CHAPTER COMPLIANCE AND THE CANADIAN PARLIAMENTARY PROCESS

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ABSTRACT:
Legislation passed by Parliament must comply with the Canadian Charter of Rights and Freedoms. This thesis explores the various processes for seeking Charter compliance within the Canadian legislative process and concludes that not all legislation is checked through formalized processes. Further, the primary processes for Charter review within Parliament do not mirror how Courts evaluate legislation challenged under the Charter. While existing processes appear focused on identifying Charter defects that could be remedied through amendment, Parliamentary procedure may run counter to fixing Charter defects, however identified. This thesis identifies issues that may arise in Parliamentary practice that may work against facilitating legislative Charter compliance.

RÉSUMÉ:
Les lois adoptées par le Parlement doivent respecter la Charte canadienne des droits et libertés. Cette thèse examine les différents processus du système parlementaire canadien qui assurent la conformité des projets de loi à la Charte et arrive à la conclusion que la constitutionalité de certains types de législation n’est pas vérifiée par un processus formalisé. De plus, les processus primaires de vérification au sein du Parlement ne reflètent pas comment les tribunaux évaluent la législation contestée en vertu de la Charte. Tandis que les processus semblent se concentrer sur l’identification de défauts anticonstitutionnels qui pourraient être remédiés par un amendement, le processus parlementaire peut aller à l’encontre d’une correction des défauts anticonstitutionnels présents dans des projets de loi, peu importe comment ces défauts ont été identifiés. Cette thèse explore comment la pratique parlementaire pourrait empêcher les efforts menés à garantir la constitutionalité des projets de loi.
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INTRODUCTION

Legislation passed by Parliament is subject to judicial scrutiny for its consistency with the Canadian Charter of Rights and Freedoms. As such, Parliamentarians may wish to inform themselves whether a bill under consideration is likely to pass constitutional muster. As this thesis will demonstrate, Parliament has established formalized mechanisms to facilitate Charter review as part of the Parliamentary process; however, not all legislation is so reviewed. Further, the formalized mechanisms that do exist differ significantly from one another in terms of the standard of review to be applied and the process of applying that standard. Moreover, the principle means by which Parliament reviews bills for Charter compliance bears little resemblance to how courts review challenged statutes.

The issue of ensuring Charter compliance as part of the Parliamentary process recently received renewed media and academic attention as the result of a lawsuit currently before the Federal Court of Canada filed by former Department of Justice lawyer Edgar Schmidt. Mr. Schmidt challenges the Department’s interpretation of its statutory obligation whereby the Minister of Justice must table a report in the House of Commons when the government introduces legislation in the House containing provisions that are inconsistent with the Charter.

The Supreme Court of Canada has declared some 50 statutory provisions passed by Parliament unconstitutional since 1984, yet no such report of Charter inconsistency has ever

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2 Though the terms “parliamentary process” and “legislative process” may seem synonymous, it is important to recall that Parliament is not always debating legislative proposals. In this regard, consider that questions of Charter compliance may be raised through oral and written questions not tied to particular pieces of legislation, committee subject-matter studies, the petition process, etc.
4 Department of Justice Act, RSC 1985, c J-2, s 4.1(1) [s. 4.1]. (“[T]he Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine […] every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.”)
been tabled in Parliament by a Minister of Justice. This seeming disconnect has been characterized as “rather curious” by some scholars; whereas others have concluded that “the current system has failed”.

Political scientists and legal scholars have cited Mr. Schmidt’s case to comment on the effectiveness of the current statutory provision, the government’s interpretation of its obligations, or the role and ethical obligations of government lawyers such as Mr. Schmidt. In doing so, however, they appear to pay little attention to the practical limit of the Schmidt case as circumscribed by the realities of Parliament. That is, focusing on Schmidt and the vetting of government bills introduced in the House of Commons ignores that nearly one in five bills becoming law in the Charter era were not introduced as government bills in the House of Commons. Further, even if such a report were to be tabled, curing Charter-defective legislation may in some ways be hindered by parliamentary procedure.

Part I will present the various types of legislation considered by Parliament and explain their respective Charter compliance processes. Part II discusses several procedural challenges that may arise when attempting to cure Charter defects, however identified. Finally, Part III analyses the interplay between Parts I and II to explore Charter compliance issues with respect to the Parliamentary process more generally.

ASSUMED KNOWLEDGE AND CAVEATS

Four important notes precede the discussion herein. First, this thesis sits in many ways at the intersection of law and political science and relies on assumed knowledge from both disciplines. Specifically, it will assume an advanced understanding of Parliament and the legislative process in the Senate and House of Commons. As well, it will assume familiarity with the Canadian

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6 Hiebert and Kelly, supra note 5.
8 Ibid.
11 See Table 1, infra.
12 Canada, Senate of Canada, Senate Procedure in Practice (June 2015).
Charter of Rights and Freedoms. Failing to assume this knowledge would repeat what is otherwise well documented in the legal and political science literature. Similarly, this thesis will, by design, mix certain competing conventions – such as those regarding capitalization – by using the style associated with each field where the discussion is primarily grounded in that discipline.

Second, it is important to establish where this thesis falls temporally. It was submitted for evaluation in August 2015, prior to the 42nd General Election and as pre-trial conferences occurred in the Schmidt case. The final submission in early December 2015 precedes any judgment in Schmidt and is purposefully without reference to events and evidence at trial because any such discussion would not have been reviewed during thesis evaluation. As well, no modifications are being made to the titles or status of Parliamentarians as a result of a new Parliament convening. This is being done for the sake of readability as well as to remain faithful to what was submitted for evaluation.

Third, this thesis will not attempt to define Charter compliance or establish what processes or practices Parliament should adopt. Much exists in the literature regarding the difficulties of terms such as “Charter-proofing”, particularly when measures have “[t]he capacity to impinge in a significant fashion upon individual liberties and civil rights [although] justified within the confines of the very right or freedom that is allegedly infringed”. In this regard, consider the

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15 These competing conventions will manifest in several ways in this thesis. For example, transcripts of parliamentary debates do not always italicize or capitalize the titles of statutes as required in legal writing; these will not be corrected with [sic]. Further, the citations herein seek to follow the McGill Law Journal Canadian Guide to Uniform Legal Citation (8th Edition) [McGill Guide], which does not provide a specific format for certain parliamentary committee materials. Further, the McGill Guide is inconsistent as to whether a legislative session should be indicated by the parliament number or the session number first when referencing parliamentary sources (specifically, opposite instructions are given when citing debates versus citing bills). Similarly, the McGill Guide indicates that debates of the House of Commons are to be cited to the title House of Commons Debates whereas the practice in political science is to cite pages of debate to Hansard. As such, parts of this thesis may appear inconsistent in citation style or formatting; it is hoped that all such instances are intentional.
16 Certain parliamentary positions for the start of the 42nd Parliament have yet to be announced as this thesis is being presented for final submission. The difficulty is that members formally identified one way during the 42nd Parliament may have had another title in the previous Parliament – through riding name changes or appointments to cabinet, for example – and it might create confusion for the reader to encounter conflicting or seemingly contradictory indications as to someone’s role or riding between the exposition and any quoted materials.
proposition advanced by some that although a law may be valid it may not live up to the spirit and principle of the Charter and should perhaps not be adopted on that basis alone.\(^\text{19}\)

Practically speaking, it is recognized that there is often great difficulty in assessing legal risk in Charter matters, particularly when section 1 arguments must be weighed.\(^\text{20}\) At the outset, it is worth noting that even with a robust compliance scheme, the possibility always exists that legislation will be found invalid. As outlined by the former Assistant Deputy Attorney General of Ontario, such situations may arise when the Supreme Court overturns its precedents or “opens up a new area of constitutional law but decline[s] to pronounce definitively on it, leaving its elaboration to future cases”.\(^\text{21}\)

The roles that Parliament and the Supreme Court ought to play vis-à-vis the Charter and which institution might have the “final say” is a subject that has been written on at great length.\(^\text{22}\) One’s perspective on Parliament’s proper role in ensuring Charter compliance influences which particular statute and Parliamentary procedure design choices one advocates. In that regard, this thesis does not attempt to establish what Charter compliance should mean for Parliament. Rather, this thesis demonstrates that there are several processes for formalized Charter review within Parliament and suggests that the differences between these processes may have substantive implications. Regardless of one’s preferences regarding Parliament’s role in Charter matters, it is difficult to argue that Parliament should not be consistent in its approach.

Ultimately, Parliament possesses the authority to abolish, retain, alter, or add Charter compliance practices as it desires. Further, it can specify standards for compliance and designate review actors and processes as it deems appropriate. This thesis will not advocate for Parliament pursuing particular Charter compliance practices; rather, it is hoped that the discussion herein may help to inform the broader understanding of both legal scholars and political scientists regarding the current processes and practices in place.


\(^{22}\) “There are actually three possible positions on the question of final say when it comes to the interpretation of the constitution: (1) the judicial power to interpret is subordinate to the interpretive power of Parliament; (2) the judicial power to interpret is superior to that of Parliament; or (3) the judicial power is coordinate with the parliamentary power.” Denis Baker, Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation (Montreal: McGill-Queen’s University Press, 2010) at 145.
PART I: LEGISLATION IN PARLIAMENT AND FORMALIZED CHARTER REVIEW

A. INTRODUCTION

Bills introduced in Parliament are advanced through a number of legislative vehicles, collectively known as public bills and private bills. Most bills passed by Parliament are public bills, taking the form of government legislation, private member’s bills (PMBs) or Senate public bills. Government legislation may originate in either the Senate or House of Commons, while PMBs originate in the House only and Senate public bills originate in the Senate. Of note, certain types bills must originate in the House pursuant to the Constitution Act, 1867.23

Private bills, which seek to “confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of persons from the general application of the law” have been “relatively rare” in the Charter era.24 Indeed, since the advent of the Charter, not a single such bill has been introduced in the House of Commons, and only a few introduced in the Senate have received Royal Assent.

Legislation receiving Royal Assent since the first new Parliament operating under the Charter – the 33rd Parliament beginning in November 1984 – has been introduced in a variety of forms, as illustrated in Table 1.

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<th>Senate Government</th>
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<th>Senate Private</th>
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23 “Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.” Constitution Act 1867, s 53.
24 Supra note 13 at 1179.
25 Parliament of Canada, “Table of Legislation Introduced and Passed by Session” (Revised 6 July 2015) online: <http://www.parl.gc.ca/parlinfo/compilations/HouseOfCommons/BillSummary.aspx> As an explanatory note, the perhaps seemingly great variance in the exact number of bills passed in a given session of Parliament is influenced by factors including the length of each session. For example, the 34th Parliament, 3rd Session lasted 849 days. In contrast, the 40th Parliament, 1st Session concluded after sixteen days.
Table 1 reveals that just over 80% of all legislation receiving Royal Assent in the *Charter* era was initiated as a government bill introduced in the House of Commons. Though this figure represents the vast majority of legislation, it is important to bear in mind that close to one-fifth of all bills becoming law in the *Charter* era were introduced by some other means.

The *Charter* does not apply differently depending on the legislative vehicle by which impugned legislation is introduced in Parliament. As a result, the various standards and processes for review – or the absence of a process – must be considered in light of the fact that legislation of that type may become law and thus subject to *Charter* scrutiny.

**B. COMPLIANCE STANDARDS AND PROCESSES**

Parliament may seek to inquire as to a proposal’s constitutionality through both formal and informal means. This thesis focuses on formalized means – that is, processes provided by statute, regulation, and rules of the legislature. These codified processes establish Parliament’s recognition that *Charter* questions ought to be considered in certain respects during the legislative process.

Outside these processes, parliamentarians may raise *Charter* concerns through various avenues, such as during legislative debate or committee consideration of a matter. For example, a parliamentarian may pose questions to a committee witness regarding a bill’s constitutionality.
Though such exchanges may indeed inform Parliament’s understanding of legislation before it, these processes are informal insofar as no parliamentarian is required to pose questions of constitutionality nor are constitutional experts required to testify regarding the soundless of every bill. Further, these processes do not place obligations on any actor nor generate, in and of themselves, any sort of formal review document. As enlightening as such exchanges may be for parliamentarians and the public, they occur only as individual legislators seek them out and do not represent a formalized or routine practice of the legislature.

One ‘hybrid’ process for review does exist: written questions on the order paper. Through this process, Parliamentarians place written queries with the government and request a formal written response in 45 days.26 This process is informal insofar as no member is required to place a Charter-related query. However, the process is formal because it produces an official response from the government that may include information relating to the Charter compliance of legislation. Where relevant, examples of these questions and their responses will be cited in the discussion of formalized means.

The formalized means by which Parliament reviews legislation for its Charter compliance is primarily driven by the type of legislative vehicle used. This section will discuss each type of legislative vehicle and its associated review practices.

C. GOVERNMENT BILLS INTRODUCED IN THE HOUSE OF COMMONS

1. REVIEW PROCESS

The requirement for Charter-based review of government bills introduced in the House of Commons is a function of section 4.1 of the Department of Justice Act:

[T]he Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine […] every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.27

Per its terms, the review focuses on ascertaining whether there are “inconsistent” provisions in proposed legislation. When found, the Minister of Justice must table a report in the House at the first convenient opportunity.28 As noted in the introduction, no report of Charter inconsistency has been tabled in Parliament whereas some fifty provisions of various federal statutes have been

26 Rules of the Senate of Canada, Rule 4-10. Standing Orders of the House of Commons, Standing Order 39(1).
27 Department of Justice Act, RSC 1985, c J-2, s 4.1(1) [s. 4.1].
28 The statute uses “shall”, which is an imperative in light of section 11 of the Interpretation Act, RSC 1985, c I-21 (“The expression “shall” is to be construed as imperative and the expression “may” as permissive.)
invalidated by the Supreme Court of Canada for violating the Charter.\textsuperscript{29} As such, academics have questioned the effectiveness of how the provision is implemented as regards both examination and reporting.\textsuperscript{30}

Section 4.1 review may play an important role in the policy development process to mitigate Charter concerns.\textsuperscript{31} However, conducting such a review and addressing concerns does not mean that all such risks are eliminated. Indeed, as one of the Department of Justice documents in the Schmidt case notes, “While a proposal may not be "reportable", it may present serious Charter risks”.\textsuperscript{32}

The apparent purpose of reporting inconsistent provisions is to inform Parliamentarians that amendments may be desirable, such as invoking the notwithstanding clause.\textsuperscript{33} The absence of a report, according to the Parliamentary Secretary to the Minister of Justice, means “that the Minister had concluded that the government bill was not inconsistent with the Charter”.\textsuperscript{34}

The s. 4.1 review upon introduction is the only formalized Charter review that government bills introduced in the House receive, though committees that study these bills may seek to inquire as to their constitutionality. As the Speaker of the House has noted:

> The Chair is not aware of further constitutional compliance tests that are applied to any kind of legislation, whether sponsored by the government or by private members, once bills are before the House or its committees.\textsuperscript{35}

As such, amendments to otherwise compliant bills rendering them unconstitutional will not be caught. Even when bills are amended by the Senate and sent back to the House, a fresh s. 4.1 does not occur because the legislation has already been introduced – the triggering language of s. 4.1.

\textsuperscript{29} Supra note 5.
\textsuperscript{30} Supra note 7. See also Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the Charter Era” (2009) 35 Queen’s LJ 773.
\textsuperscript{31} Evidence, Standing Committee on Justice and Human Rights, 41st Parl, 1st Sess, No 58 (11 February 2013) at 8 (Kerry-Lynne D. Findlay) (“[P]roposals are reviewed for charter and other legal risks throughout the policy development process, up to and including the introduction of legislation. Relevant risks are brought to the attention of senior officials and ministers, and every effort is made to mitigate them.”)
\textsuperscript{32} Edgar Schmidt v The Attorney General of Canada. Federal Court file T-2225-12 (Agreed Statement of Facts) at fl7, p. 47.
\textsuperscript{33} Ibid at 4ff, 47.
\textsuperscript{34} Supra note 31.
\textsuperscript{35} House of Commons Debates, 41st Parl, 1st Sess, No 252 (21 May 2013) at 16704 (The Speaker).
2. DEPARTMENT OF JUSTICE APPROACH

The Schmidt case sheds significant light on the Department of Justice’s approach to its obligation under s. 4.1 and how it defines “inconsistency”. The following passage from an internal Department of Justice document included in the Schmidt agreed statement of facts is instructive:

While closely related to the legal risk advisory function, the Minister's statutory obligation to report legislation inconsistent with the Charter is not the same as and should not be confused with it. To begin with, because the threshold for reporting a Charter inconsistency is very high (i.e., the measure is manifestly unconstitutional, such that no credible argument exists in support of it), it will only be triggered in rare cases. Moreover, this obligation relates exclusively to the Charter (and the Canadian Bill of Rights) and does not extend to reporting other legal risks, or even those associated with other constitutional or legislative instruments.  

With respect to reporting, the standard applied by the Department of Justice is one of a credible argument: “The credible argument standard is met where the argument is reasonable, bona fide and capable of being successfully argued before the courts”. Schmidt’s claim is that the use of this standard:

[U]nlawfully transformed the examinations […] whose core question is whether a proposed bill or regulation is consistent with the Bill of Rights and Charter […] Instead the examinations are now focused on the core question of whether there is any possibility (even if the possibility is very slender) that the proposed bill or regulation is consistent with the Bill of Rights and Charter or not. [emphasis in original].

For its part, the Government has explained that:

The credible argument approach is consistent with the constitutional principles of democracy, constitutionalism and the rule of law. Elected governments shape policy and introduce legislation as they think best; Parliament debates and enacts legislation; courts have the ultimate responsibility to decide whether legislation is constitutional or not.

Whether the credible argument approach of the Department to s. 4.1 reporting is lawful is something that may yet be determined by a decision in Schmidt.

3. MINISTER OF JUSTICE APPROACH

The parliamentary record appears to reflect somewhat different understandings on the part of the Minister of Justice with regard to what s. 4.1 requires. Consider the following recent excerpts from Ministers of Justice speaking in the House and before committees [emphasis added in each]:

Hon. Rob Nicholson: As you quite correctly pointed out, under section 4.1 of the Department of Justice Act, I have an obligation to examine bills that are presented—not just by the Department of Justice, but all

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36 Supra note 32.
37 Ibid.
38 Supra note 3 at 18.
government bills. I must satisfy myself that they **comply with the charter** and Mr. Diefenbaker's Bill of Rights.\(^{40}\)

**Hon. Rob Nicholson:** One of my responsibilities is to examine government bills presented to the House of Commons and to ascertain **whether they are inconsistent** with the purposes of the Canadian Charter of Rights and Freedoms.\(^{41}\)

**Hon. Peter Mackay:** The member is absolutely right in suggesting that we would not have introduced a bill, and certainly from a justice perspective no bill is introduced in Parliament unless it has been drafted and presented to Parliament in a way that is **consistent with the charter** and the Constitution.\(^{42}\)

**Hon. Peter Mackay:** We look to **charter compliance** before presenting any bill before the House of Commons.\(^{43}\)

While these passages may reflect casual parlance, any deviation from the statutory standard of “inconsistent” is problematic to the extent that it may contribute to a misunderstanding of s. 4.1 in the minds of parliamentarians and the public. Moreover, such statements are particularly problematic if they reflect a misunderstanding of the s. 4.1 obligation on the part of the Minister.

For example, the first comment by Minister Mackay suggests that the requirement is “no bill is introduced” that is not “consistent” with the *Charter*, which seems to overlook that s. 4.1 foresees the introduction of an “inconsistent” bill, albeit accompanied by a report of inconsistency. Similarly, Minister Nicholson’s second comment indicates that the goal is guarding against legislative inconsistency with the “purposes” of the *Charter*, whereas the statute speaks to ascertaining whether there is inconsistency with the “purposes and provisions” of the *Charter*. The other two statements speak to a notion of “compliance” that is not present in the language of s. 4.1. It may be that both ministers are going above and beyond what s. 4.1 requires in seeking “compliance”; however, these statements are difficult to reconcile with the other statements of the same minister – with respect to “consistency” or “inconsistency” – insofar as these differ from each other and from “compliance”.

Similar competing conceptions of the s. 4.1 requirement also find expression in the comments of other members of Cabinet. This is problematic to the extent that all bills introduced by the Ministry are subject to s. 4.1 review. As an example, consider a recent intervention by the Parliamentary Secretary to the Minister of Citizenship and Immigration:

> In fact, as my hon. colleagues are aware, every government bill presented in the House of Commons is to be examined by the Minister of Justice to ascertain if it is consistent with the purposes or provisions of the

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\(^{41}\) *House of Commons Debates*, 41st Parl, 1st Sess, No 223 (18 March 2013) at 14855.


\(^{43}\) *House of Commons Debates*, 41st Parl, 2nd Sess, No 148 (25 November 2014) at 9778.
charter. Bill C-24, as my hon. colleagues should know, is no exception, and it would not be before the House today in its current form if any such inconsistencies had been found.44

Though perhaps well intentioned, the comment is not entirely accurate. A bill with inconsistencies could be before the House, though would presumably be accompanied by the required report of inconsistency. Similarly, consider a recent Order Paper Question reply by Public Safety Minister Steven Blaney:

[P]ursuant to the Department of Justice Act, section 4.1, the Minister of Justice is required to examine every government bill presented to Parliament in order to ascertain whether any of its provisions are inconsistent with the purposes or provisions of the Canadian Charter of Rights and Freedoms. If the minister believes that the legislation is inconsistent, it must be reported to Parliament.45

Recalling that the s. 4.1 obligations only exist for government bills presented or introduced in the House of Commons, this statement from the Minister is inaccurate because Parliament and the House of Commons are not synonymous. Indeed, it suggests that government bills introduced in the Senate are subject to the s. 4.1 reporting requirement, which is not the case. To be fair, perhaps s. 4.1 reviews occur internally for such bills, but the statutory reporting obligation would not attach to such legislation until it is introduced in the House of Commons.

While it would be easy to assume that this inaccuracy were a simple oversight, the paragraphs in the response from Minister Blaney otherwise repeat lines from previous government materials—such as “The process of examining government legislation for charter compliance is dynamic and ongoing”—and “Section 4.1 is only one part of a broader process that involves three distinct components: advisory, certification and reporting”—etc., that all contain the correct language about the obligation being specific to the House of Commons.46 It is curious that edits would be made at the Department of Public Safety suggesting its interpretation of s. 4.1 is slightly differently than that of the Department of Justice, particularly given that the s. 4.1 review obligation is one of the Minister of Justice and not the Minister of Public Safety.

