STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

The Standing Joint Committee for the Scrutiny of Regulations has the honour to present its

THIRD REPORT

(*Report No. 91 - Marginal Notes*)

Pursuant to its permanent reference, section 19 of the *Statutory Instruments Act,* R.S.C. 1985, c. S-22, and the order of reference approved by the Senate on March 22, 2016 and by the House of Commons on March 24, 2016, the Joint Committee wishes to draw the attention of the Houses to its views on the new layout for the consolidation of federal Acts and regulations.

In January 2016, a new layout was adopted for the consolidation of federal Acts and regulations maintained on the Justice Laws Website. This was done in concert with a change to the layout of Bills introduced to Parliament and regulations enacted under federal statutory authority. The new layout for the consolidated Acts and regulations, however, was at the same time also applied to all Acts and regulations enacted before January 2016.

Pursuant to subsection 31(1) of the *Legislation Revision and Consolidation Act*, the electronic consolidation may be relied upon as evidence of a statute or regulation and its contents. This consolidation provides a convenient and efficient "official" reference for statutes and regulations in force in Canada. In the absence of an official electronic consolidation, reference to a particular statute or regulation would require locating the original publication in the Statutes of Canada or the *Canada Gazette* along with the separate publication of any subsequent amendments to any relevant provisions. That this is a time consuming and sometimes confusing process underscores the important role played by the consolidated Acts and regulations. Judges, lawyers, government officials and citizens will in most cases look first, and perhaps only, at the electronic consolidation.

One feature of the new layout is that material that formerly appeared as marginal notes has been moved to the body of the text in a manner indistinguishable from headings or subheadings. The Chief Legislative Counsel of the Department of Justice explained in written comments to the Joint Committee that this change "enhances access to the legislative corpus" by rendering each linguistic version easier to read, and by allowing visually impaired readers who rely on technical assistance to access the bilingual PDF version of legislation rather than having to rely solely on the HTML version as they did before. Although the stated intent of the new format is not to change the wording or meaning of the legislation, but simply to make it more accessible, the change of marginal notes into headings has a more substantive effect.

The difference may be seen by way of the example set out in the Appendices to this Report. The *Railway Safety Management System Regulations, 2015* were enacted on February 5, 2015. Appendix 1 shows section 1 to 5 of those Regulations as they appeared in the consolidated regulations on the Justice Laws Website on February 27, 2017. Appendix 2 shows sections 1 to 5 as they appeared in Vol. 149, No. 4 of the *Canada Gazette*, Part II, when it was published on February 25, 2015.

Section 14 of the *Interpretation Act* provides that marginal notes form no part of the enactment, but are inserted for convenience of reference only. This means that they should not be relied upon to interpret the meaning of the enactment. This is not the case with respect to headings, which are considered part of the enactment. This being the case, the transformation of marginal notes into headings effectively amends legislation by adding new elements to it. At the very least, the different weight given to marginal notes and headings as tools of interpretation leads to the conclusion that the meaning of the legislation has been altered.

While the changes at issue may be viewed as minor, the underlying principle is significant. In the absence of a clear rule to the contrary, legislation may not be altered other than by formal amendment. This is so no matter why the change is required or how minor the change. In maintaining a consolidation, the Minister of Justice has no authority to alter the law unless that authority has been clearly conferred by Parliament. The Department of Justice was therefore asked to identify the authority for the inclusion of material that was formerly found in marginal notes, and thus was not part of federal legislation, in the consolidations of Acts and regulations as elements of that legislation.

Although paragraph 27(b) of the *Legislation Revision and Consolidation Act* states that in maintaining a consolidation of the statutes or regulations, the Minister of Justice may include “information that enhances the value of the consolidation”, it is difficult to see that this extends to adding elements to the actual text of legislation.

Section 30 of the *Legislation Revision and Consolidation Act* does provide that consolidated statutes and regulations do not operate as new law, and section 31 of that Act provides that, in the event of an inconsistency between consolidated legislation and the original legislation, the latter prevails to the extent of the inconsistency. At the same time, it seems likely that not all those making use of the consolidations will be aware of these provisions and their implications. In any event, section 30 cannot be read as authorizing the creation of discrepancies by intentionally adding elements to legislation. Nor is it sufficient, in the Joint Committee’s view, that the Justice Laws Website advises that for purposes of interpreting and applying the law, users should consult the original and amending Acts as passed by Parliament and the original and amending regulations as registered by the Clerk of the Privy Council and published in the *Canada Gazette*. The Joint Committee reiterates that the consolidated Acts and regulations are stated to be “official” and can be used for evidentiary purposes.

