanLII), at para 33.

3.4.3 Delegation

A local government may not delegate authority or discretion to any of its officers or employees unless the empowering statute clearly provides for delegation of authority or discretion. Section 203(1) of the MGA allows council to delegate its powers, except for those listed in section 203(2). The exceptions to council authority to delegate include its powers to:

- pass bylaws,
- make, suspend or revoke the appointment of a person to the position of chief administrative officer,
- adopt budgets,
- cancel, refund or reduce municipal taxes or tax arrears, or
- decide appeals imposed on it by this or another enactment or bylaw, whether generally or on a case by case basis, unless the delegation is to a council committee and it is authorized by bylaw.

In *Regina* v *Horback* (1967), WWR 129 (BC SC), McIntyre J held that a bylaw provision constituting a delegation of the council's judicial or legislative function to a municipal official is invalid. In that case, the City of Vancouver by its Charter was authorized to enact bylaws to regulate the safety and repair of vehicles operated on any City street. Pursuant to this power the City enacted a bylaw authorizing the Superintendent of the motor vehicle inspection station to require any vehicles to be inspected. Under the bylaw, the Superintendent enjoyed the absolute discretion to forbid the use of a vehicle if it did not satisfy safety standards he established.

McIntyre J stated on page 135 that:

> Section 6 of the bylaw purports to delegate a judicial power unto the Superintendent and is therefore *ultra vires*. If Section 6 fails, then no attempt whatever is made in the bylaw to fix standards of safety as required by Section 317(p) of the *Vancouver Charter* … I might add that this bylaw does more than delegate judicial or legislative powers. It amounts to a complete abdication of the legislative power given Section 317(p) to the Council. That power to create standards of safety is one to be exercised by the Council as one deliberative body and not to be delegated to one employee.

In arriving at this conclusion, McIntyre J relied upon the decision of the British Columbia Supreme Court in *Re Summary Convictions Act; Re Pride Cleaners and Dyers Ltd* (1965), 50 W.W.R. 645. In that case, Branca J held that a bylaw which prohibited noise-making during certain hours and then gave the mayor power to relieve against the bylaw, where he could

conclude that it was either impossible or impractical to comply with the bylaw, was invalid as a delegation of judicial powers.

In *Regina* v. *Sandler* (1971), 3 OR 614, the Ontario High Court of Justice review a fire safety regulation bylaw. The Ontario *Municipal Act* empowered the council to enact a bylaw requiring buildings to be put in a safe condition to guard against fire, authorizing appointed officers to inspect the premises and to enforce the bylaw and making such other regulations for preventing fires as the council should deem necessary. The City of Toronto enacted a bylaw under this Section empowering the fire chief:

> to inspect the fire protection equipment in any premises and to make such orders for the installation, repair or replacement of fire protection equipment as he deems necessary.

The judgment of the Court was delivered by Kelly J who stated at page 619 that:

> it is my view that when the Legislature gave to the municipal councils a wide discretion as to the formulation of regulations for the prevention or spread of fires, it did not contemplate that any municipal council would attempt to evade its responsibility for making regulations, by substituting for its judgment that of a non- elected official in its fire department … When, as here, the bylaw itself denies (the citizen) that exposition of his obligations and purports to make him liable for noncompliance with any order the Chief may make, even if that order applies solely to his particular premises, I consider the bylaw to be an unwarranted delegation of a legislative power, the exercise of which was confined by the Legislature to the Municipal Council itself.

There are several exceptions to the rule against delegation of authority and discretion. If the enabling statute specifically provides for such delegation, it is valid.

3.4.4 Reference to Council

A council may not by bylaw reserve to itself any discretion when the empowering statute authorizes the council by bylaw to enact a regulation. The bylaw creating obligations to be observed by citizens legislated under powers set out in the enabling statutes must be sufficiently explicit that the citizen seeking to observe the provisions of the bylaw may from a reading of the bylaw satisfy himself that he has complied with its requirements. The requirements should not be left to the whim of the council.

In *British Columbia Electric Company Limited v Corporation of the District of Surrey* (1956), 18 WWR 462 (BC SC) McInnes J held that the words "subject to the approval of the municipal council" were invalid. The provincial statute authorized the council to make by bylaw regulations regulating, restricting and prohibiting in any district the location of buildings or property designed for specific uses. The District of Surrey enacted a bylaw providing that utility transmission lines could be established in any district "subject to the approval of the municipal council". At page 467 of the Reasons for Judgment McInnes J stated that:

> I must and do find on the authorities that the words 'subject to the approval of the municipal council' are (1) not a regulation; (2) discriminatory in that the rights of the applicant are subject to the whim or caprice of the council.

3.4.5 Repeating Statutory Power

A council may not wrongfully redelegate to itself any discretion by merely reciting in a bylaw the empowering provisions of the enabling statute while leaving the details to be negotiated on an ad hoc basis.

In *Canadian Institute of Public Real Estate Companies v Toronto,* [1979] 2 SCR 2, the Supreme Court of Canada determined that a municipal council in a bylaw may not merely repeat the power set out in the statute but must exercise the power by enacting a bylaw defining the desired regulations. In that case, the City of Toronto by bylaw established development controls in the core area. The bylaw did not establish specific and objective standards to be followed by landowners but repeated the empowering provisions of the enabling statute leaving the details to be negotiated on a site-by-site basis.

In determining that the bylaw as *ultra vires*, the Supreme Court of Canada relied upon its decision in *Brant Dairy Company Ltd v Milk Commission of Ontario*, [1973] SCR 131. In that case, Laskin J stated:

> a statutory body which is empowered to do something by regulation does not act within its authority simply repeating a power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the board to itself in a form different from that originally authorized.

