

The Preparation of Legislation

E. A. DRIEDGER*

Ottawa

I. Introduction

Most of us are familiar, at least in a general way, with the manner in which the Parliament of Canada exercises its legislative functions. We know that a statute first appears in bill form; it is introduced, either in the Senate or in the House of Commons, is debated and, after receiving the approval of both houses of Parliament, receives royal assent and becomes law. I do not intend to say much here about the legislative procedure in Parliament. Anyone interested in this aspect of law-making can easily find out elsewhere¹ what he wishes to know, better than I could tell him. Rather, I intend to say something about how a bill comes to be prepared in the first place, how and by whom it is prepared, and how it gets to Parliament.

Bills are either public, private or local, although the distinction is not always clear. Loosely defined, a public bill is one that relates to matters of general application; a private bill is intended to confer special powers or privileges on a particular person or group of persons; a local bill relates to a particular area rather than the whole community.² Local bills are usually private bills and the two are grouped together as "local and private bills". Thus, the statutes of Canada are printed in two parts,³ the statutes in the first

*Elmer A. Driedger, Q.C., B.A., LL.B., of the Saskatchewan Bar; Parliamentary Counsel, Department of Justice; member of the Statute Revision Commission.

¹ *E.g.*, Bourinot, *Parliamentary Procedure and Practice* (4th ed., Toronto, 1916); May, *Parliamentary Practice* (4th ed., London, 1950).

² For more precise definitions see May, at p. 833, and Bourinot at p. 558.

³ S. 10 of the *Publication of Statutes Act*, R.S.C., 1927, c. 2, provides that the Acts of the Parliament of Canada shall be printed in two separate parts, the first of which shall contain such of the Acts of Parliament as the Governor in Council deems to be of a public and general nature or interest in Canada and directs to be inserted, and the second part shall contain the remaining Acts of the session and shall be printed after the first part.

part being classified as "Public General Acts" and those in the second part as "Local and Private Acts". But, to complicate matters, this classification of bills is intersected by another: bills may be classified according to their sponsors, a bill sponsored by the government⁴ being known as a government bill and one sponsored by a private member,⁵ as a private member's bill. Confusion may result from the fact that the word "private" in the one classification is used to qualify "bill" and, in the other, to qualify "member". A government bill is introduced in the House of Commons by a Minister of the Crown, and in the Senate either by the government leader of the Senate (who is a member of the Cabinet) or by some other Senator on behalf of the government. A private member's bill is introduced in the House of Commons by a private member, whether he be a member of the opposition party or of the government party; in the Senate the division between government and opposition does not exist and the term "private member's bill" is not apt there. A private member's bill may be either a public bill or a private bill. For example, a bill introduced in the House of Commons by a private member to amend the Criminal Code would be classified as a public bill; but a bill to incorporate an insurance company would be a private bill. Similarly, in the Senate, a bill introduced by a Senator to amend the Criminal Code, without government sponsorship, would be a public bill; but a bill to incorporate a company would be a private bill.

The Parliamentary procedure varies with different bills.⁶ Government bills take priority and most of the time of the House of Commons is devoted to government business. A limited period is normally set aside each week for private members' bills and during it private bills and public bills introduced by private members are considered; but private bills take precedence over private members' public bills. In the Senate there is no distinction between government business and non-government business, and all legislation, whether public or private, whether government or non-govern-

⁴ Throughout this paper the term "government" is for the most part intended to mean the Cabinet.

⁵ The term "private member" refers to a member of the government party who is not a member of the Cabinet, and also to a member of an opposition party. Public bills introduced by private members usually originate with the members themselves and are designed to implement some reform they are advocating. A private bill, on the other hand, originates with outside promoters who arrange to have some private member introduce it.

⁶ For private bill procedure in Parliament, see House of Commons Standing Orders 92-121; Rules of the Senate 106-132. There must be a petition for a private bill, and a fee is payable; notice of intention to introduce it must be advertised in the Canada Gazette.

ment, is considered in the order in which it is presented, unless of course the order is altered with the consent of the sponsors.

Most of the public bills passed by Parliament are sponsored by the government. Government legislation is prepared by members of the civil service, and I intend to confine my remarks largely to this class of legislation. The sponsor of a bill not put forward by the government must make his own arrangements for its preparation. He may prepare it himself or engage counsel, but he cannot call on officials of government departments for assistance.

The procedure prescribed for the preparation of government legislation in Canada is designed primarily to ensure that the legislation desired by the government will be ready when it is wanted. It is also designed to overcome certain problems and difficulties that are bound to beset the draftsmen in the absence of organization. Indeed, many of the requirements of our legislative procedure, as will be apparent later, are aimed at particular problems. Consequently, before dealing with the procedure itself, I think it appropriate to say something about the drafting process, as distinguished from drafting technique,⁷ and to consider, without reference to any particular government, what is involved in the preparation of legislation from a draftsman's point of view.