With conflicting information and understandings from Cabinet, the difficulty for parliamentarians becomes determining whether the appropriate reviews have indeed been conducted and what exactly has been concluded by those conducting any review.

44 House of Commons Debates, 41st Parl, 2nd Sess, No 102 (12 June 2014) at 6795.
45 House of Commons Debates, 41st Parl, 2nd Sess, No 198 (22 April 2015) at 12871.
4. PARLIAMENTARIANS’ QUERIES

Several mechanisms exist for Parliament to inquire with the government regarding s. 4.1’s application to a particular piece of legislation. Questions regarding the constitutionality of government legislation have been posed during Question Period to the Minister of Justice and other Ministers.47 Similarly, Charter questions have been posed to the Minister of Justice and other Ministers in committees of the House.48 As well, Members have included s. 4.1-related queries in Questions on the Order Paper.

Perhaps frustratingly for members, certain information may be protected by solicitor-client privilege or the answers provided may not be fulsome. As well, similar to the oral answers cited above, sometimes written answers are inconsistent with respect to s. 4.1. It is worth considering whether these questions, by virtue of their being asked, suggest disagreement with the Minister’s conclusion under s. 4.1 as evidenced by the lack of a report. Indeed, it appears from the record that many parliamentarians have difficulty reconciling the introduction of seemingly Charter-infringing legislation with the absence of a s. 4.1 report.

As a singular example of all these issues, consider Q-514 posed by Elizabeth May. It included numerous Charter compliance questions such as:

(g) has Bill C-22 been examined by the Department of Justice to ascertain consistency with the Charter, and if so, (i) who was responsible for performing the examination, (ii) when was the examination initiated, (iii) when was the examination completed, (iv) what were the conclusions of the examination; (v) when was the Minister of Justice presented with the conclusions of the examination; (vi) was a report of inconsistency prepared; (vii) was a report of inconsistency presented to Parliament; (viii) has there been an assessment of the litigation risk relative to the enactment of this legislation and, if so, what are the conclusions of this assessment; […] (j) has the Nuclear Liability and Compensation Act included in Bill C-22 been examined the government to ascertain compliance with Supreme Court Ruling Imperial Oil Ltd. v. Quebec (Minister of the Environment) and if so, what were the conclusions?49

The response those questions received was “Solicitor-client privileged” in a written return signed from Minister of Natural Resources Kelly Block.50

While answering some of these questions might well require waiving solicitor-client privilege, it is not the case that all of them do. Consider (g)(vii), “was a report of inconsistency presented to Parliament” -- any such report would be a public document upon its presentation to

48 See especially Evidence, Standing Committee on Justice and Human Rights, 41st Parl, 1st Sess, No 50 (6 November 2012) at 7. See also Evidence, Standing Committee on Citizenship and Immigration, 41st Parl, 1st Sess, No 29 (27 March 2012) at 13.
49 Q-513, 41st Parl, 2nd Sess.
50 Sessional Paper 8555-412-513 at 7.
Parliament as any tabling is a matter of public record and recorded in the Journals. No solicitor-client privilege would be infringed in this regard, and it is possible for an Order Paper response to simply note that something sought is a matter of public record.51

More fundamentally, the fact that these questions were posed after the legislation had already been introduced, as evidenced by there being a bill number, suggests that the member posing the question believes that s. 4.1 review might occur sometime after introduction and that there is a reason to believe such a report might have been warranted or may yet be forthcoming.

5. APPLICATION OF SOLICITOR-CLIENT PRIVILEGE

The extent to which s. 4.1 review is subject to solicitor-client privilege is not entirely clear from the Order Paper responses provided. This may be an issue of concern when members seek assurances in regard to s. 4.1 review. As a Department of Justice document in the Schmidt agreed facts notes, “Members of Parliament have from time to time asked to see Justice opinions relating to the certification [of bills]. These requests have been refused to date on the basis of solicitor/client privilege”.52 While the opinion may be subject to solicitor/client privilege, perhaps the results of s. 4.1 review are not.

Consider the Order Paper Question that queried in part: “[W]hen assessing the compliance of Bill C-10 with the Charter of Rights and Freedoms under section 4 of the Department of Justice Act, what measures were used to assess whether delays in trial processes and prison overcrowding would violate Charter-guaranteed rights?”53 This yielded a response from the Minister of Justice noting in part that: “As part of the legislative development process, bills are examined to determine their consistency with the purposes and provisions of the Canadian Charter of Rights and Freedoms. This Bill is consistent with the purposes and provisions of the Charter”.54

In this case, no solicitor-client privilege was asserted. Further, the Minister of Justice did not say – as indicated in other responses on different matters – that the answer was subject to

51 See e.g. House of Commons Debates, 41st Parl, 2nd Sess, No 35 (27 January 2014) at 2124 (“With respect to appeals before the court, court records are a matter of public record and are available for consultation by the public.”)
52 Supra note 32 at ff10, p 47.
53 Q-980, 41st Parl, 1st Sess.
54 Sessional Paper 8555-411-980.
solicitor-client privilege and that the privilege was being waived in this case.\textsuperscript{55} Perhaps most significantly, the Order Paper response declared the bill “is consistent” instead of “is not inconsistent” – which more properly reflects s. 4.1 review.

By contrast, another Order Paper question response regarding the same legislation, Bill C-10, met with a response from the Minister of Justice that “Each of the component bills that make up Bill C-10 were reviewed for consistency with the purposes and relevant provisions of the Charter. Such reviews constitute legal advice and are subject to solicitor-client privilege. The Minister of Justice is confident that Bill C-10 is not inconsistent with the Charter”\textsuperscript{56}

These Order Paper responses are problematic in that they may give rise to an impression that “consistent” and “not inconsistent” are the same thing in the context of s. 4.1. They are not, most importantly, because the statute requires the Minister to report inconsistency, not to report that there is consistency.

Regardless of the most proper wording, the conclusions – that the “bill is consistent” versus later that “Minister of Justice is confident that [the bill] is not inconsistent” – stand in contrast to the solicitor-client privilege invocation in response to Ms. May regarding Bill C-22. Perhaps the matter is that in the case of Bill C-22, the privilege extends between Departments. If this is the case, might Members only be advised that a review has occurred if the bill comes from the Minister of Justice upon posing an Order Paper question?

On this point, consider a recent exchange before the Standing Committee on Public Safety and National Security:

\textbf{Mr. Garrison:} Would the minister be prepared to table the advice he received on the constitutionality of this bill? It would be very useful for this committee, to avoid further legal entanglements down the road, if we could have that advice tabled for us so that we could use it before we reach the amendment stage of this bill.

\textbf{Hon. Peter MacKay:} Thank you very much for the question, Mr. Garrison. […]

The member is absolutely right in suggesting that we would not have introduced a bill, and certainly from a justice perspective no bill is introduced in Parliament unless it has been drafted and presented to Parliament in a way that is consistent with the charter and the Constitution. Every bill receives that vetting, that lens, from the Department of Justice prior to its introduction. Officials with the Department of Justice, of course, have expertise in that area. In fact, some members of our department go back to the drafting of the charter itself. We have tremendous legal advice, which is available to all departments. So, yes, the member is correct. I would have met with and worked with my department to ensure charter compliance […] This is not to say that legislation— all legislation— presented to this committee or any committee is not subject to charter challenge. We anticipate and look at various aspects, including privacy, to come back to the

\textsuperscript{55} See e.g. \textit{House of Commons Debates}, 41st Parl, 2nd Sess, No 224 (4 June 2015) at 14565 (“Mr. Speaker, to the extent that the information that has been requested is protected by solicitor-client privilege or litigation privilege, the federal crown asserts that privilege and, in the following case, has waived that privilege […]”).

\textsuperscript{56} \textit{House of Commons Debates}, 41st Parl, 2nd Sess, No 103 (30 March 2012) at 6739-6740.
member's question, and we do so to ensure that ultimately the courts will pronounce favourably on the charter compliance. With regard to presenting that advice to this committee or any committee, I'm not able to do so as the Minister of Justice and Attorney General as solicitor-client privilege exists between the Department of Justice and the Department of Public Safety in this case.

Mr. Randall Garrison: Of course, as the beneficiary of that solicitor-client privilege, you could waive that and table it before this committee.

Hon. Peter MacKay: We're not going to do that, and of course the privilege rests not solely with me but with the entire government. 57

The actual extent to which solicitor-client privilege applies to s. 4.1 review is a complex issue, as illustrated particularly by the Schmidt case in respect of entering documents related to the process as evidence. 58 The concern is that Members must trust that the Minister has not found inconsistency when no report has been tabled, yet trust in the Government in this regard might not be encouraged by seemingly inconsistent answers regarding s. 4.1 whereby a Minister may report that a bill has been found “consistent”, “not inconsistent”, or that such an answer is subject to solicitor-client privilege. Further, parliamentarians are not privy to the advice that may inform the Minister’s conclusion. 59 As such, members are limited in their ability to query the application of s. 4.1 to specific bills and may have misapprehensions about the process and/or its results.

6. Review Actors

The s. 4.1 review is mandated by statute and the actors conducting the review are within the executive branch. Importantly, those conducting the review are lawyers with experience in relevant areas of Charter law. 60 Recent job postings for the Human Rights Law Section at the Department of Justice include requirements such as “Significant and recent experience in conducting legal research and providing legal advice on complex human rights law matters relating to the Canadian Charter of Rights and Freedoms (Charter), or relating to the Charter and other domestic or international human rights law instruments” wherein “Significant is understood to mean the depth and breadth of experience normally associated with having performed a broad range of complex related activities which are normally acquired during a period of three (3) years”. 61

57 Supra note 42.
59 Supra note 32 at ff10, p 47.
60 Supra note 3.
A posting for a higher position within the same section requires more years of experience with Charter law and specifies that candidates must have the “Ability to analyze factually and legally complex matters” as well as the “Ability to think strategically about legal and policy issues, having regard to government priorities and objectives”. How these two qualifications may relate to one another in the s. 4.1 context is worth considering.

Based on her interviews with Department of Justice counsel and analyzing the Schmidt case, Janet Hiebert concludes that the approach of the Department with respect to s. 4.1 creates a strong presumption internally against reporting. At a very basic level this is to be expected – it would be politically difficult for a Government to champion legislation that its Minister of Justice reports to the House as being unconstitutional. This does not mean, however, that the review and advice provided to the minister is not high quality. While the review at the Department is conducted by counsel, the ultimate obligation with respect to Parliament – that of reporting – is placed on a political actor. Immediately this raises questions about whether the process of review might in some way risk politicization. Put another way, if competent and qualified lawyers are doing the heavy Charter lifting, should not Parliament be the beneficiary of this advice – which it finances – without the potential filter of a Minister’s political predilections?

To be clear, the preceding is not to imply that review at the Department of Justice should not occur. Internal review may lead to the discovery of Charter issues and the improvement of legislation prior to its introduction and should be therefore be encouraged. However, whether the public or Parliamentary reporting of Charter consistency should rely in any way on an actor sensitive to political pressures is an open question. In this regard it is worth recalling that some scholars have questioned whether Canada’s combination of a Minister of Justice and Attorney General is a cause for concern in the context of s. 4.1 reporting.

7. **Review Timing**

The wording of s. 4.1 is that the “Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.”

This appears to assume that there is always a Minister of Justice serving in the House of Commons and that tabling is always possible. This is not always the case and, as a result, parliamentary difficulties with s. 4.1 review and reporting may arise that are not specifically addressed by the statute.

Consider the issue of legislation introduced before the end of a Parliamentary session. For example, on the afternoon of the last day the House sat during the 41st Parliament – 19 June 2015 – the Minister of Citizenship and Immigration introduced Bill C-75, the *Oath of Citizenship Act*. This legislation would require that individuals be seen and heard when taking the oath of Canadian citizenship and has raised Charter concerns in respect of those who may wish to wear a religious head-covering when taking the oath. Whether this bill raised any reportable issues is something we are unlikely to know as Parliament was subsequently dissolved and no documents may be deposited with the Clerk of the House during periods of dissolution.

Though certain reports may be tabled with the Clerk on designated days in the summer, the Minister could perhaps make the case that such days were not convenient for him or her. Further, the Standing Order change allowing tabling during adjournment periods only occurred in 1994, after the relevant provision of the *Department of Justice Act* was enacted, perhaps thereby giving rise to a claim that it was never the intention that such reports would be tabled except during sitting periods.

Seemingly no suggestion exists in any of the literature that a government is required to report on bills introduced in a prior session except where such bills are reintroduced. As such, we may never know if Bill C-75 would have resulted in a s. 4.1 report. In theory, a new government could opt to table reports that were prepared but not tabled by a previous government, though the likelihood that a report was prepared under the current standard is minimal.

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65 *Supra* note 4.
68 *Supra* note 13 at 438.
69 *Standing Orders of the House of Commons*, Standing Order 32(1).
70 *Supra* note 13 at 437.
71 Section 4.1 was added through the passage of *An Act to amend certain Acts having regard to the Canadian Charter of Rights and Freedoms*, RS 1985, c 31 (1st Supp), s 93.
Temporally speaking, the practice that bills are reviewed “at the time of introduction”, leaves open the possibility that a bill could be analyzed at a stage prior to the point in the legislative process when a report is made. That is, if the House were to refer the matter quickly to committee and amend it – or otherwise modify it through floor action – it could be that not long after the bill’s introduction it has been modified in such a way as to render it Charter inconsistent though it would only be reviewed in its prior form. The possibly thus exists that no report is made though one might otherwise be warranted given the inconsistent nature of the bill as it then stood before the House. The converse is also true and a bill quickly stripped of a Charter-violating provision could theoretically see a report of inconsistency tabled after the issue had been resolved, possibly creating confusion in the minds of Parliamentarians and the public.

While these all might seem like far-fetched scenarios, one ought to consider that bills may be introduced and passed on the same day. This is typically done with appropriations legislation, though other substantive items are also passed in this regard, including most recently the Miscellaneous Statute Law Amendment Act, 2014 and the Délîne Final Self-Government Agreement Act. Though it is true that there must be some cooperation within the House to move bills through the legislative process with such speed, it could be that things are overlooked or that certain assumptions are made. Indeed, it would be wholly undesirable for the House to be seized of a bill and pass it on Monday only to be informed of a Charter defect on Tuesday.

A particular context in which this would be important is back-to-work legislation. Such legislation is typically in response to an important on-going situation such that Parliament tends to act within a matter of days, if not hours. Such quick drafting and adoption of legislation may not yield time for as fulsome a Charter inquiry as the Minister sees fit prior to the legislation’s adoption. In particular, Charter concerns in this area may be more likely to arise given that the Supreme Court recently constitutionalized the right to strike.

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72 See House of Commons, Journals, 41st Parl, 2nd Sess, No 33 (9 December 2013) at 366-371 (Bill C-19, An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2014). See also House of Commons, Journals, 41st Parl, 2nd Sess, No 226 (8 June 2015) at 2666-2667 (Bill C-66, An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2016).
73 House of Commons, Journals, 41st Parl, 2nd Sess, No 157 (8 December 2014) at 1915.
74 House of Commons, Journals, 41st Parl, 2nd Sess, No 223 (3 June 2015) at 2624.
76 “Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.” Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4, [2015] 1 SCR 245 at 51.
Though it is perhaps unlikely that a Government would seek to change its own legislation in any significant way shortly after introducing it, it is possible to imagine such changes might be forced upon it, say, in the context of a minority government. As well, amendment may be needed even in the context of urgent legislation.

In response to the ‘medical isotope crisis’, 77 for example, the government introduced and passed An Act to permit the resumption and continuation of the operation of the National Research Universal Reactor at Chalk River through the House in one sitting. 78 Because there was concern that re-starting the reactor for medical purposes without appropriate oversight might lead to a nuclear incident, an amendment was moved during Committee of the Whole to ensure the powers of the Canadian Nuclear Safety Commission in respect of Atomic Energy of Canada Limited. 79 Though the amendment was clarifying in nature, one can imagine that more substantive amendments might be moved in another case, thereby creating a situation where a report or its absence might not reflect the state of the bill, and a report might only be prepared after the legislation’s passage.

Access to Information Act requests for certified copies of bills raise the question of how much time the s. 4.1 examination and certification process might require. Bill C-75 mentioned above was introduced on the last sitting day of the House during the 41st Parliament on 19 June 2015. A stamp on the certified copy of the bill received through an Access to Information Act request from the Privy Council Office confirms its examination pursuant to the Department of Justice Act, with the certification stamp dated 24 June 2015. 80 By contrast, Bill C-4 of the 41st Parliament, 1st Session bears a date stamp on its Charter compliance certificate of 24 June 2011 for legislation introduced on 16 June 2011, and Bill C-49 of the 40th Parliament, 3rd Session, was introduced in Parliament on 21 October 2010 and Charter stamped on 5 November 2010. 81 While the five days for review after introduction in the case of C-75 may not be unduly lengthy, both it and the lengthier review periods of eight days for C-4 and 15 days in the case of C-49 would prove problematic in the case of quickly adopted back-to-work legislation or other emergency legislation as discussed above. If these certified reviews form the basis for a

78 House of Commons, Journals, 39th Parl, 2nd Sess, No 35 (11 December 2007).
79 Ibid at 296.
subsequently tabled 4.1 report, one must wonder how long after a bill’s introduction a report could produce. That is, if a hypothetical Charter inconsistent bill took 15 days for examination and certification (as seemingly occurred with C-49) and only then did work on the report begin, one could easily imagine that a swift-moving government bill might will be making its way out of committee if not already passed by the time such a report would be ready for tabling in the Commons. What accounts for the differing turnaround times is not immediately clear from the available materials.

While it may be the case that review has occurred and no report is necessary upon introduction of a bill, otherwise reportable issues could arise elsewhere in the House legislative process – and perhaps even before a report of inconsistency could be tabled. In this regard, it may be worth considering whether compliance review upon introduction alone is sufficient. This may be particularly true when a bill is significantly amended.

As an extreme example, a PMB from then-Conservative Brent Rathgeber was so significantly amended during the committee process that later, as a then-Independent member he refused to move concurrence in his bill following the failure of his amendments at Report Stage stating “Mr. Speaker, […] the bill in its current form bears no resemblance to the original Bill C-461”.\(^8^2\) The Speaker noted that, “The House now seems faced with what seems to be an unprecedented situation” but ultimately concluded that in line with the Sponsor’s wishes, the bill would be withdrawn.\(^8^3\)

Though such extreme amendment may be rare, it is worth recalling that bills do not receive a fresh s. 4.1 review after the initial review. As such, no report would be forthcoming on a bill that – as amended – would have required a report if introduced in that form.

8. **Review Enforcement**

The existence of a provision might suggest that its breach can somehow be actioned, and it may be that challenges under s. 4.1 – beyond interpretation issues such as those in *Schmidt* – are raised judicially or before Parliament. One can imagine claims in respect of many of the elements of s. 4.1, through effective redress may be difficult to secure.

With respect to legal challenges, consider a case where a s. 4.1 report is tabled long after a bill’s introduction. The requirement of s. 4.1 is that these reports are to be tabled at the Minister’s

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\(^8^2\) *House of Commons Debates*, 41st Parl, 2nd Sess, vol 147 (26 February 2014) at 3259.

\(^8^3\) *Ibid.*
“first convenient opportunity”. To start, little judicial consideration of “convenient” appears to exist in Canadian law, and that which does exist may not be helpful. For example, the Canadian Abridgment of Words & Phrases offers a New Brunswick judicial citation that it translates as “Nothing is convenient which does not favour one’s purpose”.84 Under this conception of convenience it would be difficult to imagine any Minister tabling a report against his or her government’s purpose, which presumably would be to pass its legislation with minimal opposition, amendment, and negative attention.85

More practically, suppose a Minister were somehow challenged for an alleged failure to report or to report in a timely manner. A Court somehow seized of the matter would need to consider justiciability including questions of parliamentary privilege, which “immunizes certain activities of legislative bodies and their members from the ordinary law and judicial scrutiny”.86 Privilege may shield a Minister from any consequence for either late or non-reporting, regardless of how convenience is defined.87 However, even if privilege did not apply, what remedy could possibly be ordered? By the time such a case worked its way through the Courts, the Minister responsible may no longer serve in Parliament, let alone be Minister of Justice. It would perhaps not be a fulfilling outcome to order a current Minister – possibly of a different government – to table a report that a predecessor Minister failed to table or perhaps did not even prepare. Moreover, such an order would likely not even be possible given parliamentary privilege and the separation between the judicial and parliamentary spheres.

Further, the “enrolled bill principle” may work against any legal challenge in this regard absent a challenge to the statute’s validity. This principle holds that “the parliamentary roll is
conclusive – an Act passed by Parliament and enrolled must be accepted as valid on its face and cannot be challenged in the courts on grounds of procedural irregularity”.  

Although Courts have struck legislation on procedural grounds in the context of constitutional manner and form requirements, it has been observed that “Courts are not well-equipped to deal with the nuances of internal legislative procedures”. It would therefore be unlikely to see a statute struck for failure to report alone. Further, even if an implausible suit on failure to report were to occur alongside a validity challenge, it may be that a Court strikes those portions of the legislation that offend the Charter but otherwise finds the reporting defect does not invalidate the Charter-respecting portions of the statute. As such, judicial enforcement of s. 4.1 alone may prove difficult if not impossible.

If one were to action late or non-existent reports in the Parliamentary context, such as raising an allegation of contempt, similar issues might arise. To begin, an allegation that the Minister ought to have tabled a report – absent any legal determination – would be beyond the Speaker’s purview given the long standing principle that “the Speaker has no role in interpreting matters of either a constitutional or legal nature”. Similarly, if a question of privilege were raised in respect of a s. 4.1 report tabled but allegedly not at the Minister’s “first convenient opportunity”, the Minister need only assert that the moment of tabling was the first convenient opportunity given the practice that members are taken at their word:

[T]he conventions of this House dictate that, as your Speaker, I must take all members at their word. To do otherwise, to take it upon myself to assess the truthfulness or accuracy of Members' statements is not a role which has been conferred on me, nor that the House has indicated that it would somehow wish the Chair to assume, with all of its implications.

Though it is possible that perhaps members armed with a court decision could raise complaints of a Minister’s failure to report within the Parliamentary process, the question of remedy would again arise. Even still, the convention that members are taken at their word might operate such that the Minister perhaps need only assure the House that he or she was satisfied with the bill’s Charter compliance at the moment of its introduction, thereby ending the matter.