In *Doman Industries Ltd v North Cowichan (District)*, 1980 CanLII 297 (BC SC), Bouck J determined that in a zoning bylaw or an amendment to an existing zoning bylaw council may not provide for the issuance of development permits by merely repeating the contents of then section 717(2)(a) to (k) of the *Municipal Act*. Bouck J stated that the precise details a landowner must meet when he is asking for a development permit must be spelled out in the bylaw itself and not reserved to the discretion of council. Mere repetition of the *Municipal Act* provisions is insufficient because each application for a development permit is then decided on an ad hoc basis.

In determining that the development permit section of the bylaw was invalid, Bouck J stated at page 20 that:

> just because there may be enormous variations in the circumstances of each individual piece of property does not make any difference with respect to the necessity of having such a bylaw. Where it is called for in the legislation, it must be enacted no matter how difficult it may be to prepare.

In arriving at this conclusion, Bouck J relied upon the decision of the Supreme Court of Canada in the *Canadian Institute of Public Real Estate Companies* case, [1979] 2 SCR 2.

3.4.6 Uncertainty

A challenge to a bylaw will be successful if the drafting choices create uncertainty. In *Montréal* v *Arcade Amusements Inc*, [1985] 1 SCR 368, the Supreme Court of Canada indicated that bylaw will be declared invalid where its vagueness is "so serious that the judge concludes that a reasonably intelligent man, sufficiently well informed if the by-law is technical in nature, is unable to determine the meaning of the by-law and govern his actions accordingly."

A bylaw is uncertain when it is "too general and nebulous to admit of any definite interpretation". See *Barthrop v West Vancouver and Field (District)* (1979), 17 BCLR 202 (BC SC). In that case, the impugned bylaw referred to structures which were "near the bank of any water course" and at "variance with the technical standards of … the drainage survey of Dayton and Knight Ltd.". The Court held that it would be impossible for the landowner to determine whether his residence was near a water course or whether there was a variance with the technical standards set out in the 238-page report. The technical report was written in "non-legal language" and contained reference to hypothetical cases based on "estimated channels". Murray J stated at page 205 that "the mere fact that the channels are estimated is sufficient to create 'uncertainty'".

The Alberta Court of Queen's Bench upheld the bylaws in *London Drugs Ltd v Red Deer*, 81 AR 87, 1987 CanLII 3210 (AB QB) ("*London Drugs*") and in *1022049 Alberta Ltd v Medicine Hat (City of)*, 2005 ABQB 196 (CanLII) ("*1022049*"). In *London Drugs* the court considered a bylaw that was intended to restrict business hours. London Drugs argued that the bylaw was uncertain. Based on the "clearly expressed intention and purpose of the bylaw" the court was satisfied that it should receive a benevolent interpretation and that the provisions of the bylaw were capable of definition within the intent and purpose of the bylaw. In *1022049* the operator of a nightclub attempted to have the City of Medicine Hat's Anti-Noise Bylaw quashed. The Court upheld the bylaw, despite the possibility that there may be on occasion some difficulty in interpretation.

Words and phrases which have been held to be uncertain (resulting in the bylaw being unenforceable) include:

- "small articles": *Re Bunce and Cobourg* (1963), 39 DLR (2d) 513 (ON CA);
- "seasonal dwelling": *Mueller v Tiny* (1976), 72 DLR (3d) 28 (ON SC);
- "dangerous goods": Canadian Occidental Petroleum v North Vancouver (Municipality) (1983), 46 BCLR 179 (SC BC);
- "within a reasonable time": *Long Branch (Village) v Hogle* [1947], OR 436 (ON SC);
- "reasonable efforts": *Re Weir* (1979), 102 DLR (3d) 273 (ON SC);
- "sex-oriented products": *Red Hot Video Ltd v Vancouver (City)*, 1985 CanLII 634 (BC CA); and
- "environmental impact study": *Doman Industries Ltd v North Cowichan* (1980), 111

DLR (3d) 358 (SC BC.).

If there are two possible meanings for a term in a bylaw, the meaning which favours the property owner or resident (as opposed to the local government) will likely be applied: *Martell v Halifax (Regional Municipality)*, 2015 NSCA 101 citing *Wilson v Jones* [1968], SCR 258 with approval.

3.4.7 Procedural Requirements and Conditions Precedent

In addition to substantive grounds, a person attacking a bylaw may also question compliance with procedural requirements and satisfaction of conditions precedent. Conditions precedent are statutory formalities that must be satisfied prior to adoption. These include approval of an external authority (e.g., Minister, Lieutenant Governor in Council, assent of the electors), notice, publication, or a public hearing.

The general rule is that a failure to comply with statutory conditions precedent to bylaw enactment is fatal. The satisfaction of the condition is a constitutional prerequisite to validity of the bylaw: *Victoria v Mackay* (1918), 56 SCR 524.

On the other hand, failure to comply with a formal requirement imposed by statute respecting how the bylaw is to be adopted will make the bylaw voidable (i.e., liable to be quashed for illegality).

Examples of conditions precedent that must be satisfied are notice, publication or hearing requirements related to bylaws that interfere with common law or civil rights (e.g., zoning, taxing or expropriation bylaws) (see *Riopelle v Montreal* (1911), 44 SCR 579). In *Costello v Calgary* (1983), 1 SCR 14, the Supreme Court of Canada considered the validity of an expropriation bylaw in respect of which Calgary failed to serve one of the joint tenants with notice within the time limits required by the legislation. The question was whether the failure to comply strictly with the notice requirement rendered the bylaw void. The court set aside the bylaw because the City failed to comply with the statutory requirements relating to the service of a notice of the council meeting where a council was to consider the expropriation bylaw. The court stated that:

> The courts have endeavored to avoid interference with municipal enactments by an overly strict approach to their construction, but have generally insisted upon strict compliance with enabling legislation that authorizes municipalities to exercise extraordinary powers or pass bylaws concerning taxation, expropriation, or other interference with private rights.