As a general rule, the public first becomes aware of a proposed item of legislation when it is announced in the Speech from the Throne or by the government on some other occasion. The actual text of the proposed measure is usually not seen by the public until it has been introduced in Parliament. For most people, therefore, a statute has its beginning with a bill when it receives first reading either in the Senate or in the House of Commons. The time consumed by Parliament in discussing legislation varies from measure to measure. Some bills pass through all stages in a matter of days, though normally some weeks or months are required before the measure is ready for royal assent. But the parliamentary history of a measure, whatever its duration, is usually only the last phase of a much longer history. In most cases the time required to settle a proposed legislative policy and to draft the measure far exceeds the time required to dispose of the bill in Parliament. The introduction of a bill represents to the draftsman

⁷ For which see: George Coode, *On Legislative Expression* (London, 1845); Lord Thring, *Practical Legislation* (London, 1877); Sir Courtenay Ilbert, *Legislative Methods and Forms* (Oxford, 1901); Sir Alison Russell, *Legislative Drafting and Forms* (London, 1938); E. L. Piesse and J. Gilchrist Smith, *The Elements of Drafting* (London, 1950); E. A. Driedger, *Legislative Drafting* (1949), 27 *Can. Bar Rev.* 291.

the end of its history rather than its beginning, for, although he may be concerned with amendments and alterations made during its parliamentary stages, his work is finished for the most part when the bill is introduced.

II. *The Drafting Process*

A statute is the formal and legal expression of a legislative policy, and it follows that before a statute can be drafted the policy sought to be implemented by it must be determined. The first stage in the preparation of a bill therefore is the formation of the legislative policy. Under a parliamentary system of government modelled after the British, legislative policy is settled and determined in the first instance by the government and finally by Parliament; but legislative policy does not necessarily originate with the government.

In many cases the policy embodied in a bill is formulated by the government. For example, a political party, seeking office during an election, may include in its programme an undertaking to pass certain laws and, should it be successful at the polls, it may proceed to implement its announced programme by introducing appropriate legislation. I daresay that much of the legislation enacted in England during the regime of the late labour government was forecast in the election campaign. The government of the day also formulates legislative policy from session to session in order to meet current needs and problems.

Then, legislative policy may originate with the public service. Nearly every department of government administers statutes and the need for amendments is frequently seen first by departmental officials. It may be that a statute has become obsolete or unworkable, or that defects are discovered, and the officials will then recommend that appropriate amendments be made. The government itself, of course, decides whether or not the amendment should be made and what its scope should be.

Finally, the government frequently works out its legislative policy with the advice and assistance of the public service, parliamentary committees or royal commissions. The government may refer a problem or a proposed policy to them for consideration and recommendation and, on the basis of the reports it receives, formulate the policy.

It is not the function of a draftsman either to originate or determine legislative policy. But the dividing line between policy and law, between form and substance, is not a sharp one and the

draftsman cannot always escape being involved in policy discussions. Although the draftsman is not responsible for policy, he must nevertheless consider whether the prescribed policy is capable of implementation. Not all social ills can be cured by legislation, and he must critically examine the policy he has been asked to express in legislative language, not so much in his capacity as a draftsman, but as a lawyer. Let us suppose, to take an exaggerated example, that a draftsman is asked to prepare a bill compelling apiarists to confine to their property the nectar-gathering activities of their bees. It is quite proper for the draftsman to point out that a policy such as this could not be implemented or enforced without identifying each individual bee, which is impossible, and that such a policy would surely destroy the honey industry.

The draftsman also makes a contribution in rounding out the policy and filling in the details. Legislative proposals usually come in the form of broad statements of policy, leaving a multitude of minor details still to be worked out. Many of these details can be pointed out by the draftsman when he first examines his instructions, but there are always additional policy matters that cannot be known or foreseen until the drafting process is well under way. He will undoubtedly raise questions of legal policy. Administrative officials rarely give much thought to the purely legal aspects of legislation and it is usually left to the draftsman to indicate what sanctions and other legal provisions are necessary to ensure that the legislation will be effective.

The draftsman must consider a statute in its relation to other statutes and the law generally; he regards a statute as one fragment of a much greater whole, and any new law must of course be in harmony with existing law. In order to maintain this harmony, a draftsman may well suggest a modification of the prescribed policy.

Then the draftsman, because of his experience with all departments of government, can frequently recognize that departments other than the sponsoring departments are interested in a legislative proposal. The policy of a measure is not necessarily confined to the activities of one department, but a particular department may not always recognize that the measure affects the policy of others. A draftsman frequently brings officials from various departments together and the initial decisions may be altered as a result.