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92 House of Commons Debates, 41st Parl, 2nd Sess, vol 147 (29 April 2015) at 13198 (The Speaker).
Realistically, many years may have passed between any final judgment on appeal regarding statutory validity and when reporting ought to have occurred such that the Minister no longer serves in her or her role. The House might perhaps be unwilling to take action against a former Minister, and even more reticent to propose action against a former Minister no longer serving in Parliament. As such, s. 4.1 – in addition to lacking meaningful judicial enforcement – also likely lacks meaningful Parliamentary avenues for enforcement.

9. Section 4.1’s Assumptions About Parliament

The wording of Section 4.1 makes several assumptions regarding Parliament. To begin, section 4.1 requires the Minister of Justice to table a report in the House of Commons and therefore presumes that there will always be a Minister of Justice and that he or she will always sit in the House of Commons. This has not always been the case historically.

The composition of the Ministry is at the Prime Minister’s discretion, and it may be that the individual named Minister of Justice is serving as a Senator. This has occurred on four separate occasions in history: Alexander Campbell (1881-1885); Oliver Mowat (1896-1897); David Mills (1897-1902); and Jacques Flynn (1979-1980).93

Though the practice of having Senate Members of Cabinet has fallen somewhat into disuse – beyond the more common practice of having a Leader of the Government in the Senate as a Minister – it should be recalled that as recently as 2008 the Senate had an additional Minister with portfolio.94

House of Commons Standing Order 32(1) states that “[a]ny return, report or other paper required to be laid before the House in accordance with any Act of Parliament or in pursuance of any resolution or Standing Order of this House may be deposited with the Clerk of the House”.95

Standing Order 32(2) further specifies that:

A Minister of the Crown, or a Parliamentary Secretary acting on behalf of a Minister, may, in his or her place in the House, state that he or she proposes to lay upon the Table of the House, any report or other paper dealing with a matter coming within the administrative responsibilities of the government, and, thereupon, the same shall be deemed for all purposes to have been laid before the House.96

94 Ibid. (Senator Michael Fortier served as Minister of Public Works and Government Services from 2006-2008 and as Minister of International Trade for four months in 2008).
95 Standing Orders of the House of Commons, Standing Order 32(1).
96 Standing Orders of the House of Commons, Standing Order 32(2).
While a Senate-serving Minister of Justice would fall into the category of “Minister of the Crown” it is unclear that the Clerk of the House would receive such reports. Precedents in this regard are hard to find as it seems House tabling is done by Parliamentary Secretaries on behalf of Senate-serving Ministers.\textsuperscript{97} It should be recalled that Preliminary Secretaries are appointed by the Prime Minister and thus he or she may elect not to appoint one for a particular portfolio.\textsuperscript{98}

The issue is not so much that a report could not be tabled if the Minister of Justice served in the Senate, particularly if a Parliamentary Secretary to the Minister of Justice sat in the House. Rather, the concern is that a committee seized with the report upon its automatic referral pursuant to the same Standing Order\textsuperscript{99} would perhaps find difficulty in having the Minister appear to explain his or her conclusions. As O’Brien and Bosc explain in \textit{House and Commons Procedure and Practice}:

\begin{quote}
If a standing committee wants to request formally that a Senator appear before it, it must obtain the leave of the House of Commons. If the House agrees with the committee, it sends the Senate a message requesting that the Senator appear before the committee. Under the Rules of the Senate, however, even if the Upper House acquiesces to the request of a Commons’ committee to have a Senator appear before it, that Senator need not do so unless he or she thinks fit. At all times, the Rules of the Senate allow Senators to appear of their own free will before committees of the House of Commons without any formal request being sent by the House [Internal citations omitted].\textsuperscript{100}
\end{quote}

One might imagine that a Minister may seek to avoid speaking to his or her report before the House committee that would first be seized of the bill and the report, and the Minister serving in the Senate could facilitate this possibility. While the Minister might face questions in Senate Question Period,\textsuperscript{101} the ability of House committees to hear from the Minister directly and easily on such a report might impede Parliament’s ability to cure legislation of a \textit{Charter} defect. This may particularly be the case if the Minister’s report is only a terse statement that some provisions of a bill are inconsistent with the \textit{Charter}, leaving it open to speculation which provisions of the bill violate what sections of the \textit{Charter} and how such a determination was reached.

\textsuperscript{97} House of Commons, \textit{Journals}, 39th Parl, 1st Sess, No 61 (6 October 2006) at 512. (James Moore, Parliamentary Secretary to the Minister of Public Works tabling reports of the Department of Public Works; Senator Michael Fortier was then-Minister of Public Works).

\textsuperscript{98} “\textit{A Parliamentary Secretary} is appointed by the Prime Minister to assist a cabinet Minister, or, in some cases, to assist several cabinet Ministers or the Prime Minister” Parliament of Canada, “Members of the Cabinet, Parliamentary Secretaries and Opposition Party Critics” (Revised 27 April 2015) online: <http://www.parl.gc.ca/ParlInfo/Compilations/HouseOfCommons/MinistryMembers.aspx>.

\textsuperscript{99} Standing Orders of the House of Commons, Standing Order 32(5) (“Reports, returns or other papers laid before the House in accordance with an Act of Parliament shall thereupon be deemed to have been permanently referred to the appropriate standing committee”).

\textsuperscript{100} Supra note 13 at 976-977.

\textsuperscript{101} Rules of the Senate of Canada, Rule 4-8.
Another possibility to consider is that the Minister of Justice might be neither a Senator nor a Member of the House of Commons. Historically, ten Ministers of Justice have served at least some portion of their tenure outside Parliament. Of them, two served the entirety of their tenure as Minister of Justice as neither a Senator nor Member of the House of Commons: R.B. Bennett (October-December 1921) and Esioff-Léon Patenaude (July-September 1926). While perhaps such a report could be tabled by a Parliamentary Secretary, again issues would arise of compelling the Minister to testify at committee to ascertain the Minister’s reasons for a report. While a Minister in the House is responsible to the House in Question Period, and a Minister in the Senate can face questions regarding his or her portfolio during Senate Question Period, no similar mechanism exists with regard to a Minister outside the House or Senate. As such, concerns about the meaningful application of s. 4.1 within different parliamentary configurations may arise.

D. LESSONS FROM CANADIAN BILL OF RIGHTS REVIEW

Mr. Schmidt’s legal challenge goes beyond the s. 4.1 obligation to challenge the Department of Justice’s fulfillment of its review obligations under the Canadian Bill of Rights and the Statutory Instruments Act as well. Though both these reviews are beyond the scope of this discussion, there exist some important s. 4.1 parallels with the Canadian Bill of Rights review process that perhaps offer perspective on both Parliament’s and the Minister’s approach to s. 4.1.

Section 3 of the Canadian Bill of Rights provides for review by the Minister similar to s. 4.1 of the Department of Justice Act in terms of process and output:

[T]he Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine […] every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

As with review under s. 4.1, the Minister of Justice is to examine items presented to the House by all Ministers to determine inconsistency, and report “at the first convenient opportunity”.

103 Supra note 4.
104 Canadian Bill of Rights, SC 1960, c 44, s 3(1).
105 Previous versions of this provision extended the examination and reporting obligation beyond only government bills.
1. FORM OF REPORT

Whereas a report of inconsistency has never been tabled pursuant to s. 4.1, one such report is known to have been tabled pursuant to s. 3 of the *Canadian Bill of Rights*. According to the House of Commons *Journals* for 7 April 1975, Mr. Lang – indicated as “a Member of the Queen’s Privy Council” – tabled a report pursuant to s. 3. The full report – *Sessional Paper 301/7-13* – reads as follows:

Pursuant to section 3 of the Canadian Bill of Rights, I hereby report to the House of Commons that, having examined the provisions of Bill S-10, An Act to Amend the Feeds Act, as passed by the Senate on Thursday, March 6, 1975 and as read a first time in the House of Commons on March 10, 1975, I am of the opinion that subsection 10(1.2), as set out in clause 3 of the said Bill, is inconsistent with the purposes and provisions of the Canadian Bill of Rights, in the following respect:

said subsection 10(1.2) could deprive persons of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of their rights and obligations, in that a conviction recorded against a corporation, in proceedings against the corporation to which the chief executive officer of the corporation was not a party, would cause the chief executive officer to be presumed by law to be guilty of the offence of which the corporation was convicted, although the conviction recorded against the corporation could not subsequently be questioned by the chief executive officer in proceedings that would lead to his own conviction if he were unable to establish that the act giving rise to the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

All of which is respectfully submitted. [Internal formatting removed]

The document is signed by Otto Lang, the then-Minister of Justice, though this ministerial position, as noted above, is not reflected in the journal entry documenting the tabling of the report in the House.

The report can be appreciated for its clarity as to the specific provision at issue in the bill and the related right that it has the capacity to infringe. Whether reports under s. 4.1 would be similar is unknown from the public record.

The procedural history of this bill is somewhat extraordinary in that the Senate bill was amended by the House and returned to the Senate, which further amended it. The House concurred in the subsequent Senate amendment to the House amendment. The legislation received Royal Assent on 30 March 1976.

As introduced at First Reading, impugned section 10 of the proposed legislation read as follows:

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107 *Sessional Paper 301/7-13*.
10. (1) Every person who contravenes any provision of this Act or the regulations is guilty of an offence and is liable
(a) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months, or to both; or
(b) on conviction upon indictment, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.\(^\text{10}\)

As assented to after amendment, the same section reads as follows:

10. (1) Every person who contravenes any provision of this Act or the regulations is guilty of an offence and,
(a) if an individual, is liable
(i) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both, or (ii) on conviction upon indictment, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or
(b) if a corporation, is liable
(i) on summary conviction, to a fine not exceeding one thousand dollars, or (ii) on conviction upon indictment, to a fine in the discretion of the court.

(1.1) Where a corporation commits an offence under this Act or the regulations, any director or officer of the corporation who authorizes or acquiesces in the offence or fails to exercise due diligence to prevent its commission is guilty of an offence and liable to the punishment provided for in subsection (1).\(^\text{11}\)

The legislation as adopted, particularly in subsection 10(1.1) appears to address the concerns raised by the Minister of Justice’s inconsistency report. Perhaps this suggests that the reporting process can work to assist in the correction of defects in some circumstances – namely, when Parliament heeds the advice provided and modifies the legislation accordingly. This assumes, however, that there is political will to change a bill; it should be recalled that nothing prevents Parliament, procedurally speaking, from adopting legislation that conflicts with the Charter and/or Canadian Bill of Rights.

While this is one perhaps positive experience with the Canadian Bill of Rights examination and reporting mechanism, the record reflects some unique concerns that perhaps warrant consideration in light of s. 4.1.

2. **Scope of Review**

When Bill C-76 was introduced in March 1961, the sponsoring Minister stated that “the purpose of this bill is to revise the Fisheries Act to bring it into conformity with the Canadian Bill of Rights and in accordance with the report to be tabled by the Minister of Justice […] as required by the Canadian Bill of Rights Regulations”.\(^\text{12}\) However, no such report was ever tabled.

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\(^{10}\) Bill S-10, 1st Sess, 30th Parl, 1974, (first reading 8 October 1974).

\(^{11}\) An Act to Amend the Feeds Act, 23-24-25 Eliz II, c 94.

\(^{12}\) House of Commons Debates, 24th Parl, 4th Sess, vol 3 (22 March 1961) at 3217 (Mr. Carter).
The reasons for the lack of inconsistency report are not entirely clear, though it appears in part that one consideration was that while the original *Fisheries Act* may have had inconsistencies with the *Canadian Bill of Rights*, an amending bill whose provisions were themselves compliant did not necessitate a report. Indeed, a member goes on to suggest that:

The minister might perhaps consider amending section 3, to make it compulsory for him, as Minister of Justice, to examine not only the bills submitted to parliament since the date of assent to that bill, but to revise already existing legislation in order to give assurance to every citizen that it is in all respects consistent with the rights and privileges to which he is entitled under the Canadian Bill of Rights.\(^{113}\)

This similar concern may exist with regard to s. 4.1: An amending act may be viewed in a vacuum that does not consider *Charter* concerns that may still exist in the parent act despite the passage of the amending legislation. Or, it could be that proposed legislation that is on its face compliant amends an act in such a way as to make a statutory scheme produce *Charter*-violative effects. At face value, 4.1 review is of introduced legislation and “whether any of the provisions thereof” are inconsistent – not whether its consequences or effects on other statutes might be as well.

3. **DEBATE OF REVIEW**

While debating the above-mentioned fisheries legislation, the Minister of Justice and other members engaged in debate on the reporting requirement under the *Canadian Bill of Rights*.\(^{114}\)

At the time, the Speaker felt that the review process was outside the scope of what Parliament could debate at Second Reading on the *Fisheries Act* stating:

Order. I question whether the hon. member is debating the subject at issue in dealing with the reference of any bill, including this one to the Minister of Justice pursuant to the bill of rights. That procedure does not arise in this debate. This debate has to do with the principle of this bill on second reading […]

The hon. member is entitled to discuss whether or not the principle of the bill is, in his opinion, in conflict with the provisions of the bill of rights, but there is no machinery by which he can at this time make the inquiry he wishes to make from the Minister of Justice. Furthermore, the procedure of reference to the Minister of Justice is not relevant to the present debate, in my view. […]

I do not say that the hon. member could not use the opinion of the Minister of Justice if he had it; but how it was reached is not, in my opinion, relevant.\(^{115}\)

This precedent may be problematic for s. 4.1 debates to the extent that it stands for the proposition that the discussion of any compliance process is not appropriate when debating the principle of a bill at Second Reading. Though rules on the content of speeches are not always


\(^{115}\) *Ibid* at 4220.
enforced, it is important to consider whether the absence of a s. 4.1 report on a bill can be properly raised during debate of that bill. Certainly, members can and do raise Charter issues at Second Reading without intervention from the Chair; however, concern may arise from this precedent if s. 4.1 issues were raised on the floor in the context of specific legislation.

4. Process of Review

A substantial review concern raised in the Canadian Bill of Rights process can be found in answers provided to a written question in 1961. Briefly, the Minister was asked when the Canadian Bill of Rights examination had taken place with respect to Senate divorce bills. Interestingly, no solicitor-client privilege was indicated as existing or waived, and the Minister provided a list of bills and dates of exam in the answer. The response tabled 17 May 1961 also related that bills SD-233 through SD-237, which had been “presented to the House of Commons have not yet been transmitted by the Clerk of the House of Commons to the deputy minister of justice and have, therefore, not been examined as required by the Canadian Bill of Rights”. According to the Senate Journals, these bills were presented in that Chamber on 2 May, and the House reported them as received on 11 May.

While it is possible that the Minister or Deputy Minister could have been more proactive in assessing these bills – and possibly sought to acquire them not long after it was clear their passage in the Senate was assured – the Parliamentary record reveals a singularity of the Canadian Bill of Rights examination process that is without parallel in the s. 4.1 process with respect to ensuring copies of bills are received by the Minister of Justice.

Specifically, a proposal was made in April 1961 that the Standing Orders of the House of Commons be amended to add a new Standing Order 85(2):

In order to give effect to the purposes and provisions of section 3 of the Canadian Bill of Rights, it is the duty of the Clerk to cause to be delivered to the Minister of Justice two copies of every Bill introduced in or presented to the House of Commons, forthwith after the introduction in or presentation to the House of such Bill.

In September 1961, this provision was added to the Standing Orders, where it remained until June 1994. Its reasons for removal are not clear from the record; however, it is notable that at

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117 Ibid.
121 House of Commons, Journals, 24th Parl, 4th Sess, vol 107 (7 September 1961) at 957.
no point was an equivalent provision added to the Standing Orders in relation to Charter review.\textsuperscript{123} It may be that issues in referral occurring in 1961 were addressed through changes in institutional practices regarding the referral of legislation, but it is notable that Parliament did not in some way choose to facilitate the review process internally (i.e. through the Standing Orders) with respect to the Charter as it had the Canadian Bill of Rights. Importantly, for many years the relevant provisions required the Minister of Justice to conduct Canadian Bill of Rights review for all bills introduced in the House, not just government legislation.\textsuperscript{124}

\textbf{E. \textit{G}overnment Bills \textit{I}ntroduced in the \textit{S}enate}

No formalized mechanism exists for Charter review of government bills introduced in the Senate. Such bills would be subject to the s. 4.1 process as discussed above upon their introduction in the House of Commons.

As a point of reflection, at what point is an inconsistency report useful? Janet Hiebert asserts that “This report should be introduced during second-reading debate”,\textsuperscript{125} which accords with the general understanding that a report under the Canadian Bill of Rights “probably […] would have to come not later than the second reading of a Bill”.\textsuperscript{126} Hiebert goes further, however, and suggests that the report should “form a central focus for each of the two parliamentary committees that regularly examine bills that may have constitutional implications”.\textsuperscript{127} This makes sense if the bill is tabled in the House and considered by the Standing Committee on Justice and Human Rights of the House of Commons and later the Standing Senate Committee on Legal and Constitutional Affairs. However, for a government bill introduced in the Senate there would be no s. 4.1 report before that body and therefore the Chamber would not be seized of it at Second Reading nor would the Committee on Legal and Constitutional Affairs. Does it make sense to allow one committee and House to benefit from such a report but not the other?

If a Senate government bill introduced in the House of Commons required a s. 4.1 report, one might expect amendments to ensue. After passage of the bill in the House as amended, these

\begin{itemize}
\item \textsuperscript{122} House of Commons, \textit{Journals}, 35th Parl, 1st Sess, No 83 (10 June 1994) at 563 (“That the 27th Report of the Standing Committee on Procedure and House Affairs, presented to the House on June 8, 1994, be concurred in”).
\item \textsuperscript{123} Rather, the obligation of the Clerk of the House to forward legislation for review is found in the Canadian Charter of Rights and Freedoms Examination Regulations, SOR/85-781.
\item \textsuperscript{124} W.S. Tarnopolsky, \textit{The Canadian Bill of Rights}, 2d ed. (Toronto: McClelland and Stewart, 1975) at 125-128.
\item \textsuperscript{125} Supra note 63 at 66.
\item \textsuperscript{126} Supra note 124 at 126.
\item \textsuperscript{127} Supra note 63 at 66.
\end{itemize}
amendments would then be sent for concurrence by the Senate, which would debate them and consider the s. 4.1 report. However, if the process is to work such that members are informed and can vet bills fully, it is curious why the Senate should not benefit from an inconsistency report sooner where one is ultimately required.

As a final note, the possibility should be recalled that the Senate might – however unlikely – amend an otherwise compliant government bill so that it could require a s. 4.1 report once presented in the House of Commons. Certainly, the Department would have conducted a s. 4.1 review as part of the certification process and been aware of the Charter risks in the legislation as given to Parliament. The concern is that if Charter issues arose in amendment, how quickly might these be assessed and the House provided with a report upon the bill’s reception in the House from the Senate? The converse issue also exists and a bill rendered unconstitutional by the House requires no report to this effect upon its introduction in the Senate. Indeed, the Senate has no formalized review process for Charter compliance of government legislation – regardless of first chamber of introduction.

It may be that Senate legislative committees inquire on Charter matters more often than committees in the House, and in this regard it has been suggested that review checklists for Senate committees be developed that include Charter considerations. More recently, there are suggestions in the context of broader discussions about Senate reform that perhaps the role of the institution should be one of constitutional review. Specifically, Joel I. Colón-Ríos and Allan C. Hutchinson argue in favour of:

\[A\]ssigning the Senate the task of reviewing the constitutionality of bills proposed by the House of Commons with the purpose of ameliorating the democratic deficit created by the institution of judicial review of legislation, and therefore contributing the to the overall democratic legitimacy of the constitutional order. […] One of the likely outcomes of this arrangement is that if the Senate engages in a robust and good faith deliberation about the constitutionality of a controversial bill and concludes that it is consistent with the constitution, it is likely that the Supreme Court will be more restrained in using its power to strike down federal legislation.

Whether now or under a different conception of its role, review of legislation by the Senate does not guarantee that any changes will be made, nor does it circumvent any procedural limitations that may prevent Parliament or parliamentarians from either proposing amendments or implementing any recommended changes. These issues are explored in Part II of this thesis.

\[130\] Ibid at 617-620.
F. PRIVATE MEMBERS’ BILLS INTRODUCED IN THE HOUSE OF COMMONS

Private Members Business practice in the House of Commons has changed significantly over the years and its general evolution has been documented. What is less well documented, however, is the practice by which Private Members’ Bills (PMBs) are vetted for their Charter compliance, a relatively recent phenomenon.

1. SMEM STANDARD OF REVIEW

Under current practice, PMBs must be examined by the Subcommittee on Private Members’ Business (SMEM), which confirms their votability. In 2003, the Twenty-Fourth Report of the Standing Committee on Procedure and House Affairs was presented to the House of Commons, thereby establishing the criteria SMEM uses when determining the votability of PMBs:

1. Bills and motions must not concern questions that are outside federal jurisdiction.
3. Bills and motions must not concern questions that are substantially the same as ones already voted on by the House of Commons in the current session of Parliament.
4. Bills and motions must not concern questions that are currently on the Order Paper or Notice Paper as items of government business.

While the second criterion contemplates preventing Charter violation, it does not seek Charter compliance. Moreover, the standard that a bill “must not clearly violate” the Charter leaves open the possibility of significant infringement. An exchange from the last SMEM meeting of the 41st Parliament, 2nd Session, reproduced at length below, is particularly illustrative in this regard.

To provide context: Members of SMEM were to determine the votability of Bill C-639 based on the criteria above. This legislation would have amended the Criminal Code to create a new offence for interference with critical infrastructure. Critics charged that the bill could be used to imprison those who protested pipeline construction or blocked railroads during certain protests. As noted by an Assembly of First Nations’ analysis, “This Act could be used to target

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132 PMB is a problematic acronym as it refers both to Private Members’ Business and Private Members Bills, depending on the context. Confusion may arise because motions may also be matters of Private Members’ Business, and Senate Public Bills are debated during Private Members’ Business hour. In this thesis, generally speaking, PMB and PMBs refers only to Private Members’ Bills introduced in the House of Commons, except where the discussion also mentions motions.
133 Supra note 13 at 1127.
134 Ibid.
136 Justin Ling, “Bill could be used against pipeline protesters, critics say”, National Post (5 December 2014) A8.
First Nations engaging in civil disobedience, lawful protest or blockades”.