The *Costello* case was considered in *Thierman v Itaska Beach (Summer Village)*, 2002 ABQB 343 ("*Thierman*"). In *Thierman*, the Alberta Court of Queen's Bench considered whether bylaws adopted in respect of the use of municipal reserve land were invalid due to defects in the notice of public hearing given under the MGA. The MGA requires that a notice must contain a statement of the general purpose of the proposed bylaw. The court found that the Village failed to comply strictly with the requirements of the statute. The question then arose whether these defects in the notice rendered the bylaw void. The court considered *Costello* and concluded that in this case, the Village council was not exercising extraordinary powers or interfering with private rights of the nature contemplated in *Costello*. As a result, the court found that the deficiencies in the notice of the proposed bylaws were not fatal to the bylaws.

Examples of merely formal statutory requirements as to the manner of enacting a bylaw are notice deadlines or bylaw adoption limitations that do not relate to an interference with common law or civil rights: *Belrose v Chilliwack* (1893), 3 BCR 115 (BC CA).

The general rule is that non-compliance with the Council or Board procedure bylaw does not invalidate a bylaw: *Brentwood Lakes Golf Course Ltd v Central Saanich* (1991), 6 MPLR (2d) 1 (BC SC).

Councils and boards would be well-advised to prepare checklists of statutory conditions precedent and formal procedural requirements for each bylaw, with an officer (such as the person fulfilling the role of the clerk) initialing each item on the checklist prepared for the bylaw.

4. INTERPRETION ACT

Since the bylaw is a regulation which is an enactment, the *Interpretation Act* applies. Accordingly, when drafting or interpreting a bylaw it is necessary to consider the provisions of the *Interpretation Act*.

Section 12(1) of the *Interpretation Act* provides that the preamble of a bylaw is part of the bylaw intended to assist in explaining the bylaw. Accordingly, a court may determine the effect of a provision of a bylaw (e.g., a land use bylaw) based on the intent of Council as expressed in the preamble.

Section 12(2) of the *Interpretation Act* provides that the table of contents, marginal notes and references after the end of a section or other division form no part of the enactment but shall be construed as being inserted for convenience only.

Further to Section 11 of the *Interpretation Act*, the enacting clause of a bylaw is suggested to be:

> "NOW THEREFORE the Council (Board) of the Town (etc.) of
> … in open meeting assembled enacts as follows:".

Section 14 of the *Interpretation Act* provides that a bylaw does not bind or affect the Crown unless the enactment expressly states that it binds the Crown. For example, a land use bylaw does not affect Her Majesty, but likely affects a tenant or licensee on crown land [*Squamish (District) v. Great Pacific Pumice Inc.*, 2000 BCCA 328 (CanLII)].

Section 26(2) of the *Interpretation Act* provides that gender specific terms include both genders and include corporations. Section 26(3) of the *Interpretation Act* provides that in a bylaw words in the singular include the plural and words in the plural include the singular. For example, if an owner in a building bylaw is entitled to apply for a building permit, then two owners under a joint tenancy arrangement may apply for the building permit.

Section 26(4) of the *Interpretation Act* provides that if a word or expression is defined in the *Interpretation Act*, the municipal legislation, or the bylaw itself, other parts of speech or grammatical forms of the same word or expression in the bylaw have corresponding meanings.

Section 31 of the *Interpretation Act* provides that a reference to another enactment of the provincial government or of Canada is a reference to the other enactment (as amended). This does not apply to local government bylaws. Accordingly, when repealing a bylaw, it is necessary to recite the bylaw and add the words "as amended".

5. DEFINITIONS

The terms in a bylaw that need to be expressly defined depend on whether the words or term have a single common sense meaning in the context in which they appear. The Court normally first attempts to adhere to the ordinary meaning of the words used and to the grammatical construction: *Van Raay Paskal Farms Ltd v Lethbridge (County)*, 2019 ABCA 19. This approach may be varied where it is clearly the intention of the legislature, to be collected from the statute itself: *Beck v Smith* (1936), 2 MW 191. When drafting, one should ask whether the term in question has in its context an ordinary meaning which could not reasonably be disputed. If so, no definition is necessary. If there is more than one ordinary meaning, or if the term is an esoteric one, with no generally known ordinary meaning, then it should be defined. For example, the word "municipality" does not need to be defined, because it is defined in the *Interpretation Act* and the MGA, and that definition applies to the bylaw.

An expression should be defined only where it is not being used in its dictionary meaning or is being used in one of several dictionary meanings, where it is used as an abbreviation of a longer expression, where defining it would avoid repetition of words or where the definition is intended to limit or extend the provision of the bylaw.

A definition should solely explain the meaning of a word or expression and should not include any regulation.

An expression should not be defined in such a way that it is given an artificial or unnatural sense. For example, one municipality passed an animal control bylaw that provided that "in this bylaw 'dog' includes 'cat'".

The expression "means and includes" should not be used as a definition. Similarly, the phrase "unless the context allows" should never be used in a bylaw because the Courts have taken advantage of such phraseology to enable them to creatively interpret a bylaw in a way that would have made sense to the courts in the absence of the expression.

Definitions should be used sparingly and in response to a specific need.

