

Drafting Bills in the Senate and House of Commons

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INTRODUCTION

Bills introduced by senators or MPs are ordinarily drafted by parliamentary counsel in the Office of the Law Clerk and Parliamentary Counsel of the Senate or the Office of the Law Clerk and Parliamentary Counsel of the House of Commons. This paper will describe the dynamics involved in discussions between parliamentary counsel and the people who make a request for a bill to be drafted. It is not a detailed description of all possible scenarios; rather, it is intended as a guide for anyone who is involved in drafting a bill to be introduced by a senator or MP. The views expressed in this paper are the author's.

I have been drafting legislative instruments for 17 years now. I worked in the Legislative Services Branch of the Department of Justice from 1992 to 2007. I worked with various departments, preparing and revising regulations. From 1999 to 2007 I worked in the drafting services section of the Department of the Environment and worked closely with the Department's legal services and with the project officers and officials who were responsible for setting policies. In September 2007 I accepted a secondment and joined the team of parliamentary counsel at the House of Commons. It is in that capacity that I will be addressing the question of drafting instructions and the process of drafting bills to be introduced by senators and MPs.

First, I should give you some background, by describing the drafting teams. The Office of the Law Clerk and Parliamentary Counsel of the Senate of Canada has three parliamentary counsel whose duties include drafting, and the House of Commons Office has four parliamentary counsel who do exclusively legislative drafting. Parliamentary counsel draft bills for senators or MPs and also the motions requested by the senators and MPs regarding any bill that is under consideration, including government bills. During the 39th Parliament, 73 senators' bills were introduced in the Senate, and 21 received second reading and were referred to committee; 374 MPs' bills were introduced in the House of Commons, and 18 were passed by the House. To date, four senators' bills and ten MPs' bills have received Royal Assent. As you can see, there is a limited number of drafters and no shortage of work.

At the Department of Justice, instructions for drafting a government bill are provided by the department in question, and they are ordinarily the product of numerous consultations with the segments of the

public affected by the legislative proposal. When project officers decide policy and preparing drafting instructions, they have the support of their department's legal services and experts. Legislative drafters therefore expect to receive clear and precise instructions so that they can draft legislation that will convey the departments' objectives.

In the Senate and House of Commons, on the other hand, the purpose of the bills proposed by senators and MPs is to generate discussion so that issues that are already attracting public or constituent interest, but that the government has not incorporated into its legislative agenda, are debated in Parliament. Very often, there are minimal drafting instructions, and what there are describe the desired results, the objective of the bill, but do not specify how it is to be achieved. Parliamentary counsel must therefore meet with the parliamentarians and obtain the information they need in order to do their job as drafters. This calls for effective communication and creativity.

I. RECEIPT OF A REQUEST TO DRAFT A BILL

The bills drafted at the Senate and House of Commons are requested by MPs or senators or by their assistants. There is no strict rule as to how instructions are given. As a general rule, senators and MPs submit their request to the Office of the Law Clerk and Parliamentary Counsel of the Senate and House of Commons by email and the file is assigned to one of the parliamentary counsel. The documents are generally provided in only one official language, at the option of the person making the request.

Parliamentary counsel responsible for the file first reviews the instructions and ascertains that all of the information needed to start drafting the bill has been provided. The level of detail given in the instructions varies, depending on who has made the request. Sometimes, senators' and MPs' research assistants give precise instructions. They state that a new bill is to be drafted, or an existing statute amended, and supply details as to the objectives. I should note, however, that this is not always the case. There are many requests that consist of a single paragraph describing the policy objectives to be achieved by the bill, but offer no specifics as to how they are to be achieved.

Parliamentary counsel then telephones the person who made the request, and often a meeting is useful:

- to discuss the instructions and make sure that all the information needed for drafting the bill has been provided;
- to explain the drafting process and the various steps that must be completed before the bill is finished;
- to agree as to how comments will be made on drafts; and
- to establish a timeframe for introducing the bill.

II. LEGISLATIVE CONTEXT

When the instructions received do not provide the details needed for drafting the bill, parliamentary counsel suggests that the senator or MP contact the Parliamentary Information and Research Service of the Library of Parliament to clarify the problem and identify the legislative context and the points to be addressed. To provide parliamentarians with support in doing their jobs, the Library of Parliament offers information, documentation, research and analysis services for them and their staff. Counsel may have to write the request on their behalf or assist them in preparing it.

