



Submission to the Special Senate Committee on
Senate Modernization

Canadian Civil Liberties Association

Sukanya Pillay, General Counsel and Executive Director
Rob De Luca, Staff Lawyer

May 10, 2017

Canadian Civil Liberties Association
90 Eglinton Ave. E., Suite 900
Toronto, ON M4P 2Y3
Phone: 416-363-0321
www.ccla.org

Overview

In recent years, we at the Canadian Civil Liberties Association (CCLA) have become increasingly concerned about the frequency and ease with which laws with clear constitutional vulnerabilities have been proposed and passed by Parliament — only to be challenged later, and, in some cases, be struck down by the courts for violating the *Canadian Charter of Rights and Freedoms*. Key examples include parts of the *Safe Streets and Communities Act* (Bill C-10), the *Protecting Canada's Immigration System Act* (Bill C-31), the *Anti-Terrorism Act, 2015* (Bill C-51), the *Fair Elections Act* (Bill C-23), the *Act to amend the Income Tax Act (requirements for labour organizations)* (Bill C-377), the *Strengthening Canadian Citizenship Act* (Bill C-24), and the *Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* (Bill C-14).

CCLA's Charter First campaign, which we outline in detail in our Charter First report,¹ has sought to address what we believe are critical accountability and transparency gaps in our federal lawmaking process that can enable the advancement of arguably unconstitutional laws. At no point in the current process are government ministers or parliamentarians required to publicly defend the constitutionality of the laws they propose, or of amendments put forward, with rigorous legal analysis. At the same time, most parliamentarians simply do not have the resources or expertise to effectively assess the constitutionality of the laws they are asked to enact.

This has forced affected individuals and public interest organizations, such as CCLA, to launch *Charter* challenges as the only available recourse. This is particularly unfortunate insofar as some of these challenges — which come at a significant cost not only to the applicants, but also the public — could likely have been avoided had Parliament been given the resources to fulfill its duty of upholding the *Charter*. And while these lengthy court cases play out, the laws in question remain on the books, unfairly restricting the fundamental rights and freedoms of Canadians.

Meanwhile, the limited safeguards we do have are simply not working. Under section 4.1 of the *Department of Justice Act*, the Minister of Justice is required to report to Parliament when he or she finds government legislation to be inconsistent with the *Charter*; but Department officials have suggested that the Minister need only report when there is no credible argument to support a bill's constitutionality. This standard is so low that, in practice, not a single report relating concerns about Charter compliance has ever been made to Parliament.

CCLA's Charter First campaign has focused on a *system* that is failing, not on a particular government or individual. The goal of our campaign is to see that new checks and balances are introduced into Canada's federal lawmaking process — ones that we believe will raise the standard of *Charter* compliance vetting of bills tabled and passed in Parliament. These mechanisms would provide more transparency and accountability to Canadians, as well as more information and resources to parliamentarians in their consideration of *Charter* issues.

Recommendations

We believe that now is the moment to address deficiencies and gaps in our legislative system in a more comprehensive way, and have developed recommendations to help the executive and legislative branches assess the compliance of legislation with the *Canadian Charter of Rights and Freedoms*.

While the new legislative process we propose below and more fully elaborate upon in our report includes a new process for government bills introduced in the Senate and for Senate public bills, our Charter First campaign advocates for a comprehensive scheme that would need to be brought about through a combination of legislation and procedural changes to the Standing Orders. As such, we recommend that this Special Committee take this opportunity to not only consider a more robust role for the Senate as a legislative body capable of fostering a more active *Charter* review process, but also to consider advocating for a more holistic reform of the legislative process that would allow Parliament to live up to its duty to uphold the Charter as the fundamental guarantor of individual rights and freedoms.

In order to function effectively, the modified legislative process we advocate for in our Charter First report and campaign requires the following preliminary steps:

1. REPEAL SECTION 4.1 OF THE *DEPARTMENT OF JUSTICE ACT* AND REQUIRE MINISTERIAL STATEMENTS OF CHARTER COMPATIBILITY FOR ALL GOVERNMENT BILLS

Under section 4.1 and current practice, the Minister of Justice only reports *Charter* inconsistencies to Parliament when there is no credible argument to defend the constitutionality of a government bill's provisions. As a result of this low standard and ministerial discretion, no such report has ever been made. We have proposed requiring the Minister to issue a statement of *Charter* compatibility for every government bill introduced in Parliament.² Such statements should lay out the government's principled position regarding government's position regarding how, **on a balance of probabilities**, a given bill complies with the purposes and provisions of the *Charter*. This should include:

- i. Specific analysis on rights issues at play (i.e. which rights, if any, are engaged; and, if there is a potential violation, the government's justification for it under section 1 of the *Charter*).
- ii. The 'tests', factors, or reasonable alternatives considered to reach the conclusion.
- iii. Reference to jurisprudence and relevant judicial precedents, as well as an acknowledgement if the bill contradicts existing norms or precedents.