Section 13(a) of the *Interpretation Act* provides that definitions in a bylaw (unless otherwise stated) are applicable to the entire bylaw including the section containing the definitions. Section 13(b) of the *Interpretation Act* provides that definitions in the MGA are deemed to apply to bylaws.

Section 28 of the *Interpretation Act* provide that all the definitions listed in the sections apply to every bylaw enacted by a local government even if the words or phrases are not again defined in the bylaw. Some of the words or phrases have specific meanings that must be carefully considered when drafting a bylaw. For example, "holiday" is expressly defined. "Shall" is to be

construed as imperative. This is important when considering whether a bylaw imposes a private law duty of care on the local government. Useful words or terms defined in the Alberta legislation include “adult”, “minor”, “municipality”, “person”, “police”, “police officer” and “offence”. Under Section 3(1) of the *Interpretation Act,* a contrary intention can appear in the bylaw if the local government prefers a custom definition.

The effect of some of the definitions in the MGA is that the interpretation section of that act extends to all bylaws relating to municipal matters.

The effect of some of the definitions in the municipal legislation may be unexpected in relation to a bylaw that is being drafted. “Owner” is defined in relation to real property and includes a person in lawful possession, (e.g., tenant for life). It is not defined to include an agent of the owner (such as a contractor on behalf of an owner who is building or a lawyer on behalf of an owner who is applying for an approval) unless the bylaw so states. “Parcel” means where there has been a subdivision, any lot or block shown on a plan of subdivision that has been registered in a land titles office or it can mean more than two lots of blocks shown on a plan of subdivision where a building affixed to the land that would be transferred without special mention. These nuances in definitions can have a significant impact on bylaws related to land use planning and taxation. It is interesting to note that “road” in Alberta includes a bridge.

6. CONTENT OF A BYLAW

None of the provincial municipal acts require bylaws to adopt any particular form, content or ordering of content. It is interesting to note, therefore, that bylaws from Newfoundland to Yukon Territory appear to have more or less the same form and content.

Generally, the items contained in bylaws include the following:

- **Name of municipality**
- **Statement as to whether document is an office consolidation**
- **Title**
- **Subtitle to describe purpose**
- **List of amendments, if applicable**

- **Substantive purpose statement**
- **Preamble**
- **Enactment clause**
- **Citation**
- **Principles**
- **Definitions**
- **Interpretation**
- **Substantive provisions**
- **Offence provisions**
- **Severability clause**
- **Repeal**
- **Date bylaw in force**

- **Readings**

- **List of conditions**

- **Authentication**

- **Schedule**

6.1 Name of Municipality

The entire corporate name of the local government should be set out at the top of the bylaw. Pursuant to section 20 of the *Provincial Offences Procedure Act*, RSA 2000, c P-34 a court must take judicial notice of a bylaw and so the name of the local government should be the correct legal name of the entity taken from its incorporating documents (the same as would appear on pleadings).

6.2 Office Consolidation

If the bylaw is a consolidation of the original bylaw and amendments, this should be stated clearly near the top or beginning of the first page. It is useful to the user to identify amendments throughout the bylaw. Some municipalities also list the amendments and their effective dates after the subtitle or at the end of the bylaw.

6.3 Title

The words used in the title of a bylaw generally derive from the words contained in the empowering legislation. For example, if the legislation empowers the council to adopt a bylaw to regulate or prohibit businesses, business activities or persons carrying on business, then the plain language version of the title could be “Business Regulation Bylaw”.

6.4 Subtitle

Some bylaws contain subtitles to provide in greater detail the nature of the bylaw. This may be useful when searching for a bylaw in electronic format using a search engine. It is also useful when a person reading the bylaw is attempting to determine nature of the bylaw in greater detail than would be allowed by the simple title. An example of a subtitle for a business regulation bylaw would be "A bylaw to regulate or prohibit businesses or business activities." An example of a subtitle for an amending bylaw would be "A bylaw to regulate the Business of Cannabis Dispensaries".

6.5 Purpose

Some bylaws contain a clause setting out the purpose of the bylaw. Some statutes contain purpose clauses as well: see, for example, section 3 of the MGA. A purpose clause is intended to help the reader, and a court if applicable, to interpret the legislation in a "purposive" manner that is based on the legislator's purposes, and not the "subjective objectives" of the reader. A purpose statement sets out the moral basis on which the sections of the bylaw are based.

The advantages of a purpose statement are:

- better understanding of the legislative intent of the council,
- resolution of ambiguities in the bylaw.

The disadvantages of a purpose statement arise where:

- the statement is a mere manifesto that obscures the precision of the other sections,
- under the doctrine of *ultra vires*, a court uses a purpose clause as a tool to limit the effect of a subsequent empowering provision.

The purpose section must be elastic enough to meet future needs. It should not limit or restrict the ambit of the substantive provisions unless that is what the council intends.

6.6 Preamble

Federal and provincial legislative counsel have always taken the view that a preamble to a statute should be limited to a recitation of facts. This is for two reasons. First, the *Interpretation Act*, which governs all legislation and bylaws, provides that a court must consider a preamble part of the bylaw intended by the council to assist in explaining the meaning and object of the bylaw. Second, if the preamble contains principles or policies, there may be a collision between the principles or policies set out in the preamble on the one hand and the principles inherent in the provisions in the body of the bylaw on the other hand.

It is not advisable to include in the preamble the statutory authority for the enactment of the bylaw. Noting that the preamble is part of the bylaw and intended to assist the court in explaining the meaning and object of the bylaw, it is inadvisable to include the statutory authority for two reasons:

1. the section numbers and the substantive authority change from time to time, and it is not possible for local governments to update their bylaws every time statutes are amended, revised or repealed.