The draftsman cannot be instructed before the main lines of the legislative policy have been drawn. There is no point in asking him "to consolidate and revise" a statute, or to "amend a statute in order to meet modern requirements". He must receive a reason-

ably complete proposal before he can start his work, and the sponsors must therefore first settle the policy they want implemented. For example, where an existing statute is to be revised, the sponsors must first go through the whole statute, consider and discuss their problems and make their policy decisions. The draftsman probably does not participate in these preliminary discussions, but when it becomes apparent that legislation is required discussions with him will perhaps take place. When the proposals involve two or more departments of government it is usual to establish an inter-departmental committee where the problems are discussed and the policy is worked out.

Difficulties arise when instructions are given to the draftsman before the sponsors have sufficiently prepared themselves; instead of beginning the task of drafting the measure, the draftsman is obliged to pilot the sponsors through their policy discussions. A more serious consequence is that policy decisions at such a late date in the drafting process, because they are hastily made, are not likely to survive, with the result that fundamental changes will be made during the course of drafting and the draftsman will be obliged to alter his bill over and over again. Sometimes a draftsman is asked to prepare alternative drafts or to prepare a draft in order to elicit major policy decisions. Alternative drafts can be prepared if the alternative policies are clearly laid down, but the draftsman would prefer to have the policy decisions first. Where he is requested to prepare a draft for the purpose of eliciting policy decisions, his work is multiplied because he is forced to guess at what the ultimate policy will be, and his guesses are not likely to be right.

Not until the preliminary policy work has been done is the sponsoring department in a position to give instructions to the draftsman. But the drafting cannot always start even then. Before he can begin to put words on paper, the draftsman must understand the legislative proposal. He must, therefore, familiarize himself with the subject-matter of the proposed legislation, with the legislative problems and the proposed solutions. As a first step, he will usually hold a series of conferences with the sponsors; these conferences may last for a day or two, or for several weeks, depending upon the nature of the subject-matter. A draftsman cannot, of course, become an expert in every field of knowledge, but he must be brought to the point where he is qualified to deal with the subject-matter from a legislative point of view. In addition, he must, as a preliminary step, do whatever legal research is

necessary; he must ascertain the existing laws on the subject and, particularly, the statute laws of his jurisdiction.

The next step is for the draftsman to prepare the necessary legislative plan. Legislative policy is not the same thing as the legislative plan; the former is the objective to be achieved, and the latter an outline of the method by which it is to be achieved. For example, it may be laid down as a policy that certain grants are to be paid to a class of persons under specified conditions. In order to give effect to such a policy the draftsman knows that his statute must, among other things, describe the persons who are to benefit, specify the amount of the grant and the conditions under which it may be paid, and provide authority for payment out of the Consolidated Revenue Fund, for suspension for breach of the conditions and for recovery of unauthorized payments, for applications, decisions and awards, for penalties for misrepresentation or other wrongful conduct. In the case of an amending statute the draftsman must decide what statutes should be amended, what sections, and in what manner. After the legislative plan is prepared, it is discussed with the sponsors and it will undoubtedly be modified; new provisions will be added and others will be dropped or changed.

The draftsman has now reached the point where he can begin to draft the bill. Working by himself, he prepares a first draft of the proposed bill or, in the case of a lengthy or complicated bill, a first draft of a portion of it. He cannot work with other people looking over his shoulder and offering comments. And no satisfactory draft can be prepared by a group of draftsmen acting as a drafting committee; they will all have different ideas about how the work should be done, there will be endless discussions over trivialities, and the end product will be at best only a compromise. Drafts can be discussed, criticized and tested in a discussion group, but the responsibility for setting up the draft or making any changes must devolve upon one person. Usually the draftsman goes over this first draft and prepares one or more revisions before discussing it with the sponsors. When the revision is submitted to the sponsors for consideration and comment, and after they have had an opportunity of considering and discussing it, a further conference with the draftsman takes place. All the defects and imperfections of the first draft, so far as they can be seen, are discussed and a fresh draft is prepared and submitted. The process continues until the sponsors and the draftsman are both satisfied with the form and content. At this stage the officials of the spon-

soring department will probably discuss the draft measure with their deputy minister and minister, whose examination and consideration of the draft may result in further alterations.

The drafting of a bill is therefore a co-operative enterprise in which many persons take a hand. The draftsman's importance is no greater than any other participant's. Not the least important is the part played by the departmental legal adviser. It is he who guides departmental officials through their preliminary discussions, raising points of law and points of policy, finding the problems to be solved and suggesting solutions. He usually prepares the material required to obtain policy decisions and the instructions to the draftsman. Frequent discussions take place between the departmental legal adviser and the draftsman, and the legal adviser makes an excellent critic of draft bills, pointing out flaws and deficiencies and assisting in the solution of problems. He briefs the minister on the bill and if the minister has his officials in attendance in Parliament the legal adviser is normally included.

