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Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review

Janet L. Hiebert*

I. INTRODUCTION

Canada has contributed an important idea to constitutional thought about how to conceive of legislative responsibilities under a bill of rights.¹ This idea is the concept of legislative rights review, which originated in the *Canadian Bill of Rights*,² was adapted for the *Canadian Charter of Rights and Freedoms*,³ and has been emulated and altered in several other Westminster-based parliamentary systems that have recently adopted statutory bills of rights.⁴ These include New Zealand

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¹ The borrowing and adaptation of this idea elsewhere is discussed by the author in: "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82:7 *Tex. L. Rev.* 1963; "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 *Brit. J. Poli. Sci.* 235 [hereinafter "Hiebert, 'Interpreting a Bill of Rights'"]; "Parliamentary Review of Terrorism Measures" (2005) 68:4 *Mod. L. Rev.* 676; "Constitutional Experimentation: Rethinking How a Bill of Rights Functions", in Rosalind Dixon & Tom Ginsberg, eds., *Handbook of Comparative Constitutional Law* (Cheltenham, U.K.: Edward Elgar Publishing Ltd., 2011), at 298-320.

² S.C. 1960, c. 44.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ In Canada, s. 4.1 of the *Department of Justice Act*, R.S.C. 1985, c. J-2 requires the Minister of Justice in Canada (who also serves as Attorney General) to alert Parliament where bills are inconsistent with the Charter. Section 7 of the *New Zealand Bill of Rights Act*, 1990 No. 109 requires that the Attorney General advise Parliament when bills are not consistent with its provisions. In the United Kingdom, s. 19 of the *Human Rights Act 1998* (U.K.), 1998, c. 42 requires the sponsoring minister of a bill to report either that it is compatible with Convention rights or that he or she is unable to make a report of compatibility. This report must be made to both houses of Parliament (Canada requires a report only to the House of Commons while New Zealand is a unicameral system). What this means in the U.K. is that when a bill passes from one house to the other, a second statement will be required, and it must take into account earlier amendments made. The respective statements will be made by whichever minister has been given responsibility in the particular house. In the Australian Capital Territory, s. 37(1) and (2) of the *Human Rights Act 2004* oblige the Attorney General to make a compatibility statement about every bill presented to the Assembly by a minister. In Victoria, s. 28(2) of the *Charter of Human Rights and Responsibilities Act*, 2006 No. 43 requires that a member of Parliament who introduces a bill into a House of Parliament must "cause"

(1990),⁵ the United Kingdom (1998),⁶ the Australian Capital Territory (2004),⁷ and the Australian state of Victoria (2006).⁸ The idea behind legislative rights review is that rights should be a core consideration when assessing the merits of legislative objectives and how best to achieve these in the process of developing legislation, as well as during parliamentary scrutiny when deciding if amendments are warranted.

This paper argues that although the practice of legislative rights review in Canada has not materialized here as intended, Canada should revisit the benefits of this concept, and it discusses reforms to revitalize legislative rights review that are influenced by the United Kingdom's adaptation of this idea.

II. ORIGINS OF LEGISLATIVE RIGHTS REVIEW

The 1960 statutory *Canadian Bill of Rights* was criticized for its failure to establish a clear and coherent judicial mandate. Nevertheless, it envisaged the laudable objective of trying to ensure that public and political officials confront the implication of legislation in terms of rights, as a condition for responsible political decision-making.

John Diefenbaker, whose government introduced the *Canadian Bill of Rights*, differed from conventional views about the role and function of a bill of rights. Rather than relying exclusively on judicial review, he thought it possible and desirable to improve Parliament's capacity to function as a custodian of civil liberties.⁹ To that end, the *Bill of Rights* created a new statutory reporting requirement in section 3 that the Minister of Justice alert Parliament if introducing legislation that was inconsistent with rights.¹⁰ The very requirement of having to make this

a statement of compatibility to be prepared and presented before the House of Parliament into which the bill is introduced before his or her second reading speech on the bill.

⁵ *New Zealand Bill of Rights Act*, 1990 No. 109.

⁶ *Human Rights Act 1998* (U.K.), 1998, c. 42.

⁷ *Human Rights Act, 2004* (Australian Capital Territory).

⁸ *Charter of Human Rights and Responsibilities Act*, 2006 No. 43 (Victoria).

⁹ Christopher MacLennan, *Toward the Charter* (Montreal: McGill-Queen's University Press, 2003), at 148.

¹⁰ Section 3 of the *Canadian Bill of Rights* requires:

... the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and 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.

kind of report was expected to trigger a new emphasis on rights when evaluating proposed legislation, and to create a new rights consciousness within the bureaucracy, government and Parliament.