In determining votability, the committee is assisted by a Library of Parliament Analyst. In introducing the legislation to the committee, the Analyst noted “In terms of the four criteria, the bill does not concern questions that are outside the federal jurisdiction, and it does not clearly violate the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms”.

Discussion ensued:

**Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP):** [...] I am concerned about the second criterion that it must not clearly violate the Constitution Acts. I'd like to get a little more elaboration on that [...] Could you elaborate?

**Ms. Dara Lithwick:** In terms of the second criterion, the way that it's framed in terms of the evaluation at this stage, which is determining the votability or the non-votability of items, it's not the same as doing a charter analysis of likelihood that it's compliant, or likelihood that it might be challenged in that sense. It's whether there is a clear violation. An example of a clear violation would be something specifying that no one under five foot five may vote in a federal election from here on in. That's a clear violation of a voting right. There wouldn't be any question of being able to amend that at committee. You wouldn't even need to do a section one analysis of the objective of the legislation vis-à-vis its aims. [...] The issues that you raised would require at this stage an analysis of the charter rights that are implicated and an analysis of whether they're saved by section one. The need for that analysis almost shows that it's not so clear, even though there might be questions, that it would be deemed non-votable at this stage. [...] The Chair: It's not for us to debate the bill. I think when the analyst has given us her opinion, our decision is only to send it on to committee for that debate.

**Mr. Philip Toone:** Well, our decision is to determine whether it can get second reading, I think. Right?

**Ms. Dara Lithwick:** Correct.

Different and competing perspectives exist regarding the role of SMEM. It is correct that SMEM determines whether a bill will advance further in the legislative process. It is also the only formalized Charter check that PMBs will receive. If SMEM determines that a bill is non-votable, the item advances to the Standing Committee on Procedure and House Affairs (PROC) for review. PROC determines whether the matter will advance to the House, subject to appeal to the House as a whole. The issue is that in making its determination, SMEM is both pronouncing on whether a bill is worthy of more debate in addition to whether it is constitutional, and it may

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138 Charter, s 2(c).
140 Ibid at 1-3.
not always be clear which particular considerations drive the committee when it reaches a particular conclusion. As the above exchange continues:

**Mr. Philip Toone:** It's an interesting analysis. I want to point out that Criminal Code amendments are done through government bills and would benefit from the vetting process to see if they're constitutional, whereas the private member's bills aren't. That's one of the problems.

We are charged with criterion number two. I do want to evaluate it on that level.

I do have a problem with this bill. In my opinion it does clearly violate the Constitution Acts. You gave the example of someone who is five foot five. I'm not sure what criteria one could use to discriminate on the basis of height, but I didn't see that in that charter anywhere. I'm not sure if that's a criterion, but freedom of association and freedom of peaceful assembly certainly are in the charter. To me that's even a greater violation than the one you suggested.

**Ms. Dara Lithwick:** The questions you raise go to the language of the criterion of whether there is a clear violation of the Constitution Acts, including the charter, or whether there is a possibility or likelihood of a violation. In terms of the language adopted here, and in previous decisions made and analysis done at this subcommittee, the determination of clear violation really has been such a standard. It has to be so clear that it's not something that could be read down, amended, or qualified, whether you have to do that full charter analysis, or the section one analysis.

By determining that the bill does not clearly violate the Constitution Acts or the charter, it's not saying that it does not raise constitutional issues or charter issues. It does not say there might be other problems with the bill or things that raise concerns. The committee is not saying this bill should be passed; it's just saying that the bill is not disqualified because it has passed this minimum threshold. Should the committee determine down the road that it would like to alter that threshold, that's a separate question. In terms of the threshold established at this stage of whether it clearly violate the Constitution Acts, including the charter, the analysis at this point suggests that there would need to be further analysis, which almost answers the question. […]

**Mr. Frank Valeriote (Guelph, Lib.):** I'm conflicted about the issue. […] I'm not convinced that this likely violates the Charter of Rights and Freedoms. I get how perilously close it appears to be, but I'm not completely convinced that it actually does. […] Is there a way for you to come back with a fuller examination of this, let's say next week, so that we don't automatically turn it down? Can we maybe meet again next week and have you give us a further opinion, or not?

**Ms. Dara Lithwick:** My understanding is that you're asking about the likelihood of it—

**Mr. Frank Valeriote:** Violating the Charter of Rights and Freedoms....

**Ms. Dara Lithwick:** —violating the charter. That analysis is not the analysis—

**Mr. Frank Valeriote:** That's not to undertake?

**Ms. Dara Lithwick:** That is to be undertaken according to the second criterion, which is that the bill does not “clearly violate” the—

**Mr. Frank Valeriote:** “Clearly”; I see. Has Mr. Butt said anything?

**Mr. Brad Butt (Mississauga—Streetsville, CPC):** I haven't yet, but I think we're talking about two different thresholds here. The threshold in number two is “clearly violate”, and it's the analyst's opinion—the expert's opinion—that it does not. I'm not a lawyer. I don't think I'm in a position to suggest that the recommendation from the analyst is incorrect.

I think what Mr. Toone has been saying is that it “may violate” the charter, not “clearly violate” the charter.

I'm not going to put words in your mouth, Philip.
In your argument, which has some merit potentially, I'm not sure it got to the threshold of “clearly” violates, which is what we're being asked to vet on this. That would be my two cents' worth.\footnote{Ibid.}

Though this bill raised Charter concerns, it did not “clearly violate” the Charter and thus the subcommittee deemed the bill votable, applying the second criterion. The transcript elucidates the application of the “clearly violates” standard by the committee in the case of potentially Charter-infringing legislation, and raises several important process questions along the way.

Notably, it is perhaps unclear whether SMEM is meant to take on any legal analysis at all. As one Member asserted in the House upon his bill being deemed non-votable: “To suggest that my private members’ bill is clearly in violation of the Constitution is to take on the role of justices of the court, not parliamentarians”.\footnote{House of Commons Debates, 38th Parl, 1st Sess, No 60 (18 February 2005) at 3715.} Regardless of whether what appears to be a legal test should be approached in some non-legal way, at times it appears the committee is uncertain of the standard to apply. Recalling that this was the final SMEM meeting of 41st Parliament, 2nd Session – which began in fall 2013 – it may seem odd that the committee would spend so much time reviewing the meaning and application of its criteria in spring 2015; however, it should be recalled that SMEM rarely meets.

2. **SMEM Consideration in Perspective**

As the table below illustrates for the 41st Parliament, 2nd Session, SMEM meets infrequently and its meetings are generally short:


<table>
<thead>
<tr>
<th>SMEM Meeting</th>
<th>Date</th>
<th>House Bills Considered</th>
<th>Motions Considered</th>
<th>Senate Bills Considered</th>
<th>Duration of Meeting (Minutes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>24-Oct-13</td>
<td>10</td>
<td>2</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>Second</td>
<td>11-Feb-14</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>Third</td>
<td>8-May-14</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>Fourth</td>
<td>27-May-14</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
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<td>Fifth</td>
<td>25-Sep-14</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Sixth</td>
<td>7-Oct-14</td>
<td>9</td>
<td>6</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>Seventh</td>
<td>27-Jan-15</td>
<td>12</td>
<td>2</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Eighth</td>
<td>21-Apr-15</td>
<td>6</td>
<td>9</td>
<td>0</td>
<td>37</td>
</tr>
</tbody>
</table>
Breaking these figures down further, the following table represents the average amount of time each item was considered:

**Table 3: Length of SMEM Consideration by Item (41st Parliament, 2nd Session)**

<table>
<thead>
<tr>
<th>Meeting</th>
<th>Date</th>
<th>Total Items</th>
<th>Average Minutes Per Item</th>
<th>Average Seconds per Item</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>24-Oct-13</td>
<td>12</td>
<td>1.25</td>
<td>75</td>
</tr>
<tr>
<td>Second</td>
<td>11-Feb-14</td>
<td>15</td>
<td>1.13</td>
<td>68</td>
</tr>
<tr>
<td>Third</td>
<td>8-May-14</td>
<td>15</td>
<td>1.46</td>
<td>88</td>
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<td>Fourth</td>
<td>27-May-14</td>
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<td>3</td>
<td>180</td>
</tr>
<tr>
<td>Fifth</td>
<td>25-Sep-14</td>
<td>2</td>
<td>0.5</td>
<td>30</td>
</tr>
<tr>
<td>Sixth</td>
<td>7-Oct-14</td>
<td>16</td>
<td>1</td>
<td>60</td>
</tr>
<tr>
<td>Seventh</td>
<td>27-Jan-15</td>
<td>15</td>
<td>0.86</td>
<td>52</td>
</tr>
<tr>
<td>Eighth</td>
<td>21-Apr-15</td>
<td>15</td>
<td>2.46</td>
<td>148</td>
</tr>
</tbody>
</table>

Dividing the total number of legislative items (91) considered by SMEM for 41st Parliament, 2nd Session by the amount of time for which the committee met over the course of the session reveals that the average length of deliberation for each legislative item equaled 81.76 seconds. This number is slightly inflated because each meeting must also be called to order and concludes with a motion being moved and adopted to report the subcommittee’s work to the Standing Committee on Procedure and House Affairs. In fairness, members are provided with the agenda in advance to prepare as they see fit, and it may be that some bills pose no issues such that no debate on its votability is necessary.

The seconds-per-item calculation – that each legislative proposal is considered for approximately one minute and twelve seconds – might suggest that the four criteria are applied during this time. This is incorrect only in the case of Senate bills, which are assessed on one criterion, to be discussed in the section on Senate Public Bills introduced in the Senate. As well, although motions are assessed by the same four criteria, this consideration is done with the understanding that unlike bills, motions are ultimately non-binding.

A comparison across sessions would be complicated by the fact that the committee did not meet in public during the first years that it applied the criteria. However, the records of public meetings do reveal the unique way SMEM approaches Charter analysis, aided by a Library of Parliament analyst.

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144 Ibid.
3. **Approach of SMEM**

Each bill considered by SMEM is presented by the Analyst, who provides a description of the item and an indication of how the item fits the criteria. Consider the SMEM meeting of 18 October 2011 (41st Parliament, 1st Session). The analyst introduced an item as follows:

**Mr. Michel Bédard:** Bill C-315 would amend the Canada Labour Code with respect to language requirements that apply to federal works, undertakings and businesses operating in Quebec. For example, it would force federal works, undertakings or businesses there to use French in their communications with employees.

This item does not concern questions that are outside federal jurisdiction. As for other provisions of the Charter, it goes without saying that forcing a company to communicate with its employees in a particular language—in this case, French—could be seen as a violation of the right to freedom of expression. However, Supreme Court rulings do recognize the protection of the French fact in Quebec as a sufficiently important goal. Insofar as there is not a total prohibition—for example, if someone were being forced to communicate or advertise in French alone—and another language can be used, this bill could be considered constitutional.¹⁴⁵

Because the conclusion is that the bill, despite Charter concerns, “could be constitutional” it is clear that it does not “clearly violate” the Constitution. Yet, the Analyst in this case signals concerns to the committee, which it then discussed with reference to case law. For slight contrast, consider this exchange from the SMEM meeting of 8 May 2014 (41st Parliament, 2nd Session):

**Mr. Alexandre Lavoie:** Bill C-587 amends the Criminal Code so that a person convicted of the abduction, sexual assault and murder of the same victim in respect of the same event or series of events is not eligible for parole until serving a sentence of between 25 and 40 years.

The bill does not concern a question that is outside federal jurisdiction. It does not clearly violate the Constitution Act. It does not concern a question that is substantially the same as one already voted on by the House of Commons. It does not concern a question that is currently on the order paper or notice paper.

**The Chair:** Mr. Valeriote.

**Mr. Frank Valeriote:** There have been a couple of successful challenges before the courts on minimum sentences. I'm not suggesting at all that there shouldn't be this kind of sentence in association with abduction, sexual assault, and murder—it's pretty abhorrent—but notwithstanding, when you are assessing its constitutionality, can you tell me what it is you do? Do you just rely on your own review of the bill? Is there not a process the government has to go through where its legal department attempts to determine whether, in fact, it is judgment proof?

**Mr. Alexandre Lavoie:** Since it's a private member's bill, it's only the library that does the analysis. I consult my colleagues, but the government is not involved. If it were a government bill, then the Department of Justice would have to review the constitutionality before.

**Mr. Frank Valeriote:** So for a private member's bill, you don't?

**Mr. Alexandre Lavoie:** I do that with my colleagues. What my colleagues who are specialists in criminal law tell me is that generally, minimum sentences have been accepted by the Supreme Court. In some particular cases, it's a case-by-case analysis which the Supreme Court does, and some have been rejected.

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But, in general, the court will accept these as a general principle, unless it’s against the charter. That’s why I considered that one as not clearly unconstitutional against the charter.\(^ {146}\)

Though the Analyst referenced the Department of Justice’s constitutionality review process, there is no discussion of the 4.1 standard and how it differs from the committee’s analysis. Further, the key phrase “the court will accept these […] unless it’s against the charter”, suggests there is a Charter concern, but this is not developed so as to indicate whether this specific mandatory minimum sentence violates the Charter rather than whether the principle of mandatory minimum sentences has been accepted or rejected by the Courts. However, this may just be a direct consequence of the “clearly violates” standard in that its application is possible without delving into the law in detail. Ultimately, it is up to the committee to determine what information it wishes to receive and from whom; however, it is clear that Library Analysts can and do provide insight beyond that which may be apparent on the face of a bill.

On this point, consider another SMEM meeting where in the Analyst introduced an item as follows:

**Mr. Michel Bédard:** This bill will enact the National Flag of Canada Act. This bill does not concern questions that are outside federal jurisdiction.

With respect to the Canadian Charter of Rights and Freedoms, there might be some issues that may be raised with regard to this bill because its drafting is very broad, and it gives the right to display the flag with no restrictions. However, the principle of the bill itself, the right to display the Canadian flag, itself is not unconstitutional. The issues that I have identified are, in my opinion, fixable during the process.\(^ {147}\)

Discussion ensues, and while answering questions the Analyst explains a concern on a very fine point of Charter law: “It's important to understand that, under section 7 of the Canadian Charter of Rights and Freedoms, a bill that is too broad in relation to the goal being sought, and which includes criminal sanctions, could be declared unconstitutional”.\(^ {148}\) Though we can never know if the committee would have discussed this issue absent the intervention of the Analyst, it is possible that such a narrow legal issue might have escaped the notice of committee members, particularly those who have no legal background.\(^ {149}\)

Though the role of the Analyst – to the extent that he or she should signal Charter concerns beyond that which “clearly violates” – is perhaps unclear, the subcommittee and its Chair may signal to the Analyst what it finds most useful, and this could change depending on the composition of the committee. Further, it is up to the committee to ask questions of the Analyst.

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\(^ {146}\) Evidence, Subcommittee on Private Members’ Business of the Standing Committee on Procedure and House Affairs, 41st Parl, 2nd Sess, No 3 (8 May 2014) at 1-2.

\(^ {147}\) Supra note 145.

\(^ {148}\) Ibid.

\(^ {149}\) There is no requirement for SMEM members to have a legal background.
as it sees fit, and these may lead to a discussion of Charter concerns beyond those captured by the “clearly violates” standard.

4. **SMEM’S ROLE IN THE LEGISLATIVE PROCESS**

   The fact that SMEM’s assessment of Charter violation occurs within the legislative process necessarily bears upon its work. This is perhaps best illustrated when considering the language of Analysts when discussing potentially Charter-violating bills.

   As quoted above, Analysts speak to bills being “fixable” and things “so clear that it's not something that could be […] amended, or qualified”.\(^{150}\) The suggestion then, is that a subsequent reviewing body could ‘fix’ a bill that has a Charter defect, presumably through amendment. SMEM, it should be recalled, does not have the power to dictate the work of another committee, let alone propose amendments itself to the legislation before it. As the next part of this thesis will explain in detail, the suggestion that a committee may ‘fix’ a Charter concern through amendment may be misguided owing to procedural restrictions.

   The result of the SMEM process is that when a bill is not deemed votable, the matter goes before the Committee on Procedure and House Affairs for confirmation or reversal of SMEM’s decision. This review is not entirely fresh in that SMEM members sit on PROC and may have formed strong opinions on the legislation under consideration.

   Notable in this regard is the PROC meeting of 10 March 2011. SMEM had deemed Bernard Bigras (Rosemont—La Petite-Patrie, BQ)’s Bill C-486 non-votable on the basis that it violated the Constitution Act, 1867.\(^{151}\) The bill concerned international treaties and the role of provinces therein.\(^{152}\)

   Because SMEM met in camera, it was unclear who had raised the constitutional concern. However, when PROC met with Mr. Bigras to accord him his procedural right to defend his bill, Mr. Reid revealed “I was the one in the subcommittee who raised constitutional concerns about

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\(^{150}\) Supra note 139 at 2.


\(^{152}\) The bill’s summary reads as follows: This enactment provides that the Government of Canada shall inform the governments of foreign countries that a province is able to negotiate and enter into certain treaties. This enactment requires the Government of Canada to consult the provincial governments before negotiating or concluding a treaty \((a)\) in an area under the legislative authority of the legislatures of the provinces; or \((b)\) in a field affecting an area under the legislative authority of the legislatures of the provinces. This enactment provides that the Government of Canada shall enter into an agreement with each provincial government on the manner in which it shall consult that government and specifying, in the case of Quebec, the relevant mechanisms.
the validity of this private member's bill,” upon which another Member raised a point of order to note that the discussion had been in camera. Though Mr. Reid reports to have raised this particular concern, the subcommittee’s minutes only reflect the committee’s agreement that the bill “be designated as a non-votable item” and as such it is possible other members felt it should be non-votable for other reasons.

Mr. Bigras spoke to his bill before PROC alongside Bloc Quebecois political counsellor Marc-André Roche. He was asked about the constitutionality of the bill as follows:

Mr. Marcel Proulx: [...] I won't claim to be a constitutional expert or specialist, something that I am not, but I would like to ask you a question. Have you consulted experts on the constitution, constitutional specialists, who are of the view, based on their interpretation, that your bill can be debated and subsequently voted upon?

Mr. Bernard Bigras: Thanks to the member for his question. A clear question deserves a clear answer. I'm also used to asking questions when I'm on the other side of the table.
   The answer is yes. I consulted three constitutional specialists, the best known of whom has addressed the issue as a whole. That is Hugo Cyr, professor of constitutional law at UQAM. He has considered the matter in a book entitled Canadian Federalism and Treaty Powers. Those three constitutional experts have come to the conclusion that my bill is irreproachable in that respect.
   Of course, a political debate must be held, but those three constitutional specialists stated that this bill was irreproachable from a constitutional standpoint.

As a first point of reflection, it is difficult to imagine that any member would speak against their bill at committee or acknowledge its constitutional defects, particularly if this essentially guaranteed that it would be deemed non-votable. As well, it should be recalled that members speaking to this criteria and a nominally legal test may not themselves be legally trained. On this point, while Mr. Bigras noted expert consultation, the matter takes an interesting turn in subsequent questions:

Mr. Marcel Proulx: If I may take the liberty of asking you the question, Mr. Bigras, who are the other two?

Mr. Marc-André Roche (Counsellor, Bloc Québécois): They preferred to speak to us confidentially. However, I imagine we can have them come as witnesses during the study.

Mr. Bernard Bigras: One of the other two persons is a very well-known constitutional expert in Quebec whose name you probably know, but I have to keep quiet on that for the moment.

Mr. Marcel Proulx: I understand. You're telling us you consulted three, but if you can only name one, in fact it's as though you had only consulted one. I understand that this is clear in your mind because you consulted two others. However, that's not at all a problem for me.

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155 Ibid at 2.
Mr. Bernard Bigras: No, I confirm that we consulted three constitutional experts, but we can only disclose the name of one of the three for the moment. However, if the bill receives the consent of the House in the study on second reading, those constitutional experts will definitely be pleased to come and appear in committee. 156

Some members sought clarification on some finer points of the bill, and a motion was moved to deem the item votable. The Chair concluded: “We will deem it votable and send it to the House. Monsieur Bigras, thank you for coming today. It's good to see that the system works this way”. 157

Although this is how the system works, it may raise some concerns. Indeed, the committee did not hear from any constitutional experts, which would seem prima facie necessary to determine whether a bill would violate the constitution. One might wonder whether a committee would equally advance a bill if a member in a similar situation claimed to have consulted three experts but did not name any, citing either their desire for confidentiality or noting that they could appear at committee. Indeed, considering that parliamentary privilege would shield the member from any sort of repercussions (civilly speaking) for claiming anyone had said anything about his or her bill, nothing would stop a member from claiming that his or her bill was personally endorsed by the Pope, Oprah Winfrey, and Bill Gates. Though exaggerated, this is precisely the point: If the committee is to take members at their word – why should PROC invite the Member and not SMEM? What analysis should PROC undertake that SMEM does not? When should experts be called in to inform Parliament’s deliberations?

With each committee acknowledging future consideration by another committee, there exists a real possibility of a ‘Parliamentary pass the buck’ system whereby each committee blurs its role with that of other bodies.

Suppose Bill C-486 were to go to the Standing Committee on Foreign Affairs (FAAE). FAAE would hear, presumably, from constitutional experts on the bill to inform their deliberations. If this were to occur, what was the added benefit of PROC’s review of the bill’s apart from SMEM and distinct from FAAE? Put another way, this bill would have seen two reviews of its general constitutionality (SMEM and PROC) – wherein the review is seemingly duplicative – prior to meetings on the specific constitutionality of the bill by a third body (FAAE). It is not clear that the specific analysis (FAAE) would be informed by the general ones, nor what the added PROC layer of review brings to the constitutional analysis done by SMEM.

156 Ibid at 2-3.
157 Ibid at 6.
Yet, this is the difficulty of having constitutional analysis wrapped up with the question of whether legislation should advance further. Is PROC meant to revisit SMEM’s analysis de novo or build upon SMEM’s constitutional analysis in some distinct way? Perhaps more clarification would be useful in this regard.

Regardless which committee or committees review the legislation as introduced, the possibility also exists that amendments made by a legislative committee or the House at Report Stage could render an otherwise compliant bill unconstitutional. In such cases, this would not be caught by SMEM or PROC, which would have already discharged their roles in the legislative process.\(^{158}\) As well, there exists the risk that a subsequent committee may assume certain questions have been dealt with by committees prior such that a legislative committee does not delve into the constitutionality of a bill because of a belief that SMEM and/or PROC has vetted the legislation.

