



May 28, 2008

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Dear Sirs:

**RE: Undertaking of Confidentiality to Participate in Consultations
Regarding the *Police Act***

I am writing to express our opposition to a proposed “Undertaking of Confidentiality” (the “Undertaking”) that a representative of the B.C. Civil Liberties Association (the “BCCLA”) has been asked to sign by the Ministry of Public Safety and Solicitor General (the “Ministry”) in order to participate in consultations regarding “a possible legislative amendment to the *Police Act* relating to the police complaint process.” We have attached a copy of the proposed Undertaking.

Let me first say that we appreciate the fact that the Ministry is engaging in consultations regarding this matter and that the BCCLA has been asked to participate. Such consultations are a worthy endeavour in our view and will make for better legislation.

It is, of course, important that consultations be meaningful and conducted in good faith. Giving notice to interested stakeholders and obtaining their comments before a position is crystallized is essential to ensuring that consultations. Remaining open-minded about suggestions for change is as well.

We do not see, however, the need for restricting interested stakeholders with unnecessary confidentiality obligations as part of this process. There is a

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difference between obtaining expert advice and assistance, when that may be appropriate, and obtaining input from interested parties. In the former case, the expert becomes an adviser to the government and owes a duty of confidentiality, either express or implied, as to what matters are discussed. In the latter case, however the interested party is being consulted because of its interest and it is well known that the interest will continue after new legislation or regulations are put forward.

I also note that the BCCLA does not object to a condition that participants in legislative consultations maintain confidentiality regarding the discussions or the substantive legislative proposals *prior to* the introduction of the legislation. We recognize that governments may legitimately wish to foster an environment of candid dialogue with interested stakeholders that requires confidentiality before legislation is introduced in the Legislative Assembly.

That said, confidentiality in such a context ought to mean nothing more than an embargo on public discussion about what the government is proposing until the release date of the proposed legislation or regulations. The BCCLA is not willing to participate in consultations that require a permanent pledge of confidentiality regarding consultations. The precise wording of the proposed Undertaking will in fact impose a permanent obligation on participants to never acknowledge or discuss – even among themselves – the existence of, let alone the substance of, the consultations.

The undertaking will thus create a bizarre, Kafkaesque scenario that we believe is wrong, unethical and anti-democratic. It takes a reasonable concern about premature public disclosure regarding legislative proposals to a patently unreasonable level of control.

Please note that we first brought our concerns to the attention of Gordon McPherson, Program Manager, Senior Policy & Legislation Analyst in the Police Service Division who had sought our participation and asked us to sign the undertaking. In his response, he stated that: “We do not agree with your concerns, and accordingly are not prepared to revise the form of undertaking. Several other lawyers have already executed the undertaking and agreed to participate according to its conditions.”

Regardless of the actions of other lawyers who volunteer their time and input through one or another of the professional associations or who may work for organizations that have a very different mandate than the BCCLA, Mr. McPherson has failed to respond to our principled concerns about the undertaking with any substance.

We therefore appeal to you to reconsider the terms of the undertaking to limit confidentiality to prior to introduction of legislation in the Legislative Assembly or to one year after the date of the end of the consultations.

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We continue to be very interested in participating in the consultations but will not do so under the overly restrictive and unreasonable terms of the Undertaking. We urge you to amend it.

Given that consultations are set to begin imminently, we ask that you respond to our concerns as soon as possible so that, if you are inclined to agree with our concerns, we may participate in the consultations.

Yours sincerely,

A handwritten signature in black ink, appearing to read "R. Holmes", with a long, sweeping horizontal flourish extending to the right.

Robert D. Holmes,
President

Cc: Dirk Ryneveld, Q.C., B.C. Police Complaint Commissioner



Undertaking of Confidentiality

The Ministry of Public Safety and Solicitor General is working on a possible legislative amendment to the *Police Act* relating to the police complaint process.

To ensure the accuracy and workability of any such amendment, it would be of assistance if the undersigned, on behalf of the Office of the Police Complaint Commissioner, reviews the legislative proposal in the form of draft legislation.

To facilitate that review, the undersigned person agrees to review the legislative proposal in the form of draft legislation on the understanding that the undersigned undertakes:

- not to discuss with any person the fact that he or she has engaged in discussions held with staff of the Ministry in relation to the draft legislation or matters that may be included in the draft legislation;
- not to discuss or disclose the contents of the draft legislation before the government presents the legislation to the Legislative Assembly;
- not to discuss or disclose the contents of the draft legislation after the government presents the legislation to the Legislative Assembly, except as expressly permitted by staff of the Ministry;
- not to disclose the content of discussions held with staff of the Ministry in relation to the draft legislation or matters that may be included in the draft legislation;
- not to make copies of the draft legislation;
- to keep the draft legislation secure while it is in the undersigned's possession; and
- to return the draft legislation to staff of the Ministry, if staff so directs, or to destroy it when the review is completed, or earlier if staff so directs.

This undertaking does not preclude discussions of the draft legislation and any other matters noted above between the undersigned and staff of the Ministry and Legislative Counsel, or any other persons identified by staff of the Ministry as having given this undertaking.

This undertaking does not preclude discussions of any draft legislation and any other matters noted above between the undersigned and other person, if expressly permitted by staff of the Ministry and those discussions are then conducted on the terms and conditions that those staff may direct.

This undertaking does not preclude discussions of various legislative options with parties that may be affected by the proposed legislation, if those discussions are intended to provide information about the implications of those options and to solicit the views of the parties, and do not disclose the content of the draft legislation.

I, the undersigned, give the undertakings set out above.

Print Name

Signature

Position

Date