Rights protection under the *Canadian Bill of Rights* was expected to occur not simply, or even primarily, because of the introduction of rights-based judicial review. Quite separate from any role that judicial review served, rights were expected to be protected through a combination of a new practice for bureaucratic assessments of whether proposed legislation implicated rights adversely, and also because of the political implications that accrued from a new statutory obligation that the Minister of Justice alert Parliament when bills violated rights. This statutory obligation was expected to discourage cabinet from approving bills that would require this report of inconsistency. Former Deputy Minister of Justice Elmer Driedger speculated that if cabinet insisted on approving a bill that violated rights, the Minister of Justice would likely feel compelled to resign rather than risk being put in the position of having to make a report to Parliament that the government knowingly was introducing legislation inconsistent with rights.¹¹

Driedger's confidence that the reporting requirement would precipitate careful evaluation of whether and how policy initiatives implicate rights was also influenced by the presence in the *Bill of Rights* of the notwithstanding clause in section 2 (a precursor to section 33 of the Charter). This provision requires that if a government is determined to introduce legislation that patently violates protected rights, it must declare that the legislation will operate notwithstanding the *Canadian Bill of Rights*. Without this declaration, courts are otherwise obliged to interpret the legislation in a manner that does not abrogate, abridge or infringe the rights or freedoms in the *Bill of Rights*. From Driedger's perspective, the inevitable criticism that would accompany use of this declaration (both in and beyond Parliament) would discourage any such use. As he stated, no government "would be so foolish or stupid as to submit to Parliament a bill obviously in conflict with the Bill of Rights". This is because opposition parties would have ample grounds to move an amendment which, "as a matter of simple politics, the government would have to accept".¹² Consequently, from his perspective, any bill that would require reliance on the section 2 notwithstanding clause had almost no

¹¹ Elmer A. Driedger, "The Meaning and Effect of the Canadian *Bill of Rights*: A Draftsman's Viewpoint" (1977) 9 Ottawa L. Rev. 311 [hereinafter "Driedger"].

¹² *Id.*

chance of becoming law.¹³ Thus, Driedger believed that the combined effects of a political interest in not having to report to Parliament that a bill was inconsistent with the *Bill of Rights*, and a political reluctance to rely on the *Bill of Rights*' notwithstanding provision, provided ample insurance that the government would proactively comply with the *Bill of Rights*.

This proactive capacity to protect rights was believed possible under a Westminster-based political system in a way precluded by the separated system in the United States. The reason for this belief was that under a parliamentary system the "whole machinery of government" could be enlisted in the project of safeguarding rights, a holistic approach considered possible only where there is a fusion of executive and legislative powers. As Driedger opined on the juxtaposition of this particular kind of a bill of rights and a Westminster parliamentary system, the idea of enlisting all branches of government in the protection of rights represented the world's most "comprehensive, powerful and effective" bill of rights:

All future laws are ... purified before they become laws ... This process is possible only under a parliamentary system of government, where officials are responsible to Ministers, Ministers to the House of Commons, and the House of Commons to the electorate. The whole machinery of government — apart from the courts — is enlisted by the Bill of Rights to ensure that fundamental rights and freedoms are safeguarded. It cannot be disputed that at this stage the Bill of Rights is powerfully effective. This kind of control is not possible with a congressional system of government, where there is complete separation between the executive and the legislature and where the executive cannot control the content of bills submitted to the legislature.¹⁴

However, this confidence in legislative rights review under the *Canadian Bill of Rights* was seriously misplaced for three reasons. First, it did not anticipate that a direct relationship would arise between the degree to which courts interpret rights robustly or grant significant remedies for rights violations on the one hand, and the strength of the bureaucratic and political incentives to evaluate proposed legislation rigorously from a rights perspective, on the other. As it turned out, the Supreme Court's decision not to interpret the *Bill of Rights* as imposing new norms for

¹³ *Id.*

¹⁴ *Id.*, at 316.

constraining uses of state power, but as recognition of the rights that already existed (*R. v. Robertson*¹⁵), along with the validation of almost all federal legislation challenged, provided little incentive for policy and political officials to question rigorously the merits of legislative initiatives from a rights perspective.¹⁶ Second, this optimistic view also did not take into consideration that the absence of reports of inconsistency would provide Parliament little context or experience for questioning a government's assumptions that legislation complies with rights. Third, the idea that legislation could be purified through the adoption of good administrative and political practices¹⁷ belied a lack of appreciation that fundamental disagreements are more likely to arise over questions about the scope of rights, the justification of the legislative goal, and the merits of judgments about proportionality, than about actual political intentions to respect or safeguard rights.

The statutory reporting requirement has been adapted for the Charter in section 4.1 of the *Department of Justice Act*.¹⁸ However, this obligation has not facilitated the kind of intra-institutional scrutiny that the original concept intended. Bills are evaluated by government lawyers for the executive. However, Parliament has remained relatively insignificant as a venue for debate about Charter considerations and rarely questions the implicit claims of government that bills are consistent with the Charter (implicit because of the absence of a report of Charter inconsistency).

¹⁵ [1963] S.C.J. No. 62, [1963] S.C.R. 651 (S.C.C.).

¹⁶ This interpretation is based on interviews [hereinafter "Interviews"] with several officials in the Human Rights Centre at the Department of Justice, which were conducted between 1999 and 2000 on the basis of anonymity. I also had repeated and candid conversations with John Tait (1994-1995) and George Thomson (1998-1999), both of whom had earlier served as deputy minister in the Department.

¹⁷ Driedger, *supra*, note 11, at 306.

¹⁸ This requirement is found in section 4.1 of the *Department of Justice Act*, R.S.C. 1985, c. J-2, which provides:

Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and 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.

