

CONFIDENTIAL REVIEW OF DRAFT LEGISLATION BY MEMBERS OF PRIVATE BAR¹

A brief discussion of the British Columbia experience

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For a number of years, members of the B.C. Branch of the Canadian Bar Association have assisted the Ministry of Attorney General by providing confidential reviews of draft legislation. The process is coordinated through the Legislation and Law Reform Committee, a standing committee of the B.C. Branch with a staffed position of Legislation and Law Reform Officer.

These reviews are provided without remuneration and the lawyers participating are bound by an undertaking of confidentiality which prohibits them from disclosing any aspect of their engagement, even to other members of their firm, without the government's consent.

The benefits

Both Legislative Counsel and the Canadian Bar Association consider the process provides good benefits.

Legislative Counsel receive thorough, knowledgeable and practical reviews of draft legislation. The assistance is all the more appreciated in practice areas that are not usual for government lawyers (for example, legislation relating to family law or wills and estates). We also receive the benefit of a third party test for clarity, helping us to avoid the "familiarity trap" that can come when our intimate knowledge of the policy intention leads us to assume that the draft legislation is understandable to all. All this without charge - a fine benefit in these days of pressure to improve quality without increasing cost.

The mandate of the Legislation and Law Reform Committee is to promote well-developed, practical laws. This includes encouraging the use of plain language in legislation. Through the confidential review process, the Bar is able to take direct action in response to this mandate, as well as having an opportunity to raise and seek some accommodation of practice concerns regarding proposed legislation.

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The ultimate beneficiary is the public, with better, more readable laws.

The process is straightforward. Legislative Counsel (or the responsible Ministry policy analyst working with Legislative Counsel) will identify draft legislation as a candidate for the review process. The primary criteria are subject area and available time. Is this legislation in which members of the Bar are often involved? Is there sufficient time for a review? (In fact, the Legislation and Law Reform Officer can usually find a member of the Bar with experience even in an obscure practice area, and there has always been cooperation in providing advice within extremely short time frames.) The sponsoring Ministry will confirm that it is agreeable to the proposed review. Legislative Counsel or the Ministry policy analyst will then contact the Legislation and Law Reform Officer. The Officer will discuss any specific criteria they may have regarding who is appropriate for conducting the review and determine the time frame for response.

Once this is done, the Officer will arrange contact with a Bar member, ensure the required undertaking is entered and arrange how the member will receive the draft. (A copy of the standard form of undertaking is *attached*.)

Responses usually come directly to Legislative Counsel. They may range from a single written response to on-going discussions between Legislative Counsel and the private member.

BRITISH COLUMBIA BRANCH—THE CANADIAN BAR ASSOCIATION

Details of Confidential Consultation Process For Consultation by the Government of British Columbia

Options for Levels of Confidentiality

The Legislation and Law Reform Officer (the “Officer”) co-ordinates confidential reviews of policy and legislation on behalf of the Canadian Bar Association (B. C. Branch) (the “Bar”). A government representative who wishes to consult with the Bar on a confidential basis should contact the Officer, who will arrange for consultation as requested by the government. The confidential consultation process has worked successfully for many years. The type of consultation available is flexible, depending upon the needs of government.

1. A government representative may hold a preliminary discussion on broad issues with the Officer and this discussion can be kept entirely confidential. The Officer will not discuss the matter with other members of the Bar, including the Legislation and Law Reform Committee.
2. A government representative may consult with the Legislation and Law Reform Committee, and this consultation can be kept confidential. The Legislation and Law Reform Committee does not report confidential matters to the Executive or administration of the Bar.
3. A government representative may consult with one or several members of the Bar who are knowledgeable in the applicable area. The government may request that particular lawyers conduct the review or may approve lawyers suggested by the Legislation and Law Reform Committee. The project is kept confidential among the Legislation and Law Reform Committee and the lawyers requested to act. Example letters containing confidentiality undertakings are *attached*. The project may not be discussed by the chosen lawyers with other members of their firms or corporations. The Bar has members who practise in many different areas. A list of the sections of the Bar is *attached*.

Scope of Review

The terms of the consultation can be set by the government. Representatives of the Bar may be requested to provide input on policy issues at an early stage of policy development or may be confined to providing advice on technical issues or workability of ideas or draft legislation. The government sets the scope and timing of the review. The government representative then often deals directly with the lawyers conducting the review.

Timing

Consultation involving a limited number of lawyers can usually be completed quickly, often within one week, depending on the complexity of the project. In a situation with a very short time frame, the lawyers may provide verbal comments to the policy analyst or legislative counsel.

Cost

Representatives of the Bar provide their time on a voluntary non-remunerative basis.

**EXAMPLE LETTER RE CONFIDENTIAL REVIEW OF DRAFT
LEGISLATION FOR LEGISLATIVE COUNSEL**

CBA (B.C. BRANCH) LETTERHEAD

Date

PERSONAL AND CONFIDENTIAL

Dear

Re:

Thank you for agreeing to provide comments to the Ministry of Attorney General, Legislative Counsel's office in respect of the above-noted draft legislation. In this regard, I am enclosing a copy of the letter from the Ministry and the draft legislation. Your comments should be confined to the workability and legality of the proposed legislation and should not discuss the merits of the policy behind it.

Under the terms of an arrangement between the Attorney General of British Columbia and the B.C. Branch of the Canadian Bar Association, Legislative Counsel is prepared to send to the Legislation and Law Reform Committee or its designated representatives copies of bills to be introduced by the government before they are given first reading. The bills are sent on a strictly confidential basis and can be released only to the Legislation and Law Reform Committee or Legislative Counsel. Members must undertake, and this undertaking has been given on their behalf by the Canadian Bar Association, not to make public any of the terms of the bill, either generally or specifically, nor any comments that they may have thereon until after the bill has been given first reading. Any comments made by the branch or its members should not reveal that confidential comments were made to the Attorney General before first reading. Further, this project has been sent to you individually and should not be discussed with other members of your firm.

Legislative Counsel has given us their deadline for response based on the projected date for introduction of the legislation in the House. As you are the only lawyer who has been requested to review the draft bill, your timely response is essential. Please feel free to contact Legislative Counsel by telephone to discuss your comments before sending them on. I would appreciate your sending your comments to me by **, (by fax if you like) and I will forward them to the Ministry. If you have any questions, please do not hesitate to contact me.

Yours very truly,

Ann McLean, Legislation
and Law Reform Officer

cc. **, Legislative Counsel

**, Chair, Legislation and Law Reform Committee