The staff of the Parliamentary Information and Research Service of the Library of Parliament work exclusively for Parliament. They do research and provide policy analysis and advice for senators and MPs and also for committees of the Senate and House of Commons. The services provided are non-partisan and confidential. The purpose of the papers is to help parliamentarians do their jobs better, by providing background to questions that may arise in the course of their work and by providing them with analysis. However, staff do not offer legal opinions. The research officers in the Law and Government Division obtain the documents they need and analyze them, and they then write letters, brief memos or lengthier research documents, describing the legislative context and the various avenues by which the objective proposed could be achieved. In some cases, they respond to clients by telephone or meet with parliamentarians or members of their staff individually. The research paper is then passed on to the drafter, and is used as the basis for drafting the bill.

Sometimes, instructions are more detailed, and are based on legal opinions provided by experts in the private sector. Ordinarily, the legal opinions are submitted with the request, and they are very useful to drafters in drafting the bill and checking the drafting instructions. In

those cases, parliamentary counsel will have to justify any change made to the text that is generally proposed when the request is made. This question will be addressed in the discussion of the actual drafting of the bill.

To summarize, it is useful, in order to expedite the process of drafting the bill, to provide the following items with the request for a bill to be drafted:

- the research done by the Parliamentary Information and Research Service of the Library of Parliament;
- the legal opinions used in preparing the instructions;
- an explanation of the approaches and options adopted; and
- a description of how the objectives are to be achieved.

Parliamentary counsel can, at any time, help senators and MPs to select the best option and discuss with them the methods by which the objectives of the proposed legislative instrument can be achieved.

III. DRAFTING THE BILL

A. Identifying Constitutional Limitations

When parliamentary counsel has obtained all of the material needed for drafting the bill, they will, before starting the drafting, check to see whether the instructions could raise any of the following questions:

- Is the object of the bill within the authority of Parliament?
- Do the provisions of the bill comply with the *Canadian Charter of Rights and Freedoms*?
- Do the provisions of the bill comply with the *Canadian Bill of Rights*?
- Has a bill dealing with the same subject matter, intended to achieve the same object by the same means, been introduced by another MP or senator in the current session?
- Does the bill call for public funds to be expended, and does it comply with the financial limits imposed by the *Constitution Act*?

Parliamentary counsel informs the senator or MP of any issue they think might arise as an objection to the legislative proposal. It is preferable for such questions to be set out in writing, so that they are easier to follow. In some cases, senators and MPs retain independent counsel to provide an opinion as to the constitutionality of the bill. Unlike the people who draft government bills, parliamentary counsel does not have access to the specialized services in the Department of Justice to resolve these issues. It should be noted that the senator or MP who is sponsoring the bill can decide to amend their instructions to avoid problems of this nature, and is also entitled to reject a legal opinion and decide to go ahead notwithstanding that opinion, in order to generate a political debate.

When a bill could involve committing public funds, parliamentary counsel will inform the sponsor of this immediately. In that case, there must be a Royal Recommendation, obtained by a minister, to accompany the bill, and that requirement could limit the political debate. In the Senate, this type of bill must have a Royal Recommendation before second reading. If no such recommendation is forthcoming, the bill will not be debated and no witnesses will be heard on the matter. In the House of Commons, however, this kind of bill may be debated in committee, and the Royal Recommendation is required only at third reading stage.

Parliamentary counsel must ensure that the senator or MP is fully aware of the situation before introducing the bill. It should be noted that these issues are reassessed throughout the process of drafting the bill.

B. First Version

After the constitutional issues have been considered, parliamentary counsel begins drafting the bill. In some cases, the instructions given are in the form of statutory provisions that have already been drafted. This is the case, particularly, when a parliamentarian wants to amend an existing statute. Not uncommonly, parliamentary counsel will receive the printed version of a statute with the amendments incorporated into the text, so that deleted or added passages can be identified. Counsel then reviews the proposed amendments and informs the person requesting the bill of any issue raised by the proposed amendments. Often, counsel amends the proposed text in order to adhere to federal legislative drafting conventions. The changes are made in such a way as to be readily identifiable. If, instead of provisions that have

already been drafted, the instructions consist of an explanation of the object of the provisions to be amended, counsel will generally reproduce the text of the existing statute and incorporate the amendments that they think are indicated, in review mode.

Sometimes, the instructions are to draft a new statute. In that case, counsel will draft a first version of the bill and ask the questions that they believe must first be addressed before submitting the bill in its final form.