2. CREATE AN INDEPENDENT CHARTER RIGHTS OFFICER

Headed by a Charter Rights Officer, the Charter Rights Office would be given a specific mandate, with sufficient resources, to provide independent assessments of the *Charter* compliance of bills (similar in scope to the Minister's statement of compatibility, but also pointing to gaps or questions that arise from that). The Officer would also serve in an advisory role to parliamentarians and parliamentary committees on *Charter* issues. The creation of such an office is crucial for at least three reasons:

- i. While the House and Senate Law Clerk and Parliamentary Counsel are fully capable of assessing bills for compliance with basic rights, these offices are already responsible for drafting private member's bills and Senate public bills. Thus, they could be perceived as having a conflict of interest if asked to review tabled legislation, including bills they may have drafted or on which they provided legal advice.³
- ii. By placing the responsibility for rights vetting in one new office, this proposal avoids splitting the work between the House and Senate law clerks, thereby avoiding duplication and ensuring consistency as bills move from one side of Parliament to the other.
- iii. It would underscore the importance of upholding our rights and freedoms, and signal to parliamentarians and Canadians that that is a national priority (much like how the Parliamentary Budget Officer embodies our commitment to financial prudence and accountability to taxpayers).

The Charter Rights Officer would be appointed following consultation with the leaders of all recognized parties in the House and Senate and following resolutions in both houses (much like how the Auditor General of Canada is appointed).

3. BROADEN THE SCOPE OF ADMISSIBLE AMENDMENTS AT COMMITTEE

Under existing rules, it can be difficult for parliamentary committees to address *Charter* concerns via legislative amendments. That is because when proposed amendments are found to be inconsistent with the scope and principle of a bill (as agreed to at Second Reading), they are ruled inadmissible. Similarly, a bill's preamble cannot be amended unless it is necessary as a result of other amendments, or to clarify or ensure consistency between French and English versions. This is particularly problematic since preambles often contain policy content considered relevant to the government's justification for the bill under section 1 of the *Charter*.

Therefore, these rules should be modified so that committees are given more opportunities to vote on amendments that address *Charter* concerns that may have been raised by the Charter Rights Officer or expert witnesses. This change could be

accomplished by the Senate and House of Commons reviewing and revising their amendment rules.

A Modified Legislative Process

In addition to the changes proposed above, we recommend the following mandatory steps be inserted into the legislative process for all bills tabled in Parliament. In instances where a bill is expedited through the House or Senate and time does not permit the proposed Charter Rights Officer to fulfill their role, a statement to this effect should be issued.

A) GOVERNMENT BILLS INTRODUCED IN THE HOUSE OF COMMONS

1. The Minister of Justice issues a statement of compatibility at First Reading of a bill in the House. The statement should also be posted online in order to ensure that the Minister's absence from the House on a given day does not affect the availability of the statement at the earliest opportunity.
2. The Charter Rights Officer provides an independent assessment of the bill's compliance with the *Charter* as soon as practicable. The assessment should be developed with a view to ensuring that MPs have it at the time of Second Reading debate in the House, or, at the latest, before the bill is considered at House committee.
3. If amendments are made to the bill by a House committee and/or by the House at Report Stage, the Charter Rights Officer issues an addendum to their initial assessment. This should occur as soon as practicable, with a view to being done before the bill goes to Third Reading in the House and, at the latest, before the final Third Reading vote by MPs.