Considered collectively, the role of SMEM is that of a gatekeeper meant to stop bills from proceeding when they are Charter-violative in a way that is not salvageable. The question is, for bills just shy of this – is there any role for the committee, particularly given that it has no capacity to ensure any follow-up on its findings?

Perhaps the findings alone are an important end in themselves. During SMEM discussion of one ‘fixable’ item, the Analyst explained that “because subcommittee meetings are now public”, it is possible that “the sponsor of the bill could be made aware of the potential problems with his or her bill” from a reading of the SMEM transcript.\(^{159}\) The Chair echoes this sentiment in response to a later comment: “So anyone—the sponsor of this bill, for example—could review the minutes of this meeting and see what the concerns raised were and then take appropriate action, or other members of the subcommittee...when it comes to committee after it has had second reading”.\(^{160}\) Again, though the sponsor and other Members may be informed of concerns, there would be no obligation to act upon them.

The related question to all this is whether Members are presented with potential Charter issues during the drafting process such that SMEM is not the first occasion at which they are

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\(^{158}\) See Evidence, *Standing Committee on Citizenship and Immigration*, 41st Parl, 1st Sess, No 84 (13 June 2013) at 4-10.

\(^{159}\) *Supra* note 145.

\(^{160}\) *Ibid.*
presented with an issue. Indeed, by then it may be too late if the bill is so violative that it cannot be fixed.

5. **VETTING PMBs DURING THE DRAFTING PROCESS**

Members who seek to introduce PMBs typically retain the services of counsel offered through the Office of the Law Clerk and Parliamentary Counsel. As explained by the House of Commons’ Private Members’ Business Practical Guide:

> Because it could become law, a bill must be drafted with great care and the skills of experienced parliamentary counsel are normally called for. The Legislative Services Section of the Office of the Law Clerk and Parliamentary Counsel is responsible for drafting bills for private Members and acts on their instructions about the purposes and objectives of their legislative proposals. Legislative drafting services are provided by lawyers who are qualified parliamentary counsel.\(^{161}\)

A guide prepared by the Office of the Law Clerk and Parliamentary Counsel from 1988 entitled “The Drafting of Private Members’ Bills” explains the role of drafters in relation to the constitution as follows:

> Because of the intricacies of the Canadian Constitution and body of law, it is the primary duty of the Office of the Law Clerk and Parliamentary Counsel to prepare legislation for Members while respecting the many facets of the rule of law, including the division and separation of powers, the Canadian Charter of Rights and Freedoms, Crown prerogatives, international commitments, and federal-provincial relations. […]

All bills are subject to scrutiny by the Office of the Law Clerk and Parliamentary Counsel before being introduced, regardless of whether they are actually prepared by a professional legislative counsel in the Office. All bills are printed under the auspices of the Office of the Law Clerk and Parliamentary Counsel and are therefore examined for constitutionality, form, and compliance with legislative and parliamentary conventions.\(^ {162}\)

This passage suggests that Legislative Counsel do examine bills to some extent for their compliance, regardless of who drafts them. A slightly different take on the matter, however, appears in O’Brien and Bosc from 2009:

> Parliamentary Counsel (Legislation) from the Office of the Law Clerk and Parliamentary Counsel assist private Members in drafting bills for introduction in the House and in drafting amendments to government bills and private Members’ bills. […] Legislative advice usually involves taking into account existing laws, constitutional and formal requirements, and drafting conventions. While Members may draft their own bills or retain outside counsel for that purpose, before these bills are introduced in the House, they are reviewed by Parliamentary Counsel and certified as to their correctness in form.\(^ {163}\)

The consequences of a bill being “examined” or “reviewed” and found unconstitutional is unclear, particularly given that the certification spoken of in the second excerpt is limited to correctness in form without reference to constitutionality in substance. Further, whether the 1988

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\(^{162}\) Canada, House of Commons, Office of the Law Clerk and Parliamentary Counsel, “The Drafting of Private Members’ Bills” (December 1988).

\(^{163}\) Supra note 13 at 1155-1156.
document remains accurate regarding internal review is an open question. To note, questions were raised about whether solicitor-client privilege covered the work of legislative counsel, something asserted by the 1988 document but by no means clear during a 2000 investigation of a question of privilege raised in relation to the confidentiality of drafters’ work.  

Though the publicly available materials on this point are limited, the most logical conclusion is that counsel discusses Charter and related concerns with the client as they arise but have no ability to prevent the client from proceeding as she or he wishes. This would explain why items might arrive at SME M with Charter defects.

6. ROLE OF SME M IN THE POLITICAL PROCESS

As should be apparent, PROC and SME M’s analyses of constitutionality are not legal determinations undertaken by legal actors in a judicial setting. Moreover, because the ultimate PROC decision that something should remain non-votable can be overturned by the House, there are inherent political considerations in the vetting process. As a case study, consider C-450 of the 37th Parliament, 3rd Session.

Introduced by Jim Pankiw (Saskatoon—Humboldt, Ind.), C-450’s full title was “An Act to amend the Marriage (Prohibited Degrees) Act in order to protect the legal definition of "marriage" by invoking section 33 of the Canadian Charter of Rights and Freedoms.” Specifically, this legislation invoked the notwithstanding clause of the Charter to limit recognition of same-sex marriage. SME M deemed the item non-votable. During PROC consideration, the Member defended his bill as follows:

Mr. Jim Pankiw: I have here the list of criteria for making items of private members' business non-votable, and I think it was the position of your committee that number two is the reason you've deemed this to be non-votable, that the bill violates the Constitution, but in fact it doesn't.

First of all, if you look the equality section of the Charter of Rights and Freedoms, section 15, sexual orientation is not included in that. So it does not violate someone's equality rights to maintain the legal definition of marriage as a union of a man and a woman because sexual orientation is not included in section 15 of the Constitution.

But notwithstanding that and more to the point of the bill, not only is the bill not unconstitutional, it specifically uses the Constitution, section 33, the notwithstanding clause, to prevent a court challenge against the legal definition of marriage.

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164 Evidence, Standing Committee on Procedure and House Affairs, 36th Parl, 2nd Sess, No 34 (6 April 2000).
165 Bill C-450, An Act to amend the Marriage (Prohibited Degrees) Act in order to protect the legal definition of "marriage" by invoking section 33 of the Canadian Charter of Rights and Freedoms, 3rd Sess, 37th Parl, 2004 (reinstated from a previous session 2 February 2004).
So on both those counts the bill clearly does not violate the Constitution. On the contrary, it uses the Constitution, the notwithstanding clause. It’s as simple as that. To say that this violates the Constitution is just clearly not the case, because it uses the Constitution. The notwithstanding clause was put in the Constitution in contemplation of just this type of a use. It’s a perfect example of where one would use the notwithstanding clause.\(^{167}\)

PROC confirmed the item as non-votable and it subsequently went to the House for limited debate before being dropped from the Order Paper without a vote.\(^{168}\) Because SMEM met in camera, the PROC and House debates are the only indications we have regarding Members’ understanding of the constitutionality of this legislation. Much is said in the debate about same-sex marriage and the reference case then before the Supreme Court;\(^{169}\) however, seemingly nothing is discussed in terms of the constitutionality of invoking the notwithstanding clause.

More specifically, questions were asked at PROC such as: “Are you proposing that the notwithstanding clause be invoked in this instance to counter the Canadian Charter of Rights and Freedoms?” which would suggest that in the mind of the questioner the notwithstanding clause is not itself part of the Charter.\(^{170}\) Whether one thinks a particular application of the notwithstanding clause is appropriate is a very different question from whether it is constitutional. However, the ultimate impression one would have from the conclusion of PROC and SMEM alone is that invoking the notwithstanding clause is somehow unconstitutional. It is hard to see this legal conclusion in light of the fact the notwithstanding clause forms part of the constitution,\(^{171}\) with the only restrictions on its use being the provisions to which it is limited in the Charter and its expiry period.\(^{172}\)

If the bill did not clearly violate the constitution, why was it said to have done so for the purposes of SMEM and PROC? It is hard from the record to discern any discrete legal considerations apart from the political context of the then-debate over same-sex marriage and disputes over policy. The extent to which politics influences SMEM decisions was somewhat shielded during periods when the committee met in camera; however, even this proved to be divisive.

\(^{167}\) Evidence, Standing Committee on Procedure and House Affairs, 37th Parl, 3rd Sess, No 6 (26 February 2004).
\(^{168}\) House of Commons Debates, 37th Parl, 3rd Sess, No 44 (29 April 2004) at 2609-2614.
\(^{170}\) Supra note 167.
\(^{171}\) Charter, s 33.
\(^{172}\) Though, it should be acknowledged, there are arguments that it cannot and/or should not be used in part owing to its desuetude. See, for example, Richard Albert, “Advisory Review: The Reincarnation of the Notwithstanding Clause” (2008) 45:4 Alta L Rev 1037.
Whether SMEM’s deliberations should be public or private came to a head during its meeting of 15 June 2009. The Chair decided the meeting ought to be in public without discussing the matter with the committee beforehand. The legislative item at issue was C-391 (40th Parliament, 2nd Session), legislation that sought to end the long-gun registry. As the SMEM evidence recounts:

**Ms. Christiane Gagnon:** A point of order, Mr. Chair. Why are we not in camera? We were told that we would be.

**The Chair:** The notice that went out clearly indicated that it was a public meeting. I've checked with the clerks, and there are no rulings indicating that the private members' subcommittee needs to meet in camera. On that basis, we called the meeting as a public meeting.

**Ms. Christiane Gagnon:** Did you make that decision by yourself?

**The Chair:** As chair, I called the meeting as public after discussing with the clerk whether it was procedurally possible.

**Hon. Marlene Jennings:** So let us ask to be in camera.

**Ms. Christiane Gagnon:** I am new to this committee, but, normally, the decision to sit in camera is made collegially and with respect for all members of the committee.

**The Chair:** It's clear, Madam Gagnon, that the committee is the master of its own fate. If the committee chooses to move in camera, I'm certainly at the will of the committee.

**Hon. Marlene Jennings:** I propose that the committee move in camera in conformity with the practices of subcommittees when discussing this kind of issue. My understanding is that this subcommittee has sat in camera every single time it's met. It is my understanding--and you can correct me if I'm wrong--that this is the very first time that this committee is not in camera. As you can see from the reaction from some of the members, they assumed, as did I, that the meeting was in camera.

I move that the meeting go in camera.

**The Chair:** I will accept that motion. I just want to verify with the clerk […]

**Mr. Scott Reid:** Mr. Chair, I believe there was a motion on the floor to the effect that we would be voting on Bill C-391, up or down. You can't go back after having had a vote. We had a show of hands, and then we were moving to an actual recorded vote. We can't stop in the middle of a vote and have a discussion of whether we're going to go in camera. As I saw it, the three opposite members were all indicating they wanted Bill C-391 killed by voting it down. I was voting in favour, and I realized that happened and I said I would like to make this vote on division. You can't stop in the middle of a vote and go in camera or do any other procedural item.  

What follows are points of order – interrupted by points of order – leading to Mr. Reid’s final conclusion before the question is called on moving in camera. He said:

What is going on is in reference to a rule that does not exist in terms of the requirement that we be meeting in camera. An effort is being made to ensure that Bill C-391 can be killed quietly by the other parties, the

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opposition parties, in order to ensure that they don't have to suffer the embarrassment of revealing that they in fact call this one thing—\textsuperscript{174}

Why the Chair would decide – seemingly unilaterally – to have the meeting be in public, and why opposition Members would want to move \textit{in camera} may indeed be questions with only political answers. The issue is that when the review could be purely objective, particularly at the ends – i.e. when a provision does “clearly violate” the \textit{Charter} in an unfixable way – it is perhaps misplaced in a process that occurs within a political context. In other words, although the \textit{Charter} test by SMEM’s standard could be fairly objective, this task is undertaken by political actors in a political setting and this may diminish any real and/or perceived objectivity of the process, particularly when the transparency of the subcommittee’s deliberations is at its sole discretion.\textsuperscript{175}

7. THE SMEM/PROC DECISION

It is often difficult from the record alone to determine how a committee reached a particular conclusion, particularly if portions of the deliberations occurred \textit{in camera}. In the context of SMEM and PROC, this is notable because the committee and subcommittee may not formally indicate which criteria proved determinative for establishing non-votability in their reports. SMEM – as a subcommittee – reports only to its parent committee, PROC, and thus its reports are not public. PROC reports, once tabled in the House, are publically available documents. While SMEM might indicate a basis for non-votability in its non-public report, recent PROC reports provide only a conclusion regarding votability and do not indicate the ground or grounds for this decision.

When PROC considered the votability of Bill C-482 (39\textsuperscript{th} Parliament, 2\textsuperscript{nd} Session), the Analyst read the SMEM report into the record:

Pursuant to Standing Order 92(1)(a), the Subcommittee has agreed that Bill C-482, an Act to amend the Official Languages Act (Charter of the French Language) and to make consequential amendments to other Acts, should be designated as non-votable, on the basis that it contravenes the criterion that bills and motions must not clearly violate the Constitution Acts 1867 to 1982, including the Canadian Charter of Rights and Freedoms.\textsuperscript{176}

\begin{flushright} \textsuperscript{174} \textit{Ibid.} \textsuperscript{175} Of note, the Senate Rules are more precise regarding when committees can, cannot, and must operate \textit{in camera.} \textsuperscript{176} Evidence, \textit{Standing Committee on Procedure and House Affairs}, 39th Parl, 2nd Sess, No 11 (11 December 2007) at 10. \end{flushright}
Such instances of the SMEM report being made public appear rare. However, the issue is that absent such reports being public, members appearing before PROC to appeal SMEM’s decision may not know the specific reasons for SMEM’s determination of non-votability. Consequently, members may address each criterion before PROC on appeal instead of being able to focus their remarks on the specific concern(s) raised by SMEM. On this point specifically, there has even been discussion at PROC inquiring whether a member to appear would have been made aware of SMEM’s concerns.

A similar issue arises further down the line because PROC reports may not indicate a reason for non-votability. This might be of concern for the House as a whole if a member seeks to appeal PROC’s decision, but the basis for this decision are not available to the House for its consideration. Practically, however, the lack of public SMEM report coupled with the lack of reasons for PROC’s conclusion as to votability allows for speculation as to why a bill was designated non-votable. From a political perspective this is perhaps advantageous as it provides cover for whatever considerations may have fuelled a particular decision. From a legal standpoint, however, this state of affairs provides little means of assessing the extent to which legal considerations proved determinative in the committee’s work and fewer means by which to evaluate the committee’s understanding of the state of the law.

While it is clear from the record that SMEM has found bills non-votable because of Charter concerns, it is not possible to conclude definitively that PROC has done so as well. In fact, from the record alone it is possible to draw the opposite conclusion: Technically speaking, PROC has never reported that it has deemed a bill non-votable on the basis that it clearly violates the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms.

G. Senate Public Bills

Senate public bills – public bills initiated by a Senator who is not a minister – are not reviewed by any committee before they can be debated on the floor of the Upper House. Indeed, no formal review process exists at any point in the Senate’s consideration of such legislation.

177 Indeed, this was the only example found.
178 Evidence, Standing Committee on Procedure and House Affairs, 41st Parl, 1st Sess, No 68 (27 March 2013).
179 Evidence, Standing Committee on Procedure and House Affairs, 41st Parl, 1st Sess, No 4 (20 October 2011).
181 Supra note 176.
If a Senate public bill is passed and a message is sent to the House seeking concurrence, the bill is sent to SMEM for review. However, unlike the SMEM review of PMBs introduced in the House, Senate bills are reviewed by only one criterion: “whether a similar matter has been voted on by the House in the same Parliament”.\(^\text{182}\) Thus, Senate public bills are not reviewed for Charter compliance by any formal mechanism at any point in their journey through Parliament.

As is the case for all bills, witnesses may speak to the constitutionality of proposed legislation during the committee process, and this may be a particular focus of Senate committee study.\(^\text{183}\) Further, it is probable that a drafter would signal to the sponsoring Senator that a concern existed with regard to the constitutionality of his or her proposal. However, the current Parliamentary process does not require formalized review by any actor for Senate public bills prior to passage, except on the off-chance that such a bill were introduced by a Minister in the House, in which case it would be subject to the s. 4.1 requirement.

**H. MIGHT CHARTER COMPLIANCE INFLUENCE VEHICLE CHOICE?**

While Table 1, *supra*, demonstrated that most pieces of legislation receiving Royal Assent in the Charter era take the form of a government bills introduced in the House of Commons, a separate set of figures warrants consideration:

**TABLE 4: PERCENTAGE OF BILLS RECEIVING ROYAL ASSENT 1984-PRESENT BY BILL TYPE**

<table>
<thead>
<tr>
<th>Bill Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>House Government</td>
<td>80.63</td>
</tr>
<tr>
<td>House PMB</td>
<td>8.27</td>
</tr>
<tr>
<td>Senate Government</td>
<td>5.97</td>
</tr>
<tr>
<td>Senate Private</td>
<td>3.37</td>
</tr>
<tr>
<td>Senate Public Bill</td>
<td>1.76</td>
</tr>
<tr>
<td>House Private</td>
<td>0</td>
</tr>
</tbody>
</table>

These figures illustrate that close to one-fifth of all bills (19.37%) receiving Royal Assent in the post-Charter era were not Government bills introduced in the House and that 13% overall were not government bills of any kind.

If one looks at the most recent Parliament, however, the percentage of non-government bills passed is particularly striking. For the 41\(^\text{st}\) Parliament, over a quarter (27.81%) of all bills passed were not government bills at all and therefore not subject at any time to s. 4.1 review.


\(^{183}\) *Supra* note 128.
Historically speaking, many PMBs have been passed whose sole function was to change the title of an electoral district and this may inflate numbers in Parliamentary sessions where electoral boundary readjustment occurred. However, no Royal Assent-receiving PMB was passed in the 41\textsuperscript{st} Parliament, 2\textsuperscript{nd} Session in this regard. Indeed, the list of Royal Assent-receiving PMBs from the most recent session reveals an array of substantive topics, such as the \textit{Disability Tax Credit Promoters Restrictions Act},\textsuperscript{184} \textit{Employees' Voting Rights Act},\textsuperscript{185} and the \textit{Indian Act Amendment and Replacement Act}.

Considering that the Government enjoyed a majority in the House throughout the duration of the 41\textsuperscript{st} Parliament, the relatively high number of assented to PMBs invites inquiry as to whether PMBs might be used to advance what would otherwise be introduced as government legislation.\textsuperscript{187} It should be recalled that only the Government may avail itself of both government bills and PMBs from its party members, whether introduced as PMBs in the House or as Senate public bills in the Senate and sponsored by members of the government party upon their arrival in the House.

A full discussion of the potential reasons for such strategic use of PMBs and Senate public bills by the government is beyond the scope of this paper, though it is worth considering whether any differences in Charter vetting standard or procedure might influence the choice of legislative vehicle. As the preceding sections demonstrated, PMBs are only reviewed by the “clearly violates” standard and Senate public bills receive no such formalized review, compared with s. 4.1 “inconsistency” review when government bills are introduced in the House.

A government choosing between a PMB, Senate public bill, and government legislation to advance its aims might well consider matters other than Charter compliance standards. For example, PMBs and Senate public bills can only be advanced or moved back so much once scheduled for debate in the House, unlike the great flexibility the government enjoys with respect to government bills. As well, both PMBs and Senate public bills are already time allocated in essence given the limits on debate that exist at each stage of House consideration. That is, because these bills are debated for a maximum of two hours at each stage pursuant to the \textit{Standing Orders}, a government seeking to use hours of the legislative day on other items need

\textsuperscript{184} 62-63 Eliz II, c 7.  
\textsuperscript{185} 62-63 Eliz II, c 40.  
\textsuperscript{186} 62-63 Eliz II, c 38.  
\textsuperscript{187} Kelly Bildook, Address, (House Reforms of the Past: Actions, Outcomes, Lessons Learned) delivered at the Canadian Study of Parliament Group Conference on Parliamentary Reform, Ottawa, 22 May 2015.
not invoke time allocation to limit debate on these matters. From this perspective, Charter compliance may be but one factor among many considered by the government, and more research would need to be done to determine the extent to which this factor alone may be determinative.

The line between government initiative and PMB (or Senate public bill to the extent this is similar) can often be blurred, and a recent procedural development may signal a notable change in Senate practice regarding PMBs and time allocation. In the final days of the 41st Parliament, after the House had risen, the Senate was considering a PMB from the House upon which the government sought to invoke time allocation. Given that the Rules of the Senate only provide for time allocation on matters of government business, the Speaker of the Senate disallowed the motion, ruling that “The motion before the Senate does not respect the fundamental distinction between Government Business and Other Business. [...] [T]o use a government motion to determine the dispatch of non-government business violates a fundamental distinction in our Rules and practices.”188 The Government majority then voted to overturn the Speaker’s Ruling, passed a separate time allocation motion to limit time on the debate of the original time allocation motion, and, upon expiry of time allocation, subsequently forced the bill to a vote.189

Whether used to advance government policies or not, if the passage of PMBs and Senate public bills is on the rise, one might seek to pay extra attention to these vehicles and how bills introduced under these rubrics are assessed for Charter compliance. This may be a particular area of interest as the House of Commons expands by 30 Members to a total of 338 MPs with the start of the 42nd Parliament, thereby increasing the number of Members eligible to introduce PMBs. As well, any change in Senate practice – such as the use of time allocation by the government on PMBs, and possibly even Senate public bills – may factor into any calculus regarding legislative vehicle choice.

I. PRIVATE BILLS

Private bills are relatively rare in modern Parliamentary practice and not a single one has been introduced in the House of Commons in the Charter era. Unsurprisingly, there is a little scholarship on how they are reviewed for Charter compliance. However, an oft-ignored mechanism exists relative to these bills that deserves discussion and consideration.

188 Senate, Journals of the Senate, 41st Parl, 2nd Sess, no 160 (26 June 2015) at 2109.
189 Senate, Journals of the Senate, 41st Parl, 2nd Sess, no 162 (30 June 2015) at 2125-2126.
The *Supreme Court Act* allows for references regarding private bills to originate from the House or the Senate. Specifically the statute provides in section 54 that:

The Court, or any two of the judges, shall examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons.\(^{190}\)

This provision – as it existed at the time – has been used thrice, all in the 19th Century. These cases, one from 1876 and two from 1882, all concern private entities being incorporated by statute.

