Writing the (By)Law
A Legislative Drafter’s Perspective

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Writing Law

The Goal
(Your end point and starting point)

The Goal in Writing Law

➢ To create a piece of legislation that gives legal effect to the intended policy of the law-maker
➢ To do this in a form that clearly communicates that policy to:
   • the persons whose rights, duties and powers are affected by the legislation, and
   • the persons responsible for administering it
The Goal and this Presentation

- Getting ready to write the (by)law
  - Good drafting instructions
  - What courts use to interpret legislation
- Writing the (by)law
  - The legislative sentence
  - Plain language drafting techniques

Getting ready to write the (by)law

Drafting Instructions

Elements of Good Drafting Instructions

- Problem (Initiative) and Background
- Objective and Rationale
- Specifics of the proposed legislation
Problem (or Initiative) and Background

⇒ Describe the problem (initiative) that the legislation is intended to address
⇒ Provide relevant background on how the problem (initiative) came about

Objective and Rationale

⇒ Describe what the legislation is intended to do (in concrete terms)
⇒ Explain why doing this will address the problem (accomplish the initiative)

Specifics of the proposed legislation

⇒ Describe the specific changes that are proposed to implement the objective
⇒ If the proposal is for amendments to an existing bylaw, identify the current provisions that are relevant to the proposal
Thinking about drafting instructions

“WHIB”

The “WHIB” Questions

W  Who, What, Where, When, Why
H  How, How much
I  If, If not
B  But

Getting ready to write the (by)law

Statutory Interpretation
What courts use to interpret legislation

- Common law rules known as “principles of statutory interpretation”
- Legislated rules established by the Interpretation Act and other legislation

3 key common law principles of statutory interpretation

1. Every word has meaning
   - Each word adds something that would not be there if the words were left out
   - Legislation does not repeat itself
   - Legislation does not say something that does not need to be said
     - because this has already been done by other legislation, or
     - because the common law does the same thing

2. Different words mean different things

3. The “modern approach”
every word has meaning

costs
reasonable costs
reasonably incurred costs
costs that the inspector considers reasonable

2. Different words mean different things

➢ Different words mean different things – even when they would be synonyms of each other in non-legal writing
➢ The same words mean the same thing

Too much variety

promptly
immediately
with due dispatch
at once
in a timely fashion
without delay
without undue delay
forthwith
as soon as reasonably practicable
as soon as reasonably possible
3. The “Modern Approach”

To-day 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.

E.A Driedger, The Construction of Statutes (2nd ed.1983), at p. 87

A caution about the meaning of words

- The grammatical and ordinary meaning of a word may be changed by a “statutory definition”

  That is, an Act (or a bylaw or regulation) may change that meaning

- The Interpretation Act defines over 80 commonly used legislative words
The Interpretation Act

Read it.
You should know the key provisions

A drafter’s caution

“… people continually try to misunderstand [legislation] …, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you can, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”

Stephen J., Re Castioni (1890)

Writing the (by)law

The Legislative Sentence
The Basic Legislative Sentence

[who] may / must [do what]
[who] may not / must not [do what]

legal subject  legal verb  legal action

must and may

“must” is to be construed as imperative;
“may” is to be construed as permissive and empowering;

Interpretation Act, section 29

WHIB at the drafting stage

W  Who, What, Where, When, Why
H  How, How much
I  If, If not
B  But
Writing the (by)law

Plain Language Drafting

What is “plain language”?

A document is in plain language if its users can —
- find what they need, and
- understand what they find
in as short a time as possible

Achieving the goals of plain language

The techniques of plain language —
- minimize the barriers, and
- maximize the aids
to locating and understanding information
Minimizing barriers to understanding

As examples, plain language uses —

familiar words  “read” rather than “peruse”
short sentences  average less than 25 words
logical organization  from the audience perspective

Maximizing aids to understanding

As examples, plain language uses —

headings  for quick identification of relevant information
visual indicators  such as bullets for parallel information
documents design  font choices, white spaces, indent levels

Plain language techniques in legislation

➢ Use familiar words
➢ Use short sentences
➢ Use headings and other pointers
➢ Organize for your audience
Plain language – Words

- Use familiar words
  - money, not tender
- Avoid legalese
  - provide, not furnish
- Use active words
  - consider, not give consideration to

Sentences – keep them short

- Use short sentences and paragraphs
  - Guideline: prefer under 25 words
- Paragraph parallel elements
  - Shift to a list of (a), (b), (c), etc.

Paragraphing (before)

4. A person who contravenes any provision of this bylaw, or who suffers or permits any act or thing to be done in contravention of any provision of this bylaw, or who neglects to do or refrains from doing anything required to be done by any provision of this bylaw, or who does any act or thing that contravenes any provision of this bylaw, commits an offence against this bylaw.
Paragraphing (after)

4. A person who does any of the following commits an offence against this bylaw:
   (a) contravenes any provision of this bylaw;
   (b) suffers or permits any act or thing to be done in contravention of any provision of this bylaw;
   (c) neglects to do or refrains from doing anything required to be done by any provision of this bylaw;
   (d) does any act or thing that contravenes any provision of this bylaw.

Headings and other pointers

➢ Provide headings or other pointers to the organization of your legislation
➢ Make headings descriptive enough that they can be used to form a table of contents
➢ Consider using cross reference descriptors under section 11(2) of the Interpretation Act

Cross reference descriptors

“approval of the electors” means approval in accordance with section 84 [approval of the electors];

“assistance” means assistance within the meaning of section 25 (1) [prohibition against assistance to business];

“financial officer” means the municipal officer assigned responsibility under section 149 [financial officer];
Interpretation Act, section 11 (2)
cross reference descriptors

If a bylaw has
• a reference to a provision of the bylaw, another bylaw, an Act, etc. (any enactment)
• followed by “italicized text in square brackets” that describes the provision’s subject matter
that square-bracketed descriptor --
“is not part of the {bylaw} and must be considered to have been added editorially for convenience of reference only.”

Organization

➢ Ordering
Chronological? Subject matter?

➢ Dividing
Short sections with only a few subsections

➢ Grouping
Parts? Divisions?

Bylaw Revision

Bylaw Revision
A Plain Language Opportunity
Bylaw Revision

Community Charter
Revision of bylaws

140 (1) A council may, by bylaw, authorize the revision of all or any of the bylaws of the municipality in accordance with the regulations under this section.

Applicable to regional districts under section 794 (5) of the Local Government Act

Bylaw Revisions – plain language authority

Bylaw Revision Regulation, B.C. Reg. 367/2003
Revision of bylaws

1 (1) A council may, by bylaw, authorize the revision of all or any of the bylaws of the municipality.

(2) A bylaw under subsection (1) may authorize one or more of the following: …. (j) making changes, without changing the substance of the bylaw, to bring out more clearly what is considered to be the meaning of a bylaw or to improve the expression of the law.

Writing the (By)law – A Review

- Start from clear instructions
  problem, background, objective, rationale
  specifics (with WHIB questions answered)

- Write word-by-word
  every word has meaning
  different words mean different things
  keep the context in mind

- Use the basic legislative sentence as your starting point

- Use plain language techniques