In response to the Joint Committee’s concerns, the Chief Legislative Counsel of the Department of Justice expressed the view that section 14 of the *Interpretation Act* makes it clear that a marginal note is inserted for convenience of reference “regardless of its

location on a printed or electronic page." The Joint Committee was assured that no transformation from a marginal note to a heading has taken place. It is the position of a note on the page, however, that defines a "marginal note". As Paul Salambier writes in *Legal and Legislative Drafting* at page 310:

> A marginal note is a short note located beside a section that gives an indication of the content of the section… Marginal notes are usually in a smaller font size than the text of the section, which differentiates them from the section's text… A section heading performs a similar function, but is located above the section[.]

A note that does not appear in the margin cannot be a "marginal note". Moving a marginal note out of the margin to a position above a provision means that it is no longer a marginal note and is rather a heading or subheading.

The Chief Legislative Counsel referred the Joint Committee to the decision of the Appellate Committee of the House of Lords in *R.* v. *Montila*, [2004] UKHL 50 and suggested that it stands for the principle that the function of, and weight to be accorded to, a marginal note and the heading are identical. While this may or may not be implicit in the *Montila* decision, the situation at the federal level in Canada is entirely different from the United Kingdom. There is no statutory provision in the U.K. equivalent to section 14 of the *Interpretation Act*. While under the common law of the U.K., both headings and marginal notes may have the same status as descriptive components of legislation, this is simply not true under the *Interpretation Act. Montila* and other authorities from the United Kingdom are not accurate indicators of the state of the law in Canada concerning marginal notes.

In Canada, section 14 of the *Interpretation Act* provides that marginal notes "form no part of the enactment, but are inserted for convenience of reference only." Headings are not dealt with in the Act. There is ample authority that, at the federal level, marginal notes and headings do not share the same role or weight in interpretation.

Pierre-André Côté states in *The Interpretation of Legislation in Canada* (second edition, at pp. 58-60):

> It is accepted today that headings and subheadings are part of a statute and thus relevant to its construction. Headings may help situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce.
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> ... Marginal notes are deemed not to form part of the text of a statute voted by Parliament. Their sole purpose is to facilitate reference to the statute, they are included to assist in consultation.

According to Côté, the weight given by courts to headings and marginal notes varies, even though the latter are not part of the enactment. However, "[b]ecause they are part of the statute, [a heading] must be taken into consideration as part of the context, even where the enactment itself is clear" (at page 59). With respect to marginal notes, on the other hand, they "cannot be used in a direct indication of legislative intent. Marginal notes have no value as part of statute." In particular, Côté notes that marginal notes "are

opinions expressed by legislative drafters" (emphasis added) rather than by Parliament or the regulation-making authority.

After reviewing the relevant case law, *Sullivan on the Construction of Statutes* (sixth edition, at p.468) also notes that the weight given to headings and marginal notes has varied, but concludes: "There appears to be a sense in the cases that marginal notes are inherently external in a way headings are not" and "[m]ost courts are unwilling to assign much weight to marginal notes."

Per the Supreme Court of Canada in *Skoke-Graham* v. *The Queen*, [1985] 1 SCR 106: "It should be noted that the *Interpretation Act* … refers only to marginal notes and preambles and therefore does not preclude the use of headings as an aid for statutory construction". Wilson J. later stated in *R.* v. *Wigglesworth*, [1987] 2 SCR 541:

> It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the *Charter*: see *Canadian Pacific Ltd. v. Attorney General of Canada*, 1986 CanLII 69 (SCC), [1986] 1 S.C.R. 678, at p. 682. The case for their utilization as aids to statutory interpretation is accordingly weaker.

Thus, it is simply incorrect as a statement of Canadian federal law that the weight to be accorded a marginal note and the heading to a section are identical. At a minimum the transformation of marginal notes into headings leads to the conclusion that the meaning of the legislation may have been altered by changing the interpretive weight that is to be accorded such material. If it were the case that both headings and marginal notes are descriptive components of legislation that are to be accorded identical interpretive weight, then obviously there could be no objection to changing the latter into the former, which would indeed be a mere question of formatting. What has been done in the case of the consolidation of federal Acts and regulations, however, is to represent material that is not part of the enactment as if it was.