1. **Brothers of the Christian Schools**

In 1876, the Senate considered *An Act to incorporate the Brothers of the Christian Schools in Canada*. The Senate Debates indicate that the Minister of Justice first raised the primary concern about the bill’s constitutionality and is quoted as saying he would turn his attention to it, “possibly consulting the Supreme Court”.\(^{191}\) A Senator countered that, “If the Supreme Court were to be consulted in this matter, let it be consulted by reference from this House. The Minister of Justice ha[s] no right to submit the case to the Supreme Court unless it were given into his hands, and it would be better to make the reference directly”.\(^{192}\)

At the heart of the matter was whether the legislation was provincial or federal. Concern existed because such organizations had been incorporated by provincial acts in some provinces and there was disagreement about the effect a similar federal act would have, particularly in respect of provinces with an overlapping incorporation act. It was noted in debate that this was the first time since the passage of the *Supreme and Exchequer Court Act*\(^ {193}\) that Parliament was empowered to make such a referral and that “it would cause very much less delay to have this Bill referred to them for such a decision than by any other course that could be taken”.\(^ {194}\)

After debate, a motion was adopted on division:

That the question be not now put, but the Bill be referred to the Judges of the Supreme Court for their opinion, whether it is not a measure which falls within the class of subjects exclusively allotted to Provincial Legislature, under Section 92, subsection 11 of the *British North America Act* 1867, relating to “The Incorporation of Companies with Provincial objects?” and section 93 relating to Education.\(^ {195}\)

\(^{190}\) *Supreme Court Act*, RSC 1985, c S-26, s 54.

\(^{191}\) *Debates of the Senate*, 3rd Parl, 3rd Sess, vol 1 (4 April 1876) at 286 (Hon. Mr. Scott).

\(^{192}\) *Debates of the Senate*, 3rd Parl, 3rd Sess, vol 1 (4 April 1876) at 287 (Hon. Mr. Bellerose).

\(^{193}\) *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, 38 Vict, c. 11.

\(^{194}\) *Debates of the Senate*, 3rd Parl, 3rd Sess, vol 1 (31 March 1876) at 258 (Hon. Mr. Dickey).

\(^{195}\) Senate, *Journals of the Senate*, 3rd Parl, 3rd Sess, vol 1 (4 April 1876) at 155.
The feeling, as Senator Scott indicated, was that “If this legislation could be had through the Federal Parliament, the best plan would be to introduce a general law under which all bodies seeking these powers might be incorporated”. Similarly, as Senator Odell noted, the private entities at issue would benefit from certainty in the law because, “It would be very inconvenient and very embarrassing were a question as to the legality […] arise, and they should find the law which they believed to be their safeguard to be unconstitutional and inoperative”.

The resulting Supreme Court opinion, *Re Brothers of the Christian Schools in Canada*, was two paragraphs in length. In the first, Supreme Court Justices Strong and Fournier provided an answer to the constitutional question:

> In pursuance of the order of reference of your Honourable House of the fourth day of April, 1876, we have considered the bill intituled "An Act to incorporate the Brothers of the Christian Schools in Canada," and we are of opinion that it is a measure which falls within the class of subjects exclusively allotted to provincial legislatures under section 93 of "The British North America Act, 1867."

The second paragraph – neither indicated as a dissent or concurrence – is attributed to Justice Ritchie and speaks to the reference process:

> I doubt if the legislature, by the 53rd section of the "Supreme and Exchequer Courts Act," intended that the judges should, on the reference of a private bill to them, express their opinion on the constitutional right of the Parliament of Canada to pass the bill, and, for that reason, I have not joined in the accompanying opinion, and not because I differ from the conclusion of the learned judges who have signed it.

Justice Ritchie’s doubt as to whether the reference matched the intention behind the provision authorizing it is interesting because there is no indication that the Senators debating the referral were concerned with anything other than ascertaining the constitutionality of the legislation, and there seems to be no question as to the Court’s ability in this regard.

Further, Justice Ritchie’s concern regarding the intent of the Supreme Court legislation could perhaps have been addressed with his colleagues, Justices Strong and Fournier, who each had a hand in its creation. Justice Sir Samuel Henry Strong, for his part, “as a legal adviser to Prime Minister John A. Macdonald, […] worked on a legislative proposal for the creation of a national supreme court.” Similarly, Justice Télesphore Fournier had served as Minister of Justice and Attorney General from July 1874 to May 1875, and, in fact, “on April 8, 1875, when he was

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196 *Debates of the Senate, 3rd Parl, 3rd Sess, vol 1* (4 April 1876) at 286 (Hon. Mr. Scott).
197 *Debates of the Senate, 3rd Parl, 3rd Sess, vol 1* (4 April 1876) at 289 (Hon. Mr. Odell).
198 *Re Brothers of the Christian Schools in Canada*, 1876 CarswellPEI 1, Cout. Dig. 1.

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Minister of Justice, the bill creating the Supreme Court of Canada was adopted”. The Government in which he sat, then serving as Postmaster General, appointed him to the Supreme Court in September of 1875.

While we might today question whether two individuals responsible for legislation should hear matters brought under that legislation rather than recuse themselves, this concern does not find expression in the Parliamentary record. Indeed, once the Court’s opinion was transmitted to the Senate and recorded in the Journals, it appears the legislation was never raised again in debate.

2. **QUEBEC TIMBER COMPANY**

In 1882, the Senate’s discussion of private legislation to incorporate the Quebec Timber Company raised a number of issues. First was whether the Company, which had been incorporated in Scotland by an Act of the Imperial Parliament, continued to have such corporate status by virtue of that legislation in Canada. Second, if so, could the company have a second corporate status conferred by the Parliament of Canada? Third, concern existed as to whether certain powers that would be granted through incorporation were indeed federal or provincial.

When these issues were raised at Second Reading, consensus existed to refer the matter to the Committee on Standing Orders and Private Bills. Three days later, the Committee reported back to the Senate that:

> [T]he doubts which have arisen as to the jurisdiction of Parliament to legislate, as is in the said Bill proposed, are sufficiently serious to make it expedient to obtain, before proceeding further with the Bill, the report of the Supreme Court, or two Judges thereof, under the 33rd Section of “The Supreme and Exchequer Court “Act” [sic].

The report included the recommendation that “the Senate, under its 55th Rule, do refer the Bill to the Supreme Court to examine and report thereupon” and provided specific questions. This report was adopted by the Senate without debate, and thus it was ordered by the Senate on 24 March 1882 that the legislation “[b]e referred to the Supreme Court of Canada to examine and

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202 Ibid.


205 Supra note 203.

206 Ibid.

report thereon, as recommended in the Report of the Committee on Standing Orders and Private Bills”. 208

The Supreme Court issued its report209 several days later, on 29 March, entitled In re The Quebec Timber Company.210 The opinion, attributed to “The Court” – which included then-Chief Justice Ritchie and Justice Fournier – is notable for several reasons.

First, the Court does not answer the first question posed to it – namely, whether the Imperial act remained valid. As the Court wrote: “The court pray to be excused from answering this question, on the ground that the question affects private rights which may come before it judicially, and which ought not to be passed upon without a trial”. 211 While this first question goes unanswered, the second was found unclear by the Court:

As to the second part of the question, “Whether a second corporate existence can, upon its own application as a company, be given to it by the Canadian Parliament?” — this court presumes means — Whether the Dominion Parliament can give the company corporate existence in Canada? The court are of opinion that the Dominion Parliament can incorporate such a company for objects coming within the jurisdiction of the Parliament of the Dominion.212

Finally, the constitutional question was answered as follows: “The court are of the opinion that the objects mentioned in this bill are within the jurisdiction of the Dominion Parliament, and are out of the exclusive jurisdiction of the Legislature of the Province of Quebec”. 213

Though the Supreme Court had cleared the way for the legislation, the Senate still needed to dispose of it. In doing so, the Committee on Standing Orders and Private Bills reconsidered the bill and reported it to the Senate with amendment.214 At Third Reading, concern arose because some powers that would be incorporated – such as those involving the power of the company to seek loans – were not necessarily addressed by the most appropriate subject-matter committee. As such, the Senate adopted a motion referring the bill to the Banking Committee.215

Ultimately, the Banking Committee made amendments to the bill with which the Senate concurred, and the Senate passed the bill. It thus ordered “That the Clerk do go down to the House of Commons and acquaint that House that the Senate have passed this Bill with several amendments”. 216

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208 Ibid.
209 The Supreme Court’s opinion is noted as being a report in the reporting of it (infra at para 6) and presented to the Senate as a report of the Supreme Court. See: Senate, Journals of the Senate, 4th Parl, 4th Sess, vol 1 (30 March 1882) at 158.
210 In re The Quebec Timber Company, 1882 CarswellNat 5.
211 Ibid at 2.
212 Ibid at 3.
213 Ibid at 5.
214 Senate, Journals of the Senate, 4th Parl, 4th Sess, vol XVI (3 April 1882) at 170.
amendments, to which they desire their concurrence”.216 The next day, the House concurred in the Senate amendments.217 After thus having been debated in the House and studied by a House Committee, reviewed by one Senate committee, sent to the Supreme Court, reviewed by another Senate committee, passed by the Senate with amendments and then sent back to the House for concurrence in the Senate’s amendments, An Act to Incorporate the Quebec Timber Company (Limited) received Royal Assent on May 17, 1882.218

3. CANADA PROVIDENT ASSOCIATION

The legislation to incorporate the Canada Provident Association was referred to the Supreme Court on 4 May 1882 for an assessment of its constitutionality on federalism grounds with the hope that the Court could pronounce itself quickly as the legislative session would soon be ending.219 Justices Strong, Henry, Taschereau and Gwynne reported that the bill did not fall within provincial jurisdiction in a one-paragraph statement.220

Chief Justice Ritchie and Justice Fournier provided several paragraphs – also finding the bill not to be within provincial jurisdiction – but they were unprepared to declare certain clauses of the bill intra vires. Specifically:

But we are not, in the very short time allowed us for consideration, prepared to say that so much of section one as enables this company to hold and deal in real estate, beyond what may be required for their own use and accommodation, or so much of section two […] are intra vires of the Parliament of Canada. We think, before a positive opinion is expressed on these clauses, the matter should be argued before the court.221

The Senate subsequently passed the legislation on 12 May 1882.222 It received Royal Assent five days later.223 Parliament was then dissolved in advance of Canada’s fifth General Election, held 20 June 1882.224

4. DISCUSSION

As an initial reflection, it is unclear why these bills – all of which were passed by both houses – were only referred to the Supreme Court by the Senate and not the House of Commons. Further, whereas the judges indicate concerns with not hearing arguments of counsel on such

216 Senate, Journals of the Senate, 4th Parl, 4th Sess, vol 1 (18 April 1882) at 207.
218 45 Vict, c 119.
219 Debates of the Senate, 4th Parl, 4th Sess, vol 1 (4 May 1888) at 580.
220 In re Canada Provident Assn. 1882 CarswellNat 6 at 1.
221 Ibid at 3-4.
222 Senate, Journals of the Senate, 4th Parl, 4th Sess, vol XVI (12 May 1882) at 316.
223 An Act to incorporate the Canada Provident Association, Vict 45, c 107.
224 Canada Gazette, No 47, vol XV, (20 May 1882) at 1.
referred matters, it is not clear that the Supreme Court could not have heard arguments on the references if it so desired, with the possible exception of the rapid timeline for consideration sought in the *Canada Provident Association* reference. Finally, it should be remembered that these referrals were all voluntary on the part of the Senate in that they were not required by a formalized process, though were sought through one.

Difficulties existed with the early work of the Supreme Court, and it may have been that the lack of detailed reasons for the court’s decisions did not lead to a feeling among Senators that the reference process for private bills was particularly useful in informing their understanding of Parliament’s legislative authority. This may explain, in part, why only three such references occurred through this process. Though Private Bills have become increasingly rare as well, it is notable that an explicit reference process remains codified in the *Supreme Court Act* and is provided for by the *Rules of the Senate of Canada*, a document oft-updated:

11-18. At any time before the adoption of a private bill, the Senate may order that it be referred to the Supreme Court of Canada for examination and an opinion on any point identified in the order of reference to the court.\(^{225}\)

Curiously, so little is said about these references that perhaps Parliamentarians are not aware of the process; little is said about it in the reference guides for Parliamentarians. For example, the *Companion to the Rules of the Senate* from 2013 only says the power is “seldom-used” and finds expression also in the *Supreme Court Act*. The 2015-released *Senate Procedure and Practice* notes the reference power but does not provide examples of its use.\(^{226}\) *House of Commons Procedure and Practice* does not mention the Supreme Court reference process in its discussion of private bill practice.

The three references in this regard, of course, pre-date the *Canadian Charter of Rights and Freedoms*. However, it would flow that questions on the *Charter* compliance of a private bill could be referred to the Supreme Court through the provision in the *Supreme Court Act*.\(^{227}\) The conclusion, both curiously and perhaps paradoxically, is that the most direct and fulsome means by which Parliament can authoritatively appraise itself of a bill’s constitutionality – namely, by hearing from the Supreme Court directly – can only be accomplished in the context of its least-used legislative vehicle. Whether this power should be expanded to include PMBs or other legislation is something Parliament may seek to consider.

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\(^{225}\) *Rules of the Senate of Canada*, Rule 11-18.

\(^{226}\) *Supra* note 12 at 251.

\(^{227}\) *Supra* note 190.
J. SUBSTANTIVE MOTIONS

Several varieties of motions exist within Parliament and present a problem for discussion within the rubric of provenance (i.e. government vs private members). Generally speaking, motions would not pose a Charter problem because they are not legally binding and only express the view of the House or Senate at a given time. However, there are possible issues that may arise depending on what the motion itself seeks.

Motions from the government are not subject to s. 4.1 review because the statute mentions only bills. In terms of process, however, a substantive government motion might still be reviewed at the Department of Justice. Otherwise, only motions introduced in the House by private members are subject to any formal Charter review. The SMEM criteria are applied, though it is understood the application is necessarily different given the non-legally binding nature of motions. As the Library of Parliament Analyst explained during one SMEM meeting:

This motion does concern a question that is outside federal jurisdiction. I want to point out to the committee, however, that a motion only expresses the views of the House and does not have any legal implications. Generally, the House has the capacity to consider any matter and express its view on it. Otherwise, the motion does not clearly violate the Constitution Acts. It does not concern a question that is substantially the same as one already voted on by the House of Commons. It does not concern a question that is currently on the order paper or notice paper.228

As such, though the criteria technically apply, the committee does not necessarily consider them applicable, as in the motion discussed in the excerpt. Indeed, the committee allowed it to continue.229

Though the circumstances might rarely arise, motions may invite constitutional challenge. Indeed this has occurred; the prime example would be the resolution – introduced by way of a motion – to patriate the Constitution. Provinces challenged the federal government’s proposal as presented in Parliament, and the result of these challenges was the decision in Re: Resolution to amend the Constitution, which provided the way forward for Parliament when the Charter was added.230 To the extent that a resolution could impact upon the constitutional order, this should perhaps be considered by Parliament through formalized means.

Indeed, this issue may arise in the on-going context of Senate reform discussions. Although the Supreme Court has clarified the process by which certain Senate reforms might be

229 Ibid.
230 Re: Resolution to amend the Constitution, [1981] 1 SCR 753.
accomplished, many require use of the referendum process. Suppose that the House were presented with proposed resolution (by way of a motion) seeking a referendum. If this motion, presumably introduced by the government, failed to conform with the *Referendum Act*, the Supreme Court’s ruling, or meet the requirements (if applicable) of *An Act respecting constitutional amendments*, Parliament would not be informed by any formalized process since none exists with respect to substantive motions introduced by the government.

**K. CONCLUSION: COMPARISON OF FORMALIZED REVIEW**

A comparison of the various reviews herein discussed yields several principle points of divergence, illustrated in the below table.

**TABLE 5: FORMALIZED CHARTER REVIEW WITH THE PARLIAMENTARY PROCESS**

<table>
<thead>
<tr>
<th>Item</th>
<th>Process</th>
<th>Product</th>
<th>Review Question</th>
<th>Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government Bill</td>
<td>Section 4.1 review concurrent</td>
<td>Report of Inconsistency</td>
<td>Is there “inconsistency” with</td>
<td>Counsel at the Department of Justice, Minister of Justice</td>
</tr>
<tr>
<td>introduced in the House</td>
<td>with introduction</td>
<td></td>
<td>the Charter?</td>
<td></td>
</tr>
<tr>
<td>Government Bill</td>
<td>None (Note: Section 4.1 review</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>introduced in the Senate</td>
<td>if later introduced in the House)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PMB introduced in the House</td>
<td>SMEM review before Second Reading</td>
<td>Determination of Non-votability</td>
<td>Does it “clearly violate” the Charter?</td>
<td>MPs on SMEM, assisted by Analyst</td>
</tr>
<tr>
<td>Senate Public Bill</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>Two or more Justices of the Supreme Court of Canada</td>
</tr>
<tr>
<td>Private Bill</td>
<td>Supreme Court of Canada Reference (if desired)</td>
<td>Decision of the Supreme Court of Canada</td>
<td>Is it constitutional?</td>
<td></td>
</tr>
<tr>
<td>Motion</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

As the foregoing illustrates, depending on the legislative vehicle, various actors apply different standards of *Charter* review at different points in the process with varying outputs. This is distinct from any *Charter* review that may occur during the drafting process.

Perhaps most notable is the difference in essential review questions between what the Court would ask itself on a private bill reference versus what Parliamentarians seek through SMEM and s. 4.1 review. On this point, it is perhaps useful to consider a conclusion of James B. Kelly and Christopher Manfredi:

> [T]he *Charter* has produced two approaches to governing with rights: parliamentarians who govern like judges when they design legislation that is constitutionally compliant and members of the judiciary who govern like parliamentarians when they base constitutionality on the reasonable limits clause of the

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233 *Supra* note 231.
235 It should be recalled that the Supreme Court has not heard a private bill reference in the *Charter* era; however, presumably the Court would consider the *Charter* implications of any private bill or private bill petition referred.
Ultimately, only in the case of a bill deemed non-votable by SMEM – and with PROC and House concurrence – does an adverse Charter finding nominally prevent the bill from further advancing through the legislative process. A bill accompanied by a s. 4.1 inconsistency report may continue to be adopted as is, as could a private bill after an adverse Supreme Court reference – though presumably amendments would be sought on both. Whether the current procedural restrictions are appropriate to ensure Charter compliance is something Parliament may consider if it so chooses.

As a concluding note, if Parliamentarians are on the same page, all things are possible. This means suspending existing rules (such as those on non-votability), or potentially bypassing any new procedural restrictions in Charter matters. To illustrate the power of unanimous consent, consider two recent examples: First, a unanimous consent motion took a bill never debated on the floor of the House, amended it, and passed it through the legislative process on the House side all without any debate occurring. A second such unanimous consent motion split a bill in two and passed the contents of the first bill immediately while allowing the second to remain on the Order Paper. The point is that no matter how robust or intricate a Charter regime is designed – no matter the questions posed or the actors – the authority rests with Parliament to enact legislation as it sees fit.

**PART II: FIXING CHARTER DEFECTS: PROCEDURAL ISSUES**

**A. LIMITATIONS ON COMMITTEE AMENDMENTS**

Regardless of how or where a Charter defect has been identified during the course of a bill’s journey through Parliament, in theory there is always a way to amend any provision before Royal Assent, particularly given the power of unanimous consent. Absent unanimous consent or

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237 House of Commons, Journals, 41st Parl, 1st Sess, No 272 (18 June 2013) at 3441 (“Bill C-32, An Act to amend the Civil Marriage Act, be (i) deemed read a second time and referred to a Committee of the Whole; (ii) deemed considered in a Committee of the Whole and reported with the following amendment: “That Bill C-32, in Clause 4, be amended by replacing line 10 on page 3 with the following: “consent, on presentation of an order from the court or a””, (iii) deemed concurred in at report stage, as amended, and deemed read a third time and passed”).

238 House of Commons, Journals, 40th Parl, 3rd Sess, No 65 (17 June 2010) at 561-564.
majority will, however, there may be important limitations on the ability of Parliamentarians to cure defects, or even to debate them. This is significant to the extent that any compliance system is premised on the notion that Charter salvage is always possible.

Generally speaking, amendments to bills are debated in the House during committee consideration (apart from SMEM/PROC consideration) or at Report Stage. Similarly, Senate legislative committees have the power to propose amendments. Each Chamber has slightly different amending rules in theory, though the principles of admissibility are roughly equivalent. When an amendment is inadmissible, the sponsor may speak to it upon introduction, but no further debate or vote on it are allowed once a chair finds it inadmissible. It takes a majority decision to overturn the ruling of the chair on admissibility, and unanimous consent for certain actions, such as reopening a clause. This combination of restrictions may be significant where members may wish to raise and discuss a Charter issue, but might be procedurally limited in their ability to do so.

The amending practices of the Senate and House of Commons are outlined in Senate Procedure in Practice and House of Commons Procedure and Practice. Generally speaking, these rules guide the admissibility advice that committee clerks would provide to committee chairs as well as to legislators presenting amendments. A Chair may depart from that advice and committees can and do overturn admissibility decisions of their Chairs. Because such great flexibility exists within the rules and their interpretation, the following discussion is slightly more theoretical than practical. However, from a Charter perspective, it is important to consider the consequences that might arise from a strict interpretation of the various amending rules.

Although there is a set order by which clauses in a bill are considered – and some initial clauses are considered at the end – there is no order in which amendment issues are ruled upon. That is, rulings happen as amendments are moved and any amendment may raise multiple admissibility concerns or none at all. As such, it is not possible to order the items below in a way that reflects the order in which they might arise during a committee’s consideration of a bill, or even to determine the relative likelihood of each being the reason for an amendment being found inadmissible. As such, they are presented in an order that allows for convenience of argument.

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239 Supra notes 12 and 13.
B. Principle and Scope

According to *House of Commons Procedure and Practice*:

An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill. (This rule does not apply to a bill referred to a committee before second reading, since the principle of the bill has not yet been agreed to by the House.) Similarly, an amendment which is equivalent to a simple negation of the bill or which reverses the principle of the bill as agreed to at second reading is out of order.\(^\text{240}\) [Internal citation omitted]

An equivalent rule exists in *Senate Procedure in Practice*: “An amendment must respect the principle and scope of the bill, and must be relevant to it”.\(^\text{241}\) As *Senate Procedure in Practice* explains:

> Amendments must respect the objectives of the bill. In dealing with these issues, it may be necessary to perform the delicate task of trying to identify the fundamental policy and goals behind the bill. In so doing, factors such as the long title of the bill, its content and debate at second reading may be taken into account.