It may be supposed from my description that the drafting of legislation is a leisurely process, but unfortunately it is not. Rarely is a bill prepared under ideal conditions; usually the work must be done in a hurry and under pressure. One of the main reasons is that few people realize how much is involved in the preparation of legislation, with the result that insufficient time is allowed. On the other side of the scale is the fact that most draftsmen are inclined to be perfectionists and, if they had their way throughout, a bill would never be finished. A draftsman can never pick up a bill without making some change, particularly after having put it aside for a while, and he is always loath to let a bill go for fear he has committed some glaring blunder. But legislation has to be passed and it has to be drafted, and the time comes when a draftsman must put an end to his labours and produce a bill. Draftsmen must be practical and for each bill find a place somewhere between the two extremes of the slipshod and the perfect, but there is for each bill an irreducible period for preparation. Suppose, for example, that it would take one month to prepare a particular bill in the normal course. This period could be reduced, without sacrificing quality, by according the bill top priority and by working at it evenings and weekends, which might bring the preparatory period down to, say, three weeks. But the time cannot then be further reduced without sacrificing quality; as the time is cut down, the quality deteriorates, so that ultimately the point is reached where no bill fit for introduction can be produced.

As a rule a draftsman does not like to receive his instructions in the form of a draft bill; he prefers them in the form of a plain statement of what is intended, supplemented by oral discussion. If he receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended. A draftsman who is presented with a draft measure would not be discharging his duties if he assumed that a proper legislation plan had been conceived and that proper provisions had been chosen to carry it out; he cannot be expected to confine himself merely to a superficial examination of the outward form of the measure. The drafting of legislation does not consist of mere outward polishing. Draftsmen do have rules and forms they follow,⁸ but their application is only the last stage in the preparation of a bill. Formal drafting rules and forms are designed to give uniformity and consistency to legislation, to give it a certain degree of elegance, if that is possible, to make it easier to read and to understand, and to avoid misunderstanding and misconstruction.

As a rule no time is saved by preparing a draft bill for submission to the draftsman. When this is done the sponsors often expect that a final draft will be returned the same day or, at the latest, the following day, which is usually the deadline day. Even assuming that a perfect bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect bill and satisfy himself that it will give legislative effect to the intended policy? Draft measures prepared by inexperienced persons are as a rule defective, and then the draftsman must spend much time in undoing what has been done. This is particularly awkward where the draft has been circulated and discussed before submission to the draftsman, because those who have seen it expect that the final draft will closely resemble it and will resist any attempt to alter its fundamental structure.

The quality of a bill depends of course upon the competence of the draftsman. But his task is, in a sense, impossible of fulfilment. The perfect bill has never been written, and never will be. The most a draftsman can do is try to reduce doubt, ambiguity and foreseeable problems to a workable minimum, and his success will depend upon the extent to which he achieves this end. He

⁸ E.g., Department of Justice: *Memorandum on the Preparation of Acts of Parliament and Subordinate Legislation*, prepared by E. A. Driedger, Queen's Printer, Ottawa, 1951; *Rules of Drafting Adopted by the Conference of Commissioners on Uniformity of Legislation in Canada* (1948), 26 Can. Bar Rev. 1231.

must produce not only one, but many, bills in a few weeks or months; he must for each bill create a sound, workable legislative scheme, anticipating and providing for all the problems and situations that are likely to arise; he must express that scheme in clear and unequivocal language; he must ensure that the bill will carry into the law precisely what the sponsors intend. But once the measure becomes law, anyone can attack it at his leisure. In a lawsuit, counsel for the opposing parties may submit the statute, or the smallest portion of it, to microscopic examination for months or even years; they may argue about it for days before a judge; and the judge has the advantage of both sides of the argument in coming to his own conclusion. Whatever the result, in the long run the draftsman is bound to come out second-best.

III. *The Preparation of Government Legislation and the Legislative Programme*

The procedure prescribed for the preparation of government legislation is designed to ensure that the process, instead of being confined to a short period during a parliamentary session, is extended over the whole year. This gives more time for the determination of policies and the preparation of measures, eases the burden on all officials, and provides a reasonable opportunity for discussion and reflection. Moreover, if the preparation of legislation is delayed until the session has begun, there will be a lack of legislative material at the beginning of the session and congestion at the end; many bills would fall by the wayside either because there is not enough time to prepare them or to deal with them in Parliament afterwards. The legislative procedure, as will be indicated later, is designed to ensure that the preparation of foreseeable legislation will be begun before the session starts.