The Chief Legislative Counsel has suggested to the Joint Committee that a court would conclude that section 14 of the *Interpretation Act* continues to apply to marginal notes that have been relocated. The Joint Committee is concerned, at the outset, that the new layout of the consolidated Acts and regulations may lead even courts, and the parties before them, into being unaware of the nature of marginal notes *per se*. In any case, citizens are entitled to read and interpret legislation without having to resort to the time and expense of judicial proceedings. The Joint Committee has always taken the view that where deficiencies in legislation can be identified, they ought to be corrected before a person must apply to a court to determine the precise nature of their rights and obligations under the law.

The Chief Legislative Counsel concluded his comments by suggesting that the apparent transformation of marginal notes into headings falls within the authority of the Minister of Justice under section 28 of the *Legislation Revision and Consolidation Act*. The Joint Committee cannot take this assertion seriously. Section 28 reads:

> **28 (1)** The Minister may cause the consolidated statutes or consolidated regulations to be published in printed or electronic form, and in any manner and frequency that the Minister considers appropriate.

> **(2)** A publication in an electronic form may differ from a publication in another form to accommodate the needs of the electronic form if the differences do not change the substance of any enactment.

Subsection 28(1) does no more than authorize the publication of electronic versions of statutes and regulations, leaving the precise means of electronic publication and the frequency of publication to the Minister. Subsection 28(2) permits variations in the format between electronic and other versions providing that "the differences do not change the substance of any enactment." There is nothing in section 28 that can be read as permitting material that does not form part of legislation to be misrepresented as being part of that legislation.

Following its review of the Chief Legislative Counsel's comments, the Joint Committee conveyed its concerns to the Minister of Justice. The Minister responded, "we continue to be of the view that the status of legislative components depends on their function in the legislative text rather than their location on the page; and that the new format was lawfully introduced under the authority of subsection 28(1) of the *Legislation Revision and Consolidation Act*."

Quite obviously, the Minister's reply did not provide any new information that would alter the Joint Committee's view. There is no doubt that in adopting the new layout the Minister of Justice was motivated by a desire to "enhance access to the legislative corpus". However noble this goal may be, it does not alter the fact that the approach taken was very likely unlawful. If it is considered desirable to do away with marginal notes by transforming them into headings in the official consolidation of Acts and regulations, this cannot at present be done administratively.

Notwithstanding the question of legal validity, the Joint Committee also remains concerned that the change in formatting is simply misleading, may serve to obscure the nature of marginal notes, and may therefore lead to the incorrect reliance on marginal notes when interpreting or applying Acts and regulations.

The Minister of Justice also expressed an intention to "consider options to clarify the status of the marginal notes in question." In the Committee's view, there are a number of ways this could be done. Administratively, an indication could be added to the text of the consolidated Acts and regulations to identify marginal notes, perhaps in the form of words directly indicating as much, or by way of special formatting of the text, or by the use of special characters before, after, or surrounding marginal notes.

Legislatively, an amendment to the *Interpretation Act* could be introduced to Parliament which would put marginal notes and headings on equal footing. While this could involve stating that headings, like marginal notes, are not part of the enactment, the Joint Committee is mindful that Canadian jurisprudence has at times given some interpretive weight to headings and, to a more limited degree, marginal notes. It would be preferable to recognize this evolution of the common law. Accordingly, section 14 of the *Interpretation Act* could be amended to state that marginal notes are to be considered part of an enactment. Some consideration should also be given, in the interests of clarity, to expressly stating that headings also form part of an enactment.

In accordance with Standing Order 109 of the House of Commons, the Standing Joint Committee for the Scrutiny of Regulations requests the Government to table a comprehensive response to this Report in the House of Commons.

A copy of the relevant Minutes of Proceedings and Evidence *(Issue No. 16, First Session, Forty-second Parliament)* is tabled in the House of Commons.

Respectfully submitted,

Pana Merchant | Harold Albrecht

Joint Chairs

Appendix 1: Railway Safety Management System Regulations
(as it appeared on February 27, 2017)

Appendix 2: Railway Safety Management System Regulations
(as it appeared on February 25, 2015, you will need to click on "Continue to PDF", document is at page 7)