B) GOVERNMENT BILLS INTRODUCED IN THE SENATE

1. The Minister of Justice issues a statement of compatibility at first reading of a bill in the Senate. Since the Minister may not be present in the Senate Chamber when the bill is introduced, the statement may be tabled by the Leader of the Government in the Senate and also posted online.
2. The Charter Rights Officer provides an independent assessment of the bill's compliance with the *Charter* as soon as practicable. The assessment should be developed with a view to ensuring that senators have it at the time of Second Reading debate in the Senate, or, at the latest, before the bill is considered at Senate committee.
3. If amendments are made to the bill by a Senate committee and/or by the Senate at Report Stage or Third Reading, the Charter Rights Officer issues an addendum to their initial assessment. This should occur as soon as practicable, with a view to being done, at the latest, before the final Third Reading vote by senators. Then, at First Reading of

4. If amendments are made to the bill by the Senate, the Charter Rights Officer issues an addendum that addresses them. This should occur with a view to being done before the House votes again.

the bill in the House of Commons, the Minister of Justice should issue an addendum to the government's initial statement of compatibility that addresses the Senate amendments.

4. If further amendments are made to the bill by the House, either at committee or Report Stage, the Charter Rights Officer will issue an addendum that addresses them. This should occur with a view to being done before the House takes its final vote.

C) PRIVATE MEMBER'S BILLS

1. If a bill passes Second Reading in the House, the Charter Rights Officer provides an independent assessment of its *Charter* compliance. The assessment would be tabled in the House and provided to the House committee examining the bill.
2. If any amendments are made at House committee or Report Stage, the Charter Rights Officer provides an addendum to their assessment that addresses them. This should occur with a view to being done prior to the Third Reading vote by MPs.
3. If amendments are made by the Senate, the Charter Rights Officer will issue an addendum that addresses them. This should occur with a view to being done before the House votes again.

D) SENATE PUBLIC BILLS

1. If a bill passes Second Reading in the Senate, the Charter Rights Officer provides an assessment of its *Charter* compliance. The assessment would be tabled in the Senate and provided to the Senate committee examining the bill.
2. If any amendments are made at Senate committee, Report Stage, or Third Reading, the Charter Rights Officer provides an addendum to their assessment that addresses them. This should occur with a view to being done prior to the Third Reading vote by senators.
3. If amendments are made by the House, the Charter Rights Officer will issue an addendum that addresses them. This should occur with a view to being done before the House takes a final vote.

We recognize that these recommendations, if adopted, would not prevent

unconstitutional laws from being proposed or passed. We do, however, anticipate that they would produce the following positive outcomes.

First and foremost, the baseline quality of government proposed legislation, from a constitutional standpoint, would improve, perhaps immediately but certainly over time. Although governments would maintain the ability to develop legislation confidentially, and benefit from legal advice subject to solicitor-client privilege, the statement of compatibility requirement would deter them from introducing bills that likely violate the *Charter*. After all, governments have an incentive to protect their credibility and thus would want to ensure that the statements of compatibility they issue can withstand scrutiny — including that brought by the media and civil society, thereby adding further checks and balances, and enhanced accountability.

Second, since the recommendations take a double-barreled approach — by also requiring independent assessments from a newly-established Charter Rights Officer — parliamentarians and parliamentary committees would have access to independent information about *Charter* concerns to further inform their decision-making. Moreover, the proposed change to the rules governing amendments would allow *Charter* vulnerabilities to be addressed prior to subsequent votes on a bill. Failing that, there would at least be recorded votes on amendments that, under the current approach, would be deemed inadmissible, thereby further increasing accountability. Parliamentarians might even be empowered to carry out more votes of conscience when *Charter* rights are on the line at final votes on a bill.

Finally, we expect that these recommendations would have positive normative effects, with the importance of rights and freedoms underscored throughout the legislative process.

¹ Canadian Civil Liberties Association, *Charter First: A Blueprint for Prioritizing Rights in Canadian Lawmaking* (2016), available at <https://ccla.org/campaigns/charterfirst/> .

² See James B. Kelly, “The Parliament of Canada and the Charter of Rights: The Need to Establish a Joint Scrutiny Committee on Human Rights” (6 January 2016) *Séamus in Irish* (blog), online: <<https://jamesbkelly.org/2016/01/06/the-parliament-of-canada-and-the-charter-of-rights-the-need-to-establish-a-joint-scrutiny-committee-on-human-rights>>.

³ Former MP and Minister of Justice Irwin Cotler’s proposed private member’s bill, C-537, which similarly called for the review of bills for Charter compliance, would have had it done by the Law Clerk and Parliamentary Counsel of the House and Senate, with assistance from the Library of Parliament as needed.