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The Importance of Briefing Notes

Julie Maciura

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Policy makers have long relied upon briefing notes to assist in making good decisions. Boards, councils and even committees of regulators have often used briefing notes to enable staff and preparatory teams to concisely convey the information that decision-makers need.

Briefing notes now have an important legal role, too.

In this article, we use “policy” in a broad sense to include proposed legislation, regulations, by-laws, rules, standards of practice, guidelines, and advisory statements.

A traditional briefing note identifies the issues to be determined or addressed, describes the outcome of the research conducted, articulate the options available to the decision-makers, summarizes the results of any consultation, sets out the advantages and disadvantages for each option, possibly makes a recommendation, proposes an implementation plan, and specifies the method for monitoring and reviewing the impact of the policy.

However, in recent years the role played by briefing notes has expanded and has come to be seen as a component of a board’s risk management and governance functions. As a result, briefing notes identify that the topic of the policy is a risk worth addressing. The analysis portion of the briefing note evaluates the nature of the risk to help understand it better (e.g., its root cause and the impact of existing measures to reduce it). Of particular importance is a comprehensive review of the possible measures to address the risk, including the unintended consequences of each. This is where the concept of Right Touch Regulation plays a crucial role.

Briefing notes have also helped regulators to become more transparent in their work. For example, Ontario health regulators are required to post their meeting materials (including briefing notes) in advance of their board meetings (with limited exceptions). Many other regulators now do this voluntarily. Briefing notes are often a key component of a regulator’s consultation with system partners (such as the profession and the public) on their policy initiatives.

More recently, briefing notes have also served critical legal purposes. For example, they often outline the statutory provision enabling the making of the policy, especially if it is a form of subordinate legislation (such as a regulation, by-law, or rule).

In the past, the most likely challenge to a new rule or policy was that it was made in bad faith or for an improper purpose. A briefing note can provide strong evidence that the provision is consistent with the enabling legislation. For example, in *Hardick v. College of Chiropractors of Ontario*, 2023 ONSC 1479 (CanLII), a by-law amendment extended the cooling off period for prospective board members from three years to six years. A prospective candidate challenged the provision as targeting him because it was made after he expressed an interest in serving on the board. In denying an interim stay of the provision, the Court noted that the regulator's transparent policy-making process made it unlikely that a finding of bad faith or improper motive on the part of the regulator could be established.

Courts have also hesitated to find that a provision is invalid because it is not authorized by the enabling statute. Just a decade ago, Canada's highest court said that subordinate legislation should only be found to be unauthorized (i.e., to be "ultra vires") where it was "irrelevant", "extraneous" or "completely unrelated" to the authorizing sections in the enabling statute.

An example of this deferential approach, in the regulatory context, is found in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2014 BCSC 1414 (CanLII), where a regulator prohibited pharmacists from offering inducements to patients. The lower Court held that this by-law was "unreasonable" in large part because of the lack of evidence before the decision-makers regarding the public interest served by the rule. The lower Court was unimpressed by the affidavit evidence of some of the decision-makers as to why they thought the public would be protected by the prohibition. On appeal, the Court of Appeal reversed the lower Court's decision in large part because of the high level of deference that the courts should show to regulators making by-laws. See: *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 (CanLII).

However, late last year the Supreme Court of Canada pronounced on how its recent emphasis on the "rule of law" in the realm of administrative law would affect challenges to the validity of subordinate legislation. While the issue in *Auer v. Auer*, 2024 SCC 36 (CanLII), related to child support guidelines, the Court was clearly providing general guidance that should be considered by professional regulators in their decision-making processes.

The Court said that subordinate legislation must be reasonably authorized by its enabling provisions. While the Court provided reassurance that this new formulation of the criteria is unlikely to result in frequent findings of invalidity, it was indeed establishing a less deferential approach to review. The Court reiterated several propositions from *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 SCR 810, including the following:

> … the principle that subordinate legislation "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object" continues to apply when conducting a vires review…. The principle that subordinate legislation benefits from a presumption of validity also continues to apply…. Further, the challenged subordinate legislation and the enabling statute should continue to be interpreted using a broad and purposive approach…. Finally, a vires review does not

> involve assessing the policy merits of the subordinate legislation to determine whether it is "necessary, wise, or effective in practice". Courts are to review only the legality or validity of subordinate legislation…. [*citations removed*]

To manage this slightly increased legal risk, regulators should ensure that any proposed changes to their regulations, by-laws, and rules are accompanied by a briefing note that explains the purpose and goals of the proposal, its relation to the objects of the enabling legislation, and the research and analysis behind the proposal. Ideally the briefing note would also explicitly reference the provisions in the enabling legislation that authorize the proposed change (such as a provision that allows by-laws to be made on certain topics, or that permits the regulator to issue standards of practice).

The *Auer* decision is the second time in as many years that the Supreme Court of Canada court has imposed a heightened burden of explanation upon regulators. In *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 (CanLII), a case dealing with Francophone language rights, Canada's highest court said that, even where the *Canadian Charter of Rights and Freedoms* is not breached, the state must consider *Charter* values when making discretionary decisions such as making policy. The regulator (as a quasi-state actor) must address and weigh the competing *Charter* values impacted by its decisions. While boards making policy decisions typically do not provide formal reasons for such decisions, a comprehensive briefing note would go a long way to meeting this duty. Of course, meeting minutes and communications when consulting on and implementing policy decisions would also be of assistance.

The importance of having thorough briefing notes for policy decisions made by regulatory boards - including a legal component setting out the applicable enabling provision - has never been more important.

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