> Notwithstanding the above, it is possible for a bill to undergo significant amendment in committee, provided that the text reported back to the Senate continues to respect the decision of the Senate at second reading (i.e., that the amendments do not violate the principle or scope of the bill and are relevant to it). Beauchesne notes that “[t]he committee may so change the provisions of the bill that when it is reported to the House it is in substance a bill other than that which was referred. A committee may negative every clause and substitute new clauses, if relevant to the bill as read a second time”.\(^\text{242}\)

The principle and scope amendment restriction may be the most significant as regards curing a potential *Charter* defect. Consider the case of a bill that, among other things, imposes a mandatory minimum penalty. Given that the application of mandatory minimum penalties may violate the *Charter* in some circumstances,\(^\text{243}\) a member may propose an amendment modifying such a sentence. The principle and scope restrictions, however, have rendered inadmissible amendments seeking to make a proposed mandatory minimum penalty discretionary,\(^\text{244}\) as well as amendments eliminating them from proposed legislation altogether.\(^\text{245}\)

While the foregoing represents an effort to mitigate a specific *Charter* issue, efforts at general *Charter* compliance may also be impacted by rulings on principle or scope. For example,

\(^\text{240}\) *Supra* note 13 at 766.
\(^\text{241}\) *Supra* note 12 at 141.
\(^\text{242}\) *Supra* note 12 at 141.
\(^\text{244}\) See, for example, Evidence, *Standing Committee on Justice and Human Rights*, 40th Parl, 3rd Sess, No 49 (16 February 2011) at 11 (“Bill C-54 amends the Criminal Code to increase or impose mandatory minimum penalties for certain sexual offences involving children. This amendment proposes to allow for the court to exercise its discretion and select a lesser punishment than the minimum provided for by the bill. […] In the opinion of the chair, the introduction of the concept of discretion is contrary to the principle of Bill C-54 and is therefore inadmissible”).
\(^\text{245}\) See, for example, Evidence, *Standing Committee on Justice and Human Rights*, 41st Parl, 1st Sess, No 40 (31 May 2012) at 1 (“This amendment proposes to delete the mandatory minimum sentence. […] An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill. In the opinion of the chair, the deletion of the key element is contrary to the principle of Bill C-299 and is therefore inadmissible”).
recent national security legislation attracted various Charter concerns. An amendment that would have allowed for oversight – and thereby perhaps increased Charter protection – was also thwarted by the principle and scope rule:

**The Chair:** […] The amendment seeks to create a parliamentary committee on security and intelligence oversight, which would have as its mandate oversight of regulations and activities in the area of intelligence. The mandate would include activities and regulations from all departments, agencies, and civilian and military bodies involved in the collection, analysis, and dissemination of intelligence related to Canada's national security. As House of Commons Procedure and Practice, second edition, states on page 766:

An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill.

In the opinion of the chair, and of course on the advice of our legislative clerk, the mandate of this proposed committee is much broader than what was envisioned and contained in Bill C-51, and it is therefore beyond the scope of the bill. Therefore I rule the amendment inadmissible.\(^{246}\)

In other circumstances, principle and scope may limit the ability of Parliamentarians to ensure adequate consultations have occurred, whether on Charter or other issues. Consider the following ruling regarding coming into force:

**The Chair:** […] I am, on the advice of the legislative clerk, ruling this proposed amendment out of order. Clause 122 provides for the coming into force of certain sections by order of the Governor in Council. The amendment seeks to make the coming into force of the bill conditional to the coming into force of the accord between the Government of Canada and the Government of Quebec for the shared management of petroleum resources in the Gulf of St. Lawrence.

As House of Commons Procedure and Practice, Second Edition states, on page 769:

An amendment intended to alter the coming into force clause of a bill, making it conditional, is out of order since it exceeds the scope of the bill and attempts to introduce a new question into it.

Following the opinion of the clerk, which I fully support, I am ruling this amendment out of order.\(^{247}\)

While it may seem somewhat incongruous to suggest that somehow delays or consultations could cure Charter defects, consider *An Act to amend the Liquor License Act 1883*.\(^{248}\) Section 23 of the Act as passed read as follows:

Whereas doubts have arisen as to the power of the Parliament to pass “The Liquor License Act, 1883” and the amendments thereof contained in this Act, it is therefore enacted, that until the question of the competence of the Parliament of Canada to pass the said Act, and this Act, be determined as herein provided, no prosecution for the infringement or violation of the said Liquor License Acts shall be instituted […]


\(^{247}\) Evidence, Standing Committee on Natural Resources, 41st Parl, 2nd Sess, No 12 (11 February 2014) at 10.

\(^{248}\) *An Act to amend the Liquor License Act 1883*, 47 Vict c 32.
And for the purpose of having the said question determined as soon as possible, the Governor in Council may refer to the Supreme Court of Canada, for hearing and determination, the said question as to the competence of Parliament to pass the said Acts, in whole or in part [...] 249

Though this statute provision is somewhat extraordinary in that it suspended application of a law until a Supreme Court of Canada reference could occur, the issue is that moving an amendment to this same effect today would likely contravene the rule prohibiting conditional coming-into-force amendments as being beyond the principle and scope of legislation.

Similarly, amendments that might provide for specific rights beyond the initial legislation may run afoul of the principle and scope rule:

The Chair: [...] Bill C-11 amends the Copyright Act to update the rights and protections of copyrights owners. The amendment attempts to insert into the bill various rights of resale, including royalties of the original author of a work, and as House of Commons Procedure and Practice, second edition, states on page 766, “An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill”, it is the opinion of the chair that the introduction of resale rights for original authors of a work is a new concept that is beyond the scope of Bill C-11 and is therefore inadmissible.

With that, there is no further discussion on the amendment. 251

This example, while not of a Charter defect, is significant because adding rights may be one way to cure a defect. For example, if some scheme were attacked for not affording enough protection to a person subjected to it, an amendment might be moved to establish a right of appeal or review that could perhaps address this defect. The general rule is that such an amendment would be a new concept and therefore inadmissible.

As a related note, Senate Procedure and Practice includes relevance with its discussion of principle and scope, House of Commons Procedure and Practice provides it as a specific admissibility consideration, with a focus on the ‘parent act rule’:

Relevance: An amendment to a bill must be relevant in that it must always relate to the subject matter of the bill or to the clause thereof under consideration. In the case of a bill referred to a committee after second reading, an amendment is inadmissible if it proposes to amend a statute that is not before the committee or a section of the parent Act, unless the latter is specifically amended by a clause of the bill. Conversely, an amendment of that nature would be admissible in the case of a bill referred to a committee before second reading, as long as the amendment was relevant. In that case, the principle and scope of the bill would not yet have been defined, making a broader examination possible [internal citations omitted]. 252

From time to time, proposed amendments may seek to make changes to other acts and are found inadmissible. 253 As noted previously, it may be that a Charter issue arises out of the interplay

249 Ibid at s 26.
250 See also infra note 313.
251 Evidence, Legislative Committee on Bill C-11, 41st Parl, 1st Sess, No 10 (12 March 2012) at 3.
252 Supra note 13 at 766-767.
253 House of Commons Debates, 41st Parl, 1st Sess, No 78 (1 May 2014) at 4787-4788.
between statutes and therefore a committee may not be able to cure a *Charter* issue as directly as it may wish.

C. **INTERPRETATIVE CLAUSES**

As *House of Commons Procedure and Practice* explains:

The interpretation clause of a bill is not the place to propose a substantive amendment to a bill. In addition, an amendment to the interpretation clause of a bill that was referred to a committee after second reading must always relate to the bill and may neither exceed the scope of nor be contrary to the principle of the bill. This rule does not apply to a bill that has been referred to a committee before second reading.\(^{254}\)

Interpretation clauses often assist Courts in their understanding of legislative intent. Members who seek to clarify how a bill ought to be applied to rectify a *Charter* concern might face difficulties if amendments to such a clause are inadmissible. As the following example illustrates, difficulties may arise in addressing interpretation issues:

**Ms. Megan Leslie:** Thank you, Mr. Chair. This would actually remove the word “disadvantaged” from this definition. It's the word “disadvantaged” in reference to people with a physical disability. This was actually raised directly with us by a witness, recognizing that while people with physical or mental differences may face greater challenges or face more barriers than other people, they shouldn't necessarily be equated with a disadvantage. We really welcomed that feedback from the community and we're moving to remove the word “disadvantaged”.

**The Chair:** Okay, thank you. I'm going to rule this amendment out of order. This amendment seeks to make substantive modification to the definition of accessible housing in the interpretation clause. […]

**Ms. Megan Leslie:** Thank you, Mr. Chair. I am a bit new to parliamentary procedure, so I'm looking for guidance. The ruling is that it's out of order. I'm wondering, if there were to be unanimous consent from this committee to agree that despite it being out of order this is very important to the bill and important to various disability communities, would it be possible, with unanimous consent, to get around this somehow?

**The Chair:** My understanding is that the only way this could happen is if you were to challenge the chair. […]

**Mr. Brian Jean:** As you know, Mr. Chair, I'm always challenging you. I'm just wondering if the clerk can tell us about the constitutionality of this particular clause. I haven't seen the whole clause, but it might be inclusive, whether or not it's mentioned as a result of constitutional issues that have risen again. And I'm not sure what clause it refers to, but it might in fact be…. The Supreme Court has ruled in relation to various sections of this, including child of a marriage.

**The Chair:** I don't think they're prepared to give advice on constitutionality. […]

**Mr. Gerard Kennedy:** Just for other times, and also for the edification of the…. The disability community would like to see different language start to work its way in. And I'm wondering if there's a little bit of guidance in terms of…. I know this is a restrictive area of the bill, the definition section, but is it possible, for future work, that some further detail could be provided on this part in terms of why the ruling was made, and so on?

\(^{254}\) *Supra* note 13 at 769.
The Chair: Once again, if it had been part of the original bill, there would be no issue. Now that it's gone past second reading, we can't go back and change definitions. As I understand it, there would have been no problem changing the definitions in the original bill as it was presented before second reading. […]

Mrs. Lucie Tardif-Carpentier (Procedural Clerk): If we're able to make an amendment elsewhere in the bill that would make the change in the interpretation clause necessary or admissible—

While a committee could challenge the decision of its chair by majority vote, Parliamentarians may not always understand the processes at play – as illustrated in the exchange – and procedure in this regard may run counter to facilitating easy amendment.

D. CONSISTENCY

Senate Procedure in Practice indicates that “Amendments cannot be contradictory to or inconsistent with the bill as agreed to thus far by the committee.” The issue is that committee decisions happen quickly and sequentially such that members who have admissible amendments may find them inadmissible as clause-by-clause consideration progresses, as illustrated in the following example:

The Chair: On clause 3, there is a proposed amendment. Would somebody be prepared to move that amendment?

Mr. Pat Martin: The amendment is in my name, so I would be prepared to amend clause 3. The recommendation put forward by the official opposition is that in proposed subsection 3.02(1)—

The Chair: Mr. Martin, before you proceed— I apologize for interrupting— I've just been advised by the legislative clerk that if clause 2 was adopted, amendment NDP-1 cannot be put to the table. It is inconsistent with the earlier decision on clause 2. Can you help me with this ruling, please…?

In the interests of consistency, the committee's decisions concerning a bill must be consistent with earlier decisions made by the committee. An amendment is accordingly out of order if it is contrary to or inconsistent with provisions of the bill that the committee has already agreed to, if it is inconsistent with the decision that the committee has made regarding a former amendment, or if it is governed by or dependent upon amendments that have already been negatived. That's the advice that has been given to me by the legislative clerk.

Mr. Pat Martin: We only agreed to it 30 seconds ago. Maybe we could just overlook it this time.

The Chair: I can't ignore the rules, Mr. Martin, so unless there's something else, I would have to rule that it is inconsistent and would be out of order to move at this time. If that's okay, we have to move on. If that's the case, I am going to apologetically rule that the amendment is out of order and call the question on clause 3. […]

The Chair: For clause 6, there is a proposed amendment.

Again, I have the same ruling here, put to me by the legislative clerk: if clause 3 is adopted, then NDP motion 2 cannot be put to the table, as it is inconsistent with an earlier decision that was taken as a result of clause 3, which was inconsistent because of the decision taken on clause 2. Rather than read that same…

ruling into the record, I will have to rule that amendment NDP-2 is inconsistent and therefore cannot be brought forward, so I'll call the question on clause 6.256

As this exchange illustrates, it may be that as a committee progresses in its work, amendments become inadmissible for inconsistency with the committee’s decisions. This reality may not aid members who seek corrective amendments, particularly to several connected sections of a bill.

E. PREAMBLES

Limitations exist on amendments to legislative preambles. As House of Commons Procedure in Practice explains:

In the case of a bill that has been referred to a committee after second reading, a substantive amendment to the preamble is admissible only if it is rendered necessary by amendments made to the bill. In addition, an amendment to the preamble is in order when its purpose is to clarify it or to ensure the uniformity of the English and French versions. If the bill is without a preamble, the committee may not introduce one. In the case of a bill that has been referred to a committee before second reading, if there is not already a preamble, one may be proposed as long as it is relevant to the bill; in addition, substantive amendments to an existing preamble are admissible.[Internal citations omitted]257

Similar restrictions appear in Senate Procedure in Practice.258

The concern from a Charter perspective is the extent to which a preamble may prove important in Section 1 analysis.259 As the government’s Guide to Making Federal Acts and Regulations notes, preambles may “explain matters that support [the legislation’s] constitutionality”.260 Peter Hogg and others observe, there are cases where “[t]he preamble had obviously been inserted with a view to supporting a section 1 justification in the event of a constitutional challenge”.261 It should be recalled, however, that preambles are not determinative in and of themselves and, as a recent Supreme Court dissent explained:

It goes without saying that the courts, in determining whether legislation is constitutionally valid, must look beyond the legislation’s declared or apparent purpose. Were they not to do so, it would be possible for a legislature to shield statutory provisions from constitutional challenge simply by drafting a preamble.262

However useful preambles may be to the Court in determining Parliament’s intent, it must be recalled that these provisions are not open to amendment. Though it is true that Parliament can elect not to pass legislation or that a committee can strike a preamble, the fact that preambles are not open to amendment as other portions of legislation deserves consideration. This may be

256 Evidence, Legislative Committee on Bill C-18, 41st Parl, 1st Sess, No 4 (3 November 2011) at 2.
257 Supra note 12 at 770.
258 Supra note 13 at 143.
particularly true when the preamble is perhaps more important from a Charter perspective than the actual provisions of the bill.

In this regard, consider recently passed Bill C-36, the Protection of Communities and Exploited Persons Act.\textsuperscript{263} The statute’s full title, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts situates it as a response to the Supreme Court’s ruling regarding prostitution related offences, Canada (Attorney General) v. Bedford.\textsuperscript{264} The Bedford decision stuck down the offences in part because the law did not accord with Parliament’s objectives:

The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.\textsuperscript{265}

The responding Protection of Communities and Exploited Persons Act contains a preamble that indicates, among other things, “Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it” and “Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity”.\textsuperscript{266} This text was present in the bill upon its introduction, though Parliament had not declared itself as having “grave concerns” or “recognizing” that which the preamble claims prior to the bill’s introduction.

As the Department of Justice’s technical paper explains with respect to the legislative approach:

Bill C-36 reflects a significant paradigm shift away from the treatment of prostitution as “nuisance”, as found by the Supreme Court of Canada in Bedford, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls. Bill C-36 signals this transformational shift both through its statement of purpose, as reflected in its preamble, and its placement of most prostitution offences in Part VIII of the Criminal Code, Offences Against the Person.\textsuperscript{267}

This “paradigm shift” did not escape scholarly attention:

\begin{footnotes}
\footnotetext[263]{62-63 Eliz. II, c 25.}
\footnotetext[264]{\textit{Canada (Attorney General) v. Bedford}, 2013 SCC 72, [2013] 3 SCR 1101.}
\footnotetext[265]{\textit{Ibid} at 136.}
\footnotetext[266]{\textit{Supra} note 263 at Preamble.}
\end{footnotes}
These exploitation and equality-related objectives would seem considerably weightier than the nuisance-related purposes ascribed to the laws struck down in *Bedford*, and for this reason a section 7 challenge to a law directed at these new objectives would be considerably more difficult to sustain.\(^{268}\)

What weight the Court will give to the preamble in its consideration of sections 7 and 1 when the new law is challenged remains to be seen.\(^{269}\) However, from a Parliamentary practice perspective, this example serves to illustrate how important a preamble may be in *Charter* cases. Yet, as the rules stand now, amendment to a preamble after Second Reading appears largely impossible. The paradox is that while the preamble speaks to Parliament’s concerns, this portion of the bill was not the result of some consensus development by Parliamentarians over the course of the legislative process – rather the conclusions of Parliament in a preamble are most often those provided by its sponsor upon introduction of the legislation as amendment is generally impermissible.

**F. Schedules**

Schedules to bills are amendable under certain circumstances. However, one particular class of unamendable schedule is particularly noteworthy. As *House of Commons Procedure and Practice* explains:

> An amendment may generally be moved to a schedule, and it is also possible to propose new schedules except in the case of a bill giving effect to an agreement (a treaty or convention) that is within the prerogatives of the Crown. If the schedule to such a bill contains the Agreement itself, the schedule may not be amended. Notwithstanding this, amendments may be proposed to the clauses of the bill, as long as they do not affect the wording of the Agreement in the schedule, even if the consequence of the amendments is to withhold legislative effect from all or part of the Agreement.\(^{270}\)

Similarly, *Senate Procedure in Practice* explains that “Schedules are generally dealt with in the same way as clauses. If, however, the schedule contains the text of an agreement that is of independent origin (such as a treaty or convention), it cannot be directly amended”.\(^{271}\)

As such, if a bill implements an agreement containing provisions that may infringe the *Charter*, amendments to the agreement are inadmissible because they are contained in the schedule to the bill. As a recent example in this regard, law professors Allison Christians and

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\(^{268}\) Lisa Dufraimont, “*Canada (Attorney General) v. Bedford* and the Limits on Substantive Criminal Law under Section 7” (2014) 67 SCLR 2d at 502.

\(^{269}\) John Geddes, “How the Justice department sees the new prostitution bill surviving” *Macleans* (13 June 2014) online: <http://www.macleans.ca/politics/ottawa/how-the-justice-department-thinks-the-new-prostitution-bill-will-survive/> (As related by an anonymous Department of Justice official: “So just as the legislative objectives of the existing offences served as a starting point for the Supreme Court of Canada’s Charter analysis in [last year’s Bedford ruling, which struck down the old prostitution laws], so too would Bill C-36’s new legislative objectives, as reflected in the preamble, serve as the starting point for any Charter analysis of the C-36 reforms.”)

\(^{270}\) *Supra* note 13 at 770.

\(^{271}\) *Supra* note 12 at 143.
Arthur Cockfield argue that the Canada–United States Enhanced Tax Information Exchange Agreement Implementation Act, which implements a tax agreement between the United States and Canada “raise[s] a number of serious issues ranging from likely Charter violations to violations of international law”. The agreement in question was in the schedule to the legislation, and therefore not subject to amendment despite serious Charter concerns which are now being litigated.

It is true that a committee may amend the clauses that give effect to the schedule and must vote on the schedule’s inclusion in the statute. Suppose, however, Parliament has an issue with just one line of an agreement contained in the schedule to a bill. If the agreement text cannot be amended, few practical options remain besides voting against the legislation. An amendment to the bill to give effect to only a portion of the agreement would likely be inadmissible because it would exceed the purpose and scope rule (assuming the purpose of the bill were to give effect to the agreement). An interpretive clause that sought to restrict the meaning of the agreement to some subset of the agreement’s text would likely be countered by the rule against amendments to interpretive clauses. Even if there were some other mechanism by which to cure a Charter defect in an agreement through an amendment, that amendment might be caught by the consistency rule because as soon as the bill – as is – had a cause passed that gave effect to the schedule, a subsequent amendment that impacted that agreement’s full implementation would likely be found inconsistent with the vote on the clause implementing the schedule in which the agreement is contained.

G. **CHARTER REVIEW OF AMENDMENTS**

*Senate Procedure in Practice* provides the general guidance that “[t]he Law Clerk’s Office generally drafts amendments that do not originate from the government, while the Department of Justice typically drafts those for the government”. While it may be that members are informed

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277 Supra note 12 at ff74, 140.
of Charter concerns that arise, they retain the ability to put forward the amendments in question. As a result, amendments that are adopted may not pass constitutional muster.

Bills going from the House to the Senate are not subject to any further Charter review. It would be the case, however, that a Senate bill being introduced by a Minister in the House would be subject to s. 4.1 review. Such review would include consideration of any amendments made by the Senate or its committees since these would be reflected in the version as introduced.278

The House has an opportunity to reconsider the work of committees at Report Stage, and it may be that issues of constitutionality are addressed at this point. As a particular example, consider the following two comments in the same Report Stage debate:

**Mr. Rob Moore (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, CPC):** I want to speak to Motion No. 9, which is a serious motion and one I urge all members of the House to consider as it impacts on some very fundamental rights and issues relating even to members of Parliament.

Specifically, the changes brought in by adding two provisions, subclauses 41.4 and 41.5, to the new MP trust fund rules proposed for insertion into the Parliament of Canada Act raise serious legal policy issues regarding the independence of prosecutions from political interference, as well as serious Charter of Rights issues related to the ability to get a fair hearing. They also raise some concern with regard to the Constitution and the division of power. It is for those reasons that the government proposed reversing those amendments.279

**Hon. Vic Toews (Minister of Justice and Attorney General of Canada, CPC):** Mr. Speaker, I would like to raise some concerns that I have with respect to the amendments that were made to Bill C-2 in committee dealing first with subclause 41.4(4). […] I would submit that there is a serious Charter of Rights and Freedoms problem in terms of a fair trial.280

It is unclear whether the Minister’s comments and that of the Parliamentary Secretary reflect a formal review of the bill taking place after committee stage by the Department of Justice. It is possible that such a review occurred, and the Department of Justice has explained that although s. 4.1 does not apply to PMBs:

This is not to say that Private Member’s Bills will not be the subject of legal advice by Department of Justice lawyers to the government. The government may wish to know, for example, the legal impacts that a proposed Private Member’s Bill might be expected to have, whether from a Charter perspective or any other.281

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280 *Ibid* at 2641.
Whether a review of Bill C-2 as amended was requested or not, there is certainly evidence that departments review bills absent a formalized process or request. Further, there are examples of a committee reversing itself when faced with a constitutional question, aided by a Department’s expertise. The issue, however, is that there is no formalized reporting such that parliamentarians would necessarily be aware of a Charter issue raised by an amendment.