One of the fundamental principles on which our legislative system is founded is that all government measures must be approved by the Department of Justice. This is so, not only because the Attorney General of Canada⁹ is the official legal adviser to the government, but also because it is desirable that there should

⁹ The Minister of Justice is *ex officio* the Attorney General of Canada. By the Department of Justice Act, R.S.C., 1927, c. 106, the Attorney General of Canada is entrusted with the powers and charged with the duties that belong to the office of Attorney General in England; he is specifically required to advise the heads of the several departments of the government upon all matters of law connected with their departments. Since the functions of the Minister with respect to legislation relate to him in his capacity as Attorney General of Canada, references in this paper will be to the Attorney General of Canada rather than to the Minister of Justice.

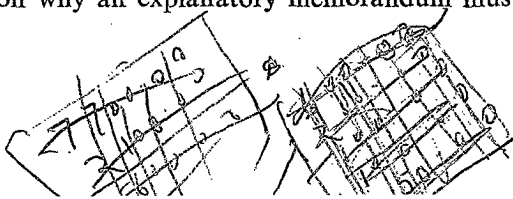
be one central authority for the preparation of legislation, and the most appropriate is of course the Department of Justice. If each department were left to prepare its own legislation, there would inevitably be a lack of uniformity and consistency among measures, some bills intended for the same session would probably conflict, and there might well be conflict between bills and existing statute law; moreover, each department could not expect to be equipped with trained and experienced draftsmen.

The preparation of legislation is now superintended by a committee of the Cabinet under the chairmanship of the Attorney General of Canada, called the Cabinet Committee on Legislation. Its functions are to prepare, for Cabinet consideration and approval, the government's legislative programme for each session, to keep the legislative programme under constant review and to examine in detail all draft bills.

Before the Department of Justice can be instructed to draft a measure, the sponsoring department or agency of the government must prepare and submit to the Cabinet a memorandum setting forth the objectives of the proposed legislation and the main questions of policy involved. In preparing the memorandum the sponsoring department is required to consult other departments that might be interested. When submitting the proposal to the Cabinet it must indicate the probable length of the bill, its degree of urgency and the session of Parliament in which it is intended to introduce it. Explanatory memoranda must not be submitted to the Cabinet unless the sponsoring department is in a position to give the Department of Justice complete instructions for the drafting of the required bill immediately Cabinet approval has been received. They must not be in the form of draft bills, but must provide a brief and clear outline of the substantive amendments or new proposals recommended; and they must contain an account of the views and comments, if any, of the other interested departments.

The explanatory memoranda are considered in the first instance by the Cabinet Committee on Legislation. Ministers and officials of the sponsoring departments appear before the committee to explain the measure and to give any other information that may be required. The committee may return a proposal to the sponsoring department for further consideration or direct that the views of other departments be obtained, or it may pass the proposal for consideration by the Cabinet.

The principal reason why an explanatory memorandum must



be submitted before a bill is drafted is to prevent departments from employing counsel to draft bills that have little chance of being accepted by the government. Without this requirement counsel in the Department of Justice would be required to spend a great deal of time, and to incur considerable expense, in futile drafting; they are better employed to draft bills the government wants. The purpose of the memorandum is therefore to obtain advance approval from the Cabinet of the broad principles of the proposed measure. The memorandum is not intended to be a substitute for the bill, and approval of the memorandum does not imply approval of the bill. The draft bill will come forward later and it can then be examined by the Cabinet in detail.

When the Cabinet approves the principle of the proposed measure, the sponsoring department is notified, and it is required within one week to give detailed instructions to the Department of Justice for the preparation of the required bill. The drafting process following receipt of instructions has been described already. When the draft of the bill is completed it is submitted to the Deputy Attorney General of Canada, who, if he approves it, forwards an official copy to the Deputy Minister of the sponsoring department, which then arranges to have the bill printed and submitted to the Cabinet. When the bill is printed, copies are sent to the Department of Justice and to the Secretary to the Cabinet. It is examined in the Department of Justice and, if it is in accordance with the draft approved by the Deputy Attorney General, a copy is certified and sent to the Secretary to the Cabinet. On receipt, the printed measure is submitted to the Cabinet Committee on Legislation in the first instance and finally to the Cabinet as a whole. If Cabinet consideration of the bill results in changes, the bill is referred back to the Department of Justice for amendment or redrafting. When the bill is approved by Cabinet it is sent to the Clerk of the Senate or to the Clerk of the House of Commons, as the case may be, for introduction. A bill imposing taxes or a charge on the Consolidated Revenue Fund must in the first instance be introduced in the House of Commons.¹⁰ Other bills are first introduced either in the House of Commons or in the Senate as the Cabinet decides in each case, although in recent years there has been a tendency to introduce in the Senate most bills that do not involve expenditure or taxation.

