Slaw

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Some Thoughts on the Accessibility of Legal Information and Legal Records

by Sarah Sutherland

In a time rapidly retreating into the past, I flirted with the idea of becoming an archivist and devoted thought to the nature of records, their legal status, and how they reflect reality. I was recently reminded of this when I heard the opinion that the official versions of legislation should no longer be published in annual volumes with amendments and periodic revisions as they are now. Instead it was proposed that a yearly annual revision be published as the official version with annotations indicating amendments as a way to simplify the process of research and to make the laws more accurately reflect the experience of people subject to the law.

I've been thinking about this idea since and come to the conclusion that while it makes sense from the perspective of the public and more closely reflects the unofficial versions of the law on services such as CanLII or in print consolidations like practitioners' criminal codes that make accessing the law simpler, it would increase the distance between the laws and the legislative process that created them, making them worse records.

In my studies, we discussed the difference between documents that record an act and documents that are binding when they are somehow signed, endorsed, sealed, notarized, or otherwise made official. A marriage is an example of the former: you are married because you made an oath, not because you signed the register. The register documents the marriage. I have been told that proclamation of regulations are an example of the later: the endorsement of the document brings it into force, though I was disappointed to learn there is not an official proclaimer of regulations one could go see read regulations aloud in full, preferably in a fancy hat.

Legislation becomes law through many processes, and the system of publishing those laws evolved as a way to express the process of legislating and to record that it had been followed. Hansard records the discussions in parliament verbatim. Interim bills are published as they change through discussion at set stages. Annual statute volumes record the actual bills that were passed. This creates a labyrinth of documentation to navigate for any complex matter where legislative intent is important, but it limits the ability of legislators to capriciously enact laws.

The need for proper recording of government actions is well illustrated by the recent news stories in British Columbia and Ontario relating to the deletion of government records. In those cases there was limited oversight of how governmental records were retained, which led to opaque decision making and limited ability to comply with access to information legislation. The reason there is so much official recording of the legislative process is to limit governments' ability to govern in this manner.

Publicly available records of parliamentary process are important ways to ensure that proper procedure has been followed over long periods of time. As preferred technologies, budgetary and space restraints, and the times have changed there is a continued shift to online presentation of this information, but structurally it remains unchanged (and I have found often easier to navigate conceptually in print).

I wonder about the recent decision of the Alberta government to discontinue the print publication of Hansard,

as Shaunna Mireau reported in December. This means that there may be limited ability to ensure that there aren't changes made to the record over time. And as the Government of Alberta hasn't made the online version official, it limits the public's access to official records of how they are governed. The impermanence of online information creates the desire to create programs like the SCOTUS Servo Twitter account, which notifies followers when the online Supreme Court of the United States decisions are changed.

I have mentioned this topic to several people, and the general consensus is that the first step to make legislative information more accessible would be to have it written in plain language. I agree with this priority, but based on my experience explaining the system to students, lawyers, and the public, I think the ways the laws are published is confusing and creates barriers to access. Changing the way the law is published wouldn't be an inconsequential way to improve intelligibility.

That said, we need to understand that the current system was not designed as a way to navigate the law, rather it was developed over time as a system of records to make sure governments are following proper procedure. I would argue that the main issue is not just the state of the primary law, but lack of access to the commentary and synthesized legal information required to mediate between the legislative records and people looking for information.

Thank you to Carolyn Petrie who kindly read over this article to confirm my memory of archival theory.

Comments

John Gregory
February 16th, 2016 at 1:31 pm

Interesting perspective. I agree that accessibility is an important value, but so is authenticity. Ontario and the federal government (and New Brunswick, and maybe others) have made their online statutes official – in Ontario, 'official copies' – for legal reference.

For access – it's hard to beat a current online consolidation, which is what Ontario has had for a dozen years. Ontario has no plans to do a 'revision' again. It's too expensive and adds little value to what we now have. (The one advantage is the rationalization of section numbers. The interposition of decimal numbers – s. 34.1, 34.2, etc – can make a statute hard to read after a time.)

Ontario's backstop of ultimate authority, and I believe the feds' too, is the signed paper record in the custody of the Clerk of the Legislature. But nobody has ever had official reference to that, once the statutes were published. That will continue to be the case, until someone manages to hack the main database and start changing the content of the online statutes. There are a number of challenges to doing that effectively, including the continued existence of some publicly printed statute volumes one could use for comparison.

These days statutes are drafted in as plain language as the instructions allow. Some topics are complex, and some statutes are passed before enough deliberation can be given to the implications of the policies or the wording of their expression. There is no preference for legalese among professional legislative drafters in Ontario, and I doubt there is elsewhere in the country.

As to access to commentary and synthesis – I agree, though it was pointed out on Slaw lately that there is in fact a great deal of it around – coordinating it, updating it and finding it can be an issue, and it's not every topic that is equally well covered.

David Collier-Brown
February 16th, 2016 at 2:16 pm

When one looks at electronic archives, it can sometimes be simpler: each time something changes it's added to a "revison control system" like git or rcs, with a statement of why it changed.

For an amendment to a statute or regulation, it might first show up as the approved text with the description "to be proclaimed circa 1 June 2016", then change to "proclaimed 22 July 2016" and so on. The changes can be thought of a a series of "deltas", each with its approver's name and their reasons, and that's very close to how they're stored.

It's quite common to look at some computer code "as of 23 July 2016" to see what it said then, who had changed it, and why. Rather similar to a non-computer archivist.

Chris Budgell
February 16th, 2016 at 10:00 pm

Though I have no formal education relating to this interesting and important topic, I recognize its importance because of what I'll call a "legislative impropriety" that occurred in BC in the mid-90's and has never been rectified. I ran into the impugned statutory provision in the year 2000. When originally debated by the House in November 1992 it relied crucially on the proprietary legal term "prima facie case" repeated in two successive lines. There is a quite remarkable debate recorded in the Hansard record.

That term wasn't in the provision when I ran into it, yet it was still being widely used elsewhere in reference to it. When it occurred to me to ask about the difference I never got a satisfactory answer, and so I started on a self-education program I could call Legislative Process 101. What I found eventually was that the provision had indeed been amended, but without actually engaging the body of legislators who had originally debated it. The mechanism that was used was the statutory revision process that had also been commenced in 1992 and that was formally completed in March 1997 (resulting in the designation RSBC 1996). One result was that there was no practical means for a member of the public to find out how and when the provision had been amended. When I later sought access to the records of the statute revision exercise the Ministry of A.G. claimed they were subject to solicitor-client privilege, and the Office of the Information and Privacy Commissioner agreed (though they referred to it as another kind of legal privilege).

Since then, I've learned a great deal more that tells me that the public is woefully unaware of the opportunities government agencies have for playing games with legislation.

Jean
February 19th, 2016 at 12:35 pm

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It is all more the reason why the legal sector needs to learn and maintain their knowledge on the rigour and discipline of legislative revision and proclamation / in force dates tied directly to the legislative process itself …regardless of country. In the electronic world and dealing with folks who don't have knowledge of legislation nor legal research, they will easily just inform others that an online audit trail of electronic user activity and multiple versions, is good enough.

It does seem ancient and arcane that version, revised, office consolidation and amendment have very specific meanings in the legal world that are different from other sectors. Compare that to the health care sector in medicine –"trial", "test"…. I am not deeply familiar what makes a prescription drug "legal" but again, that is probably tied to a piece of legislation and signed authority by Health Canada or whichever govn't healthy authority.

In the end the legal sector might the discipline/sector that demands rigour in tracing backward official, in-force record/document version via a defined legislative process that doesn't deviate over decades/centuries.