To illustrate the contrast here, if the amendment of which Mr. Toews and Mr. Moore spoke had been made to the same bill by the Senate prior to the House receiving the item, it may have resulted in a s. 4.1 inconsistency report. However, because a House committee made the change, no such report is issued, and no further formalized Charter review would occur once the Senate became seized of the matter.

H. DISCUSSION

As demonstrated, procedural rules may limit the ability of committees to consider amendments that cure Charter defects. While it is true that some amendments may be entertained if there is an appetite among committee members to overturn a chair’s ruling or if there is unanimous consent to proceed in a certain way (such as reopening a clause), there remains a very real risk that a committee’s decision may be overturned by the Speaker.

However, it may be unrealistic to expect amendments that cure Charter defects at all. As James Kelly concludes, “[b]ecause of the executive-dominated nature of parliament, the reality is that valid constitutional challenges to legislation raised at the committee stage have a marginal chance of resulting in legislative amendments”. To the extent that other processes – such as s. 4.1 review or SMEM/PROC review – operate under the assumption that changes can be made to legislation later in the process, perhaps more attention should be paid to the procedural ability of committees to amend without resulting to extraordinary measures.

282 For example, the Department of Finance reviews PMBs for their fiscal impact. See: Evidence, Subcommittee on Private Members’ Business of the Standing Committee on Procedure and House Affairs, 38th Parl, 1st Sess, No 5 (13 April 2005) at 1-2 (Hon. John McKay).

283 For example, a clause was reopened and struck after its adoption to address that it may have had an impact on then-ongoing litigation before the Supreme Court. Evidence, Standing Committee on Justice and Human Rights 41st Parl, 1st Sess, No 73 (8 May 2013) at 2-3 (discussion of clause 1).

284 Supra note 253.

B. OTHER PROCEDURAL AND PRACTICAL CONSIDERATIONS

While certain committee amendment rules may run counter to curing Charter defects, other potential procedural impediments equally warrant consideration. Considering and amending a bill does not occur in a vacuum; the legislative calendar can fill quickly and timing considerations may prevent the passage of legislation altogether because of a Charter defect. While this may be desirable to the extent that unconstitutional laws are not passed, timing in relation to procedural issues may prevent the passage of rights-granting or clarifying legislation as well.\(^{286}\) Moreover, a Chamber may, due to timing issues, opt to pass legislation it believes to be constitutionally suspect.\(^{287}\)

A. ABILITY OF INDEPENDENT MEMBERS TO AMEND

The preceding discussion of committee amendment rules presumed that MPs seeking to move amendments at committee were members of that committee or eligible to serve on such committees. This is not the case for independent members and this fact has been commented on by the Speaker at length.\(^{288}\) It may be that Members who are independent cannot even discuss amendments to their bill at the committee stage, let alone propose them.\(^{289}\) Further, while amendments to bills can be moved at Report Stage by independent members, a seconder is required at Report Stage whereas none is required at committee stage.\(^{290}\) As such, while members of recognized parties may have two opportunities to amend their bill (legislative committee and report stage), an independent member may not have the same opportunities to address their legislation.

Recall the above-noted SMEM/PROC view that perhaps their committee’s consideration of a PMB would be the first time a member would be informed of issues in his or her work. Does it make sense to tell the member that there is a problem when the member lacks procedural mechanisms to action the issue directly? If somehow this were to factor into the SMEM/PROC analysis, would members of recognized parties be privileged over independent members in determinations of votability when Charter concerns arose?

\(^{287}\) See especially Reference re Validity of Section 5(a) Dairy Industry Act, [1949] SCR 1 at 3.
\(^{288}\) See especially House of Commons Debates, 41st Parl, 1st Sess, No 197 (12 December 2012) at 13223-13225 (Speaker’s Ruling).
\(^{289}\) Supra note 283 at 1.
\(^{290}\) House of Commons, “Amending Bills at Committee and Report Stages in the House of Commons” (October 2008) online: <http://www.parl.gc.ca/About/House/Bills/AmendingBills-e.html>.
While the sponsor of a bill who is an independent member might be receptive to amendments offered by others to cure a Charter defect, he or she may have a preferred approach that cannot easily be presented for discussion let alone a vote because of party affiliation. Beyond the risk that the member’s preferred solution does not see the light of day, the possibility also exists that because of adverse amendments the member does not move concurrence after Report Stage or ultimately opts to vote against their own bill.

B. MOVING AMENDMENTS BETWEEN THE HOUSE AND SENATE

When the Senate and House of Commons disagree, messages may go back and forth regarding amendments. The issue is that mechanisms in this regard may prove problematic. This issue came to the fore recently when the Senate found itself unable to amend a PMB introduced by a backbench Member of the House because the Member would not be able to advance the bill further given they were no longer a backbencher. As the Observations to the Ninth Report of the Standing Senate Committee on Legal and Constitutional Affairs of May 2014 stated:

The new recruitment offence being added by Bill C-394 refers to a person who “coerces” a person to join a criminal organization. In the penalty section, however, there is no mention of someone having been “coerced.” The committee believes, therefore, that the word “coerced” should be added to new section 467.111(a) of the Criminal Code. […]

The committee is also concerned that when a private member’s bill is amended by the Senate, the procedures in the other place do not allow for an effective consideration of the Senate's amendments when the original sponsor of the bill is no longer in a position to move their concurrence in the House.291

If the drafting defect that the Senate sought to cure had been a Charter defect, the inability of the member to move concurrence in those amendments in the House could prove fatal to both the bill’s passage and the curing of the defect. In this case, the Senate elected to pass the bill without amendment, thereby giving rise to a possible legal challenge.292

C. ROYAL RECOMMENDATION

Legislation that invokes the financial initiative of the Crown requires what is known as a Royal Recommendation – essentially, permission of the Crown.293 The process by which the House of Commons addresses Royal Recommendation issues has evolved significantly over the

291 Senate of Canada, Ninth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-394), Observations (29 May 2014).
years and is well-documented; however, the Royal Recommendation in the Charter context appears not to have received much attention.

To provide one illustration of this issue, consider the remuneration of judges. The Supreme Court ruled in Reference re Remuneration of Judges of the Provincial Court (P.E.I.),

that inadequate judicial compensation mechanisms can infringe the section 11(d) Charter right to the presumption of innocence “until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. When the Minister of Justice proposes amendments to the Judges Act to respond to the report of the quadrennial Judicial Compensation and Benefits Commission,

the amending statute simply replaces prior salary levels. Changing one number to another in the abstract may not signal a Charter concern; however, the context in which those numbers exist – and whether the proposed numbers reflect those salaries proposed – may have significant Charter import.

Suppose a member sought to amend legislation establishing new judicial salaries out of a fear that the proposed amount raised Charter concerns. Although the bill would carry a Royal Recommendation – as this is required for government legislation in the Commons that expends public funds – the Royal Recommendation has been found not to extend to amendments. As such, if the Minister of Justice rejected the recommendations of the quadrennial commission and proposed legislation that drastically cut judicial salaries, another member – even from the government – could not introduce admissible amendments or advance stand-alone legislation restoring the commission’s recommendations absent a Royal Recommendation.

From another perspective, consider amendments that may seek to ensure procedural fairness in one form or another to ensure respect for a Charter right. If a new process or new actors are envisaged, this may require a Royal Recommendation. As an example, an amendment to criminal justice legislation that sought to “refer to a hearing held by an independent adjudicator

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296 Charter, s 11(d).
299 Evidence, Standing Committee on Finance, 41st Parl, 1st Sess, No 94 (21 November 2012) at 114-115.
who would determine if an inmate is to be confined in administrative segregation” was found inadmissible due to its infringement on the financial initiative of the Crown.300

Though the Royal Recommendation issue is perhaps most easily illustrated with committee amendment examples, the concern is broader because members who seek to introduce legislation on a topic might be prevented altogether through the lack of a Royal Recommendation, which can create a fatal procedural defect.301

The issue is raised here, apart from amendment, because the Royal Recommendation barrier may serve, in some cases, to flag potential Charter issues when fully applied. Though the example may seem far flung, consider Bill C-483 of the 41st Parliament, 2nd Session.302 This legislation extended the Parole Board of Canada’s authority regarding escorted temporary absences for offenders serving a minimum life sentence.303 Harvey Cenaiko, Chairperson of the Parole Board of Canada, testified before the Senate that the legislation would add 239 reviews annually to the 27,000 decisions made by the board and that “There would be some additional costs regarding HR, regarding resourcing the additional hearings […] and […] travel to the institution”.304 More specifically, he estimated the cost of the bill as being between $750,000 and $800,000 annually.305

The issue of costs is relevant from a Royal Recommendation standpoint, but ought to be considered from a Charter perspective as well. Consider that, as Mr. Cenaiko later testified: “[W]e did have a backlog of 22,300 files two years ago. At this point in time we are down to approximately 10,000 pardon files”.306 If no new resources are being provided – as no Royal Recommendation was required – then the Parole Board of Canada must reallocate existing resources to discharge is new obligations pursuant to this legislation. This additional financial strain would necessarily limit the capacity of the Parole Board to address its backlog and meet its

300 Minutes of Proceedings, Standing Committee on Justice and Human Rights, 41st Parl, 1st Sess, No 13 (22 November 2011).
302 62-63 Eliz II, c 36.
303 Douglas Quan “‘Back door’ parole comes under fire; Wardens using power to free killers, critics say”, Calgary Herald (29 March 2014) A10.
304 Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, 41st Parl, 2nd Sess, No 23 (12 April 2014) at 59-60.
305 Ibid.
306 Ibid at 67.
other obligations. As Catherine Latimer of the John Howard Society noted in her testimony before the same committee regarding the capacity of the Parole Board of Canada:

> We think that its inability to discharge its statutory mandate is bringing the administration of justice into disrepute. We note that there is a 10,000 application backlog under the Criminal Records Act, and the parole board has recently announced that it would no longer be processing applications for indictable offences in its backlog. That, in itself, introduces a problem. 307

Simply put, this new legislation – beyond any Charter concerns in its own provisions – might have attenuated consequences, including bringing the administration of justice into disrepute through its exacerbation of existing problems flowing from resource constraints. While the process of determining whether a Royal Recommendation was necessary may have brought this issue to the fore, the fact is that no formalized process exists to consider an act’s operational Charter consequences. In other words, formalized Charter review of proposed legislation may not be sufficient in and of itself where the implementation of a new statutory obligation gives rise to Charter concerns beyond the scope of the bill’s provisions.

**PART III: CHARTER COMPLIANCE AND THE CANADIAN LEGISLATIVE PROCESS: CONCLUSION**

Scholars assert that “Charter considerations play a significant role in the legislative process”. 308 However, little scholarly attention has been paid to how the legislative process formally considers the Charter outside of government bills and in particular those introduced in the House of Commons. Even with regard to these bills, “[t]he imbalance within legislative activism that favours Charter certification by the minister of justice has placed serious constraints on independent parliamentary scrutiny”. 309 Further, “[P]arliamentarians outside of the executive have limited resources to engage in substantive scrutiny of the Cabinet’s claim that legislation is consistent with the Charter”. 310

In this regard, this thesis addresses a gap in the literature by considering other types of legislation introduced in Parliament and how these might be reviewed for Charter compliance. Because the primary Charter compliance processes are focused on identifying rather than curing

307 *Ibid* at 32.
309 *Supra* note 285 at 250.
Charter defects, this thesis also examined procedural difficulties that may be encountered when seeking to cure legislation of Charter defects, however identified.

The differing standards and processes for review suggests that perhaps fundamental questions have not been answered, including: when should review(s) occur and at what stage(s) of the legislative process should parliament be informed; whether Parliamentarians should be informed of all Charter infringements, infringements unlikely to be saved by section 1, or something in between; and, perhaps most fundamentally, ought Parliament to consider the constitutionality of all bills through formalized means? While s. 4.1 and SMEM recognize that all bills should be reviewed when introduced in the House, equivalent measures are not in place for bills introduced in the Senate – and a wholly optional process exists in the case of private bills regardless of chamber of introduction.

The primary formalized means of review – s. 4.1 and SMEM – do not reflect how a court would approach a statute under consideration. For example, SMEM looks to “clear violation” of the Charter whereas courts look to infringements that are not justified, generally speaking. Moreover, the analysis of a court is done by legal actors with reference to case law and, in modern times, with the benefit of submissions of counsel on both sides; this is not how SMEM operates. Similarly, s. 4.1’s reporting requirement is triggered only where no credible argument exists to support a measure. Courts do not concern themselves with the mere existence of arguments; rather, they evaluate the relative strength of arguments actually presented.

Put simply, the formalized reviews in place seemingly ask the wrong questions of perhaps the wrong people, and at potentially inopportune times. Parliamentarians on SMEM are being asked to look at “clear violation” – which suggests that their only concern is where no section 1 argument could be made and perhaps where the notwithstanding clause could not apply. Section 4.1 would capture, in its reporting, only those bills at the tail end of the section 1 zone of acceptability. In neither case is Parliament informing itself of all instances of infringement that might give rise to legal challenges, including potentially successful ones.

The inconsistency between these standards and outcomes is perhaps best illustrated through the interplay between s. 4.1, SMEM, and the notwithstanding clause. Section 4.1’s report of inconsistency is produced with the premise that Parliament may opt to add a notwithstanding clause where applicable. This would reduce the likelihood of a legal challenge and temporarily eliminate a Charter defect from legislation. However, the absence of a notwithstanding clause in
a proposed PMB would likely ensure its non-votability because of the “clear violation” standard. In other words, the same exact legislative text – one containing a Charter defect that could be cured through the invocation of the notwithstanding clause – would, as a government bill, perhaps generate a report under s. 4.1 but regardless may proceed through the legislative process; as a PMB, the same bill would likely be thwarted through the non-votability analysis.

Whether early Charter analysis of a bill is sufficient for Parliament’s purposes apart from an analysis of means to render it Charter compliant is worth considering. Such a fulsome analysis of options might also make reference to procedural encumbrances. Part II’s discussion of procedural restrictions on amendments that may cure Charter defects focuses on bills referred to committee after Second Reading, as most are. The sources referenced in that section note that greater amending flexibility exists where bills are referred to committees prior to Second Reading rather than after. At present, however, SMEM analysis is presaged on a bill advancing to Second Reading prior to referral. It may be useful to consider whether in some cases it is preferable to afford a committee greater legislative latitude by referring a matter prior to Second Reading, particularly when it is evident that the legislation is inextricably bound-up with Charter rights. Similarly, it may be useful to consider a process whereby upon presentation of a s. 4.1 report, a bill could be deemed referred prior to Second Reading such as to open it to more wide-ranging amendment.

Ultimately, the only authoritative and direct way by which Parliament can assure itself of a bill’s constitutionality is though a Supreme Court of Canada reference, which Parliament can initiate in the case of its least used legislative vehicle, the private bill. The government may, if it so chooses, submit reference questions relative to legislation to the Supreme Court though the Governor in Council, but this process is wholly external to Parliament.

Though rare, Parliament has in the past made the coming into force of statutory provisions dependent on a Supreme Court reference confirming their constitutionality. Although legislative amendments to accomplish this today would likely be inadmissible, Parliament may wish to revisit the reference framework with these precedents in mind. An expanded pre-enactment reference power might allow Parliament to satisfy itself of Charter compliance while

311 For example, legislation responding to a Supreme Court of Canada ruling wherein a statute was found to violate the Charter but the declaration of invalidity was suspended.
312 Supra note 190 at s 53.
313 See, for example, An Act to amend the Special War Revenue Act, SC 1941, c 27, s 29.
at the same time permitting compliant legislation to become law without the need for additional legislative action after a Supreme Court ruling.

Parliament is free to hear from whomever it wishes on questions of constitutionality, with the notable exception of the judiciary except in the case of private bill references. While it may be that Parliament could receive conflicting legal advice with respect to a bill’s ultimate constitutionality, it perhaps ought to concern itself equally with litigation risks and their potential consequences so as to focus on mitigation efforts. In other words, though the focus of this thesis has been statutory validity – the focus of Parliament’s formalized compliance measures – Parliament may wish to inquire on related and important aspects of Charter compliance.

First and foremost, something thus far ignored in this thesis but which must be acknowledged is the human consequence of Charter rights violation, which may include outcomes such as unjustified and unlawful imprisonment, and other severe deprivations of liberty. Further, any Charter weakness may invite legal challenge that is defended at taxpayer expense, requiring many hours of work and legal costs borne by numerous departments. As well, a successful legal challenge may result in Parliament needing to legislate again on a particular topic, and perhaps hurriedly before a suspension of invalidity expires. Moreover, the costs of compliance with a decision may be expensive when policy and program changes are required.

315 See Sessional Paper 8555-381-52 (Q-52 — Mr. Breitkreuz (Yorkton—Melville) — With regard to Firearms Act cases, Criminal Code cases related to firearms, and court and Charter challenges of firearms legislation and regulations, each as a category of litigation, and for each province and territory since December 1, 1995: (a) in how many litigation cases has the Department of Justice been involved; (b) in how many litigation cases is the department currently involved; (c) are any of these cases considered “high impact legislation” cases and if so, how many and what impact are they likely to have on government expenditures and legislation; and (d) how much time and money has the government expended on the litigation of these cases?).
316 See Sessional Paper 8555-411-914 (Q-914 — Mr. Easter (Malpeque) — With regard to the case of Jodhan v. Canada (Attorney General): (a) how much has the government spent across all departments to pursue this case, at all levels of court proceedings, between January 1, 2007, and September 16, 2012; and (b) what specific steps has the government taken since May 30, 2012, to comply with the Federal Court of Appeal’s requirement that the government bring its websites into compliance with the accessibility requirements of the Canadian Charter of Rights and Freedoms?)
318 See Sessional Paper 8555-372-101 (Q-101 — Mr. Cummins (Delta—South Richmond) — With regard to Indian fisheries policies and the effect of the government’s responses to the Marshall decisions, the van der Peet decision and the Sparrow decision of the Supreme Court of Canada regarding special aboriginal rights to fish [...]).
Further, unconstitutional legislation has consequences for other branches of government, beyond simply the additional strains on already scarce judicial resources occasioned through potentially avoidable constitutional litigation.

In their recent book *False Security: The Radicalization of Canadian Anti-Terrorism*, law professors Craig Forcese and Kent Roach conclude that 2015 anti-terrorism legislation passed by Parliament is of “doubtful validity under the Charter” and assert that “the enactment of unconstitutional legislation […] harms the rule of law, […] creates delay, uncertainty, and costs for all concerned”. More particularly, they conclude that the legislation at issue “places potential limits on each and every Charter right and does so in a manner that is alien to our legal tradition by dragooning judges into doing the dirty work of deciding what rights should be limited”. In other words, because other branches of government are inextricably bound up with Charter questions, certain exercises of legislative power may ultimately re-define the relationship between Parliament and the judiciary in specific legislative domains. In some contexts this may be undesirable, and it is not evident that Parliament may be attentive to the consequences of its legislative acts in this regard.

It may be that statutory validity is too narrow an inquiry to inform Parliament’s deliberations in Charter matters. That is, apart from any discussion of a policy’s wisdom, the Charter consequences in terms of potential outcomes for individuals, costs of litigation, and costs of compliance perhaps ought to be considered as well. In this last respect, the impact of *Canada (Attorney General) v. Hislop* is particularly notable. Briefly, after the Supreme Court of Canada recognized that same-sex partners were entitled to certain spousal benefits, Parliament amended legislation to allow certain claims by surviving same-sex partners under the Canada Pension Plan. Restrictions on claims in the amending legislation were successfully challenged by means of a class action in *Hislop* for violating the Charter’s equality provisions, and as a consequence the government was required to compensate additional claims of unknown amount:

> [I]t is hard to calculate what the actual cost of rights recognition was in Hislop. Print media reported an array of possible impacts ranging from $22 million to $400 million. R. Douglas Elliott, counsel for the class of Hislop claimants […] calculates that the federal government was obliged to pay out approximately

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320 *Ibid* at 505-507.
Though significant financial consequences of an adverse *Charter* ruling may not exist in every case, Parliament might seek to inform itself of such possibilities by inquiring as to the potential consequences of an adverse *Charter* finding, rather than only the likelihood of such a finding.

While a robust parliamentary *Charter* review scheme could be envisaged that would ask those with legal backgrounds to consider bills and report upon them – such as through the Law Clerk and Parliamentary Counsel of each house – this must be balanced against the realities of resource constraints and the recognition that legislation may need to be adopted on an urgent basis. Moreover, because amendments during the legislative process may render a constitutional bill unconstitutional, it may be that pre-Second Reading review is not sufficient in and of itself. In that regard, it may be that legislation ought to be reviewed as well prior to Third Reading, once all amending possibilities at committee and Report stage have been exhausted. However, the risk is that a report here may signal a need for amendment that a chamber may be unwilling to undertake owing to timing considerations or procedural restrictions.

Regardless of who should review legislation, when, and by what standard, it is difficult to see an argument that not all legislation should be reviewed by Parliament as the *Charter* applies to all legislation and Parliament has a vested interest in the validity of its legislative acts. Yet, as the current mechanisms exist, Senate public bills receive no formal *Charter* review, and the mechanism for private bill review is optional. Further, where present, Parliament’s review processes focus on a proposed statute and its contents rather than how a statute operates in the context of other statutes, or its practical implementation by a government with multiple responsibilities and competing obligations. It may never be possible to know exactly how a bill will be implemented on the ground and what attenuated consequences it may have. That said, not attempting to seek out this information may ultimately prove problematic for parliamentarians when faced with the consequences of adverse rulings.323

Parliamentary practices are not frozen in time, nor are statutes and standing orders. Parliament possesses the ability to create *Charter* review processes and specify standards of

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review as it sees fit, and indeed there has been at least one recent legislative proposal in this regard, in addition to scholarly suggestions for reform. Moreover, new trends in parliamentary practice may emerge that effectively replace existing procedures and give rise to a new compliance assurance scheme. Ultimately, it is up to Parliament to consider how best to satisfy itself that its legislation – in all its forms, in all its parts, and its application and consequence – indeed complies with the *Canadian Charter of Rights and Freedoms*.

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