III. CHARTER EVALUATIONS PRIOR TO LEGISLATION BEING INTRODUCED TO PARLIAMENT

Despite the statutory obligation of the Minister of Justice to alert Parliament if bills are inconsistent with the Charter, no report of Charter inconsistency has ever been made, and it is highly unlikely that reports of inconsistency will be made in the future. The Canadian practice of non-reporting is influenced by the political and legal consequences that would accrue from acknowledging that a bill is inconsistent with the Charter. The popularity of the Charter makes it difficult for governments to concede that they are introducing a bill that is not consistent with the Charter. The constitutional authority of courts to declare inconsistent legislation invalid also discourages such a report because acknowledging incompatibility would make it extremely difficult for any subsequent successful defence of the legislation if it were later subject to Charter litigation. Unless the Supreme Court takes the concept of judicial deference to an entirely new level, it is unlikely to uphold legislation as a reasonable limit under section 1 if the Minister of Justice had earlier conceded that the legislation was not reasonable.

However, the lack of reports on Charter inconsistency does not mean that bills are introduced to Parliament without any consideration for their implications for the Charter. On the contrary, bills are systematically assessed by legal officials in the Department of Justice who provide ministers with advice about the likelihood that these initiatives could result in successful Charter litigation.¹⁹

The nominal purpose of Charter vetting is for the minister to fulfil his or her reporting obligation under section 4.1 of the *Department of Justice Act*. The more political purpose of these evaluations is to manage the risk associated with passing legislation in a constitutional system where courts have strong interpretive and remedial powers.

IV. RISK AVERSION

In the early days of the Charter, it was not obvious how the Supreme Court would interpret the Charter, and thus it was unclear what the consequences would be if legislation was not subject to robust pre-

¹⁹ James B. Kelly, *Governing with the Charter. Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005), at 222-57 [hereinafter "Kelly, *Governing with the Charter*"]; Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), at 3-19 [hereinafter "Hiebert, *Charter Conflicts*"].

legislative Charter scrutiny. This uncertainty had a substantial influence on how bills were initially evaluated. The sustained period of judicial restraint under the *Canadian Bill of Rights* had conditioned the public service to adopt similarly constrained interpretations of rights when advising on potential conflicts in the early days of the Charter. However, more robust Charter vetting began to occur after several early Supreme Court decisions revealed the very real possibility that governments could incur serious political, policy and fiscal costs should they lose a Charter case.²⁰ These influential decisions were *Singh v. Canada (Minister of Employment and Immigration)* (which set aside Canada's refugee determination process, necessitating very costly changes);²¹ *Schachter v. Canada* (in which the Court indicated that it was prepared to "read in" new meaning to legislation as a remedy for a rights violation);²² and *R. v. Oakes* (establishing what appear to be difficult criteria for justifying legislative restrictions on rights).²³

Growing concerns about how legislation would fare before the Supreme Court encouraged attempts to reduce the risk of invalidation. In 1991 then clerk of the Privy Council Paul Tellier wrote to deputy ministers to urge that Charter scrutiny be conducted in the early stages of the policy process.²⁴ In what became known as the "Tellier Memorandum", departments were called upon to incorporate Charter analysis in the memorandum to cabinet, and the analysis was to "include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs".²⁵

Two other factors that have led to more robust forms of scrutiny are the popularity of the Charter, particularly as contrasted with the relatively ineffective and uncelebrated status of the statutory *Bill of Rights*, and an emerging public confidence in the judiciary as the primary interpreter of rights, which makes it politically risky for politicians to defend positions that seem contrary to judicial views on Charter compatibility, or to invoke the notwithstanding clause in the event the Supreme Court sets aside inconsistent legislation. Most uses of the notwithstanding clause occurred in the early years of the Charter, often in a pre-emptive attempt

²⁰ Interviews, *supra*, note 16.

²¹ [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

²² [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

²³ [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

²⁴ Kelly, *Governing with the Charter*, *supra*, note 19, at 234.

²⁵ Mary Dawson, "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30 Osgoode Hall L.J. 597.

to protect policy distinctions amidst uncertainty about how the Court would interpret the equality protection in section 15.²⁶ However, the notwithstanding clause soon became viewed as an unacceptable way to insulate legislation from the effects of a negative judicial decision,²⁷ even for controversial decisions that fundamentally challenged the validity of government policy. A good example of this occurred after the Supreme Court ruled in *RJR-MacDonald Inc. v. Canada (Attorney General)*²⁸ that the way the government attempted to regulate tobacco advertising was not consistent with the Charter. Then Cabinet Minister David Dingwall recommended that the government respond to this ruling by invoking the notwithstanding clause, but this recommendation was rejected by cabinet, which instead approved revised legislation that was premised on less restrictive ways to accomplish the legislative goal that the government believed could be defended as a reasonable limit under section 1.²⁹

Concerns about the costs of defending legislation and the practical and political interests in protecting legislative priorities from being derailed by judicial review have resulted in institutional procedures intended to insulate legislation from the effects of a negative judicial ruling. Regardless of which political party is in power, no government welcomes unforeseen obstacles to the pursuit of its legislative agenda. A

²⁶ This interpretation is drawn from a review of all uses of this power, as compiled by Tsvi Kahana, "The Notwithstanding Mechanism and Public discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44:3 Canadian Public Administration 61.