The process of submitting memoranda to the Cabinet and of

¹⁰ S. 53 of the British North America Act, 1867, provides that bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

preparing legislation is a continuous one extending over the whole year and, normally, whatever legislation is ready on the eve of a session, or is far enough advanced that it can be completed during the session in time for Parliament to deal with it, is included in the programme for that session. One of the objectives of the Cabinet Committee is to ensure that the preparation of all legislation intended for a particular session will begin in good time so that it will be ready when it is wanted. Consequently, all departments must forward to the Secretary to the Cabinet, not later than ninety days following the prorogation or adjournment of the then current session of Parliament, information as to the legislation proposed for the next ensuing session. If in any reply reference is made to legislative items for which explanatory memoranda have not yet been submitted to the Secretary to the Cabinet, they are required to be submitted as soon afterwards as possible. Explanatory memoranda, except those relating to budget or unforeseeable proposals, that are submitted later than one month before the opening of a session of Parliament will not normally be approved for introduction during that session.

From time to time the Cabinet Committee on Legislation reviews the position of all proposed measures and, approximately one month before the opening of a session of Parliament, the committee prepares and submits to the Cabinet a tentative legislative programme. In preparing this programme the committee has regard to the amount of time likely to be available for legislation during the session, the relative priority of bills, the dates when instructions can be or have been given to the Department of Justice, the time that the drafting may be expected to take, as forecast by the Department of Justice, and the approximate date on which the bills must be introduced. The legislative programme is revised from time to time and shortly before the opening of the session the final programme is drawn up by the full Cabinet.

Although I have stated that as a general rule the text of a proposed measure is not seen by the public until it has been introduced in Parliament, there are important exceptions. Frequently the government will introduce a bill in one session of Parliament that is intended for enactment at a following session. The purpose is to have the bill printed and distributed so that members of the public can consider it and make representations. This was done, for example, in the case of the Income Tax Act, the Criminal Code, the Bankruptcy Act, the Trade Marks Act, the Indian Act and the Food and Drugs Act. Sometimes the government, before introduc-

ing a measure in Parliament, submits a draft measure to interested organizations for consideration and comment.

Our present legislative methods are of recent origin and are largely founded on the procedure followed in the English Parliamentary Counsel Office.¹¹ At the time of Confederation there was no settled method of preparing government legislation, and it was usual for ministers to seek the assistance of the legal officers of Parliament. Although it was not part of their duties, they drafted many measures, not only for members of the government, but for private members as well. A minister might therefore have had a bill prepared by the legal staff of his own department or by officers of Parliament. In the course of time, however, departments began to submit their legislation to the Department of Justice either for review or for preparation and, by 1940, the Department of Justice prepared a major part of the government's legislative programme. But there was nothing to require departments to submit their legislative proposals to the Department of Justice, and even where bills had been drafted by the Department of Justice, there was nothing to prevent administrative officials or others from making changes. 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 involved should be submitted to the Cabinet for approval. Finally, in 1952, the Cabinet Committee on Legislation was established.

In the meantime, a drafting organization within the Department of Justice began to take shape. Any legal officer of the Department may be required to prepare a bill as part of his normal duties, but before long one or more officials began to devote most of their time to drafting, thus forming the nucleus of a more or less separate drafting division. At the present time there are three officials in the department whose duties are almost exclusively the preparation of legislation and related work, but other officials of the department are also available for drafting purposes when needed.

As I have already indicated, the Canadian procedure is modelled after the English, although there are a number of important dif-

¹¹ For a detailed account of the working of the Parliamentary Counsel Office and the process of preparing government legislation in England, see Sir Granville Ram: *The Improvement of the Statute Book* (1951), 1 *Journal of the Society of Public Teachers of Law* 442. See also Sir C. T. Carr, *The Statutes Revised* (1951), 67 *L.Q.Rev.* 483; and the same author, *Mechanics of Law Making*, 1951 *Current Legal Problems* 122.

ferences. In England government legislation is prepared in the Parliamentary Counsel Office,¹² a branch of the Treasury Department, and there are two interested committees of the Cabinet, the Legislation Committee and the Future Legislation Committee. The Legislation Committee deals with legislation for the current session of Parliament and the Future Legislation Committee with legislation intended for future sessions. In Canada, after a bill has been sent in typewritten form by the Deputy Attorney General of Canada to the sponsoring department, it goes to officials of Parliament for printing and submission to the Cabinet, but the officials of Parliament in England do not see a government bill until it has been introduced; the printing of bills before actual introduction is done under the supervision of the Parliamentary Counsel Office. In England parliamentary counsel will not accept instructions in the form of a draft bill; in Canada instructions in this form are not refused, although it is more satisfactory to receive instructions in memorandum form. Finally, in England legislation is dealt with on a much stricter timetable. The government fixes in advance the dates when bills are to be introduced and all legislative plans for the session must be made accordingly. Our parliamentary system is more flexible.