2. when a municipal lawyer goes to court to defend your bylaw, the lawyer will often rely upon several sections in the municipal legislation or other legislation that may not have been in contemplation by the drafter of the bylaw. For example, provisions in a sign bylaw may be defended based on authority relating to land use, structures, highways, signs, freedom of expression or other provisions and not merely a "sign" provision expressly set out in provincial legislation.

6.7 Enactment Clause

As stated, Section 11 of the *Interpretation Act* suggests there needs to be an enacting clause for an enactment. An enacting clause of a bylaw is suggested to be as follows:

> "NOW THEREFORE the Council of the City (etc.) of …in the Province of Alberta enacts as follows: …".
>
> or
>
> "NOW THEREFORE the Council of the Town (etc.) of … in the Province of Alberta in an open meeting assembled enacts as follows:".

6.8 Citation

It is valuable to have a formal citation for the bylaw because the bylaw is often referred to or incorporated by reference in other documents or proceedings. For example, it is necessary to

refer to a bylaw in the minutes of a council or committee meeting, in a court proceeding, in a contract, in another bylaw, on a website, or in a media release. There is no rule of law or accepted standard governing the naming of a bylaw. Some municipalities include in the name of the bylaw information about what it does; the year of enactment or amendment, as the case may be; and a number based on a numbering system used by the office of the person acting as a clerk. Accordingly, an example of a citation is as follows:

> "This bylaw may be cited as "The Business Regulation Bylaw, 2019, No. XXXX".

When referring to a bylaw that has been amended, it is desirable to refer to a citation and add the words "as amended".

6.9 Principles

A court may consider the principles section of a bylaw when interpreting the legislation. Another objective of the principles section is to guide the relationship between the local government and the entity or persons affected by the bylaw.

Principles in bylaws are rare. If they are included, they should be simple, but meaningful.

There are several examples of principles in provincial legislation. For example, Section 4 of the *Local Government Act* (British Columbia) provides that the relationship between local governments and the provincial government in relation to the statute is based on several principles, including cooperative relations between the provincial government and local governments that must be fostered in order to efficiently and effectively meet the needs of the citizens.

6.10 Definitions

Comments respecting "definitions" are set out in Section V of this paper.

6.11 Interpretation

Bylaws often contain interpretation sections. There is no advantage to repeat the provisions of the *Interpretation Act* (e.g., dealing with the plural and the singular, gender, calculation of time, etc.) because, as stated, these provisions are deemed to apply to the bylaw in any event and the public is deemed to have knowledge of the provisions of the *Interpretation Act* when using a bylaw. It is necessary in some cases, however, to amplify or expand on the *Interpretation Act* provisions in order to make the bylaw more accessible (e.g., where a contrary intention appears in the bylaw).

6.12 Substantive Provisions

The substantive provisions must be drafted carefully to ensure they do not provide grounds for setting aside the bylaw. For example, there must be authority in a provincial statute or regulation

for each provision in the bylaw. The grounds for setting aside the substantive provisions of a bylaw are discussed in Section III entitled “Bylaw Validity”.

6.14 **Severability**

A regulatory bylaw may contain a provision to the effect that if any portion of the bylaw is found by a court of competent jurisdiction to be invalid, the invalid portion is to be severed and the remainder is to remain valid. This may have the effect of saving a bylaw if a court finds a portion of the bylaw to be invalid on one of the substantive grounds. If, however, a court finds that the council must have intended that the invalid portion is an integral part of the remainder, the court may set aside the entire bylaw despite a severability clause.

6.15 Repeal

It is customary when adopting a new bylaw to repeal the bylaw or bylaws that it replaces. Although it is trite common law that a new enactment supersedes an enactment that is already on the books, it is not often possible to identify with precision which portions of a new bylaw supersede which provisions of an old bylaw. It is preferable to take control of the matter by repealing the old bylaw. It is also important to repeal the amendments that may have been made between the date of the original date of enactment and the date the new bylaw is being enacted.

6.16 Readings

Most bylaws list the readings and the dates of the readings.

6.17 Conditions Precedent

If there are statutory conditions precedent, such as the necessity for approval by an external authority, it is advisable to set out the date of the satisfaction of the condition precedent on the last page of the bylaw under the “readings”.

6.18 Authentication

Section 213 of the MGA provides for the signing or authorization of municipal documents. It is significant that section 189 of the MGA provides that a bylaw is passed when it receives third reading and it is signed in accordance with section 213. Accordingly, it is recommended that the last page of the bylaw contain the authentication.

The authentication page also helps enter bylaws into evidence during court proceedings. Pursuant to section 33 of the *Alberta Evidence Act*, RSA 2000, c A-18, copies municipal bylaws may be entered into evidence without proof of the signature or official character of the person or persons appearing to have signed it.

6.19 Schedule

It is often necessary or advisable to place portions of a bylaw in a schedule. The schedule is part of the bylaw, so the definitions and interpretation provisions apply to the schedule. T be clear, an interpretation provision in the main body of the bylaw should list the state that the schedules and state that they are part of the bylaw.

Examples of matters that are customarily included in schedules include application forms, fees, geographical area plans, technical specifications or standards, drawings, legal plans, schematics or provisions that are incorporated from another document.