²⁷ Extreme controversy followed upon Quebec's decision to use the notwithstanding clause in response to the ruling in *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.) that set aside Quebec's signs law for violating freedom of expression. What intensified this controversy was the context in which the notwithstanding clause was used. At the time, the Meech Lake Accord was subject to ratification by federal and provincial legislatures. A particularly controversial element of this Accord was the relationship between its proposed distinct society clause and the Charter. Quebec Premier Robert Bourassa invoked the notwithstanding clause to insulate new legislation from judicial review. The legislation differed significantly from the earlier law of the Parti Québécois that had been subject to the Charter challenge. Nevertheless, Premier Bourassa decided to invoke the notwithstanding clause to avoid uncertainty as to whether new legislation would survive the Charter. Adding to the controversy was a statement Bourassa made that suggested that use of the notwithstanding clause might not have been necessary had the Meech Lake Accord and distinct society clause been in place. This statement was interpreted by critics of the distinct society clause as confirming their fears that the clause would undermine protection for Charter rights, and also served to undermine the legitimacy of the notwithstanding clause. The political fallout was significant. Then Manitoba premier Gary Filmon abruptly withdrew his minority government's support for the Meech Lake Accord, which required unanimous agreement to succeed. See Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996), at 138-44.

²⁸ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

²⁹ Interviews, *supra*, note 16.

government that has successfully passed legislation will often be reluctant to reopen the relevant issues, expend additional resources necessary to defend the measure politically, or manage internal divisions that could undermine caucus support, as may be required should legislation be struck down in whole or in part, or its meaning or effects altered significantly through judicial interpretation. I refer to this concern as risk-aversion. The attempt to anticipate judicial objections and incorporate judicial norms into legislative decision-making is not unique to Canada. The United Kingdom similarly engages in risk assessments of proposed legislation in terms of compatibility with the *European Convention on Human Rights*,³⁰ and institutional actors in France, Germany and Spain also engage in pre-legislative review for similar risk-averse motives.³¹

As discussed above, the principal institutional mechanism for managing risk in Canada has been a change to the Memorandum to cabinet to require an assessment of the risk of a successful Charter challenge in the courts, the anticipated impact of negative decisions, and possible litigation costs.³² When assessing proposed legislation, Charter consistency is interpreted by government lawyers on the basis of conformity with relevant case law, and assessments are framed in the language of risk: the likelihood that courts will declare that legislation inconsistent with protected rights, in the event of litigation. The political criterion for whether a report on inconsistency with the Charter is required is whether a credible Charter argument can be made in defence of the legislation.³³

Not surprisingly, the manner in which the Court has interpreted the Charter and, in particular, its approach to section 1, have significantly influenced pre-legislative Charter evaluations by government officials. The Supreme Court's decision to adopt a two-stage approach to the Charter that distinguishes the question of whether a right has been infringed from the assessment of the validity of the legislation, has led to a broader interpretation of rights than would have occurred had the Court adopted definitional limits, thus increasing the likelihood of and frequency with which legislation was vulnerable for constituting a *prima*

³⁰ Janet L. Hiebert, "Governing under the Human Rights Act: The Limitations of Wishful Thinking" (January 2012) Public Law, at 34-36. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223.

³¹ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University, 2000).

³² Government of Canada Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2d edition, ch. 2.2, online: <<http://www.pco-bcp.gc.ca/docs/information/publications/legislation/pdf-eng.pdf>>.

³³ Hiebert, *Charter Conflicts*, *supra*, note 19, at 7-13.

facie rights infringement. As a result, Canadian governments have to defend legislation more often than in jurisdictions where rights are interpreted more narrowly.

A second reason that this judicial approach has influenced bureaucratic assessments of compatibility is that the regularity of section 1 justifications has established a readily understood context for anticipating the kinds of questions and criteria asked by the Court when legislation is litigated. The invocation of consistently cited criteria for evaluating impugned legislation allows policy officials and legal advisors to predict, with a fair degree of confidence, not only when legislation will be found to implicate the Charter, but also what kinds of questions the courts will ask when deciding if legislation constitutes a justifiable restriction on a protected right. Thus, pre-legislative review focuses heavily on whether legislative initiatives are likely to satisfy judicial interpretations of proportionality, and has involved government lawyers in a regular role of advising relevant departments to seek alternative means to accomplish a legislative goal.³⁴ As James Kelly argues, the Charter has helped transform the Department of Justice's role from providing merely "a technical review of legislation to a substantive role in the development of new policy",³⁵ so much so that the Department of Justice has assumed the importance of a central agency within the machinery of government.³⁶ Many provincial governments, particularly in the larger provinces, have adopted procedures that similarly give emphasis to the identification of possible Charter problems, with the purpose of reducing the risk of constitutional invalidation.³⁷

A third reason the Court's approach to section 1 has influenced bureaucratic and political Charter assessments is the significant breadth for justifying legislative objectives that nevertheless were found to violate Charter-protected rights. The Court's reluctance to veto legislation in the first part of the section 1 inquiry has signalled to politicians the political opportunity to try to advance a wide range of policy objectives. In rare cases, anticipation of Charter vulnerability has resulted in developing

³⁴ Interviews, *supra*, note 16.

³⁵ James B. Kelly, "Legislative Activism and Parliamentary Bills of Rights" [hereinafter "Kelly, 'Legislative Activism'"] in James B. Kelly & Christopher P. Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009), at 93.

³⁶ *Id.*, at 89.