The Australian procedure is also founded on the English and it resembles closely the Canadian.¹³ In Australia, however, the parliamentary draftsmen do assist private members in preparing bills in so far as their time permits, but the bill is always shown to a minister. In Australia, too, all regulations are drafted by the parliamentary draftsmen. We have not yet reached this point in Canada and, although the Department of Justice does prepare regulations upon request, there is no requirement that they must be submitted to that department. All delegated legislation, however, is examined as to form by an officer of the Department of Justice, thus producing some degree of uniformity of style.

IV. *The Parliamentary Process*

The Parliamentary stage begins with the introduction of the bill in the Senate or House of Commons or, in the case of a money bill, with the introduction of a resolution in the House of Commons. When a bill has received first reading, it is printed for Par-

¹² For a history of the Parliamentary Counsel Office in England, see Ilbert, *Legislative Methods and Forms*, *op. cit.*, pp. 77-88.

¹³ For a description of the Australian procedure, see J. Q. Ewens, *Parliamentary Drafting in the Commonwealth of Australia* (1952), 1 *International and Comparative Law Quarterly* 363.

liament and distributed, and then, for the first time, becomes public. Afterwards, no changes can be made in the bill without the approval of Parliament. After second reading the bill is usually referred to committee: in the Senate to a standing or special committee and in the House of Commons usually to a committee of the whole, but sometimes to a smaller committee. Occasionally a bill is referred to a joint committee of the Senate and House of Commons. At the committee stage the bill is considered in detail, clause by clause, and officials of the sponsoring department are present to give whatever assistance they can. At a meeting of a committee other than a committee of the whole the officials are permitted to speak, but when a bill is before a committee of the whole the officials may only appear on the floor of the house and give whispered advice to the minister who is piloting it. Amendments are frequently made in committee, either on motion of the government or a private member.

Since the bill has now become the property of Parliament, the official government draftsman no longer has any jurisdiction over it. Nevertheless, he can, and frequently does, assist in the preparation of amendments. If the government intends to move an amendment, it is customary to have it drafted beforehand in the Department of Justice; and, where the government is disposed to accept an amendment moved by a private member, it is usual for the government to agree to the principle of the amendment and to return at a later sitting with the amendment as prepared or approved by the Department of Justice. The draftsmen do not usually attend committee meetings unless their attendance is expressly requested. It is, of course, dangerous to make on-the-spot amendments without some opportunity for reflection; at first glance an amendment may appear to be sound but on reflection turn out to conflict with some other provision of the bill or with an existing statute.

The British North America Act requires that Acts of the Parliament of Canada shall be printed and published in both the English and French languages.¹⁴ The French version is not a mere translation of the English; both versions are enacted by Parliament. A bill is introduced in both languages and there are in fact

¹⁴ S. 133 of the British North America Act, 1867, provides that either the English or the French language may be used by any person in the debates of the houses of the Parliament of Canada, that both those languages shall be used in the records and journals of those houses and that the Acts of the Parliament of Canada shall be printed and published in both.

original copies of each version. As a rule bills are drafted in English, but they are translated by the Bureau of Translations and the French versions pass through all stages in Parliament, and receive royal assent, along with the English version, and are of equal authority.¹⁵ Counsel in the Department of Justice include members of the Quebec bar, who are available for consultation on a bill affecting or relating to the civil law of Quebec.

V. Statute Revision

A picture of the legislative process would be incomplete without a reference to our system of statute revision. In most legislative jurisdictions in Canada statutes are periodically revised and consolidated,¹⁶ and a new edition of the Revised Statutes of Canada is now in preparation. Statutes are amended from time to time, and ultimately it becomes exceedingly difficult to find one's way through them. So-called office consolidations are often prepared by administering departments, but these consolidations are not official or authoritative.

A consolidation could be carried out by introducing in Parliament a consolidating bill for each statute, but this method alone would hardly be practicable. There are now in force well over three hundred separate public Acts of the Parliament of Canada, in addition to mere amending Acts, and it would be impossible for Parliament in any one session to deal with so large a number of statutes, section by section, in addition to its ordinary sessional work. The consolidating process by Parliament could, of course, be extended over the years, but intervening amendments would make it impossible to have at any one time a complete consolidation of all the statutes.

In those jurisdictions in Canada where statutes are consolidated from time to time a statute is enacted providing for the appointment of commissioners and authorizing them to prepare a consolidation, which becomes law upon proclamation by the Governor in Council or Lieutenant Governor in Council. By this method the statutes of Canada were consolidated in 1886, 1906, 1927 and are now being consolidated under the authority of chapter 67 of the statutes of 1948. On previous occasions an outside commission

¹⁵ *Food Machinery Corporation v. Registrar of Trade Marks*, [1946] 2 D.L.R. 258; *The King v. Dubois*, [1946] S.C.R. 378, at pp. 401-3; *Composers, Authors and Publishers Association Ltd. v. Western Fair Association*, [1951] S.C.R. 596, at p. 598.