7. BYLAW DRAFTING FUNDAMENTALS

7.1 Canadian Legislative Drafting Conventions

The Uniform Law Conference of Canada has produced the Uniform Legislative Drafting Conventions (set out in Appendix A to this paper). The conventions include the following fundamental rules when drafting enactments:

- consistency in the form and style is a valuable tool for achieving consistency in the use of language
- precedents, in the form of comparable bylaws from other municipalities, may be useful to identify issues that should be dealt with but should not be copied and should not be relied on as a substitute for thinking
- provisions which have no legal effect should be avoided, since a Court may try to give them an unwanted effect
- each section which creates an offence should be identified and accompanied by an appropriate penalty—while this may be redundant and overly time consuming in a bylaw a separate offence section for each page or part of the bylaw would increase flexibility
- the most frequent mistakes made when drafting bylaws are unlawful attempts to delegate discretionary powers or to use regulatory powers for a purpose to which is not intended—creative interpretation of the enabling statute is not rewarded with enforceability
- The most important thing to remember when drafting is to keep it brief and simple.

7.2 How the Courts Construe a Bylaw

It is important to know how the courts construe a bylaw (*i.e.*, how statutory interpretation works) in order to draft a bylaw in a manner that will allow the court to interpret it the way the drafter intended. There are several principles of bylaw construction. The principal rules are that:

- the Interpretation Act applies

- every word has significance
- different words mean different things, and
- words must be read in their entire context.

7.2.1 Interpretation Act

The implications of the *Interpretation Act* are discussed in detail in Section IV of this paper. In summary, every provision of the *Interpretation Act* applies to every bylaw (unless a contrary intention is evident).

The *Interpretation Act* provides that definitions in the provincial municipal acts apply to the bylaws; provides that words defined in the *Interpretation Act* have the same definitions in the bylaws; governs the calculation of time; codifies the law respecting the repeal of one provision and the enactment of a subsequent provision; and gives the courts direction on how to construe bylaws.

7.2.2 Each Word is Significant

The courts have approached the construction of enactments from the perspective that every word is intended by the legislator to have some meaning. There are three rules in this regard:

i. Words in one provision and not another are intended to have a different legal effect.

If a zoning bylaw permits "highway commercial" and "convenience store" in a different zone (where the definition of "highway commercial" does not contain the words "convenience store"), a court may find that a convenience store is not permitted in the highway commercial zone.

ii. Bylaws should not repeat something that has already been said.

The British Court of Appeal stated in *Hill* v. *William Hill (Park Land) Ltd.*:

> … though a parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is a good reason to the contrary, the words add something which would not be there if the words were left out."

iii. Every word has legal effect.

A court will approach the interpretation of a bylaw on the basis that the bylaw is not repeating what is already provided for in the same or another bylaw.

7.2.3 Different Words Intend Different Legal Effects

The courts assume that different words in a bylaw mean different things. The most common mistake made in bylaws is to refer to a "lot" in one section and then a "parcel" in another section, or to "real property" or "property" in one provision and then "land" in another provision. There are many examples, including "road" and "highway". A court will look at the bylaw on the basis that the council or board intended the words to have different meanings from each other.

7.2.4 Ordinary Meaning

The godfather of statutory interpretation, E. Driedger wrote in a book called *Construction of Statutes* that:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This statement was applied by the Supreme Court of Canada in *Rizzo and Rizzo Shoes* [1998], 1 SCR 27.

If a word is not defined in the *Interpretation Act*, the local government legislation or the bylaw, the court will give the word its ordinary meaning. This may be determined by looking at dictionaries. As well, a word or a provision of a bylaw will be read in the context of the entire bylaw, not in isolation. In this regard, the court will look at the "purpose" section or preamble (if they exist) as well as the content of the bylaw as a whole before construing the meaning.

7.3 Plain Language

The legislature in Alberta has moved in the direction of plainer language. The following rules (further to the Canadian Legislative Drafting Conventions) are helpful:

- do not use Latin
- use "despite" instead of "notwithstanding"
- short, familiar words and phrases should be used that best express the intended meaning in accordance with common and approved usage
- different words should not be used to express the same meaning
- the same words should not be used in an act in different meanings
- pronouns should be used only if their antecedents are clear from the context
- possessive nouns and pronouns may be used but with care
- the words said, aforesaid, same, before mentioned, whatever, whatsoever, whomsoever, such and similar words of reference or emphasis should not be used
- use an article instead of the words "such"
- the device "and/or" should never be used
- the expression "provided that" in its various forms to denote a provision should not be used

- unnecessary adjectives and adverbs should be avoided
- a formula to describe mathematical processes should not be avoided

Plain language takes longer to prepare and may take up more space on the page. Here is an example of traditional language versus plain language:

> "10. Where a person who does not reside, ordinarily reside or carry on business in the municipality sells or transfers a chattel to a person in the municipality, the person shall immediately apply for and obtain a business licence, complete a business licence application in the form of Schedule "B" attached to and forming part of this bylaw and pay to the treasurer the fee set out in Schedule "C" which is attached to and forms part of this bylaw.
>
> 10(1) This section applies to every person who
>
> (a) does not reside, ordinarily reside, or carry on business in the municipality; and
>
> (b) sells personal property in the municipality.
>
> (2) Every person referred to in subsection (1) must
>
> (a) apply for a business licence on the form attached as Schedule B; and
>
> (b) pay the fee set out in Schedule C,
>
> and obtain a business licence before selling the personal property.

APPENDIX A – DRAFTING CONVENTIONS

Uniform Law Conference of Canada: Uniform Drafting Conventions

I. General

Logical organization

1. The organization of an Act[1] should be logical.

A logically organized text usually proceeds from the general to the particular and follows the chronological sequence of events. If it deals with matters that occur in a particular order, such as court proceedings of administrative applications, that order should normally be followed. See also Part III on logical arrangement.

