

# *The Association of Parliamentary Counsel in Canada*

*Michael Clegg*

Parliaments and legislatures throughout the Commonwealth have established different ways of providing advice on parliamentary law to members, officers and committees as well as legislative drafting services to private members.

Naturally, the complexity and diversity of the staffing for any parliament depends to a great extent on its size. The larger the parliament, the larger its staff and the more specialized their duties. In many legislatures the Clerk, in addition to his traditional role with respect to the procedural and administrative affairs of the House, will also advise members on parliamentary law or special areas of law that affect their role as members. The Clerk and his staff may also give legal counsel to committees. Sometimes the government's legal advisers are made available to give counsel to private members and also advise committees of the legislative assembly on matters of law. Usually there is a clear distinction made between the giving of advice on procedure and on law, and different advisers are involved. But the two are sometimes merged depending on the resources and the expertise of individuals available.

In a few cases parliaments have their own legal staff with specific duties including responsibility for drafting private members' legislation. In many provinces in Canada, counsel is made available from the office of legislative counsel or the legislative drafting section of the Department of Justice. This latter system has some organizational and professional advantages but may create some conflict of interest, particularly in the case of counsel who is drafting a bill for an opposition member. The degree or existence of conflict varies from place to place depending on the position of legislative counsel. In some provinces the legislative counsel is an officer of the legislature; this very much reduces the perceived conflict. In both the Senate and the House of Commons and also in Alberta, separate offices have been established for a parliamentary counsel whose job it is to provide drafting services and legal counsel to the House, its committees, the members and officers.

The parliamentary counsel fulfills the traditional duties of law clerk with respect to all bills, amendments and the preparation

of statutes and is available in some cases to advise public officers who are independent of government, such as the chief electoral officer, ombudsman and auditor general. He also provides general legal advice on the administration of the staff and support services.

The advantage of having an independent parliamentary counsel is that he is retained by the members and for the members; he is not a part of government staff and is not accountable to the government. In giving legal advice to a member, he will develop a direct solicitor-client relationship. He does not generally participate in the drafting of government bills and is not saddled with confidential information about their content prior to their being introduced. This could cause serious difficulties if he were to be asked to draft in a similar area for a private member. Furthermore, he is able to take a fresh and unbiased view of government legislation that comes before the House, in the event that his opinion is requested by a member or a committee.

In addition to the variation in responsibilities, there is also a difference in titles in some Commonwealth countries. In the United Kingdom and Australia the office of parliamentary counsel is the organization that drafts legislation for government although drafting services are also available to private members to a limited extent. In Canada the title "Parliamentary Counsel" is used to describe an officer of parliament. The law officer who drafts bills for government is usually styled "Legislative Counsel". In Westminster, the Speaker's Counsel carries out equivalent functions to our parliamentary counsel with respect to legal advice. The drafting of private members' public bills in the United Kingdom is partly supported by grants to finance services by outside counsel. However, that situation is only workable because of the number of experienced drafting counsel in private practice in London.

In order to define the role and extent of the functions of parliamentary counsel in the Canadian context, the author carried out a Canada-wide survey in 1981, firstly to find out exactly what the situation really was in each jurisdiction and, secondly, to see if the various officers would be interested in some kind of loosely organized professional association to discuss matters of common interest. It seemed that none of the other associations that deal with parliamentary affairs provided a convenient forum for professional discussion in the field of parliamentary law as such. Moreover, many of those involved did not qualify as members of other organizations.

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The response to the survey was detailed and encouraging and resulted in the founding and initial meeting of the Association of Parliamentary Counsel in Canada in 1982. It was held at the same time and place as the Uniform Law Conference which was attended by a majority of those interested. Since then meetings have been held at the same time as the 1983 Uniform Law Conference in Quebec and immediately prior to the conference in Alberta in 1984. As most of those interested regularly attend the Uniform Law Conference anyway, the juxtaposition made it possible for most of our members to attend without extra expense and has avoided the need to fund the Association in any way up to this point in time, a great advantage in times of restraint.

The meetings have grown from an encouraging start in 1982, with about 70% of the jurisdictions represented at a one-day meeting to the two-day 1984 Conference in Edmonton where there were representatives from every legislature and from both Houses of the Canadian Parliament.

The agenda of the conference usually includes one or two items of general interest which each take about half a day of detailed discussion. Members then have an opportunity to discuss points of parliamentary law which have arisen in their own jurisdictions. Some items are a combination of law and procedure. Thus far, the topics discussed have included: the duties of the law clerk and parliamentary counsel across Canada; preparation of private bills, drafting and advice to petitioners; handling the potential conflict of interest that may arise for those who fulfill both legislative

counsel and parliamentary counsel functions; acting as counsel to committees; legal and constitutional issues affecting legislatures as legal entities and their position as contracting parties; money bills and problems arising between third reading and Royal Assent.

These subjects have nearly all been of immediate practical interest and value to many of our members. The advantage of being able to discuss them in a college of colleagues is very significant. Since creation of the Association, members have found they have increasing telephone contact with each other on a day-to-day basis. In parliaments many problems have to be solved in a very short time which is an unfamiliar and stressful dimension for most lawyers, who are trained to proceed with great care and caution and, by corollary, not much speed. It is a tremendous advantage to be able to consult informally with colleagues across the country at a moment's notice, when formal opinion has to be prepared in a matter of hours or even minutes.

To ensure its continuing usefulness and productivity the Association wishes to remain as flexible as possible. It has an open membership with no written constitution. Annual meetings are directed to well-planned and spirited discussions on relevant topics of practical interest. The present officers of the Association are Mark Audcent, Assistant Law Clerk and Parliamentary Counsel to the Senate, as President, Merrilee Rasmussen, Legislative Counsel for Saskatchewan, as Secretary. The Past Presidents are Michael Beaupré, Assistant Law Clerk and Parliamentary Counsel to the House of Commons and the author.

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## ***Upcoming Events***

The Annual Conference of the Canadian Region will be held in Quebec City from July 21-27. This being the 25th such conference, the Quebec Branch has devoted great time and effort in planning a conference worthy of this milestone. Each Canadian legislature is entitled to send delegates. More information is available from the Secretary of the CPA section in each jurisdiction.

The 31st Commonwealth Parliamentary Conference will be held in Saskatchewan this year from October 2-12. This is an international conference bringing together parliamentarians and observers from most of the 100 member Branches around the world. This is only the second time a legislature, other than a national one has undertaken to host such a conference. Further information will be published in future issues of the Review.