³⁷ Kelly, *Governing with the Charter*, *supra*, note 19, at 214; Andrew Petter, "Legalize This: The Chartering of Canadian Politics" in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) 211.

litigation strategies when legislation is actually being developed or assessed by Parliament, including uses of legislative preambles and committee hearing processes to explain Parliament's "Charter judgment".³⁸

V. RISK TAKING

Despite serious apprehension of the costs associated with successful Charter litigation, risk aversion is not the only strategy a government invokes under the Charter. Depending on the legislative objective or the political context in which it arises, risk aversion may give way to risk taking, where government knowingly introduces a bill that has a high degree of risk for litigation and invalidation.

Legal advice on Charter consistency is not binding, and therefore does not automatically lead to amendments to bills to address perceived concerns of Charter inconsistency. Instead, this advice leads to political judgment about whether and how to interpret it in the context of the government's legislative agenda, specifically, whether amendments are required to allow the minister to claim the bill is compatible for purposes of the cabinet memorandum, or whether the Minister of Justice is prepared to exercise his or her own professional judgment as a lawyer and disagree with the advice provided by legal advisors in the Department of Justice.

These political judgments reflect broad discretion for the following reasons:

- the difficulty of predicting the implications of earlier Charter cases for new issues;
- political and ideological perspectives that invite differences on how the Charter implicates the role of the state, or what responsibility government has to pursue perceived social problems or address substantive inequality in power or resources, thus affecting assessments of Charter compatibility;
- strategic calculations about whether to reduce Charter problems or gamble on whether failure or minimal responses to address these

³⁸ Good examples of this occurred in the following legislative disagreements with judicial rulings about the rules of evidence in sexual assault trials: Bill C-49, following *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.) [hereinafter "*Seaboyer*"]; Bill C-72, following *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) [hereinafter "*Daviault*"]; and Bill C-46, following *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.) [hereinafter "*O'Connor*"]. Hiebert, *Charter Conflicts*, *supra*, note 19, at 91-117.

will result in litigation, which involve consideration of the resources required to mobilize policy communities and political allies to revisit a legislative goal should it be declared unconstitutional, whether the immediate political gains of passing legislation exceed the anticipated costs if it is later declared unconstitutional, the time a government may have before a bill is declared invalid, and the political benefits of being able to blame the Court for preventing government from pursuing a particular objective it claims to be in the public interest.

Under current conditions, it is virtually impossible to know the nature of the legal advice rendered or how and why government has responded to this advice in the manner it has. The confidential nature of the advice provided to ministers is strictly protected (despite the fact that legal advice is published in New Zealand)³⁹ and this, along with cabinet solidarity, makes it virtually impossible to know whether, why or how often the government ignores or challenges the advice it receives. Compounding this uncertainty is the political environment in which legal advisors work, which has resulted in an extreme reluctance of government officials, particularly under the Harper government, to give interviews on how Charter evaluations are assessed, even under strong assurances of anonymity.⁴⁰

Concern that judgment on Charter compatibility is influenced by political and partisan considerations has led James Kelly and Matthew Hennigar to argue that the functions of the Attorney General and the Minister of Justice should be separated for Charter reporting purposes, with responsibility for assessing Charter compatibility given to the Attorney General.⁴¹ While others have called for greater independence of

³⁹ Department of Justice, New Zealand, “Section 7 of the New Zealand Bill of Rights Act”, online: <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/advising-the-attorney-general>>.

⁴⁰ Although government lawyers in the Department of Justice have been unwilling to give formal interviews, informal conversations have suggested that the Harper administration is willing to pursue legislation despite a high degree of identified risk. This impression is supported by *Globe and Mail* reporter Kirk Makin, who on the basis of anonymous interviews with senior members of the Department of Justice, reports that “legislation has been pushed through despite stern internal warnings that it would likely violate Charter provisions”. Kirk Makin, “Canadian Crime and American Punishment” *The Globe and Mail* (Quebec ed.) (November 27, 2009), at F7.

⁴¹ James B. Kelly & Matthew A. Hennigar, “The Canadian Charter of Rights and the Minister of Justice: Weak-form Review within a Constitutional Charter of Rights” (2012) 10:1 I-Con 35 [hereinafter “Kelly & Hennigar”].

the Minister of Justice when performing the reporting function,⁴² Kelly and Hennigar argue that the portfolios of the Minister of Justice and Attorney General should be treated as formally distinct. Whereas the Minister of Justice would function within government as the parliamentarian who is responsible for advocating legal policy, under their scenario, the separate office of the Attorney General would be responsible for litigating on behalf of the government and providing legal advice that is based on assessing the constitutionality of the government's agenda. They argue that the problem with the fusion of these offices, even if one argues for more independence from partisan and governmental influences, is that the Minister of Justice cannot act independently from cabinet. Thus, they call for the Attorney General to be accessible to cabinet deliberations, but not necessarily to be a full voting member of the cabinet. This change, they argue, would ensure greater independence from cabinet solidarity, as is the practice in some other Westminster-based parliamentary systems.⁴³ In the United Kingdom, the reporting on consistency with rights is not centralized in the office of the Attorney General but instead is made by individual ministers. However, the ultimate government authority on these matters is the Attorney General, who is a member of the ministry but, by convention, is independent of cabinet. In New Zealand, the Attorney General has responsibility for legal advice about compatibility and is a member of cabinet but, by convention, is not bound by cabinet solidarity on questions of the law.⁴⁴

VI. LACK OF PARLIAMENTARY SCRUTINY

If lack of transparency is a problem for legal academics who study how Charter considerations influence political behaviour, it has even more troubling implications for Parliament. Whether a government invokes a rights-aversion or a risk-taking strategy, Parliament is generally unaware of the level of risk that legislation could be invalidated or the government's assumptions about why it assumes that the risk is worth

⁴² John Ll. J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell Ltd., 1964); John Ll. J. Edwards, *Ministerial Responsibility for National Security as it Relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (Study published for the McDonald Commission of Inquiry) (Minister of Supply and Services Canada, 1980); Ian Scott, "Law, Policy, and the Role of the Attorney General: Constance and Change in the 1980s" (1989) 39 U.T.L.J. 109; Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law (2006) 31 Queen's L.J. 601.