Style

2. An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language.

Simplicity and conciseness of language can be made to exist with precision in a well organized text. It is important not to exaggerate the degree of precision that is required.

Sex-specific references

3. Sex-specific references should be avoided.

In the English version of an Act, pronouns such as "he", "his" and "him" should not be used if the message is intended to refer to persons of either sex. Instead, the drafter can use "he or she", repeat the noun referred to or use a combination of these methods. Typographical devices such as brackets, virgules and hyphens are unseemly and distracting and should not be used. It is usually possible to restructure sentences so as to avoid the problem altogether.

Nouns that have the appearance of referring to men only should be replaced by terms that can refer to both sexes (for example, use "firefighter" instead of "fireman").

II. Divisions of an Act

Required elements

4. (1) An Act always has a title and one or more sections (numbered 1, 2, 3...).

[1] Refers to uniform statutes. These conventions are also useful when drafting local government bylaws, since bylaws are enactments.

The statutes and ordinances of all Canadian jurisdictions always contain an enacting clause an element that is not found in Uniform Acts.

Optional elements

(2) An Act may also contain the following elements:

(a) a preamble;

(b) parts (designated Part I, Part II...);

(c) schedules (designated Schedule I, Schedule II...);

(d) forms (designated Form 1, Form 2...).

About preambles, see section 18.

If there is only one schedule or form, it is not necessary to number it.

Subdivisions of sections

(3) A section may be subdivided into subsections (numbered (1), (2), (3)...).

(4) A section that is not subdivided into subsections and a subsection may be subdivided into clauses (lettered (a), (b), (c)...).

(5) A clause may be subdivided into subclauses (numbered (i), (ii), (iii)...).

(6) A subclause may be subdivided into paragraphs (lettered (A), (B), (C)...).

Excessive subdivision into clauses, subclauses and paragraphs should be avoided as it makes the text harder to understand. See subsection 30(1).

Definitions

5. Definitions form part of a section or subsection and are separated by semicolons. They begin with a lower-case letter and are not lettered or numbered. Subdivisions, if any, within an individual definition take the form of clauses and are indented, separated by commas, and identified as (a), (b), and so forth.

The following example shows the recommended form of a provision containing a series of definitions:

1. In this Act,

"Minister" means the Minister of Agriculture;

"weed" means dandelion, ragweed or thistle.

Form of sections and their subdivisions

6. Sections and subsections begin with a capital letter and end with a period. Clauses are indented, begin with a lower-case letter and are separated by semicolons. Subclauses are further indented, begin with a lower-case letter and are separated by commas. Paragraphs are still further indented, begin with a lower case letter and are separated by commas.

The "paragraph" used by some jurisdictions requires introductory words like "the following" followed by a colon. The paragraphs are indented and numbered with Arabic numerals. They begin with an upper-case letter and are separated by a period. Like clauses, they must be grammatically parallel, but they may consist of complete sentences or of fragments. The "paragraph" is more autonomous than the clause, which must be an integral part of a single sentence.

III. Preamble

Preamble

7. If a preamble is to be included, it follows the title.

Definitions

8. Definitions should be set out in the first section of the Act, unless they apply only to a Part, section or group of sections. In that case, they should be placed at the beginning of the passage in question.

Interpretation or application provisions

9. Provisions that deal with the interpretation or application of the Act should follow the definitions.

Regulation-making powers

10. Provisions conferring regulation-making powers should come at the end of the Act, preceding only the transitional or temporary provisions, those repealing or amending other Acts and the commencement provision.

If an Act is divided into Parts, it may be more practical to group the provisions conferring regulation-making powers at the end of the individual Parts to which they relate.

Transitional or temporary provisions

11. Transitional or temporary provisions should follow the subject-matter to which they relate.

If they relate to the Act as a whole, they should follow the regulation-making powers.

Repealing and amending provisions

12. Provisions repealing or amending other Acts should precede the commencement provision.

Commencement provisions

13. The provision dealing with the coming into force of the Act should be its last section.

Schedules

14. Schedules, if they are necessary, should follow the last section of the Act.

It may be helpful to mention, in the heading of the schedule, the section to which it refers. The same is true in the case of forms (see section 15).

Forms

15. Forms, if it is necessary to include them in the Act, should be placed at the end of the Act, following the schedules, if any.

Normally, it is preferable to leave forms to be prescribed by regulation or by administrative procedures.

Marginal notes and table of contents

16. (1) Each section should have a succinct marginal note.

(2) A table of contents setting out the marginal note for each section may be inserted between the title and first section of the Act.

A table of contents is useful for the drafter as well as for the reader, since its preparation requires further review of the Act's basic structure and exposes any flaws in its logical organization.

However, it the Act is very short, a table of contents is not necessary.

IV. Drafting Principles

Title

17. The title should succinctly indicate the Act's subject-matter.

Preamble

18. The use of preambles is not recommended.

Statement of purpose

19. If a statement of purpose is required, it should be structured as a section rather than as a preamble.

Explicit statements of purpose are rarely necessary, since the object of a well-drafted Act should become clear to the person who reads it as a whole. In general, legislation should not contain statements of a non-legislative nature. However, a specific statement of purpose is occasionally required (for example, to give guidance to the courts).

Parts

20. An act should be divided into Parts only if the subject-matter of each Part is clearly distinct.

The insertion of succinct headings before groups of related sections may be useful alternative for supplement to division into Parts.

Definitions

21. (1) Definitions should be used sparingly and only for the following purposes:

(a) to establish that a term is not being used in a usual meaning, or is being used in only one of several usual meanings;

(b) to avoid excessive repetition;

(c) to allow the use of an abbreviation;

(d) to signal the use of an unusual or novel term.