In the case of a lengthy bill, incorporating questions into the first version of the bill, directly after the provisions in question, will make them easier to follow. The reader will not need to consult two documents simultaneously, and it will be easy to insert replies or comments. However, when there are general questions that could mean changing the structure of the bill itself or of numerous provisions of the bill, it is wise to group the questions together in the email that will accompany the first version of the bill.

Parliamentarians have very heavy schedules and receiving questions and comments in writing gives them an opportunity to look at the file as and when time permits. At their first meeting, parliamentary counsel and the senator or MP, or their staff, will have agreed on the method for commenting on drafts. Depending on the circumstances, counsel will check with the person in question to make sure that the approach agreed to is still the best one.

One final comment must be made: the first version of the bill is submitted in the official language chosen by the senator or MP, which is ordinarily the language in which the request for the bill to be drafted was made. Unlike the established practice in the Legislative Services Branch of the Department of Justice, the drafting of the bill is assigned to a single person, not to a team of drafters composed of an English-speaking drafter and a French-speaking drafter. At the Senate and House of Commons, translation of the original version is handled by the team of legislative translators.

C. Receipt of Comments

The senator or MP, or their staff, must carefully examine the first version to determine whether the legislative proposal achieves the desired objectives. They answer the questions incorporated in the draft and comment on it, either in writing, by inserting answers to the questions

raised and changes suggested by parliamentary counsel in this version of the bill itself or in the accompanying email, or by arranging a meeting with counsel, or by contacting counsel by telephone.

It is always more efficient to receive comments in writing. Because of tight deadlines or the complexity of the questions, however, one-on-one discussion between the people concerned and parliamentary counsel are sometimes needed. In those cases, it is in counsel's interest to summarize the discussions and the conclusions reached in an email, so that they can be referred to when needed.

When the first version has been distributed to various independent parties, the senator or MP, or their staff, has to consider their comments and decide which ones they want to forward to parliamentary counsel. In those cases, the comments are generally submitted to parliamentary counsel in writing, and the other parties receive a copy. If parliamentary counsel has objections, or changes are needed, the senator or MP is informed, but a meeting is sometimes needed to discuss a possible solution with all parties. In that case, we advise against conducting the discussion by email, given the number of interlocutors and the time that has to be spent analyzing each proposal. Parliamentary counsel will therefore have to select the method that he or she regards as most efficient in the circumstances.

In every case, the comments should state the difficulties that arise from the proposed text. We therefore do not advise that comments be made in the form of a new version of the legislative proposal. In a majority of cases, counsel will have to contact the various parties to determine the rationale for the proposed text, and the timeframe for submitting the final version could well be extended as a result.

D. Final Version

Several versions may be sent to the senator or MP before they approve a final text. As a general rule, each version contains only the changes made since the last revision. The reader is then able to focus on those changes, and if further changes are needed they can be made in review mode in that version. When the final version of the bill is approved by the senator or MP, parliamentary counsel will then proceed with the final steps:

- send the bill to the team of legislative translators to have the final version revised and translated into the other official language;
- submit both versions to the Publications team for the side-by-side layout of the bill to be done; and
- submit the side-by-side version to the legislative revisors, who ensure that the rules for the formatting of legislative texts have been followed and determine whether the bill should include coordinating amendments, having regard to other bills introduced during the session.

Additional changes are often needed, and parliamentary counsel will have to contact the senator or MP to explain the reasons for them and discuss any questions that arise during this part of the process.

As a last step, parliamentary counsel is to send the final version to the senator or MP for their approval and introduction in the Senate or House of Commons

CONCLUSION

The main difference between the work done by parliamentary counsel at the Senate or House of Commons and the work of legislative drafters who draft government bills is that the process of drafting private members' bills calls for a creative approach, since senators and MPs give drafters wide latitude in terms of the means of achieving the objective of a legislative measure. Counsel will often be the person who is best qualified to assist senators and MPs, and may have to resolve issues relating to the approach to be taken, the drafting of the bill and the procedure to be followed.

The role of senators and MPs is to approve the legislative proposal prepared by parliamentary counsel in the Office of the Law Clerk so that it can then be debated in the Senate or House of Commons. In most cases, they leave it up to parliamentary counsel to prepare the legislative proposal, and inform counsel of their comments and questions. Senators and MPs play the role of critic rather than drafter.