⁴³ Kelly & Hennigar, *supra*, note 41, at 51-64.

⁴⁴ *Id.*, at 50.

taking. Parliament has become even more marginalized in terms of its influence on government than before the Charter was adopted. This is a result of the increasingly centralized nature of how power is exercised (which has occurred independent of but overlapping the time frame of the Charter), which Donald Savoie characterizes as governing at the centre,⁴⁵ and also because advice on Charter consistency is centralized in the Department of Justice and this information is confidential to government and not accessible to Parliament.

James Kelly discusses the institutional imbalance between relevant information and engagement with questions of Charter consistency that arises between the Cabinet and Parliament. Kelly argues that this imbalance contributed to the decline of Parliament as a legislative-making body because it has undermined political and constitutional scrutiny of the cabinet's legislative agenda.⁴⁶ Notwithstanding rare occasions where Parliament addressed the Charter implications of contentious legislative bills (such as the government's legislative response to the *Seaboyer*, *Daviault* and *O'Connor* rulings,⁴⁷ and anti-terrorist measures in the wake of anti-terrorist legislation),⁴⁸ as a general matter, Parliament is seldom a focus for deliberation about whether bills are consistent with the Charter or should be amended to redress consistency problems.

This lack of parliamentary Charter engagement occurs despite the fact that the Canadian Parliament has a committee in each house that evaluates constitutional and legal dimensions of bills. These are the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs. These committees often hear from witnesses who present a range of opinions on Charter and other relevant issues. Yet committee members have indicated they lack adequate time and information to make informed judgments about the extent and nature of Charter concerns.⁴⁹ Moreover, their lack of independent legal advice on the Charter can make it difficult to know how to assess the significance of committee testimony by individuals or groups who allege a serious Charter breach, particularly when the Minister of Justice has not reported a compatibility

⁴⁵ Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

⁴⁶ Kelly, "Legislative Activism", *supra*, note 35, at 94.

⁴⁷ *Supra*, note 38; Hiebert, *Charter Conflicts*, *supra*, note 19, at 91-117.

⁴⁸ Kelly, "Legislative Activism", *supra*, note 35, at 93.

⁴⁹ Hiebert, *Charter Conflicts*, *supra*, note 19, at 16, 157-59.

problem. The absence of any ministerial report on Charter inconsistency has dissuaded Parliament from participating in judgment about compatibility, either because of the possible mistaken assumption that the absence of a report should be construed as confirmation that serious Charter problems do not exist or, more likely, because neither government nor Parliament conceives of Parliament as a significant forum for debates about Charter consistency. As a consequence, Parliament is entirely unaware of the nature of the legal advice on Charter consistency rendered, whether or how often a government ignores or disagrees with its legal advisors' evaluations of Charter compatibility, or the likelihood that legislation could be subject to judicial invalidation if subsequently litigated. This lack of parliamentary awareness for how legislation implicates the Charter raises the serious concern that Parliament will regularly pass legislation without knowing whether the legislation has significant Charter problems.

VII. REVISITING THE CONCEPT OF LEGISLATIVE RIGHTS REVIEW IN CANADA

Canada would benefit from revisiting the reasons and benefits of legislative rights review, and considering reforms to facilitate Parliament's capacity and knowledge to make reasoned judgments about whether legislation is justifiable under the Charter.

Skeptics might question this claim to revisit the role of legislative rights review under the Charter on two accounts. First, they might query why legislative rights review is even necessary under a constitutional bill of rights that authorizes strong judicial remedial powers, and second, they might question whether Parliament has the institutional capacity or temperament to engage in judgments about rights. It is easier to respond to this first skeptical query than the latter (but as argued later, four reforms to current procedures would help revitalize Parliament's institutional capacity to call on government to defend and explain assumptions about why legislative initiatives are justified from a Charter perspective). In responding to skepticism about relevance, the following three reasons justify revisiting the concept of legislative rights review under the Charter.

First, parliamentary engagement with how the Charter should guide or constrain legislation would help reconcile democratic concerns with respect for rights. Parliamentary scrutiny of the merits of legislative objec-

tives and their means would better enable Parliament to achieve its legislative intentions in a constitutionally viable manner, than if Parliament were compelled to revise legislation within judicially defined parameters after a negative judicial finding, in what many Charter scholars currently characterize as the “dialogue” phase of inter-institutional disagreements.⁵⁰ If government is not pressured to explain its assumptions about whether and how legislative bills are justified in light of their Charter implications, Parliament could be in danger of unknowingly passing legislation that is either overly risky in terms of its potential for successful Charter litigation or, alternatively, overly risk averse and thus less ambitious or effective than otherwise necessary. Either way, the idea that Parliament is required to vote on legislation despite being uncertain about the Charter implications undermines the idea that legislation should be guided by the normative values reflected in the Charter. Not only would parliamentary Charter scrutiny more likely result in legislation that reflects more reasoned judgment about whether legislation is justified in light of its adverse implications for protected rights than current practices that rely on government checking itself, but Charter scrutiny, or the lack of it, would also be useful for external assessments by judges when assessing the justification of legislation.