The drafter should not prepare the definitions until the main substantive provisions of the Act have been settled.

See also section 32.

No substantive content

(2) A definition should not have any substantive content.

Statements of the application of the Act should be made in substantive provisions rather than definitions.

Artificiality

(3) A definition should not give an artificial or unnatural sense to the tem defined.

"Means" and "includes"

(4) "Means" and "includes" have different uses.

"Means" is appropriate for exhaustive definition. "Includes" is appropriate for two kinds of definitions; those that extend the defined term's usual, and those that merely give examples of the defined term's meaning without being exhaustive.

The drafter should exercise caution when using "includes". It should not be used in exhaustive definitions, and the contradictory "means and includes" should never be used.

Consistency

(5) A defined term should never be used in the same Act in a different sense.

See also subsection 34(2).

Content of section

22. (1) A section should deal with a single idea or with a group of closely related ideas.

Single Sentence

(2) A section (or, if it is divided into subsections, each subsection) should consist of a single sentence.

Short sentence

(3) Sentences should be as short as clarity and precision will allow.

It is desirable to keep sentences terse and simple. (In traditional English drafting, the one-sentence rule has often led to excessively long sentences.) If a sentence becomes long and convoluted, the drafter should first consider whether it contains redundant material and can be simplified or (if there is no redundancy) whether it would be more appropriate to break it into two or more subsections.

Use of clauses and further subdivisions

23. (1) Clauses should be used only if they improve communication of the message to the reader. Subclauses and paragraphs should be used even more sparingly.

"Clause sandwiches"

(2) "Clause sandwiches" should be avoided.

Arrangements of a flush passage followed by a series of clauses and a closing flush are

undesirable. Even more undesirable are similar arrangements containing two series of clauses, interrupted by a flush passage. They are apt to lead the drafter into errors of grammar and logic and are difficult to read in either language. In bilingual drafting, "clause sandwiches" make it difficult sometimes impossible to ensure close correspondence of form between the two versions.

Parallelism

(3) Clauses and further subdivisions should be grammatically and logically parallel to one another.

Connection words

(4) A series of clauses or further subdivisions should usually be linked by one "and" or "or", placed at the end of the second-last item in the series.

No conjunction should be used if the subdivisions follow a complete sentence (e.g. "The court may give directions with respect to the following matters:"). It is best to omit "and" and "or" if their use could cause confusion.

Verbs in present indicative

24. (1) Verbs should appear in the present tense and indicative mood unless the context requires an exception.

The use of "shall" as an imperative is the major exception to this rule.

Passive undesirable

(2) Restraint should be exercised in the use of the passive voice.

Duties and prohibitions

(3) "Shall" is used to impose a duty or (with "not" or "no") a prohibition.

Powers, rights and choices

(4) "May" is used to confer or indicate a power, right or choice.

Internal references

25. Internal references should be used sparingly.

A logical arrangement makes frequent internal references unnecessary.

Internal references should clearly identify the provisions referred to by their number or letter. It is not necessary to describe the provision referred to as "of this Act", unless there is a danger of confusion with another Act that has been mentioned.

Derogations and restrictions

26. (1) Derogations and restrictions ("notwithstanding", "despite" and "subject to") should be used sparingly and only if there is an inconsistency, to make it clear which provision is meant to prevail.

Inconsistencies can often be eliminated by reading the passage.

(2) If provision 1 is meant to prevail over provision 2, it is sufficient to say that 1 applies notwithstanding (or despite) 2, or that 2 is subject to 1. The two devices should not be used simultaneously.

Placement of new provisions

27. (1) A new provision should be inserted in the most logical place.

Designation of new provisions

(2) The numbers or letters assigned to new provisions are determined in accordance with the decimal system adopted by the Conference (1968 Proceedings pages 76-89).

Changes to original structure

(3) Amendments to existing Acts should not detract from the readability of the original structure.

Rather than attaching new provisions to an existing structure, perhaps repeatedly, it may be desirable to rework the original structure.

Tables and mathematical formulas

28. Tables and mathematical formulas should be used if they make the text clearer and more concise.

Regulation-making powers

29. Regulation-making powers should be clearly expressed and should be no broader than is necessary.

Ordinary language

30. (1) An Act should be written as much as possible in ordinary language, using technical terminology only if precision requires it.

Intended audience

(2) The terminology of an Act should be suitable for its intended audience.

Redundancies and archaisms

31. Redundant or archaic words and phrases should be avoided.

It is desirable to examine stock phrases that take the form of pairs or triplets (especially common in English for example, "give, devise and bequeath", "terms and conditions") in order to determine whether fewer words could convey the desired meaning. Legislation should be written in a style that is correct and up to date without being either faddish or excessively conservative. Many words and phrases that are often seen in legal documents belong to an earlier age and are no longer well understood. They should be replaced by a contemporary equivalent. If they add nothing to the message, as is often the case, they should be eliminated.

Neologisms

32. Neologisms should be used with caution.

In principle, terms that are not found in standard reference works should be avoided in legislation. Sometimes it is necessary to invent a term or to use a recently coined term; in which case it is prudent to define it. The use of neologisms causes special problems in bilingual drafting.

Other languages

33. Terms from languages other than English should be used only if they are generally understood and if there is no equally clear and concise way of expressing the concept in English.

Consistency

34. (1) Different terms should not be used to express the same meaning within a single Act.

(2) The same term should not be used with different meanings within a single Act, unless, in a given context, the particular meaning that is intended is perfectly clear and no other term is suitable.

The exception does not apply to defined terms, which should never be used in a different sense than that of the definition. See subsection 21(5).