¹⁶ For a history of the statute consolidation process in Canada and its provinces see Ollivier, *The Revised Statutes of Canada* (1948), 26 Can. Bar Rev. 795.

was appointed, but the present commission consists of members of the public service.¹⁷ The commission is given authority, not only to consolidate the Revised Statutes of Canada, 1927, with subsequent Acts, but also to "make such alterations in their language as are requisite in order to preserve a uniform mode of expression" and to "make such minor amendments as are necessary to bring out more clearly what it deems to be the intention of Parliament or to reconcile seemingly inconsistent enactments or to correct clerical or typographical errors". The consolidation prepared by the Statute Revision Commission does not go back to Parliament before it becomes law, but takes effect when it is proclaimed by the Governor in Council. The objection may be made that Parliament in this way is delegating its authority to enact legislation. On the other hand, the commission has no authority to alter the substance of the law, and it is unthinkable that a responsible commission would consciously do so. Changes in the law may perhaps result unintentionally from a consolidation or a minor verbal revision, but this is part of the price that must be paid for the convenience of having the statutes appear periodically in consolidated form.

To assist in carrying out the current work, the present commission engaged a staff of lawyers to prepare a consolidation of both versions of the statutes. Each statute so consolidated was printed and then referred to the commission for revision in accordance with the authorizing statute. Corresponding changes were made in the French version by the Government Translation Bureau, in addition to other verbal changes that appeared to be necessary. The revision made by the commission is not in any sense a revision of the substance of the statute law; only the form may be changed. For example, the commission has removed jargon and unnecessary verbiage in so far as it was able to do so without altering the substance of the statute. It paid particular attention to the tense, voice and mood of verbs and verbal forms, broke up solid blocks of type by paragraphing and indenting or by dividing a section into subsections. It has eliminated the now outmoded proviso and, as each individual case required, substituted a proper English conjunction, placed the content of the proviso in its proper position in the legislative sentence or simply converted the

¹⁷ The Minister of Justice and the Solicitor General are members *ex officio*. The appointed members are the Rt. Hon. T. Rinfret, Chief Justice of Canada; F. P. Varcoe, Q.C., Deputy Minister of Justice; W. R. Jackett, Q.C., Assistant Deputy Minister of Justice; C. Stein, Q.C., Under Secretary of State; and E. A. Driedger, Q.C., Parliamentary Counsel, Department of Justice.

proviso into an additional section or subsection. In short, the commission has attempted, within the bounds set by Parliament, to modernize and simplify the language of the written law.

But a consolidation of a statute with its amendments, even when coupled with formal revision, is not always enough. Many statutes have become obsolete, unworkable or otherwise unsuited to modern conditions and a complete revision of their substance is necessary. These revisions are made by Parliament by what amounts to a continuous process. During the last ten years, for example, consolidation and revision statutes enacted by Parliament include such major Acts as Bankruptcy, Land Surveys, Citizenship, Currency, Explosives, Farmers' Creditors Arrangement, Financial Administration, Indian, Income Tax, Immigration, Judges, National Defence, National Film, Northwest Territories, Post Office, Precious Metals Marking, Statistics, War Veterans Allowance and Weights and Measures. For the current session of Parliament revisions of the Criminal Code, the Food and Drugs Act, the Trade Marks Act, the Civil Service Superannuation Act and the Yukon Act have been announced.

The two processes, revision by Parliament and consolidation by commissioners, have therefore been combined; it is hoped that in this way the statutes will be constantly improved in quality and made readily accessible in the most convenient form.

The Spirit of the British Constitution

The combination of responsible leadership by Government with responsible criticism in Parliament is the essence of our Constitution. Our aim must be to preserve it through the inevitable changes which the needs and demands of each generation bring about in its outward structure and in the adjustment of its parts.

No less characteristic is the instinctive English love of concrete detail and suspicion of abstract principles and logical deductions. Our Norman conquerors and the clerics and lawyers that came in their train could add copiously to our vocabulary. But they never succeeded in implanting the tendency, universal in countries of Latin derived speech, of arguing from general principles to particular conclusions. Even in the domain of law the broad principles of the Roman Law were never able to displace the English belief that the merits of any particular case could only be judged in the light of decisions on similar cases which had commended themselves. In mediaeval philosophy it was an Englishman, William of Ockham, who was the keenest critic of the Platonic notion that abstractions were something more than a verbal convenience, while another Englishman, Francis Bacon, could challenge the whole accepted order of thinking by his inductive philosophy and by his warning against the danger arising from 'the spacious liberty of generalization'. (L. S. Amery in *Parliament: A Survey*. 1952)