Second, legislative rights review has the potential to rebalance power between Parliament and the executive. The popularity of the Charter has made it difficult for politicians to openly criticize the Charter or argue that Charter values should be ignored if these constrain a legislative objective that the government strongly supports. If a process of parliamentary Charter scrutiny were institutionalized, this would help create an expectation that government should explain assumptions about why bills are warranted and justified in light of their consistency with the Charter. This scrutiny would also make it more difficult for government to act as if it has a political monopoly on Charter judgment, as it currently does by default because of Parliament’s lack of engagement, and would also expose the contested nature of government claims of compatibility.

Finally, incorporating legislative rights review would offer more comprehensive rights protection than relying so heavily on judicial review and judicial remedies, and thus would address a serious concern that has long plagued more conventional bills of rights. The concern is

⁵⁰ Peter W. Hogg & Alison A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such A Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

that judicially imposed remedies can only provide partial protection against rights infringements because the majority of legislation passed will not be litigated and therefore will not be subject to judicial review. Thus, if Parliament were to pass rights-offending legislation regularly, whether by intention or by neglect, only a small portion of these rights-offending decisions would ever be corrected through judicially imposed remedies. As Brian Slattery argues in challenging the idea that judicial review is a sufficient remedy for a lack of political engagement with the Charter:

Courts have only a limited capacity to assess the correctness of governmental decisions on crucial aspects of public policy and so (quite properly in many instances) may feel constrained to defer to the wisdom of the government on these points. It follows that for a government to adopt the attitude of “pass now, justify in court later” would not only be an abdication of its *Charter* responsibilities, but in fact would undermine the foundations of judicial respect for the decisions of coordinate branches of government.⁵¹

VIII. REFORM CONSIDERATIONS TO STRENGTHEN PARLIAMENTARY CHARTER SCRUTINY

This paper concludes by suggesting four reforms to current practices that would help facilitate Parliament’s capacity to engage in Charter scrutiny. Three of these are influenced by the United Kingdom’s implementation of legislative rights review.

The first reform would be to alter the nature of the statutory reporting obligation to include a statement on the compatibility status for all government bills. The United Kingdom approach requires either a report on whether bills are compatible with protected rights (which is the category in which the overwhelming majority of bills fit) or, where this is not possible, a report that the minister is unable to claim that the bill is compatible.⁵²

⁵¹ Brian Slattery, “A Theory of the Charter” (1987) 25:4 Osgoode Hall L.J. 714.

⁵² The United Kingdom’s *Human Rights Act 1998* (U.K.), 1998, c. 42 requires ministerial reports of compatibility. The specific requirement is in s. 19 and is as follows:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill —

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

Broadening the reporting obligation in Canada is not likely to result in reports of an inability to claim compatibility, for the same reasons the Minister of Justice is not currently willing to acknowledge that bills are inconsistent with the Charter. Nevertheless, a statutory requirement to address the compatibility of all bills would help focus Parliament's attention on the fact that Charter compatibility should be a consideration in parliamentary debate and that political judgment about compatibility is often contested.⁵³

A second reform Canada should consider is also influenced by the United Kingdom, where the responsibility for ministerial reports on compatibility is adapted for a bicameral system, and therefore requires a report to be made in both houses. This would ensure that Charter concerns do not arise because of amendments proposed after the initial report was made.

The third consideration is derived from the persuasive arguments by Kelly and Hennigar to help reduce the risk of partisan influence from legislative assessments of Charter compatibility, by separating the responsibility for providing legal advice from political responsibility to develop the government's legal policy. Thus, the functions of the Attorney General and Minister of Justice would be formally distinguished, and Charter assessments and reports to Parliament would be conducted by the Attorney General, rather than by the Minister of Justice.

Finally, Canada should follow the United Kingdom's lead by establishing a specialized joint committee to assess questions of rights.⁵⁴ The Joint Committee of Human Rights ("JCHR") in the United Kingdom has earned a strong reputation for the robust scrutiny it provides. The Committee, assisted by a highly respected human rights lawyer, examines all bills and focuses particular attention on those that raise questions of compatibility with protected rights. The committee assesses ministerial claims of compatibility, analyzes the implications of bills for protected rights, writes to departments and ministers with queries and follows up on responses, conducts hearings to elicit evidence where concerns arise about whether government claims about the importance or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

⁵³ This argument was developed by the author in "Interpreting a Bill of Rights, *supra*, note 1, at 253-54.

⁵⁴ Kelly also makes this recommendation in "Legislative Activism", *supra*, note 35, at 101-102.

nature of the perceived problem warrant the measures proposed by government, and reports its recommendations and concerns to Parliament while a bill is still being debated in at least one house of Parliament.⁵⁵ Policy officials and legal advisors interviewed suggest three ways in which JCHR reports influence legislation. First, departments and ministers try to avoid being subject to a critical report and thus where possible will anticipate JCHR concerns to avoid this prospect. Second, public officials acknowledge that on occasion the JCHR draws attention to issues that were overlooked in the pre-introduction evaluation of bills. Third, the JCHR's persistent criticism of the lack of reasons or explanations for ministerial claims of compatibility has increased pressure on departments to provide more substantive explanations to support the claim about why a bill is compatible with protected rights.

Research suggests at least one other way of influencing government: pressure to increase safeguards necessary for ensuring that policies are implemented in a compatible manner. Disagreements with the JCHR on compatibility have arisen because departmental compatibility assessments are based on the actual provisions of the legislation, whereas the JCHR pays more attention to problems that could arise from insufficient safeguards to ensure policies are interpreted and applied in a rights-compatible manner.⁵⁶

This idea for a joint parliamentary Charter committee is not an obvious panacea for the current lack of reasoned or robust parliamentary engagement with the Charter. Canadian parliamentary proceedings are heavily conditioned by several factors that constrain Parliament's influence on government. The most significant constraint is stronger party discipline that far exceeds what occurs in the United Kingdom. The smaller size of the Canadian Parliament makes it easier for government to control its caucus, and backbench members rarely revolt or vote against a government bill because their desire to remain on good terms with the leader dissuades them from having a more robust conception of their role as parliamentarians. A second serious constraint is the concentration of power in the office of party leaders, which far exceeds the

⁵⁵ Adam Tomkins makes the important observation that this perseverance, keeping an issue on the agenda through updated and thematic reports, is the way to win in politics by not letting an issue die or being dependent on an accident of litigation. A. Tomkins, "Parliament, Human Rights and Counter-terrorism" in T. Campbell, K.D. Ewing & A. Tomkins, eds., *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), at 13-39.

⁵⁶ The JCHR has been particularly critical of government for not doing enough to ensure that public authorities act in a compliant manner. JCHR, Ninth Report, Session 2006-2007, HL 77/HC 410.

power of party leaders in other Westminster parliamentary systems. Members can be pressured to support party positions in the lower house because of unparalleled Canadian powers to oust members from caucus for failing to support the government, and even to refuse to sign their nomination papers for future elections.

However, the effort to facilitate a rights-oriented debate in the Canadian House of Commons has one important advantage that the United Kingdom lacks: the popularity of the Charter is in sharp contrast to high levels of political and public skepticism about the *Human Rights Act* in the United Kingdom. If the question of Charter compatibility became a more substantial part of assessing the merits of the government's legislative agenda, this would almost certainly strengthen the capacity of the House of Commons to place pressure on government to justify and explain its assumptions about why bills are compatible with protected rights, increase pressure on government to consider amendments to redress perceived Charter problems and, where the issue of consistency was contested, to explain why the government believes the bill is nevertheless meritorious.

IX. CONCLUSION

Legislative rights review has become a core element in recently introduced parliamentary bills of rights. Whether as compensation for constraints on the scope of judicial remedial power or a sincere belief that a bill of rights is better conceived as encouraging proactive attempts to avoid rights violations, bills of rights introduced after the adoption of the Charter have embodied attempts to reduce the likelihood that Parliament passes legislation without awareness of the implications for rights. Yet this idea is worthwhile, independent of the form a bill of rights takes, because legislative rights review addresses a fundamental challenge that all bills of rights incur: will rights protection be undermined by Parliament's failure to engage in judgment about how rights appropriately guide or constrain legislative decisions? Thus, whether a bill of rights authorizes strong-form or weak-form judicial review, a bill of rights can only provide minimal or partial protection if courts are the sole institutional venue for assessing the merits or legitimacy of legislation from a rights perspective.

Canada would benefit from placing more emphasis on Parliament's responsibility to scrutinize legislation in terms of justification and

consistency with the Charter. However, the possibility of integrating Charter consideration more fully into legislative deliberations is not a realistic option as long as Parliament defers to government for judgment about compatibility and continues to absolve government of responsibility to explain its reasons for assuming that bills are consistent with or justified under the Charter.

This paper has identified several reforms that would help improve Parliament's capacity to assess bills in terms of their implications for the Charter. In the absence of reforms to require government to explain and account for bills that implicate rights adversely, Parliament remains in the untenable position of passing legislation for which it does not fully understand the Charter implications. The fact that only a small fraction of the legislation passed will ever be subject to Charter litigation suggests that current Canadian practices can provide only limited assurances that Charter values appropriately guide and constrain Canadian laws.

Although the focus of this paper is on Parliament's role under the Charter, it is interesting to speculate whether parliamentary deliberations about Charter justification would (or should) influence judicial rulings. A decision about whether or how courts should be guided by the quality of parliamentary deliberations is ultimately a judicial prerogative. Yet, it seems fair to suggest that reasoned parliamentary deliberation is more likely to produce reasonable legislation than when such deliberation is absent, and that the reasonableness of the legislation will also be more apparent. It also seems appropriate to suggest that where contentious legislation is passed that raises serious questions of Charter consistency, and parliamentary deliberations seem opaque or non-responsive to Charter concerns, judges might reasonably ask themselves why judicial deference is warranted, particularly when judges have a reasonable basis to be apprehensive that a regular or predictable pattern of judicial deference will undermine the political incentives for government to take Charter considerations seriously.

